Mandatory minimum sentences of imprisonment as 'cruel and unusual punishment': Exploring constitutional infirmity post-*Nur* (2015)

by

Kayla Barkase

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Declaration of Committee

Name:	**Kayla Barkase**
Degree:	**Master of Arts**
Title:	**Mandatory minimum sentences of imprisonment as 'cruel and unusual punishment': Exploring constitutional infirmity post-*Nur* (2015)**
Committee:	**Chair: Sheri Fabian** University Lecturer, Criminology
	David MacAlister Supervisor Associate Professor, Criminology
	Bryan Kinney Committee Member Associate Professor, Criminology
	Michelle Lawrence Examiner Associate Professor, Law University of Victoria

Abstract

This research examines judicial intervention striking down mandatory minimum sentencing laws in Canada. Between 2006 and 2015, former Prime Minister Stephen Harper's Conservative government introduced (and increased) an unprecedented number of mandatory minimums in the *Criminal Code* and *Controlled Drugs and Substances Act*. Approximately 100 offences now carry a minimum period of imprisonment. In 2015 and 2016, the Supreme Court of Canada struck down provisions imposing minimum periods of imprisonment in *R v Nur* and *R v Lloyd*, for violating the prohibition against cruel and unusual punishment enshrined in s. 12 of the *Canadian Charter of Rights and Freedoms*. Lower courts across Canada have continued striking down other mandatory minimum provisions (primarily those pertaining to drug, sex, and weapons offences). 134 cases challenging the constitutional validity of mandatory minimums are reviewed. This research concludes the current Liberal government has not fulfilled its commitment to review the previously imposed mandatory minimum penalties, despite more effective and less costly sentencing approaches.

Keywords: mandatory minimum sentencing; constitutional challenges; cruel and unusual punishment; Canadian *Charter of Rights and Freedoms*; principles of sentencing; judicial discretion

Dedication

Over the past five years, several individuals generously took the time to speak with me and share their experiences of sentencing and incarceration at little/no benefit to themselves. With gratitude, this thesis is for you.

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"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones." – Nelson Mandela

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List of Acronyms

ADHD	Attention deficit hyperactivity disorder
ASD	Autism spectrum disorder
CDSA	*Controlled Drugs and Substances Act*
CSO	Conditional sentence order
DO	Dangerous offender
FASD	Fetal alcohol spectrum disorder
IRPA	*Immigration and Refugee Protection Act*
PI	Particularized inquiry
PMB	Private member's bill
RH/F	Reasonable hypotheticals/foreseeability
SCC	Supreme Court of Canada

Preface

"*If locking up those who violate the law contributed to safer societies, then the United States should be the safest country in the world. In fact, the United States affords a glaring example of the limited impact that criminal justice responses may have on crime.*"

– 12th Report of the Standing Committee on Justice and the Solicitor General (1993)

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"*If anyone had told me when I became an MP nine years ago that I'd be looking at the social causes of crime, I'd have told them that they were nuts. I'd have said, 'Lock them up for life and throw away the key.' Not any more.*"

– Bob Horner, Chair, Standing Committee on Justice and the Solicitor General (1993)

Chapter 1. Mandatory Minimum Sentencing

1.1. Introduction

On November 4th, 2015, Justin Trudeau was sworn in as Prime Minister, and his Liberal government replaced nearly a decade of Conservative reign led by Stephen Harper. A month later Parliament was sitting, and it set to work implementing their electoral platform through legislative change. However, their legislative agenda has not yet addressed the problems generated by the proliferation of mandatory minimum sentences. Despite repeated assertions by (former) Justice Minister Jody Wilson-Raybould, action on repealing mandatory minimum sentences remains elusive. Instead, it has been left to the courts, which have consistently addressed the constitutionality of these laws. In fact, the Department of Justice reported in 2018 that 68% of the (then) current 256 *Canadian Charter of Rights and Freedoms* (1982) [hereinafter *Charter*] challenges relate to mandatory minimum sentences prescribed in the Canadian *Criminal Code* (1985) [hereinafter *Code*] and *Controlled Drugs and Substances Act* (*CDSA*) (1996). It is, thus, integral to examine the impetus driving the creation of mandatory minimum sentences, and the consequences these have on broader sentencing and criminal justice policies. A logical starting point is a review of the historical tension between the legislative and judicial branches in Canada, their search for a principled approach to sentencing, and the aim of controlling sentencing disparity.

1.2. The Need to Control Sentencing Disparity

The need to control sentencing disparity through sentencing commissions, sentencing principles, and sentencing guidelines began in England in the early twentieth century (Roberts & Ashworth, 2016, p. 308). The use of tariffs in nineteenth century England has been cited as an early indicator of the concern for parity (*R v Lacasse*, 2015, para. 56; Gray, 2017, p. 411).[1] In Canada, sentencing disparity has been considered a "primary issue" since a wave of sentencing reforms in the 1980s, and as a result of studies conducted by Hogarth (1971), and Palys and Divorski (1986), for

[1] The court in *R v Lacasse* (2015) [hereinafter *Lacasse*] described this system generally as "[synthesizing] … the relevant principles applicable to each type of crime in order to standardize sentencing for it" (para. 56).

example (Roberts, 1999, p. 286). While sentencing research in Canada has dwindled in recent years, public perception regarding inconsistency in sentencing (often decries of judicial leniency) prevails. The types of sentencing disparity generally envisioned are inter-judge and inter-jurisdiction variations (i.e., judge-to-judge and court-to-court variations), although there is no single, uniform conceptualization (Roberts, 1988, p. 17). Primary disparities emerge when judges emphasize different sentencing objectives and/or principles (Roberts, 1988, p. 18). In contrast, secondary disparities arise when "differential weights [are] applied to characteristics of the offender and the offence" (i.e., aggravating and mitigating factors) (Roberts, 1998, p. 18). These categories are not mutually exclusive and disparate sentences can result even when judges agree on the predominant sentencing factors (Roberts, 1998, p. 18).

While empirical research demonstrates that sentencing disparity is a reality, questions about its justification remain. Roberts (1988) argues: "… while 'similar sentences for similar offenders committing similar offences' has an intuitive appeal, it fails to address the issue of how dissimilar sentences can be and yet still be considered equitable" (p. 16). Two considerations help explain this. First, if judges are tasked with assessing the particular circumstances of an offender and offence, and with imposing punishment that takes such circumstances into account, some disparity should be expected. The facts of individual cases can be and often are sufficiently dissimilar that they necessitate different outcomes (i.e., sentences), hence the incorporation of aggravating and mitigating factors into sentence calculus.[2] Thus, it is *unwarranted* sentencing disparity that is problematic rather than sentencing disparity altogether. Second, while parity is a noble aim, it is tempered by additional sentencing principles; proportionality, in particular, is the codified, fundamental principle of sentencing in Canada. In *R v Arcand* (2010), the Alberta Court of Appeal reflected on these complexities, declaring (in a commonly cited paragraph):

> We must face up to five sentencing truths. First, it is notorious amongst judges, of whom there are now approximately 2,100 in this country at three court levels, that one of the most controversial subjects, both in theory and practical application is sentencing. That takes us to the second truth. The proposition that if judges knew the facts of a given case, they would all agree, or substantially agree on the result, is simply

[2] Of course, the weight these factors are afforded depends on the decision-making of individual judges in individual cases. The disparity generated by this human element has been explored elsewhere, and particularly by those who adopt the legal realist theoretical perspective.

