Barreau du Québec

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

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The Hon. Robert Douglas Nicholson
Minister of Justice and Attorney General of Canada
Department of Justice of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Subject: Brief of the Barreau concerning Bill C-10, *Safe Streets and Communities Act*

Dear Mr. Nicholson:

The Barreau du Québec has reviewed Bill C-10 which was introduced for first reading in the House of Commons on September 20, the short title of which is *Safe Streets and Communities Act*. Essentially, Bill C-10 reiterates the provisions of nine bills. [1] While six

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[1] *Protecting Children from Sexual Predators Act* (former Bill C-54), which provides for longer sentences for individuals who commit sexual offences against children and creates two new offences relating to conduct likely to facilitate or enable the commission of a sexual offence against a child.

Penalties for Organized Drug Crime Act (former Bill S-10), which targets organized crime by imposing harsher sentences for the production and possession of illegal drugs for the purpose of trafficking.

Sébastien's Law (Protecting the Public from Violent Young Offenders) (former Bill C-4), which is intended to guarantee that violent young offenders and young repeat offenders will be held accountable for their acts and that the protection of society will be a dominant consideration in the treatment of young offenders by the justice system.

Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act (C-16), which is intended to eliminate conditional sentences of imprisonment, i.e. house arrest, for serious violent crimes.

Abolition of Early Parole Act (former Bill C-39), which is intended to entrench the right of victims to participate in parole hearings and provide for the responsibility for and management of inmates under the *Corrections and Conditional Release Act*.

Eliminating Pardons for Serious Crimes Act (former Bill C-23B), which is intended to impose ineligibility periods for applications for record suspensions (currently called "pardons") of three to five years for individuals who commit summary conviction offences and five to 10 years for individuals who commit indictable offences.

Keeping Canadians Safe (International Transfer of Offenders) Act (former Bill C-5), which provides for additional criteria that the Minister of Public Safety may consider in deciding whether to permit repatriation of a Canadian offender to Canada to serve their sentence in this country.

Justice for Victims of Terrorism Act (former Bill S-7), which is intended to enable victims of terrorism to bring action against individuals who commit terrorist acts and those who support them, including the foreign states in question, for losses or damage suffered as a result of an act of terrorism committed anywhere in the world.

of those bills were debated in Parliament or in the Senate in the last session, none received Royal Assent.

This legislation, one of the purposes of which is to increase sentences and impose mandatory minimum prison terms, has been strongly criticized both in Quebec and in the rest of Canada, not only by the legal community, of which the Barreau du Québec is part, but also by various groups concerned with the welfare of victims and with public safety issues.

1. APPROPRIATENESS

The Barreau du Québec regrets the government's decision to proceed with such a substantial legislative reorganization (over 200 sections) by introducing an omnibus bill, and in addition to enact amendments of this nature within 100 days of Parliament's return. There is no situation, no objective reason, that justifies this approach, particularly since this bill proposes a fundamental transformation of a number of statutes that comprise the legal framework for the criminal law and the treatment of offenders.

The bill is entitled: *Safe Streets and Communities Act*. When the law mandates imprisonment for every person who has committed certain offences, regardless of the circumstances surrounding the commission of the offence, the particular characteristics of the individuals who have committed the offence and the likelihood that those individuals can be rehabilitated, the potential for further criminalizing these people becomes concrete. In other words, there are actually grounds for fearing that this bill will not achieve the objective assigned to it, while the risk of causing the opposite effect is real.

Considering the impact of this proposed legislation, it would have been desirable for a major public debate to be held, that would enable everyone involved in the judicial process and in social intervention, at any level, to be consulted. That kind of consultation would allow a broad consensus to be identified that would relate to the best known ways of (1) reducing the incidence of crime; (2) responding appropriately to people who have committed criminal offences, while focusing on the most effective means of promoting denunciation, deterrence and rehabilitation of offenders; and (3) identifying and remedying weaknesses with respect to social reintegration.

Bill C-10 comes at a time when the figures provided by Statistics Canada show that crime is on the decline in Canada; in 2011, the crime rate in Canada reached its lowest level since 1973.[2] Violent crime is also declining, to a lesser degree.[3]

Preventing the Trafficking, Abuse and Exploitation of Vulnerable Immigrants Act (former Bill C-56), which is intended to authorize immigration officers to refuse work permits to vulnerable foreign citizens where they are at risk of suffering humiliating and degrading treatment, including sexual exploitation and human trafficking.

