

**SUBMISSIONS OF THE CANADIAN CIVIL LIBERTIES
ASSOCIATION RE: BILL C-15**



**CANADIAN
CIVIL LIBERTIES
ASSOCIATION**

SUBMISSIONS TO: The Standing Committee on Justice and Human Rights

RE: Bill C-15, An Act to amend the Controlled Drug and Substances Act and to make related and consequential amendments to other Acts

FROM: The Canadian Civil Liberties Association (CCLA)
per Graeme Norton, Director, Public Safety Project

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THE CCLA

The Canadian Civil Liberties Association (CCLA) is a national organization with the paid support of more than 6,500 individuals drawn from all walks of life, several affiliated chapters across the country, and many associated group members which in turn represent several thousand Canadians. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend, extend, 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.

It is not difficult to appreciate the relationship between the CCLA's mandate and the issue of mandatory minimum sentences. Such sentences incur significant risks that, in a particular set of circumstances, an encroachment on freedom will be unreasonable. As it is not possible to anticipate all of the many situations that reality creates, there is a consequent risk of unfair and unjust punishment. One need not claim ultimate wisdom with respect to sentencing practices in order to discern the many problems associated with rigid mandatory minimums. To this extent at least, we make the ensuing submissions.

MANDATORY MINIMUM SENTENCES IN BILL C-15

Bill C-15 introduces mandatory minimum penalties for certain offences involving the trafficking, importing, exporting, and production of illegal drugs. Depending on the offence, the Bill requires that a minimum sentence of between six months and three years of imprisonment be imposed. At the low end, a sentence of six months imprisonment is required for any person found to have produced, for the purpose of trafficking, 200 or fewer marihuana plants. This would appear to apply even if as

little as one plant was produced. At the high end, a three year sentence is required for certain persons who produce more serious “Schedule I” substances. For various other drug crimes, sentences of between one and two years imprisonment are required. Mandatory imprisonment can be avoided by entering into a drug treatment court program, but only with respect to certain offences. For those offences where this option is not available, sentencing judges are given no discretion to diverge from legislated imprisonment requirements, even where they believe doing so would be in the interests of justice.

The Problems with Mandatory Minimum Sentences

Unjust Sentences

The CCLA has long opposed the adoption of mandatory minimum sentences in Canadian law. By imposing an inflexible restriction on judicial discretion, such sentences create a significant risk that, in a particular set of circumstances, an unjust punishment could be imposed. While such injustice is, of course, 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, they fail to account for unforeseen factors that might render a particular sentence inappropriate or even excessive. This is why the overwhelming majority of judges believe that minimum penalties restrict their ability, at least sometimes, to impose a just sentence.¹

Canadian law is no stranger to the type of injustice that can result from mandatory minimum sentences. One particularly telling example is the case of *R. v.*

¹ Anthony N. Doob & Carla Cesaroni, *The Political Attractiveness of Mandatory Minimum Sentences*, (2001) 39 Osgoode Hall L. J. at pg. 291-292.

*McDonald*², in which a 21-year-old man received a mandatory minimum sentence for robbing a fast-food outlet by exposing the butt of a gun that was tucked into the waist of his pants. The fact that the weapon 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. 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. In the Court's view, the required sentence failed to "take into account the impact of the [accused man's] mental illness" and was "beyond what [was] necessary to punish, rehabilitate or deter" the young man "or to protect the public".³ In spite of acknowledging these grave concerns, the Court was legislatively required to impose a penalty that it believed was "demonstrably unfit."⁴

A similar outcome was avoided in *R. v. Levert*⁵ because of the *absence* of a mandatory minimum sentence. In this case, an accused person appealed the sentence of one year imprisonment he received for discharging a firearm with intent to wound. The offender had fired two shots at another person, one of which grazed that person's arm. After considering the accused's prior history of "excellent service to the community" and his general good character, the Ontario Court of Appeal reduced the sentence to six months.⁶ The offender, it turns out, was a police officer and the victim was a burglar. In the circumstances, the officer was attempting to arrest the man, who was subsequently convicted of breaking and entering.

