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The Fear Factor

Stephen Harper's "Tough on Crime" Agenda

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List of Acronyms

CBA	Canadian Bar Association
CSC	Correctional Service Canada
CSI	Criminal Severity Index
MMS	Mandatory Minimum Sentence
PBO	Parliamentary Budget Office
YCJA	Youth Criminal Justice Act
YOA	Young Offenders Act

Executive Summary

The Conservative government of Stephen Harper is pursuing a "tough on crime" agenda despite the fact that crime rates are trending downward. Proposed tough legislation will in fact be more likely to increase the risk to public safety than to reduce it.

According to Statistics Canada, crime rates have been trending down for over 20 years. This includes the violent crime rate. Yet the Harper government continues to insist that there is an epidemic of crime, and that Canadians should be very afraid of increasing violence — guns, gangs and drugs — the fear factor. This mantra is picked up by the media, and the public is duly terrified of crime and willing to support the government in its tough measures. About 30% of all current legislation before the House of Commons relates to crime. This is a very high proportion for any single file, especially in view of the urgent and complex issues facing Canadians today.

Tough measures do not produce public safety. Longer sentences, harsher prison conditions and the incarceration of more Canadians will return the system to a time when prisons were extremely violent, and when the end result was more rather than less crime. Recidivism is more likely to occur when offenders have been locked up for long periods with few programs of rehabilitation. The recent annual report of the Correctional Investigator confirms that these trends have already emerged in the prison system since the Harper government took power.

Statistics, expert testimony, and the experience of decades have not deterred the government from its chosen path. It plans to create more criminal offences, many more mandatory minimum sentences, the abolition of statutory release with supervision, and the closing of many proven programs such as the highly effective prison farms which have just been dismantled.

Nor is the Harper government apparently deterred by the extraordinary financial costs of its proposed legislation. No proper estimates have been provided to Canadians by the government, The Parliamentary Budget Officer, however, has costed out a single piece of legislation which he estimates will cost taxpayers upwards of $5 billion over five years (including the construction of 13 new federal prisons). This will more than double the budget for Corrections in Canada. The additional dozens of proposed laws will

have similar extraordinary cumulative effects upon the budget.

Why, then, is the government determined to stay the course? It appears to be acting solely upon belief and ideology — the discredited notion that more incarceration in nastier conditions will solve the crime problem. Additionally, there is an Old-Testament vindictiveness in the approach which even victims of violent crime do not always support.

On the other hand, crime legislation is sure to divert the public away from the more pressing and difficult issues of the day, and it is sure to garner votes as well. By scaring Canadians with skewed and misleading information, the Conservative government can legislate truly draconian crime laws which are likely to increase both the incidence of crime and the deficit.

Introduction

The Conservative Government of Stephen Harper in 2006 adopted as one of its main objectives a "Tough on Crime" policy. Since that time, the government has proposed a staggering amount of crime legislation. Today, fully one-third of House of Commons Government Bills relate to crime.

This legislation is being proposed at a time when virtually all crime statistics are down and have been down for over 20 years. This is also being done at a time when Canada is weathering one of the most difficult economic periods in its history and is fighting an unpopular war. Our international reputation is being damaged because of the government's disinterest in climate change and support of the tar sands. The world stands bemused as we stumble over the issue of maternal and child health in the developing world. We fail to gain a seat on the United Nations Security Council. Nevertheless, the government seems largely preoccupied with its crime agenda.

A number of reasons could be offered for this emphasis on crime. It is possible that the file is being invoked to distract the public from more distressing issues. It is possible that a government which seems to admire everything Republican is intent upon leading us to a system of criminal justice more like that of the United States. Under this model, punishment takes precedence over everything else. Canada's new crime laws reflect a harshness that is not easy to explain.

Facts and evidence seem not to be important to the government when it comes to criminal justice. Nor, apparently, is cost. The following examination of the legislation and of past experience shows that the Conservative approach to crime will cost billions and will probably produce less rather than more public safety. There will be a burgeoning of inmate populations, the building of new jails, and an American-style "throw away the key" attitude.

The government ignores ample evidence that most of its proposals do nothing to improve public safety. In taking a tough, retributive approach, however, the government has a certainty of gaining votes. Neither of the main opposition parties seems willing to put an intelligent alternative forward because they do not want to be seen by the voting public as "soft on crime."

To help craft their new crime agenda, the Conservative government commissioned and then quickly adopted a Report of the Correc-

tional Service Canada Review Panel in 2007, called *Roadmap to Strengthening Public Safety*.[1] Chaired by Rob Sampson (former Minister of Corrections under Michael Harris's Conservative government in Ontario), the hand-picked panel recommended tough measures which took virtually no notice of human rights and provided little rationale for its harsh recommendations.

Michael Jackson and Graham Stewart[2] have written a lengthy and detailed critique of the *Roadmap*. They say that the report illustrates the "dangers of creating major 'transformative' policy virtually overnight by a largely unqualified group under a heavy cloud of political expediency."[3]

The *Roadmap* does not acknowledge any of the history, precedent, or constitutional bases concerning the rights of offenders, nor does it recognize that imposing more privation upon those who have already suffered much privation in their lives is counterproductive. The panel members did not provide an evidence-based analysis, and seemed mostly oblivious to the likely consequences of the direction they were setting. Their recommendations seem to be based upon an acceptance of incarceration as the best solution to all issues.

One person who has personal experience of prison and also professes to have great respect for Prime Minister Harper had this to say about the *Roadmap*:[4]

> The Roadmap is the self-serving work of reactionary, authoritarian palookas, what we might have expected 40 years ago from a committee of southern U.S. police chiefs. It is counter-intuitive and contra-historical. The crime rate has been declining for years, and there is no evidence cited to support any of the repression that is requested. It appears to defy a number of Supreme Court decisions, and is an affront, at least to the spirit of the Charter of Rights.

It is very easy to create new offences and long sentences, to legislate misery in prison and pander to ill-informed voters. It is not so easy to craft a system which actually works to reduce crime while treating offenders humanely. The Canadian system has made great strides in this direction in the last few decades. New proposed legislation will wipe out these gains and return the system to the old, violent, punishment-oriented path of the sixties and seventies. Few who work in the system, including those who run the prisons and many victims advocates, want to see this happen.

Tough on Crime is actually Lazy on Crime. It is certainly Tough on Taxpayers. A better approach is to be Thoughtful on Crime or Smart on Crime. Our legislators must pay attention to all the best evidence on the subject. Voters must demand this of their elected representatives. Anything less will result in a system which abuses human rights, incarcerates large numbers of people for long periods of time, and leaves average citizens more vulnerable.

SECTION ONE

Tough On Crime: Shaping Public Opinion

One of the most serious criticisms of the "tough on crime" agenda, with its emphasis on punishment, is that it will actually result in more of a threat to public safety rather than less. To understand why, it is important to review the facts about crime rates, the severity of crime, and the relative success of the criminal justice system over the past decades.

It appears that many Canadians think crime is rampant. Even though most people have never been touched by crime, and never will be, there is an increasing fear of "drugs, gangs and guns." This is exacerbated by a tendency of the media to give saturation coverage to sensational crimes.

The Conservative government of Stephen Harper has played its part in stoking public fear. Out of a total of 64 bills before the House at prorogation in 2009, seventeen (or 25%) were related to criminal justice issues *(see Appendix A).* This year, in the 3rd session of the 40th Parliament, the government has produced 54 bills, of which 18 (or 33%) are related to crime *(see Appendix B).* The clear inference is that crime in Canada is out of control, and that the government must dedicate a huge proportion of time and taxpayers' money to crime and punishment.

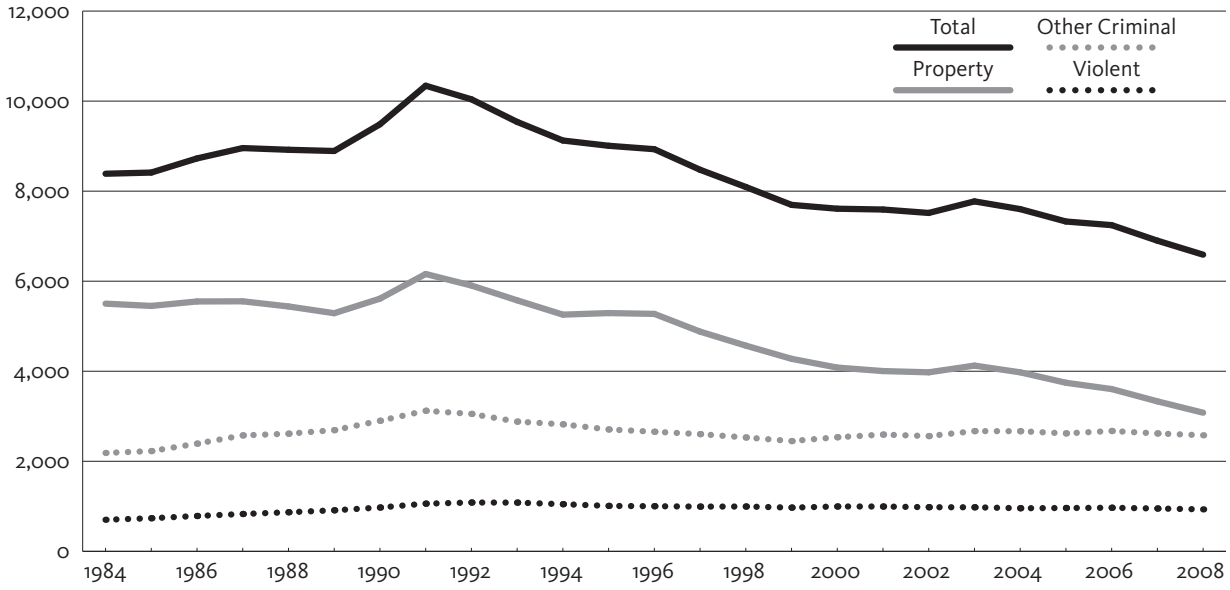
However, the fears of increasing crime appear to be unfounded. The police-reported crime rate has been decreasing since 1991, as shown in Figure 1 from Public Safety Canada:[5]

- "The crime rate, since peaking in 1991, continues to decline. In 2008, the crime rate was the lowest recorded in the last 25 years.
- The property crime rate has declined by 50% since 1991, and in 2008, was also at its lowest in the last 25 years.
- Violent crime peaked in 1992, and has decreased by 14% to a rate of 932 per 100,000 in 2008. The 2008 violent crime rate was the lowest recorded since 1989."

The specifics of recently reported crime rates for 2009 have been set out by Statistics Canada:[6]

- The traditional crime rate (volume of crime reported to police) dropped 3% from 2008, and 17% from 1999.
- The Crime Severity Index (CSI) (a measure of the seriousness of police-reported crime)

FIGURE 1 **Police-reported crime rate has been decreasing since 1991** Rate per 100,000 population



SOURCE Uniform Crime Reporting Survey, Canadian Centre for Justice Statistics, Statistics Canada.

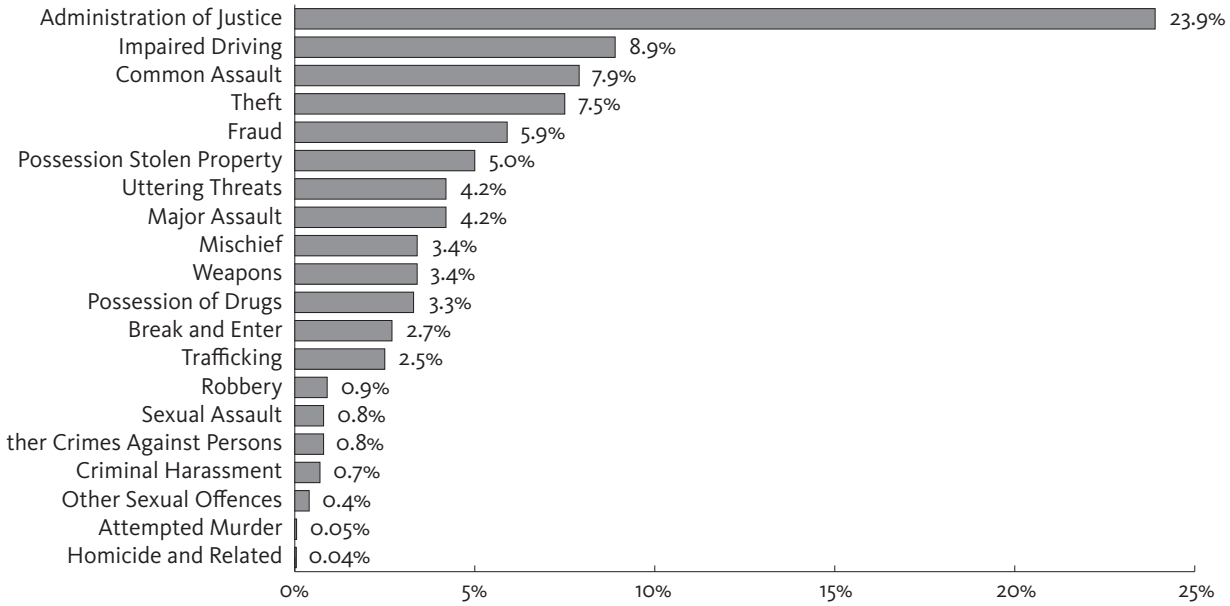
decreased 4% from 2008 and 22% from 1999.