[2] Police-reported Crime Statistics, available on line at the Statistics Canada site: http://www.statcan.gc.ca/daily-quotidien/110721/dq110721b-eng.htm

It is obvious that the reason the national crime rate has been falling steadily for 20 years and is today at its lowest point since 1973 is primarily because of the current sentencing system, which seeks a balance between denunciation, deterrence and rehabilitation of offenders. Proportionality and personalization of the sentence are fundamental values of that system.

Numerous studies show that imprisonment does not reduce the incidence of crime. Public Safety Canada has released the results of a study dealing with the impact of imprisonment on recidivism among offenders serving prison terms. The conclusions are:

1. For most offenders, prisons do not reduce recidivism. To argue for expanding the use of imprisonment in order to deter criminal behaviour is without empirical support. The use of imprisonment may be reserved for purposes of retribution and the selective incapacitation of society's highest risk offenders.

2. The cost implications of imprisonment need to be weighed against more cost efficient ways of decreasing offender recidivism and the responsible use of public funds. For example, even small increases in the use of incarceration can drain resources from other important public areas such as health and education.

3. Evidence from other sources suggests more effective alternatives to reducing recidivism than imprisonment. Offender treatment programs have been more effective in reducing criminal behaviour than increasing the punishment for criminal acts.[4]

Increasing and proliferating minimum sentences is the figurehead of Bill C-10. The Barreau would point out the flagrant disparity between the real needs in relation to penalizing offenders and preventing crime and recidivism and the solutions proposed by the government in that regard.

In addition, and having regard to the inevitable and exorbitant expenses that will be generated by implementing these more coercive measures, victims of crime will again be left by the wayside. In the opinion of the Barreau du Québec, it is not only regrettable but also contradictory to choose, by enacting a bill whose objective is to promote public safety and welfare, to invest money in implementing sentences imposed on individuals who have committed crimes when those funds could be allocated to programs to assist victims.

As well, increasing and proliferating minimum sentences translates into the gradual and irremediable elimination of the decision-making power of prosecutors and judges. They make our criminal justice system more complex and less effective, while increasing the chances of judicial errors.

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[3] Mia Dauvergne and John Turner, Police-reported Crime Statistics in Canada, 2009, available on line at the Statistics Canada internet site: http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11292-eng.htm
[4] Gendreau, P., Goggin, C. and Cullen, F.T. The Effect of Prison on Criminal Behaviour. Ottawa: Solicitor General of Canada, available on line at the Public Safety Canada website, http://www.publicsafety.gc.ca/res/cor/sum/_fl/cprs199911-eng.pdf

In light of this information, and having regard to the government's objective, the Barreau submits that the measures proposed by Bill C-10 are pointless and even counter-productive: not only do the proposed measures not respond to any real need, or to any concern for improving the justice system, but on top of that the proposed measures do not provide a means of achieving the public safety objective sought.

2. THE PROCESS

The legislative process calls for a careful and thorough examination of the potential impacts of legislation. Only rare cases of emergency and necessity will justify applying special measures for enacting legislation, in particular measures relating to the timeframe and the legislative vehicle for the proposed amendments.

Bill C-10 proposes an amalgam of major legislative changes, the scope of which must be assessed in terms of both the principles of the criminal law and the philosophy that defines the Canadian penal system in general.

In the circumstances, the Barreau regrets the government's decision to proceed by introducing an "omnibus" bill that proposes a wholesale series of legislative amendments; doing this diminishes, or even short circuits, the public debate on the issues specific to each of the statutes affected.

In addition, and maintaining its intention to enact the omnibus bill within 100 days of the return of Parliament, the government is implicitly refusing to allow the groups concerned to provide informed and documented opinions, and is thereby denying Parliament an undeniable source of relevant information that could assist it in achieving the objectives of this bill.

It would have been desirable for the government to consult with stakeholders such as the police, lawyers and prosecutors, social workers, probation officers, criminologists, professionals from the prison system, victim advocates and other experts, to obtain information from the people who are best informed about the issues raised by the bill.

