

MORE THAN WE CAN AFFORD: **THE COSTS OF MANDATORY MINIMUM SENTENCING**

Raji Mangat

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By Raji Mangat

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EXECUTIVE SUMMARY

Over the last several decades, the federal government has introduced sweeping, substantial amendments to the Canadian criminal justice system. “Tough on crime” measures, such as Bill C-10, *The Safe Streets and Communities Act*, include the increased use of mandatory minimum sentences. There are now over 50 offences carrying mandatory minimum terms of imprisonment in the *Criminal Code*, and mandatory minimum sentences for non-violent drug offences in the *Controlled Drugs and Substances Act*.

Historically, judges have had wide discretion to fashion fit sentences for criminal offenders. Minimum sentences encroach on that broad discretion by setting a mandatory floor below which judges cannot sentence, even if to do so would be the proportionate sanction in the circumstances. Absent a finding of unconstitutionality, Canadian law does not grant judges any latitude in departing from the imposition of a mandatory minimum sentence. However, the *Criminal Code* also recognizes that proportionality is the fundamental principle in setting a just sentence. Canadian courts are being asked to reconcile these contradictory approaches to sentencing where mandatory minimums apply. In this regard, Canada is increasingly out of step with comparable jurisdictions where efforts are being made to restore judicial discretion in sentencing decisions.

The British Columbia Civil Liberties Association undertook this research to provide a comprehensive look at the legal and societal implications of mandatory minimum sentencing. This report adds to the literature on mandatory minimum sentencing in Canada by bringing together considerations about the efficacy, costs and collateral consequences of minimum sentences. The report also looks at the state of the law in challenging mandatory minimums under the *Canadian Charter of Rights and Freedoms*.

Rationales advanced in support of mandatory minimum sentencing include their effect as a general deterrent, and their role in making the justice system more transparent, certain and fair. However, the research shows that punitive sentencing does not lead to safer communities. Instead of deterring potential offenders, mandatory minimums result in excessive, harsh penalties that increase the likelihood of recidivism. Mandatory minimum sentencing shifts

discretion from judges, whose decisions are public and reviewable, to prosecutors, whose decision-making is largely beyond review. While facially neutral, mandatory minimum sentences affect individuals from certain communities disproportionately. Mandatory minimum sentences have a particularly detrimental effect on Aboriginal offenders and communities.

The monetary costs associated with punitive reforms to the criminal justice system, including the rise of mandatory minimum sentencing, are staggering. However, the true cost of these measures goes well beyond expenditures on their implementation. There is a human and social cost to mandatory minimum sentencing that affects the long-term economic viability and wellbeing of Canadian communities. It is important to appreciate the downstream collateral consequences of punitive sentencing regimes as part of our collective responsibility for a just society.

An increase in the use of mandatory minimum sentencing results in an increase in the number of court challenges to their implementation. *Charter* challenges to the imposition of a mandatory minimum take the form of attacking the duration of the sentence itself, the means used to arrive at the mandatory minimum sentence, or its discriminatory impact on particular offenders. The law is in a state of flux and courts are being presented with novel approaches to testing the constitutionality of mandatory minimum sentences.

This report highlights the urgent need for evidence-based, thoughtful policy reform in the criminal justice system. In the meantime, there are important roles for lawyers, advocacy organizations, researchers and policy-makers to play in addressing the unjustness that results from mandatory minimum sentences. Challenging these sentences in court is one approach, but equally important is educating the public about the criminal justice system and ongoing research on the collateral consequences of incarceration.



INTRODUCTION

On March 13, 2012, the *Safe Streets and Communities Act*, S.C. 2012, c. 1 [SSCA] received Royal Assent.¹ The SSCA – also known as Bill C-10 and the “Omnibus Crime Bill” – marked a dramatic legislative retreat from the primacy of judicial discretion in the sentencing of criminal offenders. Bill C-10 combined nine bills that had been separately introduced during the previous Parliament.² It made sweeping, substantial amendments to the criminal law ranging from reducing the availability of pardons to adding specific deterrence and denunciation as sentencing principles for young offenders; from restrictions on the use of conditional sentences of imprisonment to facilitating the pre-sentencing detention of young persons.³ Alongside these changes, the SSCA also added new mandatory minimum sentences, including for the first time minimum sentencing in the *Controlled Drugs and Substances Act* [CDSA].⁴

¹ The House of Commons passed Bill C-10 on March 12, 2012 with 154 Members of Parliament voting in favour of the legislation and 129 voting against.

² Bill C-10 brought together the following bills, all of which had been introduced during the Third Session of the 40th Parliament and which died on the *Order Paper* with the dissolution of Parliament on March 26, 2011: *Protecting Children from Sexual Predators Act* (former Bill C-54); *Penalties for Organized Drug Crime Act* (former Bill S-10); *Sébastien’s Law (Protecting the Public from Violent Young Offenders)* (former Bill C-4); *Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act* (former Bill C-16); *Ending Early Release for Criminals and Increasing Offender Accountability Act* (former Bill C-39); *Eliminating Pardons for Serious Crimes Act* (former Bill C-23B); *Keeping Canadians Safe (International Transfer of Offenders) Act* (former Bill C-5); *Justice for Victims of Terrorism Act* (former Bill S-7); and *Preventing the Trafficking, Abuse and Exploitation of Vulnerable Immigrants Act* (former Bill C-56).

³ The SSCA made amendments to every key criminal justice statute: the *Criminal Code*, R.S.C., 1985, c. C-46, [Criminal Code or Code], the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [CDSA], the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the *Criminal Records Act*, R.S.C., 1985, c. C-47, and the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

⁴ Mandatory minimum penalties for drug offences had been under consideration for several years before Bill C-10 was enacted. They were first considered by Parliament in Bill C-26, which received second reading during the 2nd Session of the 39th Parliament, but which died on the *Order Paper* when Parliament was dissolved on September 7, 2008. Bill C-26 was resurrected in the form of Bill C-15, which was introduced during the 2nd Session of the 40th Parliament. Although Bill C-15 had passed the House of Commons and the Senate with certain amendments, it too died on the *Order Paper* when Parliament was prorogued on December 30, 2009. Mandatory minimums for drug offences were again considered in the 40th Parliament, when the Leader of the Government in the Senate introduced Bill S-10 in the Senate on May 5, 2010. Bill S-10 also died on the *Order Paper* when the 40th Parliament was dissolved on March 26, 2011.

Opposition to Bill C-10 was widespread. Organizations such as the Canadian Bar Association, the Canadian Centre for Policy Alternatives, the Assembly of First Nations, the Women's Legal Education and Action Fund, the John Howard Society of Canada, the Canadian Association of Elizabeth Fry Societies, the Canadian Psychological Association and UNICEF Canada all problematized different aspects of the Bill.⁵ But resistance to Bill C-10 was not limited to criminologists, psychologists, lawyers and advocates. Some provincial governments – Ontario and Québec being the most vocal – raised red flags about the cost implications of the Omnibus Crime Bill, particularly its impact on provincial coffers.⁶ The Federation of Canadian Municipalities adopted a resolution at its June 2013 annual conference calling on the federal government to provide a rigorous cost-benefit analysis of the impact of new federal crime control laws, including the *SSCA*.⁷

Mandatory minimum sentences are not new to the Canadian criminal justice system, which has always contained a certain class of offences mandating a minimum level of punishment. They set a threshold below which judges cannot go in cases where an accused has been found, or has plead, guilty. A penalty below the minimum may only be imposed on an offender if the sentencing judge finds the minimum penalty unconstitutional.⁸

⁵ This is by no means an exhaustive recounting of opposition to Bill C-10. Many groups and individuals appeared before House and Senate committees to make submissions, both in favour and critical of Bill C-10. Transcripts of this testimony before the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs are available online from the Parliament of Canada website at: www.parl.gc.ca/LegisInfo.

⁶ Kim Mackrael, "Huge price tag for provinces attached to crime bill" *The Globe and Mail* (June 28, 2012), available online: www.theglobeandmail.com/news/politics/huge-price-tag-for-provinces-attached-to-crime-bill/article1359437; Canadian Press, "Provincial pleas for federal crime bill funding dismissed" (January 27, 2012), available online: www.cbc.ca/news/canada/prince-edward-island/provincial-pleas-for-federal-crime-bill-funding-dismissed-1.1147974; Tobi Cohen, "Tories use majority to pass omnibus crime bill" *National Post* (March 12, 2012), available online: <http://news.nationalpost.com/2012/03/12/contentious-tory-crime-bill-passes-as-countrys-biggest-provinces-voice-concerns-over-costs/>.

⁷ Federation of Canadian Municipalities, *Investments in Crime Prevention Resolution*, adopted June 2013, available online: www.fcm.ca/home/about-us/corporate-resources/fcm-resolutions.htm.

⁸ Mandatory minimum penalties need not be penalties of imprisonment; mandatory minimum fines also feature in the Canadian criminal justice system. The focus of this report is on the challenges posed to law and society by the imposition of mandatory minimum terms of imprisonment.



Mandatory minimum sentences of imprisonment have been a feature of the Canadian criminal justice system since 1892, when the first *Criminal Code* was enacted.⁹ At that time, there were six offences carrying minimum terms of imprisonment, of which the most severe was a five-year sentence for “stopping the mail with intent to rob.”¹⁰ Today, there are approximately 50 offences carrying a mandatory minimum sentence of imprisonment in the *Criminal Code*, the vast majority of which came into force since 1995.¹¹ And the count will continue to rise: notwithstanding the opposition to mandatory minimum sentences in Bill C-10, the government continues to introduce new legislation featuring mandatory minimum penalties. Two of these are the *Tackling Contraband Tobacco Act*¹² and the *Tougher Penalties for Child Predators Act*.¹³ The former will add new mandatory minimum sentences of imprisonment and the latter will increase current mandatory minimum sentences for a number of offences in the *Criminal Code*.

Over the past decade, the Canadian justice system has experienced a deliberate and fundamental shift towards punitive sentencing. There now exist an array of mandatory minimum sentences, multiple restrictions on the availability of alternatives to incarceration such as conditional sentences of imprisonment,¹⁴

⁹ For a comprehensive review of the legislative history of mandatory minimum sentences of imprisonment in Canada from 1892 to 1999, see Nicole Crutcher, *Mandatory Minimum Penalties of Imprisonment: An Historical Analysis* (M.A. Thesis, Carleton University, 2000) [unpublished] [*Historical Analysis*].

¹⁰ *Ibid.* at 27. With the exception of a three-month minimum sentence for engaging in prizefights, the remaining minimum penalties were for offences against public institutions (*ibid.* at 157).

¹¹ This number was reached by counting offences on the offence grid of the *Martin’s Annual Criminal Code, 2014*. One may quibble over the actual number of offences attracting mandatory minimum sentences of imprisonment, as this number could be higher or lower depending on how you choose to count hybrid offences and mandatory minimums for first and subsequent offences. Regardless, it is beyond doubt that mandatory minimum sentences of imprisonment are a growing trend in Canada.

¹² Bill C-10, *An Act to Amend the Criminal Code (Trafficking in Contraband Tobacco)*, 2nd Sess., 41st Parl., 2013, cl. 3 (introduction and first reading November 5, 2013).

¹³ Bill C-26, *An Act to Amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to Enact the High Risk Child Sex Offender Database Act and to Make Consequential Amendments to Other Acts*, 2nd Sess., 41st Parl. 2014, cls. 7, 9-14 (introduction and first reading February 26, 2014).

¹⁴ Conditional sentences of imprisonment are authorized under s. 742.1 of the *Criminal Code*. These sentences allow an offender to serve time under community supervision instead of at a penitentiary. Since their inception into the *Criminal Code* in 1995, judges’ ability to order conditional sentences

and a reduction of the ratio of credit for pre-sentence custody.¹⁵ Almost immediately after the purpose and principles of sentencing were codified, and most palpably since 2006, Parliament has enacted a range of amendments to the *Criminal Code*. This practice continues what the Canadian Sentencing Commission characterized in 1987 as “piecemeal and inconsistent” reforms¹⁶ – none of which appear consonant with a principled or evidence-based approach to sentencing. The common thread running through these reforms is a not-so-slow and steady encroachment on the decision-making power of judges. Judges may view these developments as an expression of a lack of confidence in their ability to dispense justice; troublingly, so may the public.

“Tough on crime” measures are being avidly pursued at a time when crime rates in Canada are at their lowest since the early 1970s.¹⁷ Canada is somewhat anomalous in its pursuit of mandatory minimums, as there is now clear evidence that several comparable jurisdictions with mandatory sentencing legislation are presently either repealing or amending these punitive laws.¹⁸ The United States,

has gradually been eroded. The *SSCA* added new exceptions to eligibility for conditional sentencing orders.

¹⁵ The *Truth in Sentencing Act*, S.C. 2009, c.29 amends the *Criminal Code* to limit the credit a judge may allow for time an offender has spent in pre-sentencing custody. Prior to the *Truth in Sentencing Act*, courts had developed a practice of crediting pre-sentence detention at a ratio of two days for one, and sometimes more. The rationale for giving credit to offenders in custody awaiting sentencing is both quantitative and qualitative. Quantitatively, offenders who were not released on bail should not spend more days behind bars than if they had been released on bail. Qualitatively, time spent in pre-trial remand detention is often more difficult than post-sentence incarceration. The *Truth in Sentencing Act* sets a maximum credit of one day for each day spent in pre-sentencing custody as a default (s. 719(3)), with a proviso that only if circumstances justify it, a judge may allow a maximum credit of one and half days for each day spent in pre-sentencing custody (s. 719(3.1)). In *R. v. Summers*, 2014 SCC 26 and *R. v. Carvery*, 2014 SCC 27, the Supreme Court of Canada unanimously held that while the *Truth in Sentencing Act* caps pre-sentence credit, it does not limit or change the circumstances that justify granting credit.

¹⁶ Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*. (Ottawa: Minister of Supply and Services Canada, 1987) (Chair: J.R. Omer Archambault) [*Sentencing Reform*] at 477.

¹⁷ The crime rate peaked in 1991, but has been declining steadily ever since. In 2012, the police-reported crime rate dropped to its lowest level since 1972. Samuel Perrault, “Police Reported Crime Statistics in Canada, 2012” (2013) *Juristat*, 34:1, available online: www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.pdf.

¹⁸ Research and Statistics Division, Department of Justice Canada, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models* by Julian V. Roberts (2005) [*Representative Models*] at 6, available online: www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/index.html.



for instance, is presently moving away from mandatory minimums by re-introducing judicial discretion in sentencing at the federal and state levels.

A note on judicial discretion is necessary here. Judicial discretion in sentencing is never entirely unfettered. The sentencing process does not occur in a vacuum. A trial judge exercises his or her discretion to impose a fit and fair sentence within statutory and judicially defined limits, including sanctions for offences that may be bounded at either end of the range by minimums and maximums. Even in the absence of a mandatory minimum floor, judicially-determined sentencing ranges operate as guidelines, and sentencing decisions may be overturned on appeal if

“Tough on crime” measures are being avidly pursued at a time when crime rates in Canada are at their lowest since the early 1970s.

they stray too far. A fit sentence is widely accepted as one imposed by the court after consideration of the range of sentences imposed for similar offences committed reasonably contemporaneously.¹⁹ However, as these ranges are not set in stone, courts may order sentences outside the range,

provided that they do so in accordance with the principles and objectives of sentencing, and with regard to the circumstances of the offence and the offender, and the needs of the community in which the offence took place.²⁰

The Canadian criminal justice system strikes a balance between the roles of legislators and the judiciary. Most offences are drafted fairly broadly (within constitutional limits) to capture a range of potentially criminal conduct. Judges are required then to exercise a broad power to ensure that the sentence fits the crime in the circumstances not only of the offence, but also of the offender. Just as not every future criminal act can be pre-determined; neither can the circumstances and moral culpability of every future offender. Significant changes to the role of one criminal justice actor made without regard to the system as a whole are ill considered. These are short-term responses to concerns that require comprehensive policy reform. In the case of mandatory minimum sentencing, they are also costly and harmful.

¹⁹ Clayton C. Ruby, Gerald J. Chan and Nader R. Hasan, *Sentencing*, 8th ed. (Markham: LexisNexis, 2012) at 788.

²⁰ *Ibid.* at 790, citing to *R. v. Nasogaluak*, 2010 SCC 6 [*Nasogaluak*] at para. 44.

The British Columbia Civil Liberties Association undertook this research to provide a comprehensive look at the legal and societal implications of mandatory minimum sentencing. While many fundamental changes have been made to the criminal justice system, many of which impact the ability of judges to properly exercise discretion, the focus of this report is on mandatory minimum sentences of imprisonment. The report is meant both for the interested layperson and for lawyers and policy-makers.

The report begins with brief introductions to mandatory minimum sentencing and principles of sentencing. It then goes on to look at minimum sentencing as policy. Here, the focus is on the impact of mandatory minimums on deterrence, on shifting discretion in the criminal justice system, and on disparities and discrimination in incarceration practices. Along with the policy implications of mandatory minimum sentencing, concerns have also been raised about its cost implications. The report describes efforts made at articulating the financial costs of criminal justice reforms and raises some collateral costs of incarceration, the impact of which will require a great deal more research. As the number of mandatory minimums increases, so too do challenges to their constitutionality. The report describes ways in which mandatory minimums have been, and may continue to be, challenged in the courts. It ends with a brief look at minimum sentencing for drug offences, and efforts in the United States to return discretion to judges after decades of a failed “War on Drugs.”



MANDATORY MINIMUM SENTENCING

Mandatory minimum sentencing is not a uniquely Canadian phenomenon. Apart from the United States – the undisputed leader among western states in the adoption of broad-based mandatory penalties – minimum sentencing features in the criminal justice systems of, *inter alia*, England and Wales, Scotland, Ireland, Australia, New Zealand, India and South Africa. Mandatory sentences of imprisonment in common law jurisdictions can be classified into three general categories: (1) sentences that are truly mandatory, in that they do not allow the exercise of judicial discretion either above or below the mandated sentence (such as a sentence of life imprisonment for first-degree murder); (2) sentences that set a mandatory floor below which the court cannot sentence an offender, although courts may exercise discretion in sentencing above the mandatory minimum limited only by statutory *maxima*; and (3) presumptively mandatory sentences of custody that permit courts to impose a lesser custodial sentence or non-custodial sentence only in exceptional circumstances.²¹

This latter form of mandatory sentencing – whereby relief from, or exceptions to, mandatory minimum sentences are provided for in the law – is the most prevalent approach to legislating mandatory minimums among states comparable to Canada. Such an approach allows judges to retain discretion to impose sentences below the minimum in certain prescribed circumstances, or where the court finds that a strict application of the minimum sentence will result in an unjust penalty. However, no general provision for exceptional relief from the application of mandatory sentences exists in Canada.²²

There have been calls for some form of residual judicial discretion in the Canadian context. A study of exceptional relief provisions in other common law

²¹ *Representative Models*, *supra* note 18 at 4.

