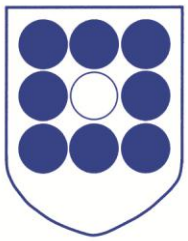
CANADIAN CIVIL LIBERTIES ASSOCIATION



ASSOCIATION CANADIENNE DES LIBERTES CIVILES

Brief to the Senate Committee on Legal and Constitutional Affairs regarding Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts

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Overview: Executive summary and specific recommendations for amendment

The Canadian Civil Liberties Association (CCLA) has both policy and legal concerns regarding many aspects of Bill C-10. From a policy standpoint, many of the proposed changes will do little to make Canadian society safer. Instead, they will result in unjust outcomes, impose needless burdens on Canadian individuals, families and communities, and result in a considerable financial drain on taxpayer dollars. From a legal standpoint, there are numerous amendments that would, in our opinion, be unconstitutional. The following seven areas are highlighted in an attempt to draw the Committee's attention to what the CCLA believes are some of the most problematic portions of the Bill and suggest targeted changes that would help remedy these infirmities.

Burden of proof for the imposition of an adult sentence: It is unconstitutional to impose a harsher sentence without proving aggravating factors beyond a reasonable doubt.

- Bill C-10 s. 183(1) should be amended to include a reference to proof beyond a reasonable doubt.

Amendments to the *Immigration and Refugee Protection Act*: Amendments give a very broad mandate to deny *any* foreign national a work permit and do not specify what factors would be used to target an individual as 'at risk' of being exploited. It is also poor public policy to punish foreign individuals who are vulnerable to abuse as opposed to more specifically addressing the Canadian employers who exploit these populations.

- Bill C-10, ss. 205-207 should be removed pending further public discussion regarding the choice to punishing exploited individuals and an evaluation of the impact it will have on women.

Expand the rights of victims: Both torture and terrorism are serious crimes of international concern. According to at least one Court of Appeal, Canadian torture victims are currently prevented from accessing meaningful justice due to the *State Immunity Act*.

- Bill C-10, ss. 3-9 should be amended to specify that the *State Immunity Act* does not prevent suits by not only victims of terrorism, but also victims of torture and other breaches of *jus cogens* human rights obligations.

Unconstitutional use of mandatory minimums: The use of mandatory minimums for broad and vague underlying offences may result in the imposition of unjust, grossly disproportionate sentences. The drug provisions include low-level drug offences – producing as little as six marijuana plants – and extremely broad aggravating factors which would target all those who rent or live in a house they do not own. The child pornography provisions criminalize, and would impose mandatory minimum jail sentences, for the consensual, legal sexual activities of youth and young adults. There is little evidence that mandatory minimums provide any deterrent impact, enhance community safety or lower crime rates. As a result, all mandatory minimums should be removed from Bill C-10. At a minimum, the following specific amendments should be made:

- S. 41(1) should be amended to eliminate the mandatory minimum sentences for production of small quantities of marijuana
- S. 40 should be amended to specify that the offence of importing or exporting must be committed for the purpose of financial gain
- S. 39(1) should be amended to remove the word 'carrying' from the weapons provision
- S. 41(2) should be amended to remove the aggravating factor of using real property belonging to a third party
- S. 39(1) should be amended to ensure that the aggravating factor of committing an offence near a public place usually frequented by persons under 18 only applies if youth were present or in the immediate vicinity when the offence took place
- S. 17, increasing the mandatory minimums for offences involving child pornography, should be removed in its entirety until the underlying definitions and defences are remedied

Prison conditions and disparate impact of amendments on Aboriginal peoples and persons requiring mental health care: The proposed amendments greatly increase the prison population, and are likely to have a disproportionate and devastating impact on already-marginalized communities – particularly Aboriginal peoples and those with mental health needs. These populations are already greatly over-represented in correctional institutions, and existing programs and services are already ineffective and insufficient to keep up with general demand. The following specific amendments should be made:

- S. 34 should be amended to add a provision providing for exceptions to subsections (b), (c) and (e) where the offender is Aboriginal or has underlying mental health needs and the imposition of a conditional sentence could better address their rehabilitation and reintegration than a period of incarceration

Unconstitutional amendments to the *International Transfer of Offenders Act*: The amendments attempt to give the Minister an unconstitutional level of discretion over when Canadian citizens, incarcerated abroad, can return to Canada. From a policy perspective, facilitating such transfers enhances public safety as rehabilitation and reintegration is enhanced when individuals are close to their families and have access to high-quality, culturally-appropriate programs. When offenders serve a portion of their sentence in Canada, it also allows the government to create records of their crimes and monitor their rehabilitation. Absent such transfers, offenders would simply return to Canada at the end of their sentence without any records or legal restrictions on their activities. The CCLA recommends the complete removal of ss. 135 and 136, which would cancel all amendments to this *Act*. At a minimum, the following specific amendments should be made to s. 136 in order to better comply with constitutional requirements:

- Remove all instances of 'in the minister's opinion'
- Subsection 10(1) of the Act should read, "the Minister shall consider…"
- Remove subsections (h), (i) and (k)
- Delete subsection (l)
- Amend subsection (b) to clarify that the listed factors are limited to criminal activity or safety concerns arising specifically due to incarceration in Canada, rather than after general release

Increasing transparency and accountability: The CCLA welcomes the required 5-year review of the mandatory minimum provisions set out in s. 42 of the *Bill* and the requirement that the National Parole Board submit an annual report that includes the number of applications for record suspensions and the number of record suspensions ordered. Similar independent reviews and public reports to Parliament should be undertaken with respect to the changes to the other acts.

