

SUBMISSIONS TO: The Honourable Irwin Cotler
Minister of Justice for Canada

RE: Mandatory Minimum Jail Sentences

FROM: Canadian Civil Liberties Association (CCLA)

DELEGATION:

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Introduction

The Canadian Civil Liberties Association (CCLA) is a national organization with the paid support, across the country, of more than 7000 individuals and 50 associated groups which themselves represent several thousands of people and 7 affiliated chapters. Our membership roster includes a wide variety of callings, constituencies, and interests — lawyers, writers, homemakers, clergy, trade unionists, professors, minority groups, media performers, business executives, and others.

Our objectives include the following:

- S to promote legal protections against the unreasonable invasion by public authority of the freedom and dignity of the individual, and
- S to promote fair procedures for the resolution and adjudication of conflicts and disputes.

It is not difficult to appreciate the relationship between these objectives and the issue of mandatory minimum sentences. A mandatory minimum incurs a significant risk that, in a particular set of circumstances, an encroachment on freedom will be unreasonable. It is not possible adequately to anticipate all of the many situations that reality creates. Thus, there is a consequent risk of unfair and unjust punishment.

No one who has seriously reflected on the issue of punishment can be sanguine about the amount of wisdom it requires. Like others who have attempted to deal with this thorny problem, the Canadian Civil Liberties

Association is humbled by the exercise. It is not necessary, however, to claim ultimate wisdom with respect to sentencing practices in order to discern the substantial foolishness that inheres in rigid mandatory minimum sentences. To this extent at least, we make the ensuing submissions.

The Injustice Involved

In early November of 1994, the Ontario Court of Appeal reduced a jail sentence from 12 months to 6 months.¹ The prisoner had been convicted of discharging a firearm with the intent to wound. The offence involved firing a gun at another person; the bullet had merely grazed the victim's arm.

Upon reducing the sentence, the appeal court judges took account of the prisoner's prior history of "excellent service to the community" and his general good character.² They also noted that the prisoner had acted "in a situation of high stress that demanded split second decisionmaking".³ The prisoner, it turns out, was a police officer and the victim was a burglar. In the circumstances, the officer was chasing the burglar in an attempt to arrest him. The burglar was subsequently convicted of breaking and entering.

If this situation were to occur today, that police officer would have to be jailed for *at least* 4 years. Neither the exceptional nature of the circumstances nor the mitigating factors in the officer's personal history could rescue him from the severity of such punishment. The law currently requires a 4-year

minimum sentence for the offence that the officer committed.⁴ The courts may, of course, consider aggravating circumstances and increase the punishment, but they may not consider mitigating circumstances to reduce it.

It's hard to believe that even the most extreme proponents of minimum sentences would have wanted that officer to be jailed for 4 years. The most plausible explanation is that they simply did not envision the kind of scenario that occurred in this case. This, of course, is precisely the problem with minimum sentences. The realities of human life are too complex for such simplistic solutions. Situations always arise that are beyond what planners have anticipated. Elementary wisdom requires, therefore, a more flexible capacity to respond.

The minimum sentence legislation was enacted soon enough after this case to catch a 21-year-old man who robbed a fast-food outlet by exposing the butt of a gun he had tucked into the waist of his pants.⁵ The fact that the instrument of the robbery turned out to be an unloaded BB gun could not lessen the sentence. Nor could the fact that the man suffered from a manic-depressive disorder for which he was not receiving medical care or taking medication.