While at the time that *R. v. Levert* was decided no relevant mandatory minimum sentence existed, subsequent legislative developments would require that one be imposed today.⁷ Thus, regardless of the exceptional nature of the circumstances

² *R v. McDonald* (1998) 40 O.R. (3d) 641 (C.A.).

³ *Ibid* at para 71.

⁴ *Ibid* at para 72.

⁵ *R. v. Levert* [1994] O.J. No. 2627.

⁶ *Ibid* at para. 10.

⁷ Section 244 of the *Criminal Code* now requires that a minimum sentence of four years imprisonment be imposed on anyone convicted of discharging a firearm with intent to wound.

and any mitigating factors in the officer's personal history, he would now be required to serve a sentence of at least *four years imprisonment*. Courts could, of course, consider aggravating circumstances and *increase* the punishment, but they could not consider mitigating circumstances to reduce it. It's hard to believe that even the most extreme proponents of minimum sentences would consider such a sentence to be fair.

Ineffectiveness

The potential injustice of mandatory minimum sentences is further compounded by their apparent ineffectiveness. Surveys conducted among members of the public - and even among prison inmates - have revealed widespread unfamiliarity with minimum sentencing provisions.⁸ Indeed, when asked to name an offence carrying such a penalty, very few people were able to do so. It's hard to imagine how a minimum sentence could have a deterrent impact when its very existence is unknown. Not surprisingly, therefore, the reported research does not show that such significant sanctions are more effective at preventing crime.⁹

Nor does the evidence reveal that minimum sentences are necessary to keep dangerous criminals off the streets. A perusal of published sentencing decisions shows that heavy penalties are not infrequently imposed upon drug offenders. Trafficking convictions, for example, have resulted in sentences of 13 and 14 years imprisonment in several recent cases.¹⁰ In many situations without minimum sentences, the criminal law permits substantial penalties and experience suggests that the Canadian judiciary is not reluctant to impose them. This is true of the crimes addressed by Bill C-15, many of which already permit the imposition of a life sentence.

⁸ Julian V. Roberts, "*Public Opinion and Mandatory Sentencing*", (2003) 30 Criminal Justice and Behaviour, at pgs. 483, 489.

⁹ *Ibid* at pg. 502.

¹⁰ See, for example, *R. v. Dew*, 2008 MBQB 159 and *R. v. Li*, 2009 BCCA 85. Also, see the recent case of Ontario man Gerald Ward - <http://www.nationalpost.com/m/story.html?id=1432003>.

Undermining Law Enforcement

There is also reason to believe that mandatory minimum sentences can actually *undermine* effective law enforcement. Indeed, some observers have noted that prosecutors and police may opt against charging people with offences that would automatically lead to a prison term.¹¹ The relevant empirical literature further suggests that “juries may be less willing to convict if they know that the charge being tried is covered by a mandatory minimum penalty.”¹² These are yet more reasons why, since 1952, all Canadian Royal Commissions and other commissions of enquiry that have addressed the role of mandatory minimum penalties have recommended that they be abolished.¹³

Mandatory Minimum Sentences and Drug Crime

Drug crime is a sphere of criminal activity in which a wide range of citizens, from a wide range of social milieus, engage in at one time or another. Some do so for profit, and are willing to engage in acts of violence to increase their profit. Others do so for pleasure, using a range of different drugs with varying degrees of regularity. Then there are addicts - those who will go to great, often criminal, lengths to feed their addictions, frequently destroying their lives and the lives of their families in the process. 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. Targeting drug

¹¹ Thomas Gabor and Nicole Crutcher, “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures,” (Report prepared for the Department of Justice, Research and Statistics Division, January 2002.) at pg. 17.

¹² Doob & Cesaroni, *supra* note 1 at pg. 293.