1. Introduction: CCLA's mandate and activities

The Canadian Civil Liberties Association (CCLA) is a national organization with the paid support of thousands of individuals drawn from all walks of life. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. The CCLA's major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable invasion by public authority, and the protection of procedural fairness. For over 40 years, the CCLA has worked to advance these goals, regularly appearing before legislative bodies and all levels of court. It is in this capacity, as a defender of constitutional rights and an advocate for the rights and liberties of all individuals, that we strongly object to many of the provisions put forward in this Bill.

2. Standard of proof in the *Youth Criminal Justice Act*

The CCLA is concerned about a wording change between the YCJA amendments in Bill C-10 and those that were set out in a previous version, Bill C-4. Specifically, in the bill currently under consideration the government has deleted a reference to the standard of proof applicable when determining whether an adult sentence should be imposed upon a young offender.[1] It is unclear why the reference to proof beyond a reasonable doubt was removed from this portion of the bill. If, however, it is intended to indicate that a lower burden of proof applies – ie. balance of probabilities – it is CCLA's view that such a provision would be an unjustifiable infringement of s. 7 *Charter* rights.[2] CCLA therefore recommends that the reference to proof beyond a reasonable doubt be re-inserted back into s. 183(1) of the Bill, or that at a minimum the Committee make it clear, on the

[1] Bill C-10 specifies that Section 72(1) of the *Youth Criminal Justice Act* would be amended to state that "The youth justice court shall order that an adult sentence be imposed if it is satisfied that…" a number of factors are present. Bill C-4, a 2010 bill with almost identical amendments, would have amended s. 72(1) to state that "The youth justice court shall order that an adult sentence be imposed if it is satisfied *beyond a reasonable doubt* that…".

[2] See *R. v. D.B.*, [2008] 2 S.C.R. 3 at paras 78 – 83 (stating that the government conceded that it was a principle of fundamental justice that "the Crown is obliged to prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies."). See also *R. v. Gardiner*, [1982] 2 S.C.R. 368 ("…both the informality of the sentencing procedure as to the admissibility of evidence and the wide discretion given to the trial judge in imposing sentence are factors militating in favour of the retention of the criminal standard of proof beyond a reasonable doubt at sentencing."); *R. v. Pearson*, [1992] 3 S.C.R. 665 (citing *Gardiner* and noting that "it is clear law that where the Crown advances aggravating facts in sentencing which are contested, the Crown must establish those facts beyond reasonable doubt [...] While the presumption of innocence as specifically articulated in s. 11(d) may not cover the question of the standard of proof of contested aggravating facts at sentencing, the broader substantive principle in s. 7 almost certainly would.").

record, that it is not Parliament's intention to establish a lower burden of proof in this area.

3. Vague and broad changes to the *Immigration and Refugee Protection Act*

The changes to the *Immigration and Refugee Protection Act* grant wide latitude to the Minister to develop "instructions" setting out public policy considerations which may be used to deny work permits to any foreign nationals – seemingly including those already present in Canada such as foreign students and refugees. This is an extremely broad mandate, shifting considerable policy- and decision-making power away from public forums into the back rooms of the government and civil service where oversight and accountability mechanism are fewer and less accessible.

Based on the very vague provisions contained in Bill C-10, CCLA is concerned about the nature of the criteria that may be used in order to make this assessment. In particular, any assessment of an individual's vulnerability that is inferred from his or her national or ethnic origin, sex or age could be unconstitutional under the equality guarantees in s. 15 of the *Charter*. On a policy level it is unclear why the government is targeting those individuals who are vulnerable to abuse rather than furthering the implementation and enforcement of provisions that would punish the Canadian employers who are truly at fault. The CCLA therefore recommends that the amendments to IRPA in ss. 205-207 be removed until further public discussion can take place on this issue, including an assessment and measurement of the anticipated impacts on women.

4. Expanding rights of action for victims

Access to justice is one of the pillars of a democratic society and as such the CCLA applauds the government's efforts to ensure that victims have meaningful redress within the Canadian courts, even when the perpetrator is a foreign government or another foreign entity. There remain concerns, however, that numerous victims will still be barred from launching civil suits. First, CCLA is concerned that individuals will be limited to suing only those states that appear on a list formed based on the recommendations of the Minister of Foreign Affairs. Victims' ability to sue for redress should not be limited by political expedience. Unfortunately, this is exactly what the proposed list appears positioned to do. Second, barriers imposed by the *State Immunity Act* impact not only claims by victims of terrorism, but also those Canadians who have been tortured at the hands of foreign governments. Like terrorism, torture has been repeatedly condemned at the international level. The prohibition against torture is a peremptory (or '*jus cogens'*) norm of international law – binding upon every state and non-derogable. It is enshrined in international legal instruments that Canada has ratified and that legally bind Canada to provide civil redress to victims and their families. Nevertheless, the Ontario Court of Appeal has ruled that the *State Immunity Act* bars civil suits brought by Canadians who were tortured abroad.[3] In order to fulfill our

[3] *Bouzari v. Iran (2004),* 243 D.L.R. (4th) 406 (Ont. C.A.).

commitments under international law and provide meaningful remedies to Canadian torture victims, the government should further amend the *State Immunity Act* to clarify that foreign states are not immune from the jurisdiction of courts for acts of torture or violations of other human rights obligations that have achieved *jus cogens* status.