²² The only (very limited) exception to the imposition of a mandatory penalty is found in recent amendments to the *CDSA*. Under s. 10(5), the court is not required to impose the minimum punishment if the offender has successfully completed a drug treatment program. The potential of this provision to address concerns about mandatory minimum sentencing for drug offences should not be overstated. Access to drug treatment programs in Canada is very limited. At present, these programs are available only in large urban centres. Moreover, individuals who wish to avail themselves of this exception must forego the right to a trial and plead guilty. There are additional qualification requirements for acceptance into these treatment programs that put them out of reach for many offenders.

jurisdictions was recently prepared under the auspices of the Uniform Law Conference of Canada.²³ Nine distinct categories of exceptions or exemptions were identified, including relief in light of “mitigating factors,” in “exceptional or substantial and compelling circumstances,” and in the “interests of justice” or to avoid “unjust sentences.”²⁴ In 2011, the Canadian Bar Association passed a resolution calling on the Government of Canada to add a “safety valve” in s. 718 of the *Criminal Code* that would grant judges a residual discretion, such that: “where injustice could result by the imposition of a mandatory minimum sentence, in extraordinary circumstances, the judge may consider other sentencing options.”²⁵

Mandatory minimum sentences of imprisonment in Canada arise in one of three general circumstances: (1) where the offence provides for a minimum sentence in all circumstances leading to the commission of the offence; (2) where a mandatory minimum sentence applies to a second, third or subsequent offence; and (3) for hybrid offences,²⁶ where a mandatory minimum sentence or a greater minimum sentence applies when the Crown elects to proceed by way of indictment. Most mandatory minimum sentences in the *Code* are a combination of the above criteria, applying different minimums depending on the Crown’s election on the mode of proceeding, and for second and subsequent offences. Several offences also require a minimum sentence where certain aggravating factors exist, such as the use of a firearm in the commission of the offence, connection to a criminal organization, or the age of the complainant in respect of sexual offences.

Regardless of how mandatory minimum sentences come to bear on an offender, in all their forms Parliament has predetermined the baseline punishment for a particular act or omission, thereby preventing the court from fully considering the circumstances of the offence and of the offender. Absent a finding of

²³ Yvon Dandurand, *Exemptions from Mandatory Minimum Penalties* (report prepared for the Uniform Law Conference of Canada Working Group on Exemptions from Mandatory Minimum Penalties) (August 2012), available online: www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0032.pdf.

²⁴ *Ibid.* at 19-41.

²⁵ Canadian Bar Association, *Justice in Sentencing*, Resolution 11-09-A, carried by the Council of the Canadian Bar Association at the Annual Meeting held in Halifax, August 13-14, 2011.

²⁶ A hybrid offence is an offence that may be pursued as either a summary conviction offence or an indictable offence. The Crown prosecutor decides the mode of proceeding.



unconstitutionality, judges are unable to account for any unforeseen factors that may make the minimum sentence inappropriate or excessive in the particular circumstances.

PRINCIPLES OF SENTENCING

The significance of sentencing in the criminal justice system cannot be overstated: the stakes can go no higher. Sentencing judges must balance the needs of society in general, of victims, and of individual offenders while at the same time giving effect to principles of accountability and proportionality to achieve a sentence that is fit and fair. Historically, the approach to sentencing in Canada has granted wide discretion to judges, with mandatory penalties very much the exception. There is good reason for this. Judges are uniquely positioned to fashion just and appropriate sentences: they will have heard all the evidence concerning the circumstances of the offence and of the offender, they will be better able to assess community needs, and they have experience at the front-line of the justice system.²⁷

It was not until 1995 that Parliament provided legislative guidance to courts on the purpose and principles of sentencing. Bill C-41 came into force as the new Part XXIII of the *Criminal Code*.²⁸ This Bill was the culmination of over a decade of careful study. A pressing need for sentencing reform had been recognized in the early 1980s. The Canadian Sentencing Commission [Commission] was established by the federal government in 1984 to review the practices and problems of sentencing in Canada. The Commission published a landmark report of its findings in 1987,²⁹ recommending comprehensive reforms that included presumptive sentencing guidelines for all offences in the *Criminal Code*.³⁰ While the Commission's reforms were not ultimately adopted, Bill C-41 was nevertheless an innovation. It was the first effort to codify the purpose and

²⁷ See e.g. *R. v. Wu*, 2003 SCC 73 at para. 19 (regarding appellate review of sentencing judgments).

²⁸ Bill C-41, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, S.C. 1995, c. 22 (Assented to July 13, 1995). For a discussion of Bill C-41, see David Daubney and Gordon Parry, "An Overview of Bill C-41 (*The Sentencing Reform Act*)" in Julian V. Roberts and David P. Code (eds.) *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999).

²⁹ *Sentencing Reform*, *supra* note 16.

³⁰ A detailed consideration of the work of the Commission is outside the scope of this report. For more information about sentencing reform in Canada, including the work of the Commission, see Julian V. Roberts and Howard H. Bebbington, "Sentencing Reform in Canada: Promoting a Return to Principles and Evidence-Based Policy" (2013) 17 Can Crim L Rev 327 and Anthony N. Doob, "The Unfinished Work of the Canadian Sentencing Commission" (2011) 53 Can J Crim & Criminal Justice 279.

principles of sentencing in Canada and created the architecture of sentencing that still stands today.

Section 718 of the *Code* sets out the fundamental *purpose* of sentencing as “contribut[ing], along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions” that meet one or more of six listed objectives: (a) denunciation, (b) specific and general deterrence, (c) incapacitation, (d) rehabilitation, (e) reparation and (f) promoting a sense of responsibility in offenders. No one sentencing objective is valued higher than any other.³¹

Among the sentencing principles enumerated in the *Code* is the parity principle (that like offenders be treated alike: s. 718.2(b)), the totality principle (that, in combination, consecutive sentences not be unduly long or harsh: s. 718.2(c)), and principles of restraint in sentencing (that there be no deprivation of liberty if less restrictive sanctions are appropriate in the circumstances: s. 718.2(d) and the consideration of all available sanctions other than imprisonment for all offenders, particularly Aboriginal offenders: s. 718.2(e)). The *Criminal Code* also directs courts to increase or reduce a sentence to account for aggravating or mitigating circumstances.³²

However, the *fundamental* principle of sentencing is identified in the *Code* as *proportionality* between the gravity of the offence and the degree of responsibility of the offender (s. 718.1). The principle of proportionality has two equally important dimensions. A sentence that reflects both the gravity of the offence and the level of responsibility of the offender enhances public confidence in the criminal justice system and ensures that the sentence is no more than what is appropriate. As the Supreme Court of Canada has stated, “a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.”³³ Proportionality in sentencing is so essential to the

³¹ This is so with two exceptions: under s. 718.01, courts must give primary consideration to denunciation and deterrence when sentencing for offences that involve the abuse of a person under the age of 18, and under s. 718.02 when sentencing certain offences against peace officers and other participants in the justice system.

³² A non-exhaustive list of seven aggravating circumstances specified in the *Code* include motivation by bias, prejudice or hate (s. 718.2(a)(i)), abuse of a person under the age of 18 years (s. 718.2(a)(iii)), and evidence of connection with a criminal organization (s. 718.2(a)(iv)).

³³ *R. v. Ipeelee; R. v. Ladue*, 2012 SCC 13 [*Ipeelee*] at para. 37.



criminal justice system that it arguably has a constitutional dimension, and may itself constitute a principle of fundamental justice.³⁴

It has long been recognized that proportionality in sentencing is best achieved through individualized decision-making, having regard to both the nature and circumstances of the particular offence and of the particular offender.³⁵ Situating proportionality at the core of the sentencing scheme supports the legitimacy and justness of a particular penalty

by linking the offender's punishment to the blameworthiness of his or her conduct. In this way, proportionality operates as a tool of restraint, such that "a fit sentence will impose no more

Proportionality in sentencing is so essential to the criminal justice system that it arguably has a constitutional dimension, and may itself constitute a principle of fundamental justice.

coercion than is reasonably necessary to realize the relevant objectives as supported by the evidence concerning the offence and the offender."³⁶ It may be useful to think of proportionality as a gauge used to measure the justness of sanctions, precluding the imposition of unduly harsh or improperly lenient punishment alike.

If proportionality is a gauge, however, the experience of the last decade shows that it is out of alignment. The years since 1995 have been marked by the proliferation of exceptional enactments (such as those legislating mandatory minimum sentences of imprisonment and restricting the availability of

³⁴ See *ibid.*, at para. 36; *R. v. Smith*, [1987] 1 S.C.R. 1045 [*Smith*] at 1075-1076 (per Lamer J.); *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 [*Re Motor Vehicle Act*] at 533 (per Wilson J.).

³⁵ See e.g., *R. v. Proulx*, 2000 SCC 5 at para. 82 ("Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the 'punishment fits the crime.' As a by-product of such an individualized approach, there will be inevitable variation in sentences imposed for particular crimes.") More recent examples include *Nasogaluak*, *supra* note 20 at para. 43 ("The determination of a 'fit' sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case" (internal citations omitted) and *Ipeelee*, *supra* note 33 at para. 38 ("Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender").

³⁶ See Patrick Healy, "Sentencing From There to Here and From Then to Now" (2013) 17 Can Crim L Rev 291 at 293. See also, Morris J. Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 Oxford J Legal Stud 57 at 68-69.

alternatives to incarceration) straining against what are thought to be settled principles of sentencing. Sentencing judges sit squarely at the centre of these contradictory developments. The tension that arises is one between the courts and the legislature, but also one amongst the wills of legislators past and present.



POLICY CONSIDERATIONS

... Mandatory penalties are a bad idea. They often result in injustice to individual offenders. They undermine the legitimacy of the courts and the prosecution system by fostering circumventions that are wilful and subterranean. They undermine achievement of equality before the law when they cause comparably culpable offenders to be treated radically differently when one benefits from practitioners' circumventions and another receives a mandated penalty that everyone immediately involved considers too severe. There is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.³⁷

Just as mandatory minimums are not new to the Canadian criminal justice system, opposition to their imposition is also longstanding. Minimum penalties and the concomitant fettering of judicial discretion were viewed as "inadvisable" as long ago as 1938 in the first Royal Commission to address mandatory minimum penalties.³⁸ Almost 20 years later and two years after an extensive revision of the *Criminal Code*, another early review of the criminal justice system concluded that the "question of the amount of punishment to be imposed upon a convicted offender is one exclusively for the courts."³⁹ Just over a decade after that, the Canadian Committee on Corrections went further and recommended that mandatory minimum penalties for all offences except murder be repealed because they "constitute an unwarranted restriction on the sentencing discretion of the court."⁴⁰

³⁷ Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Findings" (2009) 38 *Crime & Justice* 65 [*Unintended Effects*] at 100.

³⁸ Canada, *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: King's Printer, 1938) at 170 (Chair: Hon. Joseph Archambault), quoted in *Historical Analysis*, *supra* note 9 at 89.

³⁹ Canada, *Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Ottawa: King's Printer, 1956) at 36 (Chair: Gerald Fauteux).

⁴⁰ Canada, *Towards Unity: Criminal Justice and Corrections, Report of the Canadian Committee on Corrections* (Ouimet Report) (Ottawa: Queen's Printer, 1969) at 210 (Chair: Roger Ouimet). The Law Reform Commission of Canada was likewise critical of mandatory minimum sentencing as preventing judges from determining the most effective and suitable penalty in the circumstances. Law Reform Commission of Canada, *Studies on Imprisonment: Working Paper 11* (Ottawa: Information Canada, 1976), quoted in *Historical Analysis*, *supra* note 9 at 95-96.

The Canadian Sentencing Commission was granted a wide-ranging mandate to review the overall structure and process of sentencing in Canada. Their study included review of mandatory minimum and maximum penalties, the principles and purposes of sentencing, relevant aggravating and mitigating circumstances in sentencing, and the use of sentencing guidelines. As part of its study, the Commission conducted exhaustive research and consultation with judges, Crown attorneys, defence lawyers and the public.

A chapter in the Commission's final report was devoted to mandatory minimum sentences. Called upon to consider whether mandatory minimum fines and terms of imprisonment constitute "just and effective sanctions," the Commission ultimately concluded that minimum penalties should be abolished, with the exception of minimum sentences for murder and high treason.⁴¹ Highlighting the need for principles of proportionality and equity to guide sentencing judges, the Commission observed that:

... each criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined.⁴²

Contemporary critiques of minimum sentencing discussed below find their antecedents in the Commission's work. Canadian and international sentencing experts and scholars are overwhelmingly critical of minimum sentencing schemes.⁴³ Despite its detractors, however, the history of minimum sentencing in Canada reveals strong and enduring support among legislators and policy makers of all political stripes for these types of penalties, particularly over the past decade. Mandatory minimums have continued to flourish in spite of their critics.

⁴¹ *Sentencing Reform*, *supra* note 16 at 188. Overwhelmingly, the submissions received by the Commission were in favour of abolition of mandatory minimum penalties. Some participants viewed mandatory minimums as "an over-reaction to excessive discretion and individualization of sentences" and that mandatory minimums would lead to "unduly harsh" sentences. (*Ibid.* at 179).

⁴² *Ibid.* at 186.

⁴³ See, among many others, the work of Micheal H. Tonry, Anthony N. Doob, Julian V. Roberts, Franklin E. Zimring, and Rosemary Gartner.



... each criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined.

Justifications for mandatory penalties centre around the certainty of punishment, their effect on deterring, denouncing and incapacitating offenders, and their role in enhancing public confidence in the justice system by making the process of sentencing more transparent. Mandatory minimum penalties for criminal offences are also

supported as valid exercises of Parliamentary power. They are seen as setting a stable sentencing floor in an appropriate exercise of the policy- and law-making power of legislators to sanction certain conduct in the ways that they deem fit.⁴⁴

The sections below briefly consider how mandatory minimums respond to penological goals, the impact of shifting discretion from judges to other criminal justice actors, and the impact of mandatory minimum sentences of imprisonment on particular offenders.

Mandatory Minimum Sentences and Deterrence

The myth that general or specific deterrence can be achieved through tougher sentencing retains its currency because it seems intuitive: if sentences are increased in severity and duration, potential offenders will choose not to offend. Deeply held, the belief that minimum sentences will serve to deter is also deeply flawed. Countless studies have shown that there is no evidentiary basis to support this belief. Simply put, deterrence through sentencing does not work: mandatory minimum sentences do not deter any more than proportionate sentences reached through the exercise of broad judicial discretion.⁴⁵

⁴⁴ For a recent contribution to the literature supportive of mandatory minimum sentences, see Lincoln Caylor and Gannon G. Beaulne, "Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences" (May 2014) (MacDonald-Laurier Institute) available online: www.macdonaldlaurier.ca/files/pdf/MLIMandatoryMinimumSentences-final.pdf.

⁴⁵ Cheryl Marie Webster and Anthony N. Doob, "Searching for Sasquatch: Deterrence of Crime Through Sentence Severity" in Joan Petersilia and Kevin Reitz, eds., *Oxford Handbook on Sentencing and Corrections* (New York: Oxford University Press, 2012) 173 at 175 (listing reviews failing to conclude that deterrence through sentencing is a plausible way in which to reduce crime). See also

It is important to consider why mandatory minimum sentences do not deter offenders. For mandatory minimum sentences to deter, they must first be known. It is axiomatic that if the public or potential offenders do not appreciate that penalties upon conviction are harsh, or have become harsher, they will not be deterred.⁴⁶ The immediate consequences of offending also matter. If offenders do not believe that they will get caught, the penalty becomes irrelevant, regardless of how harsh it may be. Numerous studies have concluded that the public is largely ignorant of sentencing in general, let alone which offences attract mandatory minimums.⁴⁷

The utility of mandatory minimum sentences in denouncing criminal conduct also becomes less effective once public attitudes about crime are examined closely. Studies show that mandatory sentences appeal to the public in principle, but once actual cases and the circumstances of actual offenders are put to them, people are in favour of more proportional punishments, particularly so in the case of non-violent offenders.⁴⁸ Not surprisingly, support for mandatory sentencing is greatest only when the issue is raised in the abstract.

Daniel S. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-first Century" (1998) 23 *Crime & Justice* 1; Michael Tonry, "Mandatory Penalties" (1992) 16 *Crime & Justice* 243; Paula Smith, Claire Goggin, and Paul Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (Ottawa: Public Works and Government Services Canada, 2002).

⁴⁶ Anthony N. Doob and Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 *Crime & Justice* 143 [*Sentencing Severity*] at 181-184.

⁴⁷ See e.g., Julian V. Roberts, Nicole Crutcher & Paul Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings" (2007) 49 *Can J Crim & Criminal Justice* 75 [*Public Attitudes*]; Julian V. Roberts, "Public Opinion and Mandatory Sentencing: A Review of International Findings" (2003) 30 *Criminal Justice & Behavior* 483 [*Public Opinion*]; Colin Meredith, Bruno Steinke & Sherilyn A. Palmer, *Research on the Application of Section 85 of the Criminal Code of Canada (Working Document)* prepared for the Firearms Control Task Group and Research Section (Ottawa: Department of Justice, 1994) [*Research on Application of Section 85*]; Julian V. Roberts & Anthony N. Doob, "Sentencing and Public Opinion: Taking False Shadows for True Substances" (1989) 27 *Osgoode Hall LJ* 491. See also, Julian V. Roberts, *Public Opinion and Sentencing: The Surveys of the Canadian Sentencing Commission* (Ottawa: Department of Justice Canada, 1988).

⁴⁸ *Public Opinion*, *ibid.* at 501, 504-505 (for instance, when asked a general question, almost all of those polled supported a mandatory sentence of life imprisonment for murder; however when the circumstances of Robert Latimer – originally sentenced to life imprisonment for the murder of his disabled daughter – were described, nearly 75% of those polled voted against imposing a mandatory sentence of life imprisonment).



A lack of public confidence in the justice system is often advanced as a justification for imposing harsh penalties on offenders. This concern appears to be overblown, or at least without any evidentiary basis, as public opinion research suggests that the public is concerned that offenders receive *appropriate* punishment, not just more of it.⁴⁹ According to one study, there is strong public support for judges to exercise some discretion even within a mandatory sentencing regime. The results of this research show that the public understands that “a mandatory penalty that imposes the same sentence on all offenders, regardless of variation in the seriousness of the offence or levels of culpability, will inevitably create injustice.”⁵⁰

Public opinion on sentencing is far more nuanced than proponents of minimum sentencing may realize. Context clearly matters to whether a sentence will be seen by the public as appropriate or not. It may be that over time the greater threat to public confidence in the justice system will come from the erosion of judges’ ability to impose proportional sentences with regard to all of the relevant circumstances.