¹³ Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services, Canada, 1987) (Chair: J.R. Omer Archambault) at pg. 178. (As cited in Doob and Cesaroni, *supra* note 1)

producers and traffickers will not alleviate this concern, as addicts may find themselves engaging in such conduct in order to finance a personal habit that is spiralling out of control. Mandatory minimum sentences are simply not sufficiently nuanced to address these realities. Rather, they are “blunt instruments... that fail to distinguish between low and high-level, as well as hardcore versus transient dealers.”¹⁴

In other jurisdictions, this “blunt” approach has proven demonstrably incapable of reducing drug crime. As one study has noted, “drug consumption and drug-related crime seem to be unaffected, in any measurable way, by severe mandatory minimum sentences.”¹⁵ This observation appears to be particularly accurate with respect to high-level drug criminals. Indeed, a study in the mid-1990s by the US-based Federal Judicial Center, found that:

“only 5% of the offenders convicted under the mandatory minimum statutes... were organizers or leaders of an extensive drug operation. Over 85% did not manage or supervise trafficking activity. These low-level offenders are the type who are easily replaced in a drug ring and whose removal cannot realistically be expected to disrupt drug distribution.”¹⁶

In light of these findings, it is difficult to imagine how the mandatory minimum sentences in Bill C-15 will effectively address concerns about serious drug crime in Canada.

¹⁴ Gabor and Crutcher, *supra* note 8 at pg. 31.

¹⁵ *Ibid.*

¹⁶ Barbara S. Vincent and Paul J. Hofer, “*The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*,” (Report prepared for the Federal Judicial Center, 1994) at pg. 11-12.

Mandatory Minimum Sentences and Bill C-15

A vivid imagination is not required to envision the potential injustice that could flow from Bill C-15's mandatory sentencing requirements. Particularly telling are the Bill's provisions relating to drug production, which would appear to require that any person who grows as little as a single marijuana plant for trafficking purposes be sentenced to six months imprisonment. Given the breadth of the *Controlled Drugs and Substances Act's* definition of trafficking, this sentence could apply equally to those persons who *sell* a large amount of what they have produced for profit and to those who *give* a small amount to friends for free.¹⁷ As a result, courts would be unduly restrained from assessing the culpability of such individuals differently.

Also of concern are Bill C-15's trafficking provisions, which require, among other things, mandatory imprisonment of at least two-years for any person found to have trafficked drugs "on school grounds". This would apply regardless of whether the trafficking took place in the middle of a school day or late on a Saturday night, when minors are unlikely to be present. The Bill would further require that any person who trafficked in certain drugs while carrying a "weapon" would receive a minimum sentence of at least one year of imprisonment, regardless of whether the weapon was a loaded pistol in their jacket pocket or a fishing knife in the backseat of their car. While drug trafficking is undoubtedly a serious crime, it could certainly be reasonable for judges to punish sellers differently based on the specifics of each case. Bill C-15, however, permits no such distinctions.

A survey of recent drug cases reveals that there is no shortage of offenders who will receive mandatory minimum sentences if Bill C-15 becomes law. In some cases, these sentences will be appropriate and proportionate to the crime in

¹⁷ 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.

question. In others, they will be unduly excessive, as courts will lack the authority to vary sentences to account for exceptional circumstances. *R. v. Wellington*¹⁸ provides an example of the type of offender who, though previously given a conditional sentence, would likely be imprisoned for *at least* one-year as result of Bill C-15. This case involved a 26 year-old single mother of two convicted of importing drugs into Canada. In determining whether imprisonment was appropriate, the Ontario Court of Appeal considered that the “drug involved was hashish, which is... not nearly as addictive or otherwise dangerous as cocaine, heroin, or some others,”¹⁹ and that the offender was neither previously involved in the drug trade nor posed a danger to the community.²⁰ The Court also found it relevant that, because of “the young age of both [of the offender’s] children and the special needs of one,... the children’s need for their mother to remain with them at that time was critical.”²¹ These factors led the Court to conclude that a conditional sentence served in the community was most appropriate. Such a conclusion would be impermissible if Bill C-15 becomes law.

As a result of the foregoing, the CCLA believes that there is no place for mandatory minimum sentences in Canadian law, and particularly in Canada’s drug strategy. Accordingly, the CCLA recommends that all mandatory minimum sentences be excised from Bill C-15.