5. Unconstitutional reliance on mandatory minimums

CCLA has long opposed the adoption of mandatory minimum sentences in Canadian law. The decision to deprive a person of their liberty is one of the most serious rights deprivations sanctioned by our society. As such, sentences involving incarceration must be proportionate and carefully tailored to both the offence and the offender, with all available sanctions other than imprisonment being considered wherever appropriate.[4]

Mandatory minimums fundamentally undermine this careful proportionality, imposing an inflexible restriction on judicial discretion and creating a significant risk that, in a particular set of circumstances, the mandated punishment will be unjust. While such injustice is not the intention of mandatory minimum sentences, it becomes an unavoidable byproduct of their rigidity. Simply put, mandatory minimum sentences are not capable of anticipating and responding to the range of situations that human reality creates. By predetermining the punishment for a particular act or omission and preventing the consideration of the offender's circumstances and moral blameworthiness, they fail to account for unforeseen factors that might render a particular sentence inappropriate or excessive.

The reliance on mandatory minimum sentences also raises concerns regarding the impact they have on the operation of the criminal justice system as a whole. First, many of the proposed mandatory sentences are triggered by a prosecutorial decision to proceed by way of indictment. This takes power over sentencing decisions out of judges' hands and places it in the domain of police and prosecutors – relatively non-transparent and unaccountable decision makers who do not have to publicly disclose or justify their decisions. Second, imposing high mandatory sentences can have the effect of deterring individuals from pursuing their right to a fair and open trial. Academics in the United States have found that prosecutors offer plea bargains to lesser offences that do not carry mandatory minimum sentences – using threats of charges with high mandatory jail terms as leverage.[5] Defendants who reject the offered plea can then be punished – not simply for the crimes they committed, but also for their decision to insist on their innocence, and insist on their right to a fair trial. This scenario is unacceptable for all defendants, but is particularly stark for those who are innocent. Those who are wrongfully charged are faced with the choice of insisting on their innocence and demanding a trial that may result in lengthy mandatory sentence, or taking a more lenient plea deal in spite of their innocence. This is not a choice anyone should have to make.

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[4] *Criminal Code* s. 718.2.

[5] Richard A. Oppel Jr., "Sentencing Shift Gives New Leverage to Prosecutors", The New York Times, (Sept. 25 2011).

a. Mandatory minimums and the Charter

When mandatory sentences become grossly disproportionate they are not only unjust, but also constitute violations of the *Charter*'s s. 12 right to be free from cruel and unusual treatment and punishment. Indeed, the first Supreme Court of Canada case on cruel and unusual punishment struck down a mandatory minimum sentence for the importing of narcotics, reasoning that it was "so excessive as to outrage standards of decency" [6] and disproportionate to an extent that Canadians "would find … abhorrent or intolerable."[7] Several factors are relevant to whether a particular punishment will be cruel and unusual:

(a) The gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter a given offence or to protect the public from a given offender;
(b) The effect of the sentence actually imposed;
(c) Whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed; and
(d) Whether a comparison with punishments imposed for other crimes reveals great disproportion.[8]

In order to assess s. 12 constitutionality, courts will consider not only the particular facts raised in the instant case, but also the full range of reasonable hypothetical circumstances governed by any given offence.[9] Critically, prosecutorial discretion is no answer to a sentence that contravenes s. 12 of the *Charter*[10] and individual constitutional exemptions are not an available remedy,[11] increasing the likelihood that a mandatory minimum will be struck down in its entirety.

Not all mandatory minimums are unconstitutional, and the mandatory minimums proposed in Bill C-10 are shorter than what the Court was considering in *Smith*. Nevertheless, the vague and broad nature of several of the underlying crimes and aggravating factors give rise to a number of instances where the sentence imposed would be undeniably disproportionate. Mandatory minimums do not allow for any safety valve in cases where the required sentence would be disproportionate having regard to the gravity of the offence, the personal characteristics of the offender, and any other relevant circumstances. Without the incorporation of this flexibility, there are significant concerns regarding the constitutionality of a number of these specific amendments.

b. Mandatory minimums and valid penal purposes

[6] *R. v. Smith*, [1987] 1 S.C.R. 1045 at para. 54; see also *R. v. Ferguson*, [2008] 1 S.C.R. 96 at para. 14.
[7] *R. v. Morrisey*, [2000] 2 S.C.R. 90 at para 26.
[8] *R. v. Smith*, [1987] 1 S.C.R. 1045 at paras 53-39; *R. v. Goltz*, [1991] 3 S.C.R. 485.
[9] *R. v. Goltz*, [1991] 3 S.C.R. 485.
[10] *R. v. Smith*, [1987] 1 S.C.R. 1045at paras. 68-69.
[11] *R. v. Ferguson*, [2008] 1 S.C.R. 96 at para. 74.