- Both of these rates dropped with respect to violent crime (1% from 2008 and 6% from 1999).
- The homicide rate remained stable and is well below the peak rate of the 1970s.
- The rate of reported sexual assault has been declining since its peak in 1993, including a 4% decrease in 2009.
- The rate of robbery has been declining since its peak in the early 1990s.
- There has been a decrease in the use of weapons in robberies over the past decade. Firearms accounted for 15% of robberies in 2009, compared to 20% in 1999. Knives accounted for 30% in 2009, compared to 36% in 1999.
- Break-ins have dropped 42% since 1999.
- Auto thefts have dropped 40% from 1999 (including a drop of 15% from 2008).
- Drug offences are down 6% from 2008, including a 21% drop in cocaine offences.
- The traditional youth crime rate (the volume of youth accused) is about the same as it was in 1999, but youth crime severity is 7% lower than in 1999, and the youth violent CSI remained stable in 2009. This stability continues despite the fact that far fewer youth are being incarcerated under the new *Youth Criminal Justice Act (YCJA)*.[7] Between 2003–2004 and 2009–2009, the average number of youth in detention following conviction fell 42%.

These statistics are remarkable in that they show significant decreases in rates of crime in those very areas which the public fears most.

For example, it seems to be generally accepted that gun crime is up. This perception was encouraged by media descriptions of the "Summer of the Gun" in Toronto. Statistics Canada, however, says that firearm offences are down

FIGURE 2 **Administration of Justice charges account for 24% of charges in adult courts**



SOURCE Adult Criminal Court Survey, Canadian Centre for Justice Statistics, Statistics Canada.

10% from 1999 figures.[8] As well, Toronto has the third lowest CSI among 33 metropolitan areas.[9]

Yet in the face of these incontrovertible facts, Prime Minister Harper speaks of the "epidemic" of rising levels of gun, gang and drug crime.[10] His former top adviser, Tom Flanagan, refers to an "explosion of crime".[11] Why does the Harper government persist in actively misrepresenting the facts? Alarmist pronouncements by government, coupled with its outright rejection of evidence, leads a worried public to believe that we are all in jeopardy, and that tough measures will help.

On the contrary, the kinds of crimes which are mainly occupying the justice system could be described as virtually innocuous and victimless. Public Safety Canada says that fully one-quarter of charges in adult courts are "administration of justice" charges:[12]

- "Administration of justice charges (offences related to case proceedings such as failure to appear in court, failure to comply with a court order, breach of probation, and unlawfully at large) account for almost one quarter of charges before the courts.
- Apart from charges of administration of justice, impaired driving, which has decreased in each of the last three years, is the most frequent federal statute charge in adult courts."

Another source of fear for the public has to do with offenders who re-offend upon release from prison. According to the *Roadmap*, Canadians need to be very afraid of violent recidivism. And yet statistics show that the rate of re-offending (both violent and non-violent) has been dropping steadily for years from an already low rate.[13] For example, in 2006–2007, only 117 violent offences (0.035% of all violent crime) were committed by offenders under statutory release (in which inmates are released under supervision at two-thirds of their sentence). The same year, only 2.2% of those released were returned to prison because of violence.

Canadians have the right to expect public policy to be developed based upon expertise, hard evidence, and solid statistics, not upon the fiery rhetoric of individuals who are clearly misreading the facts.

The language Mr. Harper uses is unequivocal:[14]

> "But times are changing.
>
> "Our cities are changing.
>
> "And the safe streets and safe neighbourhoods that Canadians have come to expect as part of our way of life are threatened by rising levels of crime."

The Prime Minister knows that he has voters on his side. Almost half of the respondents to a recent Angus Reid poll thought that their communities were unsafe — that the prevalence and severity of violent crime were steadily rising. [15] As has been pointed out, the reverse is true. Saturation coverage of sensational events, though, creates an impression that Canadian streets are descending into chaos.

The pollster in charge of the Angus Reid survey, Andrew Grenville, points out that, when a government pursues a tough agenda on crime, it actually feeds a population's fears.[16] How this works is explained at length by David Pizarro from Cornell University:[17]

> Fear…motivates concern for safety and leads to heightened perception of risk — very handy when avoiding predators. But while our fear response is not calibrated for the complexities of our modern social world, it continues to influence our judgments. Fear makes individuals more likely to endorse security measures at the expense of other important freedoms, and encourages support for conservative policies in general. One study showed that whenever there were government-issued terror warnings, public support for president George W. Bush spiked.

Thus canny governments may manipulate voters into supporting their policies by exploiting their fears.

A more recent poll conducted by Ekos found that Canadians are indeed taking a tougher outlook on crime, and give punishment a more prominent role than other factors, such as deterrence or rehabilitation.[18] Pollster Frank Graves says this is why it is becoming "increasingly perilous for a politician to be caught on the wrong side of the 'tough on crime' debate, even if their policy position is more rational."[19] This helps to explain the reticence of our Opposition parties in addressing the "tough on crime" agenda.

"Tough on Crime" has been rejected by none other than the authors of a study prepared for the Department of Justice of a previous Conservative government which points out, among other things, that long sentences are counterproductive:[20]

> The evidence shows that long periods served in prison increase the chance that the offender will offend again.... In the end, public security is diminished, rather than increased, if we "throw away the key."

It will be seen that researchers are generally in agreement with this conclusion. Getting tougher on crime will reduce public safety while contributing mightily to Canada's deficit.

SECTION TWO

Tough on Crime: The Legislative Agenda

Mandatory Minimum Sentences (MMSs)

A hallmark of the Conservative government's approach to criminal justice is the mandatory minimum sentence. The government maintains that MMSs will ensure that the severity of the sentence will match the severity of the crime. In fact, MMSs will provide a one-size-fits-all solution, catching large numbers of offenders in a very wide net, with judges allowed no discretion to tailor sentences to particular circumstances and particular offenders.

Most Canadians do not realize that minimum sentences already apply to more than forty offences, including everything from murder to impaired driving. Almost all of these MMSs came into being after 1995. Eight were imposed following the Ecole Polytechnique massacre in Montreal, and relate to firearms offences. Twelve came into being in 2005, when the Liberal government was fighting off "soft on crime" accusations. Nineteen have been created or increased since the Conservatives came to power. Many, many more are being proposed.

The effects of mandatory minimum sentences are various. These include the removal of judicial discretion, failure to provide the intended deterrence, and a number of unexpected consequences upon the administration of justice and marginal populations.

Removal of Judicial Discretion

One thing mandatory minimum sentences do is to remove from experienced judges the discretion to impose appropriate sentences in individual cases. The Conservative government is clearly signalling that judges are now imposing sentences that are too light. Yet the current process, with its emphasis on flexibility and respect for judges' ability to assign appropriate sentences, works well.

Take, for example, a case cited by Alan Borovoy, former President of the Canadian Civil Liberties Association.[21] He spoke about Constable Stanley Levant, an Ontario Provincial Police officer, who shot a fleeing suspect in 1994 during a split-second, high-stress confrontation. The constable was given six months in jail because of the circumstances of the shooting, and because of his spotless record. If he were to be sentenced under the current MMS law, he would receive an automatic four years in jail. It is unlikely that many

members of the public would find four years to be appropriate under the circumstances, yet that is what today's law would dictate.

The Supreme Court of Canada has recently spoken on the issue of mandatory minimum sentences in its February 19, 2010, ruling in *R. v. Nasogaluak*.[22] This decision opened the door to the possibility of judges going below mandatory minimum sentences in exceptional circumstances, following the lead of many other countries. In doing so, the court has recognized that MMSs can lead to injustice. The decision, penned by LeBel J., was unanimous, and said at p. 64:

> [In] some exceptional cases, sentence reduction outside statutory limits...may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and the offender.

Judges do know the difference between less serious or more serious offences. Criminal lawyer and sentencing expert Alan Manson says, "Judges in Canada can and do distinguish between offenders and offences that require firm sentences. They can be heavy hitters when the case warrants a harsh response." It is their extensive experience and training which prompts judges to make the right decision on both ends of the sentencing scale. It is not wise for our legislators to remove this discretion.

Deterrence

Another faulty assumption behind mandatory minimum sentences is that longer sentences will deter others from crime. Criminologist Anthony Doob points out that we should be taking a lesson from south of the border. The United States, he says, is "a big laboratory on minimum sentences." The result there has been a disaster. Several states have retreated from MMSs for drug offences, saying that they are a "glaring symbol of the failed U.S. war on drugs."[23] The United States experience over 25 years has shown that MMSs have "flooded jails, with a disproportionate effect on drug addicts, the poor, the young, blacks, and other minorities."

Studies have repeatedly shown that MMSs have no deterrent effect on prospective criminals and crime rates.[24] "Very few criminals have any idea what sentencing ranges pertain to particular offences, let alone being deterred by the prospect of drawing a certain sentence."

As an example of the near-impossibility of understanding some of these minimum sentences, the proposed regime of MMSs for drug offences is so complicated that the Department of Justice had to resort to a three-page chart to set out the details *(see Appendix C)*.[25] Such a complex set of laws is unlikely to impress itself upon the mind of the average potential offender. If a potential offender does not have the least idea of the likely consequences of his actions, there can be no deterrent effect. What does get his attention is the relative likelihood of getting caught.[26]

There is ample evidence that mandatory minimum sentences do not work. Law Professor Michael Tonry points out:[27]

> Experienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms — from one-year add-ons for gun use in violent crimes in the 1950s and 1960s, through 10-, 20-, and 30-year federal minimums for drug offences in the 1980s, to three-strikes laws in the 1990s — are a bad idea.

Dr. Tonry's research is based on at least sixteen studies of justice systems, including that of the United States.

The Correctional Service Canada (CSC) agrees. CSC is the organization which administers the prison system in Canada. It says in an analysis obtained by *The Toronto Star*[28] that research shows mandatory minimums do not have a deterrent or educative effect. In general, the CSC

says that the "tough on crime" proposals will likely not make for safer streets.

The list is long of experts who agree that lengthy sentences (of which MMSs are an integral part) do not work:

- The Canadian Safety Council says, "There is little demonstrable correlation between the severity of sentences imposed and the volume of offences recorded. [The] greatest impact on patterns of offending is publicizing apprehension rates, or increasing the prospect of being caught."[29]
- The National Criminal Justice Section of the Canadian Bar Association (CBA, which includes Crown Attorneys, judges and students, as well as defence lawyers) also says that, even if long sentences did provide deterrence, the new, highly complex firearms MMSs will not work because they are too difficult to understand (like the drug laws). The Criminal Lawyers' Association (CLA) agrees.[30]
- One judge, speaking of the new proposed firearms MMSs, said that the "vast bulk of evidence" suggests there is no deterrent from increasing sentences. [31]
- Sanjeev Anand, a University of Alberta law professor and former prosecutor, says that the people are "buying Ottawa's message. They are not thinking the way criminals think. Most criminal acts are impulsive; they are not well thought out."[32]
- Craig Jones, former Executive Director of the John Howard Society, says that not even repeat offenders pay attention to the sentences they might face.[33] "They will tell you very specifically: 'I wasn't thinking about the sentence. I was thinking about how best not to get caught'."
- A 1999 study from the University of New Brunswick reviewed research on recidivism that covered more than 300,000 offenders.[34] The conclusion was that the longer someone spent in jail, the more likely he was to commit another crime upon release. This impact was greater for low-risk offenders, confirming again that prison is a school of crime that makes offenders worse, not better.

In the face of this evidence, federal Justice Minister Vic Toews (now Public Safety Minister) stubbornly took the position in 2006 that more studies were needed to determine "whether general deterrence through tougher sentences actually works."[35] And the current Justice Ministers's office lamely replied to the evidence of these studies that "in our opinion, the studies are inconclusive, particularly with respect to the main debate: do [MMSs] deter crime?"[36]

Unexpected Consequences

There are some other negative consequences to mandatory minimum sentencing which might not be apparent to the casual observer.

If the judge's discretion is removed, it is likely that in many cases police and prosecutors will pick up the ball. That is to say, where it is perceived that the minimum sentence for the offence would be too harsh, police may choose to lay a lesser charge or no charge, and prosecutors may choose not to prosecute.[37] Juries may decide not to convict if they perceive the mandatory sentence to be unjust. Thus the administration of justice becomes distorted, with judicial decisions being made by parties who are not trained for and should not be responsible for these decisions.