> not so. The third truth. Judges are not the only ones who know truths one and two, and thus judge shopping is alive and well in Canada — and fighting hard to stay that way. All lead inescapably to the fourth truth. Without reasonable uniformity of approach to sentencing amongst trial and appellate judges in Canada, many of the sentencing objectives and principles prescribed in the Code are not attainable. This makes the search for just sanctions at best a lottery and at worst a myth. Pretending otherwise obscures the need for Canadian courts to do what Parliament has asked: minimize unjustified disparity in sentencing while maintaining flexibility. The final truth. If the courts do not act to vindicate the promises of the law, and public confidence diminishes, then Parliament will. (para. 8)

Many factors have contributed to the sentencing disparity issue in Canada: lack of guidance to sentencing judges, respect for the individualized nature of sentencing, reluctance of appeal courts to interfere (unnecessarily) with lower court decisions, jurisdictional differences from province to province, and conflicting principles of and approaches to sentencing (Doob & Webster, 2003, p. 151). One approach Parliament has taken in attempt to minimize sentencing disparity is through the expansion of its mandatory minimum regime.

1.3. The Mandatory Minimum Approach

Mandatory minimum penalties take a variety of forms: (1) they attach to designated offences, (2) they apply to particular types of offenders, such as recidivists (i.e., an enhancement based on the number of prior convictions), and/or (3), they are triggered by particular criteria (e.g., the addition of an incremental penalty for using a firearm during an offence) (Dandurand, 2016, p. 3). However, several assumptions underlie the practice and use of mandatory minimum sentencing.

1.3.1. Assumptions

Mandatory minimum sentencing has been described as “radical, draconian, and inconsistent with any intelligible notion of human rights” (Tonry, 2013, p. 472). Academics, lawyers, judges, offenders and ex-offenders, politicians and political actors, and activists all echo similar sentiments. Despite survey research criticizing sentences

as "too lenient,"[3] public attitudes about mandatory minimums are surprisingly mixed[4] and tend to follow those of politicians (Doob & Webster, 2003, pp. 157-158; Webster & Doob, 2015, p. 301). However, as other countries like the United States shift away from minimum sentencing approaches, the number of mandatory minimums in Canada has grown significantly. Support for mandatory minimum penalties appears to be grounded in at least one of three claims: first, they are crime preventative (i.e., they impact the crime rate through deterrence or incapacitation, for example); second, they ease public concern about leniency in sentencing; and finally, they reduce sentence disparity (i.e., by limiting judicial discretion, thereby increasing uniformity across offence types and parity amongst offenders) (Allen, 2017, p. 3).

1.4. Research Questions

The purpose of this research is to examine case law where: (1) the accused was convicted with an offence carrying a mandatory minimum sentence of imprisonment, and (2) the constitutionality of the provision(s) was challenged under s. 12 of the *Charter* (1982). This research does not include cases that address other types of mandatory minimum penalties (mandatory minimum fines or mandatory victim surcharges, for example), although such penalties have also been constitutionally challenged.[5] This research also does not include cases where the mandatory minimum sentence of imprisonment was challenged under a different section of the *Charter* (1982) (s. 7 or s. 15, for example). The primary focus of this analysis is determining what makes a mandatory minimum sentence of imprisonment "cruel and unusual," and thus, a violation of s. 12 of the *Charter* (1982). All cases analyzed in this study were handed down following the Supreme Court of Canada's (SCC) decision in *R v Nur* (2015) [hereinafter *Nur*], which marked the first successful s. 12 challenge in nearly three decades. The test used to determine the constitutionality of a provision challenged under s. 12 was established in *R v Smith* (1987) [hereinafter *Smith*] and remains the standard today.

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[3] Advocates for increased severity of punishment typically include individuals who are afraid of crime, believe harsher punishment deters crime, and/or believe that crime is increasing (Doob & Webster, 2003, p. 153).

[4] According to Roberts (2005), these attitudes (1) suggest limited knowledge of mandatory minimums, (2) often depend on the type of offence, and (3) are qualified by other considerations, such as loss of proportionality (p. 2, 5).

[5] See *R v Boudreault*, 2018 SCC 58.

According to the SCC, s. 12 is infringed when a sentence is "grossly disproportionate," and the "punishment or treatment [is] 'so excessive as to outrage standards of decency'" (*R v Smith*, 1987).

In order to determine what constitutes "cruel and unusual punishment" in the post-*Nur* (2015) years, this research explores potential differences between successful and unsuccessful constitutional challenges to mandatory minimum sentences. Broadly, this analysis can help identify and clarify: (1) particular factors that are considered at sentencing in mandatory minimum cases (and the weight they are afforded), (2) how judges interpret s. 12 in light of specific offence types, offenders' personal circumstances, the provisions that are engaged, and the severity of punishment that is mandated (assuming length of sentence is indicative of sentence severity), (3) the challenges judges face when restricted by mandatory minimum sentencing legislation (namely, curtailed judicial discretion and inability to fashion appropriate sentences for particular offenders), and (4) how judges reconcile the mandatory minimum sentencing scheme with the fundamental principle of sentencing (proportionality).

1.5. Research Methodology

Case law was collected through the online legal database *Quick Law*. A purposive sample was generated from cases that were restricted by content and time period. These cases were not, however, restricted by location (i.e., province), court level (i.e., trial, appeal, or SCC), or offence type and severity. Consequently, each case satisfied the following criteria:

- **Content**: (1) Each case challenged at least one provision(s) in the *Code* (1985) or *CDSA* (1996) where a mandatory minimum sentence of *imprisonment* is/was attached, and (2) each case discussed whether the impugned mandatory minimum sentence of imprisonment violated s. 12 of the *Charter* (1982).

- **Time Period**: Each case was decided after April 14th, 2015, when the SCC handed down the *Nur* (2015) decision, and up to January 24th, 2019, when the Ontario Superior Court of Justice released the decision in *R c MRM* (2019).

These cases were collected using a two-step approach. The first step of data collection involved reviewing all cases that cited *Nur* (2015) *and* met the aforementioned criteria. This step was repeated during the course of this research, to account for new cases that were handed down and subsequently uploaded to *Quick Law*. The second step of data collection required examination of legal citations in the selected (i.e., relevant) cases. This helped identify cases that did not necessarily cite *Nur* (2015) (*R v Lloyd* (2016) [hereinafter *Lloyd*] was cited instead, for example) but nonetheless met the criteria for inclusion in the study sample. In total, 134 cases were collected for analysis.

1.6. Theoretical Frameworks

There are at least two reasons why penal theory is relevant to discussions on mandatory minimum sentencing and the prohibition against cruel and unusual punishment entrenched in s. 12 of the *Charter* (1982). First, it is difficult to understand the appeal of mandatory minimum sentencing without an understanding of the theories of punishment that underlie their justification. Second, these theories together provide a broader understanding of the practice of legal punishment generally – why punish, how much punishment, and how to punish.

1.6.1. Penal Theory and the Practice of Punishment

At the intersection of the criminal law and the broader philosophies of punishment is the sentencing decision. According to Sebba (2013), "… the sentencing decision (although generally short and formalized) can be considered the lynchpin of the criminal justice system connecting the punishment to the crime in both symbolic and practical senses" (p. 239). Legal punishment requires justification because it entails treating individuals in a way we would not normally. That is, it involves the imposition of unpleasant consequences, whether achieved through deprivation or the infliction of some form of pain, harm, or suffering (Duff & Garland, 1994, p. 2). Contending that legal punishment is morally justifiable does not mean it is not morally wrong (Zimmerman, 2011, p. 25). Rather, it is agreement that at least in some cases and circumstances, (1) it is *morally permissible* for the state to punish particular individuals, or (2) the state is *morally required* to punish particular individuals (Zimmerman, 2011, p. 25). Ten (1968) suggests:

> … given that in any society there are at least some criminal laws which are bad and should not have been enacted, it is impossible for any theory of punishment to justify the punishment of every person who is convicted of a criminal offence. Theories of punishment specify the type of considerations which, if satisfied, will justify punishment. These considerations are not always satisfied. (p. 3)

It is necessary but insufficient to examine rationales for legal punishment provided by consequentialist, retributivist, restorative, and hybrid penal philosophies. Available alternatives must also be examined if legal punishment is justifiable (Zimmerman, 2011, p. 32). As Duff and Garland (1994) state: "… a justification of state punishment must show not merely that punishment achieves some good, but that it is a proper task of the state to pursue that good *by these means*" [emphasis added] (p. 6). In the context of sentencing, this may require concession that particular types of sentences (e.g., incarceration) for particular offenders and in particular circumstances are neither appropriate nor effective. Furthermore, it may encourage sentencers (i.e., judges) to use intermediate and alternative sanctions, and restorative practices.

