Brief to the Standing Senate Committee on Legal and Constitutional Affairs, in relation to the Committee's study on Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code and other Acts*

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1. Summary

For many reasons, Bill C-10 is ill-advised on fiscal, public health and human rights grounds. By creating minimum prison terms for a variety of drug offences, Bill C-10 removes judicial discretion in sentencing and imposes prison terms for drug offences in a broad range of circumstances, including for non-violent offences, inviting sentences that are unjust in the circumstances of the offence and casting the net of incarceration far wider than the 'drug dealers' it purports to target. Rather than penalizing profiteers engaged in large-scale trafficking, it is likely to be primarily the most marginalized people with addictions and/or living in poverty, engaged in small-scale trafficking often related to their drug dependence, who will bear the brunt of such mandatory incarceration provisions. Available evidence also indicates that mandatory minimum sentences for people convicted of drug-related offences do not reduce the problems associated with drug use (or drug use itself) — a conclusion confirmed by Justice Canada's own review.

Further compounding the tension, overcrowding and violence that will invariably ensue in a prison population housing increasing numbers of people who use drugs, are proposed amendments to the *Corrections and Conditional Release Act* (CCRA) that are contrary to Canadian and international law and policy concerning the rights of people in prison. These amendments would remove language reflecting the minimal impairment of prisoners' rights and their retention of all rights (but for liberty), and potentially undermine their right to health in a prison environment where rates of HIV and hepatitis C are already significantly higher than in the community as a whole.

In light of the evidence that (1) mandatory prison terms for drug offences have little effect in reducing crime, but impose significant human and societal costs while undermining public health, and (2) the Canadian government's constitutional and international human rights obligations to respect the rights of people in prison, the Canadian HIV/AIDS Legal Network respectfully submits that Bill C-10 be abandoned, and in particular, the proposed amendments to the *Controlled Drugs and Substances Act* (CDSA) and the CCRA. In the alternative, we submit that Bill C-10 should be amended through the addition of provisions mandating an annual (and publicly-accessible) impact assessment and a sunset clause — amendments that would enable Members of Parliament to monitor, review and evaluate the impact of certain provisions of the law to determine whether they merit renewal.

2. About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) is a national non-governmental organization with over 150 members across Canada, many of whom are community-based AIDS service organizations. As Canada's leading organization working on the legal and human rights issues raised by HIV/AIDS, the Legal Network promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education and community mobilization.

The Legal Network has been involved in extensive government and community consultations regarding a wide range of HIV/AIDS-related legal and policy issues, and has developed

particular expertise on drug law and policy as they relate to people who are at risk of HIV infection as a result of injection drug use and on the rights of people in prison.

We appreciate the opportunity to comment on Bill C-10 and to draw the Committee's attention to certain elements which are relevant from the perspective of public health and human rights.

3. Mandatory minimum sentences for drug offences

One critical health consideration in crafting illicit drug policy is the role of injection drug use in contributing to the spread of HIV — and how ill-considered laws that criminalize people with addictions make this situation worse, contributing further to the harms associated with unsafe drug use. Years of research indicate that Bill C-10 would exacerbate the already damaging imbalance in Canada's response to drug use, by relying even more heavily on the application of the criminal law and imposing yet harsher punishments in the form of mandatory minimum sentences for certain drug offences. For the reasons outlined here, the mandatory minimum sentences included in Bill C-10 are not sensible, evidence-based pragmatic public policy and raise serious public health and human rights concerns.

The Legal Network has prepared a briefing paper entitled *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses* (April 2006) explaining, in general terms, why the approach of imposing mandatory minimum sentences for drug offences is ill-advised. A copy of that paper is enclosed as part of this submission. This brief to the Committee supplements that general analysis with some specific observations regarding the particular effects of Bill C-10 and explains why it should not be enacted by the Government of Canada.

Currently, there are no mandatory minimum sentences for the offences set out in the CDSA. In amending the CDSA, the **factors in Bill C-10 which would attract a mandatory minimum sentence of imprisonment are overly broad, going well beyond violent offences or the activities of gangs or organized crime.** While the government contends that simple possession would not be subject to a mandatory minimum sentence and Bill C-10 targets "drug dealers" and not people with addictions or others who use drugs, this distinction cannot be drawn so categorically.