Highly respected jurist Justice David Cole agrees that this will be the result.[38] He gives as an example the situation in United States jurisdictions where use of a firearm in the commission of an offence dictates a minimum sentence:

> The Americans have this phenomenon in which the prosecution "swallows the gun." In other words, the prosecutor makes the gun go away so that the judge doesn't hear

about it. We are concerned about taking those kinds of important decisions away from the public arena and into the private arena.

There are other negative effects upon the administration of justice. An offender facing a draconian minimum sentence is much less likely to plead guilty, thus pushing the number and cost of trials up, backlogging courts, and overcrowding remand jails.

As one judge said, "There is very little percentage for a prisoner facing a significant minimum mandatory penalty to plead guilty. What judges are always concerned with is that, when the occasional exception comes along, we cannot do the right thing. There are cases where a mandatory minimum is simply too harsh."[39]

On the other hand, an innocent accused might choose to plead guilty to a lesser charge rather than face the certainty of an MMS associated with the full charge. This would avoid the minimum sentence, but would also entail the serious injustice of an innocent person being convicted of a crime he did not commit.

Aboriginal People and MMSs

CSC says that the new federal legislation will hit Aboriginal people the hardest.[40] The over-incarceration of Aboriginal people has been described by the Supreme Court of Canada as a "staggering injustice."[41] At 4% of the population, Aboriginal people comprised fully 24% of those admitted to provincial and federal prisons in 2006–2007.[42] In Ontario, twice as many Aboriginal youth are being sent to jail as non-Aboriginal youth who commit the same offence.[43] Aboriginal women comprised 30% of all federal women inmates in 2007, despite the fact that they comprise only 2% of the general population.[44] Jonathan Rudin, Program Director of Aboriginal Legal Services of Toronto, says that Aboriginal people also have less access to parole and rehabilitation programs than other inmates.[45]

The Supreme Court decision in *Gladue* provided an opportunity for courts to turn these statistics around, but unaccountably, sentencing has become harsher. Alternatives to jail such as substance-abuse treatment, Aboriginal spirituality centres, and community sentencing circles have all begun to disappear as funding dries up. As in so many other areas of criminal justice today, there is a terrible disconnect between what actually works and where the government is applying resources.

The Saskatchewan government, particularly, has expressed its concerns about the effect of "tough on crime" laws upon Aboriginal people. The province uses restorative justice as a model which keeps people out of jail and provides assistance to victims and the community. To do this, it uses conditional sentencing liberally. Under new federal laws, the ability to use "house arrest" in this way will be severely curtailed.

A Closer Look: Specific Legislative Examples

2-for-1 Pre-Trial Credit (Bill C-25: The "Truth in Sentencing Act")

New legislation has already been passed eliminating the convention of allowing two days for every one served in pre-trial custody when determining sentence. This sensible approach provided credit to offenders because of the appalling conditions of remand centres, and because the time spent there is "dead time" — meaning it is not included when calculating release dates.

Inmates in remand have not yet been convicted of any crime. Some have not yet had a bail hearing. Some have had a bail hearing, but failed to convince the court that they were a good risk for release. Others have been ordered released on conditions, but have been unable to meet the conditions.

The pool of remand inmates includes people charged with extremely violent crimes, people on shoplifting charges, and everything in between.

There are people of all ages. Some will have long criminal records, and others will have none at all. Some will be sick with addiction withdrawal or will have other health issues. Many will suffer from a mental illness.

Recent statistics show that the number of inmates in remand has doubled in recent times. The most recent numbers show that 65% of those on remand are eventually convicted.[46] 30% have their charges withdrawn or stayed. The remainder are acquitted. Yet they are all treated exactly the same way within the remand centre.

In view of the conditions in remand, it is hard to accept the government's suggestion that remand prisoners are intentionally accumulating remand time in order to get a shorter sentence later. Most prisoners would rather spend this time as a convicted prisoner in a prison with programs and a more humane regime than is to be found in remand.

Martin Friedland, Q.C., a highly respected expert in criminal law, discovered through his research that pre-trial custody affected virtually all aspects of the criminal case. He found:[47]

> ...a clear relationship between custody pending trial and the trial itself. Not only was custody likely a factor in inducing guilty pleas, but those not in custody during trial were more likely to be acquitted than those in custody, and, if convicted, were more likely to receive lighter sentences.

Under the new law, should an inmate wish to apply for more credit than one-for-one, the process will now be more unwieldy and will take longer because of additional requirements. Judges will have to consider the decisions of earlier judges. The clogging of the courts thus increases, and it all costs more, both in money and in misery.

Justice David Cole says that the elimination of 2-for-1 has already prompted judges to start talking about how to compensate for this kind of policy.[48] He says they intend to force trials to be held more quickly, and that they may also "start compensating by intentionally lowering sentences."

Judges understand what remand conditions are like and why offenders should be provided with special credit for dead time. Contrary to the inference in the name given to this bill, there was never any "lie" in sentencing.

Abolition of Faint Hope
(Bill C-36: The "Serious Time for the Most Serious Crime Act")

The "faint hope" clause allows offenders sentenced to life to apply to a judge for the opportunity to apply for parole at fifteen years. The Conservative government proposes to abolish this possibility, in the name of applying "serious time for serious crime."

Canada already sentences serious offences more harshly than other Western democracies. For example, with respect to first degree murder, Canadians spend more time in custody than offenders in any other Western country.[49]

Few offenders ever apply for faint hope consideration and, on average, only six offenders per year are released under this provision.[51] The CSC says that only a handful of these have been returned to custody. Since 1991, when faint hope became available, only 17 of the 118 successful applicants were returned to prison for breaching the conditions of their release.[52]

A faint hope application does not lead to automatic release at fifteen years. The application process is long and arduous. First, the applicant must convince a judge that he should properly be allowed to apply for parole. Then the parole application itself must be approved unanimously by a jury of twelve citizens. Then the applicant gets to make his presentation to the National Parole Board. Thus, for any offender to be released at fifteen years, strong agreement by the community is required.[53]

Importantly, the faint hope clause allows for offenders to cherish some distant prospect of release, minimal though it may be. This is impor-

TABLE 1 **Average time spent in custody by country for offenders serving life for first degree murder**

Country	Time in Custody (Years)
New Zealand	11.0
Scotland	11.2
Sweden	12.0
Belgium	12.7
England	14.4
Australia	14.8
United States[50]	18.5
Canada	28.4

tant because it provides motivation to offenders to work hard to meet their program and rehabilitation goals. Without this remote possibility of release, offenders have no incentive to follow the rules or to refrain from violence as a way of settling accounts. The safety of inmates and guards alike hangs in the balance.

Years of research and statistics show that a purely punitive model for imprisonment does not contribute to rehabilitation of offenders and consequent enhanced public safety.[54] The rationale behind the proposed abolition of the faint hope clause looks suspiciously like non-evidence-based pandering to voters, or sheer vindictiveness, or both.

Youth Crime (Bill C-4: Sébastien's Law: "Protecting the Public from Violent Young Offenders Act")

It is strange that young offenders should be the very first target of new Conservative "tough on crime" legislation. In 2008, a new, tougher young offender law was the first major plank in the government's crime agenda. In 2010, it was again the first announcement on criminal justice made by Justice Minister Rob Nicholson.

The current *Youth Criminal Justice Act* (YCJA) was designed to alleviate the very harsh results of the *Young Offenders Act* (YOA), which it replaced. Under the YOA, Canada had one of the highest youth incarceration rates in the Western world.[55] It was because of this that a new approach was deemed necessary. The new regime set out by the YCJA in 2003 was an "unmitigated success," according to the CBA.[56]

According to Statistics Canada, the number of youth committing offences has remained relatively stable since 1999, but the total number of crimes committed by youth is down.[57] Just as important, 26% fewer cases were heard in youth court in 2006–2007 than in 2002–2003 (the last year of the YOA). And the average number of youth in detention following conviction fell 42% from 2003–2004 to 2008–2009. As the authors emphasize, the drop in incarceration rates was not followed by an increase in the youth crime rate. On the contrary, the crime rate has generally dropped since the YCJA came into force.

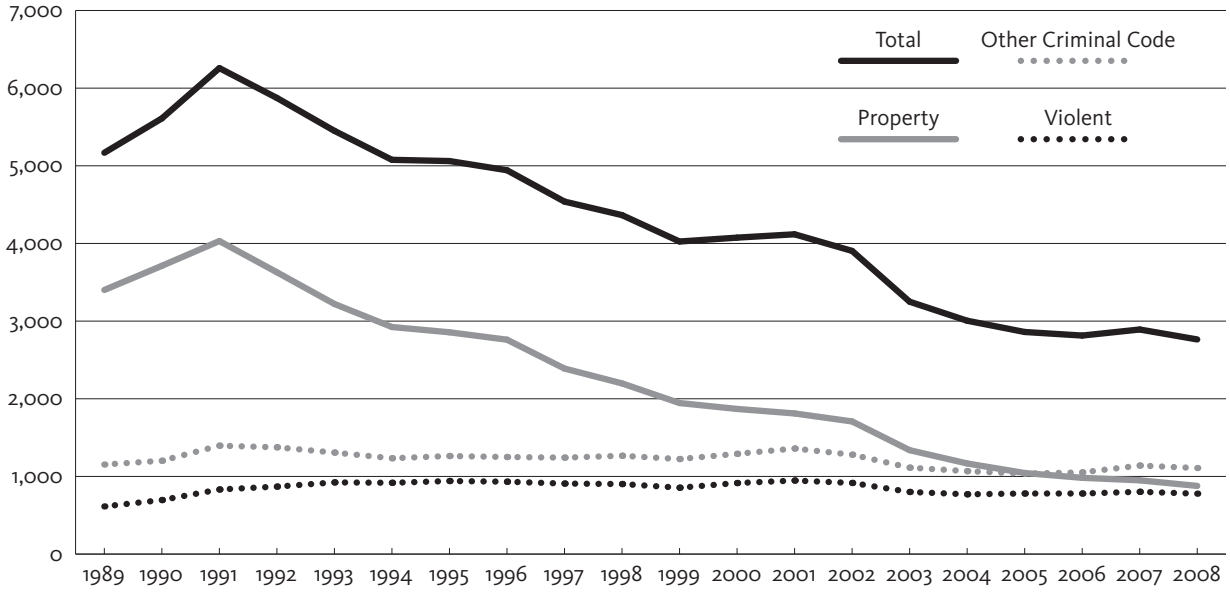
Figure 3 from Public Safety Canada illustrates the declines in youth charge rates:[58]

- "The rate of youth charged has decreased since 1991.
- In 2003, there was a notable decrease in all major crime categories, in part attributable to the implementation of the *Youth Criminal Justice Act* (YCJA) in April 2003, which places greater emphasis on diversion."

It would seem that the current system is working to the benefit of all. Three acknowledged experts in the area say:[59]

> Without increasing recorded youth crime, the YCJA has resulted in a very significant reduction in the use of courts and custody for adolescent offenders in Canada and hence has allowed a significant reduction in spending on youth courts and custody facilities, a reduction generally accompanied by shifting resources to community-based programs.

FIGURE 3 **The rate of youth charged peaked in 1991 and has declined steadily since**
Rate of youths charged in 100,000



SOURCE Uniform Crime Reporting Survey, Canadian Centre for Justice Statistics, Statistics Canada.
NOTES For criminal justice purposes, youth are defined under Canadian law as persons aged 12 to 17 years.
Violent crimes include homicide, attempted murder, assault, sexual offences, abduction and robbery.
Property crimes include break and enter, motor vehicle thefts, other thefts, possession of stolen goods and fraud.
In 2008, 43.3% of all youths charged with violent crimes were charged with assault level 1 (minor assault).

The authors say, with respect to the proposed new legislation, that "sending more young people into custody would increase the cost of youth justice services without increasing public safety."

Witnesses before the House of Commons Standing Committee on Justice and Human Rights confirmed that the approach of the YCJA is the right one, and produces the best results for both offenders and victims. For example, Kelly Lamrock, Minister of Social Development and Attorney General of New Brunswick, defended the YCJA and his government's approach. New Brunswick works to meet the unique needs of each young offender, whether these be poverty, abuse, mental illness or other difficulties, and strives to avoid incarceration.[60] Lamrock called the Conservative government's proposed changes "one-size-fits-all," and said it would result in more serious problems than if we allow judges, lawyers, and professionals working directly with young persons to do their jobs. Arlene Gaudreault, President of the Association Québécoise Plaidoyer-Victimes, a victims' rights group, also pleaded for less enforcement and more programs to attack root problems.

