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As these hearings on C-10 come to a close, It might be instructive to look back over the last 40 years and compare the experience of Canada and the US regarding the use of mandatory minimum sentences as a crime control strategy.

Since 1974 the incarceration rate in Canada has moved from 89 to 118/100,000 (32%). The incarceration rate in the US has increased about from 149 to 730/100,000 (389%) making it the world's leader in imprisonment. with 5% of the world's population but 25% of the world's prisoners.

This astonishing growth in the American prison population has come with enormous financial and social costs.

- Today, 1 in every 100 American adults is in prison
- 1 in 30 men between the ages of 20 and 34 is behind bars,
 - the figure is 1 in 9 for black males in that age group.
- Five states -- [Vermont](#), [Michigan](#), [Oregon](#), [Connecticut](#) and [Delaware](#) -- now spend as much as or more on corrections as on higher education.
(Pew Centre on the States, One in 100 behind Bars in America, 2008)

More than any other cause, the difference in the incarceration rates between Canada and the US reflects sentencing policy and in particular the use of mandatory minimum sentences.

While the US embraced mandatory minimum sentences, Canada, through various governments of different political stripes, avoided wedge politics and instead developed sound sentencing policies that reflected the values of Canadians.

That led to stable incarceration levels.

There are some differences between Canada and the USA which would likely ensure that Canada will not go so far as the US. In Canada our judges are not elected and we have a single criminal code which means we do not have the pressure that comes when state governments try to outdo one another in the race to be the toughest. And we have our Charter.

Still, we need to realize that the growth in the US incarceration rate went far beyond what anyone predicted or wanted when they launched their incremental approach to mandatory minimum sentencing.

Back in the 70s no one really knew where mandatory minimum policies would lead. Once Americans adopted the idea that mandatory minimums **meant** public safety, there was no way back. Harsh penalties only led to demands for more of the same. The public was never satisfied.

Mandatory minimum sentences affect the least serious offences – the ones that are seldom reported and ones that we can't even imagine.

If we could accurately anticipate the least serious case and set mandatory minimum sentences accordingly, most people would see that sentence as being too lenient for the crimes that they imagine it would apply to.

But if we set the mandatory minimum sentences to be greater than the least serious offence deserves, we ensure that some sentences will be unjust.

Either way, mandatory minimum sentences will be seen as too harsh or too soft and will erode public confidence in our justice system. Mandatory minimums cannot address what Canadian report are the most important sentencing objective – rehabilitation and reparation with the lowest support being for incapacitation and denunciation. (Justice Canada, The 2007 National Justice Survey: Tackling Crime and Public Confidence)

In this debate it is notable that the judiciary is virtually silent – keeping themselves from participating in political debates - as is quite proper. By doing so, they become sitting ducks for criticism.

Mandatory minimums sidestep the principles of sentencing. Judges are not permitted to do so. So long as the Judiciary in Canada follow the laws relating to sentencing they will use imprisonment as a last resort and will always be subject to criticism by those who want more onerous penalties.

We do not breed confidence in our system by breeding distrust in our judiciary. Measures that would eliminate the discretion of the court and replace it with one that is inherently arbitrary cannot generate public confidence in either the judicial or the political systems.

Chief Justice Beverly McLachlin said:

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

The only way to craft sentences that take into account the criminal act and the circumstances of the offender is to sentence individuals as individuals. The only way to limit the use of imprisonment is to apply principles that require that it be used no more than necessary. That cannot be done through mandatory minimums.

Mandatory minimum sentences leave the Criminal code pockmarked with arbitrary sentences throwing the entire sentencing process into chaos marked by arbitrary unfairness, and irrational bits of cruelty. No sentence makes sense in such an environment.

Perhaps that is why Canadian courts enjoy a much higher degree of public confidence than American courts where mandatory minimum sentences are used routinely.

At the same time it is likely that we will add substantially to our prison populations.

By 2012-13, the federal corrections budget will be \$861-million higher than it was 2009-10, a 36- per-cent jump. But even with that and further substantial increases it is likely that already overcrowded prisons will get much worse.

A crowded prison is a dysfunctional and fearsome place for both staff and prisoners. It is an environment without even the most minimal privacy as people share a cell – which is really a bathroom - for extended hours each day and night, often for months on end, unable to leave. The person you share a cell with might not be the ideal cell mate. You might fear him or you might hate him - particularly as time wears on.

Crowded prisons are ones where work, recreation, education, treatment and visiting is sacrificed because of the need for space, staff and for money. Prisoners become increasingly desperate, violence becomes more common. Staff get to know prisoners less well see them as more threatening. Staff are more likely to place prisoners in higher security settings. Parole boards are less likely to grant parole under such circumstances. That in turns feeds the prison system while increasing the number of victims in the community All of these factors lead longer terms in custody with fewer

1 McLachlin C.J., Chief Justice, Supreme Court of Canada. *Sauvé v. Canada* (Chief Electoral Officer) 2002 SCC 68.

opportunities for rehabilitation and gradual release and higher rates of reoffending - at great expense. There is no winner in this scenario.

This is not a strategy for public safety. Neither will it build public confidence in either the Justice system or the political system.

We know now what the Americans didn't know in the 1970's. There is no excuse for repeating their failed experiment.