1.6.2. Consequentialism

Consequentialism, as an ethical theory, suggests that actions are "right" or "wrong" depending on the consequences they produce. In other words, an individual's conduct is morally justifiable if it produces good consequences. Consequentialists may disagree about what constitutes "good consequences." Utilitarians, such as Jeremy Bentham and John Stuart Mill in particular, endorse the principle of utility; like hedonists, they believe that "good consequences" are those that maximize pleasure or happiness, while bad consequences are those that produce pain or unhappiness.

As a forward-looking theory of punishment, consequentialism concerns an offender's future behaviour; that is, his or her likelihood of committing future offences. In the context of sentencing, consequentialists assume that punishment (i.e., the sentence handed down) has a crime preventative effect. This is unsurprising given that crime reduction is logically connected to the overall purpose of criminal justice systems (von Hirsch et al., 1999, p. 39); it would be nonsensical if actors working within the criminal justice system (i.e., those individuals enforcing its rules) did not seek to prevent crime from occurring in the first place. Hart (1968) explains: "… the moral justification for

punishment lies in its effects – its contribution to the prevention of crime and the social readjustment of the criminal" (p. 159).

Consequentialists believe that the good consequences of punishment outweigh its bad consequences (Ten, 1987, p. 7). In particular, consequentialists argue that the crime preventative function of punishment produces at least one of three "good effects": a deterrent effect, a reformative/rehabilitative effect, and/or an incapacitative effect (Ten, 1987, p. 7). First, punishment may deter an individual offender from committing future crimes ("specific/special deterrence") or it may deter other individuals from committing crime ("general deterrence"). Second, punishment may rehabilitate or reform an individual offender, so that (s)he no longer commits crime. Finally, even if punishment fails to impact an individual offender's decision to commit crime, it can incapacitate that offender so it is (physically) unlikely or impossible for him or her to do so.

1.6.3. Retributivism

Central to the retributivist theory of punishment are the concepts of *desert* and *proportionality*. Punishment is morally justifiable if it is "deserved," however, the amount of punishment must be proportionate to both the offender's level of moral blameworthiness/fault, and the seriousness of the crime/the amount of harm caused. In other words, the severity of punishment should reflect the gravity of the offence (von Hirsch, 1993, p. 6). Historically, the retributivist theory emerged from Kantian philosophy. Kant's theory of punishment conflicts with consequentialist principles in that individuals should always be treated as ends in themselves and not used to promote some other social good (e.g., crime prevention). He also called for the equalization of punishment with crime, requiring punishment to be proportionate to the "internal wickedness" of the criminal (Kant, 1797). Retributivism had a "restricted" influence compared to utilitarian ideals (von Hirsch, 1992, p. 61). von Hirsch (1992) argues that this is likely the result of its focus on the distribution of punishment rather than the justification of punishment (p. 61).

von Hirsch's (1993) desert perspective, in particular, introduces the notion of censure: conveying blame and disapprobation at wrongs committed (i.e., crimes) and offenders' wrongdoings. He argues that punishment is not merely crime preventative; it performs two moral functions. First, it acknowledges the rights that have been infringed,

and second, it addresses the offender as a moral agent (i.e., an individual with a sense of right and wrong) (von Hirsch, 1992, p. 67). von Hirsch (1992) argues that censure involves everyday moral judgments and punishment is just one specific context where such moral judgments are passed. Punishment, however, is distinct in that it is expressed through the vehicle of deprivation or "hard treatment" (von Hirsch, 2009, p. 117). Many of us possess a normative or “ethical” reason to desist from crime; however, he believes this must be supplemented with a prudential reason for resisting criminal temptation (von Hirsch, 1992, p. 69). This ensures crime is kept at a tolerable level (von Hirsch, 1992, p. 69).

Thus, for von Hirsch’s (1992) desert theory, punishment is composed of both proportionality and censure. It can be expressed as follows: “If crime X is punished more than crime Y, this connotes the greater disapprobation of crime X” (von Hirsch, 1992, p. 70). Applying the principle of proportionality, von Hirsch (1992) cautions us to recognize the difference between the comparative ranking of punishments (*ordinal proportionality*) and the magnitude and anchoring points of the penalty scale (*cardinal proportionality*). Ordinal proportionality is restrictive and not merely a limiting criterion; individuals convicted of like crimes must receive punishments of comparable severity (von Hirsch, 1992, p. 78). Cardinal proportionality is less restrictive because the censure expressed through deprivation is based upon convention; relative increases or decreases in sanctions reflect changes in convention (von Hirsch, 1992, p. 77, 83). However, it is important that penalties remain at a moderate level in order to adequately portray the normative message inherent in penal censure (von Hirsch, 1992, p. 83).

As a backward-looking theory of punishment, retributivism concerns an offender’s past behaviour in terms of receiving his or her “just deserts.” Retributivist theories tend to be “ethically plausible” in that they appeal to our common sense intuitions about justice and fairness (von Hirsch, 1993, pp. 1-2). von Hirsch (1993), for example, argues that proportionality is, in fact, a “requirement of justice” (p. 6). Even consequentialist theories of punishment acknowledge proportionality constraints, to the extent that disproportionate punishment is unlikely to produce aggregate good consequences (Tonry, 2011, p. 221). The importance of proportionality as a common law principle can be traced as far back as *Magna Carta* (1215) and early British case law (Gray, 2017, p. 402). Proportionality depended on “the gravity of the offense, its magnitude, the harshness of the penalty, sentences imposed on other criminals in the

same jurisdiction, and sentences imposed for the same crime in other jurisdictions," considerations that for the most part apply today (Gray, 2017, p. 402).

1.6.4. Hybrid and Restorative Theories

Hybrid theories of punishment include those that blend consequentialist and retributivist principles, those that build on (but retain) a consequentialist or retributivist framework, and those that are proposed as alternatives to punishment (i.e., restorative theories/restorative justice). While comprehensive review of these theories is beyond the scope of this research, some approaches are introduced below.

Hart (1959-1960) long-acknowledged "… any morally tolerable account of this institution [of punishment] must exhibit it as a compromise between radically distinct and partly conflicting principles" (p. 1). Consequently, he proposed a difference between a *general justifying aim for punishment* and the *distribution of punishment*: it does not follow from admitting retribution in distribution that the general justifying aim of punishment is, therefore, retribution (Hart, 1959-1960, p. 8). For Hart (1959-1960), the general justifying aim of punishment should be utilitarian, while retribution should be reserved for questions of liability/culpability (who will be punished) and quantity/amount (how much punishment) (p. 10).