Despite convincing evidence, and the clear benefits of not sending children to jail — for both offenders and victims — the Harper government is intent upon getting tough on kids. Astoundingly, the Prime Minister dismisses all of the evidence and statistics by pronouncing the YCJA an "unmitigated failure."[61]

The new young offender legislation would add "denunciation and deterrence" to the sentencing principles, even though the Supreme Court of Canada says that there is a presumption of diminished moral culpability of youth.[62] Denunciation and deterrence were purposely left out of the YCJA because it was clear that they did not work to deter crime or rehabilitate offend-

ers — objectives which are important if crime is to continue its downward trend. This proposed change will ensure that many more young offenders will go to jail for much longer sentences.

Experts in criminal justice disagree emphatically with the proposed amendments. Frank Addario, past president of the Criminal Lawyers' Association, is reported as saying that "causes of youth violence are closely linked to foetal alcohol syndrome, violence in the home, and poverty."[63] He calls the proposed changes an "American-style approach to criminal justice" where the young are expected to have the same level or moral culpability as an adult. "This can be seen as another attempt to simplify what's really a complex social issue in order to condense it into a digestible election issue," he says. Nicholas Bala, a respected youth justice expert at Queen's University, calls the legislation "an example of pandering to public misperceptions about youth crime."[64]

Imprisonment has an exceptionally negative effect on young people. Take, for example, the problems with the new Roy McMurtry Youth Centre in Ontario.[65] Opened in July 2009, the new youth super-jail was supposed to turn troubled youth into future taxpayers. It was supposed to provide the best programming in safe conditions.

However, Ontario child advocate Irwin Elman has reported that the facility is not safe, and that there have been serious allegations of abuse, and lack of food and programming. "It doesn't feel safe and it isn't safe," Mr. Elman said.[66] Both staff and detainees reported escalating violence, lack of programming, and questionable body-cavity searches for missing items such as a DVD.

Perhaps the last word on youth justice should go to a former young offender, writing to the editor of *The Globe and Mail* in response to the proposed new legislation:[67]

> I was arrested twice as a young offender, so I read carefully the proposed changes to the legislation.
>
> For the most part, harsh sentences do not deter crime and actually work against rehabilitating offenders. My brief time in incarceration only ensconced me more deeply in the criminal culture: While in detention, I befriended hardened offenders. Most of the people I met in juvenile detention were good persons, who just happened to come from unfortunate backgrounds (poverty, dysfunctional families etc.).
>
> I always wonder how much talent our country is wasting by not making these young offenders do something productive with their lives (e.g., getting them involved in sports/arts/culture), rather than leaving them to wither in detention.
>
> I eventually went on to get a PhD at Princeton after graduating from the University of Toronto. Teenage years are rough for everyone.

House Arrest (Bill C-16: The "Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act")

This proposed law would restrict the use of conditional sentencing, including house arrest. Conditional sentences may be imposed for less serious offences and require an offender to serve his sentence under house arrest and very stringent conditions. Any breach of the conditions results in the offender serving the full sentence in custody.

Conditional sentences were established when Parliament recognized that the collateral consequences of incarceration were too high.[68] Joseph DiLuca lists the negative consequences of high incarceration rates for less serious crimes: increased financial costs; increased exposure of first offenders to career criminals; low rehabilita-

tive success of penitentiaries. As we have heard, research shows that "putting people in jail rather than 'non-custodial sanctions' actually increases the likelihood they will re-offend.[69]

While the government has talked about conditional sentences being too light, and inappropriate for "serious violent offences," the legislative proposals actually go far beyond eliminating this possibility for violent offences. First, under the Tackling Violent Crime Act in 2007, conditional sentences were limited according to the maximum penalty that might have been imposed for any offence under that section of the *Criminal Code*, regardless of the seriousness of the particular offence. Now the new proposals in Bill C-16 would prohibit their use for property crimes as well. Appendix D sets out the list of 39 new offences for which conditional sentences will no longer be available. Many of these are not offences which should require an automatic custodial sentence.

Conditional sentences do not amount to a slap on the wrist. They are often longer than a jail term would have been, and they often include even more stringent conditions than those applied to offenders released on early parole.

The CSC says of these proposals: "Conditional sentences are imposed in fewer than 5% of all cases, have reduced admissions to provincial jails by 13% with no negative impact on crime rates, and 'generally worked well and garnered praise from sentencing experts around the world'."[70]

Dangerous Offenders
(Bill C-2: The "Tackling Violent Crime Act")

With the Tackling Violent Crime Act in 2007, the Conservative government made it easier to label offenders as "dangerous" by reversing the burden of proof for people found guilty of three violent crimes. Dangerous offenders are sentenced to an indefinite term of imprisonment.

Bill C-2 is a type of "three-strikes-you're-out" legislation which, in the opinions of many, is likely to be unconstitutional.[71] Since it has taken many years to settle the constitutionality of the current dangerous offender legislation, it seems rash to set up a whole new regime that will require time-consuming (and money-consuming) *Charter* challenges.

According to the CBA, the current dangerous offender legislation is working well.[72] The CSC also argues against this measure, saying the proposal could have a "disproportionately higher impact" on Aboriginal people because Aboriginal people have a higher rate of conviction for the offences in question.

Additional costs will be incurred because of constitutional challenges and because offenders will likely go to trial rather than plead guilty when facing the possibility of a dangerous offender application and its concomitant indefinite sentence.

New Drug MMSs (Bill C-15)

The MMS regime with respect to drug laws is about to become much more harsh. The stated justification is to combat organized crime and reduce the associated violence.

Yet lawyer Eugene Oscapella, who is a drug policy analyst, calls the legislation "a wonderful gift to organized crime,"[73] saying that, "We're going to drive some of the smaller players out of the business and they'll be replaced by people who do not respond to law enforcement initiatives."

Neil Boyd, Professor at Simon Fraser University and an expert on drug policy, told the Standing Senate Committee on Legal and Constitutional Affairs that the drug amendments were especially hard on marijuana offenders.[74] The bill, he said, would have "the unfortunate consequences of annually jailing thousands of Canadians who do not threaten our social fabric any more than those who produce, in a regulated framework, drugs such as tobacco and alcohol." In fact, he says, tobacco and alcohol demonstrably cause more harm to society. Violent crime is rarely, if ever, associated with marijuana use, whereas alcohol is prominent in violent offences.[75]

The CBA, representing Crown Attorneys as well as defence lawyers and judges, has weighed in on the proposed drug legislation.[76] It concluded that the amendments would be costly and ineffective, would add extra strains to the administration of justice, would create unjust and disproportionate sentences, and would not increase public safety.

The new MMS regime is extremely complicated *(Appendix C).* Some of the practical results of the law are as follows:

- Anyone growing six to 200 marijuana plants will go to jail for a minimum of six to nine months, if the production is for the purpose of trafficking.
- Anyone growing 201 to 500 plants will go to jail for a minimum of twelve to eighteen months, with no requirement that production be for the purpose of trafficking.
- There is also a complicated sliding scale of MMSs which takes into account aggravating factors like intention to traffick, and health and safety features.

It is impossible to overemphasize the many problems with this type of regime, and the many financial and human costs it will entail. Offenders will be caught up in higher minimum sentences because of the difficulty of defining the new aggravating factors, such as "near an area normally frequented by youth" or "in the immediate area" or "in relation to a youth." These criteria are vague and broad, and destined to consign hundreds more offenders to prison for lengthy periods.

Canada is tightening the screws on all aspects of drug laws: harm-reduction programs, medical marijuana regimes, and sentencing laws. Meanwhile, other jurisdictions are beginning to move toward decriminalization.

California's recent effort to legalize, regulate and tax marijuana failed at the ballot on November 2. However, five other states are considering similar measures, while fourteen states have legalized medical marijuana. One report claims that nation-wide marijuana legalization in the United States would yield at least $6 billion in taxes if treated like alcohol and tobacco.

On September 30, 2010, Governor Arnold Schwarzenegger of California signed into law a provision which would make possession of up to one ounce of marijuana an "infraction" with a maximum penalty of $100.[77]

Prohibition of marijuana is often recommended by those who consider it to be a "gateway" drug, leading users to move on to harder drugs. This is contrary to the evidence. In the Netherlands, where marijuana "coffee shops" are common, there is less of a drug problem than in other European countries, and "the estimated prevalence of problem users of hard drugs...is the lowest per thousand inhabitants in Western Europe."[78]

Abolition of Statutory Release (Bill C-39: the "Ending Early Release for Criminals and Increasing Offender Accountability Act")

A central recommendation of the *Roadmap* is the abolition of statutory release. This recommendation was made despite a CSC analysis which laid out the statistics and evidence supporting the continuation of statutory release.[79]

Statutory release is the policy by which offenders are released under supervision into the community upon completion of two-thirds of their sentences. It was established forty years ago for the purpose of promoting public safety by ensuring that inmates were supervised upon release.

The CSC has pointed out that two-thirds of all federal offenders released in 2004–2005 were statutory releases and that there were generally few problems. The ability of correctional authorities to supervise offenders in the community for the last third of their sentences means that offenders are no longer released directly into the community from facilities that may include su-

per-maximum security without conditions or supervision of any kind.

Jackson and Stewart, in their critique of the *Roadmap*, excoriate the Panel for failing to recognize the history that led to the establishment of statutory release, and failing to see the human rights implications of abolishing the system. (As pointed out above, the average rate of violent offences — compared to the total number of violent offences — committed by people who were on statutory release was 0.035% in 2006–2007.[80]) They maintain that, based upon the data on reoffending, it would make more sense to increase the period of supervision rather than eliminate it.

While any violent crime is too much, and represents real victims, it makes sense that public policy should not be crafted based upon the exceptional case. Rather, it should be directed to the treatment of the average prisoner, employing sufficient flexibility to allow for the exceptional case. The abolition of statutory release will mean that all inmates who are not granted parole will spend 50% more time in prison than they would today. This is a terrible price to exact from the many for the offences of the very few. It will be costly in both financial and human terms.

SECTION THREE

Tough on Crime: The Costs

The Conservative government has promised to reduce spending and attack the $54 billion budget deficit. At the same time, the government is reintroducing "tough-on-crime" laws. These crime bills will result in the lengthy incarceration of thousands of additional offenders under harsh conditions. There will be very high costs in financial, social and human terms.

The Financial Costs

Total Costs of "Tough on Crime" Measures. When pressed about the projected cost of Bill C-25 (the elimination of 2-for-1 credit), Public Safety Minister Toews said, "We're not exactly sure how much it will cost us."[81] It is unlikely, then, that the government has costed out the financial impacts of the many other proposed "tough on crime" measures.

The CSC's Reports on Plans and Priorities show, however, that the capital expenditures budget of the federal penitentiary system is expected to increase an alarming 33% in one year, from 2009–2010 to 2010–2011. That is an increase from $246.8 million to $329.4 million.[82]

The same document projects an increase in capital spending to $517.5 million in the following year, 2011–2012. This represents a whopping 108% increase in two years.

The trend in CSC's estimate of expected expenditures is shown in Figure 4.[83]

According to the Parliamentary Budget Office, operations and maintenance expenditures of the federal adult correctional system were in the order of $1,633 million in 2005–2006.[84] The PBO further reports that this figure rose to $2,092 million by 2009–2010 — an increase of 28% since the Conservative government took power.