RECOMMENDATION 1: All mandatory minimum sentences should be eliminated from Bill C-15.

In making this recommendation, the CCLA acknowledges the validity of the argument that a minimum sentence would *usually* be appropriate for specific crimes. There is an important distinction, however, between “usually” and “always”. For such purposes, we can envision the idea of a *presumptive* minimum sentence.

¹⁸ *R. v. Wellington* [1999] O.R. (3d) 534

¹⁹ *Ibid* at para. 17.

²⁰ *Ibid* at para. 18

²¹ *Ibid*.

This would signal to the judges that they should impose a prescribed minimum punishment unless the circumstances warrant a lesser sanction. 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.”²² Such a solution would accomplish the intended benefits of mandatory minimum sentences while minimizing their negative consequences.

TRAFFICKING NEAR MINORS

While Bill C-15’s introduction of mandatory minimum sentences is by far its greatest flaw, there are other components of the Bill that also raise significant concern. Particularly noteworthy is section 1(1) of the Bill, which requires that anyone who traffics in certain substances “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” be sentenced to two-years imprisonment. In the CCLA’s view, this provision is far too broad to serve as a rational basis for a particular sentence – whether mandatory or presumptive. Notably, there is a dangerous absence of clarity surrounding what is meant by the term “near”. Does this mean within ten metres? One hundred metres? Ten kilometres? There is simply no way to know. Depending on how one interprets the term, it is conceivable that there would not be *any place* in certain urban areas that is not “near” a school or a place popular with young people.

Similar concerns obtain regarding the term “any other public place usually frequented by persons under the age of 18 years”, as the list of places that this could describe is essentially limitless. It could easily refer to a park, movie theatre,

²² *Powers of Criminal Courts (Sentencing) Act 2000*, Section 109.

mall, restaurant, or stadium. 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 would be fair game. In the CCLA's view, the overbreadth of this aggravating factor is sufficient to condemn its use for these purposes. Accordingly, we recommend that proximity to minors should only serve as a possible basis for increasing punishment where there is clear evidence that such persons were present when the impugned conduct occurred.

RECOMMENDATION 2: Proximity to minors should only serve as a possible basis for increasing punishment where there is clear evidence that such persons were present when the impugned conduct occurred.

THE DRUG TREATMENT COURT EXCEPTION

Bill C-15 contains one important exception to the mandatory minimum sentences that it prescribes. For certain offences, there is a judicial power to diverge from the required minimum sentence when the offender successfully completes a drug treatment court (DTC) program. By recognizing the unique situation of drug-addicted accused persons, this more nuanced approach to sentencing helps alleviate some of the concerns resulting from the imposition of mandatory minimum sentences. Unfortunately, however, this judicial discretion is unduly restricted, as only those persons whose offence did *not* involve one of the aggravating factors set out in section 1(1) of the Bill are eligible for the DTC exception.

In the CCLA's view, Bill C-15's restrictions on DTC participation are excessive. Since their introduction in 1998, DTCs have played a significant role in reducing

rates of criminal recidivism.²³ By addressing underlying circumstances that may be the cause of criminal behavior, such courts can achieve outcomes that may be beyond the reach of more traditional punishment. Unfortunately, like mandatory minimum sentences, Bill C-15's restrictions on DTC participation excessively curtail the judicial discretion necessary to fashion the best course of action in a particular case. Both Canadian society and the relevant individual offenders would be better served if broader access to DTCs was permitted.

RECOMMENDATION 3: Bill C-15 should permit broader access to drug treatment courts.

²³ Jeff Latimer, Kelly Morton-Bourgon, and Jo-Anne Chrétien, "A Meta-Analytic Examination of Drug Treatment Courts: Do They Reduce Recidivism?" (Report prepared for the Department of Justice, Research and Statistics Division, August 2006)

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1: All mandatory minimum sentences should be eliminated from Bill C-15.

RECOMMENDATION 2: Proximity to minors should only serve as a possible basis for increasing punishment where there is clear evidence that such persons were present when the impugned conduct occurred.

RECOMMENDATION 3: Bill C-15 should permit broader access to drug treatment courts.