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PARLIAMENTARY RESTRICTIONS ON JUDICIAL DISCRETION IN SENTENCING:

A Defence of Mandatory Minimum Sentences

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Executive Summary

Mandatory sentencing tools have received a great deal of attention lately as the federal government continues to promote law-and-order legislation in response to the public's perception that Canada's criminal sentencing regime is overly lenient with offenders. This legislation has met with fierce criticism from members of the media and academia, and increasingly inventive attempts to subvert it by the judiciary.

Yet, judicial discretion in sentencing has never meant an unfettered entitlement to impose any sentence deemed appropriate by the particular judge. Since the early 1890s, legislators have relied on mandatory sentencing tools to, among other things, mitigate inconsistencies in the exercise of judicial discretion in sentencing for certain offences. In the years that followed, Parliament has gradually increased the role of mandatory sentencing tools, culminating in the enactment of numerous mandatory minimums over the past two decades, with public commentary on the issue nearly unanimous in opposition. Despite this opposition, Parliament has steadily increased the number of mandatory sentencing tools contained in the *Code* over the past 20 years.

Why? A key feature of our system of government is that Parliament constantly reviews old legislation and passes new legislation with a view to ensuring that its laws, including its sentencing laws, properly align with the demands of justice. This is a crucial task because criminal laws, passed in the context of a particular moment in history, often call out for modernization. For example, in 1976, Parliament abolished the death penalty. Clearly, this decision represented a restriction on a sentencing judge's discretion insofar as it took the ultimate penalty off the table. Interestingly, this decision has not been maligned as an intrusion on judicial discretion in sentencing.

If properly deployed, mandatory minimum sentences are an important tool for ensuring – not inhibiting – justice in sentencing.

Judges who ignore or otherwise circumvent mandatory minimums act contrary to the office that they have sworn to uphold. Ignoring mandatory minimums is no more acceptable than would be ignoring mandatory maximums. Today, the public would react with outrage if a judge purported to impose a death sentence. However, setting aside the obvious differences, imposing such a sentence would be no different from a constitutional law perspective than refusing to apply a mandatory minimum that passes constitutional muster. This is true regardless of how justified sentencing judges think themselves in refusing to apply the law.

This paper ultimately concludes that, if properly deployed, mandatory minimum sentences are an important tool for ensuring – not inhibiting – justice in sentencing.

It is natural to wonder what has motivated this phenomenon and, more specifically, what objectives and principles Parliament hopes to achieve and honour through the use of mandatory minimum sentences. The answer lies in the intersection between the purpose and principles of sentencing, the requirements of the rule of law, and the roles of Parliament and the courts.

The rule of law lies at the root of Canada's system of government. It requires that laws exhibit five important qualities: certainty, accessibility, intelligibility, clarity, and predictability. A gap between a law's theory and practice creates uncertainty and unpredictability; Canadians must know what the law is in advance so that they can govern their conduct accordingly.

Rather than eliminating a judge's ability to assess a proportionate sentence, mandatory minimums set a stable sentencing range for an offence, permitting citizens to understand in advance the severity of the consequences that attend the commission of that offence, regardless of the individual offender's particular degree of responsibility.

Judges who ignore the rule of law and seek to make decisions according to their personal views of justice in the face of clear legislation to the contrary assault the justice system and offend the duties of their office.

In recent years, some judges have been particularly creative in avoiding the imposition of mandatory minimum sentences. For example, instead of simply finding a fatal violation of the *Charter* on the ground of cruel and unusual punishment, some judges have considered the possibility of granting constitutional exemptions to individual offenders. By granting a constitutional exemption, a judge would be able to impose a lesser penalty than what is required by law without actually striking down the offending provision. However, the Supreme Court of Canada has now ruled that constitutional exemptions are not appropriate for sidestepping mandatory minimums.

It is inarguable that mandatory sentencing tools should be carefully scrutinized by the courts for proportionality measured against the clear boundaries set by the Constitution and its written and unwritten principles. However, insofar as they suggest that the mere act of curtailing judicial discretion by imposing mandatory penalties is problematic, critics are missing the point. If rational, proportionate mandatory minimum sentences are imposed, they promote justice. If disproportionate, arbitrary, or over-harsh mandatory sentences are imposed, they do not promote justice and, thus, should be struck down.

Sommaire

L'imposition de peines minimales obligatoires a reçu beaucoup d'attention depuis quelque temps, le gouvernement fédéral continuant de promouvoir des mesures législatives sur la loi et l'ordre aptes à combattre au sein de la population l'impression que le régime de détermination de peine au Canada est trop clément envers les criminels. Ces mesures législatives ont suscité de vives critiques de membres des médias et du milieu universitaire et ont été sujettes à des tentatives toujours plus astucieuses d'invalidation à l'intérieur de l'appareil judiciaire.

Pourtant, le pouvoir discrétionnaire des juges n'a jamais signifié que leur droit d'imposer une peine jugée appropriée était absolu. Depuis le début des années 1890, les législateurs se sont appuyés sur

des dispositions obligatoires permettant, entre autres choses, d'atténuer les incohérences révélées dans l'exercice du pouvoir judiciaire discrétionnaire lors de la détermination des peines pour certaines infractions. Dans les années qui ont suivi, la législature a progressivement accru l'importance des peines obligatoires, aboutissant à la promulgation de nombreuses peines minimales obligatoires au cours des deux dernières décennies, ce qui a suscité des commentaires largement négatifs de la part du public. Malgré cette opposition, la législature n'a jamais cessé d'ajouter des peines obligatoires dans le *Code* au cours des 20 dernières années.

Il en a été ainsi en raison d'une caractéristique fondamentale de notre système de gouvernement : le Parlement revoit constamment les anciennes lois et en promulgue de nouvelles en veillant du même coup à ce que les lois, y compris les lois sur les déterminations de peine, soient tout à fait conformes aux exigences de la justice. Cette tâche est cruciale parce que les lois pénales, adoptées dans un contexte temporel bien particulier, ont souvent besoin d'être modernisées. Par exemple, en 1976, le Parlement a aboli la peine de mort. De toute évidence, cette décision portait atteinte à la discrétion des juges dans la mesure où ils ne pouvaient plus imposer cette peine ultime. Fait intéressant, cette décision n'a pas été décriée comme une intrusion dans le pouvoir discrétionnaire des juges en matière de peine.

Les juges qui n'appliquent pas les peines minimales obligatoires ou qui les contournent trahissent leur serment d'office. Il est aussi inacceptable d'écarter une peine minimale obligatoire que de ne pas tenir compte d'une peine maximale. De nos jours, le public s'indignerait de voir un juge imposer la peine de mort. Cependant, mis à part les différences évidentes, l'imposition d'une telle peine, du point de vue du droit constitutionnel, serait tout aussi injustifiée qu'un refus d'appliquer une peine minimale obligatoire qui serait constitutionnelle. Cela est vrai quelle que soit la justification invoquée par le juge pour refuser d'appliquer la loi.

Les peines minimales obligatoires n'empêchent pas d'assurer le prononcé de peines justes, bien au contraire.

Cette étude permet ultimement de conclure que lorsqu'on en fait un usage approprié, les peines minimales obligatoires n'empêchent pas d'assurer le prononcé de peines justes, bien au contraire.

Il est naturel de se demander ce qui a motivé ce phénomène et, plus précisément, quels sont les objectifs et les principes que la législature vise à faire respecter au moyen des peines minimales obligatoires. La réponse se trouve au point de rencontre entre le rôle joué par la détermination des peines et les principes qui la sous-tendent, les exigences de l'État de droit et les rôles du législateur et des tribunaux.

La primauté du droit est au cœur même du système de gouvernement du Canada. Elle exige que les lois possèdent cinq qualités importantes : elles doivent être explicites, accessibles, intelligibles, claires et prévisibles. En ce qui concerne les lois, tout écart entre la théorie et l'application engendre incertitude et imprévisibilité; les Canadiens doivent comprendre les lois pour régir leur conduite en conformité avec elles.

Les peines minimales obligatoires n'ont pas retiré aux juges leur capacité d'imposer une peine proportionnelle, mais ont plutôt établi un ensemble cohérent de sanctions minimales, ce qui permet aux citoyens d'anticiper la gravité des conséquences d'une infraction commise, quel que soit le degré de responsabilité du contrevenant.