We have long known that long sentences of imprisonment are a recipe for recidivism. As the Department of Justice noted in 1990:

We instinctively look to long sentences to punish offenders, yet 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” and then return offenders to the streets at sentence expiry, unreformed and unsupervised.⁵¹

Apart from simply not working, the mistaken belief that excessively harsh sentencing laws will reduce crime serves as a costly distraction, obviating the

⁴⁹ See Jane B. Sprott, Cheryl Marie Webster & Anthony N. Doob, “Punishment Severity and Confidence in the Criminal Justice System” (2013) 55 Can J Crim & Criminal Justice 279 (concluding that there is essentially no relationship between the punitiveness of a province’s courts and public confidence in its criminal justice system); *Public Attitudes*, *supra* note 47 at 98-99.

⁵⁰ *Ibid.*, *Public Attitudes* at 99.

⁵¹ Department of Justice, *Directions for Reform: A Framework for Sentencing, Corrections and Conditional Release*, (Ottawa, Department of Justice, 1990) at 5, 9.

need to look at the underlying causes of criminal behaviour and for recourse to evidence-based approaches to crime reduction. An inordinate emphasis on deterrence through sentencing has the unfortunate collateral effect of drawing attention and resources away from more effective approaches to reducing crime and recidivism, such as crime prevention strategies, rehabilitation and treatment for offenders.⁵² With mandatory minimum sentencing, not only are we not making things better, we are making them worse.

Shifting Discretion in the Criminal Justice System

Historically, courts in Canada have exercised wide discretion in sentencing. Canada has eschewed the use of sentencing commissions and rigid sentencing guidelines in favour of courts retaining sufficient judicial discretion to ensure

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individualized sentences aimed at proportionality between the gravity of the offence and the culpability of the offender. The increasing frequency with which mandatory minimum sentences are being legislated is a break with this tradition.

The justice system cannot function without discretion and discretion is not in itself a bad thing. Discretion operates at all levels of the criminal justice system: from the decision of a law enforcement officer to stop someone on the street, to a Crown Prosecutor's decision to bring charges for a particular offence, through to a judge's decision about how to sentence an offender. A system that tried to do away with all discretion would be "unworkably complex and rigid."⁵³ But, to say that discretion in the criminal justice system is necessary is not to say that all discretion is the same.

⁵² *Sentencing Severity*, *supra* note 46 at 191 ("Deterrence-based sentencing makes false promises to the community. As long as the public believes that crime can be deterred by legislatures or judges through harsh sentences, there is no need to consider other approaches to crime reduction.")

⁵³ *R. v. Beare*; *R. v. Higgins* [1988] 2 S.C.R. 387 [*Beare*] at 410.



Critiques of mandatory minimum sentencing often focus on the harms that result to the offender when judges' exercise of discretion is circumscribed by the mandatory floor dictated by legislation. These harms include excessively punitive, unfair sentences that fall short of being constitutionally offensive. It is a mistake, however, to think that removing discretion from judges will not have broader, more invidious consequences for the justice system as a whole.

Experience has shown that discretion removed from judges is discretion added to prosecutors.⁵⁴ Limitations on the exercise of judicial discretion make the consequences of discretion exercised by other actors in the criminal justice system much more significant. This development should be of concern to all who value transparency and fairness in criminal procedure, regardless of how one feels about mandatory minimum sentences in particular.

The public interest is better served when broad sentencing discretion remains with judges, whose decisions are public and reviewable on appeal. These are high-stakes decisions that impact the liberty of the offender. As one academic puts it, Bill C-10 has effectively turned "Crown attorneys into judges" because decisions about which charges to prosecute may ultimately determine what sentence the judge must impose.⁵⁵

One of the clearest manifestations of shifting discretion in the criminal justice system is the growing significance of the plea bargaining process where mandatory minimum sentences are involved. Plea bargaining is one of the most misunderstood practices in the criminal justice system. It can describe a broad range of behaviours at the heart of which is an agreement by the accused to plead guilty in exchange for the prosecutor's agreement to take or refrain from taking a particular action. The bargain may relate to the charges that will be brought, the sentence that will be sought, or the facts that will be introduced at the sentencing hearing. In respect of mandatory minimums, a plea bargain may

⁵⁴ See e.g., *Research on Application of Section 85*, *supra* note 47; United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011); David Bjerk, "Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion under Mandatory Minimum Sentencing" (2005) 48 *JL & Econ* 591; and Debra Parkes, "From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 *Sup Ct L Rev* (2d) 149.

⁵⁵ Jonathan Rudin, "Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in *R. v. Ipeelee*" (2012) 57 *Sup Ct L Rev* (2d) 375 at 381.

result in the Crown charging a lesser, included offence that does not attract a minimum sentence, or the Crown agreeing not to provide notice to seek a greater mandatory minimum penalty.

According to surveys conducted by the Canadian Sentencing Commission, both Crown and defence counsel agreed that plea bargaining was more likely to occur in cases involving offences carrying mandatory minimum penalties.⁵⁶ A significant percentage of those surveyed indicated that mandatory minimum sentences “caused Crown and defence to enter into agreements that they would otherwise avoid.”⁵⁷ Described as the “informal criminal justice system,” the Commission’s concerns about plea bargaining were focused on the potential of this practice to undermine proportionality, equity and certainty in sentencing.⁵⁸ If plea bargains replace trials, then constitutional safeguards are left to discretionary decision-makers whose conduct is nearly beyond review.⁵⁹

While plea bargains are accepted practice in the criminal justice system, they become coercive in a system where mandatory minimum sentences are increasingly normalized. Apart from the concern that prosecutorial discretion lacks in transparency, shifting discretion from judges to prosecutors increases the likelihood that individuals charged with offences carrying mandatory minimum sentences will be under great pressure to plead guilty to charges for offences without minimum sentences – regardless of their culpability.⁶⁰ In a justice system

⁵⁶ *Sentencing Reform*, *supra* note 16 at 180.

⁵⁷ *Ibid.* at 180-181. See also *Research on Application of Section 85*, *supra* note 47 (finding that charges under s. 85 were often used in plea negotiations and about two-thirds of the charges laid were stayed, withdrawn or dismissed).

⁵⁸ *Ibid.*, *Sentencing Reform* at 406. It is worth noting here that certainty and equity in sentencing are sometimes cited as positive outcomes that flow from the imposition of mandatory minimum sentencing itself.

⁵⁹ *R. v. Nixon*, 2011 SCC 34 (prosecutorial discretion reviewable only for abuse of process). In *Nixon*, after reaching a plea agreement with the accused, the Crown resiled from the agreement and continued the prosecution. In *R. v. Anderson*, 2014 SCC 41 [*Anderson*], the Supreme Court of Canada recently affirmed that as a matter of prosecutorial discretion, the Crown decision to tender notice under *Criminal Code* s. 727 in seeking a greater mandatory minimum punishment is only reviewable for abuse of process.

⁶⁰ This possibility was recently discussed by Justice Renee M. Pomerance in an article reflecting on her role as a trial judge. Justice Pomerance notes that: “... mandatory minimums may create a coercive environment that encourages false pleas of guilt – pleas entered by persons who are not guilty of the offence. This may happen where the Crown offers to take a plea to a lesser offence, one that does not carry a minimum penalty. The disparity between the sentence offered on a plea and that guaranteed



that is no stranger to wrongful conviction, the prospect that prosecutors may leverage mandatory minimum sentences for guilty pleas is especially egregious.⁶¹

A recent review of plea bargaining in the United States shows that the imposition of mandatory sentences can deter individuals from exercising their right to a fair and open trial.⁶² Prosecutors in the US commonly use threats of charges with high mandatory terms of imprisonment to leverage guilty pleas on lesser offences that do not carry minimum sentences. The use of these minimum sentences on those charged with drug offences is particularly pernicious.⁶³ Ironically, by increasing the likelihood that offenders will opt to plea bargain to avoid mandatory minimum sentences, legislative efforts like Bill C-10 may actually run contrary to Parliament's purported objective of toughening up on crime by requiring minimal sentences for certain offences.

Perpetuating Systemic Discrimination

Minimum sentences in Canada are truly mandatory. The law does not leave any room for judges to exercise discretion in departing from their imposition unless the offender is able to mount a successful constitutional challenge. Mandatory minimum sentences apply to every offender regardless of his or her individual circumstances.

Some proponents of mandatory sentences claim that they provide protection for disadvantaged groups who are historically subjected to victimization on a

on conviction may create an unhealthy inducement... ." Renee Pomerance, "The New Approach to Sentencing in Canada: Reflections of a Trial Judge" (2012) 17 Can Crim L Rev 305 at 312.

⁶¹ For example, see *R. v. Hanemaayer*, 2008 ONCA 580 at para. 18, where the court entered acquittals for the accused, who had pleaded guilty to, and served a sentence for crimes he did not commit. Although the pleas were voluntary and informed, the court recognized that the justice system held out to the accused "a powerful inducement that by pleading guilty he would not receive a penitentiary sentence." The accused had spent eight months in jail awaiting trial and was facing the prospect of a further six years in a federal penitentiary if convicted.

⁶² Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013), available online: www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse.

⁶³ Canadian mandatory minimum sentences are nowhere near as long as those in the US. Regardless, the experience with mandatory minimums for drug offences in the US is a lesson that Canada would do well to heed.

disproportionate basis.⁶⁴ The conflation of punitive sentencing practices and victims' rights is at best unfortunate, and at worst exploitative.⁶⁵ As Kent Roach explains:

The dichotomy between victims and offenders that drives many punitive forms of victims' rights often breaks down in practice and individuals such as women, the young, Aboriginal people, the disabled, and other vulnerable minorities who are thought to be protected by mandatory sentences may also be caught by them.⁶⁶

Other proponents of mandatory sentences believe they are equitable because they purport to sentence all offenders the same. This view ignores the reality that, while facially neutral, mandatory minimum sentencing has a disproportionate impact on Aboriginal persons, women, members of racialized communities, and the mentally ill.

One way in which this disproportionate impact occurs is by reason of the types of offences that attract mandatory minimum sentences. For instance, the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System found that "persons described as black are most over-represented among prisoners charged with drug offences, obstructed justice and weapons possession."⁶⁷ The new mandatory minimums for drug offences will disproportionately impact low income, drug dependent individuals, such as those on the Downtown Eastside of Vancouver.⁶⁸ Similarly, higher mandatory minimum sentences for second, third or subsequent offences have a disproportionate impact on Aboriginal and mentally ill offenders who are more

⁶⁴ Kent Roach, "Searching for Smith: The Constitutionality of Mandatory Sentences" (2001) 39 Osgoode Hall LJ 367 [*Searching for Smith*] at 389.

⁶⁵ It is beyond the scope of this report for an in-depth review of victims' rights in the Canadian criminal justice system. It is important to note that the needs and rights of victims must be responded to and respected. All too often legislative responses to victims' rights are little more than proposing punitive legislation, leaving the complex concerns of victims of crime untouched.

⁶⁶ *Searching for Smith*, *supra* note 64 at 390.

⁶⁷ Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) [*Systemic Racism*] at 69-70.

⁶⁸ For a comprehensive review of the impact of mandatory minimum sentences for drug offences, see Darcie Bennett & Scott Bernstein, *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences* (Vancouver: Pivot Legal Society, 2013) [*Throwing Away the Keys*].



likely to be charged with multiple offences, and for crimes against the justice system.⁶⁹

Another way in which the disproportionate impact of mandatory minimum sentencing will be felt by particular offenders relates to discrimination in the justice system. Canadian courts,⁷⁰ commissions and inquiries,⁷¹ reports,⁷² and scholars⁷³ have documented this systemic failing, particularly as it affects members of Aboriginal communities. A by-product of the racism inherent in the criminal justice system are the ways in which exercises of discretion by non-judicial actors work against women, members of certain visible minorities and Aboriginal accused. While the reality of racial profiling by police in Canada has been widely acknowledged,⁷⁴ racialized groups, such as Blacks and Aboriginal persons are also less likely to benefit from exercises of prosecutorial discretion,

⁶⁹ See, e.g., Canadian Criminal Justice Association, *Aboriginal Peoples and the Criminal Justice System* (May 15, 2000) available online: <http://caid.ca/CCJA.APCJS2000.pdf>.

⁷⁰ See e.g., *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*]; *R. v. Brown*, 57 O.R. (3d) 615, [2002] O.J. No. 295 (Ont. Sup. Ct. Just.) [*Brown*]; *Peart v. Peel Regional Services Board*, (2006), 43 CR (6th) 175; 217 OAC 269 (ONCA); *Ipeelee*, *supra* note 33.

⁷¹ See e.g., Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal Peoples and Criminal Justice in Canada* (Ottawa: Queen's Printer, 1996); Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (Province of Manitoba: 1999).

⁷² See e.g., Office of the Correctional Investigator of Canada, *A Case Study of Diversity in Corrections: the Black Inmate Experience in Federal Penitentiaries: Final Report* (2013), available online: www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx [*Case Study of Diversity*]; *Systemic Racism*, *supra* note 67; Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Toronto: Law Commission of Canada, 2003); Department of Justice, *Task Force on Aboriginal Peoples in Federal Corrections: Final Report* (Ottawa: Minister of Supply and Services, 1988).

⁷³ See e.g., Wendy Chan & Kiran Mirchandani, eds., *Crimes of Colour: Racialization and the Criminal Justice System in Canada* (Peterborough: Broadview Press, 2002); Robynne Neugebauer, ed., *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars Press, 2000); Larry N. Chartrand, "Aboriginal Peoples and Mandatory Sentencing" (2001) 39 Osgoode Hall LJ 449; Julian V. Roberts & Ronald Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003) 45 Can J Crim & Criminal Justice 211; Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009) 54 Crim LQ 447; Elizabeth Sheehy, "The Discriminatory Effects of Bill C-15's Mandatory Minimum Sentences" (2010) 70 CR (6th) 302 [*Discriminatory Effects*].

⁷⁴ See *Brown*, *supra* note 70; *Systemic Racism*, *supra* note 67; Ontario Human Rights Commission, *Paying the Price? The Human Cost of Racial Profiling* (Toronto: Inquiry Report, 2003); Scott Wortley & Julian Tanner, *The Toronto Youth Crime and Victimization Survey Report* (Toronto: Centre of Criminology, 2002).

the effect of which becomes increasingly significant due to constraints on judicial discretion in sentencing under mandatory minimum sentencing.⁷⁵

Mandatory minimum sentences of imprisonment will add to prison populations by limiting the availability of alternatives to incarceration. Nowhere will this be more disproportionate than in its effect on Canada's Aboriginal population.

It should come as no surprise that Aboriginal people have historically been overrepresented in Canadian prisons. And the statistics indicate that Aboriginal overrepresentation continues to worsen. As of February 2013, 23.2% of the federal inmate population was Aboriginal (First Nations, Métis or Inuit), although Aboriginal persons make up just over 4% of the Canadian population.⁷⁶ In 1996-1997, Aboriginal people represented 15% of offenders in federal custody. By 2008-2009, that percentage had risen to 20%. It is projected that by 2020, fully 25% of those incarcerated in federal prisons will be Aboriginal persons.⁷⁷ The situation for Aboriginal female offenders is even more stark. In 2010-2011, Aboriginal women accounted for over 33.6% of all federally incarcerated women.⁷⁸

In respect of Aboriginal accused, the Supreme Court of Canada has said that courts must take judicial notice of the gross overrepresentation of Aboriginal peoples in the criminal justice system.⁷⁹ Legislative notice of Aboriginal

⁷⁵ Faizal Mirza, "Mandatory Minimum Prison Sentencing and Systemic Racism" (2001) 39 Osgoode Hall LJ 491.

⁷⁶ Office of the Correctional Investigator of Canada, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Final Report) (October 22, 2012) [*Spirit Matters*] at 11, available online: www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022-eng.aspx; Statistics Canada, Aboriginal Peoples in Canada: First Nations, Métis and Inuit, National Household Survey, 2011 available online: <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>; Office of the Correctional Investigator of Canada, Backgrounder, Aboriginal Offenders - A Critical Situation [*Critical Situation*], available online: www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx.

⁷⁷ Office of the Correctional Investigator of Canada, *Backgrounder: Aboriginal Inmates*, available online: www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20052006info-eng.aspx; Michelle M. Mann, *Good intentions, Disappointing Results: A Progress Report on Aboriginal Corrections in Canada* (Ottawa: Office of the Correctional Investigator, 2010) [*Good Intentions*].

⁷⁸ *Spirit Matters*, *supra* note 76 at 11; See also, Rebecca Kong & Kathy AuCoin, "Female Offenders in Canada" *Juristat*, 28:1 available online: www.publicsafety.gc.ca/lbrr/archives/jrst85-002-x2008001-eng.pdf; *Critical Situation*, *supra* note 76.

⁷⁹ *Gladue*, *supra* note 70 at 731-732



overrepresentation is effectively codified in s. 718.2(e) of the *Code*, in which “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders*.” The benefits of alternatives to imprisonment are documented. A 2011 study from the Department of Justice evaluating the Aboriginal Justice Strategy found that community-based justice programs contribute to reduced crime and incarceration rates, and to creating safer and healthier communities.⁸⁰ It remains to be seen how courts will reconcile mandatory minimum sentences with the need to reach proportionate sentences for Aboriginal persons, bearing in mind the necessary context for understanding the circumstances of Aboriginal offenders – a context that includes a history of colonialism, displacement, residential schools, alienation and isolation.

Apart from being overrepresented in Canadian prisons, Aboriginal offenders are treated differently, and more harshly, in the correctional system. In *Gladue*, the Supreme Court of Canada recognized that:

... Aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be ‘rehabilitated’ thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination against them is so often rampant in penal institutions.⁸¹

Aboriginal offenders differ from other offenders in a number of ways, many of which constitute mitigating circumstances:

The offending circumstances of Aboriginal offenders are often related to substance abuse, inter-generational abuse and residential schools, low levels of education, employment and income, substandard housing and health care, among other factors. Aboriginal offenders tend to be younger;

⁸⁰ Department of Justice, *Aboriginal Justice Strategy Evaluation* (Final Report) (Ottawa: Department of Justice, 2011) at 33-35. The evaluation found that four years after completing the program, about 25% of the program participants had re-offended compared to nearly 40% of the non-participating comparator group. The Aboriginal Justice Strategy was launched in 1991 by the federal government under the name Aboriginal Justice Initiative. The strategy provides support to pilot community-based justice programs across Canada.