Although the Ontario Court of Appeal upheld the constitutionality of this minimum sentence, it nevertheless expressed deep reservations about its propriety in the circumstances of this case. The judges evinced particular concern that "such a sentence does not take into account the impact of the

[accused man's] mental illness".⁶ They said that they also had "reservations about putting this relatively young man into a penitentiary setting".⁷ And they noted that, in these circumstances, "a sentence of even 3 years' imprisonment is beyond what is necessary to punish, rehabilitate or deter" the young man "or to protect the public" from him.⁸ In conclusion, the court declared the penalty to be "demonstrably unfit".⁹

It should come as no surprise, therefore, that, in a survey of judges conducted in the 1980s by the Canadian Sentencing Commission, 91% said minimum penalties restricted their ability, at least sometimes, to impose a just sentence.¹⁰ And a substantial number said that the existence of such penalties contributes, at least sometimes, to inappropriate plea bargains.¹¹

The Issue of Necessity

Surveys conducted among members of the public — and even among prison inmates — by the Sentencing Commission revealed widespread unfamiliarity with the provisions for minimum sentences.¹² Indeed, when asked to name an offence carrying such a penalty, very few were able to do so. It's hard to imagine a minimum sentence having a deterrent impact when its very existence is unknown. Small wonder that the reported research does not show that such rigid sanctions are more effective than less rigid ones in preventing crime.¹³

Indeed, there is reason to believe that mandatory minimum sentences can actually *undermine* effective law enforcement. From a 1994 report commissioned by the Federal Department of Justice, we learn that “the empirical literature reviewed . . . suggests”, *inter alia*, the following conclusion:

Juries may be less willing to convict if they know that the charge being tried is covered by a mandatory minimum penalty.¹⁴

Nor does the evidence reveal that minimum sentences are necessary to keep dangerous criminals off the streets. A perusal of the published sentencing decisions for the 1990s shows that heavy penalties are not infrequently imposed upon violent offenders. For aggravated assault, there have been sentences of 8 and 9 years, and as high as 10 and 12 years for aggravated sexual assault. In many situations without minimum sentences, the Criminal Code permits substantial penalties and experience suggests that the Canadian judiciary is hardly a sanctuary for bleeding hearts.

Moreover, in those cases where a sentence appears unduly lenient, there are readily accessible remedies: the Crown can usually appeal at least once, and perhaps twice. Appellate courts are usually empowered to alter the punishment. In fact, appeals of sentences have produced a number of longer prison terms. But, apart from the exceptional and relatively hard-to-get possibility of a constitutional exemption, there is no such readily accessible remedy where a mandatory minimum sentence is considered too *harsh*.

The Case of Robert Latimer

Undoubtedly, the most poignant example of the evil in minimum sentences is the case of Saskatchewan farmer Robert Latimer. He has been languishing in jail for more than 3 years as a result of his having ended the life of his severely disabled 12-year-old daughter, Tracy. In view of the fact that he was convicted of second-degree murder, Latimer is serving the required minimum sentence — life with no chance of parole for 10 years.

However, the trial judge, Mr. Justice Ted Noble, had found as a fact that Mr. Latimer committed this deed in order to relieve what he saw as his daughter's terrible and unremitting pain (she had a severe form of cerebral palsy). It is also significant to note that the other triers of fact — the jury — recommended that he be eligible for parole after only 1 year. They who saw all the witnesses and heard all the evidence urged a course of mercy. In this connection, it is appropriate to note that, contrary to certain commentary on the case, Judge Noble found that, on the evidence, "there is no suggestion ... that [Latimer] was motivated in any way by [Tracy's] disability".¹⁵ In the trial judge's view, the key factor was Tracy's pain, not her disability. Moreover, as expressed by Judge Noble, "Mr. Latimer was motivated solely by his love and compassion for Tracy".¹⁶

But, since the prosecution chose to lay a charge of second-degree murder, Mr. Latimer, who was clearly guilty as charged, is subject to the rigid minimum sentence that must confine him in jail for at least 10 years. It is not necessary to excuse mercy killings in general or Robert Latimer in particular to be outraged by the punishment he is currently suffering. The greatest number

of second degree murders are motivated by hate, greed, or at least selfishness. It is palpably unfair for a compassionate father who misbehaves out of love to receive the same penalty as, for example, a malevolent robber who misbehaves out of greed. Significantly, a nation-wide poll found that support for clemency was more than 70%¹⁷ and more than 60,000 Canadians have signed a CCLA petition urging both a substantially reduced penalty for Mr. Latimer and the repeal of all mandatory minimum sentences.