One of the considerations in determining constitutionality under s. 12 is "whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles and whether there exist valid alternatives to the punishment imposed."[12] It is the CCLA's position that there is little evidence to support the proposition that mandatory penalties of imprisonment will serve as effective deterrents and achieve the objectives of a safer society. This is *particularly* true with respect to drug offences, which may be motivated by underlying addictions. As one learned author notes:

> There is little evidence to support the hope that mandatory penalties of imprisonment, which may not even be known by the general public, will serve as effective deterrents of crimes committed against vulnerable people. …
>
> Mandatory sentences may be defended in the often vain and, at best, uncertain hope that they will provide protection for various disadvantaged groups that are subject to disproportionate victimization. However, they will also result in injustice when applied to exceptional offenders, including exceptional offenders with the same characteristics as the disadvantaged group that is supposed to be protected by the mandatory penalty. The dichotomy between victims and offenders that drives many punitive forms of victims' rights often breaks down in practice and individuals such as women, the young, Aboriginal people, the disabled, and other vulnerable minorities who are thought to be protected by 20 mandatory sentences may also be caught by them.[13]

Moreover, the public is largely unaware of the offences covered by mandatory minimum sentences,[14] negating whatever minimal deterrent effect such measures might theoretically have. Indeed, given the generally negative impacts of incarceration as compared to conditional sentences, some authors have argued that mandatory minimums may actually contribute to increased recidivism and undermine effective law enforcement and administration of justice.[15]

c. Drug provisions: vague and broad underlying crimes and aggravating factors

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[12] *R. v. Smith*, [1987] 1 S.C.R. 1045 at para. 69.

[13] Kent Roach, "Searching for Smith: the Constitutionality of Mandatory Sentences", [2001] 39 Osgoode Hall L.J. 367 at 389-90; see also Julian V. Roberts, "Mandatory Minimum Sentences of Imprisonments: Exploring the Consequences for the Sentencing Process", [2001] 39 Osgoode Hall L.J. 305.

[14] Julian V. Roberts, "Public Opinion and Mandatory Sentencing", [2003] 30 Crim. Just. & Behav. 483, 489.

[15] A 1994 report commissioned by the Federal Department of Justice reviewed the empirical literature and concluded that "[j]uries may be less willing to convict if they know that the charge being tried is covered by a mandatory minimum penalty." C. Meredith, B. Steinke and S. Palmer, "Research on the Application of Section 85 of the Criminal Code of Canada" (1994) Ottawa: Department of Justice Canada.

Bill C-10 proposes new and increased mandatory minimums for a range of criminal offences, including both drug charges and child-targeted sex offences. Each of these areas contains crimes that are already extremely broadly defined, and as such catch a wide range of behavior giving rise to circumstances in which imposing a mandatory minimum sentence may be grossly unjust.

The underlying marijuana drug offences that are targeted for increased mandatory minimum sentences could be applied to a wide range of conduct. Producing as few as six plants for the purposes of trafficking would result in a minimum prison sentence of six months. Production of any amount of oil or resin for a similar purpose results in a mandatory year in jail. Given the breadth of the *Controlled Drugs and Substances Act*'s definition of trafficking, this sentence would apply equally to those persons who sell a large amount of what they have produced for profit and to those who simply *offered* a small amount to friends for free.[16]

Similarly, the charge of importing marijuana and other drugs applies equally to those who traffic large quantities of drugs for sale in other countries, and those who cross the border while in possession of a small amount of marijuana. If a court found that these individuals were intending to share, and thereby traffic, the drugs, they would receive a minimum of one year in prison – regardless of the precise circumstances surrounding the offense.

Although the Bill's reference to aggravating factors does attempt to reintroduce some contextual considerations into the sentencing process, a number of the categories are so broad that they again raise constitutional concerns when used as the basis for mandatory sentences. For example, an individual who is carrying a weapon in committing a trafficking will receive a mandatory two year sentence. The term "weapon", however, is broadly defined by the *Criminal Code*, and could encompass both the loaded pistol in the jacket pocket as well as the fishing knife in the backseat of a car. As currently written there is no requirement that the potential 'weapon' be used, or intended for use, in connection with the underlying crime. Similarly, a person found guilty of trafficking "in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years" the sentence will, in many cases,[17] be a minimum of two years. The number of public places "usually frequented" by youth, however, is essentially limitless. It easily includes parks, streets, malls, restaurants, and

[16] Under the CDSA "traffic" means, in respect of a substance included in any of Schedules I to IV,
(a) to sell, administer, give, transfer, 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.

[17] While this mandatory minimum is limited to those crimes involving over 3 kg of marijuana or resin, there are no quantity restrictions for Schedule I drugs. Bill C-10, s. 39(1).

any number of other locations. Indeed, the only places that one could imagine not meeting this definition are those where persons under the age of 18 are not permitted, such as bars and night clubs. Almost everywhere else could result in the mandatory sentence of two years, no matter the surrounding or extenuating circumstances of the case.