In the opinion of the Barreau du Québec, what the government has done by proceeding without any prior substantive debate, without identifying the real flaws in the existing system, apart from anecdotal cases, but most importantly without a broad constitution, involving all stakeholders, is depriving itself of input from the people who will be faced with having to implement the new legislation.

The government could and should also have done an analysis of experiences in other countries, and in particular should have taken lessons from those experiences and then proceeded with the necessary reforms.

3. THE PRINCIPLES OF JUSTICE IN ISSUE

Minimum sentences and judicial discretion

Section 718.1 of the *Criminal Code* specifically provides that it is a fundamental principle that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". In that regard, judicial discretion alone allows for the principles of proportionality and individualization of the sentence, and ultimately criminal justice in general, to be respected and given full effect. Although it is essential that offenders take responsibility for their acts, judicial discretion alone makes it possible to weigh the various relevant sentencing principles and thus to impose a just penalty that will take into account all of the circumstances and the offender's real responsibility.

> 21 Even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. …
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> 22 Consequently, it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system...[5]
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> [Emphasis added]

The minimum sentences proposed in Bill C-10 comprise a major step backward in terms of sentencing principles. A host of inquiries and commissions have been held in Canada to examine, among other things, the effectiveness of imprisonment.

> A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction. [6] [Emphasis added]

In fact, In 2005, the Research and Statistics Division of the Department of Justice of Canada produced a report entitled *Mandatory Sentences of Imprisonment in Common Law Jurisdictions*, which summarized the findings of a study of sentencing in a number of western countries. The objective of the report was to identify and discuss current trends regarding the use of mandatory sentencing.

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[5] *R. v. Wust*, 2000 SCC 18 (CanLII), [2000] 1 SCR 455, para. 21

[6] *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688, para. 55. The Supreme Court quoted the Canadian Sentencing Commission in its report *Sentencing Reform: A Canadian Approach*, p. 24:

The report establishes that the judiciary in Canada and other common law countries oppose mandatory sentences of imprisonment. The Canadian Sentencing Commission (1987), in its survey of judges, found that slightly more than half of them felt that minimum sentences impinged on their ability to impose a just sentence. In the circumstances, and when the situation lends itself, it is possible that there may be an agreement between defence and Crown counsel to avoid the harmful effects of the judge applying the minimum sentence.[7] Such an agreement is often inappropriate having regard to the law and the circumstances of the offence.

Minimum sentences can therefore have perverse effects both for the accused and for the victims of crimes. Two examples illustrate this situation.

In some cases, and accused person might feel compelled to plead guilty to an offence with a less severe minimum sentence and thus waive their right to assert a defence, for fear of receiving a harsher minimum sentence if they are found guilty of the offence of which they are accused.

Similarly, an accused might refuse to admit guilt if they are certain that, notwithstanding all the factors that might justify it, a prison sentence cannot be avoided. If the offender has nothing to lose, they might want to take their chances and go to trial, where there are so many imponderables that might arise, even to the benefit of the accused. Holding trials that would otherwise not have taken place tarnishes the image of the justice system, in addition to creating significant human and financial costs. Once again, victims are disadvantaged by this approach, since they will have to testify in court, which could have been avoided in the case of a guilty plea.

The increase[8] in and proliferation of minimum sentences amounts to a non-confidence vote by the government in the judicial system and is similar to a form of interference by the legislative branch in what ordinarily belongs to the judicial branch.

The report also establishes that “minimum sentences are not an effective sentencing tool: that is, they constrain judicial discretion without offering any increased crime prevention benefits”.[9]

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[7] “Some Representative Models”, Department of Justice Canada, September 30, 2005, p. 11 http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_10/toc-tdm.html; “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures”, Department of Justice Canada, January 2002, http:// www.justice.gc.ca/eng/pi/rs/rep-rap/**2002**/rr02_1/rr02_1.pdf

[8] In particular, clauses 11 and 12 of Bill C-10 increase the minimum sentence provided in section 151(*a*) and (*b*) and 152(*a*) and (*b*) of the Criminal Code for “sexual touching” and “invitation to sexual touching” offences. As well, clause 42 of Bill C-10 increases the maximum sentence for the offence of producing marijuana, provided for in section 7(2)(*b*) of the *Controlled Drugs and Other Substances Act*.