For example, a mandatory minimum of two years in prison is required in cases of trafficking or possession for the purpose of trafficking if "the person committed the offence in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years." This broad formulation could encompass anyone who committed the offence in the vicinity of a park, store, theatre, restaurant or any number of other places where youth may be present. Youth would not necessarily be involved or targeted in any way by the offence. Moreover, this clause is likely to result in more young people serving jail time, including students with no criminal records caught selling small amounts of drugs to their classmates or friends. Bill C-10 would also impose a mandatory minimum sentence of one year in prison if "the person carried, used or threatened to use a weapon in committing the offence." This provision casts the net far beyond those who commit violent offences, and would include someone who happened to have a jackknife in their backpack or someone who threatened to use a weapon but did not actually have one in their possession. In practice, Bill C-10 would also

have the effect of imposing minimum prison terms on people who engage in small-scale trafficking precisely because of their own addiction, since Bill C-10 also imposes a minimum penalty of one year in prison for anybody who has, within the 10 preceding years, been convicted of a "designated substance offence".

As noted in the enclosed companion briefing paper *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses*:

> The real profiteers, who traffic large quantities of illegal drugs, distance themselves from more visible drug activities and are rarely captured by law enforcement efforts. Instead, it is those people who are addicted and involved in small-scale, street-level drug distribution to support their addictions who are much more easily targeted by law enforcement efforts and more commonly end up being charged with drug offences. Evidence for this result comes from the long-running Vancouver Injection Drug Users Study (VIDUS), which sampled some of the most vulnerable, street-involved people who use illegal drugs. 20% of those surveyed reported dealing drugs, usually on a very small scale.
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> Furthermore, characteristics that are markers of the highest levels of addiction, such as high-intensity drug use, were associated with drug dealing. The most common drug-dealing roles assumed by VIDUS participants were low-level, dangerous dealing tasks, including direct street-level selling (82%), "middling" or carrying drugs (35%), and "steering" or sending addicts towards dealers (19%). The most common reasons given for dealing drugs included getting money either to support a drug addiction or to pay off debts related to drug use. A "get tough" approach with mandatory minimum sentences will serve primarily to penalize people who are themselves addicted, rather than large-scale traffickers.[1]

Tragically, the U.S. experience further illustrates that the brunt of mandatory minimum sentences are not in fact borne by "drug kingpins". Mandatory minimum sentences for drug offences have a substantial history in the U.S., going back more than a quarter-century. Yet only 5.5% of federal crack cocaine defendants and 11% of federal drug defendants are high-level drug dealers. It is more frequently the low-level offenders such as mules and street dealers who have served jail time for drug offences.[2]

The number of women imprisoned in the U.S. for drug-related offences has also increased rapidly as a result of mandatory minimum sentencing provisions — in fact, during the time such laws have been in place, the incarceration of women for drug-related offences in state prisons in the U.S. has increased by a staggering 888%, the majority of this increase accounted for by women of colour and women living in poverty.[3] Because of their visibility on the street, small-scale dealers in poor, inner-city neighbourhoods are often those who are arrested when the police crack down on drug use and drug dealing. Women are disproportionately represented at the bottom of the drug-dealing hierarchy and are highly vulnerable to arrest, hence the dramatic increase in the number of women imprisoned.[4] In the Canadian context, the consequences for women of imposing mandatory prison terms for drug offences cannot be overlooked. Already, a significant percentage of women in prisons were incarcerated for offences related to drug use, often linked to underlying factors such as experiences of sexual or physical abuse or violence.[5]

In other words, our current drug laws already play a disproportionate role in the incarceration of women, including women with addictions. Imposing mandatory prison sentences will only exacerbate this impact and the corresponding impact on their children and other family members.

By removing judicial discretion from the sentencing process, unintended and unjust consequences could result. Every crime is distinct, as is every person who offends. Bill C-10 flies in the face of the long-established sentencing principle in Canada that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[6] Mandatory minimum prison terms are *prima facie* at odds with this principle, because they deny judicial discretion to tailor the penalty to the circumstances of the case, which can result in unduly harsh penalties. For example, mandatory imprisonment is unduly harsh and unjust in cases such as those of the following people, all of whom could be caught by Bill C-10, as they have been caught by similar mandatory minimum sentencing laws for drug offences in the U.S.:

- someone who faces a reasonable apprehension of harm for not participating in an offence (e.g., a battered woman charged as conspirator or accomplice to her boyfriend's dealings);[7]
- a young person who dabbles in drugs briefly, whose future is then damaged by incarceration, perhaps irreparably; or
- someone living in extreme poverty or with severe addiction, for whom small-scale trafficking (and possession) is a viable option to earn money needed for survival.