Similar to Hart, Robinson (1987) proposes a distinction between a "determining purpose," and a "limiting purpose" (p. 29-31; Van Ness, 1993, p. 265). Consistent with retributivist philosophy (and according to von Hirsch (1992), the closest model to desert theory), Robinson's theory requires the severity of the punishment to reflect the gravity of the offence (p. 85). At the same time, it allows departure from proportionality when such departure is necessary to prevent an "intolerable level of crime" (Robinson, 1987, as cited in von Hirsch, 1993, p. 48). However, the theory also contains a "restricting principle": "*gross*" departures from proportionality are not permitted (Robinson, 1987, as cited in von Hirsch, 1993, p. 51). The Bottoms-Brownsword model also allows departure from proportionality, even where there are no measurable aggregate effects (von Hirsch, 1993, p. 51). Instead, the theory focuses on *subjective dangerousness*: individuals who constitute a "*vivid danger*" are more likely to cause serious, grievous harm and as such, require an additional period of confinement (von Hirsch, 1993, p. 51). Of course, these

theories presuppose both the validity and reliability of our inferences (von Hirsch, 1992, p. 88).

Belief that proportionality is quantitatively imprecise, providing only broad ranges, forms the basis of range theories (von Hirsch, 1992, p. 75). One type of range theory is Morris' *limiting retributivism*. According to his theory, the principle of desert sets punishment's "outer limits"; that is, it merely signifies how much punishment is too much and how much punishment is too little (von Hirsch, 1993, p. 53). Because proportionality is, thus, "indeterminate," the distribution of punishment is determined by other penal aims (von Hirsch, 1993, p. 53). One major challenge, then, is how one justifies disparate punishment of two offenders who commit offences of equal gravity (von Hirsch, 1992, p. 76).

Pettit and Braithwaite (1992-1993), on the other hand, have attempted to elucidate the *theoretical* grounding for restorative approaches of "punishment." They propose a "republican theory of criminal justice" as an alternative to consequentialist (specifically, utilitarian) and retributivist theories (p. 225; Dolinko, 2003, p. 323).[6] "Dominion" is introduced as the central variable; it is conceptualized as a particular kind of non-interference that maintains a "resilient or secure character" and is protected "to the highest degree standard" (Pettit & Braithwaite, 1992-1993, p. 227). Furthermore, it is "distribution-sensitive" in that threat to an individual's dominion impacts the overall dominion of society (Pettit & Braithwaite, 1992-1993, p. 230). The role of courts is to "rectify" or "remedy" acts that threaten dominion (i.e., crimes) (Pettit & Braithwaite, 1992-1993, p. 231). Sentencing judges accomplish this by requiring offenders to recognize the victim's loss of dominion, recompense the damage caused by this loss of dominion, and reassure the community by "undoing the negative impact of the crime on their enjoyment of dominion" – apparently backwards-looking ideals that can be measured and constrained by the "dominion" variable (Pettit & Braithwaite, 1992-1993, p. 232-233, 238; Pettit & Braithwaite, 1994, p. 318). With respect to implementation of the republican theory, Braithwaite and Pettit (1992) seek to increase the dominion of individuals who come into contact with the criminal justice system, without diminishing the dominion of individuals impacted by crime (Braithwaite & Pettit, 1992, p. 140). This requires

[6] Braithwaite and Pettit (1992-1993) admit the republican theory is a *form* of consequentialism in that it requires maximization of "personal dominion," however, they disagree that this permits a "license-to-optimize sentencing policy" (p. 226).

decremental reduction of punishment and crime control initiatives until there is an "adverse" effect on the crime rate (Braithwaite & Pettit, 1992, p. 140).

Unsurprisingly, the republican theory is not immune from consequentialist problems. Critics argue it does not adequately address the shortcomings of utilitarian calculus or the potential for disproportionate punishment (i.e., absence of "the restraining role of proportionality"), and does not provide justification for upper limits on punishment divorced from retributive principles (e.g., blameworthiness, desert, censure, etc.) (von Hirsch & Ashworth, 1992, pp. 87-89, 97; Ashworth & von Hirsch, 1993, p. 9-10). The consequence is that broad discretion is afforded to judges to impose a sentence that provides recognition, recompense, and reassurance (i.e., the maximal dominion or rectification) (Ashworth & von Hirsch, 1993, p. 12). Furthermore, the forward-looking nature of the "decremental strategy" requires prediction and relies on an ability to measure deterrent effects (von Hirsch & Ashworth, 1992, pp. 90-91). The ideal of fairness is, thus, lost (Ashworth & von Hirsch, 1993, p. 12).

Alternatively, a restorative justice paradigm emphasizes the harm caused to the community, victim(s), and offender him- or herself, the need for cooperation and involvement of all parties, and aims to restore both community peace and the relationships between individuals in that community (Van Ness, 1993, p. 259).[7] This approach encounters familiar challenges. A first essential question is whether the multiple (and potentially divisive) goals of each party can be ranked relative to one another (Van Ness, 1993, p. 264; Ashworth, 1993, p. 287). Given that the *Code* (1985) identifies proportionality as the fundamental principle of sentencing, a second, related issue is the relationship between restoration and proportionality. It is questionable whether proportionality can be preserved in a restorative justice paradigm and whether reparation is a realistic candidate for the central place proportionality currently occupies (Ashworth, 1993, p. 285; Dolinko, 2003, p. 337-339).[8] A third problem is the exacerbation of sentencing disparity:

[7] Ashworth (1993) notes no single "version" of restorative justice currently exists "in theory or in practice" (p. 280).

[8] Dolinko (2003) suggests that reparation "supplement but not displace" other sentencing objectives, and that it be handled by institutions separate from the criminal justice system (p. 339).

> … if each offender is sentenced according to the type of offence alone, the restitution order may fail to reflect the actual harm caused, because similar offenders committing similar crimes can bring about dramatically different injuries … if each offender is sentenced according only to the actual harm caused, then similar illegal conduct may result in dramatically different sentences … differing circumstances on the part of victims and offenders may lead to a disparate effect even when the offence and financial loss are the same. (Van Ness, 1993, p. 270)

As a group, victims are composed of individuals who no doubt have differing views about adequate and appropriate restoration or restitution. Allowing sentences to be influenced by such views is arguably akin to allowing sentences to be based on the personal preference of judges (Ashworth, 1993, p. 298; Dolinko, 2003, p. 331). Ultimately, it becomes unclear how the overall notion of punishment is dispensed with, especially when, in practice, restorative justice relies on voluntary participation of all parties to the offence (Dolinko, 2003, p. 341).

1.7. Thesis Outline

This thesis begins by considering the effectiveness of mandatory minimum sentences, including a review of the empirical research and statutory objectives of sentencing. This is followed by an examination of the origin of mandatory minimums. The history of mandatory minimums is briefly traced from their beginning in English sentencing, to their inclusion in the first Canadian *Criminal Code* (1892), and finally to the amendments that have been introduced throughout the years. This section concludes with a discussion of the Harper-era developments and their impact on the creation and treatment of mandatory minimums. The next section summarizes the early constitutional challenges to mandatory minimum sentences, beginning in 1987 through to 2008. Constitutional scrutiny of mandatory minimums re-emerged in 2015 and 2016 as a result of the *Nur* (2015) and *Lloyd* (2016) cases, which are also examined. The next section discusses the results of the case law analysis. As mandatory minimums tend to attach to particular types of offences, the subsections are categorized to reflect this. Provisions that carry a mandatory minimum sentence of imprisonment but are unrelated to drug offences, sex offences, or weapons offences are analyzed in a residual category. The thesis concludes with a discussion of potential policy implications, including ways to fix the mandatory minimum approach, and alternative policy approaches to mandatory minimum sentencing.