Combining capital and operations and maintenance, the total increase for the CSC's budget from 2005–2006 ($1,704 million) to 2009–2010 ($2,245 million) was in the order of 32%.[85]

Figure 5 shows the trend towards much higher expenditures on corrections by the current government.[86]

As part of its effort to reign in the $54 billion deficit, the Harper government is requiring federal departments to cut staff. The CSC, however, has been and will continue to be on a hiring binge. In 2006, under the Liberal government, full-time equivalents in the federal penitentiary

FIGURE 4 **CSC summary of forecast capital spending**

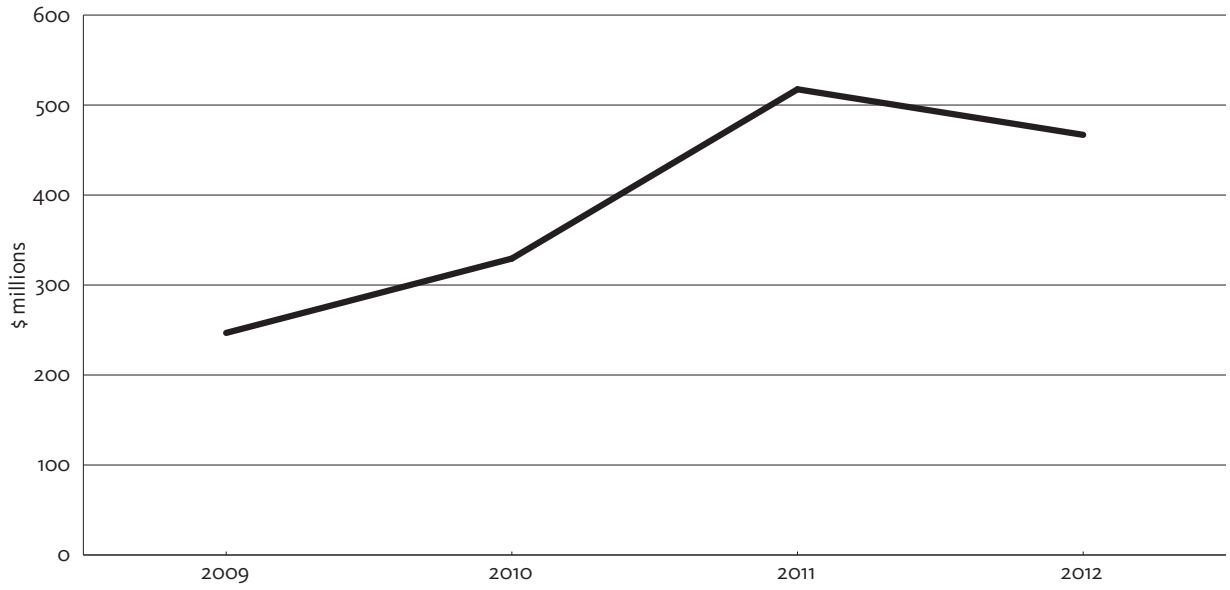
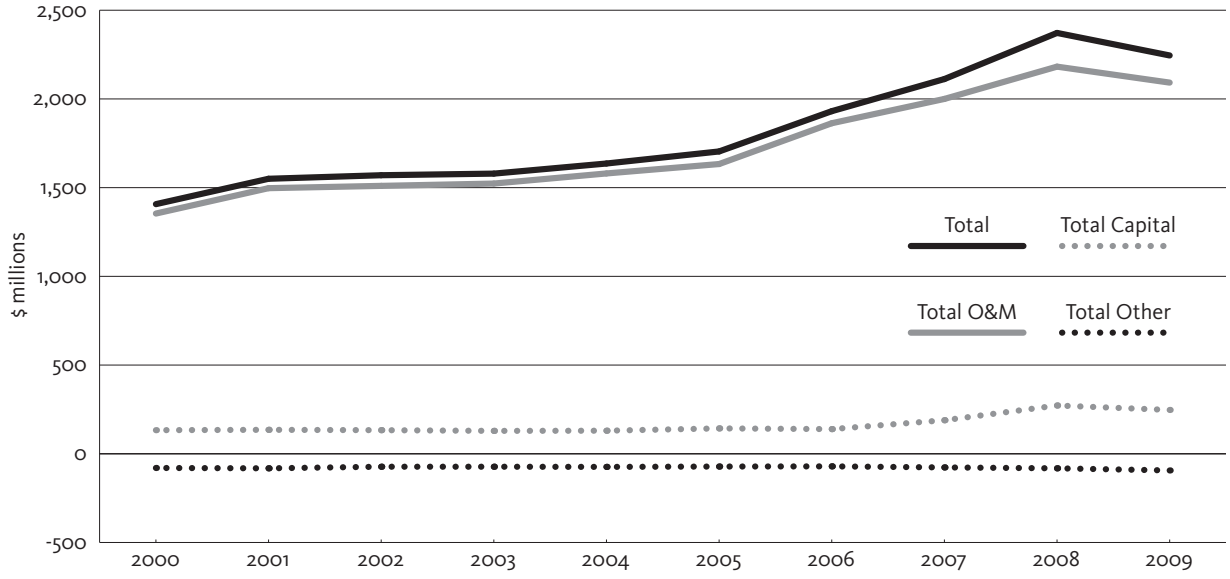


FIGURE 5 **CSC historical total annual parliamentary appropriations**



system amounted to 14,663.[87] In 2012–2013, the CSC projects that it will employ 20,706 full-time equivalents. This will be an increase of 41% over the time that the Conservatives have been in office.

There will be a huge expansion of prison infrastructure. Twenty-two new prisons are already being built by the provinces, at a projected cost of $2.7 billion.[88] A spokesman for Public Safety Minister Vic Toews says that there is a plan to spend $9 billion on new prisons in addition to $2 billion over five years to increase capacity within existing prisons.[89]

The federal prison population will increase substantially. The capital cost of building one minimum security cell is $260,000, while medium security cells will cost $400,000 and maximum security cells $600,000.[90]

In addition, the PBO calculates that the average annual costs per inmate per cell amount to $84,225 for an inmate in the provincial/territorial system, and $147,467 per inmate in the federal system.[91]

Statistics Canada reported in 2009 that the number of police officers in Canada has been steadily increasing over the past decade.[92] The report indicates that the number of officers is 9% higher than it was a decade ago, and that the 1.5% increase from 2008 to 2009 was the third highest annual increase in thirty years. At the end of 2009, there were 67,000 police officers across the country.

This level of policing comes at a cost. After adjusting for inflation, police expenditures rose for the twelfth consecutive year in 2008.[93] The total spent on policing was $11 billion, or 6% more in constant dollars than in the previous year. This was the largest annual increase since 1990.

As if this were not enough, there are other less obvious costs related to the new crime legislation. These considerable costs are associated with the administration of justice and are not always taken into account when calculating the increased pressure on budgets.

New legislation will add thousands of accused persons to the court system, and those convicted will received much longer sentences. Adding hundreds of trials, bail hearings, appeals and so on to existing court dockets will require the hiring of new personnel. Sheriffs will be needed to escort prisoners to court. More court clerks and support staff will be required. New Crown Attorneys and more judges will have to be appointed to handle the additional traffic. There will be a need for more correctional officers, classification officers and parole officers. New court houses will have to be built to accommodate the increased number of trials. Legal Aid funding will have to be increased. There will be a requirement for more programs providing alternatives for those seeking bail. John Howard and Elizabeth Fry Societies will be stretched, and will require more funding.

Wherever there is a mandatory minimum sentence, or a very lengthy potential sentence, accused persons who are going to trial will fight every inch of the way. There will be multiple bail hearings, motions, Charter challenges, and appeals.

In trying to come to terms with how significant the potential financial increases will be, it is helpful to look at some of the proposed new laws to show how they will affect the rates and length of incarceration, and therefore the financial costs.

The Cost of Bill C-25: Abolition of 2-for-1 Credit for Time in Remand, the "Truth in Sentencing Act"

The report from the Parliamentary Budget Officer, Kevin Page, shows what the government's crime legislation is likely to cost taxpayers.[94] Because of his own budget constraints, his office was only able to calculate the financial impact of a single one of the many new laws. The results are startling.

Bill C-25 was signed into law this year, and was passed by Members of Parliament who had no idea what the impact would be on prison populations or on the federal budget. The Bill ensures that 2-for-1 credit for remand time will no longer be allowed in sentencing, thus substantially increasing the length of time inmates will spend in custody.

The PBO released its report on Bill C-25 in June 2010. The numbers, based upon two different models, confirmed that this single new piece of legislation would cost taxpayers about $1 billion federal dollars annually over the next five years.[95] This additional $1 billion per year will be added to the $4.4 billion per year now spent by

federal, provincial and territorial governments[96] (plus whatever increased costs must be borne by the provinces and territories as a result of C-25).

According to the report, "The total funding requirement for correctional departments in Canada is thus projected to rise to $9.5 billion by [2015–16], a factor of 2.15 increase over the [2009–10] expenditures of $4.4 billion."[97]

By contrast, Public Safety Minister Vic Toews first claimed Bill C-25 would cost "not more than $90 million".[98] He later abruptly revised his estimate to $2 billion over five years.[99] And more recently, his spokesperson said they would be spending $9 billion on new prisons.[100] In view of the PBO's detailed analysis, these government estimates are clearly unrealistic.

So is Toews' comment that increases in prison populations can be accommodated by renovating old prisons, and by double-bunking.[101]

The PBO report says that 13 new federal prisons will have to be built on existing CSC land, at a cost of $1.8 billion, or $363 million per year for five years, just to accommodate the changes in Bill C-25.[102] Provincial and territorial costs (including construction, operations and maintenance) are estimated by the PBO at $6.5 billion next year, and continuing to rise each year thereafter.[103]

Toews went on to say that double-bunking in prisons is "no big deal".[104] This flies in the face of the evidence, which shows that double-bunking results in increased incidents of institutional violence.[105] James Clancy, national president of the union representing prison employees, says that overcrowding is "becoming a huge public safety issue and a very real danger to our members."[106]

Howard Sapers, the Correctional Investigator, has reported that in 2009, the number of "major institutional incidents" had increased, including violent assaults, serious bodily injuries and use of force.[107] There is currently a federal directive against double-bunking, but in response to the new legislation, CSC issued a Commissioner's Directive which allows double-bunking without the need to acquire an exemption. *(See Appendix E).*

Canada also has international obligations with respect to the housing of inmates, but this appears to carry no weight with the current government.[108]

Since the Conservatives came into power, the amount of double-bunking has increased by more than 50 per cent.[109] CSC estimates that over the next three years, the penitentiary population in Canada will increase by about 25 per cent.[110]

Toews insists that the federal government will shoulder whatever expenses result from its legislation, and that the provinces should not see any increase in costs.[111] Page, on the other hand, says that the provinces will have to pay about 56% of total expenditures in future years, compared to 49% in 2009–2010.[112]

Figure 6 shows the proportion of federal, provincial and territorial monies going to the corretions budget for the year 2009–2010.[113]

The PBO then draws the comparison with 2015–2016, incorporating the impact of the "Truth in Sentencing Act" on the total corrections funding requirements, as shown in Figure 7.[114]

The financial impact of Bill C-25 on provincial and territorial budgets is clearly going to be substantial.

It is important to note that the estimates produced by the PBO do not include all of the consequences of the new Bill C-25, and thus may be regarded as very conservative estimates.[115] For example, the inevitable Charter challenges and increased number of appeals will add to the burden, and longer sentences will mean the necessity for more programs and more personnel.

Drug Laws

Professor Neil Boyd estimates that the new mandatory minimum sentences for marijuana cultivation will result in an additional 500 growers going to jail for six months each year — just in British Columbia.[116] Based upon a modest estimated cost of $57,000 per year for each provincial

FIGURE 6 **Annual expenditures 2009–10** Total: $4.396 B

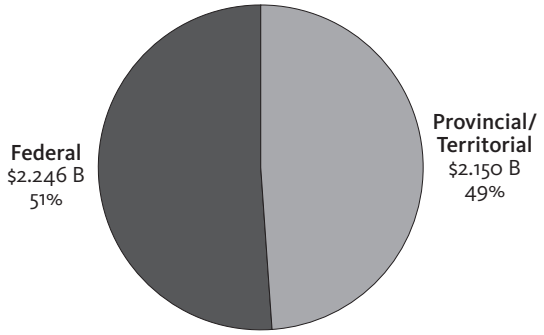
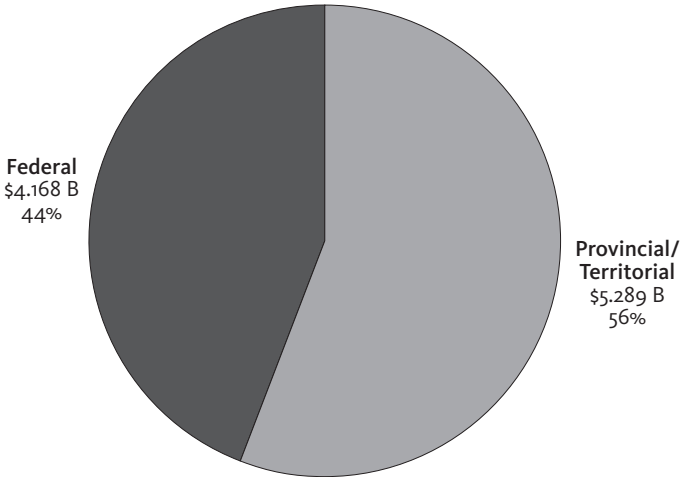


FIGURE 7 **Projected funding requirements 2015–16** Total: $9.457 B



prisoner, it will cost $30 million more per year for operations and maintenance to house these new inmates. It is also likely that a new prison will have to be built to house them.

There are 10 provinces and three territories, with marijuana being grown in all of them. The financial implications of this single piece of legislation are self-evident.

Reducing the Use of House Arrest

Just 15 conditional sentences save the system more than $1 million per year.[117]

Abolition of Statutory Release

Under this law, sentenced prisoners will now spend 50% more time in prison. Up to 2,310 cells will be required to house them, at a capital cost of $924 million, and an operating cost of $156 million per year.[118] The total costs will approach $1 billion in the first year. These are the costs

calculated at the high end. At the low end, the figures amount to a capital cost of $610 million and additional operating costs of $103 million per year. Either way, there is a considerable financial cost to be incurred by this piece of legislation.

Other Criminal Laws

Fraud over $1 million will now net two years minimum, whereas there is no MMS in the current law. Interestingly, the much-vaunted "crackdown" on white collar crime fails to deal with some of the more egregious forms of fraud: fraud affecting the market, fraudulent manipulation of stock markets, insider trading, and publication of a false prospectus.