Punishing "serious crimes", including those presumably contemplated by the aggravating factors included in Bill C-10, can equally be achieved without risking the potential unjust sentences that arise when judicial discretion is unduly curtailed. In the event that violence is committed in connection with a drug offence, applicable charges under the *Criminal Code* (e.g., assault, firearms offences) may be laid. Similarly, existing criminal offences with respect to organized crime (e.g., under *Criminal Code* s. 467.11 – 467.13) could be used if the offence was committed for the benefit of organized crime. But in the case of non-violent offenders convicted of trafficking, importing/exporting or producing small quantities, there is little justification for departing from basic sentencing principles in criminal law that the punishment should be proportional to the gravity of the crime and incarceration should be a punishment of last resort. Justice will only be seen to be done if judges are able to consider the circumstances of each crime and each offender, and exploit the panoply of sentencing options available to arrive at the best individual and societal outcomes.

The Supreme Court of Canada has ruled that a mandatory minimum sentence constitutes cruel and unusual punishment, contrary to s. 12 of the *Canadian Charter of Rights and Freedoms* (*Charter*), if it is possible for the sentence, in a specific matter or reasonable hypothetical case, to be "grossly disproportionate," given the circumstances of that case. In *R. v. Smith*, the Court ruled that a mandatory minimum sentence of seven years for importing or exporting a narcotic constituted cruel and unusual punishment because it failed to take into account the nature and quantity of the substance, the reason for the offence, or the absence of any previous convictions. The Supreme Court therefore struck down the provision as unconstitutional.[8] More recently, in *R. v. Smickle*, the Ontario Superior Court refused to impose a mandatory three-year sentence on a

man posing with a loaded handgun who had no previous criminal record, holding that "a reasonable person knowing the circumstances of this case, and the principles underlying both the *Charter* and the general sentencing provisions of the *Criminal Code*, would consider a three-year sentence to be fundamentally unfair, outrageous, abhorrent and intolerable."[9] The Court struck down the compulsory term as cruel and unusual punishment and sentenced the man to a one-year conditional sentence, to be served in the community. Under Bill C-10, any time a person is convicted of one of the designated offences and the broad aggravating factors are present, they would have to serve a prison sentence, regardless of the circumstances of the individual case. In light of the above decisions, we question whether such an outcome is constitutionally sound.

Bill C-10's provisions on drug treatment courts are of limited value and, upon closer examination, do not fully square with the Government's stated concern of "getting tough" on serious criminals while helping people with addictions. To date, there are few operational drug treatment courts (DTCs) in Canada, and the evidence is equivocal at best about their effectiveness in contributing to long-term reduction in drug use and recidivism among participants and the cost-effectiveness of the programs,[10] and whether such programs can, paradoxically, contribute to *widening* the net of the criminal justice system in dealing with drug offences.[11] The programs all operate on the same principle of coercive, abstinence-based addiction treatment with only limited tolerance for relapse. The focus on abstinence, however, ignores the substantial body of research that demonstrates that addiction is a chronic and relapsing condition, shaped by many behavioural and social-contextual characteristics.[12] As a result, those individuals with the most severe drug dependence are at the highest risk of "failing" DTC programs,[13] which under the provisions of Bill C-10 would mean that they are sent back to the judicial system and subject to mandatory minimum prison terms. This is directly at odds with the government's stated policy of helping people with addictions.

Greater incarceration of people who use drugs is ill-advised as a matter of both human rights and public health. Evidence indicates that incarceration of people who inject drugs contributes to Canada's worsening HIV and hepatitis C virus (HCV) epidemic. In Canada's federal prison system, the reported HIV prevalence of 4.6 percent is approximately 15 times greater than in the Canadian adult population as a whole, and the reported hepatitis C virus (HCV) prevalence at 31.0 percent is approximately 39 times greater.[14] Levels of HIV are similar in provincial prisons, with studies undertaken in B.C., Ontario and Quebec revealing HIV seroprevalence levels in prisons between 10 and 20 times higher than in the general population.[15]