Les juges qui se distancent de la primauté du droit en rendant des décisions en fonction de leur vision personnelle de la justice en dépit de la clarté des lois trahissent au contraire le système de justice

et désobéissent aux devoirs découlant de leur charge.

Au cours des dernières années, quelques juges ont été particulièrement créatifs, évitant ainsi l'imposition de peines minimales obligatoires. Par exemple, plutôt que de simplement reconnaître une violation de la *Charte* fondée sur une peine cruelle et inusitée, certains juges ont envisagé la possibilité d'accorder des exemptions constitutionnelles à des délinquants particuliers. En accordant une exemption constitutionnelle, un juge serait en mesure d'imposer une peine moins lourde que ce qui est requis par la loi sans pour autant annuler la disposition en cause. Toutefois, la Cour suprême du Canada a statué que les exemptions constitutionnelles ne sont pas appropriées pour contourner les peines minimales.

Incontestablement, la proportionnalité des peines obligatoires doit être soigneusement examinée par les tribunaux au regard des limites claires fixées par la Constitution et de ses principes écrits et non écrits dans les textes. Toutefois, dans la mesure où ils suggèrent que le simple fait de restreindre la discrétion judiciaire en imposant des peines obligatoires est problématique, les critiques errent. Si des peines minimales obligatoires proportionnelles et rationnelles sont imposées, elles favorisent la justice. Si des peines obligatoires disproportionnelles, arbitraires ou trop sévères sont imposées, elles ne favorisent pas la justice et, par conséquent, elles doivent être annulées.

I. Introduction

In Canada, courts have historically borne the primary responsibility for ensuring that sentences in criminal cases fit the seriousness of the impugned conduct. In this respect, Canada is not unique. As in many other common law jurisdictions, the Parliament of Canada has preferred to define criminal offences in broad language, permitting an offence to capture a wide array of conduct with varying degrees of moral culpability. It usually sets only high, rarely-imposed maximum penalties. Although these maximum penalties are mandatory, the yoke of this Parliamentary circumscription of judicial discretion in sentencing has rested lightly on judges' shoulders.

Since Canada's first *Criminal Code* was passed in the 1890s, our criminal laws have included mandatory minimum sentences. More recently, Parliament has carved out a bigger role for mandatory sentencing tools, particularly since the enactment of the *Canadian Charter of Rights and Freedoms.* Two manifestations of this trend have attracted considerable academic and public comment: mandatory minimum sentences and mandatory victim fine surcharges. To put it mildly, the response has been largely negative. Many critics object to these restrictions on a judge's discretion, which the authors will refer to as *mandatory sentencing tools*.

> *Canada's criminal laws have included mandatory minimum sentences since the first* Criminal Code.

Some Canadian judges have balked at applying mandatory sentencing tools for years. However, since Prime Minister Stephen Harper's government introduced Bill C-2 in 2008, some judges have become progressively more inventive, bold, and arbitrary in operating outside the rule of law that they have sworn to uphold and in identifying justifications for refusing to apply mandatory minimum sentences and mandatory victim fine surcharges. In the latter instance, Justice Kevin Phillips, then of the Ontario Court of Justice has opined

that judges are "creatively sabotaging" the mandatory victim fine surcharge regime (Seymour 11 December 2013). This troubling judicial response to Parliament's circumscription of judicial discretion raises important policy questions about the rule of law and the role of Parliament and the courts in sentencing. All judicial discretion has limits. The independence of an unelected, life-tenured judiciary is a cornerstone of our constitutional democracy. However, judges who ignore the rule of law and seek to make decisions according to their personal views of justice in the face of clear legislation to the contrary assault the justice system and offend the duties of their office.

Today, mandatory sentencing tools are in the spotlight as Parliament continues to promote law-and-order legislation in response to the public's perception that Canada's criminal sentencing regime is overly lenient with offenders. Most notably, the Harper government introduced the *Safe Streets and Communities Act* which was passed in 2012. This omnibus bill included nine measures, including new (or higher) mandatory minimums for certain drug and sexual offences. The government followed up by introducing the *Tackling Contraband Tobacco Act* in November 2013 and the *Tougher Penalties for Child Predators Act* in February 2014. Both statutes would add mandatory penalties to the books. In light of the intense hostility with which these measures have been met, the public debate about the value of mandatory sentencing tools has never had more practical significance.

This paper begins by tracing the history of judicial discretion in sentencing in Canada. It notes that sentencing has never been the exclusive purview of Canadian courts, and it emphasizes Parliament's valid interest in stepping in to ensure that offenders receive sentences which reflect the true gravity of the offences committed. Then, this paper describes the creative ways in which some Canadian judges have sought to circumvent Parliament's attempts to use mandatory sentencing tools. Finally, it offers the outline of a defence of mandatory minimums and other legislated restrictions on judicial discretion in sentencing at a policy level.

> *"[The sentence] is to the trial what the bullet is to the powder."*
>
> SIR JAMES FITZJAMES STEPHEN, 1863.

Beyond the scope of this paper is an analysis of any particular mandatory sentencing tool imposed by Parliament over the past 200 years. Nor does the paper purport to engage with instrumentalist arguments raised in the academic literature about, for example, the deterrent effect of mandatory minimums or their disproportionate impact on some segments of the population. Instead, the purpose of this paper is to focus on mandatory minimum sentencing as a utilitarian tool for Parliament to establish boundaries in the sentencing realm. Ultimately, this paper concludes that, if properly deployed, mandatory minimum sentences are an important tool for ensuring – not inhibiting – justice in sentencing.

II. Sentencing Discretion in Canada: A Brief History

A. The Importance of Sentencing Law

Sentencing is a vital aspect of the criminal law's fact-finding, decision-making process.[1] In 1863, Sir James Fitzjames Stephen wrote that the sentence is the gist of the proceeding: "It is to the trial what the bullet is to the powder" (189). This statement remains true today.[2] In the 1982 case of *R. v. Gardiner,* Justice Dickson of the Supreme Court of Canada noted:

> [T]he vast majority of offenders plead guilty. Canadian figures are not readily available but American statistics suggest that about 85 percent of the criminal defendants plead guilty or nolo contendere. The sentencing judge therefore must get his facts after plea. Sentencing is, in respect of most offenders, the only significant decision the criminal justice system is called upon to make. ([1982] 2 SCR 368 at para 110)

The stakes of sentencing are high. Given this fact, judges in criminal courts have long understood their role to include exercising their discretion, in the full context of the case's facts, to ensure that the sentence fits the seriousness of the offence and the moral culpability of the offender's conduct.

Judicial discretion grew out of the constitutional doctrine of the separation of powers.

The ability of a judge to exercise discretion grew out of the constitutional doctrine of the separation of powers and is an aspect of judicial independence.[3] One of the defining characteristics of the Canadian sentencing regime is that sentencing is, in essence, a discretionary exercise, left in the hands of the judge hearing the evidence in each case. Canadian cases have repeatedly confirmed that judges must exercise their discretion to find a sentence that is "fit" to the seriousness of the offence.[4]

B. The Historical Role of Mandatory Minimums

Judicial discretion in sentencing has never meant an unfettered entitlement to impose any sentence deemed appropriate by the particular judge. Since the early 1890s, legislators have relied on mandatory sentencing tools to, among other things, mitigate inconsistencies in the exercise of judicial discretion in sentencing for certain offences. In the years that followed, Parliament has gradually increased the role of mandatory sentencing tools, culminating in the enacting of numerous mandatory minimums over the past two decades.

1. 1892–1955

Section 91(27) of the *Constitution Act, 1867* provides that the criminal law, excluding the constitution of courts of criminal jurisdiction but including criminal procedure, falls within the exclusive legislative authority of the Parliament of Canada. This includes, of course, the law of sentencing.

The first mandatory minimums were enacted along with the *Bill Respecting the Criminal Law* which came into force on July 1, 1893, as Canada's first version of the *Criminal Code*.[5] This early version of

the *Code* was based in part on the works of Sir James Fitzjames Stephen, including a draft code he prepared through the Royal Commission on the *Criminal Code* in Great Britain in 1880.[6] At the time, six offences carried mandatory terms of imprisonment:

1. prize fighting;
2. frauds upon the government;
3. stealing post letter bags;
4. stealing post letters;
5. stopping the mail with the intent to rob; and
6. corruption in municipal affairs (Crutcher 2001, 280).