⁸¹ *Gladue*, *supra* note 70 at 725.

to be more likely to have served previous youth and/or adult sentences; to be incarcerated more often for a violent offence; to have higher risk ratings; to have higher need ratings; to be more inclined to having gang affiliations; and to have more health problems, including Fetal Alcohol Spectrum Disorder and mental health issues.⁸²

It is important for courts to understand and address the reality that Aboriginal and non-Aboriginal offenders who receive the same sentence will very likely not serve the same sentence. Compared to non-Aboriginal offenders, Aboriginal adult offenders are more likely to receive a higher security classification level based on risk assessment, be involved in use of force incidents, and be placed in segregation.⁸³ Aboriginal offenders are less likely to get appropriate programming, educational and training opportunities. Aboriginal offenders are also more likely to serve a greater portion of their sentences in custody, less likely to be paroled and more likely to have parole revoked.⁸⁴

An Aboriginal offender's experience in prison will likely begin with his or her over-classification on the Custody Rating Scale, the security classification tool used by the Correctional Service of Canada. The tool is applied to an offender when they arrive at a facility to determine the security classification and placement of the individual.⁸⁵ Overall, Aboriginal inmates are consistently over-classified, leading to a disparity between Aboriginal and non-Aboriginal offenders' placement in minimum-security facilities. Aboriginal offenders are placed in minimum-security institutions at only half the rate of their non-Aboriginal counterparts.⁸⁶ The disparity is even more pronounced for Aboriginal

⁸² *Good Intentions*, *supra* note 77 at 4.

⁸³ *Spirit Matters*, *supra* note 76 at 5.

⁸⁴ See Public Safety Canada, "Corrections and Conditional Release Statistical Overview" Annual Report (Ottawa: Public Safety Canada, 2011); Jonathan Rudin, "There Must be Some Kind of Way Out of Here: Aboriginal Over-Representation, Bill C-10 and the Charter of Rights" (2013) 17 Can Crim L Rev 349.

⁸⁵ Correctional Service of Canada, Commissioner's Directive 705-7, "Security Classification and Penitentiary Placement" (February 19, 2010), available online: www.csc-scc.gc.ca/text/plcy/cdshtm/705-7-cd-eng.shtml.

⁸⁶ Office of the Correctional Investigator, Annual Report of the Office of the Correctional Investigator 2007-2008 at 33, available online: www.oci-bec.gc.ca/rpt/pdf/annrpt/annrpt20072008-eng.pdf.



women.⁸⁷ An offender's security status determines the nature and conditions of imprisonment. A higher security status may limit or remove entirely access to core and group programming that will impact parole eligibility and successful re-entry into the community.

The disproportionate impact of incarceration on non-Aboriginal racialized groups is also well-known.⁸⁸ The Commission on Systemic Racism in the Ontario Criminal Justice System reported racial hostility and intolerance in prison environments, racial segregation of male prisons within and among prisons, and racial inequality in the delivery of prison services.⁸⁹ A more recent study prepared by the Office of the Correctional Investigator of Canada also found that discrimination and stereotyping persist in the treatment of Black offenders.⁹⁰

Women also experience imprisonment differently – and often more harshly – than men.⁹¹ Correctional facilities, programming and policies are developed with male offenders as the norm. Women's common pathways to crime are more likely to be based on survival of physical and sexual abuse, poverty, and addiction.⁹² Separation from their children is an acute effect of imprisonment for women. For instance, in *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, the BC Supreme Court found that the cancellation of a mother-baby program at a women's prison violated the constitutional rights of the mothers and their infants. Extensive evidence concerning the adverse consequences of separation of mothers and infants was before the court.

The promise of mandatory minimum sentences is simply not borne out in the evidence. Communities will not be safer. The criminal justice system will be less

⁸⁷ *Ibid.*, see also Mandy Wesley, *Marginalized: The Aboriginal Woman's Experience in Federal Corrections* (Ottawa: Public Safety Canada, 2012) [*Marginalized*] available online: www.publicsafety.gc.ca/cnt/rsrscs/pblctns/mrgnlzd/index-eng.aspx.

⁸⁸ See *Systemic Racism*, *supra* note 67; *Case Study of Diversity*, *supra* note 72.

⁸⁹ Commission on Systemic Racism in the Ontario Criminal Justice System, *Racism Behind Bars* (Toronto: Queen's Printer for Ontario, 1994).

⁹⁰ *Case Study of Diversity*, *supra* note 72. The case study uses the term 'Black' to denote those inmates who voluntarily self-identified during the CSC intake process as being 'Black'.

⁹¹ See *Discriminatory Effects*, *supra* note 73 at 308-317.

⁹² Barbara Bloom, Barbara Owen & Stephanie Covington, "Women Offenders and the Gendered Effects of Public Policy" (2004) 21 *Review of Policy Research* 31 at 34-35.

transparent and equitable. The impact of the proliferation of mandatory minimum sentencing in Canada reverberates beyond its impact on an individual offender. It goes to the state of the system as a whole and its costs are borne by us all.



THE COSTS OF MANDATORY MINIMUMS

It is beyond question that the Omnibus Crime Bill has had and will continue to have a profound impact on Canadian law and society. The costs of Bill C-10 and other similar tough on crime legislation go much further than simply tallying up how much money the federal and provincial governments will have to spend on their implementation. The human and social costs of these laws are likely beyond measure and will not be fully appreciated until much later.

Financial Costs of Bill C-10

Not long after Bill C-10 was introduced in the House of Commons, questions about how much the bill would cost dominated the headlines. The government did not release estimates of the total cost of the justice policy reforms and provincial governments expressed concerns about how much of the financial burden they would bear. Unfortunately, there has been no clear-cut costing analysis prepared for those elements of Bill C-10 that either created or increased mandatory minimum penalties of imprisonment.

On October 6, 2011, the government announced without further explanation that at the federal level Bill C-10 would cost taxpayers \$78.6 million over five years. The government estimated that only two of the nine bills combined in the Omnibus Crime Bill would add costs federally. The increased penalties for drug crimes were estimated to cost \$67.7 million over five years because of higher prison populations. The new mandatory minimums for sexual offences were estimated to cost \$10.9 million over two years for the same reason.⁹³

Estimates of the costs of implementing Bill C-10 in British Columbia have not been made publicly available. Developing a costing analysis for British Columbia is difficult because statistical data on criminal justice system expenditures are unavailable. In its 2011 audit of the provincial justice system, the government did acknowledge that increased costs will be incurred provincially as a result of the Bill. Former Bill C-16 (which was folded into the Omnibus Crime Bill) was forecast to add 200 additional inmates to BC's correctional system. Bill C-25, *The*

⁹³ Office of the Parliamentary Budget Officer, *The Fiscal Impact of Changes to Eligibility for Conditional Sentences of Imprisonment in Canada* by Tolga R. Yalkin & Michael Kirk (Ottawa: Office of the Parliamentary Budget Officer, 2012) [*Fiscal Impact*] at 17.

Truth in Sentencing Act was projected to add 270 additional inmates. The audit estimated that, at the current per diem rate for incarceration, an increase of 470 inmates would cost BC's criminal justice branch approximately \$31 million per year.⁹⁴

It is patently obvious, however, that changes to the criminal justice system of the magnitude enacted in Bill C-10 will cost in the billions of dollars. By way of illustration, the cost of *The Truth in Sentencing Act* was estimated by the Parliamentary Budget Office [PBO].⁹⁵ The reduction in the number of overall days that judges may credit offenders for time spent in pre-sentencing custody will increase correctional costs. The total expenditure on corrections in Canada, across federal and provincial/territorial jurisdictions was estimated at about \$4.4 billion for fiscal year 2009-2010, with a near equal split between the federal government and the provinces and territories.⁹⁶ With the *Truth in Sentencing Act* in force, by fiscal year 2015-2016, the total funding requirement for correctional departments is projected to rise to \$9.5 billion, of which the federal share is estimated to decline to 44% and the provincial share estimated to rise to 56%.⁹⁷

The PBO has also estimated the fiscal impact of the changing eligibility criteria for conditional sentences of imprisonment in Bill C-10.⁹⁸ This analysis included

⁹⁴ British Columbia Ministry of Finance, *Review of the Provincial Justice System in British Columbia* (2011) at 22.

⁹⁵ Office of the Parliamentary Budget Officer, *The Funding Requirement and Impact of the "Truth in Sentencing Act" on the Correctional System in Canada* by Ashutosh Rajekar and Ramnarayanan Mathilakath (Ottawa: Office of the Parliamentary Budget Officer, 2010). The report was made in response to a request from a Member of Parliament for an investigation into the ongoing and future costs to the federal treasury stemming from government bills reforming sentencing and conditional release. However, as the authors of the report indicate, the scope of their study was limited to the *Truth in Sentencing Act* "in light of the limited information made available by the Government of Canada to Parliament" (at 7).

⁹⁶ *Ibid.* at 12. Of the \$4.4 billion estimated for 2009-2010, the federal component was \$2.2 billion (51%), and the provincial share was \$2.15 billion (49%).

⁹⁷ *Ibid.* at 13. The shift in the share of annual funding requirements is based mainly on the shifting proportion of the sentenced versus remanded inmates in provincial and territorial detention, and in the context of capacity constraints facing provincial and territorial correctional departments.

⁹⁸ *Fiscal Impact*, *supra* note 93. This estimate was made in response to a request from a Member of Parliament who was seeking an assessment of the financial impact of the new mandatory minimum sentences in the *CDSA* and costs associated with changing the eligibility criteria for conditional sentences. As there were data limitations associated with analyzing the new mandatory minimum sentences in the *CDSA*, the PBO report looks only at changes to conditional sentencing.



three cost categories: trial costs, corrections costs and parole costs. The total cost before the amendments was estimated at \$11,504,822. After the amendments, the total increased to \$156,562,459, of which only \$7,958,617 is attributed federally. The remaining \$148,603,842 would fall on the provinces and territories.⁹⁹

Other attempts at costing portions of Bill C-10 have also been made. The Québec-based Institut de recherche et d'information socio-économiques [IRIS] prepared an analysis of the costs associated with various portions of what was ultimately enacted as Bill C-10, all of which are projected to increase rates of incarceration and make non-custodial sentencing more difficult.¹⁰⁰ The IRIS analysis looked at the costs for building new prisons and the costs for operation, maintenance and capital. With respect to the costs for building new prisons, IRIS estimates a cost of just over \$1 billion for the provinces. For all the measures studied, IRIS estimates a total cost of \$18 billion for the provinces, territories and federal government combined.¹⁰¹ The cost for operations, maintenance and capital is estimated at \$1.6 billion per year for the federal government, and \$2.2 billion for all provinces combined.¹⁰²

The Canadian Centre for Policy Alternatives and the John Howard Society of Manitoba have also prepared a costing for Bill C-10.¹⁰³ Their analysis estimates that Bill C-10 will initially cost Manitoba an additional \$90 million: \$60 million a year in operating expenses, plus \$30 million in capital expenses. This estimate includes an assumption that jail populations in Manitoba will rise by 25% as a result of Bill C-10. The estimate also includes additional costs for indirect operating expenses, such as increased court and remand time for offenders.¹⁰⁴

⁹⁹ *Ibid.* at 68-69.

¹⁰⁰ Institut de recherche et d'information socio-économiques (IRIS), *Coûts et efficacités des politiques correctionnelles fédérales* (2011), available online: www.iris-recherche.qc.ca/publications/couts-et-efficacite-des-politiques-correctionnelles-federales. This analysis was based on several bills which ultimately were enacted as Bill C-10, specifically Bill C-4 (*Protecting the Public from Violent Young Offenders*), C-15 (the predecessor to Bill S-10, *Penalties for Organized Drug Crime*), C-16 (*Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act*), and C-39 (*Ending Early Release for Criminal and Increasing Offender Accountability Act*).

¹⁰¹ *Ibid.* at 6.

¹⁰² *Ibid.* at 7.

¹⁰³ Canadian Centre for Policy Alternatives, Manitoba and the John Howard Society of Manitoba, *Bill C-10: The Truth About Consequences* (2010).

¹⁰⁴ *Ibid.* at 6-7.

The report concludes that \$90 million could better be spent on investments in employment, education, public housing, addictions treatment and mental health support services – all investments in social services that have been proven to reduce crime.

To provide context for these estimates, it is important to consider trends in expenditures on criminal justice at the federal, provincial and territorial level. The PBO prepared the first longitudinal estimate of expenditures in Canada's criminal justice system, looking at the period from 2002 to 2012.¹⁰⁵ While the crime rate has been decreasing steadily from 2002 to 2012 (a drop of just over 30%), expenditure for the criminal justice system over the same period has been increasing both in nominal and real terms. In nominal terms, total expenditure has increased by 66%, reaching \$20.3 billion, of which \$5.5 billion (27%) is federal spending and the remaining \$14.8 billion (73%) is provincial and territorial spending.¹⁰⁶ In real terms (using 2002 dollars), criminal justice expenditures have increased by 37%, starting at \$12.2 billion in 2002 and reaching \$16.7 billion by 2012.

Collateral Costs of Mandatory Minimums

The human cost of punitive sentencing goes well beyond the sentence imposed on an individual offender. Incarceration has a ripple effect, touching nearly every aspect of the offender's life and community. These range from the health and wellbeing of the offender, to the impact of incarceration on an offender's family, through to the infrastructure of communities – whether they are good places to live, work and raise children. The collateral costs of increasingly punitive approaches to sentencing – the human and social costs – are difficult to measure, but necessary to appreciate.

Understanding the broader impact of incarceration takes on increasing importance in a society where we lock more people away for longer terms of imprisonment.

¹⁰⁵ Office of the Parliamentary Budget Officer, *Expenditure Analysis of Criminal Justice in Canada* by Rod Story & Tolga R. Yalkin (Ottawa: Office of the Parliamentary Budget Officer, 2013).

¹⁰⁶ *Ibid.* at 14.



Understanding the broader impact of incarceration takes on increasing importance in a society where we lock more people away for longer terms of imprisonment. For instance, research shows that when parents are incarcerated, their children are negatively affected not only in the immediate term due to the loss of a parent in their lives, but also in more complex and long term ways that influence whether or not they are likely to become offenders themselves.¹⁰⁷ An estimated 20,000 children are separated from their mothers because of incarceration every year in Canada.¹⁰⁸ The cost of incarceration on children includes negative behavioural manifestations, including withdrawal, low self-esteem, depression, substance abuse and aggression.¹⁰⁹ If large numbers of men and women from a particular community are imprisoned, there are long term consequences for its economic viability.¹¹⁰

The costs associated with punitive sentencing and other “tough on crime” measures are most often viewed through the lens of criminal justice system expenditures. However, a growing body of literature is looking at the health and social impacts of incarceration, including several contributions that have focused their attention on the health impacts of Bill C-10.¹¹¹

¹⁰⁷ See e.g., Todd Clear, “The Effects of High Imprisonment Rates on Communities” (2008) 37 Crime & Justice 97 [*Effects of High Imprisonment*]; Christopher Wildeman, “Parental Incarceration and Children’s Physically Aggressive Behaviours: Evidence from the Fragile Families and Child Wellbeing Study” (2010) 89 Social Forces 285; Joseph Murray, Rolf Loeber & Dustin Pardini, “Parental Involvement in the Criminal Justice System and the Development of Youth Theft, Marijuana Use, Depression and Poor Academic Performance” (2012) 50 Criminol 255; A. Cunningham & L. Baker, *Waiting for Mommy: Giving a Voice to the Hidden Victims of Imprisonment* (London, ON: Centre for Children and Families in the Justice System, 2003).

¹⁰⁸ Ruth Elwood Martin, Jane A. Buxton, Megan Smith, et al. “The Scope of the Problem: The Health of Incarcerated Women in BC” (2012) 54 BC Medical Journal 502. The BC Supreme Court recently acknowledged the importance of bonding between incarcerated mothers and their babies in *Inglis*. The court held that mothers’ and babies’ equality rights and rights to security of the person were violated by the government’s decision to end a mother-baby program at Alouette Correctional Centre for Women.

¹⁰⁹ Shimica Gaskins, “Women of Circumstance: The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes” (2004) 41 Am Crim L Rev 1533.

¹¹⁰ See generally *Effects of High Imprisonment*, *supra* note 107.

¹¹¹ Joshua Lau & Ruth Elwood Martin, *Health Impacts of the Safe Streets and Communities Act (Bill C-10) Responding to Mandatory Minimum Sentencing* (Vancouver: Collaborating Centre for Prison Health and Education, 2012); Office of the Provincial Health Officer, *Health, Crime, and Doing Time: Potential Impacts of the Safe Streets and Communities Act (Former Bill C-10) on the Health and Well-being of Aboriginal People in BC* (2013) [*Health, Crime, and Doing Time*].

To appreciate the connection between health and incarceration, it is important to consider the social determinants of health. These are the environmental, social, cultural, economic and individual contexts that directly or indirectly affect health and lifestyle choices.¹¹² The key determinants of health include one's income, education, employment status, early childhood development, food security and housing, gender, race, community identity and sense of connectedness.¹¹³

An individual's health status relates to his or her involvement in crime. Substance use, for instance, has a direct and indirect relationship to crime.¹¹⁴ According to the Correctional Service of Canada, about four out of five offenders arriving at a federal prison have a serious substance-use problem, with half of them having committed an offence while under the influence of drugs or alcohol.¹¹⁵ Drug use continues in prison: in 2010, CSC reported that 17% of men and 14% of women have injected drugs while imprisoned, and that among these, 55% of men and 41% of women reported using needles that were previously used by someone else.¹¹⁶ The extent of unsafe injection drug use in prisons poses an urgent threat to the health and safety of prisoners, but also to public health more generally. HIV prevalence among federal prisoners is 15 times the estimated prevalence in the Canadian population as a whole, and Hepatitis-C is 39 times more prevalent in prisons.¹¹⁷ An unwillingness to approach addiction as a health problem will only continue to perpetuate the cycle of addiction and incarceration.

Mental health is also directly and indirectly related to crime.¹¹⁸ Studies of mental health prevalence in prison show that the rates of serious mental illness are

¹¹² Juha Mikkonen & Dennis Raphael. *Social Determinants of Health: the Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) available online: www.thecanadianfacts.org/The_Canadian_Facts.pdf.

¹¹³ *Ibid.*

¹¹⁴ *Health, Crime, and Doing Time*, *supra* note 111 at 37-39.

¹¹⁵ CSC Review Panel, *A Roadmap to Strengthening Public Safety* (Ottawa: Government of Canada, 2007) at 4.

¹¹⁶ D. Zakaria et al., *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk Behaviours Survey* (Ottawa: CSC, 2010), available online: www.csc-scc.gc.ca/research/005008-0211-01-eng.shtml.

¹¹⁷ *Ibid.*

¹¹⁸ *Health, Crime, and Doing Time*, *supra* note 111 at 37-39.



substantially higher in prison than in the general population. In Canada, prisoners are approximately three times as likely as the general population to suffer from serious mental illness.¹¹⁹ Persons with serious mental illness are among the most marginalized, misunderstood and underserved incarcerated populations. Unless their mental condition amounts to a mental disorder that allows for a finding that they are not criminally responsible under s. 16 of the *Criminal Code*,¹²⁰ sentencing judges are required to ignore the reduced capacity and moral culpability of the mentally ill and apply the minimum sentence. Longer periods of incarceration of those with mental illness serve only to exacerbate illnesses.