Incarceration has been shown to lead to injection drug use among some prisoners who did not previously use drugs or use by injection.[16] The federal correctional service acknowledges that drugs enter prisons despite efforts to prevent this, and that an estimated 80% of prisoners in federal penitentiaries have substance use problems.[17] In a 2007 study, over 15% of federal prisoners surveyed reported injecting drugs in prison, of which about half reported sharing used equipment to inject drugs, and one-third reported sharing equipment with someone who has HIV, HCV or unknown infection status.[18] However, there is no access to sterile injection equipment in prisons, because correctional systems in Canada continue to refuse to implement needle and syringe programs that have long been demonstrated to be an effective and crucial element of HIV prevention among people who inject drugs in Canada outside the prison setting.[19] Not surprisingly, a study undertaken in Vancouver revealed that incarceration more than doubled the

risk of HIV infection of people who use illegal drugs and suggested that 21% of all HIV infections among Vancouver injection drug users may have been acquired in prison.[20]

Sentencing people with addictions to conditions of imprisonment that prevent access to health-protection tools such as sterile injection equipment infringes their human rights, constitutional rights (e.g., to equality in access to health services, to security of the person, and to freedom from cruel and unusual punishment under ss. 7, 12 and 15 of the *Charter*) and violates the state's statutory obligation to take reasonable care to safeguard the health of prisoners (e.g., CCRA, s. 70).[21] Moreover, incarcerating people who use drugs, or may have a greater vulnerability to initiating drug use, in a setting where drugs are available but sterile injection equipment is not, is a recipe for a public health disaster. There is ample evidence from numerous countries of outbreaks of HIV infection related to drug injection using contaminated equipment shared by multiple prisoners.[22]

Instead of wasting considerable public funds on a "get tough" approach that would harshly penalize people with addictions and/or people living in poverty, as well as people (including young people and students) who have engaged in non-violent offences, it is advisable to invest in more cost-effective, proven addiction treatment services.[23] Employment opportunities may also be a more cost-effective intervention for drug importers, producers and dealers who are underemployed. It makes more sense to direct our public resources towards services and programs that build healthy individuals and communities — including stable housing, early childhood development, employment opportunities, quality childcare and education programs — than towards building prisons to house drug offenders. These interventions would address illicit drug use more appropriately as a health and social issue.

Finally, mandatory minimum sentences for drug offences do not work. Mandatory minimum sentences for drug offences have been in place in the United States for some time and there is no evidence to support the claim that this has helped curb drug-related crime or problematic drug use. Rather, the vast increase in incarceration of non-violent drug offenders in U.S. prisons has taken a terrible human toll and led to enormous financial expenditure, while the drug problem in the U.S. has worsened. As a result, many U.S. states are now repealing or softening their mandatory sentencing laws — including Michigan, Hawaii, Washington state, Louisiana, Texas, North Dakota, Indiana, New Mexico, Connecticut, Maine and New York.[24]

In Canada, after careful examination comparing mandatory minimum sentences for drug offences to similar policies for drunk driving and gun crimes, a report conducted for Justice Canada concluded that such an approach is "least effective in relation to drug offences" and that "blunt instruments" such as mandatory minimum sentences "do not appear to influence drug consumption and drug-related crime in any measurable way."[25]

4. Amendments to the *Corrections and Conditional Release Act*

In addition to the imposition of mandatory minimum sentences for drug offences, Bill C-10 proposes a number of amendments to the CCRA which represent a radical shift in the guiding principles of the Correctional Service of Canada (CSC) and are contrary to Canadian and international law and policy concerning the rights of people in prison.

Among them is a proposed amendment to section 4(d) of the CCRA which currently requires CSC to "**use the least restrictive measures** consistent with the protection of the public, staff members and offenders." The proposed change would have CSC use measures "that are consistent with the protection of society, staff members and offenders and *that are limited to only what is necessary and proportionate* to attain the purposes of this Act." [emphasis added] Correspondingly, Bill C-10 proposes amending section 28 of the CCRA, from its current language of providing the "least restrictive environment" for confinement in a penitentiary, to "an environment that contains *only the necessary restrictions*…" [emphasis added]

The justification for these proposed amendments can be found in the December 2007 final report of the CSC Independent Review Panel, entitled "A Roadmap to Strengthening Public Safety". In the report, the Panel contended that the principle of "least restrictive measures" had:

> been emphasized too much by the staff and management of CSC, and even by the courts in everyday decision-making about offenders. As a result an imbalance has been created that places the onus on CSC to justify why the least restrictive measures shouldn't be used, rather than on offenders to justify why they should have access to privileges based upon their performance under their correctional plans.

The Review Panel does not cite evidence demonstrating what it claims are CSC's or courts' overemphasis of the least restrictive measures principle, or the resulting imbalance placed on CSC to justify why the least restrictive measures should not be applied. Moreover, the Review Panel does not appear to consider the fact that the "least restrictive measures" approach is consistent with the *Charter*, from which the *Oakes* test has been derived, stipulating that any limitation on a *Charter* right must impair as little as possible the constitutional right in question. In the prison context, the requirement to only "minimally impair" *Charter* violations has been adopted by the majority of the Supreme Court of Canada in *Sauvé v. Canada*.[26]

The removal of language reflecting minimal impairment is also contrary to recognition under international law of the importance of this principle. For example, the requirement to minimally impair the rights of those in prison is reflected in the *Standard Minimum Rules for the Treatment of Prisoners*, which acknowledge that "[i]mprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty."[27] As such, the Rules require prison administrations "to minimize any differences between prison life and life at liberty…"[28] Similarly, the 2006 *European Prison Rules* provide, "Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed."[29]

While Bill C-10 has yet to pass, the erosion of prisoners' rights has already been experienced by federal prisoners who have reported to staff of prison outreach groups an increase in exceptional searches, greater restrictions on movement and association within institutions, and loss of work resulting from institutional charges prior to any hearing taking place.[30] This erosion of rights has also been observed by the Correctional Investigator of Canada in his 2009–2010 Annual Report.

In particular, the Correctional Investigator noted that "[l]ockdowns appear to be more frequent and are sometimes used to facilitate training exercises or staff assemblies"[31] and that

> conditions of confinement, especially at the higher security levels, are becoming more and more restricted in terms of inmate association, movement and assembly…. A more restricted and austere prison regime does not necessarily lead to safer working conditions for staff or a more positive living environment for offenders."[32]

A second proposed change concerns section 4(e) of the CCRA, which provides that people in prison "**retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence**." The proposed amendment provides that people in prison "retain the rights of all members of society except those that are, as a consequence of the sentence, *lawfully* and necessarily removed or restricted." [emphasis added]

As the majority of the Supreme Court of Canada in *Sauvé* held, "*Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside."[33] The Court thus recognized that prisoners' rights are not contingent on the whims of the correctional authority or the behaviour of those who are incarcerated. While the proposed change does not appear on its face to significantly alter the principle of retained rights, it paves the way for *lawful* impairments on rights, which may not be justified. The breadth of possibilities for the lawful removal or restriction of rights is considerable, especially in light of recently imposed restrictions on visitations and yard-time imposed by CSC at various federal institutions in Ontario, presumably in anticipation of the passage of Bill C-10.[34]

The principle of retained rights is generally accepted by the international community. For example, the *Basic Principles for the Treatment of Prisoners*, which was adopted by the UN General Assembly, provides:

> Except for those limitations that are *demonstrably necessitated* by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.[35] [emphasis added]

Reinforcing this principle, the UN Human Rights Committee has provided that people in prison retain all rights "subject to the restrictions that are *unavoidable* in a closed environment".[36] [emphasis added] Moreover, the 2006 *European Prison Rules* provide, "All persons deprived of their liberty shall be treated with respect for their human rights."[37] This provision is correctly interpreted as meaning the deprivation of liberty is the singular right that is necessarily restricted as a consequence of incarceration and that the remainder of prisoners' human rights are intact.

If rights can be restricted or removed, as long as this is carried out lawfully, prisoners will undoubtedly suffer severe consequences in an inherently coercive environment. For example, the proposed amendment to the principle of retained rights may provide greater scope for

legislated restrictions on the right of people in prison to the highest attainable standard of health, which is recognized in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, and which is explicitly retained by people in detention.[38] Restrictions on prisoners' right to health would undermine the generally accepted "principle of equivalence," which entitles people in detention to have access to a standard of health care equivalent to that available outside of prison, and includes preventive measures comparable to those available in the general community.[39] In addition to being a violation of the rights of people in prison, permitting "lawful" restrictions or removals of human rights may have significant public health implications. In a federal prison system where the reported HIV and HCV prevalence is, respectively, 15 and 39 times greater than in the Canadian adult population as a whole,[40] any restrictions on the right to health, including access to comprehensive harm reduction measures, may lead to the escalating transmission of blood-borne diseases, including HIV.

5. Conclusions and recommendations

For all the reasons outlined above, Bill C-10 is a misguided approach to drug-related offences and to prisoners' rights that should be abandoned. In particular, we recommend the deletion of the provisions requiring mandatory minimum sentences in the CDSA (Sections 39 to 41 of Bill C-10) and the preservation of the language of "least restrictive" measures in sections 4(d) and 28 of the CCRA and the language of retained rights in section 4(e) of the CCRA.

In the alternative, should those provisions in Bill C-10 be maintained, we respectfully submit that there should be amendments to the bill requiring an **annual impact assessment** and a **sunset clause**. Policy makers contemplating new social initiatives will routinely conduct an impact assessment to determine the viability and sensibility of the initiative, and address the likely unintended consequences that could arise from the initiative. In the U.S., racial impact statements are a new legislative tool developed to estimate the disproportionate racial impact of criminal justice policies. These impact statements serve a similar purpose as fiscal or environmental impact statements, which describe the budgetary and ecological effects of particular policies. Similarly, it is common in the U.S. for laws to be passed with sunset clauses when they are deemed to be controversial for any reason, or if any part of the bill may potentially include the curtailment of civil liberties.

The effects of incarceration go beyond the experience of imprisonment itself, and can have a devastating, long-term impact on incarcerated individuals and society at large. This may include negatively impacting a prisoner's future employment prospects and his or her family's income security, an outcome which would require the government to offer financial assistance. In light of these and other significant ramifications already discussed above, Bill C-10 should include a provision that amendments to the CDSA (namely, mandatory minimum sentences for drug offences) shall be assessed yearly by an independent non-governmental entity to consider their impact on youth, race and ethnicity, gender, health, social services, and relevant provincial and federal budgets. The resulting report shall be submitted to relevant committees of the House of Commons and the Senate for review within two years of the passage of the bill. This information should also be made publicly available. This is a responsible move to ensure that Bill C-10 is properly monitored and revised, if necessary, based on a non-partisan review.

Correspondingly, a sunset clause should be included in Bill C-10. The sunset clause would require that the provisions requiring mandatory minimum sentences expire (and revert to their current language) within two years of the passage of Bill C-10, unless Members of Parliament vote to continue the law. Given the far-reaching social impact that Bill C-10 is likely to have, it is important to have an opportunity to assess its impact on our communities, which would be the combined purpose of the sunset clause and the impact assessment. At a time of fiscal restraint and an escalating public health crisis in Canadian prisons, a sunset clause enables Members of Parliament to squarely confront whether mandatory minimum sentences for drug offences accomplish any of their purported objectives (with the benefit of two years' worth of evidence) and importantly, whether they merit renewal.

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[2] Drug Policy Alliance, "Focal Point: Mandatory Minimum Sentencing," online via www.drugpolicy.org.

[3] American Civil Liberties Union, Brennan Center and Break the Chains, *Caught in the net: The impact of drug policies on women and families*, 2005, p. 1.

[4] M. Eliason, J. Taylor and R. Williams, "Physical Health of Women in Prison: Relationship to Oppression," *Journal of Correctional Health Care* 2004; 10(2): 175-203 at 190.

[5] J. Csete, *"Vectors, Vessels and Victims": HIV/AIDS and Women's Human Rights in Canada*, Canadian HIV/AIDS Legal Network, 2005, p. 36; S. Boyd and K. Faith, "Women, illegal drugs and prison: views from Canada," *International Journal of Drug Policy* 10 (1999): 195–207 at 199.

[6] *Criminal Code*, s. 718.1.

[7] *Caught in the net*, supra note 3.

[8] *R.* v. *Smith*, [1987] 1 S.C.R. 1045.

[9] *R. v. Smickle*, 2012 ONSC 602 at para. 89.

[10] D. Werb, R. Elliott, B. Fischer, E. Wood, J. Montaner & T. Kerr, "Drug treatment courts in Canada: an evidence-based review," *HIV/AIDS Policy & Law Review*, 12(2/3) (2007), pp. 12-17 and P. Allard, T. Lyons and R. Elliott, *Impaired Judgment: Assessing the Appropriateness of Drug Treatment Courts as a Response to Drug Use in Canada*, Canadian HIV/AIDS Legal Network, 2011.

[11] Justice Morris B. Hoffman, "The Drug Court Scandal," *North Carolina Law Review* 2000; 1477.

[12] Werb et al., supra note 10, p. 16.

[13] Ibid.

[14] CSC, *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey* by Dianne Zakaria *et al.* (Ottawa: CSC, March 2010).

[15] Canadian HIV/AIDS Legal Network, *HIV and Hepatitis C in Prisons*, Fact Sheet #1: "HIV and hepatitis C in prisons: the facts," (2008); C. Poulin et al., "Prevalence of HIV and hepatitis C virus infections among inmates of Quebec provincial prisons," *Canadian Medical Association Journal* 177(3) (2007): 252-256; L. Calzavara et al., "Prevalence of HIV and hepatitis C virus infections among inmates of Ontario remand facilities," *Canadian Medical Association Journal* 177(3) (2007): 257-261.

[16] E. Wood et al., "Initiation of opiate addiction in a Canadian prison: a case report", *Harm Reduction Journal* 2006.

[17] CSC, *Corrections Fact Facts – Drugs in Prisons* (undated).

[18] *Summary of Emerging Findings*, supra note 14.

[19] There is ample evidence of the success of such programmes from numerous other countries and they have been endorsed from a wide range of experts: e.g., Canadian HIV/AIDS Legal Network, *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, 2nd ed., 2006; Ontario Medical Association, *Improving Our Health: Why is Canada Lagging Behind in Establishing Needle Exchange Programs?* (Toronto: OMA, 2004); Canadian Medical Association, Resolution 26 of 17 August 2005, online: www.cma.ca/index.cfm/ci_id/45252/1.htm; Correctional Investigator of Canada, *Annual Report of the Correctional Investigator 2003-2004*; *Annual Report of the Office of the Correctional Investigator of Canada 2005-2006*; *Annual Report of the Office of the Correctional Investigator 2006–2007*; WHO & UNAIDS, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response* (Geneva, 2006); Public Health Agency of Canada, *Prison needle exchange: Review of the evidence* – Report prepared for CSC, 2006.

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[21] S. Chu & R. Elliott, *Clean Switch: The Case for Prison Needle and Syringe Programs in Canada*, Canadian HIV/AIDS Legal Network, 2008.

[22] Canadian HIV/AIDS Legal Network, *Prison Needle Exchange: Lessons from a Comprehensive Review.*, *supra* note 19.

[23] T. Gabor and N. Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures* (Ottawa: Justice Canada, 2002), pp. 17-18.

[24] K. Richburg, "N.Y. Governor, Lawmakers Agree to Soften Drug Sentencing Laws," *The Washington Post*, March 28, 2009, p. A02; M. Gray, "New York's Rockefeller Drug Laws," *TIME*, April 2, 2009.

[25] *Mandatory Minimum Penalties*, supra note 23.

[26] [2002] 3 S.C.R. 519.

[27] *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, s. 57.

[28] Ibid, s. 60.

[29] Council of Europe, Recommendation (2006)2 of the Committee of Ministers to member states on the European Prison Rules. Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, Part I, Basic Principle 3.

[30] This has been reported by prisoners to staff of PASAN and the Legal Network in Warkworth and Joyceville institutions.

[31] Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2009–2010*, 2010 at p. 33.

[32] Ibid at p. 32.

[33] *Sauvé v. Canada* [2002] 3 S.C.R. 519 at para. 14.

[34] Supra note 30.

[35] UN Doc. A/RES/45/111, 14 December 1990, Principle 5.

[36] UN Human Rights Committee, General Comment No. 21, Article 10 (Humane treatment of persons deprived of their liberty), UN CHROR, 44th Sess. 1(1992), UN Doc. HRI/GEN/1/Rev.6(2003), para. 3.

[37] Council of Europe, Recommendation (2006)2 of the Committee of Ministers to member states on the European Prison Rules. Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, Part 1, Basic Principle 1.

[38] See Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/6316 (1966).

[39] Prisoners' right of access to health care equivalent to that available in the community is reflected in international declarations and guidelines from the UN General Assembly, the WHO, UNODC and UNAIDS. See *Basic Principles for the Treatment of Prisoners*, supra, at para 9; WHO, *WHO Guidelines on HIV Infection and AIDS in Prisons*, 1993; UNODC, WHO and UNAIDS, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response*, 2006 at 10; and UNAIDS, "Statement on HIV/AIDS in Prisons to the United Nations Commission on Human Rights at its Fifty- second session, April 1996," in *Prison and AIDS: UNAIDS Point of View* (Geneva: UNAIDS, 1997) at 3.

[40] *Summary of Emerging Findings*, supra note 14.