Thus, mandatory minimums have existed in Canada's criminal law since the beginning. The first offences carrying mandatory minimums were largely concerned with preventing abuses of public institutions (Crutcher 2001, 281). These offences carried mandatory minimum sentences ranging from one month to five years in prison.

Aside from these six offences, the vast majority of the *Code*'s provisions left sentencing to the judge's discretion. Moreover, the *Code* established mechanisms to assist sentencing judges in imposing just sentences. For example, section 971 permitted judges to grant first-time offenders a conditional release where the term of imprisonment for the offence in question was less than two years (Crutcher 2001). This provision ultimately morphed into the suspended sentence. Other available tools included the royal pardon and the royal prerogative. Subsequently, Parliament enacted the *Ticket of Leave Act* which provided that any person convicted of an offence and sentenced to serve a term in prison could be granted a license to remain at large.[7]

In 1915, Parliament added to the original six offences carrying mandatory minimums by enacting a mandatory sentence of three months in prison for anyone convicted three or more times of being a keeper or inmate of a common bawdy house.[8] This was perhaps the first "three strikes and you are out" mandatory sentence. Between 1917 and 1922, it also introduced minimum sentences for insurance fraud, injuring persons by "furious driving" while impaired, stealing an automobile and, for the first time, certain drug offences.[9] By 1927, 13 offences carrying mandatory minimum terms of imprisonment were on the books (Crutcher 2001, 286).

Parliament's reliance on mandatory minimums markedly increased between 1928 and 1954.

Between 1928 and 1954, the *Code* was amended nine more times to add mandatory minimum sentences (Crutcher 2001, 293–294). This period witnessed a marked increase in Parliament's reliance on mandatory minimums. It also witnessed the beginning of a trend that would resurface again in the 1990s: mandatory minimums for offences involving firearms. Although some mandatory minimums were also repealed during this period, many were reintroduced with the enactment of the revised *Code* in 1954. Thus, six decades after the first *Code* came into force, mandatory minimum sentences were on the rise but the debate about their role in criminal law, particularly as a counterpoint to judicial discretion, was only beginning.

2. 1955–1981

In 1958, Parliament repealed the *Ticket of Leave Act*. In its place, it established the National Parole Board to oversee the early release of offenders. Despite some debates in Parliament about the value of mandatory minimum sentences around this time, it was not until the Trudeau government in-

troduced a large omnibus bill in 1969 that the *Code* was amended again.[10] In the 1970s, Parliament repealed mandatory minimums for driving while impaired and stealing mail, but it added mandatory minimums for second and third-time offenders who failed to provide a breath sample and who had a blood alcohol level over the legal limit. In addition, it established mandatory minimums for betting, pool-selling and book-making, and placing bets on behalf of others.[11]

In 1976, Parliament passed Bill C-84 which abolished the death penalty and established mandatory minimum sentences of life in prison for murder and high treason. That same year, Parliament also made its first foray into gun control, and it passed mandatory minimums for offences committed while using a firearm.[12] Overall, with nine amendments to the *Code* introducing mandatory minimums and six minimum penalties repealed, the decades preceding the patriation of Canada's Constitution witnessed a gradual increase in activity involving mandatory minimums (Crutcher 2001, 300–301).

3. 1981–Present

In the early post-*Charter* era, mandatory minimums receded from the spotlight, with the exception of a seminal Supreme Court of Canada decision striking down a seven-year mandatory minimum term of imprisonment for a drug offence as violating section 12 of the *Charter*.[13] However, in 1995, the Chrétien government spearheaded one of the largest enactments of mandatory minimum sentences in the history of the *Code* by introducing Bill C-68. This bill was largely concerned with offences involving firearms. For the first time, Parliament incorporated mandatory minimum sentences directly into provisions establishing the offences to curb plea bargaining (Crutcher 2001, 302). Bill C-68 incorporated 18 more mandatory minimums into the *Code* (Crutcher 2001, 303).

By 1999, there were a total of 29 offences in Canada with mandatory minimum terms of imprisonment.

In 1996, the Chrétien government followed up with Bill C-27 which created a new offence for aggravated procuring and living off the avails of child prostitution with a five-year minimum term in prison.[14] Thus, by 1999, there were a total of 29 offences in Canada with mandatory minimum terms of imprisonment – the highest number in the country's history (Crutcher 2001, 304).

In 2008, Prime Minister Stephen Harper's minority government introduced Bill C-2. This bill increased the length of the mandatory minimums introduced earlier for firearms and impaired driving offences, and it imposed escalating minimum penalties for repeat offenders with firearms (Dufraimont 2008, 464). It followed up by introducing the *Safe Streets and Communities Act* which included new (or higher) mandatory minimums for certain drug and sexual offences. On October 24, 2013, the Harper government passed Bill C-37, doubling the victim fine surcharges imposed on offenders and making them mandatory. Finally, it introduced the *Tackling Contraband Tobacco Act* in November 2013 and the *Tougher Penalties for Child Predators Act* in February 2014. Both bills, if passed, would add mandatory penalties to the books.

C. Chipping Away at Judicial Discretion

The evolution of mandatory minimums in Canada over the past 200 years is a story of Parliament gradually chipping away at judicial discretion in sentencing. Although it began with only six mandatory minimums focusing on abuses of public institutions, the *Code* has evolved since then and so too has Parliament's approach to mandatory sentencing tools. Today, the *Code* features mandatory minimums for 49 of the most serious offences, including certain sexual offences (for example, child

pornography and other sexual offences involving minors) and numerous violent offences involving firearms.[15]

Today, the Code *features mandatory minimums for 49 of the most serious offences.*

This evolution has meant that judges increasingly face the task of applying what some have called deleterious intrusions on judicial discretion. Others have sought to identify legal grounds upon which to challenge the applicability of the laws in the statute books. Increasingly, judges have opted for the latter option. Over the years, Canadian courts have both upheld mandatory minimum sentences and declared them invalid.[16]

III. Contemporary Judicial Reactions

A. The Purpose and Principles of Sentencing

In section 718 of the *Code*, Parliament describes the fundamental purpose and objectives of sentencing in a part of the *Code* entitled "Purpose and Principles of Sentencing":

> **718.** The fundamental purpose of sentencing is to contribute, 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 have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

In that same part, section 718.1 sets out the fundamental principle of sentencing:

> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

The *Code* includes other important sentencing principles as well, including in section 718.2 which sets out, among other things, a list of aggravating factors and the principle of parity which states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". The sentencing principles outlined in these provisions are mandatory: the court *shall* take them into consideration. They are mandatory sentencing tools imposed by Parliament.

Parliament did not set out the purpose and principles of sentencing in the *Code* until 1996 (Roach 2001, 369). Although it has now legislated the basic framework for sentencing in Canada, the discretionary process of navigating and applying the objectives and principles of sentencing in the full

context of a case's facts has generally been left to judges. However, the rising incidence of mandatory minimums and other mandatory sentencing tools has led to less freedom in doing so. Perhaps unsurprisingly, it has also led to creative attempts by some judges to undermine mandatory minimums, both individual provisions and writ large.

B. The Judiciary Strikes Back – Disproportionately?

For the most part, the judiciary has responded to Parliament's efforts to curtail its discretion in sentencing with opposition. The Canadian Sentencing Commission conducted a survey in 1987, when fewer than 10 offences carried mandatory minimum sentences, and found that slightly over half of the judiciary believed that mandatory minimums infringed on a judge's ability to impose a just sentence. Since 1987, negative judicial sentiments towards mandatory minimums have only been aggravated by several rounds of new mandatory minimum provisions being passed by successive Liberal and Conservative governments and Parliament's decision to make the victim fine surcharge mandatory (Pomerance 2013, 311–315).

The Code's *sentencing principles are mandatory.*

In recent years, some judges have been particularly creative in avoiding the imposition of mandatory minimum sentences. For example, instead of simply finding a fatal violation of the *Charter* on the ground of cruel and unusual punishment, some judges have considered the possibility of granting constitutional exemptions to individual offenders. By granting a constitutional exemption, a judge would be able to impose a lesser penalty than what is required by law without actually striking down the offending provision. However, the Supreme Court of Canada has now ruled that constitutional exemptions are not appropriate for sidestepping mandatory minimums.