Inmates who suffer from mental illness, substance use and addiction are trapped in a cycle that perpetuates illness and criminality. In the absence of supports and proper interventions, these individuals increasingly come into contact with the criminal justice system. Once incarcerated, they are at greater risk for further challenges to their health, which in turn will increase their likelihood of reoffending upon release.

Compared with the general population, all prisoners have poorer physical and mental health. And the Correctional Investigator reports that conditions in Canadian federal prisons are getting worse: use of force incidents are on the rise, inmates are being double- and triple-bunked, and there are more segregation-like cells, which limit offenders' access to rehabilitative programming while in prison.¹²¹ On any given day, less than 25% of the population inside a correctional facility is involved and engaged in a "core" correctional program, of the sort that

¹¹⁹ See Alexander I.F. Simpson, Jeffrey J. McMaster & Steven N. Cohen, "Challenges for Canada in Meeting the Needs of Persons with Serious Mental Illness in Prison" (2013) *J Am Acad Psychiatry Law* 501 at 503; M.C. Olley, T.L. Nicholls & J. Brink (2009) *Mentally ill individuals in Limbo: Obstacles and Opportunities for Providing Psychiatric Services to Corrections Inmates with Mental Illness* 27 *Beh Science & Law* 811.

¹²⁰ Section 16(1) provides that: No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

¹²¹ Office of the Correctional Investigator, *Annual Report of the Correctional Investigator 2009-2010* (Ottawa: Office of the Correctional Investigator, 2010) [2009-2010 *Annual Report*]; See also, Benjamin L. Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*" (2009) 47 *SCLR* (2d) 101 at 109 for a discussion of how mandatory minimum sentences cause serious disruption to the proper day-to-day administration of justice in Canada.

address underlying rehabilitative need.¹²² When offenders are released from prison, they will return to their communities in much worse shape than when they entered prison. Imprisoning more people for longer periods of time will do nothing to ultimately make streets and communities safer.

¹²² *Ibid.*, 2009-2010 *Annual Report*, at 46.



LEGAL CHALLENGES TO MANDATORY MINIMUMS

With the coming into force of the *Safe Streets and Communities Act*, mandatory minimum sentences are at an all-time high. It should come as no surprise then that over the last several years, there has been an increase in the number of constitutional challenges being brought against mandatory minimums.¹²³ Courts across Canada are being presented with novel approaches to testing their constitutional compliance.

Typically, the approach has been to challenge the length of a minimum sentence as “cruel and unusual punishment” under s. 12 of the *Charter*.¹²⁴ However, claims have also been brought under s. 7 urging that either the mandatory minimum itself, or the exercise of prosecutorial discretion used to arrive at it is contrary to principles of fundamental justice.¹²⁵ Section 15’s equality guarantee¹²⁶ has been invoked to challenge the discriminatory and disproportionate effects of mandatory minimum sentences, particularly as they apply to Aboriginal offenders. Protection from arbitrary detention or imprisonment enshrined in s. 9 of the *Charter* has also been advanced as a basis for a constitutional challenge.¹²⁷

Consequently, the state of the law is somewhat in flux. Much will depend on the Supreme Court of Canada’s judgments in the *Nur* and *Charles* appeals, scheduled to be heard on December 11, 2014, in which the Court will opine on the constitutionality of mandatory minimum sentences for firearms offences under ss. 7 and 12 of the *Charter*.¹²⁸ As a threshold matter, courts have repeatedly

¹²³ Apart from the cases referred to in this report, see e.g., *R. v. Montague*, 2010 ONCA 141; *R. v. Lewis*, 2012 ONCJ 413; *R. v. Scarlett*, 2013 ONSC 562; *R. v. Crockwell*, 2013 NLTD(G) 23; *R. v. McMillan*, 2013 MBQB 229; *R. v. Hailemolokot, et al*, 2013 MBQB 285.

¹²⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [*Charter*]. Section 12 provides that “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

¹²⁵ Section 7 states that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

¹²⁶ Section 15(1) provides that: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

¹²⁷ Section 9 provides that “Everyone has the right not to be arbitrarily detained or imprisoned.”

¹²⁸ *R. v. Nur*, 2013 ONCA 677 [*Nur*], leave to appeal to SCC granted, [2014] S.C.C.A. No. 17 (QL); *R. v. Charles*, 2013 ONCA 681 [*Charles*], leave to appeal to SCC granted, [2014] S.C.C.A. No. 18 (QL). The

affirmed Parliament's role as sentencing lawmaker¹²⁹ and continue to find that mandatory minimum sentences are not presumptively unconstitutional.

The role of defence counsel post-conviction is always vital; it is more essential than ever in light of the proliferation of legislative measures that constrain judges' ability to exercise broad discretion in fashioning fit and fair sentences. Short of a complete overhaul of the *Criminal Code*, in which all mandatory minimum sentences are repealed, defence counsel will need to consider whether the mandatory minimum sentence imposed on a particular offender is vulnerable to a constitutional challenge.

In broad strokes, mandatory minimum sentences are susceptible to challenge on the bases that they are: (1) unconstitutional in themselves, as grossly disproportionate or contrary to the principles of fundamental justice; (2) arrived at through means that are contrary to the principles of fundamental justice; and/or (3) discriminatory and adversely impacting on members of a disadvantaged group. In the sections that follow, this report will consider how the *Charter* has been and may continue to be used to challenge mandatory minimum sentences on each of the bases set out above.

Challenging the Minimum Sentence Itself

The conflict between mandatory minimums and the principles of sentencing – particularly the fundamental principle that sentences be proportionate – has

Ontario Court of Appeal recently convened a five-judge panel to jointly consider six appeals that challenged mandatory minimum sentences for various firearms offences. *Nur* is the lead decision of those appeals. In *Nur*, the Ontario Court of Appeal unanimously struck down the three-year indictable mandatory minimum sentence for firearms possession under s. 95 of the *Criminal Code* as a violation of s. 12. In *Charles*, the Court of Appeal struck down the five year minimum sentence for a second offence under s. 95, also as a violation of s. 12.

¹²⁹ See e.g., *R. v. Ferguson*, 2008 SCC 6 at para. 54 (recognizing Parliament's intention to remove judicial discretion to impose a sentence below the stipulated minimum) [*Ferguson*]; *Nasogaluak*, *supra* note 20 at para. 45 (mandatory minimums are a "forceful expression of government policy in the area of criminal law"); *R. v. Stewart*, 2010 BCCA 153, at para. 38 ("It is beyond question that Parliament can require mandatory punishments to be imposed unless it can be shown that a particular punishment violates s. 12 of the *Charter*"); *R. v. Mohla*; *R. v. Singh*, 2012 ONSC 30 at para. 134 ("While mandatory minimum sentences have become increasingly more common, the decision to enact criminal law policy in this way is constitutionally assigned to Parliament. These types of sentences constitute the law of Canada and agreement or disagreement with the wisdom of such legislation is not a judiciable matter").



been recognized by the Supreme Court of Canada. In *R. v. Wust*, the Court observed that:

Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the *Code*, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the *Code*: the principle of proportionality.”¹³⁰

In the nearly fifteen years since *Wust* was decided, Parliament has enacted many more mandatory minimum sentences to cover an ever-growing list of offences. Until relatively recently, the principal way in which minimum sentences have been challenged is by arguing that they constitute “cruel and unusual punishment.”

Mandatory Minimum Sentences as Cruel and Unusual Punishment

Mandatory minimum sentences are primarily challenged as “cruel and unusual punishment” under s. 12 of the *Charter*. Section 12 claims may be brought against the duration of the punishment, the nature of the punishment, and/or the conditions under which the punishment is served.

The foundational case concerning s. 12 is *R. v. Smith*.¹³¹ In *Smith*, the Supreme Court of Canada struck down a minimum sentence of seven years imprisonment for importing narcotics. Writing for a plurality of judges, Justice Lamer held that a “cruel and unusual punishment” is one that is grossly disproportionate. Since *Smith*, the gross disproportionality standard has endured as the hallmark of the s. 12 analysis.

¹³⁰ *R. v. Wust*, 2000 SCC 18 at para. 18.

¹³¹ *Smith*, *supra* note 34.

Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the Code, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the Code: the principle of proportionality."

A sentence that is "grossly disproportionate" has been defined in the jurisprudence as a sentence that is "so excessive as to outrage standards of decency"¹³² and "disproportionate to the extent that Canadians 'would find the punishment abhorrent or intolerable.'"¹³³ The practical difficulty in applying the gross

disproportionality standard was recently remarked upon by Justice Molloy of the Ontario Superior Court of Justice. Justice Molloy observed that, "... there is little guidance to be gleaned from [the] cases as to what grossly disproportionate means in a tangible sense, apart from the fact that it is beyond harsh and demonstrably unfit."¹³⁴

The two-stage analytical framework for determining whether a punishment is grossly disproportionate was articulated by the Supreme Court of Canada in *R. v. Goltz*,¹³⁵ and elaborated upon in *R. v. Morrisey*. In *Goltz*, the Court considered the constitutionality of a seven-day minimum sentence for knowingly driving while prohibited. In *Morrisey*, a first-time offender convicted of criminal negligence causing death was subject to a four-year mandatory minimum because the offence was committed with a firearm. In both cases, the mandatory minimum was challenged under s. 12 of the *Charter*; in neither case did the Court find a *Charter* violation.

When assessing the constitutionality of a mandatory minimum sentence under s. 12, the first stage is a specific inquiry focused on the situation of the individual offender before the court. The specific inquiry requires balancing the gravity of the offence with the personal characteristics of the offender. If the challenged

¹³² *Ibid.* at 1072.

¹³³ *R. v. Morrisey*, 2000 SCC 39 [*Morrisey*] at para. 26.

¹³⁴ *R. v. Smickle*, 2012 ONSC 602 [*Smickle*] at para. 80.

¹³⁵ *R. v. Goltz*, [1991] 3 S.C.R. 485 [*Goltz*].



provision would impose on the offender a grossly disproportionate sanction, then it will amount to a *prima facie* violation of s. 12. If the circumstances of the particular offender do not warrant a finding of gross disproportionality, the court will nevertheless go on to the second stage and engage in a generalized inquiry. Under the generalized inquiry, the court will consider whether the challenged provision would be grossly disproportionate when applied in reasonable hypothetical circumstances.

Specific Inquiry

The specific inquiry requires the court to first consider what a fit sentence would be in the absence of a mandatory minimum. Over time, the jurisprudence has identified several factors that are relevant to the determination of whether a sentence is grossly disproportionate to the individual offender:

- The gravity of the offence;
- The personal circumstances of the offender;
- The particular circumstances of the case;
- The actual effect of the punishment on the individual;
- The penological goals and sentencing principles upon which the punishment is founded;
- The existence of valid alternatives to the punishment imposed; and
- A comparison with punishments imposed for other crimes in the same jurisdiction.¹³⁶

The first four of these factors are important touchstones to demonstrate that there is a gross disconnect between the minimum punishment and the moral culpability of the offender. The latter three factors perhaps ought to more properly be considered in a s. 1 analysis, as they address legislative and policy considerations. The Court has addressed all of these factors at the infringement stage of the *Charter* analysis. In so doing, the Court emphasized that no one factor is paramount in the analysis. Further, none of the factors are “in themselves decisive to a determination of gross disproportionality.”¹³⁷

¹³⁶ *Ibid.* at 499-500.

¹³⁷ *Morrissey*, *supra* note 133 at para. 28, citing to *Goltz* at 500.

Over time, the case law appears to have narrowed the scope of these factors. In particular, a robust, individualized consideration of these factors has given way to an increasingly deferential and generalized assessment of legislative intent.¹³⁸

In *Smith*, Justice Lamer endorsed a contextual, individualized approach to assessing whether the sentence was grossly disproportionate to what the offender deserved. He stated that the court should consider both “the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this *particular* offender or to protect the public from this *particular* offender.”¹³⁹ After *Smith* however, the Court’s focus shifted to the gravity and nature of the offence in a more abstracted sense. In *Morrissey*, for instance, the *mens rea* of the offence (wanton and reckless disregard) was fixed upon in prioritizing principles of general deterrence and denunciation.¹⁴⁰ The analysis largely ignored the actual circumstances of the case in which a firearm discharged when an extremely intoxicated Mr. Morrissey fell off a bunk bed.

The Court has also taken a limited view of what is meant by “the actual effect of the punishment on the offender”. In *Morrissey*, this factor was described as requiring courts to “fully understand the impact of the sentence as it will be actually served” including the *nature and conditions* of the sentence.¹⁴¹ In this regard, Justice Gonthier listed the potential availability of escorted absences, intermittent sentences, and the possibility of day parole and full parole as considerations.¹⁴² However, it is equally – if not more – important for courts to consider the non-ameliorative potential conditions of the sentence as it may

¹³⁸ But see *R. v. Vandyke*, 2013 ABPC 347, where a judge of the Alberta Provincial Court recently found that, in respect of s. 95 (firearms) offence, “the Parliamentary rationale for the minimum sentence and its justification does not satisfy true penological goals, nor is it in line with sentencing principles currently existing in the Criminal Code.” (para. 14). After assessing evidence from the field of criminology, Judge Lamoureux concluded that the mandatory minimum reflected “ineffective penologic goals” and that, “At best, it is a perceived goal of deterrence which factually and statistically is not achieved.” (para. 15). The court declared s. 95(2)(a)(i) to be of no force and effect to the extent that it imposes a mandatory three year minimum term of imprisonment when the Crown proceeds by indictment. The accused was sentenced to a 12-month conditional sentence.

¹³⁹ *Smith*, *supra* note 34 at 1073 (emphasis added).

¹⁴⁰ *Morrissey*, *supra* note 133 at paras. 36, 47.

¹⁴¹ *Ibid.* at para. 41.

¹⁴² *Ibid.*



actually be served by the offender. There should be room here for the Court to consider the disproportionate impact incarceration may have on certain offenders, such as Aboriginal and racialized offenders, women and offenders with mental health concerns.¹⁴³

General Inquiry

If the minimum sentence is not found grossly disproportionate when applied to the individual offender, the court goes on to consider whether the mandatory minimum is grossly disproportionate when applied to a “reasonable hypothetical” offender.

The proffering of reasonable hypotheticals for the court to consider is an important – and often contested – part of the s. 12 challenge. Minimum sentences are often struck down not because of their effect on the offender before the court, but on how the sentence would be grossly disproportionate for other offenders.

Here too, the Court’s jurisprudence has evolved considerably since the notion of a hypothetical offender was first raised obliquely in *Smith*. In *Smith*, the seven year mandatory minimum sentence for importing a narcotic was struck down, not because of Mr. Smith’s own circumstances (he was convicted of importing a significant quantity of cocaine from Bolivia), but because of the possibility that the minimum would also apply to a much more sympathetic offender: the hypothetical young person who is caught driving back from the U.S. with his or her “first joint of grass.”¹⁴⁴

Although a hypothetical offender was used to strike down the minimum sentence in *Smith*, it wasn’t until 1991 that “reasonable hypotheticals” became a term of art and the Court provided guidance on their development. In *Goltz*, the Supreme Court held that reasonable hypotheticals must be found in “reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable

¹⁴³ In a similar vein, the Ontario Court of Appeal recently suggested in *R. v. Nur* that judges take judicial notice that first offenders, especially youthful first offenders, “will have a difficult time when placed in the federal penitentiary system.” *Nur*, *supra* note 128 at para. 93.

¹⁴⁴ *Smith*, *supra* note 34 at 1053. Justice McIntyre, in dissent, would have confined the s. 12 analysis to the first prong only, such that individuals would be confined to arguing only that their punishment is cruel and unusual, not that the punishment may be cruel and unusual for a hypothetical third party (at 1083-1084).

cases.”¹⁴⁵ Instead, the reasonable hypothetical must be focused on “imaginable circumstances which could commonly arise in day-to-day life.”¹⁴⁶ The actual facts of the case at bar were also regarded as an “important benchmark” for defining a hypothetical.¹⁴⁷

The definition of a reasonable hypothetical was revisited in *Morrissey*. Justice Gonthier, again writing for the majority, clarified that it would be sufficient for reasonable hypotheticals to be “common examples of the crime rather than examples of common occurrences in day-to-day life.”¹⁴⁸ Further, “reported cases can be used with caution as a starting point, and additional circumstances can be added to the scenario to construct an appropriate model against which to test the severity of the punishment.”¹⁴⁹ When adding circumstances to actual cases, the “proper approach is to develop imaginable circumstances which could commonly arise with a degree of generality appropriate to the particular offence.”¹⁵⁰ Applying this standard, Justice Gonthier identified two types of hypothetical situations for negligent use of a firearm: (1) an individual playing around with a gun; and (2) a hunting trip gone awry.¹⁵¹ Under either scenario, a four-year minimum sentence would not be grossly disproportionate.

Reasonable hypotheticals have not featured prominently in subsequent challenges to mandatory minimums that have reached the Supreme Court and the Court has not provided further guidance on the development of reasonable hypotheticals. Recent appellate court consideration of reasonable hypotheticals is found in the reasons of the five-judge bench of the Ontario Court of Appeal empaneled to jointly hear six appeals concerning the constitutionality of

¹⁴⁵ *Goltz*, *supra* note 135 at 505-506.

¹⁴⁶ *Ibid.* at 515-516.

¹⁴⁷ *Ibid.* at 516.

¹⁴⁸ *Morrissey*, *supra* note 133 at para. 33.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* at para. 50.

¹⁵¹ The concurring minority reasons of Justices Arbour and McLachlin (as she then was) disagreed with a categorical approach to reasonable hypotheticals. Given the fact-driven and highly variable nature of the offence, the minority felt that it could not be concluded that the four year sentence would not be grossly disproportionate for any reasonable hypothetical offender. *Morrissey*, *supra* note 133 at paras. 60-65.



mandatory minimum sentences for s. 95 (firearms) offences. In the lead decision, *Nur*, Justice Doherty (writing for a unanimous court) defined the reasonable hypothetical as:

... one that operates at a general level to capture conduct that includes all the essential elements of the offence that trigger the mandatory minimum, but no more. Characteristics of individual offenders, be they aggravating or mitigating, are not part of the reasonable hypothetical analysis. ... It flows from *Morrissey* that the broader the description of the offence in the provision creating the offence, the wider the range of reasonable hypotheticals."¹⁵²

In stating an appropriate reasonable hypothetical for s. 95 offences, Justice Doherty first had to determine whether the hypothetical should be limited to scenarios that share the central features of the case before the court – namely, possession of a loaded firearm without authorization to possess it anywhere at any time. Justice Doherty concluded that the proper approach to developing the hypothetical is to look at *all* potential applications of the section. In earlier cases where a more narrow approach to the scope of the hypothetical was taken, the minimum sentence applied because the offender had committed another (predicate) offence.