Some commentators have contended that, unless this man serves the full sentence, people with disabilities are “not going to sleep very well”.¹⁸ But, even if Mr. Latimer’s sentence were reduced, anyone contemplating a similar misdeed would have to reckon with the kind of legal ordeal that he has suffered — by now, some 6 hearings and, in total, well over three years in jail. And, of course, anyone charged with such an offence will inevitably endure the awful tension of anticipation that must accompany not knowing exactly what punishment will ultimately be imposed. Not a very inviting predicament.

Moreover, during the 1990s, there were at least 4 cases of Canadian courts accepting guilty pleas to something less than murder where the lives of very ill patients were *deliberately extinguished* to relieve their unendurable pain.¹⁹ Spared the requirement of a minimum sentence, the courts decided against *any* imprisonment. Despite this leniency, Canada has hardly become engulfed in such killings. Thus, clemency for Mr. Latimer need not create insomnia for *anyone*.

The purpose, then, of this delegation is two-fold. We seek the abolition of all minimum sentences and early clemency for Robert Latimer. As regards the request for Latimer, we are aware of news reports to the effect that he is not disposed to ask for clemency. We urge the government of Canada not to allow his seemingly inexplicable reluctance to derail the cause of justice. It is simply an abomination that this man is currently suffering the magnitude of incarceration that he is. The government should do what is right despite his reluctance to request it.

A Perspective

At the same time, CCLA requests the government to begin the process of repealing all mandatory minimum sentences. In saying this, we acknowledge the validity of the argument that the heinous nature of some crimes is so great that a minimum sentence would *usually* be appropriate. There is an important distinction, however, between “usually” and “always”. For such purposes, we could envision the idea of a *presumptive* minimum sentence. This would signal to the judges that they should impose the minimum punishment unless the circumstances are truly exceptional.

According to recent legislation in the United Kingdom, for example, there must be an automatic life sentence for certain offences “unless the court is of the opinion that there are exceptional circumstances relating to ... the offences or to the offender”.

The Canadian Sentencing Commission summarized the Canadian expertise on this issue as follows: “Since 1952, all Canadian commissions that have addressed the role of mandatory minimum penalties have recommended that they be abolished”.²⁰ The requirements of justice and good sense demand that this be done. The sooner, the better.

Recommendations

The Canadian Civil Liberties Association urges the Minister of Justice for Canada to adopt the following measures:

- (a) Initiate a process aimed at abolishing those minimum jail sentences that permit no flexibility whatsoever and
- (b) Recommend to the appropriate members of the federal cabinet that they grant early clemency to Robert Latimer.

Notes

1. *R v. Levert* [1994], 197 76 O.A.C. 307 (On. Ct. App.).
2. *Id.* at para. 10.
3. *Id.*
4. Criminal Code § 244.
5. *R v. McDonald*, (1998) 40 O.R. (3d) 641 (C.A.).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Cited in Anthony N. Doob & Carla Cesaroni, *The Political Attractiveness of Mandatory Minimum Sentences*, (2001) 39 Osgoode Hall L. J. 287, ¶ 11.
11. *Id.*
12. Julian V. Roberts, *Public Opinion and Mandatory Sentencing*, (2003) 30 Crim. Just. & Behav. 483, 489.
13. *Id.* at 502.
14. Doob & Cesaroni, *supra*.
15. *R v. Latimer*, [1997] S.J. No. 701 at ¶ 16.
16. *Id.* at ¶ 27.
17. Jill Mahoney, *Most Back Cut in Latimer's Term*, *Globe & Mail*, April 18, 2001.
18. Diane Ritcher, *Association for Community Living*, quoted in *Judge's Decision 'Terrifying', Advocate for Disabled Says*, *Toronto Star*, December 2, 1997.

19. R v. Latimer, 99 C.C.C. (3d) 481, 539(Sask. C.A.) (per Bayda, C.J.S., dissenting).