The government is proposing new MMSs for arson, counterfeiting, and extortion.

While MMSs already exist with respect to the use of firearms, the government is proposing to increase these minimums significantly. It is also planning to create new firearms offences.

The Human Costs

Incarceration in Canada bears no resemblance to the "Club Fed" picture drawn by proponents of imprisonment. Prison life can be very brutal — for prisoners, families, friends and the community, and for those who work in the prison. At the same time, social programs which serve to prevent crime cannot function properly because of underfunding.

Howard Sapers, Canada's Correctional Investigator, speaks to this when he describes the "violence and despair" of prisoners.[119] He says that program shortages within the prison system are "so severe they have become a threat to public safety." He is referring to the fact that, as budgets shrink, important programs like literacy, anger management, and life skills are being cut. These are the programs which have been shown, by years of trial and error, to be the most effective in preventing released prisoners from re-offending.

Yet one of the most successful programs — which has proven to rehabilitate prisoners by teaching them work skills — has been cut by the Conservative government.[120] Prison farms, for over 150 years, have given thousands of prisoners a reason to get up in the morning, and have taught them essential skills for a life of employment on the outside: punctuality, responsibility, problem-solving, and so on.

This program, costing only $4 million a year, is being axed because the government says that only 1% of inmates eventually go to work on farms, and so the program is irrelevant. Proponents of the program, on the other hand, say that the skills learned are highly relevant to many different work situations, and that the program largely pays for itself because it provides food for the prisons. When the farms are gone, the CSC will have to shell out $1 million for milk for inmates in Ontario alone.[121] The January 2006 edition of CSC's publication *Let's Talk* was glowing in its assessment of the farm at Frontenac Institution in Kingston.[122] It talked about the "positive changes it makes in inmates' lives."

The 1970s are acknowledged to have been extremely violent in Canada's prisons. The response to this was the MacGuigan Report (1977), which recommended a number of new programs. As a result of these, prisons became less dangerous and more rehabilitative. This evidence has been ignored by the *Roadmap*, which recommends eliminating many of the successful programs. This will return the system to a time when prisoners had no rights, no release possibility before sentence expiry, and no programs except requirements to somehow work. Such a system has already been tried and found terribly wanting.

These harsh trends have already become evident within the prison system since the Conservatives took power, according to Howard Sapers, the Correctional Investigator. In his annual report released November 5, 2010, he says that harsher sentencing laws, including MMSs, have resulted in more overcrowding, less interaction

between staff and inmates, and an undermining of rehabilitation efforts.[123] Mr. Sapers says that "the climate [in prisons] is increasingly harsh, tense and stressed.... Current conditions inside our federal penitentiaries are...challenging the ability of our correctional authority to deliver a correctional service that is fair,safe and humane."

One example of the rollbacks suggested by the *Roadmap* is the way in which visitors will now be treated. Inmates and the CSC alike agree that the ability for prisoners to have visits with family and friends from their community is very relevant to their ability to succeed upon release. The authors of the *Roadmap,* however, "believe" that most drugs come into prisons through visitors, and so there will now be more surveillance, more searches, more sniffer dogs, and more ionscans.[124] Both of the latter have been shown to be unreliable (with CSC officials testing positive for cocaine and meth, for example). Also, CSC's own internal audit shows that less than 20% of drugs in prisons are seized in the visit area.[125]

The *Roadmap* approach to release of inmates reflects the same hard-line approach. Prisoners will no longer be released early unless someone decides they "deserve" it. The *Roadmap* does not consider that many prisoners do not have the skills to adhere to a strict regimen of work-oriented programs because of illiteracy, mental health issues, and so on. The *Roadmap* is setting them up for certain failure.

"Whether he deserves it" also puts an enormous amount of power into the hands of correctional personnel. And it is known that prisons are a prime locus for abuse of human rights because of the power differential that necessarily exists in jail.[126]

One interested observer severely criticized the Conservative government's determination to treat prisoners more harshly.[127] The *Roadmap*, he says:

> ...turns the humane traditions of Canada upside down.... [It] does not mention prisoners' rights, beyond basic food, shelter, clothing and medical care, and assumes that they are probably not recoverable for society and that the longer they are imprisoned, the better it is for society. Almost no distinction is made between violent and non-violent offenders."

With respect to the proposed requirement to "earn" all but the most basic rights, Black says, "Traditionally, the punishment is supposed to be the imprisonment itself, not the additional oppressions of that regime." Speaking of the proposed restrictions on visits, he says, "This is just a pretext to assist in the destruction of families and friendships."

Referring to the emphasis upon generating employment skills, he says this would be sensible "except that it is specifically foreseen that they will shoulder aside other programs of more general education, substance abuse avoidance, and behavioural adaptation.... No useful purposes will be served by cranking back into the world unreconstructed sociopaths who can fix an air conditioner or unclog a drain."

According to the Correctional Investigator, in 2009, only 25% of the prison population was enrolled and participating in programming.[128]

Correctional Officers are expressing concerns for their own personal safety because of the overcrowding that will be an immediate result of Conservative proposals. One officer with 19 years' experience at the Toronto West Detention Centre recently said that overcrowding results in more violence, greater conflict, and more problems managing inmates.[129] He pointed out that all detention centres like the Toronto West are maximum security in that they lump everyone together, whether the charge is shoplifting or murder. Of those in detention, 30% to 50% are mentally ill, and belong more properly in mental health facilities. Many inmates have anger management problems, and it is Correctional Officers who get injured breaking up the fights. This

officer also said that conditions for workers will be worse because of the recent repeal of 2-for-1 credit for remand time.

There is already evidence that the move to harsher sentencing without providing the necessary supports is resulting in a more volatile prison atmosphere. Use-of-force incidents have increased, including use of pepper spray and firearms.[130] Complicating the scenario further is the fact that correctional staff are now expected to deal with an increasing number of inmates with mental illnesses. One in four new federal inmates has some form of mental illness.[131]

Conclusion

The public may have scant sympathy for the conditions of incarceration. But when it comes to paying the bills, people sit up and take notice. The PBO has made a contribution by producing its detailed analysis of the 2-for-1 legislation and its impact upon budgets. Unfortunately, the PBO does not have the resources to do a similar analysis of the many other proposed "tough on crime" laws. If it were to do so, both taxpayers and the opposition would be aghast.

The government says these measures are being taken to increase public safety. As the foregoing shows, most of the proposals are likely to result in less public safety at great financial cost, as offenders are punished unduly, sentenced out of proportion to their crimes, and angered by the lack of suitable programs of rehabilitation.

SECTION FOUR

Tough on Crime: The Motivation

In view of the evidence that proposed crime legislation is counterproductive, dangerous, expensive, and contrary to the available evidence, it is important to look into the Conservative government's motivation, as well as the tactics it is using to achieve its goal.

The tactics are clear. Stephen Harper's Conservatives employ language which turns up the heat on issues, distorts reality, and enables the government to move ahead with its agenda. To achieve their goals, they employ an opportunistic manipulation of Parliament. There is a serious anti-evidence bias which springs from a version of the "truth" based upon belief and faith, and they persist in their beliefs despite the evidence of statistics, research, and prior experience. They have also adopted an approach which represents the Americanization of crime and punishment. Finally, they embrace a politics of "Tough on Crime" which relies upon manipulating the emotions of Canadians and diverting attention away from more pressing issues.

The tactics are clear, but what may not be immediately obvious is the government's motivation for behaving in this way. A clue is provided by Tom Flanagan, former top adviser to Prime Minister Harper, in his book *Harper's Team: Behind the Scenes in the Conservative Rise to Power.*[132] Flanagan says that the long-term goal of the Harper government is to transform Canada's public philosophy by instilling in the population the conservative values espoused by himself and the Prime Minister.

A good example of the pursuit of this ideological goal is the recent debacle over the census. By abolishing the long-form mandatory census, the government will achieve its goal of weakening the data upon which Canadians rely to craft the suite of social policies and programs so respected by Canadians but so apparently despised by Harper's Conservatives. The abolition of this census flies in the face of all evidence as to its ultimate integrity, and is contrary to the views of virtually all experts in the field and all those who rely upon the census data. Nevertheless, the government persists.

Criminal justice can be made to feed the underlying agenda of pushing Canadians farther to the right. Flanagan's ardent support for "tough on crime" laws fits the thesis that by frightening Canadians and then providing a sinecure for those fears, it is possible to push them towards a

more extreme, punitive model in criminal justice matters. Citing what he calls the "explosion of crime," Flanagan says that "the imprisonment of serious and repeat offenders is an excellent investment in purely economic terms — to say nothing of the value of restoring people's faith in justice."[133]

The motivation becomes all too clear: manipulate the Canadian public by distorting the facts and fomenting fear, and then force a conservative agenda on an unsuspecting people.

The Theatre of Language

It has already been pointed out that the Prime Minister and others use inflammatory language to convince the public that tougher measures are required to deal with crime. In a further effort to convince Canadians that the criminal justice system is broken and needs fixing, the government is departing from a long-standing tradition of neutral language when naming its crime bills.

For example:

- **"Truth in Sentencing" — Bill C-25**
  This title implies that there is now no truth in sentencing because offenders are allowed (on average) two days for every one day spent in pre-trial custody. It has been explained above that there are no lies inherent in this system, and that judges can be relied upon to sentence appropriately. Bill C-25, however, is now law.
- **"Serious Time for the Most Serious Crime" — Bill C-36**
  This title implies that offenders are currently not serving serious sentences for serious offences. Yet our current sentence for first degree murder is already much longer than that of comparable countries.
- **"Retribution on Behalf of Victims of White Collar Crime Act" — Bill C-52.**
  This title was changed to "Standing up for Victims of White Collar Crime Act." (Bill C-21 in the 2nd Session of the 40th Parliament).

  Both the original and amended titles wrongly imply that the bill is tackling white collar crime. In its first incarnation, the title affords an emotional appeal by suggesting that the bill provides retribution for victims. The second version of the title suggests a righteous defence of victims in the face of white collar crime. In fact, the bill only increases the sentence for fraud, nothing more.
- **"Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act" — Bill C-16.**
  Note that the name was changed from its original title of "Ending Conditional Sentences for Property and Other Serious Crimes Act". (Bill C-42 in the 2nd Session of the 40th Parliament).
  This is a good example of the government turning up the volume by changing the name of the bill in order to convince Canadians that house arrest is a bad idea. The inference, a demonstrably false one, is that serious and violent offenders are being allowed to serve their sentences at home.

The Manipulation of Parliament

Prime Minister Harper and the Conservative government have promoted the "tough on crime" agenda by manipulating parliamentary procedure. Early crime initiatives were allowed to die on the order paper so the Conservatives could put forward an omnibus bill (Bill C-2, the "Tackling Violent Crime Act") which contained some measures highly unpalatable to the opposition. Individual crime bills that had been studied and amended by all parties (through parliamentary committee) were reintroduced in their original, unamended form in this omnibus bill. The Prime Minister then made the bill the subject

of a confidence motion, knowing that the opposition parties could not vote against it without bringing on an election they did not want. Also, they could not vote against a number of publicly popular crime measures without suffering the wrath of voters at a later date.

Law professor and expert on sentencing Allan Manson says,[134] "When a minority government can ram through these bills, there is something wrong. These bills represent a lack of respect for evidence, research and methodology — and a supreme confidence that they know what people want."

The government has also accused the Liberal majority in the Senate of holding up or "gutting" essential crime measures. Yet 15 of the crime bills from the last session died on the order paper because the Prime Minister prorogued the House, not because of anything the Senate did.[135] Of those 15 bills, only three had even reached the Senate. One reached the Senate a couple of weeks before prorogation (the repeal of the faint hope clause). One was modified by the Senate (drug crime sentences). And one was languishing in the Senate (creating a new offence of motor vehicle theft). Two other bills were passed by the Senate and are now law (organized crime legislation, and the repeal of two-for-one sentencing). This record hardly reflects a plot by the Senate to overthrow the crime agenda.

Yet Minister of Justice Nicholson said,[136] "I have a busy criminal law agenda but, [after] getting it stuck in the Senate and having it bogged down there for month after month, I know the game that they are playing." Liberal senators "are trying to stall these things and they are doing the dirty work for the Liberals in the House of Commons."

The Prime Minister's language is similarly misleading:[137]

> Our government is serious about getting tough on crime. Since we were first elected, we have made it one of our highest priorities. The Liberals have abused their Senate majority by obstructing and eviscerating law and order measures that are urgently needed and strongly supported by Canadians.