[9] “Some Representative Models”, Department of Justice Canada, September 30, 2005, p. 11 http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_10/toc-tdm.html

In addition, the use of minimum sentences is also contrary to another objective of sentencing. Paragraph 718(*c*) of the *Criminal Code* codifies the recognized principle that a just sentence isolates the offender "where necessary". In the opinion of the Barreau du Québec, prison must continue to be the last resort of the criminal justice system to achieve the legitimate objectives associated with sentencing. The existing criminal justice system rightly promotes the rehabilitation and social reintegration of offenders. It is certainly not inconceivable to argue that prison can often amount to a school for crime, and in the medium term this can encourage criminality and thus destroy the significant gains achieved in recent decades.

The Supreme Court has often reiterated[10] the need for trial judges to hold this privileged position.

> A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

Those comments, made in the context of the standard of review applied by appellate courts to a sentence imposed b a trial judge, seem to us to be relevant in a situation where the government is inviting the legislative branch to further limit the methods available to judges to make informed, fair and appropriate sentencing decisions.

Because the principles relating to individualization and proportionality of sentences are being put aside, it is also reasonable to foresee constitutional challenges to the validity of the new minimum sentences provided for offences that, to date, have not carried minimum sentences. In some cases, the sentence might be so disproportionate that it would result in an injustice.

For all these reasons, the Barreau du Québec opposes the increase and proliferation of minimum sentences provided for in Bill C-10, and its corollary, the reduction in judicial discretion.

However, if the government decided to continue proposing minimum sentences for certain criminal offences, the Barreau du Québec believes that it is essential that the *Criminal Code* be amended to provide that judges will not be required to impose the minimum sentence where circumstances require.

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[10] *R. v. Wu*, [2003] 3 S.C.R. 530, para. 19; *R. v. Proulx*, [2000] 1 S.C.R. 61, para. 126; *R. v. McDonnell*, [1977] 1 S.C.R. 948, para. 16; *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, para. 91.

On that point, the report entitled *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* indicates that apart from Canada, nearly all mandatory sentencing laws in the other common law countries give judges the discretion, in exceptional cases, to deviate from the mandatory sentence imposed by law. As well, the report points out that in most of those jurisdictions, judges often depart from the mandatory sentence, citing a "judicial discretion" clause allows the courts to impose a sentence below the mandatory minimum when mitigating circumstances exist.[11]

In Canada, this kind of mechanism to enable a judge to balance the minimum sentence against the accused's particular circumstances has been incorporated in bills in the past.[12] The Barreau believes that the government must consider this approach, to ensure that the sentences imposed by the courts are just in relation to the crime committed and fair to the individual who must serve the sentence.

With respect to the *Controlled Drugs and Substances Act*, the Barreau du Québec notes that Bill C-10 contains a mechanism that would allow or mitigation of the harmful effects of a minimum sentence, by giving the judge discretion if the prosecutor did not actually seek a sentence of imprisonment. Clause 42 of the bill proposes to add section 8 to the *Controlled Drugs and Substances Act*, which would read as follows:

> <u>8. The court is not required to impose a minimum punishment unless it is satisfied that the offender, before entering a plea, was notified of the possible imposition of a minimum punishment for the offence in question and of the Attorney General's intention to prove any factors in relation to the offence that would lead to the imposition of a minimum punishment.</u>

The effect of that provision would be to permit a judge not to impose a minimum sentence in cases where the prosecutor had not met the requirements set out in the section for seeking a minimum sentence. If that is the government's intention, it would be preferable for the section to be worded consistently with section 727 of the *Criminal Code*, which provides for harsher sentences in the case of repeat offences, but includes the following specific provisions:

> **727.** (1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof <u>unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof</u>.

The wording of section 727 of the *Criminal Code* has the advantage of being clearer.