Chapter 2. Effectiveness of Mandatory Minimum Sentencing

Several problems exist with mandatory minimum periods of incarceration. The courts and academic commentators have been clear in elucidating the nature and extent of these problems. However, systematic analyses of the Canadian mandatory minimum regime remains lacking and much research on the efficacy of mandatory minimum sentences can be seen as overly reliant on research in the United States. This is particularly apparent with so-called "three-strikes" legislation. The available research affirms the limited impact of mandatory minimum sentences on incidence of crime. If expansion of mandatory minimum sentences is to be supported, it must be established that mandatory minimum sentences actually impact crime and recidivism rates (and that such impact is not attributable to other factors), and that there is a principled basis for selecting mandatory minimum penalties over some more effective, less costly (in terms of both financial and social/human costs) sentencing policy.

Despite caution that the evidence on deterrence is "very complex and incomplete" (Gabor & Crutcher, 2002, p. 5), politicians continue to justify the imposition of mandatory minimum sentences by appealing to their supposed deterrent effects. Given that Canadian penitentiaries can only house limited numbers of offenders for long-term periods of incarceration, it is unsurprising that focus has been placed primarily on deterrence rather than incapacitation. Gabor and Crutcher (2002) argue: "Deterrence offers the hope that any short-term increases in the prison population produced by MMS will be offset by long-term reductions arising from declining crime rates" (p. 7). While Canadian prison populations have remained relatively stable, the United States has witnessed a 532% increase in incarcerated drug offenders (for example), and it has been argued that this is at least partly attributable to the proliferation of mandatory minimum sentences for such offences (Lamb, 2015, p. 128).

2.1. Purpose and Principles of Sentencing

> *"The problem with having no clear overall set of principles in sentencing is that it is almost impossible to show that a change in sentencing laws violates important principles."* – Anthony Doob (2011, p. 287)

The Canadian sentencing commissions and committees of the late 1980s and early 1990s all recommended that courts rely less on incarceration and, instead, promote alternative sanctions (Daubney & Parry, 1999, pp. 31-32). They also recommended that Parliament codify a moral foundation for punishment.[9] In 1996, Bill C-41 offered (for the first time) a legislated statement of sentencing aims, also referred to as "the purpose and principles of sentencing" (Roberts & von Hirsch, 1994-1995, p. 221). Section 718 is comprised of four "elements": a fundamental purpose of sentencing (s. 718), six objectives that support the fundamental purpose of sentencing (s. 718), a fundamental principle of sentencing (s. 718.1), and five subordinate sentencing principles (s. 718.2) (Roberts & von Hirsch, 1994-1995, p. 224). However, with the exception of the fundamental principle of proportionality, Roberts and von Hirsch (1994-1995) argue that elements of s. 718 appear throughout the evolution of Canadian sentencing policy (p. 233). In fact, s. 718 is criticized as codifying objectives long implicit in sentencing jurisprudence (Daubney & Parry, 1999, p. 34; Roberts & von Hirsch, 1994-1995, p. 233).

In theory, s. 718 states what the appropriate aims of sentencing are. However, in practice, the section does not state when a given objective applies (Roberts & von Hirsch, 1994-1995, p. 225). The major weakness of s. 718, then, is that no guidance is given to the judiciary about the relative weight of the objectives of sentencing (Roberts & von Hirsch, 1994-1995, p. 226). For example, in what types of cases and under what types of circumstances should deterrence take precedence over rehabilitation? Another example is that s. 718.1 identifies proportionality as the primary sentencing principle, yet it is constrained by "offender blameworthiness" and by objectives such as deterrence and incapacitation. Consequently, judges must balance the competing penal philosophies of consequentialism and retributivism: is the primary purpose of a sentence to "contribute … [to] crime prevention initiatives"[10] or to "[impose] just sanctions"?

[9] A survey conducted by the Canadian Sentencing Commission found that two-thirds of a sample of 400 judges also supported this (Roberts & von Hirsch, 1994-1995, p. 222).

[10] After 2015, the wording of this section was amended so that it now includes the protection of society as a fundamental purpose of sentencing (*Criminal Code*, 1985, s. 718).

2.1.1. Proportionality: The Fundamental Principle

The fundamental *purpose* of a sentence includes the imposition of "just sanctions." In *R v Ipeelee* (2012) [hereinafter *Ipeelee*], the SCC identified proportionality as "the sine qua non of a just sanction" (para. 37). Proportionality is governed by dictates of justice and fairness, requiring courts to consider both the gravity of the offence *and* the degree of responsibility of the offender. In this sense, it performs a dual function: it ensures that offenders are held accountable for harmful conduct, while also limiting punishment to that commensurate with an offender's moral blameworthiness (no more and no less) (*R v Ipeelee*, 2012, para. 37). As a result, courts must also balance conflicting principles of parity and individualization in their search for the proportionate or "fit" sentence (*R v Lacasse*, 2015, para. 53).

A principled approach to sentencing requires adherence to this standard for several reasons. First, proportionality is a "general principle of criminal liability"; punishment is imposed relative to the wrong committed/harm caused and the intention of the offender (*R v C (AM)*, 1996, para. 40). Second, proportionality gives meaning to other sentencing objectives and principles (denunciation and totality, for example). A sentence that is disproportionately harsh or disproportionately lenient is unlikely to further the aims contained in s. 718, and all remain secondary to the principle of proportionality. Third, disproportionate punishment undermines confidence in the criminal justice system and sentencing process. Finally, proportionality is the overarching standard by which sentences and laws are assessed. It has been deemed the "ultimate protection" (*R v C (MA)*, 1996, para. 73) – sentences that are "demonstrably unfit" are subject to appeal, "grossly disproportionate" punishment or treatment is constitutionally prohibited,[11] and limitations on human rights must pass the proportionality branch of the *R v Oakes* (1986) [hereinafter *Oakes*] test.

Unsurprisingly, the concept of proportionality is central to an analysis on mandatory minimum sentences; after all, the framework for determining their validity is gauged by a legal test of "gross disproportionality." According to von Hirsch (1992), one way that penal philosophies differ is the role that the principle of proportionality plays: "A desert rationale is one that gives the principle a dominant role. Other viewpoints permit

[11] In addition to s. 12 of the *Charter* (1982), the principles of fundamental justice under s. 7 protect against gross disproportionality.

proportionality to be trumped, to a greater or a lesser degree, by ulterior concerns such as those of crime control" (p. 56). However, in practice, all sentences must be consistent with the fundamental principle of proportionality enshrined in s. 718.1 of the *Code* (1985), even when other sentencing objectives/principles must be emphasized.

2.1.2. Denunciation and Deterrence: Paramount Objectives

The paramount objectives for offences carrying a minimum sentence of imprisonment are denunciation [12] and deterrence. A custodial sentence is often necessary in cases where these are the primary sentencing objectives. However, the SCC has acknowledged that other types of sentence are also available. In particular, the court held that a conditional sentence order (CSO) could provide sufficient denunciation and deterrence in circumstances where the sentence imposed is longer, more onerous, and "the public is made aware of the severity of these sentences"[13] (*R v Proulx*, 2001, para. 103, 107). At least two benefits emerge from sentences of imprisonment served in the community rather than in a penitentiary. First, CSOs are more likely to satisfy the restorative objectives of sentencing (rehabilitation, reparations, and promotion of a sense of responsibility in the offender) (*R v Proulx*, 2001, para. 109). Second, the deterrent and denunciatory effects are often enhanced. As the SCC reflected in *R v Proulx* (2001) [hereinafter *Proulx*]: "… they [CSOs] are primarily responsible for lowering the rate of recidivism" (*R v Proulx*, 2001, para. 109).