The so-called "health and safety" factors that appear in s. 42(2) of the Bill are also problematic. First, it appears that the production of *any* number of cannabis plants – even one – if produced for the purpose of trafficking, would result in a minimum of nine months jail time if any of the 'health and safety' factors were present. Factor 3(a) – whether the person "used real property that belongs to a third party in committing the offence" – is so broad that it could include all those who rent or lease their homes. This would undoubtedly encompass many young adults, including those who live in their parents' homes. It would also include a very large portion of urban populations and disparately impact the poorest individuals and families within our society. It also borders on absurd to categorize whether or not an individual is renting as a "health and safety factor".

The potential injustice worked by the broad nature of the underlying offences and aggravating factors is compounded by the large and disparate group of individuals, from a wide range of social milieus, who may engage in such offences. The community of drug offenders includes those who seek profit, those who use recreationally, and those who are addicted and who will go to great, often criminal, lengths to feed their addictions. The lines between these groups are easily blurred and the distinctions between those who may be more or less culpable for their conduct is not always readily apparent. Depriving judges of the case-by-case discretion to apply the sentence that they see as most just will unquestionably result in unduly harsh sentences being imposed in some cases.

It is overly simplistic and misleading to assert that Canadian courts are 'soft on crime'. Appellate courts have repeatedly reinforced the seriousness of production and trafficking drug crimes, stating that conditional sentences are generally inappropriate, even for first-time offenders.[18] Even if the government is of the opinion that existing sentences are on average too lenient for average drug offenders, the imposition of minimum sentences is not the appropriate mechanism to respond to this problem. Alternatives measures exist, including sentencing guidelines for prosecutors that would leave from for nuanced response to exceptional cases. It should also be remembered that public debates and the education of judges, prosecutors, and police are also viable means. In the case of sentences for sexual assaults, there have been more severe penalties imposed after a

[18] See, eg., *R. v. Jacobson* [2006], 207 CCC (3d) 270 (O.C.A.) (stating that "a conditional sentence for a cultivation operation of [367 plants …] would be rare even for first time offenders."); *R. v. Van Santvoord*, 2007 BCCA 23 at para. 38 ("*Su* [*R. v. Su*, 2000 BCCA 480] remains a guideline and has been referred to in many subsequent decisions of this court for the principles that denunciation and deterrence are appropriate sentencing objectives where commercial marihuana operations are involved…").

concerted effort at public education and legal interventions. The use of mandatory minimum sentences is a blunt tool. Law and public policy must also be concerned about offenders who are in unique circumstances. A review of some cases where conditional sentences have been imposed demonstrates the types of individuals who are most likely to be impacted:

- A 12 month conditional sentence was given to the mother of two young children, where the father of the children carried on a marihuana grow operation in the mother's home. The mother knew little of the business and did not participate.[19]
- A 12 month conditional was given to a 38 year old man who had been diagnosed as a schizophrenic while serving a previous conditional sentence. The evidence was that he committed the marijuana production and related offences during the onset of the mental illness, and by the time of sentencing and the appeal, was managing his illness in the community with significant community support.[20]
- A 12 month conditional sentence for a single immigrant working mother of two who lived with her mother in a house being used as a grow-op. The house and grow-op belonged to the woman's brother, who required their mother to take care of the plants in exchange for continued immigration sponsorship. The woman was not actively involved in the grow operation, but would occasionally assist her mother upon request.[21]
- An 18 month conditional sentence for a man who was living in a house with a large grow-op. The man had been sexually, physically and emotionally abused as a child and in his early 20s had been kidnapped, tortured and beaten in an extortion attempt. He had suffered significant mental illness all his life including depression, anxiety and panic attacks, self-mutilation, suicide attempts, and self-medication with various street drugs and prescription anti-depression and anti-anxiety medication. When he first agreed to care-take the grow operation he was desperate – unable to work due to his psychological and psychiatric health issues and dependent on his now elderly mother. Since that time, however, he had started a relationship with a supportive and loving partner, reduced his prescription drug intake, gotten off of street drugs and found a stable job. He had also been seeing an addictions specialist and had been receiving professional help to deal with the various emotional, psychological and psychiatric issues.[22]
- A 36-year-old cook who had a total of 47 small marijuana plants, intended for personal use, outside his house. Around the area where the plants were growing he had tied fish hooks to a fishing line, which was then attached to a set of wind chimes inside the house. He was sentenced to one month incarceration for setting a trap (s. 247(3) of the *Criminal Code*) followed by a six month conditional sentence for production of marijuana (s. 7(2)(b) of the *Controlled Drugs and Substances Act*). Under Bill C-10 the *CDSA* charge alone would carry a

[19] *R. v. Nguyen*, 2001 BCCA 461 (B.C. C.A.).
[20] *R. v. Godwin*, 2005 BCCA 477 (B.C. C.A.).
[21] *R. v. Ye*, 2009 BCPC 303 (CanLII).
[22] *R. v. Wyss*, 2009 BCPC 468 (CanLII).

mandatory 9 months incarceration for producing plants with a trap, and be in addition to any sentence for setting a trap contrary to the *Criminal Code*.[23]

Several common threads run through these and other cases – including low levels of involvement, coercion, histories of mental illness, desperation. Often, where single parents are involved, mandatory periods of incarceration would take away a family's only means of subsistence and be highly disruptive to the children. In the case of offenders with mental health or addiction problems, a period of incarceration could irreparably damage ongoing and future recovery efforts. The availability of restrictive conditional sentences give courts the flexibility to impose lengthier sentences while mitigating the devastating and disproportionate impacts traditional incarceration would have for the individual or their family. In each of these cases the proposed mandatory minimums would eliminate these options.

d. Sexual offences against children: breadth of pornography provisions

Children are a vulnerable population who should receive particularly strong protection under Canadian criminal law. Sexual offences against children are particularly heinous, and it is fully understandable that the government would seek to demonstrate the unacceptable nature of such crimes in the strongest terms. Unfortunately, several of the underlying offences are quite broad and capable of encompassing a wide range of activity, not all of which may be suitable for criminal sanction, not to mention mandatory incarceration.