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[11] "Some Representative Models", Department of Justice Canada, September 30, 2005, p. 11
http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_10/toc-tdm.html

[12] Bill C-528, *An Act to amend the Criminal Code (judicial discretion)*, available on line:
http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=3357551&file=4
Bill C-388, *An Act to amend the Criminal Code (judicial discretion)*, available on line:
http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=3906472&file=4

However, the Barreau du Québec has serious reservations regarding this mechanism, since in practice it could create a power imbalance between prosecutors and accused. It is not difficult to imagine scenarios in which an accused would admit guilt for a crime they did not commit in order to avoid having a prosecutor seek the minimum sentence of imprisonment, even if they had a defence to assert. Clause 41(1) of the bill provides for the addition of another minimum sentence of six months' imprisonment for anyone in possession of fewer than 201 and more than five marijuana plants for the purposes of trafficking. The bill provides that everyone who is in possession of six plants would be subject to the same minimum sentence as a person who had 60 or 90 or 200. Drug trafficking is not <u>necessarily</u> an activity associated with networks of highly criminalized persons. The *Controlled Drugs and Substances Act* defines "traffic" as follows:

> *"traffic"* means, …
> (*a*) to sell, administer, <u>give, transfer</u>, transport, send or deliver the substance,
> (*b*) to sell an authorization to obtain the substance, or
> (*c*) to offer to do anything mentioned in paragraph (*a*) or (*b*),
> otherwise than under the authority of the regulations.
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> [Emphasis added]

It is therefore conceivable that a person charged with possession of seven marijuana plants might be tempted to choose the less risky path and plead guilty even if they had a defence to assert, to avoid the certainty of a six-month prison term if they chose to go to trial with the risk of being convicted.

The Barreau is of the opinion that fairness in the criminal justice system requires that judges have full control over the exercise of judicial discretion in respect of sentencing, with no prerequisites imposed that, moreover, depend on the will of only one of the parties involved.

Rehabilitation

The amendments proposed by Bill C-10 relating to criminal records make rehabilitation more difficult, if not inaccessible, in cases where there would be no good reason to refuse it. Neither the number nor the nature of the convictions can, in itself, justify making it impossible for a rehabilitated offender to obtain a pardon and thus erase the inevitable stigma associated with having a criminal record.

Bill C-10 creates certain classes of persons who will never be able to obtain a pardon, regardless of the fact that their conduct has been entirely above reproach for several years after serving their sentence. This approach is not only totally unfair to offenders who are trying to rebuild their lives and become good citizens, it is also incompatible with human dignity.

The Barreau du Québec believes that individuals who have served their prison sentences and have successfully complied with their terms of probation have been punished and in a majority of cases can contribute positively to society. About 97% of people who have been granted a pardon do not re-offend.[13] The fact that the crime rate has been constantly declining in Canada for 10 years should give the government cause to take the rehabilitation and social reintegration route more, to protect the public.

Legislation designed to create fear of punishment among the public has always been ineffective. In addition, Canadians do not assign one single goal to the correctional system: they believe that the system has a dual mission, to punish offenders, but also to rehabilitate them by promoting social reintegration.[14] As well, a number of surveys have shown a persistent trend among Canadians to believe in social reintegration. A national survey done in 2002 showed that more than four out of five respondents believed that “a significant number of offenders can become law-abiding citizens through programs, education and other support”. This solid confidence Canadians have in the correctional philosophy is also apparent in the results of another survey (2004).[15] From that perspective, and to maintain public confidence in the judicial system, the government must put effort into crime prevention, but also into rehabilitating people who have committed crimes, in order to reduce crime from the long-term perspective.

Ending Early Release for Criminals and Increasing Offender Accountability Act

The Barreau du Québec would like to raise the general issue of the consistency of the provisions proposed in Bill C-10[16] with the purpose of certain legislation it intends to amend, a particular example being the *Corrections and Conditional Release Act*. At present, the Act gives the correctional system the following mandates:

> 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*) <u>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</u>.[17]
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> [Emphasis added]

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[13] http://www.casierjudiciaire.ca/casier-judiciaire-rehabilitation-pardon/comission-nationale-liberations-conditionnelles.php

[14] Correctional Service of Canada, Audit and Evaluation Branch, Performance Assurance Sector, “Public Opinion and Corrections: Recent Findings in Canada”, 2005 p. 4, quoting Léger Marketing, “Canadians and the Judicial System”, Montreal, Léger Marketing, 2002b

[15] Id., p. 5

[16] In particular, clause 54 of Bill C-10

[17] *Corrections and Conditional Release Act*, s. 3

Bill C-10 introduces new provisions that run counter to the general spirit of that Act, in that it provides for the application of an overriding criterion, the protection of society, when the restrictions on the rights and privileges of offenders cannot be rationally connected with the objective of protecting society.