Interestingly, the SCC notes that the objectives of denunciation and deterrence are generally most appropriate for "offences that might be committed by ordinarily law-abiding people," given that: "It is such people, more than chronic offenders, who will be sensitive to harsh sentences" (*R v Lacasse*, 2015, para. 73). The SCC has also cautioned against relying on imprisonment for purposes of deterrence (in particular), given that "the empirical evidence suggests that the deterrent effect of incarceration is uncertain" (*R v Proulx*, 2001, para. 107). Thus, the targets of mandatory minimum

[12] Broadly, denunciation is the way a community expresses or communicates disapproval of an offence. According to the SCC, it is "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law" (*R v M(CA)*, 1996, para. 81).

[13] On the other hand, research suggests that public confidence in the criminal justice system and public perceptions of sentencing leniency are largely unaffected by punishment severity or the punitiveness of sanctions (Sprott, Webster, & Doob, 2013, p. 281).

legislation do not appear to be those envisioned by the SCC; in fact, they often include offences that are resistant to marginal deterrent effects and offenders who do not require lengthy custodial sentences of imprisonment (i.e., incapacitation of offenders despite minimal effect on and/or increase to public safety).

2.2. Empirical Research on Mandatory Minimum Sentencing

If deterrence is the primary rationale for punishment, it is necessary to demonstrate that crime preventative policies do, in fact, deter criminal behaviour. As mandatory minimum sentences are introduced amongst pre-existing penalties, they cannot have an absolute deterrent effect; rather, they must be shown to have an additional effect (what is known as "marginal deterrence") (Gabor & Crutcher, 2002, p. 5). Isolating mandatory minimum sentencing as the cause of some marginal deterrent effect is problematic at best (and at worst, impossible), and a variety of problems are well documented (see von Hirsch et al., 1999; Gabor & Crutcher, 2002; Tonry, 2009; Paciocco, 2015, for example). Studies fail to control for confounding variables, including other justice and enforcement initiatives, publicity and education campaigns, and screening provisions for firearms (Raaflaub, 2006, p. 2; Gabor & Crutcher, 2002, pp. 15-16). Furthermore, as many Western countries have witnessed declining crime rates, it is possible that mandatory minimum sentencing is merely entangled in this broader trend (Sloth-Nielsen & Ehlers, 2005, p. 16). It is also difficult to determine whether any difference in incidence of crime is attributable to the severity of punishment or the certainty of punishment. While sentencing policy can impact the severity of punishment (e.g., by increasing the mandatory minimum sentence for an offence), certainty of punishment depends on the apprehension of an offender. Thus, deterrence is likely a "function" of certainty of punishment, not severity of punishment (Lamb, 2015, p. 144).

Underlying marginal deterrence theory is the assumption that offenders can actually be deterred. Significantly, deterrence studies often fail to address an important distinction: to determine whether an individual has been deterred from committing a crime, the focus must be on his or her perception (i.e., his or her "perceived likelihood of apprehension and the expected penalty" rather than "the actual probability of apprehension or the actual penalty") (Doob & Webster, 2003, p. 144; Paciocco, 2015, p. 180). Research must consider whether an offender is aware of the mandatory minimum

penalty and believes that (s)he will be caught, and how such factors weigh into his or her decision to commit an offence. Furthermore, as particular offenders differ on a wide range of factors, research must account for these different types of offenders and how they may respond to punishment (Gabor & Crutcher, 2002, pp. 7-8).

Thus, for several reasons, it is difficult to measure the correlation between harsher penalties and incidence of crime. Doob and Webster (2003), for example, provide a comprehensive analysis of the deterrence literature. They conclude that the current literature does not support a finding that variation in sentence severity results in variation in crime rates (specifically, harsher sentences do not reduce crime rates) (Doob & Webster, 2003, p. 187). Studies suggesting that increased severity of sentences deter have been methodologically, statistically, or conceptually flawed (Doob & Webster, 2003, p. 187). Tonry (2009) similarly argues:

> No matter which body of evidence is consulted – the general literature on the deterrent effects of criminal sanctions, work more narrowly focused on the marginal deterrence hypothesis, or the evaluation literature on mandatory penalties – the conclusion is the same. There is little basis for believing that mandatory penalties have any significant effects on rates of serious crime. (p. 100)

Consequently, the mandatory minimum sentencing regime does not appear to be fulfilling its intended purpose. There appears to be no defensible theoretical or practical rationale for the continuous introduction of mandatory minimum sentences. Marginal deterrence aside, the suggestion that mandatory minimums result in more severe sentences is misleading given that sentences often already meet or exceed the stipulated minimum, and that justice system officials can and do employ strategies to circumvent them (Tonry, 2009, p. 82; Gabor & Crutcher, 2002, p. 5). Some empirical evidence also demonstrates that increases in sentence length can have minimal impact and/or unintended consequences, including increased crime rates and recidivism rates (Kovandiz, Sloan, & Vieraitis, 2002; Smith, Goggin, & Gendreau, 2002; Stolzenberg & D'Alessio, 1997).[14]

[14] Using a multiple time series research design to study cities in states with three-strikes legislation, Kovandiz et al. (2002) found "short-term increases in homicide rates of 13% to 14% and long-term increases of 16% to 24% compared with cities in states without the laws" (p. 399). Stolzenberg and D'Alessio (1997) studied California's three strikes legislation in particular, noting "little observable influence" on both the serious crime rate and the petty theft rate in 9 of 10 states examined (the exception being Anaheim) (p. 465). In a Canadian study on the effects of prison

Chapter 3. History of Mandatory Minimum Sentencing

3.1. English Criminal Sentencing

Mandatory minimum sentencing can be traced back to the "mandatory-ultimate penalties" of the *Black Act 1763*, which imposed the death penalty for over 50 offences (*R v Deyoung*, 2016, para. 20). The *Peel's Acts* introduced reforms that were eventually carried over to the *English Consolidation Acts of 1861*, thus establishing the general structure of criminal law and punishment in nineteenth century England (Friedland, 1988, p. 30). As the purpose of the *Acts* was to consolidate and simplify the existing criminal law (rather than codify new criminal law), it retained the harsh penalties of previously enacted legislation, but relied less on the use of minimum sentences (Friedland, 1988, p. 30).[15] The *Acts* were not well received by English Law Commissioners, who labelled it "disorderly," and lacking "rationalisation" (Friedland, 1988, p. 31). They criticized the broad definitions, the "multiplicity of punishments for analogous crimes," and the wide scope of judicial discretion emanating from earlier prescribed maximum sentences, concluding: "The result was often a wide variety of penalties within the same field, derived from different statutes enacted at different times and usually without regard to the existing state of the criminal law" (Friedland, 1988, p. 30). Charles Greaves, the draftsman of the *Acts*, raised additional concerns about proportionality. He reflected:

> I have long wished that all punishments for offences should be considered and placed on a satisfactory footing with reference to each other … The truth is, that whenever the punishment of any offence is considered, it is never looked at, as it always ought to be, with reference to other offences, and with a view to establish any congruity in the punishment of them, and the consequence is that nothing can well be more unsatisfactory than the punishments assigned to different offences. (Friedland, 1988, p. 31)

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and intermediate sanctions on recidivism (focusing on juveniles, females, and minority groups), Smith et al. (2002) found "no evidence of a punishment effect" when comparing more and less time in prison (pp. 9-10). They ultimately concluded: "Prisons and intermediate sanctions should not be used with the expectation of reducing criminal behaviour" (p. ii).

[15] Buggery was the only criminal offence at this time to carry a mandatory minimum sentence (Friedland, 1988, p. 31).

These events, along with attempts at constructing an English Draft Code, laid the foundation for Canadian criminal law, post-Confederation.