The existing child pornography provisions in the criminal code are purposively broad offences. The child pornography provisions of the *Criminal Code* criminalize possession of a substantial range of material. The definition of child pornography set out in the *Code*, and as interpreted by the Supreme Court,[24] goes well beyond actual photographs of children being sexually abused. It includes:

- Depictions of persons under 18 years engaged in lawful sexual activity;
- Depictions of individuals over 18 years engaged in lawful sexual activity if they are depicted as being under 18
- Depictions of imaginary children or adolescents, regardless of whether the activity depicted is lawful or not;[25] and
- "[A]ny written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of 18 years that would be an offence" under the *Criminal Code*.[26]

[23] *R. v. Legge*, 2011 CanLII 5561 (NL PC).
[24] See *R. v. Sharpe*, [2001] 1 S.C.R. 45.
[25] *Criminal Code* s. 163.1(1)(a).
[26] *Criminal Code* s. 163.1(1)(c).

Even taking into account the constitutional exemptions read in by the Supreme Court jurisprudence, 18 year olds could still be charged with possession of child pornography if their 17 year old partners send them sexual or partially nude photos.[27] Similarly, an 18 year old who appears under age could be charged with producing child pornography for taking photos of him or herself and distributing them to friends or partners. In each of these instances, the individuals would receive a mandatory 3 months in jail for accessing or possessing child pornography, and six months for its production or distribution. The only available defences require the material to have a "legitimate purpose related to the administration of justice or to science, medicine, education, or art."[28] The ambiguity of the available defenses and the breadth of the provisions will lead to the criminalization and months of mandatory jail time for cases involving significant freedom of expression and privacy concerns. Removing all judicial discretion in such circumstances may result in manifestly inappropriate sentences.

A review of recently reported court cases on child pornography suggest that the courts do not hesitate to impose sentences that are much higher than the proposed minimums in Bill C-10. For possession of materials, the child pornography cases reported by the Canadian Abridgment Digests in the past two years show that a majority of sentences are longer than 12 months. In almost all cases of production of child pornography sentences were for 12 months or more. Again, however, it is not the 'typical' case that gives rise to constitutional concerns.

e. Summary of specific recommendations

In general, CCLA would recommend the removal of all mandatory minimums, and their restatement as presumptive sentencing guidelines. At a minimum, the following specific changes should be made in order to ensure the Bill's amendments have the greatest chance of being constitutionally compliant.

- S. 41(1) should be amended to eliminate the mandatory minimum sentences for production of small quantities of marijuana
- S. 40 should be amended to specify that the offence of importing or exporting must be committed for the purpose of financial gain
- S. 39(1) should be amended to remove the word 'carrying' from the weapons provision

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[27] *R. v. Sharpe*, 2001 SCC 2 at paras. 115-129. The two exceptions outlined in *Sharpe* are "1. Self-created expressive material: i.e. any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and 2. Private recordings of lawful sexual activity: i.e., any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use." The second category would only protect a teenage couple's consensual, lawful sexual pictures so long as the "pictures were created together and shared only with one another."

[28] *Criminal Code* s. 163.1(6). The material must also not "pose an undue risk of harm to persons under the age of eighteen years."

- S. 41(2) should be amended to remove the aggravating factor of using real property belonging to a third party
- S. 39(1) should be amended to ensure that the aggravating factor of committing an offence near a public place usually frequented by persons under 18 only applies if youth were present or in the immediate vicinity when the offence took place
- S. 17, increasing the mandatory minimums for offences involving child pornography, should be removed in its entirety until the underlying definitions and defences are remedied

6. Prison conditions and disparate impact of amendments on Aboriginal peoples and persons requiring mental health care

While the government has not released estimates regarding the precise impact of the proposed amendments on incarceration rates, it is expected that there will be a significant increase in the prison population. The imposition of new mandatory minimums means that conditional sentences will not be available for these crimes. Similarly, the amendments to the s. 742.1 of the *Criminal Code* would remove the possibility of conditional release for a wide range of offences when prosecuted by indictment, including criminal harassment, motor vehicle theft, theft over $5000 and being unlawfully in a dwelling house. It is clear that a significant number of people, previously allowed to serve their sentence under restrictive conditions in the community, will now be incarcerated.