The breadth of the offence was important to the Court of Appeal's proper hypothetical. The court observed that, like the narcotics importing offence in *Smith*, s. 95 also prohibits a broad range of conduct. Section 95 offences also attract a wide range of sentencing options – ranging from an absolute discharge on the one hand to ten years of imprisonment on the other, depending on which mode of proceeding the Crown elects. The range of sentencing options were seen as significant to developing a proper hypothetical. Ultimately, in *Nur*, the reasonable hypothetical selected was on the regulatory end of the spectrum of the wide range of conduct caught by the provision.¹⁵³

¹⁵² *Nur*, *supra* note 128 at para. 142.

¹⁵³ *Ibid.* at paras. 150-153. In *Nur*, the reasonable hypothetical had three characteristics: (1) knowing possession of an unloaded restricted or prohibited firearm with readily accessible useable ammunition stored nearby; (2) authorization to possess the firearm and it is registered, but to the offender's knowledge the authorization does not permit possession at the place or in the manner

At the Court of Appeal in *Nur*, the reasonable hypothetical analysis was successful in striking down a hybrid offence on the basis that it was grossly disproportionate under s. 12. Section 12 jurisprudence has developed in cases where the minimum sentence applied to a direct indictable offence. In *Nur*, the Crown had discretion to choose the mode of proceeding, the effect of which would determine whether or not a mandatory minimum sentence would apply. The lower court in *Nur*¹⁵⁴ refused to strike down the mandatory minimum if prosecuted by indictment, taking the view that the Crown's discretion to elect a mode of proceeding operates as a "constitutional safety valve." Justice Code found that the hybrid nature of the offence offers "a complete answer to all of the 'reasonable hypotheticals' under s. 12 of the *Charter*"¹⁵⁵ such that were any of the reasonable hypothetical scenarios to occur, the Crown would have elected to proceed summarily and a minimum sentence would not apply. The Court of Appeal took the contrary view and found that the Crown's ability to proceed summarily would not "save" a potential infringement of s. 12.¹⁵⁶ In *Smith*, the Supreme Court had likewise found that an exercise of prosecutorial discretion could not "salvage" the minimum sentence.¹⁵⁷

The Supreme Court of Canada has not yet pronounced on whether reasonable hypotheticals are available to challenge minimum sentencing in hybrid offences, or on how the hybrid nature of an offence may affect the development of a proper hypothetical. However, it appears unlikely that the Court would accept an exercise of prosecutorial discretion in electing mode of proceeding as a complete answer to potential constitutional infirmity. In *Nur* and *Charles*, the Supreme Court will have an opportunity to provide further guidance on the appropriateness and development of reasonable hypotheticals generally.

where it is possessed; and (3) possession of the firearm is not connected to any lawful purpose or activity and the offender is not engaged in any dangerous activity with the firearm.

¹⁵⁴ *R. v. Nur*, 2011 ONSC 4874 (Ont. S.C.J.) [*Nur* ONSC].

¹⁵⁵ *Ibid.* at para. 108.

¹⁵⁶ *Nur*, *supra* note 128 at para. 156.

¹⁵⁷ *Smith*, *supra* note 34 at 1078.



Threshold Considerations

Several recent judgments call into question whether courts should undertake a constitutional analysis of mandatory minimum sentences at all in circumstances where the court finds that the minimum sentence provision will have no impact on the individual before the court. These are cases in which courts have declined to hear constitutional arguments where the appropriate range of sentence for the offender is found to be consistent with or greater than the mandatory minimum.¹⁵⁸ The most recent illustration comes from the BC Court of Appeal's hearing of an appeal from a successful s. 12 claim brought against the one-year mandatory minimum sentence for possession for the purposes of trafficking.

In *R. v. Lloyd*, Provincial Court Judge J.F. Galati found that the mandatory minimum sentence of one-year imprisonment under s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* constituted cruel and unusual punishment in violation of s. 12 of the *Charter*.¹⁵⁹ Judge Galati declared the mandatory minimum to be of no force and effect.¹⁶⁰ The judge found that the one-year minimum sentence was not grossly disproportionate for Mr. Lloyd, but that it would be for a hypothetical offender. The hypothetical offender put forward by counsel and accepted by the judge was that of a drug-addicted individual in possession of a small amount of a Schedule 1 substance, which is intended to be shared or is shared with a spouse or a friend – a scenario the judge observed “happens daily in the Downtown Eastside of Vancouver and is in no way a far-fetched or extreme scenario.”¹⁶¹ Mr. Lloyd was sentenced to one-year imprisonment.

On appeal, the BC Court of Appeal declined to address the constitutionality of the minimum sentencing provision, finding that, as the one-year minimum has

¹⁵⁸ See e.g., *R. v. Ball*, 2013 BCSC 2372, sentence varied 2014 BCCA 120; *R. v. Craig*, 2013 BCSC 2098 and *R. v. Curry*, 2013 ONCA 420.

¹⁵⁹ *R. v. Lloyd*, 2014 BCPC 8 [*Lloyd BCPC*], 2014 BCPC 11.

¹⁶⁰ One of the issues on appeal in *Lloyd* was the jurisdiction of the Provincial Court to issue “declarations” striking down laws. The Court of Appeal held that the Provincial Court Judge acted outside his jurisdiction in issuing a formal declaration that the mandatory minimum sentence was of “no force or effect.” While a Provincial Court Judge may find a law to be of no force or effect under s. 52 of the *Charter* and must not give effect to a law so found, the power to make a formal declaration lies only within the inherent powers of provincial superior courts: *R. v. Lloyd*, 2014 BCCA 224 [*Lloyd*] at paras. 29-38.

¹⁶¹ *Lloyd BCPC*, *supra* note 159 at paras. 48-49.

no impact on Mr. Lloyd himself, it would be “unnecessary and unwise” to do so.¹⁶² In the lower court, Judge Galati had found that Mr. Lloyd could challenge the constitutional validity of the mandatory minimum sentence because of the potential for the minimum to have an inflationary effect on the sentence he would have otherwise received.¹⁶³ While the Court of Appeal did not take issue with Mr. Lloyd’s standing to make constitutional arguments, it did raise the principle of judicial restraint that weighs in favour of deciding cases on narrow, non-constitutional grounds as far as possible to avoid gratuitous intrusion on the powers of the legislative or executive branches of government.¹⁶⁴ The court held that before undertaking a constitutional inquiry, courts should “consider whether the impugned provision would have any effect on the sentence to be imposed.”¹⁶⁵

In the court below, the trial judge accepted that the one-year minimum sentence sets an “inflationary floor” that affects not only those offenders who would have received a sentence below the minimum, but also affects offenders who would have received a higher sentence. The theory of the inflationary floor was first expressed by Justice Arbour in her minority concurring judgment in *Morrissey* in support of the view that mandatory minimum sentences do not completely disavow proportionality in sentencing. Justice Arbour observed that:

¹⁶² *Lloyd*, *supra* note 160 at para. 6.

¹⁶³ In this respect, the trial judge relied on the Ontario Court of Appeal judgment in *Nur*, *supra* note 128 at para. 110, fn 12, in which Doherty J. held that, given the potential inflationary effect of mandatory minimum sentences, any sentence the accused might receive for a conviction under s. 95 could be affected by the existence of a mandatory minimum. Consequently, the accused clearly had standing to bring a *Charter* challenge to the minimum sentencing provision. The discussion of standing in *Nur* took place at the beginning of the Ontario Court of Appeal’s analysis on reasonable hypotheticals, after having found that the three-year minimum sentence was not grossly disproportionate for Mr. Nur.

¹⁶⁴ *Lloyd*, *supra* note 160 at para. 42, citing to Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supplemented) (looseleaf) (Toronto: Thomson Carswell, 2007 (updated to 2013)), 59-22. However, courts frequently disregard restraint. As Peter Hogg goes on to observe, “If the issue is likely to recur, there is much to be said for deciding the issue then and there, even if the case could be disposed of on a non-constitutional or narrower constitutional basis.” Given the likelihood that challenges to mandatory minimums under the *CDSA* are likely to recur, a decision on the constitutionality of this sentencing provision would provide much-needed certainty in the law.

¹⁶⁵ *Lloyd*, *supra* note 160 at para. 44.



... By fixing a minimum sentence, particularly when the minimum is still just a fraction of the maximum penalty applicable to the offence, Parliament has not repudiated completely the principle of proportionality and the requirement, expressed in s. 718.2(b), that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Therefore, in my view, the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called “best offender” whose conduct is caught by these provisions. The mandatory minimum must not become the standard sentence imposed on all but the very worst offender who has committed the offence in the very worst circumstances. The latter approach would not only defeat the intention of Parliament in enacting this particular legislation, but also offend against the general principles of sentencing designed to promote a just and fair sentencing regime and thereby advance the purposes of imposing criminal sanctions.¹⁶⁶

Consequently, the inflationary effect is such that if the “best offender” receives the minimum sentence, one that may be higher than what he or she would have received in the absence of a mandatory minimum, sentences for more culpable offenders are increased as well, ultimately increasing the entire sentencing range. A majority of the Supreme Court of Canada has not endorsed the view that mandatory minimum sentences have an inflationary effect on sentencing; however the concept has gained support in other courts.¹⁶⁷

The Court of Appeal in *Lloyd* urged caution in accepting that mandatory minimum invariably have inflationary effects, suggesting that, in light of the Supreme Court’s view that maximum sentences are not reserved for the “worst offender and the worst offence,”¹⁶⁸ it “may be doubted that the minimum sentence should be reserved for the ‘best offender.’”¹⁶⁹ The court went on to

¹⁶⁶ *Morrissey*, *supra* note 133 at para. 75.

¹⁶⁷ Apart from *Nur*, see e.g., *R. v. Delchev*, 2014 ONCA 448 at para. 18; *R. v. B.C.M.*, 2008 BCCA 365 at paras. 25-36; *R. v. Guha*, 2012 BCCA 423 at paras. 32-35; *R. v. Colville*, 2005 ABCA 319 at paras. 21-22.

¹⁶⁸ *R. v. Cheddesingh*, 2004 SCC 15 and *R. v. L.M.*, 2008 SCC 31.

¹⁶⁹ *Lloyd*, *supra* note 160 at para. 53.

observe that where a mandatory minimum provision “dramatically increases the severity of sentences at the low end of the sentencing range”, there will be a ripple effect that will impact not only those offenders sentenced at the low end of the range.¹⁷⁰ Conversely, where the minimum sentence does not dramatically increase the severity of sentences actually handed out, there will be “no reason to accept that the provision will have any necessary inflationary effect on sentencing”; in those circumstances, the court stated that the new mandatory minimum sentence should have no effect at all.¹⁷¹

After reviewing the case law in cases similar to Mr. Lloyd’s, the court held that the concept of an inflationary floor is not applicable to the possession for the purposes of trafficking offence, as a 12- to 18-month sentencing range applies to low-level drug dealers with relevant prior convictions who have sold drugs to support their own addictions. In this case, the mandatory minimum one-year sentence did not result in any significant change to the low end of the sentencing range and had no effect on the sentence to be imposed on Mr. Lloyd. Consequently, it was unnecessary for the court to consider the constitutionality of the mandatory minimum in this case.

The BC Court of Appeal’s analysis in *Lloyd* raises many questions. Must courts consider whether a particular mandatory minimum sentence has an inflationary effect before undertaking a constitutional analysis, at least under s. 12 of the *Charter*? To what extent is a finding that a mandatory minimum sentence will have no inflationary effect on an accused ostensibly the same as finding that the sentence is not disproportionate under the first part of the s. 12 test? How do these threshold considerations affect the reasonable hypothetical stage of the gross disproportionality test?

Mandatory Minimum Sentences as Contrary to Principles of Fundamental Justice

Section 7 of the *Charter* preserves the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. A sentence of imprisonment – mandatory or

¹⁷⁰ *Ibid.* at paras. 54-55.

¹⁷¹ *Ibid.* at para. 56.



otherwise – clearly constitutes a deprivation of liberty. This raises the question: may mandatory minimum sentences be challenged substantively under s. 7 as contrary to the principles of fundamental justice?

From the beginning of the Court’s jurisprudence on the constitutionality of mandatory minimum sentencing a distinction has been made between grossly disproportionate sentences that trigger constitutional protection under the *Charter* and the “merely excessive” sentences that should be left to the sentencing appeal process.¹⁷² Concerns about the potential for overlap in ss. 7 and 12 in respect of sentencing were raised in *Smith*. Justice McIntyre, writing in a dissenting opinion, was concerned that s. 7’s broad and general rights should not impose “greater restrictions on punishment than section 12 – for example by prohibiting punishments which were merely excessive.”¹⁷³

The overlap was discussed again in *R. v. Marmo-Levine*; *R. v. Caine* in the context of an offence provision which was challenged on the basis that it violated a new principle of fundamental justice. The Supreme Court of Canada considered whether there is a principle of fundamental justice embedded in s. 7 that could give rise to a constitutional remedy for a punishment that does not already infringe s. 12. The majority of the Court said no, reasoning that:

To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected “legal rights” set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.¹⁷⁴

Justice Arbour, dissenting in part, believed it would be improper to limit the review of the constitutionality of an individual’s liberty interest to consideration only under s. 12. In her view, s. 7 provided the proper scope to assess the availability of imprisonment as a fit sentence.¹⁷⁵ Where a principle of

¹⁷² *Smith*, *supra* note 34 at 1072.

¹⁷³ *Ibid.* at 1107.

¹⁷⁴ *R. v. Marmo-Levine*; *R. v. Caine*, 2003 SCC 74 at para. 160.

¹⁷⁵ *Ibid.* at para. 260.

fundamental justice not specifically named in the *Charter* is at issue, Justice Arbour observed that an analysis of the “fitness” of the sentence would appropriately be conducted pursuant to s. 7.¹⁷⁶ The majority of the Court found that, even if the punishment could be considered under s. 7, the constitutional standard would have to be gross disproportionality to preserve the internal consistency of *Charter* rights.¹⁷⁷ Thus, the analysis would be redundant, as it would be duplicative of review for cruel and unusual punishment under s. 12.

The Ontario Court of Appeal recently considered the relationship between ss. 7 and 12 in a challenge to a mandatory minimum sentence. In *Nur*, the court observed that section 12, like the other legal rights protected in ss. 8 to 14 of the *Charter*, is itself a principle of fundamental justice.¹⁷⁸ The court held that a claim that a minimum sentence constitutes an infringement on liberty that is inconsistent with the principles of fundamental justice must be determined exclusively under the s. 12 prohibition against cruel and unusual punishment.¹⁷⁹

Challenges to the length of the sentence itself have been regarded as properly raised under the more specific guarantee in s. 12.¹⁸⁰ As of late, however, substantive challenges to mandatory minimum sentences are being brought under s. 7 as well. Section 7 challenges to mandatory minimums may take one of two forms: the minimum sentence as a deprivation of liberty assessed against an established substantive principle of fundamental justice, or as a deprivation of liberty assessed against a new principle of fundamental justice, such as proportionality in sentencing.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.* at para. 161.

¹⁷⁸ *Nur*, *supra* note 128 at para. 62.

¹⁷⁹ *Ibid.* at para. 63, citing to *Malmo-Levine* at para. 160.

¹⁸⁰ *Ibid.*; See also *R. v. Genereux*, [1992] 1 S.C.R. 259 at 310. In this case, a challenge had been brought under both s. 11(d) and s. 7 of the *Charter*. At issue was the independence of the Court Martial before which the appellant had been tried. The Court was unwilling to consider the challenge under the “more open language of s. 7” where the appellant had complained of a “specific infringement which falls squarely within s. 11(d).”



Recognized Principles of Fundamental Justice

Section 7 principles of fundamental justice have evolved greatly since the early days of the *Charter*. The law now recognizes four generally applicable substantive principles of fundamental justice: the law must not be vague, overbroad, or arbitrary, nor must it be grossly disproportionate in its effects.¹⁸¹

While the law recognizes these substantive principles of fundamental justice as distinct, there is still considerable confusion about which principle is best suited to a particular challenge. The underlying issue when assessing a law against one of these principles is to consider whether, as Hamish Stewart helpfully puts it: “there is a mismatch between the legislature’s objective and the means chosen to achieve it: the law is inadequately connected to its objective or in some sense goes too far in seeking to attain it.”¹⁸² Apart from being grossly disproportionate in their effects, mandatory minimum sentences are arguably also arbitrary or overly broad.¹⁸³

Substantive Arbitrariness

A challenged law will be arbitrary contrary to the principle of fundamental justice where the law “bears no relation to, or is inconsistent with, its legislative objective.”¹⁸⁴ In other words, “there must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes

¹⁸¹ Until recently, there was considerable confusion about whether these principles operated as distinct principles of fundamental justice given their overlap. The Supreme Court of Canada recently addressed the “commingling” of arbitrariness, overbreadth and gross disproportionality in *Bedford v. Canada*, 2013 SCC 72 [*Bedford*] at paras. 106-123. The Court clarified that each is a distinct principle of fundamental justice.

¹⁸² Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 151.

¹⁸³ Gross disproportionality, apart from being the standard upon which a cruel and unusual punishment is found under s. 12 of the *Charter*, is also a principle of fundamental justice. Where the “effect of the law is grossly disproportionate to the state’s objective,” the law will not be in accordance with the principles of fundamental justice. The threshold for such a finding is high: it will be met where the “seriousness of the deprivation is totally out of sync with the objective of the measure.” *Bedford*, *supra* note 181 at paras. 103, 120. As the analysis for a claim that a mandatory minimum sentence violates s. 7 on the basis of gross disproportionality will likely be duplicative of the analysis described above for a s. 12 claim, it will not be canvassed further here.

¹⁸⁴ *A.C. v. Manitoba*, 2009 SCC 30, at para. 140; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 131 (“The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair”).

on life, liberty, or security of the person.”¹⁸⁵ The mandatory minimum term of punishment must be rationally connected to the objectives of the law under which it arises.

In *Nur*, a two-year sentencing “gap” in s. 95 of the *Criminal Code* created between cases where the Crown proceeds summarily and where the Crown proceeds by indictment was challenged on grounds that it is substantively arbitrary. Under s. 95, if the Crown proceeds summarily, the *maximum* sentence is one-year imprisonment, but if the Crown proceeds by indictment, the *minimum* sentence is three years, leaving a two-year gap. At the lower court, the gap was found to breach s. 7. Justice Code reasoned that the two-year gap hindered the valid legislative purpose of hybrid offences in providing for flexibility in procedure. The gap in the law between one-year maximums and three-year minimum sentences makes no rational sense from a sentencing or penal perspective.¹⁸⁶

Despite having found a breach of s. 7, Justice Code did not strike down the legislation. He found that, as Mr. Nur was not an offender whose case would reasonably be expected to proceed summarily, he did not have standing for that remedy. However, the lower court’s analysis of the two year sentencing gap in *Nur* was endorsed and adopted by the lower court in *R. v. Smickle*.¹⁸⁷ As Mr. Smickle did fall within the class of individuals who could have reasonably faced a summary conviction proceeding, he did have standing to challenge the scheme.¹⁸⁸ Justice Molloy found the sentencing scheme to be an arbitrary, unjustifiable violation of s. 7.

¹⁸⁵ *Bedford*, *supra* note 181 at para. 111.

¹⁸⁶ *Nur* ONSC, *supra* note 154 at para. 126-127.

¹⁸⁷ *Smickle*, *supra* note 134 at paras. 90-96. See also, *R. v. G.H.T. Sheck*, 2013 BCPC 105 at para. 23, in which Judge Bahen of the BC Provincial Court applied the reasoning in the lower court decisions in *Nur* and *Smickle* to find the two-year sentencing gap creates an “arbitrary and fundamentally unjust sentencing process in violation of s. 7.”

¹⁸⁸ Mr. Smickle’s case was very widely reported on and the facts are well known. At his cousin’s home, Mr. Smickle was taking a photo of himself for his Facebook page while posing with a loaded handgun in one hand when members of the police Guns and Gang Squad executed a valid search warrant in relation to Mr. Smickle’s cousin, who was believed to be in possession of illegal firearms. Mr. Smickle was charged with various offences in relation to the possession of a loaded firearm and the Crown proceeded by indictment.



The Ontario Court of Appeal unanimously overturned this finding on appeal, holding that the two-year gap in the legislation is not arbitrary. The Court of Appeal found the gap to be consistent with the deterrence and denunciation objectives of s. 95. Writing for the court, Justice Doherty found that the objective of this “limited summary proceeding option” is to make stronger Parliament’s deterrence and denunciation message.¹⁸⁹ At neither level of court were concerns raised about the propriety of bringing such a challenge under s. 7.

Overbreadth

As a principle of fundamental justice, overbreadth occurs “where the law goes too far and interferes with some conduct that bears no connection to its objective.”¹⁹⁰ Along with the norm against arbitrariness, overbreadth is “directed at the absence of a connection between the infringement of rights and what the law seeks to achieve.”¹⁹¹ Overbreadth applies to a law that is so broad in scope that while it may be rationally connected in *some* cases, it will overreach in others. A law that mandates a minimum sentence for everyone who commits the offence would seem on its face overbroad.

Mandatory minimum sentences have not often been challenged on the basis of overbreadth. A successful overbreadth challenge to s. 95 of the *Code* was brought in *R. v. Adamo*, although the court did not engage in a full s. 7 analysis. In *Adamo*, the court framed the question as asking “whether Parliament, in deciding to imprison *everyone* who commits this offence (and is prosecuted by indictment) for a minimum of three years, has gone further than necessary to achieve its objective of combatting gun violence and possessing prohibited and restricted weapons.”¹⁹² As the court had already found the provision had a grossly disproportionate impact on Mr. Adamo under the s. 12 analysis and that it served no general deterrent purpose, the provision was also found to be an overbroad infringement of s. 7.

¹⁸⁹ *Nur*, *supra* note 128 at paras. 200-204.

¹⁹⁰ *Bedford*, *supra* note 181 at para. 101.

¹⁹¹ *Ibid.* at para. 108.

¹⁹² *R. v. Adamo*, 2013 MBQB 225 [*Adamo*] at para. 122. Mr. Adamo is a mentally disabled offender. In order to fix fit and proper sentence for Mr. Adamo, the court spent considerable time in the judgment looking at the reasons for Mr. Adamo’s disability and his level of responsibility in light of it, including the extent to which he was failed by the justice system.

Proportionality in Sentencing as a Principle of Fundamental Justice

The attraction of challenging sentencing provisions under s. 7 is understandable. Unless s. 12 evolves to do more “substantive work” as one scholar puts it,¹⁹³ it is likely that claimants will increasingly look to s. 7 for relief from mandatory minimum sentences. Insofar as s. 7 is used to challenge mandatory minimum sentences, there are valid concerns about the creation of unnecessary precedent and parallel jurisprudence.

Challenges to mandatory minimums brought under s. 7 of the *Charter* have the potential to fundamentally shift the analytical landscape. As it stands, the s.12 analysis is framed in negative terms: a constitutional infringement is found where the punishment is grossly *disproportionate*. There is potential under s. 7, however, for courts to recognize a constitutionally-protected right to a positive standard of “proportionality in sentencing.” This may result in the law evolving to recognize a right to a proportionate sentence, not merely one that is not grossly disproportionate.

There is support for the view that proportionality in sentencing may be recognized as a principle of fundamental justice under s. 7, or at least that the Court is open to reconsidering the analytical framework for proportionality in sentencing. As Kent Roach observes, there is a strong case to be made that proportionality between crime and punishment is a principle of fundamental justice.¹⁹⁴ In *R. v. Ipeelee*, Justice LeBel, writing for a unanimous Court, opened the door to this possibility when he remarked (likely in *obiter*) that “proportionality in sentencing could aptly be described as a principle of

There is potential for courts to recognize a constitutionally-protected right to a positive standard of “proportionality in sentencing.”

This may result in the law evolving to recognize a right to a proportionate sentence, not merely one that is not grossly disproportionate.

¹⁹³ Jamie Cameron, “Fault and Punishment under Sections 7 and 12 of the Charter” (2008) 40 SCLR (2d) 553 [*Fault and Punishment*].

¹⁹⁴ Kent Roach, “The Charter versus the Government’s Crime Agenda” (2012) 58 SCLR (2d) 211 [*Charter versus Government*] at 231-234.



fundamental justice under s. 7 of the *Charter*.”¹⁹⁵ This may very well be the sort of proportionality analysis under s. 7 that Justice Arbour was forecasting in *Marmo-Levine*. There is precedent for such a principle going back to the *Reference re Motor Vehicle Act (British Columbia)*.¹⁹⁶ In her concurring judgment, Justice Wilson concluded that a fit proportion between crime and punishment was a principle of fundamental justice traditionally used by trial judges in the exercise of their sentencing discretion.¹⁹⁷ In *Ipeelee*, the Supreme Court recently emphasized the dual nature of proportionality, reflecting the gravity of the offence and the moral blameworthiness of the offender. A truly just sanction is one that “reflects both perspectives on proportionality and does not elevate one at the expense of the other.”¹⁹⁸

What implications does the Court’s renewed articulation of proportionality have for constitutional challenges to sentencing provisions? Currently, the *Charter* provides no protection from a “merely excessive” sentence.¹⁹⁹ As Marie-Eve Sylvestre observes, a “merely excessive” sentence is an oxymoron: in some sense, either a sentence is excessive or it is not.²⁰⁰ If a sentence is truly excessive, then it is outside the range of what is societally accepted. How does an excessive sentence of imprisonment not infringe an individual’s liberty interest? Should such a sentence not have to accord with principles of fundamental justice, even if it may fall short of “shocking the conscience”?

There is potential for excessive sentences to be challenged on the basis that they are out of proportion when assessed against the gravity of the offence and the degree of responsibility of the offender under s. 7 of the *Charter*, as signaled by the Court’s decision in *Ipeelee*. The Court’s reinvigoration of proportionality is

¹⁹⁵ *Ipeelee*, *supra* note 33 at para. 36.

¹⁹⁶ *Re Motor Vehicle Act*, *supra* note 34. In this reference, the Court held that an absolute liability offence in the BC *Motor Vehicle Act* violated s. 7 of the *Charter* because it resulted in mandatory seven day imprisonment that was disproportionate to the offence.

¹⁹⁷ *Ibid.* at 533-534.

¹⁹⁸ *Ipeelee*, *supra* note 33 at para 37.

¹⁹⁹ Smith, *supra* note 34 at 1046 (Section 12 aimed at punishments more than merely excessive).

²⁰⁰ Marie-Eve Sylvestre, “The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility” (2013) 63 SCLR (2d) 461 at 468.

arguably inclusive of review on the basis of arbitrariness and overbreadth. As Sylvestre notes, courts may come to be asked to distinguish between demonstrably unfit sentences dealt with through sentencing appeals, disproportionate sentences that trigger review under s. 7 and grossly disproportionate sentences assessed against s. 12.²⁰¹

A form of proportionality in sentencing was recently recognized as a principle of fundamental justice in a case out of Manitoba. In *R. v. Adamo*, Madam Justice Suche found the mandatory minimum three-year sentence in s. 95(2)(a)(i) violated ss. 12, 7 and 15 of the *Charter*.²⁰² On the s. 7 analysis, Justice Suche recognized that “proportionality, *whereby the moral blameworthiness of an individual is taken into account*, is equally a principle of fundamental justice both in criminalizing conduct and in determining punishment for an offence.”²⁰³ While the court ostensibly assessed the s. 7 challenge against the principles of gross disproportionality and overbreadth (finding that both were violated), the analysis is very much focused on proportionality in sentencing. The court took a robust view of Mr. Adamo’s culpability. Mr. Adamo suffers from a significant mental disability, and while his condition did not preclude him from being found criminally responsible for his conduct, his mental disability reduced his moral culpability. The three-year minimum as applied to Mr. Adamo was also found to have violated s. 12.

Regardless of how it does so, it is clear that the Court must find a way to reconcile the fundamental principle of sentencing – proportionality – with reduced judicial discretion in sentencing decision-making, particularly in the context of mandatory minimums. A coherent and rational approach to assessing the constitutionality of mandatory minimum sentences is necessary, one that gives effect to a “thick” view of what proportionality in sentencing means and how it can be achieved.

Apart from expanding the scope of s. 7 in assessing the sentencing process, there is much potential for challenging mandatory minimum sentences under a renewed approach to s. 12. Since *Smith*, no other challenge to a minimum

²⁰¹ *Ibid.* at 469.

²⁰² *Adamo*, *supra* note 192.

²⁰³ *Ibid.* at para. 113 (emphasis added).



sentence has been successful at the Supreme Court of Canada. Later this year, the Court will be hearing appeals in *R. v. Nur* and *R. v. Charles*. The *Nur* and *Charles* appeals are the Court's next opportunity to refine – and hopefully revive – s. 12.

Jamie Cameron calls for a reinvigorated approach to substantive criminal law under s. 12 – the “faint hope”²⁰⁴ provision of the *Charter*. This can be done by refocusing the analysis on whether there exists a positive relationship of proportionality between the offender's conduct and the punishment.²⁰⁵ Since *Smith*, the examination under s. 12 has moved farther away from the facts of each particular case.

The Court's rich view of proportionality in *Ipeelee* is likely to have significance for how the Court comes to see the role of s. 12 in reviewing mandatory minimums. An approach to minimum sentencing under s. 12 that takes a rich view of proportionality – one that integrates “a range of offender characteristics and mitigating factors” into the analysis²⁰⁶ – will go some way in bridging the gaping chasm between sentencing reality and perception. The approach taken in *R. v. Adamo* may signal a more robust role for s. 12.

Challenging the Process of Mandatory Minimum Sentencing

The majority of mandatory minimum sentences recently added to the *Criminal Code* and the *CDSA* do not apply to an offender automatically. Their application is triggered by an exercise of prosecutorial discretion, in which the Crown makes decisions about whether to: (1) proceed by indictment or summarily for hybrid offences; (2) serve notice to seek a greater punishment; or (3) prove aggravating factors. Challenging the exercise of prosecutorial discretion resulting in a mandatory minimum sentence is another way in which mandatory minimums are being attacked in court. These challenges have taken two forms. They arise either as a challenge to the sentencing scheme granting discretion to the Crown, or as a challenge to the exercise of Crown discretion.

Prosecutorial discretion has long been recognized as an essential feature of the criminal justice system. The Court has found that prosecutorial discretion in

²⁰⁴ *Fault and Punishment*, *supra* note 193 at 583.

²⁰⁵ *Ibid.* at 584.

²⁰⁶ *Charter versus Government*, *supra* note 194 at 231.

itself does not offend the principles of fundamental justice in s. 7 of the *Charter*.²⁰⁷ Further, the Crown's exercise of discretion in making its election to proceed either by indictment or by summary conviction has also been held to accord with constitutional principles.²⁰⁸

As a preliminary point, where a mandatory minimum sentence requires the Crown to give notice of its intention to seek a mandatory minimum penalty and notice of an intention to prove any of the aggravating factors that would either engage or increase the mandatory minimum penalty – such as under s. 8 of the CDSA – that notice must be given prior to plea. In the absence of proper notice, the court is not required to impose the minimum punishment. Pursuant to s. 724(3)(e) of the *Criminal Code*, the presence of any aggravating factors must be proven by the Crown to the criminal standard of proof beyond a reasonable doubt. Defence counsel may be able to challenge the application of a mandatory minimum at the outset by thoroughly testing the Crown's evidence on aggravating factors. The aggravating factors may themselves also be challenged on the basis that they violate the principles of fundamental justice.

Challenges to the Scheme

Challenges have been brought against sentencing regimes where an exercise of prosecutorial discretion triggers a mandatory minimum penalty. These claims essentially posit that, while individually Crown discretion and minimum penalties may be constitutionally sound, in combination they violate the *Charter*.

In *R. v. Kumar*,²⁰⁹ the offender challenged a statutory scheme where the Crown could exercise discretion to prove prior convictions which would in turn invoke a mandatory minimum sentence. The majority of the BC Court of Appeal found that prosecutorial discretion is not properly exercised where the effect of it would be to decide the outcome, including whether or not the offender should be imprisoned. An infringement of s. 7 arbitrariness was found, but the scheme was justified under s. 1. The s. 7 breach was seen as “contained” because of the availability of a constitutional exemption remedy under s. 24(1) in future cases

²⁰⁷ *Beare*, *supra* note 53 at 410-411.

²⁰⁸ See, e.g., *R. v. Laws* (1998), 128 C.C.C. (3d) 516 (Ont. C.A.) at para. 41.

²⁰⁹ *R. v. Kumar*, (1993) 85 C.C.C. (3d) 417 (BCCA).



where the imposition of the minimum sentence would be grossly disproportionate. However, after the Supreme Court of Canada's decision in *R. v. Ferguson*, exemptions are no longer available to remedy unconstitutional sentences.²¹⁰

Likewise, in *R. v. Lonegren*, the court held that the hybrid offence scheme in s. 151 of the *Criminal Code* was arbitrary under s. 9 of the *Charter*.²¹¹ The court found the scheme arbitrary because it would expose an offender to a longer minimum sentence on the basis of a discretionary decision made by the Crown for reasons entirely unrelated to any penological purpose. While an infringement of s. 9 was found, the scheme was held justified under s. 1. The court was persuaded that the extent of the impairment would be attenuated in part because of the manner in which the Crown ordinarily exercises its discretion proceeding by indictment in more serious cases, and because the difference between the two minimum sentences is only 30 days. The two-tiered scheme of mandatory sentences was seen as falling within a range of reasonable alternatives to achieving the pressing and important objective of protecting children from sexual interference.

In *Nur*, an attempt to challenge legislation that combines a hybrid offence with a mandatory minimum penalty was unsuccessful at the Ontario Court of Appeal. The intervener Advocates' Society argued that the scheme created by s. 95 offends s. 7 in two ways: (1) by not requiring the Crown to explain or justify its election to proceed by indictment; and (2) by allowing the Crown to "substantially determine" or "dictate" the sentence to be imposed.²¹² The Court of Appeal rejected these submissions. The Court observed that there are several decisions made by the Crown that will influence the ultimate sentence imposed by the trial judge, such as which charge to prosecute, which procedure to elect, or which aggravating factors to prove at sentencing.²¹³ In making these

²¹⁰ *Ferguson*, *supra* note 129. In *Ferguson*, the Court ruled that constitutional exemptions are an inappropriate remedy for an unconstitutional mandatory minimum sentence.

²¹¹ *R. v. Lonegren*, 2009 BCSC 1678, 2010 BCSC 960.

²¹² *Nur*, *supra* note 128 at para. 189.

²¹³ *Ibid.* at para 193. See also, *R. v. Gill*, 2012 ONCA 607 (the accused unsuccessfully challenged a mandatory minimum sentence triggered by the Crown's decision on sentencing to prove a prior conviction for the same offence. The court held that the trial judge's sentencing discretion is limited by statutory provisions enacted by Parliament, not by the Crown's exercise of discretion).

discretionary decisions, the Crown is not dictating the sentence to be imposed because it is Parliament who determines the available range of sentences.

Exercises of Prosecutorial Discretion

Challenges brought not to the sentencing scheme itself, but rather to the prosecutor's exercise of discretion in a particular case raise questions about the proper standard of review for prosecutorial decision-making. After the Supreme Court's decision in *Krieger v. Law Society of Alberta*, some confusion had arisen in the case law about whether different standards of review would apply to exercises of prosecutorial discretion depending on whether the decision applies to a core or non-core function of the Crown.²¹⁴ In *Krieger*, the Court defined prosecutorial discretion as "referring to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence."²¹⁵ The court recently clarified what is meant by prosecutorial discretion in *R. v. Anderson*.²¹⁶

In *Anderson*, the issue before the Court was whether Crown prosecutors are constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence. Mr. Anderson, an Aboriginal offender, had been charged with impaired driving under s. 255 of the *Criminal Code*, which provides for an escalating scheme of mandatory minimum sentences applicable only if the Crown notifies the accused of its intention to seek a greater penalty and tenders proof that the notice was served before plea. Mr. Anderson argued that, under s. 7 of the *Charter*, the Crown is constitutionally obligated to consider his Aboriginal status in deciding whether or not to tender the notice because consideration of an offender's Aboriginal status for the purpose of sentencing is a principle of fundamental justice.

²¹⁴ *Krieger v. Law Society of Alberta*, 2002 SCC 65. In *Krieger*, the Law Society of Alberta had reprimanded and removed the Crown prosecutor after finding that a delay in disclosure of exculpatory evidence to the accused in a prosecution of an accused charged with murder was unjustified. Mr. Krieger sought an order that the Law Society had no jurisdiction to review the exercise of prosecutorial discretion by a Crown prosecutor.

²¹⁵ *Ibid.*, at para. 43.

²¹⁶ *Anderson*, *supra* note 59.



The Supreme Court found that Crown is under no constitutional obligation to consider Aboriginal status in making a decision that will ultimately limit the sentencing options available to a judge. Mr. Anderson had argued that consideration of Aboriginal status in sentencing applied to all state actors, including the Crown. The Court observed that this argument improperly equates the duties and roles of judges and prosecutors. It is the judge's responsibility to impose sentence, and the judge's responsibility to craft a proportionate sentence. Importantly, the Court added that, "If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged."²¹⁷

The Court affirmed that prosecutorial discretion applies to a wide range of prosecutorial decision, and covers "all decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it."²¹⁸ Examples of such decisions include the Crown's decision to repudiate a plea agreement; charge an accused with multiple offences; negotiate a plea; the decision to proceed summarily, or by indictment; and – as in *Anderson* – the decision to tender notice of a greater punishment, even where that will result in a mandatory minimum sentence for the accused.

In *Anderson*, the Court clarified that there is no core versus non-core distinction in exercise of prosecutorial discretion. Prosecutorial discretion is entitled to considerable deference, reviewable only for abuse of process. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim. Abuse of process is a high standard: "conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system."²¹⁹ The Court found that there was no evidence in support of Mr. Anderson's abuse of process claim.

²¹⁷ *Ibid.* at para. 25.

²¹⁸ *Ibid.* at para. 44.

²¹⁹ *Ibid.* at para. 50.

Challenging the Discriminatory Effects of Mandatory Minimum Sentences

The s. 15 *Charter* equality guarantee presents another means by which the constitutionality of mandatory minimum sentences may be challenged. A challenge under s. 15(1) attacks the discriminatory and disproportionate effects of mandatory minimum sentences on particular classes of individuals. Section 15(1) guarantees equal protection and equal benefit of the law without discrimination.²²⁰ For an infringement of s. 15(1) to be found, the court must first find that the challenged law creates a distinction based on an enumerated or analogous ground; and second, that the distinction creates a disadvantage by perpetuating prejudice or stereotyping.²²¹ The disadvantage may also arise from the unintended effects of legislation or government action.²²²

Laws can infringe s. 15 “through disparate impact on vulnerable groups either because they affect those groups in a manner disproportionate to their population or because those groups will feel particularly harsh effects emanating from those laws.”²²³ Mandatory minimum sentences will have a disproportionate impact on certain groups who already experience disadvantage and discrimination through the criminal justice system,

including Aboriginal persons, African-Canadians, members of other racialized groups, women, persons with mental disabilities and those with intersecting points of disadvantage.

Claimants have had mixed success with s. 15 claims in

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²²⁰ Section 15(1) provides that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

²²¹ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 30.

²²² *Quebec (Attorney General) v. A*, 2013 SCC 5 at paras. 196-198.

²²³ *Discriminatory Effects*, *supra* note 73 at 304.



the context of mandatory minimum sentences. In *R. v. King*,²²⁴ the accused, an Aboriginal man, argued that a mandatory minimum penalty violated his s. 15 rights because it barred the judge from considering all available sanctions other than imprisonment per s. 718.2(e). The Ontario Court of Justice found that the mandatory minimum prison sentence violated Mr. King's s. 15 rights. The differential treatment that the statutory scheme brought about was described as "a return to a systemic discrimination resulting in disproportionate incarceration and greater hardship by virtue of imprisonment based on being Aboriginal."²²⁵

Later, in *R. v. Bressette*, the Ontario Superior Court of Justice took an entirely contrary view on the same question, finding that mandatory minimum sentences are not contrary to s. 15(1) just because they fetter judicial discretion.²²⁶ The court was unconcerned that offenders must start from a one year minimum period of imprisonment because the judge still has "significant latitude to tailor an appropriate penalty reflecting both the circumstances of the offence and the personal characteristics of the accused" for firearm related offences up to the maximum ceiling.²²⁷

In *Nur*, the offender brought a s. 15(1) claim on the basis that the mandatory minimum sentence had a disproportionate impact on black males, and therefore has discriminatory effects. A great deal of material was filed in support to show the socio-economic disadvantage suffered by this community, and bias and discrimination in the criminal justice system. The claim failed, however, to establish that these adverse effects were caused by the law itself.²²⁸

A s. 15 claim for adverse effects discrimination on the basis of mental disability was successful in *R. v. Adamo*. The court considered whether the mandatory minimum has the "effect of perpetuating and worsening the disadvantage of mentally disabled persons, who, while criminally responsible for their actions, have a lesser degree of moral culpability."²²⁹ The mandatory minimum sentence

²²⁴ *R. v. King*, 2007 ONCJ 238.

²²⁵ *Ibid.* at para. 61.

²²⁶ *R. v. Bressette*, 2010 ONSC 3831 at para. 19.

²²⁷ *Ibid.* at para. 20.

²²⁸ *Nur* ONSC, *supra* note 154 at paras. 74-82, *aff'd* on appeal at para. 182.

²²⁹ *Adamo*, *supra* note 192 at para. 137.

was found to have a “much greater impact” on mentally disabled persons because it does not account for their reduced moral blameworthiness.²³⁰

Aboriginal Status and Mandatory Sentencing

The interplay between mandatory minimum sentences and s. 718.2(e) of the *Criminal Code* directing courts to consider all available sanction other than imprisonment, with particular attention to the circumstances of Aboriginal offenders has not yet been resolved. In *Ipeelee*, the Court reiterated its position in *Gladue* that s. 718.2(e) is properly seen as a “direction to the members of the judiciary to inquire into the cause of the problem [Aboriginal over-incarceration] and to endeavor to remedy it, to the extent that a remedy is possible through the sentencing process.”²³¹ The increasing numbers of offences with mandatory minimum sentences makes it very difficult to give effect to this requirement.

Courts have found that while s. 718.2(e) applies in cases where there is a mandatory minimum sentence of imprisonment, its practical impact is limited, just as it is for any other potentially mitigating factor.²³² In *R. v. T.M.B.*,²³³ an unsuccessful argument was made suggesting that a perception of institutional bias or lack of impartiality results where judges abide by Parliament’s statutory directive to incarcerate without regard for the individual circumstances of Aboriginal offenders. Recently, in *Anderson*, the Supreme Court found that there is no constitutional requirement for Crown prosecutors to consider an offender’s Aboriginal status when deciding whether or not to seek a mandatory minimum sentence.²³⁴ The decision is simply a matter of prosecutorial discretion, reviewable by courts only for abuse of process.

Justification Under Section 1

Section 1 guarantees *Charter* rights and freedoms subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and

²³⁰ *Ibid.* at para. 139.

²³¹ *Ipeelee*, *supra* note 33 at para. 68 (emphasis in original).

²³² See e.g., *R. v. Brooks*, 2012 ONCA 703 at para. 11.

²³³ *R. v. T.M.B.*, 2011 ONCJ 528, *aff’d* 2013 ONSC 4019 (s. 15(1) claim rejected for tenuous link between the mandatory minimum sentence and the perpetuation of discrimination for Aboriginal offenders).

²³⁴ *Anderson*, *supra* note 59.



democratic society. The s. 1 analysis proceeds after a claimant has successfully established an infringement of a *Charter* right on a balance of probabilities. At the s. 1 stage, the state bears the burden of establishing – also on a balance of probabilities – that the infringement is justifiable. The justification analysis involves two components. First, the court considers whether the impugned law has a “pressing and substantial” objective. Then, the court considers whether the means chosen by the government to meet the pressing objective are proportional. Section 1 proportionality asks three questions: (1) is the purpose of the legislation rationally connected to its aims; (2) is the law minimally impairing of the *Charter* right; and (3) is there proportionality between the objective of the law and its deleterious effects?²³⁵

There remains an open question about whether a sentence that is found “cruel and unusual” under s. 12 of the *Charter* could ever qualify as a reasonable limit under s. 1. In *Nur*, the Ontario Court of Appeal did not engage in a full s. 1 analysis after finding a breach of s. 12, observing that:

Given the very high bar set for a finding that a sentence constitutes cruel and unusual punishment, I find it very difficult to imagine how a sentence that clears that high bar could ever qualify as a reasonable limit demonstrably justified in a free and democratic society.²³⁶

Likewise, the Court has also recognized that “violations of section 7 are seldom salvageable.”²³⁷

At the court of first instance, Justice Molloy conducted a full s. 1 analysis in *R. v. Smickle*. Her analysis on the minimal impairment and proportionality aspects of the *Oakes* test highlights many of the policy problems identified in this report.²³⁸

As is often the case, the court accepted the government’s objective for the law. The objective was accepted as protecting the public by controlling gun crime and

²³⁵ *R. v. Oakes* (1986) 1 SCR 103 at 138-140.

²³⁶ *Nur*, *supra* note 128 at para. 178.

²³⁷ *R. v. D.B.*, 2008 SCC 25 at para. 89.

²³⁸ *Smickle*, *supra* note 134 at para. 97-123.

violence. Justice Molloy was also willing to accept that there is a rational connection between the objective and mandatory minimum sentencing.

At the minimal impairment stage, Justice Molloy rejected the Crown's argument that its discretion to proceed summarily (thereby not triggering a mandatory minimum sentence) serves as a constitutional safety valve. The court observed that: the safety valve does not always work; the scheme creating the safety valve is an arbitrary breach of s. 7; and importantly, a constitutional safety valve cannot vest with the Crown. Looking to the experience of other states with similar criminal justice systems, the court concluded that the mandatory minimum sentence did not minimally impair the *Charter* rights at issue. A minimally impairing approach would see a "presumptive sentence for [the offence] while still preserving a judicial discretion to be exercised in those rare circumstances where the presumptive sentence would be grossly disproportionate given the circumstances of the offender and the offence."²³⁹

In assessing the proportionality of the mandatory minimum sentence, Justice Molloy observed that, where there is a tenuous connection between the success of the measure and its stated objective, the better approach is to balance the salutary and deleterious effects. Justice Molloy balanced the objectives of the law against its harmful effects with respect to serious breaches of ss. 7 and 12. The significant deprivation of liberty – a three year penitentiary term – is a "severe deleterious effect," one that is "sufficiently strong that it outweighs any salutary effect there may be."²⁴⁰

Justice Molloy outlined several additional deleterious effects of the mandatory minimum regime: (1) sentence inflation for persons who would properly be sentenced within the gap between the minimum and maximum sentences; (2) the danger of increased recidivism when youthful offenders serve time with hardened criminals; (3) contributing to over-crowding in prisons; (4) the systemic disincentive for guilty pleas due to a mandatory three year sentence;

²³⁹ *Ibid.* at para 113.

²⁴⁰ *Ibid.* at para. 121. The court had already found that there is "no tangible evidence that imposing a mandatory sentence does anything to accomplish" the broad objectives of reducing violent crime and protecting the public. (*Ibid.* at para. 120).



and (5) the unfair advantage to the Crown as the accused will be under pressure to plead guilty to a lesser included offence.²⁴¹

Even if a full s. 1 analysis may be regarded as unnecessary where courts find serious infringements of ss. 12 and 7, there is value in discussing the broader issues surrounding mandatory minimums in the justification analysis. Since *Smith*, many of these broader considerations have found a home at the s. 12 infringement stage of the analysis, but this has shifted the focus of the analysis away from a consideration of the measure of proportionality between moral culpability and punishment. Taking account of policy considerations at the rights infringement stage bears the risk of diluting the substance of the right itself. However, because very few challenges overcome the high hurdle set by the gross disproportionality analysis, few cases arrive at the s. 1 stage. An ancillary effect of this has been lost opportunity for dialogue between the judiciary and legislature.

²⁴¹ *Ibid.* at para. 121.

SPOTLIGHT ON DRUG OFFENCES: A CAUTIONARY TALE

Bill C-10 added new mandatory minimum penalties in the *CDSA* for drug offences ranging from six months to three years. Where a particular offence falls in that range will depend on the nature of the controlled drug or substance, whether there is trafficking, or possession for the purposes of trafficking and the presence of aggravating factors. For marijuana production offences, the minimum penalty incrementally increases with the number of plants.

The perils of these mandatory terms of imprisonment will be visited upon the most marginalized and vulnerable offenders: low-income drug users and the drug-addicted engaged in street-level trafficking are those most likely to be caught, due to their visibility, lack of sophistication and location in heavily monitored high-crime areas.²⁴² The personal circumstances of the offender going to his or her moral blameworthiness – such as addiction, mental illness, history of abuse and hardship – will be ignored. Each offender will be subject to the same sentence, but the effects of incarceration will vary immensely.

Producing as few as six marijuana plants for the purposes of trafficking would result in a minimum six month sentence under s. 7(2)(b)(i). Producing any amount of cannabis resin for the purposes of trafficking results in either a mandatory one year sentence under s. 7(2)(a.1)(i) or an 18 month sentence under s. 7(2)(a.1)(ii) if aggravating factors are present. Apart from selling, “trafficking” also includes administering, giving, or delivering a substance, or even offering to do so.²⁴³

Given the broad definition of trafficking, these mandatory minimum sentences will apply equally to someone who produces and sells large quantities for profit, and to those who share with a few friends. The mandatory minimums for marijuana offences will disproportionately affect low-income producers of

²⁴² For a comprehensive review of the disproportionate and discriminatory impact of these new mandatory minimum sentences for drug offences on low-income drug users, see *Throwing Away the Keys*, *supra* note 68.

²⁴³ The conduct caught by “trafficking” is very broad. “Traffic” means to sell, administer, give, transfer, transport, send or deliver a substance included in any of Schedules I to IV in the *CDSA*. Traffic also means to sell an authorization to obtain the substance to offer to do any of the above (*CDSA*, s. 2(1)).

medical marijuana who cannot afford to buy medicine through government approved producers and distributors. The importing and exporting offences are equally broad. The hypothetical youthful first-offender in *Smith*, crossing back to Canada from the U.S. with the proverbial “joint of grass” now faces a mandatory minimum one year term of imprisonment.

Many of the aggravating factors that will trigger an increased mandatory minimum sentence are vague and overbroad to the point of constitutional infirmity. A person found trafficking “in or near a school, on or near a school grounds or *in or near any other public place* usually frequented by persons under the age of 18 years” will be subjected to a mandatory two year minimum sentence. Public places “usually frequented” by youth is both vague and overbroad. It arguably includes parks, shopping malls, neighbourhoods and streets.

Just as Canadian lawmakers are busy building up a mandatory minimum sentencing regime for drug offences, legislators in the United States are trying to dismantle theirs. Mandatory minimum sentencing – long the centrepiece of the failed “War on Drugs” – is increasingly being seen not only as a waste of money, but also a waste of lives. On the issue of mandatory minimum sentences for drug-related crimes, U.S. Attorney General Eric Holder has stated:

Some statutes that mandate inflexible sentences – regardless of the individual conduct at issue in a particular case – reduce the discretion available to prosecutors, judges, and juries. Because they oftentimes generate unfairly long sentences, they breed disrespect for the system. When applied indiscriminately, they do not serve public safety. They – and some of the enforcement priorities we have set – have had a destabilizing effect on particular communities, largely poor and of colour. And, applied inappropriately, they are ultimately counterproductive.²⁴⁴

The United States Sentencing Commission concluded in 2011 that mandatory minimum provisions lead to, *inter alia*, arbitrary, unduly harsh and

²⁴⁴ Eric Holder, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (August 12, 2013), available online: www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.



disproportionate sentences, discriminatory impacts on racialized communities, and huge increases in prison populations and costs.²⁴⁵ Support for shifting away from mandatory penalties has been growing at the federal and state levels in the United States. In the current legislative session, Congress is considering two important bills²⁴⁶ that will give sentencing discretion back to judges by increasing the number of offences eligible for “safety valve provisions” and expanding retroactive application of revised sentencing guidelines. At the state level, mandatory sentencing laws have also been under review for many years. Efforts to reform sentencing practices in favour of enhanced judicial discretion at the state level have been endorsed by politicians and groups of all political stripes.²⁴⁷

Canada would do well to learn from the American experience with mandatory minimums, particularly for non-violent drug offenders. The US “epidemic” of imprisonment is well-researched and documented. Characterized by one scholar as the “new Jim Crow”²⁴⁸ laws, mass incarceration – particularly for non-violent drug offenders – has damaged the health and wellbeing of families and communities in the U.S. for generations to come.²⁴⁹ The US experience provides plenty of evidence that punitive criminal justice policies have grave long-term economic and social consequences.

²⁴⁵ US Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, DC: United States Sentencing Commission, 2011) at 345-347.

²⁴⁶ *Smarter Sentencing Act of 2013*, S. 1410, H.R. 3382, 113th Cong., 1st sess.; *Justice Safety Valve Act of 2013*, S. 619, H.R. 1695, 113th Cong., 1st sess.

²⁴⁷ Ram Subramanian and Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences* (New York: VERA Institute of Justice, 2014) at 4.

²⁴⁸ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012).

²⁴⁹ See Ernest Drucker, *A Plague of Prisons: The Epidemiology of Mass Incarceration in America* (New York: The New Press, 2011).

CONCLUSION

For several decades now, a fundamental shift has been taking place in Canadian criminal justice policy-making in favour of punitive sentencing and the tightening of judicial discretion. Bill C-10 is the latest, most dramatic illustration of this shift, but it will likely not be the last. It is important to understand the long-term legal and policy implications of mandatory minimum sentencing from all angles. This report draws attention to the costs and consequences of minimum sentences in all their permutations.

The immediate concern with Bill C-10 has been the financial cost of implementing it. No full analysis of the costs of all of the measures of the Bill – for provinces and the federal government – has been undertaken, or at least made public. The most obvious of the anticipated costs may be estimated. These will include costs associated with a growing prison population both federally and provincially and costs related to increased trials, trial times and resource allocation in the court system. This is just one piece of the picture.

A more difficult task is assessing how much these measures will cost communities. The impact of incarceration on society goes well beyond how much it costs taxpayers to imprison more people for longer sentences. Incarceration has a ripple effect through our communities. It impacts the community broadly by negatively affecting relationships and opportunities for social and economic development. Some communities bear the effects of incarceration disproportionately. Aboriginal communities, in particular, will be especially affected adversely in nearly all indicia of socio-economic development, health and wellbeing.

These costs must be seen alongside another cost – the cost to the administration of justice. What do fundamental shifts in sentencing mean for the criminal justice system? What do they mean for public confidence in the judiciary's role?

Mandatory minimum sentences remove from judges their discretion to enact appropriate, proportionate sentences – sentences that take into account all of the considerations, including the gravity of the offence and the degree of fault of the offender. By fashioning a one-size-fits-all floor for sentencing, mandatory

minimums make anemic one of the core features of the criminal justice system – justness. The cost of that will be more than we can afford.

Bill C-10 has regenerated debate in Canada about the value of mandatory minimum sentencing as a policy response to crime. It has opened the door to serious discussion about reform in the criminal justice system. Canada is increasingly out of step with the sentencing practices of other comparable countries where minimum sentences are mitigated by vesting in the judiciary a residual discretion to sentence below the minimum when there are good reasons to do so. We are enacting mandatory minimum sentences for non-violent drug offences at the same time that the United States is taking steps to minimize their damage.

The need for evidence-based, thoughtful policy reform in the criminal justice system can be no clearer. But we cannot wait. Lawyers, advocacy organizations, researchers and policy makers all have important and immediate roles to play in preventing the unjustness that will result from mandatory minimum sentences: bringing constitutional challenges under the *Charter*, increasing public education about the criminal justice system (sentencing in particular, about which the public knows very little) and ongoing research on the downstream costs of incarceration. It is our responsibility to ensure that the justice system is first and foremost just.