As well, while the Act currently provides "that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders",[18] Bill C-10 will change that criterion to "what is necessary and proportionate to attain the purposes of this Act". In other words, the new wording eliminates the idea of least restrictive measures.[19] In the opinion of the Barreau du Québec, the amendments proposed in the bill are inconsistent with the law that applies in this area, in particular because of the status of the rights that would be jeopardized in the event that the mechanisms provided in the Act were implemented.

Moreover, Bill C-10 contains certain amendments[20] that are designed, in particular, to eliminate the protection of the rights and privileges guaranteed to every individual, except those rights and privileges that are denied or restricted as a consequence of the sentence imposed. This means that the proposed amendments will not only jeopardize a range of factors that are likely to promote social reintegration and rehabilitation (recreation, family contact, culture, training), but will also open the door to arbitrary treatment of offenders. This extreme control over various aspects of offenders' lives is in no way a consequence of sentence; it is squarely in contradiction with the objectives of rehabilitation and social reintegration set out in the purpose of the Act and does nothing to achieve the objectives of public safety and protection for which it aims.

As well, the amendments proposed in Bill C-10 give various parties in the prison system enhanced powers, but without circumscribing the scope of those powers and delineating the terms on which they are to be exercised. Moreover, some of the provisions of the bill are vague and imprecise, and this could exacerbate arbitrariness in decision-making.

For example, we note the proposed amendments to permit the correctional service to demand that an offender wear a monitoring device.[21] There are no criteria in the bill, leaving a risk of arbitrary action. The National Parole Board should have the authority to require that such a device be worn, based on the pre-determined criterion in the Act. In the opinion of the Barreau, these provisions open the door to potential violations of fundamental rights.

The Bill also provides for the possibility that an institution head or the staff member authorized by them to monitor, intercept or prevent communications between an inmate and another person.[22] No criteria are provided in the bill. These provisions grant vast

[18] Id., s. 4(*d*)
[19] In particular, clause 71 of Bill C-10
[20] In particular, the concept of privilege is also done away with by the effects of clause 61 of the bill
[21] Provided in clause 64 of Bill C-10
[22] Clause 69 of Bill C-10

discretion that could open the door to abuse and arbitrary action. The existing Act provides for measures of this kind where they are necessary to protect persons or the penitentiary. These criteria and guidelines are not mere modalities that can be established by regulation. The Barreau submits that parliamentarians and interested groups must be able to debate them publicly.

The bill also provides for the possibility that a peace officer may arrest an offender without warrant who has violated or is violating a condition of parole or mandatory supervision, except in certain circumstances.[23] The Barreau believes that a peace officer who is not familiar with the case is not the appropriate person to act and decide in the matter. That power is such as could lead to arbitrary decisions and abuses. It is essential that the peace officer refer to the parole service.

In the opinion of the Barreau, some of the proposed amendments are such as could derogate from the offender's rights. In particular, the bill provides[24] that an offender may not withdraw an application for day parole or parole within 14 days before the review of their case, unless the withdrawal is necessary and it was not possible to withdraw it earlier due to circumstances beyond their control. In general, the hearing date is not known to counsel and the parties until less than 14 days before the hearing. The Barreau du Québec wonders what the intention behind this proposal is: why force an offender to continue their application if they are not ready?

The bill[25] also provides that the "releasing authority" may, in order to facilitate the successful reintegration into society of an offender, as a condition of statutory release, require that the offender reside in a community-based residential facility or a psychiatric facility. The bill provides no additional indication as to the identity of the releasing authority and the circumstances why such a decision could be a condition of the offender's parole. Given the consequences for the person affected, the Barreau believes that such decisions should never be made on the file only. These persons must have the right to be heard.

International transfer of Canadian offenders

The present objectives of the *International Transfer of Offenders Act* are to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals. We believe that these are valid objectives and are consistent with the duties of states to their nationals and citizens.

[23] Clause 92 of Bill C-10
[24] Clause 78 of Bill C-10; similar provisions are found in proposed sections 123.7 and 122.6
[25] Clause 86 of Bill C-10

The amendments proposed in Bill C-10 dilute those objectives, in the name of strengthening public safety, by creating a series of procedural obstacles to the repatriation of Canadian offenders. Moreover, the objectives of reintegration and rehabilitation are relegated to the background, and the Barreau du Québec therefore observes that the *International Transfer of Offenders Act* has been stripped of meaning.