While these English statutes were perceived as severe, some protection existed. Prohibition on excessive punishment traces back to section 10 of the *English Bill of Rights* (1689), which stated: “That excessive Bail ought not to be required, nor excessive Fines imposed; *nor cruel and unusual Punishments inflicted*” [emphasis added] (*R v Smith*, 1987, para. 22; Gray, 2017, p. 409). However, there is no reported case that engaged this section (*R v Smith*, 1987, para. 23).

3.2. The Original *Criminal Code*

Drawing from the English experience, Canada’s first *Criminal Code* was enacted in 1892, and emphasized “deterrence and punishment”[16] and wide judicial discretion (Friedland, 1988, p. 39). It also aimed for greater consistency at sentencing, with (then) Minister of Justice Sir John Thompson proclaiming: "It aims at making punishments for various offences of something like the same grade more uniform" (Friedland, 1988, p. 36). It contained six mandatory minimum sentences: a three month minimum for engaging in a prize fight (formerly section 94); a one month minimum for corrupting public officials (formerly section 133); a one month minimum for corrupting a municipal council member (formerly section 136); a three year minimum for mail theft from a post bag or post office; a three year minimum for other mail theft (formerly section 327); and a five year minimum for mail robbery (formerly section 401) (Crutcher, 2001, p. 273). The original *Criminal Code* (1892) made it clear that selecting the appropriate sentence in Canadian criminal law was within the discretion of the court, and that judges were free to impose less than the stated maximum terms; however, they were required to impose at least the mandated minimum if the punishment section established one. It was typical for Parliament to prescribe maximum sentences in the *Criminal Code* (1892) provisions, and not minimum sentences (*R v Arcand*, 2010, para. 19). At that time, minimum sentences were reserved for offences that threatened the “legitimacy of public institutions,” rather than offences against the person (Crutcher, 2001, p. 273).

[16] On the infliction of punishment, Sir John Thompson also noted: "We have to provide the maximum punishment for the gravest kind of ... offence, leaving it to the discretion of the court to mitigate the punishment according to circumstances" (Friedland, 1988, p. 36).

Prior to the enactment of the *Charter* (1982), section 2(b) of the *Canadian Bill of Rights* (1970) similarly prohibited the imposition of cruel and unusual punishment (*R v Smith*, 1987, para. 12); it stated that the law should not "impose or authorize the imposition of cruel and unusual treatment or punishment" (Canadian Bill of Rights, 1970, s. 2(b)). However, *McCann v The Queen* (1975) is the only case where "a treatment or punishment" was found to be "cruel and unusual" (*R v Smith*, 1987, para. 29). While several international human rights treaties prohibited cruel and unusual punishment, in practice this typically concerned the "conditions of imprisonment" and quality of treatment, rather than the actual punishment itself (*R v Smith*, 1987, para. 24-26).[17]

3.3. Amendments Over the Years

> *"For the most part, it was understood that "good government" included expending effort on criminal justice issues that weren't necessarily vote-getters."* – Doob & Webster (2015, p. 26)

Each sentencing committee and commission from 1952 to present day has recommended the reduction and/or elimination of mandatory minimum sentences (Doob & Cesaroni, 2001, para. 2). Reports discussing corrections, penitentiaries, and penal reform have echoed this recommendation. The *Archambault Report* (1938), for example, noted idiosyncrasies generated by the addition of new statutory minima:

> Your Commission is of the opinion also that provisions in the criminal law imposing minimum penalties for certain offences, thus fettering the judicial discretion of the trial judge or magistrate in individual treatment of special circumstances, is inadvisable. For example, a minimum one-year term of imprisonment is imposed as punishment for stealing an automobile, and three years for theft of a postal letter. (p. 170)

The *Ouimet Report* (1969) dedicated an entire chapter ("Chapter 11") to sentencing-related issues, with the Committee similarly advising against the adoption of mandatory minimum sentences. This trend continued in the *Criminal Law Reform Act* (1984) (which died on the Order Paper, failing to receive Royal Assent), *Sentencing* (1984), *Sentencing Reform: A Canadian Approach* (1987), the Report of the House of Commons Standing Committee on Justice and Solicitor General: *Taking Responsibility* (1988)

[17] The English *Bill of Rights Act* 1689, which is the basis of the US Eighth Amendment, also prohibits cruel and unusual punishment "methods" in "degree and kind" (Gray, 2017, p. 401). This was affirmed in the 1910 case *Weems v United States* 217 U.S. 349 (as cited in Gray, 2017, p. 401).

("Daubney Report"), *Directions for Reform: A Framework for Sentencing, Conditional Release and Corrections* (1990), and Bill C-90 (1992) (which also died on the Order Paper). These works eventually led to the passing of Bill C-41 (1996), renewing some interest in Canadian sentencing reform. Regrettably, newer issues emerged,[18] proving to be convenient distractions; the mandatory minimum problem was largely ignored and forgotten, as were discussions around the creation of a permanent sentencing commission and sentencing guidelines (Roberts, 2012b, p. 330).

In 1987, nearly a century following the enactment of the original *Criminal Code* (1892), the number of legislated mandatory minimum sentences increased only by three.[19] These nine mandatory minimum sentences included: (1) a life sentence for high treason (formerly s. 47(1)); (2)/(3) a life sentence for first and second-degree murder (formerly s. 218(1) and (2)); (4) a one-year (first offence) or three-year (subsequent offence(s)) minimum sentence for use of a firearm during the commission of an offence (formerly s. 83(1)(c) and (d)); (5)/(6) a 14-day (second offence) or three-month (each subsequent offence) minimum sentence for betting/pool-selling/book-making and also for placing bets on behalf of others (formerly s. 186(2)(b) and (c), and s. 187(e) and (f)); and (7)/(8)/(9) a 14-day (second offence) or 90-day (each subsequent offence) minimum sentence for impaired driving (formerly s. 239(a)(ii) and (iii)), for failure or refusal to provide a sample of breath or blood (formerly s. 238), and for operation of motor vehicle while impaired or with more than 80 milligrams of alcohol in blood (formerly s. 237).[20] With passage of Bill C-71 (1974-1976),[21] it was also the first time that the *Code* (1985)

[18] Publicity around the passage of Bill C-41 focused on the inclusion of "sexual orientation" as part of a list in s. 718.2(a)(i), which made an offence "motivated by bias, prejudice, or hate" an aggravating factor at sentencing, and s. 718.2(e), which mandated restraint in the use of incarceration "with particular attention to the circumstances of aboriginal offenders" (Doob, 2011, p. 286). Note: Section 718.2(e) was amended in 2015 to include: "… that are reasonable in the circumstances and consistent with the harm done to victims or to the community…"

[19] In 1987, the seven-year minimum sentence for importing or exporting a drug or narcotic (formerly s. 5 of the *Narcotic Control Act* (1961)) was struck down in *Smith* (1987).

[20] Arguably, a tenth legislated minimum sentence was for the offence of conspiracy (formerly s. 423(1)(d)), which imposed the same minimum sentence as required by the actual offence.

[21] This Bill imposed the minimum sentences for betting/pool-selling/book-making, placing bets on behalf of others, failure or refusal to provide a sample of breath or blood, and operation of a motor vehicle while impaired or with more than 80 milligrams of alcohol in blood (Crutcher, 2001, p. 277).

imposed mandatory minimums dependent on whether the offence was a first or second/subsequent one.[22]

The (then) Liberal government passed Bill C-68 in 1995, which created the *Firearms Act* (1995) and amended the *Code* (1985). 19 minimum sentences were introduced for firearms-related offences, several requiring a significant period of imprisonment (RCMP, 2016, "History of firearms control in Canada"; Gabor & Crutcher, 2002, p. 1; Crutcher, 2001, p. 278).[23] Questions about the efficacy of mandatory minimums remained. Doob and Webster (2016) suggest these provisions did not significantly impact rates of imprisonment; offenders convicted of "serious violent offences with firearms" were already receiving similar sentences from sentencing judges (p. 374; Doob, 2012, para. 47). From 1996-2005, mandatory minimum sentences were primarily imposed in impaired driving cases (Doob & Webster, 2016, p. 364). This changed as a result of the 2006 federal election (see Doob, 2015, p. 8).