Increased use of jail terms will have a disproportionate and devastating impact on two of Canada's most marginalized communities – those with mental health needs and Aboriginal peoples. The number of offenders with some form of mental illness has continued to grow over the past few years, and the Office of the Correctional Investigator estimates that "at least one-in-four new admissions to federal corrections present some form of mental health illness" with many "struggling with a concurrent disorder such as substance abuse."[29] Internal Correctional Service Canada documents suggest that in the Pacific region nearly 40% of male offenders, and over 50% of women, present with some form of mental health problem. Meeting the mental health needs of this population is undoubtedly "a daunting challenge to the Correctional Service."[30] In the absence of sufficient resources to deal with this population, solitary confinement becomes a method of behaviour treatment and control. Indeed, resort to segregation in federal correctional institutions is increasing. As stated by the Correctional Investigator, "[g]iven the gaps in appropriate mental health treatment and the reliance on segregation as a population management strategy, it only stands to reason that a sizable proportion of the segregated population will be found to be mentally disordered."[31]

[29] Annual Report of the Correctional Investigator 2009-2010.
[30] Annual Report of the Correctional Investigator 2009-2010.
[31] Annual Report of the Correctional Investigator 2009-2010.

The government's proposed amendments are likely to exacerbate the current problems. Underlying mental health conditions are often highly relevant considerations in the imposition of conditional sentences. Conditional sentences requiring addiction counseling, therapy and treatment may be imposed in lieu of jail time in an attempt to aid rehabilitation and reintegration. Without this option, all those offenders whose health issues could be more effectively treated in the community will instead be set to jail. It is therefore reasonable to conclude that a disproportionate percent of 'newly' incarcerated offenders will have mental health and addiction issues.

The sentencing provisions of the Bill also completely fail to address the unique historical and contemporary situation of Aboriginal peoples. Although Aboriginal peoples account for less than 4% of the Canadian population, they constitute over 20% of the federal prison population. The position of Aboriginal women is particularly stark: the number of Aboriginal women offenders has grown by almost 90% over the last ten years, and nearly 50% of the female maximum security population is Aboriginal.[32] Current correctional programs tend to be less effective for Aboriginal inmates, who generally have a lower parole rate and a higher segregation rate than the non-Aboriginal population.[33] The elimination of conditional sentences, which may take into account many of the community-specific challenges that Aboriginal offenders face, are likely to have a particularly disproportionate impact on Aboriginal communities.

The criminal law and correctional systems are already failing these two at-risk populations. Canadian jails are over-crowded and under-serviced: "on any given day less than 25% of the population inside CSC correction institutions is enrolled and engaged in … a "core" correctional program."[34] Already a significant proportion of offenders are missing their parole eligibility dates because they cannot access the required programming.[35] Mental health facilities and staff are lacking – particularly for those with intermediate mental health needs[36] – and existing programs are generally failing the Aboriginal population.[37] In these circumstances, introducing measures that will greatly increase the prison population – with a disproportionate impact on these communities – is unconscionable. It is also likely to give rise to constitutional challenges, including litigation surround s. 7 rights, cruel and unusual punishment (s. 12), and equality guarantees (s. 15).

Finally, the CCLA is concerned that, when taken as a whole, the series of criminal law amendments will compound to have a devastating impact on young offenders who will effectively be legally barred from exiting the criminal justice system and reintegrating into society.

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[32] Annual Report of the Correctional Investigator 2009-2010.
[33] Annual Report of the Correctional Investigator 2009-2010.
[34] Annual Report of the Correctional Investigator 2009-2010.
[35] Annual Report of the Correctional Investigator 2009-2010.
[36] Annual Report of the Correctional Investigator 2008-2009.
[37] Annual Report of the Correctional Investigator 2009-2010.

At a minimum, s. 34 should be amended to add a provision providing for exceptions to subsections (b), (c) and (e) where the offender is Aboriginal or has underlying mental health needs and the imposition of a conditional sentence could better address their rehabilitation and reintegration than a period of incarceration.

7. Unconstitutional amendments to the *International Transfer of Offenders Act*

a. International transfer and the Charter

Canadian citizens detained in foreign countries have the right, under Section 6 of the *Charter*, to return to Canada. So long as the transfer is approved by the sending country, obstacles to a citizens' return constitute infringements of an individual's *Charter* right to repatriation. In a recent Federal Court of Appeal case the Court determined that "the right to enter and to remain in Canada is infringed by the *International Transfer of Offenders Act*" [38] and that "the Minister's power to consent or to refuse such a transfer must be exercised in accordance not only with the provisions of the legislation, but also in accordance with the *Charter*."[39]

Although some transfer requests may be denied without violating the constitution, in order to do so the government must fully justify such decisions under s. 1 of the *Charter* as proportional to a pressing and substantial objective. In examining the existing *International Transfer of Offenders Act*, the only pressing and substantial goals identified by the Court of Appeal were "the security of Canada and the prevention of offences related to terrorism or to organized crime are pressing and substantial objectives."[40] Constitutional examples of why a Canadian citizen could be refused repatriation included instances where incarcerating a terrorist in Canada "would result in retaliatory attacks on Canadian citizens" or where it would be reasonable to believe that jailing an "international drug cartel kingpin […] would result in attacks on Canadian prison guards or would facilitate the criminal operations of that offender or of his criminal organization."[41]

The majority of the proposed amendments, however, purport to give the Minister discretionary powers that would go far beyond constitutional limits. First, the references to "the minister's opinion" are gratuitous and misleading, since the government is required to establish a threat to Canada under a s. 1 burden of proof. In numerous recent cases the Minister's opinion has, without any explanation, differed from the expert recommendations of Correctional Services Canada.[42] Under constitutional standards the

[38] *Divito v. Minister of Public Safety and Emergency Preparedness,* 2011 FCA 39 at para. 45.
[39] *Ibid.* at para. 47.
[40] *Ibid.* at para. 51.
[41] *Ibid.* at para. 56.
[42] See, e.g., *Yu v. Canada (Minister of Public Safety & Emergency Preparedness*, 2011 FC 819; *Singh v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2011

Minister cannot simply state a differing opinion that is contrary to the evidence and bulk of authority in order to justify *Charter* rights violations. It is evidence and expertise, not the Minister's opinion, which is determinative.