1. Cruel and Unusual Punishment

Although Parliament has the power to enact mandatory minimum sentences, courts have the power to strike down unconstitutional legislation, freeing judges and the convicted they sentence from unconstitutional sentences and freeing judges from unconstitutional restrictions on their discretion. This dialogue between courts and Parliament has generated an interesting body of case law, particularly under section 12 of the *Charter*. This section provides: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."[17]

If a mandatory minimum sentence can be characterized as grossly disproportionate, courts will find that its imposition would constitute cruel and unusual punishment contrary to section 12. In *R. v. Smith*,[18] the Supreme Court of Canada struck down a minimum seven-year prison sentence for the importation of any amount of narcotics. Justice Lamer, writing for the Court in 1987, held that this mandatory minimum, as established under section 5(2) of the *Narcotics Control Act*, violated the offender's right to be free from cruel and unusual punishment. He defined cruel and unusual punishment to mean punishment that is "so excessive as to outrage standards of decency" or "grossly disproportionate to what would have been appropriate".[19]

Significantly, the accused in *Smith* did not argue that the mandatory minimum was cruel and unusual punishment in his particular circumstances. Instead, he advanced the argument that the mandatory minimum was overly broad and would capture a sympathetic hypothetical offender. Justice Lamer considered a first-time young offender who could be caught crossing the border with a negligible

amount of marijuana. In this hypothetical situation, imposing a mandatory minimum of seven years would be a cruel and unusual punishment, and it could not be saved under section 1 of the *Charter*. On that basis, the law was struck down as unconstitutional. Since *Smith*, gross disproportionality has been the hallmark of the section 12 analysis.

The Supreme Court shed further light on the section 12 analysis in two subsequent cases. In *R. v. Goltz*,[20] Justice Gonthier held that the section 12 analysis was twofold. First, the court should determine whether the impugned mandatory minimum would amount to cruel and unusual punishment in the particular offender's circumstances. In making this determination the court must examine all the relevant contextual factors: the gravity of offence, the personal characteristics of the offender, the particular circumstances of the case, the actual effect of the punishment on the accused, the penological goals of the impugned sentence, existence of any alternative punishments, and a comparison of penalties for other crimes in the same jurisdiction. Subject to the above contextual factors, the court can then proceed to consider a range of appropriate sentences for the particular individual. If the prescribed mandatory sentence is grossly disproportionate, the court proceeds to consider whether the infringement is justified under a section 1 of the Charter.[21] However, if the punishment was not grossly disproportionate on the specific case's facts, the court could then go on to consider whether the mandatory minimum would be grossly disproportionate if applied to a "reasonable hypothetical circumstance, as opposed to far-fetched or marginally imaginable cases".[22] Subsequently, in *R. v. Morrisey*, the Supreme Court confirmed that "courts are to consider only those hypotheticals that could reasonably arise".[23]

In two recent landmark decisions, *R. v. Nur* and *R. v. Smickle*,[24] the Ontario Court of Appeal declared mandatory minimum sentences for gun possession under section 95 of the *Code* unconstitutional. *Smickle* concerned a first-time offender who was found in his cousin's apartment, posing for pictures to be posted on Facebook while holding a loaded illegal firearm. Charged under section 95(1), the accused was facing a minimum three-year sentence. In *Nur*, the accused was caught with possession of a prohibited firearm outside of a community centre in Toronto.

Gross disproportionality is determined by application of the mandatory sentence to a reasonable hypothetical.

Writing for the Court in both decisions, Justice Doherty did not find the mandatory minimum sentence cruel and unusual in the circumstances of these particular offenders but, instead, found that the penalty became cruel and unusual when applied to a reasonable hypothetical. In *Nur*, Justice Doherty considered the example of a law-abiding gun owner who stored his gun at the cottage rather than at home, as required by law.[25] Section 95 would be triggered in such a situation, exposing that person to a grossly disproportionate mandatory sentence.

Thus, Canadian courts have exerted constitutional pressure on specific mandatory minimum sentences. In this way, courts have developed a powerful tool for preserving proportionality in sentencing. Like judges, Parliament does not have unfettered discretion in determining a just sentence. The Supreme Court is expected to provide further guidance on the constitutionality of mandatory minimums; *Nur* and *Smickle* will be before Canada's highest court in the near future.

2. Constitutional Exemptions Undermine the Rule of Law

Although a declaration of invalidity is available, Canadian courts have struggled with the appropriate remedy where a mandatory sentence could be applied without violating the Constitution in the gen-

eral run of cases but resulted in cruel and unusual punishment in a unique set of circumstances. In these instances, courts settled on the tool of a constitutional exemption.[26]

By way of background, if a law violates the *Charter*, two remedial provisions govern the remedies that may be available. First, section 24(1) of the *Charter* provides:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This provision has generally been understood to create a case-by-case remedy called a constitutional exemption for the unconstitutional act of government agents operating under a lawful scheme the constitutionality of which is not challenged.[27] Second, section 52(1) of the *Constitution Act, 1982* provides:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This is a blunt instrument. It confers no discretion on judges: any law that violates the *Charter* is rendered null and void to the extent of the inconsistency.

A finding that the impugned law is of no force and effect under section 52 is the usual remedy for a mandatory minimum that violates section 12.[28] However, in *Ferguson*, the Supreme Court was asked not to strike down the impugned provision but, rather, to grant a constitutional exemption under section 24(1).[29] This case involved the shooting of a detainee by an officer who was convicted of manslaughter with a firearm, carrying a mandatory minimum sentence of four years in prison.

Writing for a unanimous court, Chief Justice McLachlin analysed the availability of a constitutional exemption to remedy a violation of section 12, a remedy that would give a judge the freedom to impose a sentence below a mandatory minimum that would continue to stand.[30] She concluded that the arguments in favour of constitutional exemptions in these circumstances are "outweighed and undermined by counter-considerations".[31] She identified and relied on four such counter-considerations:

1. the jurisprudence;
2. the need to avoid intruding on the role of Parliament;
3. the remedial scheme of the *Charter*; and
4. the impact of granting constitutional exemptions in mandatory sentence cases on the values underlying the rule of law.[32]

For these reasons, the Supreme Court accepted that allowing Canadian courts to grant constitutional exemptions "directly contradicts Parliament's intent in passing mandatory minimum sentence legislation".[33]

Crucially, the Supreme Court observed that the vaunted "flexibility" of a constitutional exemption would, in these circumstances, come at the expense of undermining the rule of law and the values that underpin it.[34] It cautioned that the laws in the statute books must not be left to drift apart from the laws as applied.[35] In this way, *Ferguson* represents an important check on attempts in the Canadian judiciary to preserve a sphere of judicial discretion in sentencing in the face of Parliament's increasing reliance on mandatory minimum sentences. The message in *Ferguson* is clear: statutory provisions containing mandatory minimum sentences should either be applied or struck down.

C. Mandatory Victim Fine Surcharges

Certain Canadian judges have taken a similarly dim view of mandatory victim fine surcharges imposed under section 737 of the *Code*. A victim fine surcharge is a fine imposed on an offender upon sentencing. In the past, sentencing judges had discretion to waive surcharges if the offender could demonstrate that paying it would result in undue hardship. In practice, surcharges were waived as a matter of course. With the passing of Bill C-37, the *Increasing Offenders' Accountability for Victims Act*, on October 24, 2013, victim fine surcharges doubled in amount and became mandatory for all offences. The amendments contained in Bill C-37 require sentencing judges to impose victim fine surcharges according to the following rubric:

- 30 percent of any fine that is imposed on the offender for the offence; or
- If no fine is imposed on the offender for the offence,
  - $100 in the case of an offence punishable by summary conviction, and
  - $200 in the case of an offence punishable by indictment.

Mandatory surcharges represent a further restriction on judicial discretion in sentencing. Almost immediately after Bill C-37 came into force, some Canadian judges began entertaining new methods of circumventing these now-mandatory surcharges. For example, many judges have simply refused to apply them.[36] Others have granted years or even decades to pay them or imposed a fine of only $1 to effectively defeat Parliament's intent.

Many judges have simply refused to apply mandatory victim fine surcharges.