3.4. Harper-era Developments

In 2006, the Canadian political rhetoric surrounding sentencing and criminal justice policy shifted dramatically with the election of (former) Prime Minister Stephen Harper's Conservative government. Doob and Webster (2016) have described the "Harper revolution" as "a completely different sentencing landscape that stands – in almost all aspects – in striking contrast with Canada's long-standing past traditions" (p. 362). For three terms, Harper's Conservatives advocated a "tough on crime" and "law and order" approach, with (harsher) punishment as its lynchpin. Consistent with penal populism, criminal justice policy became "politicized" and based on "common sense" (rather than being expert- or evidence-based) (Kelly & Puddister, 2017, p. 394; Moore & Donohue, 2008, p. 376; Doob & Webster, 2015, p. 28-29). "Non-traditional actors" were central to the formation and legitimization of questionable (and arguably unsound) law, with diminished institutional oversight (Kelly & Puddister, 2017, p. 394; Doob & Webster,

[22] Caylor and Beaulne (2014) claim that the first version of "three-strikes" law, in particular, was adopted in 1915; a three-month minimum sentence was attached to the offence of "being a keeper or inmate of a common bawdy house" three or more times (p. 8).

[23] Ten of these offences carried a minimum sentence of four years.

2015, p. 28).[24] Focus shifted to victims' rights, strengthening the justification for "tougher" sentences, in particular (Kelly & Puddister, 2017, p. 394). Unsurprisingly, Conservative opponents were labeled "soft on crime" (Kelly & Puddister, 2017, p. 393). In 2006 alone, the number of minimum sentences had grown to 40 and the costs of federal and provincial punishment totaled approximately three billion dollars (Moore & Donohue, 2008, p. 384). In sum, "the political need to be seen to be doing something trumped good policy" (Doob & Webster, 2015, p. 26).

During the first half of Harper's near-decade rule, his government introduced 61 *separate* criminal justice bills; by 2015, this number grew to approximately 90 (including two omnibus bills) (Greenspan & Doob, 2012; Doob & Webster, 2015, p. 29). 42 of these bills eventually became law, many creating or amending existing mandatory minimum sentences for particular offences (Doob & Webster, 2016, p. 384).[25] While unprecedented in number, these reforms have been reviewed and criticized extensively by Doob and Webster (2015), who have described them as "minor, trivial or redundant," and "piecemeal" (p. 29). Opposition to mandatory minimums remained overwhelming and included critics of diverse backgrounds and political alignments, such as: the Canadian Bar Association, former Correctional Investigator of Canada, Howard Sapers, a coalition of US law enforcement officials, judges and prosecutors, senior Department of Justice officials such as David Daubney, former CSC commissioner, John Edwards, former chair of the Parole Board of Canada, Willie Gibbs, and former executive director of the office of the Correctional Investigator, Ed McIssac (Stuart, 2012, para. 8-11).

The five major pieces of Conservative legislation that introduced or increased mandatory minimums include: (1) *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, 2005*, (2) the *Tackling Violent Crime Act, 2008*, (3) the *Safe Streets and Communities Act, 2012*, (4) the *Protection of Communities and Exploited Persons Act, 2014,* and (5) the *Tougher Penalties for Child Predators Act, 2015* (Allen, 2017). The subsequent changes are summarized in the table below.

[24] Private members' bills are not governed by the *Department of Justice Act* (1985), which requires all "*government*" bills to be constitutionally sound (Kelly & Puddister, 2017, pp. 393-394).

[25] See Doob & Webster, 2016, p. 385.

Table 3-1. Harper-era Legislation Affecting Mandatory Minimum Sentences in the *Criminal Code* (1985) and *CDSA* (1996)

Legislation	Changes Affecting Mandatory Minimums[26]
An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act (2005)	45 days (s. 151(a)) 14 days (s. 151(b)) 45 days (s. 152(a)) 14 days (s. 152(b)) 45 days (s. 153(1.1)(a)) 14 days (s. 153(1.1)(b)) One year (s. 163.1(2)(a)) 90 days (s. 163.1(2)(b)) One year (s. 163.1(3)(a)) 90 days (s. 163.1(3)(b)) 45 days (s. 163.1(4)(a)) 14 days (s. 163.1(4)(b)) 45 days (s. 163.1(4.1)(a)) 14 days (s. 163.1(4.1)(b))
Tackling Violent Crime Act (2008)	Three years (s. 85(3)(b)) Three years (s. 85(3)(c)) Three years (s. 95(2)(a)(i)) Five years (s. 95(2)(a)(ii)) Three years (s. 99(2)(a)) Five years (s. 99(2)(b)) One year (s. 99(3)) Three years (s. 100(2)(a)) Five years (s. 100(2)(b)) One year (s. 100(3))
Safe Streets and Communities Act (2012)[27]	One year (s. 151(a)) 90 days (s. 151(b)) One year (s. 152(a)) 90 days (s. 152(b)) One year (s. 153(1.1)(a)) 90 days (s. 153(1.1)(b)) Five years (s. 155(2)) One year (s. 160(3)(a)) Six months (s. 160(3)(b)) Six months (s. 163.1(2)(b)) Six months (s. 163.1(3)(b)) Six months (s. 163.1(4)(a)) 90 days (s. 163.1(4)(b)) Six months (s. 163.1(4.1)(a)) 90 days (s. 163.1(4.1)(b))

[26] Other changes were made to maximum punishments and age cut-offs, but are not included here.

[27] Conveniently, this allowed them to "push through" nine bills that were previously introduced (i.e., when the Conservatives held a minority government) and in disregard of opposition amendments (Stuart, 2012, para. 5).

	One year (s. 170(a)) Six months (s. 170(b)) 90 days (s. 171(b)) 90 days (s. 171.1(2)(a)) 30 days (s. 171.1(2)(b)) One year (s. 172.1(2)(a)) 90 days (s. 172.1(2)(b)) One year (s. 172.2(2)(a)) 90 days (s. 172.2(2)(b)) 90 days (s. 173(2)(a)) 30 days (s. 173(2)(b)) One year (s. 271(a)) 90 days (s. 271(b)) Five years (s. 272(2)(a.2)) Five years (s. 273(2)(a.2)) One year (*CDSA* s. 5(3)(a)(i)) Two years (*CDSA* s. 5(3)(a)(ii)) One year (*CDSA* s. 6(3)(a)) Two years (*CDSA* s. 6(3)(a.1)) Three years (*CDSA* s. 7(2)(a)) One year (*CDSA* s. 7(2)(a.1)(i)) 18 months (*CDSA* s. 7(2)(a.1)(ii)) Six months (*CDSA* s. 7(2)(b)(i)) Nine months (*CDSA* s. 7(2)(b)(ii)) One year (*CDSA* s. 7(2)(b)(iii)) 18 months (*CDSA* s. 7(2)(b)(iv)) Two years (*CDSA* s. 7(2)(b)(v)) Three years (*CDSA* s. 7(2)(b)(vi))
Protection of Communities and Exploited Persons Act (2014)	Five years (s. 279.01(1)(a)) Four years (s. 279.01(1)(b)) Two years (s. 279.02(2)) One year (s. 279.03(2)) