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Procedural Clerk/Greffier à la procédure
Standing Committee on Public Safety and National Security
House of Commons
131 Queen Street,
Room 6-17
Ottawa, Ontario K1A 0A6

Dear M. David:

A Brief on Bill C-71: Firearms Legislation

I am writing to the Standing Committee on Public Safety and National Security in order to provide my views about Bill C-71, which is presently before Parliament. I am a longstanding member of the Coalition for Gun Control because I share the concerns of many that Canada needs much stronger firearm legislation. I am also a Professor Emeritus of Law, with my speciality as an academic being in the areas of Criminal Law, Criminal Procedure, and Sentencing. I therefore feel qualified to comment on Bill C-71. I would ask that you circulate this brief to the members of the Standing Committee.

As the members of the Standing Committee will know, where firearms are concerned, there is a great deal of discussion by gun proponents of “rights.” This is unfortunate for two reasons. First, it is largely an import from the United States due to its Second Amendment that in recent years was interpreted by their Supreme Court to provide for an individual right to bear arms. (and leaving aside that that ruling was contrary to more than two centuries of quite different rulings on the interpretation of the Second Amendment). Second, Canada’s Supreme Court made it clear in *R. v. Hasselwander*, [1993] 2 S.C.R. 398 and *Reference re: Firearms Act*, [2000] 1 S.C.R. 783 that Canadians do NOT have a right to bear arms and that the licensing and possession of firearms is legitimately a highly- regulated field. I will return to the theme of how the regulation of firearms in at least some contexts permits lower constitutional standards for inspections and licensing that the standards applicable in the case of full-blown criminal proceedings.

However, in respect of rights and firearms, there is another important perspective--that of international human rights. I am writing to encourage the committee to consider human rights in its deliberations with particular reference to the rights of women and vulnerable groups. If our priority were human rights, we would put the safety of communities front and centre in our discussions. If the rights of women were a priority, we would consider the impact of firearms on their safety and our obligations under international law to combat violence against women. And we would ensure that their voices were heard in this debate. If we put human rights at the centre of our deliberations, we would take this opportunity to fill the loopholes that have been created in recent years through the erosion of our firearms laws. The cost of not doing so is measured in human lives.

Let me begin with a short discussion of global norms that are applicable to firearms.

Global Norms:

Internationally there are few jurisdictions that recognize a “right” to bear arms. Global norms among industrialized countries include licensing, registration, and a ban on military assault weapons. Many countries also ban handguns. The European Union has standardized measures as do many other regions.

In *Hasselwander, supra*, the Supreme Court majority stated this:

Canadians, unlike Americans, do not have a constitutional right to bear arms. Indeed, most Canadians prefer the peace of mind and sense of security derived from the knowledge that the possession of automatic weapons is prohibited.

Even Courts in the United States have limited the implications of the Second Amendment. It has seldom been successfully used to prevent the introduction of reasonable regulation on firearms. *District of Columbia v. Heller*, 554 U.S. 570 (2008), is a landmark case in which the Supreme Court of the United States held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia for traditionally lawful purposes, such as self-defence within the home and was used to overturn a ban on handguns. However, despite that ruling, there are controls over sales of firearms in most states which are stronger than what is proposed in Bill C-71. Federal Firearms Licensees (FFL) are required to keep records of firearm sales and make them available to police to support the tracing of firearms (BC Task Force, 2017). In the US, there have been licensing provisions, registration provisions and prohibitions on firearms ranging from Saturday Night Specials to Military Assault Weapons that have not been successfully overturned by in the courts. The principal reason the US seems incapable of implementing effective legislation has far more to do with the power of the industry, the gun lobby and the lack of campaign spending limits than it has to do with rights (Diaz, 2005). We must ensure Canada does not follow suit.

The Problem:

Firearms are a significant cause of death and injury. For every person killed there are many more injured. Firearms are also part of a cycle of fear in domestic violence where women and family members and even pets are often threatened with firearms. They also create fear and insecurity in communities and firearms and related violence is associated with a wide range of negative physical and mental health effects which extend far beyond the victims of gun shots. There is a reasonable body of evidence that suggests that across jurisdictions stronger controls on firearms are associated with reductions in firearms injury and death (Santaella-Tenorio, Cerdá, Galea, & Andrés Villaveces, 2016), reinforcing therefore the obligations of the state to take action.

Women are differentially affected by firearms – they are far more likely to be shot and killed by their intimate partner than by a stranger. They are far less likely to use firearms. They are far more likely to support stronger gun laws. Tellingly, a poll conducted across Canada revealed, as one might expect that while the vast majority of Canadians supported the registration of firearms, about 2/3 of gun owners opposed it. That is not surprising. What is surprising is that almost the same percentage of people “living with a gun owner” supported the legislation. Yet in the debates about gun control, women’s voices are often absent.

While Canada does not generally collect crime data based on race, it is also obvious from the media reports that there are racial and socio economic dimensions to firearm violence,

particularly gang related homicide. The majority of victims are racialized. In contrast when it comes to suicide with firearms, the majority of victims are men with rates highest in rural areas and western provinces because of the ready availability of firearms.

With the implementation of stronger firearms regulation in the 1990's, there was a significant reduction in firearm-related suicides and intimate partner homicides. With weakening of gun laws in Canada, in particular, the repeal of the firearms registry, firearm-related mortality and injury are once again increasing. In 2016, for the third consecutive year, there was an increase in both the number and rate of firearm-related homicides in Canada. There were 223 firearm-related homicides reported, 44 more than the previous year. This represents a rate of 0.61 firearm-related homicides per 100,000 population, the highest rate since 2005 (<http://www.statcan.gc.ca/daily-quotidien/171122/dq171122b-eng.htm>). Shootings have now become the most common method of homicide, surpassing homicide by stabbing and beating (<https://www.publicsafety.gc.ca/cnt/cntrng-crm/gn-crm-frms/index-en.aspx>). The rate of handgun homicide (0.36 per 100,000 population) is at its highest point since 2008 and increased by 26% from the previous year (0.28 in 2015). Homicides involving a rifle or a shotgun also increased in number (+13) and rate (+34%) in 2016 (<https://www.statcan.gc.ca/pub/85-002-x/2016001/article/14668-eng.htm>). For the first time in 30 years, police in both Toronto and British Columbia reported that when crime guns were traced the majority were sources to Canada rather than being smuggled in from the United States signalling that the relaxation of laws is increasing diversion of legal guns to illegal markets. In 2016, the highest rates of firearm-related homicide were reported in Yukon and the Northwest Territories (2.67 and 2.27 per 100,000 population respectively). Alberta reported the next highest rate at 1.17 per 100,000. The rate of firearm homicides grew the most, however, in Saskatchewan, increasing from 0.36 per 100,000 in 2014 to 0.97 in 2015.

In Canada, among those aged 15 to 34, suicide was the second leading cause of death, preceded only by accidents (unintentional injuries) (<https://www.statcan.gc.ca/pub/82-624-x/2012001/article/11696-eng.htm>). Firearms were, in 20% of cases, the method used in male suicide (<https://www.statcan.gc.ca/pub/82-624-x/2012001/article/chart/11696-02-chart2-eng.htm>). Firearms used in suicide attempts in Canada generally tend to be rifles and shotguns (http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/wd98_4-dt98_4/p4.html). Rates of overall firearm death and injury are higher in rural areas and the west. Firearms suicides declined with successively strong firearms legislation in 1977, 1991 and 1995. For example, after Bill C-68 was enacted, the national rate of firearms suicide dropped by more than 50 percent: from 3.1 per 100,000 in 1995 to 1.5 per 100,000 in 2013 (Statistics Canada. *Deaths and mortality rate, by selected grouped causes, age group and sex, Canada*. [Downloaded from <http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=1020553>]). However, since then, a troubling pattern has emerged: for the first time in decades, firearm suicides are increasing, rising to 1.8 per 100,000 in 2015, the last year of available data. In that year 604 men committed suicide with firearms, the largest number in more than a decade and significantly higher than the 10 year average.

Firearms also have a significant impact on children and youth. Not only are they the third leading cause of death among Canadian youth (following automobile accidents and suicides by other

means) but they are a significant factor in injuries among children and youth. Although there are no comparable national studies, in the Province of Ontario which has one of the lowest rates of firearm ownership and injury in the country, every day there is almost one injury requiring hospitalization.

Finally, firearms have been used in rare but devastating incidents of violence waged for political, ideological or religious reasons and informed by misogyny, racism, anti-semitism, islamophobia, homophobia and other forms of hate. Legislation must include provisions to prevent the misuse and diversion of firearms to individuals and non-state actors at risk of misusing them.

International Law:

Under the *International Covenant on Civil and Political Rights* (ICCPR), human rights ‘derive from the inherent dignity of the human person’ and are aimed at achieving ‘freedom from fear and want.’ However, the repeated mass shootings in the United States have led Amnesty International to state that gun violence in that country is a human rights crisis. Under the ICCPR, governments have a duty to ensure people are secure (article 9) and that they are not arbitrarily deprived of life (article 6). It has been suggested that “A government acting in accordance with its human rights obligations would seek to maximise the chances of personal safety for its citizens by minimising circulation of deadly weapons. The deadlier the weapon, the more control is likely to be justified.” (Fletcher, 2016)

Barbara Frey, UN Special Rapporteur on Human Rights (2006) has stated that:

Under human rights law, States have a primary obligation to maximize human rights protection, especially with regard to the right to life. This commitment entails negative and positive obligations; State officials must refrain from violations with small arms and States must take steps to minimize armed violence between private actors. Article 2, paragraph 1, of the International Covenant on Civil and Political Rights imposes positive obligations upon States parties to prevent acts by private persons that impair fundamental rights, including the right to life.

Minimum effective measures that States must adopt to comply with their due diligence obligations to prevent small arms violence must go beyond mere criminalization of acts of armed violence. States must also enforce a minimum licensing requirement designed to keep small arms out of the hands of persons who are most likely to misuse them. Other effective measures should also be enforced to protect the right to life, as suggested by the draft principles on the prevention of human rights violations committed with small arms that have been proposed by the Special Rapporteur.

The principle of self-defence has an important place in international human rights law, but does not provide an independent, supervening right to small arms possession, nor does it ameliorate the duty of States to use due diligence in regulating civilian possession.... **The principle of self-defence does not negate the due diligence responsibility of States to keep weapons out of the hands of those most likely to misuse them. The State has particularly acute obligations to protect vulnerable groups, including victims of domestic violence, from abuses with small arms.** Article 51 of the Charter of the United Nations applies to States acting in self-defence against armed attacks against their State

sovereignty. It does not apply to situations of self defence for individual persons.
[emphases added]

Of her recommendations, several stand out and are relevant to this discussion:

The present final report will further delineate two legal principles: States' responsibilities under the due diligence standard to take affirmative steps to prevent small arms abuses by non-State actors and the implications of the principle of self-defence upon the State's small arms policies.

4. The human rights policy framework for this entire study is based upon the principle that **States must strive to maximize human rights protection for the greatest number of people, both in their own societies and in the international community.** In other words, **to meet their obligations under international human rights law, States must enact and enforce laws and policies that provide the most human rights protection for the most people.** In regard to small arms violations, this principle - the maximization of human rights protection - means that States have negative responsibilities to prevent violations by State officials and affirmative responsibilities **to increase public safety and reduce small arms violence by private actors.**

6. To maximize human rights protection, **States are also required to take effective measures to minimize private sector violence by enforcing criminal sanctions against persons who use small arms to violate the law and, further, by preventing small arms from getting into the hands of those who are likely to misuse them.** [emphases added]

This is perhaps instructive in informing recent cases of individual gun owners using excessive force allegedly to protect private property. Given the risks associated with the misuse of firearms, failure to adequately regulate them and to enforce those regulations may be seen as a failure to fulfil Canada's obligations under international law particularly with reference to vulnerable populations.

Certainly Canada's obligations under *Declaration on the Elimination of Violence Against Women* (DEVAW) as well as the *UN Committee on the Elimination of Discrimination Against Women* (CEDAW) would suggest more attention should be paid to the negative impacts of firearms on the safety of women particularly given the gendered differences in the benefits and costs of firearms in Canada. After being regarded as an international leader for many years, a gender plus analysis of Canada's firearms policy and its implementation leaves us vulnerable to international criticism.

Finally, Canada is also signatory to a number of international agreements intended to reduce the misuse and illicit trafficking of firearms that it has yet to ratify or comply with in part because of its inadequate regulations of gun sales and transfers, marking and tracing.

Analysis of Bill C-71

Bill C-71 does not do all it should to protect Canadians from the risks associated with firearm death, injury or threats. It does, however, provide some improvements over the current legislation. Specifically, some of these improvements are:

- Verification of licences by a peace officer, firearms officer or chief firearms officer.
- Referral of the classification of firearms (non-restricted, restricted, and prohibited) to the RCMP. The legislation must reinforce the longstanding principle that military assault weapons do not belong in the hands of civilians and therefore shifting responsibility for the classification of individual firearms to the RCMP is appropriate. A priority should be placed on updating the lists of restricted and prohibited weapons based on recommendations from the RCMP and police experts.
- Restoration of the discretion of the chief provincial firearms officer
- Providing access to the registry data for the Province of Quebec.
- Extension of the licensing screening period to ten years, removing the reference to the five-year period set out in subsection 5(2) of that Act, that applies to the mandatory consideration of certain eligibility criteria for holding a licence.

Recommendations for Bill C-71

Licensing: I recommend amendment to section 5 of the *Firearms Act* in respect of licensing to ensure that there is rigorous screening to ensure that:

1. A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm” but adding **(d) or for any other reason is considered a threat to themselves or others** to the list of enumerated criteria.
2. That section 5(2) should be amended to read:

In determining whether a person is eligible to hold a licence under ss (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

- (a) has been convicted or discharged under section 730 of the Criminal Code of
 - (i) an offence in the commission of which violence against another person was used, threatened or attempted,
 - (ii) an offence under this Act or Part III of the Criminal Code,
 - (iii) an offence under section 264 of the Criminal Code (criminal harassment), or
 - (iv) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the Controlled Drugs and Substances Act;
- (b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or
- (c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

These simple changes will signal that broader issues should be considered, that the spouse’s concerns should be taken seriously, that references should be contacted, and that mechanisms should be developed to deal with, for example, online hate or concerns from references even if they are not as explicit as the list defines them.

Sales Records:

It is extremely important to restore the controls on the sales of rifles and shotguns that were in place in 1977. Those controls required the licensed firearms owner to record the Firearms Acquisition Certificate (now Licence) number, make, model and serial number of firearms. Police were able to inspect these expeditiously in order to trace firearms. If they were conducting a criminal investigation of the firearm dealer they would need a warrant. These records should be subject to inspection annually. Our recommendation is that in order to combat the illegal gun trade and meet our international obligations, controls on sales must be strong and at least as rigorous as those in place in the United States.

It is also here that I wish to outline the constitutional position that applies to regulated activities and that differentiates those activities from unregulated activities insofar as constitutional protections are concerned. Since the enactment of the Charter of Rights and Freedoms in 1982, it has been the case, in general, that, in order to make a lawful search or seizure, the police require both reasonable and probable grounds that an offence has or is taking place and that evidence will be located in the place to be searched and they must undertake the search and seizure under the authority of a warrant issued by a judge. There are, however, important exceptions to these general requirements—and these exceptions occur in respect of regulated activities.

For instance, the police may stop a motor vehicle without reasonable and probable grounds (indeed, without any grounds whatever so long as they stop the vehicle to check for driver impairment, a driver's licence, vehicle registration, and insurance). In the context of regulated activities where both criminal offences and regulatory offences may be committed, the Supreme Court of Canada has long recognized that regulatory inspections and the like must be treated differently from criminal searches and seizures because, otherwise, public protection would be lost. I will refer you to a short list of Supreme Court of Canada decisions that bear on this point: *Thomson Newspapers Ltd. v. Canada* (1990), 76 C.R. (3d) 129 (S.C.C.); *R. v. McKinlay Transport Ltd.* (1990), 76 C.R. (3d) 283 (S.C.C.); *Comité paritaire de l'industrie de la chemise v. Potash* (1994), 168 N.R. 241 (S.C.C.); and, in the income tax realm, *R. v. Jarvis* (2002), 6 C.R. (6th) 23 (S.C.C.).

The selling, possession, and use of firearms is—and must be—a highly regulated field. There is no reason whatsoever why the regime set out by our highest court to deal with both everyday regulation and criminal investigations within the same scheme cannot apply in this context as well. In *Jarvis*, the Supreme Court upheld the ability of Canada Revenue Agency to require taxpayers to supply information in support of deductions, tax credits, and the like without requiring a warrant. Quite obviously, a warrant requirement would be totally unworkable in the administration of the income tax system. On the other hand, once CRA has the grounds to believe that a particular taxpayer has committed an offence, a warrant is then necessary in order to search for and seize documents that might assist the criminal investigation. **A similar approach for firearm sellers is called for. The police ought to be able to inspect the records of a firearm seller without a warrant in order to ensure that the seller is following the legal requirements. If the seller is believed to have committed a criminal offence, then a warrant would be required.** Unfortunately, Bill C-71 does not adopt this sensible, constitutional manner

of balancing the public interest in seeing that dangerous instruments are being regulated vs. the privacy protection that all Canadians enjoy under section 8 of the Charter.

In addition to urging that change to the legislation, I believe that some strengthening of the conditions applicable to firearms businesses are in order. For ease of reference, I am reproducing the proposed section 58.1 with proposals for strengthening in bold:

58.1(1) A chief firearms officer who issues a licence to a business shall attach the following conditions to the licence:

a) The business must keep records and keep the prescribed information that relates to the businesses possession and disposal of non-restricted firearms

ADD: in a form or prescribed by the Commissioner and containing such information as is prescribed by the Commissioner

b) the business must record – and for a period of 20 years, from the day on which the business transfers a non-restricted firearm, or for a longer period that may be prescribed – keep the following information in respect of the transfer

i) the reference number issued by the Registrar,

(ii) the day on which the reference number was issued,

(iii) the transferee's licence number, and

(iv) the firearm's make, model and type and, if any, its serial number;

(c) the business must, unless otherwise directed by a chief firearms officer transfer any records containing the information described in paragraphs (a) and (b) to a prescribed official if it is determined that the business will cease to be a business.

(2) The prescribed official shall, (in accordance with the regulations), keep any records it receives from a business.

ADD: 3) The business must produce the record and inventory for inspection at the request of any police officer or police constable or any other person authorized by regulations made pursuant to para 106.8(a) to enter any place where a business referred to in that paragraph is carried on; and

d) mail a copy of the record and inventory relating to restricted weapons to the Commissioner or to any person authorized [...] to issue a permit to carry on the business in accordance with any request in writing made by the Commissioner or any such person

Restricted and Prohibited Weapons: Authorizations to Transport

The proliferation of restricted and prohibited weapons is a cause for concern. Restricted weapons, principally handguns, are supposed to be **restricted**, yet the number is approaching 1 million legally owned guns. Police have reported increases in diversion of legal guns to illegal markets. Research has certainly linked the likelihood of fatalities and the number of fatalities to the use of military style semi-automatics arguing that the combination of rapid fire and large capacity magazines increases mortality and morbidity (Yank D. Coble Jr, MD; A. Bradley

Eisenbrey, MD, PhD; E. Harvey Estes Jr, MD; et al Mitchell S. Karlan, MD; William R. Kennedy, MD; Michael P. Moulton; Patricia Joy Numann, MD; William C. Scott, MD; W. Douglas Skelton, MD; Richard M. Steinhilber, MD; Jack P. Strong, MD; Henry N. Wagner Jr, MD; William R. Hendee, PhD; William T. McGivney, PhD; Sharon B. Buchbinder, RN, MA; Sona Kalousdian, MD, MPH ” Assault Weapons as a Public Health Hazard in the United States“ JAMA. 1992;267(22):3067-3070 <https://jamanetwork.com/journals/jama/article-abstract/397742>).

The legislation must ensure that controls on handguns (restricted and prohibited weapons) are reinstated through restoring strict issuance of the authorizations to transport. Previous legislation allowed restricted and prohibited weapons to be transported between two or more defined locations. The new formulation allows them to be transported to any gun club or range in the province in which the gun owner resides. This means virtually anywhere. There is nothing in the law to stem the proliferation of restricted and prohibited weapons and the risks of a diversion. This is a small but important measure.

Controls on Stockpiling

Incidents involving mass shootings, whether in Canada, the United States, or elsewhere, typically involve a person who has a stockpile of firearms. Therefore, it is imperative that the legislation will ensure that owners of multiple firearms – whether citizens or dealers – are subject to higher levels of scrutiny, especially because of the risks of diversion of firearms into illegal activities. One way to accomplish this would be to stringently exercise the existing inspection powers for inspecting safe storage of collections and to do so on an annual basis. While there are mechanisms for flagging multiple purchases of restricted and prohibited weapons, mechanisms are needed to do this for unrestricted firearms as well, perhaps through the verification process.

Additional Measures

- Adding a mechanism to require physicians and other professionals to report cases where individuals are a threat to themselves or others. This may have to be at the provincial level (consistent with the Motor Vehicle provisions and Anastasia’s law).
- Committing to providing appropriate mechanisms to address the problems of non-powder guns.
- Ensure that questions about access to firearms are part of all risk assessment protocols and that physicians and other professionals are aware of the procedures to lawfully and safely remove firearms from situations where there is a potential risk.
- Continued support for research into firearm-related injury and death in order to guide further public policy development and future legislation.

Conclusion

I am pleased that the Parliament of Canada is seeking to strengthen Canada’s firearms laws. Nevertheless, we believe that there are weaknesses in the proposed legislation and that it could be considerably improved through the adoption of the measures that I have outlined in this brief.

Yours sincerely,

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