Recently, in *R. v. Flaro*, Justice Schnall held that victim fine surcharges were a form of punishment, stating that it should be subject to the same constitutional scrutiny as any penalty. Justice Schnall found that section 737 violates section 12 of the *Charter* insofar as it results in a sentence which is grossly disproportionate to the offence and the offender's circumstances.[37] He stated his opposition in the strongest possible terms:

> It would outrage the sentiments of an informed public if it were to realize the arbitrary nature of this mandatory provision which fails to consider the individual circumstances of the offender … [T]his results in a sentence which is not only beyond excessive; the mandatory provisions impose a crushing debt on an individual who has no reasonable expectation of ever being able to pay: this constitutes cruel and unusual punishment. In those cases it forces a person to have to choose between buying food and paying the VFS. (*R. v. Flaro*, 2014 ONCJ 2, [2014] OJ No 94 at para 21)

Other courts have concluded that the surcharge is an unconstitutional tax,[38] while still others have determined that section 737 only applies to offences committed after the amendments.[39]

The current status of the mandatory victim fine surcharge is unclear. With judges questioning its constitutionality, ignoring it, creatively circumventing it, or explicitly finding a *Charter* violation, the proliferation of constitutional challenges to section 737 will no doubt generate more jurisprudence in the near future and, hopefully, an appeal-level decision that will bring clarity to an area of law that, in the words of Justice Phillips, then of the Ontario Court of Justice, is being "creatively sabotaged" by the judiciary (Seymour 11 December 2013).

IV. The Case for Mandatory Minimums

A. Framing the Issue

Nearly every modern commentary on mandatory minimums in Canada vehemently advocates against them. Despite this opposition, Parliament has steadily increased the number of mandatory sentencing tools contained in the *Code* over the past 20 years. It is natural to wonder what has motivated this phenomenon and, more specifically, what objectives and principles Parliament hopes to achieve and honour through their use. The answer lies, the authors suggest, in the intersection between the purpose and principles of sentencing, the requirements of the rule of law, and the roles of Parliament and the courts.

Canadian courts can – and indeed must – ensure that the laws in the statute books are kept within the strict boundaries of the constitutional rights and principles recognized in Canada. There is a disconnect, however, between the idea that the courts should guard against violations of the Constitution and the apparent view of some academics, the media, and even members of the judiciary that all mandatory sentencing tools *qua* intrusions on judicial discretion interfere with a judge's ability to impose a just sentence. This section explores that disconnect.

B. A Defence of Mandatory Sentencing Tools

The rule of law lies at the root of Canada's system of government.[40] It has been described as a "fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] SCR 121 at para 44, 16 DLR (2d) 689). In essence, it requires that laws exhibit five important qualities: certainty, accessibility, intelligibility, clarity, and predictability.[41] The rigours of the rule of law have been discussed in the context of mandatory minimum sentences before. In fact, it was a principal basis for the Supreme Court's decision in *Smith* that constitutional exemptions should not be recognized as an appropriate remedy for cruel and unusual punishment.[42] In reaching this conclusion, the Court commented:

> The mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply. As constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied. (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*] at para 70)

The divergence between the law as it exists and the law as it is applied is a quintessential rule of law problem. A gap between a law's theory and practice creates uncertainty and unpredictability and, in the Supreme Court's words in *Ferguson*, "exacts a price paid in the coin of injustice".[43] Canadians must know what the law is in advance so that they can govern their conduct accordingly. This includes knowing what sentence will likely attend the commission of a particular criminal offence.

Canadians must know what the law is in advance so that they can govern their conduct accordingly.

Opponents of mandatory minimum sentences tend to focus on the restrictions that these laws impose on a sentencing judge's ability to tailor the sentence to an offender's unique circumstances.

However, scrutinized in light of the rule of law, it is clear that, at least in the abstract, mandatory minimum sentences should be capable of functioning as effective tools to ensure the even, equal, and proportionate application of sentences to offenders guilty of the same offence. Rather than eliminating a judge's ability to assess a proportionate sentence, mandatory minimums set a stable sentencing range for an offence, permitting citizens to understand in advance the severity of the consequences that attend the commission of that offence, regardless of the individual offender's particular degree of responsibility.

Mandatory minimums reflect the lowest possible sentence for the least culpable offender. The policy underlying any given sentencing floor is a function of Parliament's answer to an important question: "What sentence would be appropriate for the least morally culpable person whose behaviour still constitutes the elements of the offence?" Answering this question requires Parliament to perform a nuanced, multi-faceted policy analysis of the moral status of the behaviour in question. Put simply, how bad is it? Of course, Parliament is neither omniscient nor infallible. It can, and certainly has, imposed inappropriately severe sentences in the past, as the Supreme Court in *Smith* ultimately determined the Diefenbaker government had in passing the seven-year minimum sentence contained in section 5(2) of the *Narcotic Control Act* in 1960. This is not a frailty of mandatory sentencing tools. After all, Canadian judges have certainly reached inappropriately severe (or, more frequently, inappropriately lax) sentences as well. Through statutes, Parliament speaks with a single voice. Its errors thus have the virtue of being applied consistently until they are struck down. Conversely, individual judges exercising discretion are more likely to create uncertainty and unpredictability with their errors. As any trial lawyer can confirm, it is often easier to predict the weather than to predict a trial judge's verdict.

Rather than rejecting mandatory sentencing tools as such, critics would be well served by focusing on the more defensible position of attacking Parliament's conclusions about the moral status of the behaviour constituting the elements of a given offence. It is beyond the scope of this paper to consider whether Parliament has set an appropriate sentencing floor reflecting the moral gravity of each offence carrying a mandatory minimum sentence in the statute books today, or for that matter those of the last 200 years. Suffice it to say that, if and to the extent that it has not, the gross disproportionality test and section 52(1) of the *Constitution Act, 1982* offer the appropriate remedy.

Mandatory minimums reflect the lowest possible sentence for the least culpable offender.

A key feature of our system of government is that Parliament constantly reviews old legislation and passes new legislation with a view to ensuring that its laws, including its sentencing laws, properly align with the demands of justice. This is a crucial task because criminal laws, passed in the context of a particular moment in history, often call out for modernization. For example, in 1976, Parliament abolished the death penalty. Clearly, this decision represented a restriction on a sentencing judge's discretion insofar as it took the ultimate penalty off the table. Interestingly, this decision has not been maligned as an intrusion on judicial discretion in sentencing. In a 2007 article entitled *Public Attitudes to Sentencing in Canada: Exploring Recent Findings*, the authors considered the attitudes of Canadians towards various sentencing issues, including the severity of sentencing and mandatory sentencing (Robert, Crutcher, and Verbrugge 2007, 75). It was found that most Canadians thought that Canada's sentencing regime is too lenient on offenders (Robert, Crutcher, and Verbrugge 2007, 83). Thus, it is hardly surprising that Parliament has stepped in to impose what it believes to be a just sentencing range for certain offences.

A review of Hansard illustrates that a period's particular issues and concerns have historically been the driving force behind most, if not all, mandatory minimums. For example, the enactment of a minimum sentence for offenders convicted three or more times of being a keeper or inmate of a common bawdy house arose out of a concern for women and girls working in these places. In the 1970s, concerns about the increasingly common phenomenon of deaths caused by impaired driving led to the passing of a bill that instituted minimum penalties for refusing to provide breath samples and having blood alcohol levels over the legal limit.

As a further example, section 49 of the *Code* illustrates the need for Parliament to continually monitor the laws in the statute books to ensure that they are connected to Canada's evolving understanding of the moral gravity of a given offence. This provision, which is still in the *Code*, makes it an offence punishable by up to 14 years in prison to wilfully act with intent to alarm the Queen. A 14-year sentence for alarming the Queen would be out of touch with the gravity of the relevant behaviour in virtually every reasonable hypothetical scenario. Perhaps for this reason, the authors are not aware of any instance of a conviction under this section in modern times. Nonetheless, it remains a law in the statute books for now and, thus, speaks to a gap between the laws of Canada and the application of those laws. It demonstrates how criminal laws can slide out of touch with our understanding of the moral gravity of an offence, requiring Parliament to step in to rectify that gap.