More specifically, the Barreau is concerned about the amendments to the procedure that the Minister must follow in relation to whether or not to give consent for the transfer of a Canadian offender. At present, the Act provides that the Minister shall "consider" the factors set out in the Act in making his decision. Under the amendments proposed in the bill, the Minister would no longer be bound by those factors, and the Act would provide that the Minister "may consider" the factors listed, which means that he could make his decision without even referring to them. Apart from the subjective criterion referring to the "Minister's opinion" in assessing various factors to make his decision, a disturbing reference is added to the following factor:

> **10.** (1) … <u>(i) whether the offender has accepted responsibility for the offence for which they have been convicted, including by acknowledging the harm done to victims and to the community;</u>

The application of a criterion of that nature presents a problem In the case of persons who argue they have been unjustly convicted or who pleaded guilty without admitting the facts alleged against them.[26] The Barreau du Québec understands that the Minister is not required to consider that criterion, but is concerned that the factors that justify refusing the transfer are expanding while those that operate in favour of transfer are shrinking.

The Barreau is concerned with maintaining a form of legal security for persons who apply for transfer, but also, to prevent arbitrary decision-making, the Barreau believes it is necessary to provide a normative framework in which the Minister would exercise his discretion. That framework would guarantee that decisions relating to the transfer of offenders would be made in compliance with the established standards in respect of procedural fairness and justice, and would support the rehabilitation of the offender and eventual reintegration of the offender into society, without neglecting public safety in any way.

Youth Criminal Justice System

The Barreau du Québec notes, unfortunately, that the approach proposed in Bill C-4 has been adopted almost in its entirety into Bill C-10.

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[26] In the United States, an accused has the option of entering a guilty plea while maintaining that they do not admit the facts alleged against them; this is known as an Alford Plea.

The bill raises the idea of protection of the public to the level of a principle, thereby relegating rehabilitation and social reintegration to the background. By changing the declaration of principles set out in the *Youth Criminal Justice Act* (YCJA), we have grounds to be apprehensive of a shift toward the criminal law principles applicable to adults. The Barreau again stresses the importance of maintaining the separate criminal law applicable to young people, by focusing on rehabilitation as the way to protect the public in the long term.

By maintaining the approach of stressing the principles of deterrence and denunciation, there is reason to be apprehensive that the distinct nature of the youth criminal justice system will be jeopardized.

A number of amendments proposed in Bill C-10 operate to create a form of intrusion into the professional independence that prosecutors must enjoy. The requirement that a prosecutor inform the court that they are not making an application to have a young person sentenced as an adult, in certain circumstances, is not only pointless, it does, in a way, alter the objectives of such a notice and must be intended to serve the purposes of justice and enable the parties to act accordingly.

The Barreau du Québec also wishes to point out that Bill C-10 marks a break from what has been the Canadian approach since 1908, in relation to the rules of confidentiality and the identification of young people. This break is a serious interference in the separate nature of the youth criminal justice system and involves heightened risks that a young person will be stigmatized, and the consequence of that will be to harm their chances of rehabilitation and social reintegration.

The Barreau du Québec reiterates its support for the distinct nature of the criminal law that applies to young people, which must focus on rehabilitation as the way to protect the public in the long term. The proposed amendments neglect to incorporate the idea of “lasting protection of the public”. The Barreau du Québec submits that the idea of “protection of the public” is connected with the immediate protection of members of the public and not long-term protection, which favours rehabilitation and social reintegration.

Conclusion

Bill C-10 reiterates a series of legislative proposals on which the Barreau du Québec has already commented. We believe it is useful to submit those comments again.

The Barreau du Québec believes that there is nothing to justify the hasty passage of this bill and that it is always preferable to proceed cautiously and by consultation in examining any bill. This is particularly true when the bill is one, as in this case, that proposes a major legislative change.

Please be assured of the participation and collaboration of the Barreau du Québec in any consultation and in-depth examination of this legislative proposal that may be undertaken.

Yours truly,

[signed]

Louis Masson, Ad. E.

Bâtonnier du Québec

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Encl. (7)