The Prime Minister promptly appointed five new Senators, all of whom support the tough on crime agenda.[138]

In another cynical effort to further the Prime Minister's tough on crime agenda, the government recently exploited its powers to enact regulations. Waiting until the summer recess of 2010, when Parliament was not sitting and MPs were busy in their constituencies, the Minister of Justice announced new regulations that he said targeted organized crime.[139] He was able to do this without debate and without passing legislation, acting by executive decision of the federal cabinet. The government thus avoided the scrutiny of the House of Commons while establishing longer sentences and a broader use of wiretaps, seizure of proceeds of crime, and tougher bail, parole, and sentencing conditions.

Among other measures, a number of offences have been bumped up into the "serious crimes" category, including keeping a common gaming or betting house, betting, pool-selling and book-making, committing offences in relation to lotteries and games of chance, and cheating while playing a game or in holding the stakes for a game or in betting.

The end result of these new regulations is that more people will serve longer sentences in custody. Law enforcement will also have highly expanded rights of surveillance. The opposition parties and those who might have disagreed had no input whatsoever.

The Bias against Evidence-Based Policy

A determination to ignore evidence and statistics prompts the Conservative government to continually mis-state the facts on criminal justice

issues in the most cynical way. The Prime Minister's former Chief of Staff, Ian Brodie, frankly — and amazingly — told a public policy gathering at McGill University that:[140]

> Politically, it helped us tremendously to be attacked by [sociologists, criminologists, and defence lawyers] because they are "held in lower repute than Conservative politicians" [and thus] we never really had to engage in the question of what the evidence actually shows about various approaches to crime.

As has been noted, the government has an ill-disguised contempt for the expertise of academics, lawyers, judges, and others who have worked in the criminal justice system for years. It ignores reams of solid research, based upon years of first-hand experience and peer-reviewed analyses. It does accept to some degree the position of prison staff and police, but rejects the CSC's concerns out of hand. In a report dated January 24, 2006, the CSC said in no uncertain terms that the proposals would "hit Aboriginal people the hardest, violate Charter rights of inmates, and likely not make for safer streets."[141]

Let us recall that the CSC is comprised of the people who are in charge of prisons, inmates, and the carrying out of sentences. They are saying that the "tough on crime" agenda will not make for safer streets. The CSC also says that there will be dramatic increases in prison populations, and that mandatory minimum sentences do not have a deterrent effect — rather, they drain funds away from needed social programs that do prevent crime.

The Conservative government is unwilling to accept the advice and evidence of experts, researchers, and people who work with offenders every day, but it is especially troubling that it will not accept the advice of its own public service, charged with implementing the law.

The Harper government ignores the fact that research is based upon data — not upon peoples' unfounded impressions, but upon systematically recorded experiences with crime. It also ignores the fact that all citizens have human rights, even those who have broken laws; and that the human rights of offenders and the human rights of victims are not diametrically opposed to one another, and are not mutually exclusive.

Statements of various Ministers of the Crown also demonstrate an unwillingness to assess the available evidence. For example, Vic Toews, Minister of Justice in 2006, claimed that mandatory minimum sentences (MMSS) had caused a "significant drop in crime" in the United States.[142] Yet individual states are today abolishing MMSS because they have been found to be both expensive and counterproductive.

Minister Stockwell Day seriously underestimated the number of additional inmates that would have to be accommodated under new crime legislation. He thought perhaps 300 to 400 additional inmates would be incarcerated, a number he plucked out of the air, according to his communications director.[143] The PBO has shown that Bill C-25 alone will add 4,189 headcounts to the correctional system.[144]

Minister Day also recently opined that Canada needs more prisons because of an "alarming" rise in the number of unreported crimes.[145] He cited a reduction in reporting of 3% between 1999 and 2004. This was apparently an effort to dismiss the incontrovertible evidence of a falling crime rate in the face of the government's massive expenditures on Corrections, and the PBO's report saying further huge infusions of cash would be needed.

Underlying the foregoing is a pervasive theme. The tone of the government's approach to crime is vindictive. Its contempt for human rights and evidence-based policy appear to be based upon simplistic moral judgments. There is an eye-for-an-eye approach to punishment which does not even recommend itself to many victims of crime.

The position appears to turn upon nothing more than personal belief. For example, on March

16, 2010, the Prime Minister accepted an invitation to answer questions from Canadians on YouTube.[146] On the topic of legalizing marijuana, raised by a number of participating Canadians, Harper responded that he did not want his young children to be able to obtain illicit drugs, and that "drugs are not bad because they are illegal; they are illegal because they are bad."

The Prime Minister's children and all children, however, can readily obtain illegal drugs by simply walking down the street and handing some cash to the local dealer. This is *because* they are illegal and unregulated. Tobacco and alcohol, on the other hand, are almost impossible for children to obtain. This is because they are legal and regulated by governments.

To say simply that drugs are "bad" and that's why they are illegal ignores the fact that marijuana is often used as an effective medicine. It also smacks of a personal moral judgment that should not provide a basis for legislation in a democracy.

The Prime Minister went on to tell his YouTube audience that committing murder should entail "some time," inferring that murderers were being lightly sentenced in Canada. Similarly, the recent Throne Speech intoned: "Our Government will propose laws ensuring that for multiple murderers, life means life and requiring that violent offenders serve their time in jail, not in the luxury of home."[147]

But life *does* mean life in our criminal justice system. Murderers, on average, are jailed for over 25 years in Canada. They may win parole at that point, or they may not. They may spend their whole lives in prison. If they are ever released, they will be supervised for the rest of their lives.

The inference that judges routinely release violent offenders to "the luxury of their homes" is false. Violent offenders are treated harshly. Judges are best placed to decide what that means. Violent offences virtually always net jail time. Why is the government claiming the opposite?

Harper said that deterrence will not work if there is "always a loophole" or if "the punishment can be downgraded." He implied that a prison sentence reduced to probation or to a conditional sentence would not operate to deter people — as though non-custodial sentences do not cause pain and humiliation to offenders and their families. In fact, conditional sentences are often longer than jail terms and have more stringent conditions than for those offenders released on parole.[148]

The Supreme Court of Canada has addressed this exact issue. In *R. v. Proulx*[149], the Court said that conditional sentences can indeed address both punitive and rehabilitative objectives of sentencing, and also mete out a strong measure of public denunciation.

The Americanization of the Criminal Justice System

The politics surrounding the "tough on crime" agenda look a lot like those of the United States. Graham Stewart points out that Canada has taken a different approach from the United States to fighting crime over the past 30 years — one that concentrates on programs to encourage rehabilitation rather than longer sentences. As a result, he says, Canada has…got better results at a fraction of the cost.[150] "Why," he wants to know, "would we decide to go the American route? The only reason I could identify in our discussion is that, whereas it's bad corrections, it's good politics."

Craig Jones, Executive Director of the John Howard Society, says the belief that longer sentencing leads to deterrence is based upon a "bedrock economic model" of the sort now recognized as neoliberal.[151] "If you increase the price of something, demand for it goes down. Crime is regarded the same way as any other market," he says. He is here suggesting a parallel with the economic model accepted by the Canadian Conservative government and every Chicago School of Economics adherent. Stretching the analogy

somewhat, this would suggest that, if you exact a high enough price for committing crime, people will decide not to commit criminal offences. This flies in the face of the evidence that offenders are not thinking about the consequences of their actions when they commit crimes.

The irony is that many American states have recently begun to rescind "tough on crime" sentencing provisions. High costs of imprisonment, coupled with its questionable benefits, have prompted states to rethink this approach and reduce incarceration rates and lengths of sentences. Twenty-five states have reduced or eliminated mandatory minimum sentences, and the American Bar Association is recommending ending the practice.[152] New York reduced its imprisonment rate by 20% from 1999 to 2009.[153] New Jersey's reduction was 19% for those years. Michigan reduced its rate by 19% in the three years ending in 2009, and Michigan prosecutors were among those supporting the abolition of mandatory minimum sentences.

Although many Americans now see the folly of their earlier approach, Canada's proposed new laws follow the old path and constitute "signposts of the Americanization of our justice system," according to Eric Gottardi of the CBA.[154]

In a further echoing of the American system here in Canada, criminologist Julian Roberts expects to see the partial privatization of prisons.[155] This development in the United States has not been an unalloyed success. Nevertheless, the chair of the Review Panel which produced the *Roadmap*, Rob Sampson, was himself responsible for trying to privatize Ontario prisons while he was a Minister in Michael Harris's Conservative government.

The privatization of the Penetanguishene "super-jail" was an experiment that failed spectacularly.[156] After five years of management by a Utah-based company, it was returned to public sector management by the McGuinty Liberals in 2006 because of high operating costs and poor performance. Yet it is entirely possible that the Harper government might consider the idea of privatization as a way of offloading the rising costs of incarceration to the private sector.

The Politics of "Tough on Crime"

The government's inflammatory language and continued emphasis on crime tend to create fear among the public. This enables the government to bring in draconian laws without having to worry about a backlash from the voters, and without reference to the actual situation for police on the streets, for prison guards in institutions, or for lawyers and judges in the courts, much less for accused persons.

Professor Allan Manson says that, if the goal is to do something that reduces crime, none of this legislation is based on sound evidence. "It will be costly, and it may get votes, but it won't reduce crime. It is harshness for harshness's sake."[157]

Some knowledgeable commentators have been frank about the degree of cynicism surrounding the criminal justice file. Respected Justice David Cole of the Ontario Court of Justice is a sentencing and parole expert. His response to the "tough on crime" agenda?[158]

> You would think that you would want good policy development in the area of criminal justice — particularly in sentencing — but everything is done on the fly, and always with a view to quick political gain. All the academics know this. All the commentators know this.

Justice Cole also said he believes that "the shots are actually being called at the uppermost echelons of government":[159]

> All of us who know civil servants in this area know that they are not listened to. It's all about what political gain can be made. There is no room for thoughtful disagreement. Take it or leave it.

Many commentators have also noted that the "tough on crime" agenda has appeared at a time when the Canadian economy is suffering its worst slowdown since the Great Depression. Crime legislation provides a reliable distraction at a time when there is also a crisis in the economy, a climate crisis, an Afghan detainee crisis, and a census crisis. Scaring people with crime stories has been a tried-and-true method of diverting the public's attention ever since Richard Nixon trotted out his "tough on crime" platform during the Viet Nam war.

Professor Manson says the government is also diverting attention from the real issues surrounding crime:[160]

> Focusing on such an ineffective and costly sentencing strategy has had the disastrous side-effect of distracting legislators and policy-makers from the actual causes of crime and modern-crime-reduction techniques.

The "tough on crime" agenda has nothing to do with public safety and everything to do with politics. Take, for example, the government's intention to establish mandatory minimum sentences for many drug crimes. When questioned by the Justice Committee, Minister Rob Nicholson was unable to provide any evidence from other countries that implies such sentences work to reduce crime.[161] In fact, two studies produced for his own Justice Department (2002 and 2005) concluded that mandatory minimums do not work. Nevertheless, he said his proposed legislation was "a smart response to a public outcry to crack down on the growing 'scourge' of drugs." "I can tell you," he said, "there is support for this bill from many ordinary Canadians who are quite concerned about drug abuse." Once again, his ability to read the minds of Canadians, and willingness to act on that alone, trumped the evidence.

One alarming aspect of much of the new legislation is its anticipated head-on collision with the *Charter of Rights and Freedoms*. In normal cases, before a proposed piece of legislation goes before Parliament, the Justice Minister signs an "executive certification" saying that it complies with the Charter. Recently, though, according to one insider, legislation has been pushed through "despite stern internal warnings that it would likely violate Charter provisions".[162]

> They made a lot of campaign promises that were either ill-advised or not workable. Then, when they came into power, they were hell-bent on making them happen... Very often, there have been instances where very fine Department of Justice legal minds would say: "You can't do that because the Charter says X or Y." The answer from the minister would be: "I can't take that to caucus. We'll just have to barrel ahead."... The prevailing attitude was: "We'll sign the certification saying that this is Charter-proof and let the judiciary fix it later." There is a real fix-it-later attitude.

Finally, the level of political cynicism rises when we see the government's repeated rhetoric about acting on behalf of victims. As it happens, victims' rights advocates have spoken for themselves eloquently.

Arlene Gaudreault, President of the Association Québécoise Plaidoyer-Victimes, appeared before the House of Commons Standing Committee on Justice and Human Rights.[163] Speaking of the new young offender legislation, she said, "We do not believe that calling for a more enforcement-oriented justice system will automatically translate into greater protection for society in general, and victims in particular."

Gaudreault quoted recent research that shows "there is no evidence to support the hypothesis that victims want harsher sentencing. In fact, studies show the opposite.... Victims are not excessively punitive, any more than people who are not victims. That is also the case among victims of violent crime." She said that the confidence

of victims and the public would be restored by other means than enforcement, including programs to reduce poverty and inequality.

What an astonishing submission this was. How could any government ignore it?