The amendments would also introduce a host of factors that have little to no connection to national security, terrorism or organized crime. It is difficult to see what possible relevance a consideration of the offender's health, his/her participation in a rehabilitation or reintegration program and his/her acceptance of responsibility could have to permissible pressing and substantial objectives. Those who have been incarcerated in jurisdictions with insufficient fair trial and due process protections and substandard incarceration facilities cannot reasonably be expected to 'cooperate' with corrupt officials or renounce their innocence. Language and cultural barriers may prevent Canadians from taking part in what rehabilitation or reintegration programs there are. Since there is a legal presumption that Canadian citizens incarcerated abroad and approved for transfer by a foreign country have a right to return, these deemed "positive" efforts on the part of the offender are irrelevant. Only in exceptional circumstances – such as a concrete threat to public safety or national security during incarceration – are such rights violations justified.

Indeed, in general public safety considerations are significantly *enhanced* by allowing international transfers. No matter where they are incarcerated, offenders who are Canadian citizens will have the right to enter Canada upon their release. Rehabilitation and reintegration is improved when offenders have community and institutional support both during and after their incarceration; in most circumstances these goals are more easily achieved in Canadian penal institutions. Moreover, when individuals are transferred to serve their sentence in Canadian facilities it provides the government with a record of their offence and the ability to monitor their behavior during incarceration and impose conditions on their release. In contrast, when offenders serve their sentences entirely in foreign countries there will generally be no record of their offence in national or local police databases, and they will reenter the Canadian population without any legal conditions, monitoring or restrictions.

The final proposed amendment would introduce a catch-all provision allowing the Minister to also take into account "any other factor that the Minister considers relevant."[43] In addition to possibly introducing a host of irrelevant considerations, the implementation of this provision could also lead to numerous challenges stemming from the procedural fairness rights guaranteed under s. 7 of the *Charter.*[44] Giving the Minister

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FC 115; *Vatani v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FC 114.

[43] Bill C-10, s. 136.

[44] The procedural fairness guarantees under s. 7 of the *Charter* require that an individual has sufficient notice of the case against him or her to enable meaningful participation. If novel factors are used in the determination of individuals' cases, without giving the individual an opportunity to respond to new allegations, the decision may be in breach of that individual's s. 7 rights.

a blanket authority to supplement the listed considerations will frequently violate s. 7 of the *Charter* if an individual's transfer request is denied without sufficient notice or opportunity to respond.

b. Summary of specific recommendations

The CCLA submits that many of the amendments proposed in this section of the *Bill* grant an unconstitutional amount of discretion to the Minister and thus must be rejected by this Committee. At a minimum, the following specific amendments should be made to the existing *Bill* in order to better comply with constitutional requirements, s. 136 should be amended as follows:

- Remove all instances of 'in the minister's opinion'
- Subsection 10(1) of the Act should read, "the Minister shall consider…"
- Remove subsections (h), (i) and (k)
- Delete subsection (l)
- Amend subsection (b) to clarify that the listed factors are limited to criminal activity or safety concerns arising specifically due to incarceration in Canada, rather than after general release

8. Moving forward: increasing transparency and accountability

The CCLA welcomes the required 5-year review of the mandatory minimum provisions set out in s. 42 of the *Bill* and the requirement that the National Parole Board submit an annual report that includes the number of applications for record suspensions and the number of record suspensions ordered. Similar independent reviews and public reports to Parliament should be undertaken with respect to the changes to the other acts, including:

- An independent review and report on the changes to the *International Transfer of Offenders Act*;
- An independent review and annual report on the changes to the *Immigration and Refugee Protection Act*, including an assessment of who is being denied work permits, and whether it is an effective mechanism to protect vulnerable populations;
- An extended independent review and report on criminal records suspensions, including an annual report on how many record suspensions were revoked that year, an assessment of the impacts of the lengthened waiting periods before individuals are eligible to apply for record suspensions, and a review of the costs and benefits of mandatory exclusion for certain offences and the specific crimes which appear in Schedules 1 and 2;
- An independent review and report on the changes to conditional sentences; and
- An independent review and report on the changes to the *Corrections and Conditional Release Act*.

As part of an ongoing assessment effort, the government should require that departments keep and regularly proactively disclose relevant statistical information and evaluations so that a wider body of experts can analyse the results in a meaningful manner.

Finally, the government should increase the resources of existing accountability bodies in step with the anticipated growth in their areas of oversight. With the expected rise in numbers of inmates, for example, it is imperative that the resources and personnel allocated to the Office of the Correctional Investigator be proportionately increased.