The Supreme Court noted Parliament's important role in guarding against gaps between laws as they exist and as they are applied when, in *Ferguson*, it rejected constitutional exemptions for mandatory minimums in breach of section 12. In particular, the Supreme Court emphasized the institutional value of striking down unconstitutional laws:

> A final cost of constitutional exemptions from mandatory minimum sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada. (*R. v. Ferguson*, 2008 SCC 6 [2008] 1 SCR 96 [*Ferguson*] at para 72)

As a separate point, while Parliament and the courts must be separate and independent of one another, this does not mean that courts enjoy an unrestrained dominion over courtroom matters. Justice Phillips of the Ontario Court of Justice puts this point eloquently when discussing the mandatory victim fine surcharge:

> While my judicial independence is very important, in the sense that I must be able to decide cases without fear or favour, such independence does not mean that I should conduct myself as if unmoored from legislative directives. Put another way, I can't just do whatever I want. The rule of law requires consistency of application. Judges effectively thwarting the will of parliament is a recipe for arbitrariness. Arbitrariness is antithetical to the rule of law. (*R. v. Kelly*, [2013] OJ No 5581 at para 5)

Judges regularly recognized the side-constraints limiting the exercise of their powers. In *R. v. Nasogaluak*, the Supreme Court was unequivocal: "Absent a declaration of unconstitutionality, minimum sentences must be ordered where so provided in the *Code*. A judge's discretion does not extend so far as to override this clear statement of legislative intent."[44] It is the duty of judges to make decisions

on legal issues within the letter of the law. A sentencing judge's discretion is, and has always been, restricted by precedent and Acts of Parliament.

Beyond the limits of the judiciary's powers writ large, individual judges are required to apply constitutional Acts of Parliament and to uphold the rule of law. These duties are inherent in the position, and they are set out in many places.[45] For example, in its code of conduct entitled *Ethical Principles for Judges*, the Canadian Judicial Council states: "The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is a cornerstone of the rule of law."

Ignoring mandatory minimums is no more acceptable than would be ignoring mandatory maximums.

Judges who ignore or otherwise circumvent mandatory minimums act contrary to the office that they have sworn to uphold. Ignoring mandatory minimums is no more acceptable than would be ignoring mandatory maximums. Today, the public would react with outrage if a judge purported to impose a death sentence. However, setting aside the obvious differences, imposing such a sentence would be no different from a constitutional law perspective than refusing to apply a mandatory minimum or surcharge that passes constitutional muster. This is true regardless of how justified sentencing judges think themselves in refusing to apply the law.

V. Conclusion

So long as they remain within the boundaries of the *Constitution Act, 1982*, mandatory minimum sentences do not intrude on a judge's ability to set an appropriate sentence. Rather, they simply establish a certain and predictable range in which that discretion is to be exercised. In *R. v. Martin*, Justice McCawley offers a lucid and compelling explanation of this point:

> A sentencing judge is required to determine a fit and proper sentence within the parameters set by Parliament. As such no sentencing judge has an unfettered discretion. Parliament has the unquestioned authority to determine the sentence for every *Criminal Code* offence and has done so in a number of ways, subject always to the constraints of s. 12 of the *Charter*. Although Parliament's right to impose minimum sentences is also unquestioned, such instances are relatively rare. Whereas Parliament has chosen to give considerable discretion to judges to fashion an appropriate sentence in keeping with the purpose and principles of sentencing articulated in the *Criminal Code*, the fact that judicial discretion is limited, either directly from a mandatory minimum provision or indirectly from the notice requirement, does not offend the principles of fundamental justice. (2005 MBQB 185 at para 49, 203 Man R (2d) 214)

Thus, mandatory minimums which do not offend section 12 of the *Charter* actually promote proportionality and the rule of law insofar as they set a strict sentencing range commensurate with the range of possible moral culpability for a given offence and, therefore, render sentencing for that offence more certain, accessible, intelligible, clear, and predictable.

Eminent constitutional scholar Kent Roach has expressed a concern that mandatory minimums will

cause the range of sentencing for specific offences to shift upwards (2001, 399–404). It is unclear whether this is true – or, if it is, whether it is unwelcome – but it does not engage with the key question of whether the sentencing range created by the mandatory minimum for the specific offence in question reflects the gravity of the offence and captures the moral blameworthiness of the least culpable offender. If it does, a shift upwards should be treated as a necessary correction of the previous sentencing range. If it does not, section 12 of the *Charter* and section 52(1) of the *Constitution Act, 1982* provide the cure. In both instances, no rule of law problem arises.

It is inarguable that mandatory sentencing tools should be carefully scrutinized by the courts for proportionality measured against the clear boundaries set by the Constitution and its written and unwritten principles. However, insofar as they suggest that the mere act of curtailing judicial discretion by imposing mandatory penalties is problematic, critics are missing the point. Sentencing laws, like all laws, must be certain, accessible, intelligible, clear, and predictable. If rational, proportionate mandatory minimum sentences are imposed, they promote justice. If disproportionate, arbitrary, or over-harsh mandatory sentences are imposed, they do not promote justice and, thus, should be struck down. No middle ground can be maintained.

If rational, proportionate mandatory minimum sentences are imposed, they promote justice.

A rule of law problem arises each time a judge ignores a law in the statute books without striking it down as unconstitutional. So far, Canada's highest court has done an admirable job of defending the rule of law against attacks justified on the ground of preserving judicial discretion in sentencing. However, the gross disproportionality test is a discretionary analysis left in the hands of the Canadian judiciary. If exercised inappropriately, it could quickly become a means through which judges can usurp Parliament's power to enact valid criminal sentences within the boundaries of the Constitution. This is a legitimate concern. If nothing else, the Supreme Court's recent decision to reject the Harper government's choice of Justice Marc Nadon to fill a position on Canada's highest court illustrates how politics can masquerade as law.

The current debate about mandatory sentencing tools highlights that more court battles will likely arise in the future. The rule of law must remain paramount. Neither Parliament nor judges can be permitted to exercise absolute discretion in the realm of criminal sentencing. Each branch of government must hold the others to account. While this is a difficult balance to strike, it is indispensable for protecting individual rights and the principles that lie at the core of Canada's political and legal systems.

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Appendix A
Offences Carrying Mandatory Minimum Sentences[1]

Section of the *Criminal Code*	Description of the Offence	Mandatory Minimum Sentence
s. 85	Using firearm in commission of offence	1 year – first offence 3 years – second+ offence
s. 86	Careless use of firearm	2 years – first offence 5 years – second+ offence
s. 92	Possession of firearm knowing its possession is unauthorized	1 year – second offence 2 years less a day – third+ offence
s. 95	Possession of restricted or prohibited firearm with ammunition	3 years – first offence 5 years – second+ offence
s. 96	Possession of weapon obtained by crime	1 year
s. 99	Weapons trafficking	3 years – first offence 5 years – second+ offence
s. 100	Possession of weapons for purpose of trafficking	1 year, unless prohibited firearm involved then: 3 years – first offence 5 years – second+ offence
s. 102	Making a firearm automatic	1 yr
s. 103	Importing or exporting firearms knowing it is unauthorized	1 year, unless prohibited firearm involved then: 3 years – first offence 5 years – second+ offence
s. 151	Sexual interference	45 days (indictable) 14 days (summary)
s. 152	Invitation to sexual touching under age 14	45 days (indictable) 14 days (summary)
s. 153	Sexual exploitation, age 14 to 18	45 days (indictable) 14 days (summary)
ss. 163.1(2), (3)	Child pornography	1 year (indictable) 90 days (summary)

1 Unless indicated otherwise, the listed mandatory minimum sentence is applicable to indictable offences or if the Crown proceeds by way of indictment for hybrid offences.

Section of the *Criminal Code*	Description of the Offence	Mandatory Minimum Sentence
ss. 163.1(4), (4.1)	Possession of or accessing child pornography	45 days (indictable) 14 days (summary)
s. 170	Parent or guardian procuring sexual activity	Person under 16 – 6 months Person over 16 – 45 days
s. 171	Householder permitting sexual activity	Person under 16 – 6 months Person over 16 – 45 days
s. 202	Betting, pool-selling, book-making	14 days – second offence 3 months – third+ offence
s. 203	Placing bets on behalf of others	14 days – second offence 3 months – third+ offence
s. 212(2)	Living on avails of person under 18	2 years
s. 212(2.1)	Living on avails of person under 18 and using violence	5 years
s. 212(4)	Obtain sexual services of person under 18	6 months
s. 220(a)	Cause death by criminal negligence, use of firearm	4 years
ss. 229-231, 235	Murder	Life
ss. 234, 236(a)	Manslaughter	4 years
s. 239(1)(a)	Attempt murder, use restricted or prohibited firearm, or any firearm, in committing acts for a criminal organization	5 years – first offence 7 years – second+ offence
s. 239(1)(a.1)	Attempted murder, use of firearm (other)	4 years
s. 244(2)(a)	Discharging firearm with intent, use restricted or prohibited firearm, or any firearm, in committing acts for a criminal organization	5 years – first offence 7 years – second+ offence
s. 244(2)(b)	Discharging firearm (other) with intent	4 years
s. 244.2(3)(a)	Discharging firearm recklessness, use	5 years – first offence 7 years – second+ offence
s. 244.2(3)(b)	Discharging firearm (other) recklessly	4 years

Section of the *Criminal Code*	Description of the Offence	Mandatory Minimum Sentence
s. 253, 255	Operation while impaired (not causing bodily harm) over .08	30 days – second offence (indictable/summary) 120 days – third+ offence (indictable/summary)
ss. 254(5), 255(1)	Refusal to provide breath or blood sample	30 days – second offence (indictable/summary) 120 days – third+ offence (indictable/summary)
ss. 253(1), 255(2), (2.1), (2.2)	Impaired operation causing bodily harm; "over 80" causing accident resulting in bodily harm; refusal to provide breath or blood sample knowing accident resulted in bodily harm	30 days – second offence 120 days – third+ offence
ss. 253, 255(3), (3.1), (3.2)	Impaired operation causing death; "over 80" causing accident resulting in death; refusing to provide breath or blood sample knowing accident resulted in death or bodily harm leading to death	30 days – second offence 120 days – third+ offence
s. 272(2)(a)	Sexual assault with a weapon, threats to a third party or causing bodily harm with firearm for benefit of, at direction of, or in association with a criminal organization	5 years – first offence 7 years – second+ offence
s. 272(2)(a.1)	Sexual assault with weapon, threats or causing harm, use of firearm (other)	4 years
s. 273(2)(a)	Aggravated sexual assault, use of restricted or prohibited weapon, or any firearm, in committing acts for criminal organization	5 years – first offence 7 years – second+ offence
s. 273(2)(a.1)	Aggravated sexual assault, use of firearm (other)	4 years
s. 279(1), (1.1)(a)	Kidnapping, use of restricted or prohibited firearm, or any firearm, in committing for criminal organization	5 years – first offence 7 years – second+ offence
ss. 279(1), (1.1)(a.1)	Kidnapping, use of firearm	4 years
s. 279.011(1)(a)	Trafficking in persons under age of 18 years, kidnapping, etc.	6 years
s. 279.011(1)(b)	Trafficking in persons under age of 18 years	5 years

Section of the *Criminal Code*	Description of the Offence	Mandatory Minimum Sentence
s. 279.1(2)(a)	Hostage taking, use of restricted or prohibited firearm, or any firearm, in committing acts for criminal organization	5 years – first offence 7 years – second+ offence
s. 279.1(2)(a.1)	Hostage taking, use of firearm (other)	4 years
s. 333.1	Motor vehicle theft	6 months – third+ offence
ss. 343, 344(1)(a)	Robbery, use of restricted or prohibited firearm, or any firearm, in committing for criminal organization	5 years – first offence 7 years – second+ offence
ss. 343, 344(1)(a.1)	Robbery, use of firearm (other)	4 years
ss. 346(1), (1.1)(a)	Extortion, use of restricted or prohibited firearm, or any firearm, in committing for criminal organization	5 years – first offence 7 years – second+ offence
ss. 346(1), (1.1)(a.1)	Extortion, use of firearm (other)	4 years

Appendix B
Cases Declaring Mandatory Penalties Unconstitutional[2]

Section of the Subject Act	Case	Explanatory Note
ss. 5(2) of the Narcotic Control Act	*R. v. Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435.	Seven-year mandatory minimum sentence for the importation of any narcotic was declared unconstitutional.
ss. 5(3)(a)(i)(D) of the Controlled Drugs and Substances Act	*R. v. Lloyd*, 2014 BCPC 8, [2014] BCJ No 274.	One-year mandatory minimum sentence for an individual with a prior offence of possession for the purpose of trafficking was declared unconstitutional. The matter was adjourned to allow the Crown to address arguments under section 1 of the Charter.
ss. 6(3) of the Summary Convictions Act	*R. v. Joe* (1993), 87 CCC (3d) 234, 27 CR (4th) 79.	Five-day mandatory minimum sentence for a default in payment of a fine, to the extent it applied to parking offences, was declared unconstitutional.
s. 95 of the Criminal Code	*R. v. Adamo*, 2013 MBQB 225, 300 CCC (3d) 515. *R. v. Charles*, 2013 ONCA 681, 117 OR (3d) 456. *R. v. Nur*, 2013 ONCA 677, 117 OR (3d) 401. *R. v. Smickle*, 2013 ONCA 678, 5 CR (7th) 359.. *R. v. Sheck*, 2013 BCPC 105, [2013] BCJ No 999.	Three-year mandatory minimum sentence for possession of a prohibited or restricted firearm was declared unconstitutional.
ss. 99(2) of the Criminal Code	*R. v. C.L.*, 2012 ONCJ 413, 264 CCC (2d) 122.	Three-year mandatory minimum sentence for firearms trafficking was declared unconstitutional.
ss. 244.2(1) of the Criminal Code	*R. v. McMillan*, 2013 MBQB 229, 1 WWR 556.	Four-year mandatory minimum sentence for intentionally discharging a firearm into a place knowing that or being reckless as to whether another person was in that place was declared unconstitutional.
s. 737 of the Criminal Code	*R. v. Flaro*, 2014 ONCJ 2, [2014] OJ No 94.	Only the 2013 amendments, which increased the percentage calculation on a victim fine surcharge to 30 percent and increase the quantum to be imposed if no fine to $100 on summary conviction and $200 for indictable offences, were declared unconstitutional.

2 The list above does not include Quebec jurisprudence, to the extent that the decision was not available in English.

Endnotes

1 *R. v. Gardiner*, [1982] 2 SCR 368 at para 107, 140 DLR (3d) 612 [*Gardiner*].

2 *R. v. Gardiner*, [1982] 2 SCR 368 at para 108.

3 *Mackin v. New Brunswick (Minister of Justice)*, 2002 SCC 13 at para 35, [2002] 1 SCR 405, citing *Provincial Court Judges Assn (Manitoba) v Manitoba (Minister of Justice)* [1997] 3 SCR 3 at para 130, 150 DLR (4th) 577.

4 See, e.g., *R. v. Ipeelee,* 2012 SCC 13, [2013] 1 SCR 433.

5 SC 1892, c 29. See, e.g., *R. v. Boulanger*, 2006 SCC 32 at para 33, [2006] 2 SCR 49 [*Boulanger*].

6 *R. v. Boulanger*, 2006 SCC 32 citing Hansard, vol XXXIV, 2nd Sess, 7th Parl, April 12, 1892, at 1312; A. W. Mewett, 1967, "The Criminal Law, 1867–1967", *Canadian Bar Review* 45 at 727; and Don Stuart, 2001, *Canadian Criminal Law: A Treatise*, 4th ed at 2.

7 *An Act to Provide for the Conditional Liberation of Penitentiary Convicts*, 4th Sess, 8th Parl, 1899.

8 *An Act to Amend the Criminal Code of Canada*, 5th Sess, 12th Parl, 1915.

9 *An Act to Amend the Criminal Code of Canada,* 7th Sess, 12th Parl, 1917; *An Act to Amend the Criminal Code of Canada*, 5th Sess, 13th Parl, 1921; and *An Act to Amend the Opium and Narcotic Drug Act*, 1st Sess, 14th Parl, 1922.

10 *An Act to Amend the Criminal Code, the Parole Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff Act and the National Defence Act,* 1st Sess, 28th Parl, 1969.

11 *An Act to Amend the Criminal Code of Canada*, 1st Sess, 30th Parl, 1974-1976.

12 *The Criminal Law Amendment Act,* 1st Sess, 30th Parl, 1976.

13 *R. v. Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435 [*Smith*]. See the discussion of this case in the section titled “Cruel and Unusual Punishment”.

14 *An Act to Amend the Criminal Code of Canada*, 2d Sess, 35th Parl, 1996.

15 Appendix A to this paper contains a list of all criminal offences in Canada that currently carry mandatory minimum sentences.

16 Appendix B contains a non-exhaustive list of jurisprudence in Canada which has declared mandatory minimum sentences invalid.

17 *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

18 *R. v. Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435 [*Smith*] at para 53.

19 *R. v. Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435 [*Smith*] at para 53.

20 [1991] 2 SCR 485, 61 BCLR (2d) 145 [*Goltz*].

21 A provision that violates the *Charter* may not be unconstitutional if the infringement can withstand constitutional scrutiny. Section 1 of the *Charter* provides as follows: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 1 allows a court to uphold the impugned provision if the violation that emanates therefrom is reasonably justified. According to the wording of section 1, the infringement must be clearly prescribed by law. In a foundational decision, *R. v. Oakes*, [1986] 1 SCR 103, the Supreme Court provided a two-step legal framework to determine whether an infringement is justified. This test is widely known as the "Oakes test". Firstly, the objective of the impugned provision must be pressing and substantial. Stated differently, the purpose of the law must be an important issue for society. Secondly, the means chosen to achieve such objective must be proportional to the burden placed on the rights of the claimant. Such analysis requires that the objective is rationally connected to the limit placed on the infringed *Charter* right, the violation is as minimal as possible and there is proportionality between the benefits from the infringement and the deleterious effects created by it. If an infringement cannot be justified based on the above Oakes test, the impugned provision cannot withstand constitutional scrutiny and will be struck out.

22 *R. v. Goltz* [1991] 2 SCR 485, 61 BCLR (2d) 145 [*Goltz*] at para 42.

23 2000 SCC 39 at para 33, [2000] 2 SCR 90 [*Morrisey*].

24 2013 ONCA 677, 117 OR (3d) 401 [*Nur*]; and 2013 ONCA 678, 5 CR (7th) 359 [*Smickle*].

25 *R. v. Nur* [2013] ONCA 677, 117 OR (3d) 401 [*Nur*] at para 167.

26 See, e.g., *R. v. Sever,* 2006 ONCJ 138, [2006] OJ No 1593; *Regina v. McDonald*, [1998] OJ No 2990, 40 OR (3d) 641; *R. v. Chief* (1989), 51 CCC (3d) 265, 74 CR (3d) 57; *R. v. Kumar* (1993), 85 CCC (3d) 417, 20 CRR (2d) 114; *R. v. McGillivary* (1991), 89 Sask R 289, 62 CCC (3d) 407; *R. v. Kozy*, [1989] OJ No 824, 7 WCB (2d) 186; *R. v. Massettoe*, 2003 BCPC 451, [2003] BCJ No 3009; *R. v. B*égin, [2005] QJ No 469; *R. v. Sanghera* (2002), 22 MVR (4th) 155, 52 WCB (2d) 396; *R. v. Cordero*, [2001] OJ No 2901; *R. v. Luc* (2007), 165 CRR (2d) 85, 222 CCC (3d) 299; and *R. v. Netser* (1992), 70 CCC (3d) 477, 15 WCB (2d) 2123.

27 *R. v. Ferguson*, 2008 SCC 6 at para 35, [2008] 1 SCR 96 [*Ferguson*].

28 *R. v. Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*] at para 36. This was the remedy sought in: *Goltz*; *Morrissey*; and *R. v. Luxton*, [1990] 2 SCR 711, [1990] SCJ No 87.

29 *R. v. Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*] at para 36.

30 *R. v. Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*] at para 37.

31 *R. v. Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*] at para 40.

32 *R. v. Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*] at para 40.

33 *R. v. Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*] at para 52.

34 *R. v. Ferguson*, 2008 SCC 6 at para 35, [2008] 1 SCR 96 [*Ferguson*] at para 69. See the discussion of this issue in the section titled "The Case for Mandatory Minimums.".

35 *R. v. Ferguson*, 2008 SCC 6 at para 35, [2008] 1 SCR 96 [*Ferguson*] at para 70.

36 See, e.g., *R. v. W(DL)*, 2014 BCSC 43, [2014] BCJ No 62.

37 *R. v. Flaro*, 2014 ONCJ 2, [2014] OJ No 94.

38 This view, which is referred to in passing in *R. v. Flaro*, 2014 ONCJ 2, [2014] OJ No 94 at para 18, is fleshed out in an unreported decision by Justice Stephen Hunter of the Ontario Court of Justice dated October 29, 2013.

39 See, e.g., *R. v. Deeb*, 2013 ONSC 7870, [2013] OJ No 5925; and *R. v. Dominaux*, 2014 NLTD(G) 2 at para 36, [2014] NJ No 16.

40 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70, 161 DLR (4th) 385.

41 *R. v. Ferguson*, 2008 SCC 6 at para 35, [2008] 1 SCR 96 [*Ferguson*] at paras 68–69.

42 *R. v. Ferguson*, 2008 SCC 6 at para 35, [2008] 1 SCR 96 [*Ferguson*] at para 75.

43 *R. v. Ferguson*, 2008 SCC 6 at para 35, [2008] 1 SCR 96 [*Ferguson*] at para 72.

44 2010 SCC 6 at para 45, [2010] 1 SCR 206.

45 See, e.g., Canadian Judicial Council, *Ethical Principles for Judges*, Ottawa: Canadian Judicial Council; Ontario Court of Justice, *Principles of Judicial Office*, Toronto: Ontario Court of Justice; and *Courts of Justice Act*, RSO 1990, c C43, s 80. See also Scott Shapiro (2012, 190); and Justice Pomerance (2013, 320; 322).

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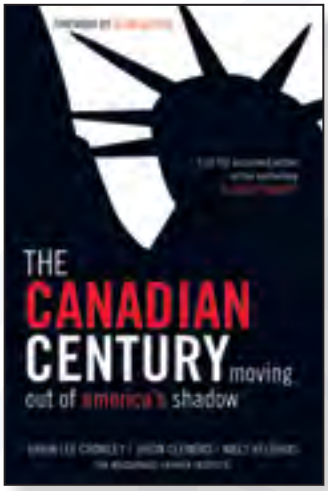

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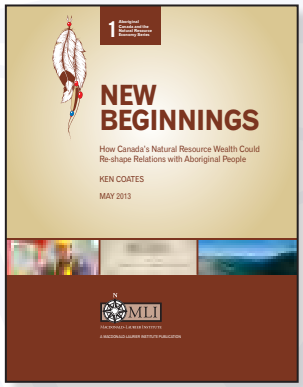

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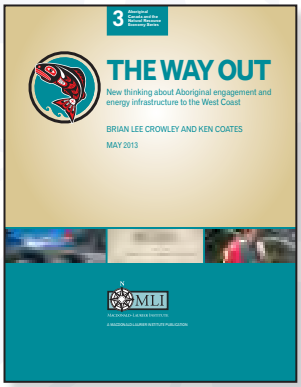

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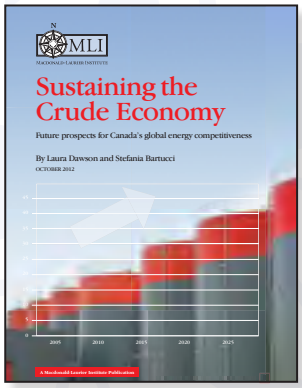

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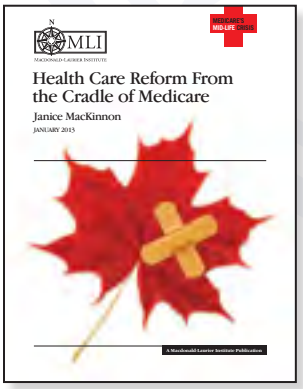

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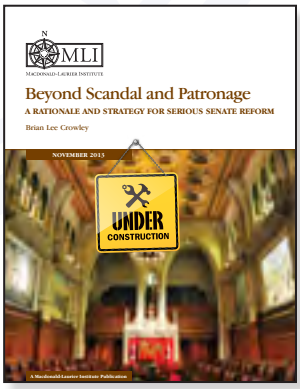

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