Steve Sullivan, Federal Ombudsman for Victims of Crime, agrees that calling for more enforcement will not automatically translate into greater protection for society, and for victims in particular.[164] He writes:

> Victims understand, better than most, that nearly all offenders will eventually be released from prison. Given their personal experiences, they know the impact violence can have, which is why many victims sincerely hope that offenders will be rehabilitated while in prison. The best protection victims, their families, and the community will have is if the offender can learn to modify negative behaviour before he or she is released.

Conclusion

The Prime Minister and his Conservative government appear to be acting upon personal inclination and belief rather than on evidence. This approach to public policy disregards human rights and distorts democracy.

One knowledgeable commentator expressed the following opinion about the Conservative government's approach to crime legislation:[165]

> The government "believes." And, as every man of faith knows, belief can conquer even the mightiest army of facts. But for those of us in the reality-based community — the famously dismissive phrase of a Bush official — belief isn't good enough. We expect policy to be supported by facts and research. Perhaps that makes us lesser men and women, but we can't accept something as true simply because it's been given Stephen Harper's benediction. So where's the evidence that the government's radical, U.S.-style approach to criminal justice will make us safer? You won't find it on its website. There are lots of bold claims, of course. But in the press release and background information, there isn't a word about evidence.
>
> Not that any of this will bother Mr. Harper or his ministers. They've got faith. And they've made it clear they have no intention of changing their minds, no matter what the research says. It's the rest of us — those who still value evidence and reason — who should be concerned.

It must be clear to any reasonable person that the "tough on crime" approach is wrong-headed, expensive, and counterproductive. Prison officials are already reporting the negative impacts of increased numbers of prisoners serving longer sentences. And the prison ombudsman says the climate inside Canadian prisons has become "increasingly harsh, tense and stressed" and has damaged the rehabilitative process.[166]

People generally have little sympathy for criminals. They do, however, given accurate information, understand the apparent inverse relationship between good results and the cost to their pocketbooks.

It is imperative that politicians approach criminal justice policy-making with a clear head and a full understanding of the repercussions of their sometimes hasty decisions. To do less is to undermine a criminal justice system which has been moving toward a more humane treatment of those who pose a threat to public safety, thereby helping to ensure the safer streets that Canadians deserve.

APPENDIX A

Criminal Justice Bills in the House Of Commons

40th Parliament, 2nd Session, January 26–December 30, 2009

Bill C-14
An Act to amend the Criminal Code (organized crime and protection of justice system participants)

Bill C-15
An Act to amend the Controlled Drugs and Substances Act and to make related and consequential amendments to other Acts

Bill C-19
An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)

Bill C-25
An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody) (*Truth in Sentencing Act)*

Bill C-26
An Act to amend the Criminal Code (auto theft and trafficking in property obtained by crime)

Bill C-31
An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act

Bill C-34
An Act to amend the Criminal Code and other Acts (*Protecting Victims from Sex Offenders Act)*

Bill C-36
An Act to amend the Criminal Code (*Serious Time for the Most Serious Crime Act)*

Bill C-39
An Act to amend the Judges Act

Bill C-42
An Act to amend the Criminal Code (*Ending Conditional Sentences for Property and Other Serious Crimes Act)*

Bill C-43
An Act to amend the Corrections and Conditional Release Act and the Criminal Code (*Strengthening Canada's Corrections System Act)*

Bill C-46
An Act to amend the Criminal Code, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act (*Investigative Powers for the 21st Century Act)*

Bill C-52
An Act to amend the Criminal Code (sentencing for fraud) (*Retribution on Behalf of Victims of White Collar Crime Act)*

Bill C-53
An Act to amend the Corrections and Conditional Release Act (accelerated parole review) and to make consequential amendments to other Acts (*Protecting Canadians by Ending Early Release for Criminals Act)*

Bill C-54
An Act to amend the Criminal Code and to make consequential amendments to the National Defence Act (*Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act)*

Bill C-55
An Act to amend the Criminal Code (*Response to the Supreme Court of Canada Decision in R. v. Shoker Act)*

Bill C-58
An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service (*Child Protection Act (Online Sexual Exploitation)*

APPENDIX B

Criminal Justice Bills in the House Of Commons

40th Parliament, 3rd Session, March 3, 2010–Present

Bill C-4
An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other acts (*Sébastien's Law (Protecting the Public from Violent Young Offenders))*

Bill C-5
An Act to amend the International Transfer of Offenders Act (*Keeping Canadians Safe (International Transfer of Offenders) Act)*

Bill C-16
An Act to amend the Criminal Code (*Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act)*

Bill C-17
An Act to amend the Criminal Code (investigative hearing and recognizance with conditions) *(Combating Terrorism Act)*

Bill C-21
An Act to amend the Criminal Code (sentencing for fraud) *(Standing up for Victims of White Collar Crime Act)*

Bill C-22
An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service (*Protecting Children from Online Sexual Exploitation Act)*

Bill C-23A
An Act to amend the Criminal Records Act

Bill C-23B
An Act to amend the Criminal Records Act and to make consequential amendments to other Acts *(Eliminating Pardons for Serious Crimes Act)*

Bill C-30
An Act to amend the Criminal Code *(Response to the Supreme Court of Canada Decision in R. v. Shoker Act)*

Bill C-39
An Act to amend the Corrections and Conditional Release Act and to make consequential amendments to other Acts *(Ending Early Release for Criminals and Increasing Offender Accountability Act)*

Bill C-48
An Act to amend the Criminal Code and to make consequential amendments to the National Defence Act (*Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*)

Bill C49
An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act (*Preventing Human Smugglers from Abusing Canada's Immigration System Act*)

Bill C-50
An Act to amend the Criminal Code (interception of private communications and related warrants and orders) (*Improving Access to Investigative Tools for Serious Crimes Act*)

Bill C-51
An Act to amend the Criminal Code, the Competition Act and the mutual Legal Assistance in Criminal Matters Act (*Investigative Powers for the 21st Century Act*)

Bill C-52
An Act regulating telecommunications facilities to support investigations (*Investigating and Preventing Criminal Electronic Communications Act*)

Bill C-53
An Act to amend the Criminal Code (mega-trials) (*Fair and Efficient Criminal Trials Act*)

Bill C-54
An Act to amend the Criminal Code (sexual offences against children) (*Protecting Children from Sexual Predators Act*)

APPENDIX C

New Drug Mandatory Minimum Sentences[167]

TABLE 2 **Proposed new mandatory sentences for serious drug offences**
Schedule I drugs (cocaine, heroin, methamphetamine, etc.)

	MANDATORY PENALTY				
OFFENCE		**w/ Aggravating Factor List A[1]**	**w/ Aggravating Factor List B[2]**	**w/ Health and Safety Factors[3]**	**NOTES**
Production	2 YEARS	n/a	n/a	3 YEARS	
Trafficking		1 YEAR	2 YEARS	n/a	
Possession for the Purpose of Trafficking		1 YEAR	2 YEARS	n/a	
Importing Exporting	1 YEAR 2 YEARS (*if more than 1 kg of Schedule 1 substances*)	n/a	n/a	n/a	Offence is committed for the purpose of trafficking
Possession for the Purpose of Exporting	1 YEAR 2 YEARS (*if more than 1 kg of Schedule 1 substances*)	n/a	n/a	n/a	Offence is committed for the purpose of trafficking

TABLE 3 **Proposed new mandatory sentences for serious drug offences**
Schedule II drugs (cannabis and marijuana)

OFFENCE	MANDATORY PENALTY				NOTES
		w/ Aggravating Factors List A[1]	w/ Aggravating Factor List B[2]	w/ Health and Safety Factors[3]	
Trafficking		1 YEAR	2 YEARS	n/a	Offence would have to involve more than 3 kg of cannabis marijuana or cannabis resin
Possession for the Purpose of Trafficking		1 YEAR	2 YEARS	n/a	Offence would have to involve more than 3 kg of cannabis marijuana or cannabis resin
Importing Exporting	1 YEAR	n/a	n/a	n/a	Offence is committed for the purpose of trafficking
Possession for the Purpose of Exporting	1 YEAR	n/a	n/a	n/a	Offence is committed for the purpose of trafficking
Production—6–200 plants	6 MOS	n/a	n/a	9 MOS	Offence is committed for the purpose of trafficking. Maximum penalty will be increased to 14 years imprisonment
Production—201–500 plants	1 YEAR	n/a	n/a	18 MOS	Maximum penalty will be increased to 14 years imprisonment
Production—more than 500 plants	2 YEARS	n/a	n/a	3 YEARS	Maximum penalty will be increased to 14 years imprisonment
Production—oil or resin	1 YEAR	n/a	n/a	18 MOS	Offence is committed for the purpose of trafficking

1. Aggravating Factors List A

The aggravating factors include offences committed:

- for the benefit of organized crime;
- involving use or threat of violence;
- involved use or threat of use of weapons;
- by someone who was previously convicted of a designated drug offence or had served a term of imprisonment for a designated substance offence in the previous 10 years; and,
- through the abuse of authority or position or by abusing access to restricted area to commit the offence of importation/exportation and possession to export.

2. Aggravating Factors List B

The aggravating factors include offences committed:

- in a prison;
- in or near a school, in or near an area normally frequented by youth or in the presence of youth;
- in concert with a youth;
- in relation to a youth (e.g. selling to a youth).

3. Health and Safety Factors

- the accused used real property that belongs to a third party to commit the offence;
- the production constituted a potential security, health or safety hazard to children who were in the location where the offence was committed or in the immediate area;
- the production constituted a potential public safety hazard in a residential area;
- the accused placed or set a trap.

APPENDIX D

Bill C-16's Proposed List of Criminal Code Offences For Which a Conditional Sentence (Including House Arrest) Will No Longer Be Available

Offence	Section of *Criminal Code*	Maximum Sentence
Forge passport or use forged passport	57(1)	14 years
Hijacking	76	Life
Endanger aircraft	77	Life
Take weapon or explosive on board	78	14 Years
Breach of duty of care, explosives, causing death	80(a)	Life
Breach of duty of care, explosives, causing harm	80(b)	14Year
Explosives, intent to cause death or harm	81(1) (a&b)	Life
Explosives, placing or making	81(1) (c&d)	14 Years
Explosives, for benefit of a criminal organization	82(2)	14 Years
Bribery of judicial officers	119	14 Years
Bribery of officers	120	14 Years
Perjury	131, 132	14 Years
Contradictory evidence with intent to mislead	136	14 Years
Fabricating evidence	137	14 Years
Incest	155	14 Years
Accessory after fact, murder	240	Life
Overcoming resistance to commission of offence	246	Life
Dangerous operation of vehicle, etc., causing death	249(4)	14 Years
Fail to stop at scene of accident knowing person is dead; or reckless whether death results	252(1.3)	Life
Criminal breach of trust	336	14 Years
Public servant, refuse to deliver property	337	14 Years
Stop mail with intent	345	Life

Offence	Section of *Criminal Code*	Maximum Sentence
Break and enter with intent, committing indictable offence re: dwelling house	348	Life
Draw document without authority	374	14 Years
Obtaining, etc., based on forged document	375	14 Years
Obtaining, etc., based on forged document	380(1)(a)	14 Years
Intimidation of justice system participant or journalist	423.1	14 Years
Wilful mischief endangering life	430(2)	Life
Arson, disregard for human life	433	Life
Arson, damage to property of others	434	14 Years
Arson, damage to own property, threat to safety of others	434.1	14 Years
Make counterfeit money	449	14 Years
Possession, etc., of counterfeit money	450	14 Years
Uttering, etc., of counterfeit money	452	14 Years
Attempts and accessories, indictable, punishment by life	463(a)	14 Years
Conspiracy, murder	465(1)(a)	Life
Conspiracy to commit other indictable offence	465(1)(c)	Life
Commission of offence for criminal organization	467.12	14 Years
Instructing offence for criminal organization	467.13	Life

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APPENDIX E

Commissioner's Directive (CD) 550

Inmate Accommodation, Correctional Service Canada, August 11 2010

Commissioner's Directive 5500: *Inmate Accommodation* identifies single accommodation as the most desirable and appropriate method of housing offenders. The current policy reflects CSC's belief that double bunking (one cell designed for one inmate occupied by two) is inappropriate as a permanent accommodation measure within the context of good corrections.

However, forecasted increases resulting from the passing of Bill C-2, the Tackling Violent Crime Act, and Bill C-25, the Truth in Sentencing Act, and normal growth projections will exert significant pressure on current capacities to accommodate inmates. Even with proposed accommodation identified in CSC's annual plans the Service will be forced to increase the level of double bunking—accommodation measures typically reserved for short term capacity shortfalls.

In order to streamline and assist operational units to react quickly as the population grows, the process described in paragraph 29 of CD 550, which requires prior approval by the Commissioner before increasing the number of double bunked cells, has been suspended.

This exemption does not apply to administrative segregation status where the policy remains in effect.

Effective immediately:

(Signed) Don Head

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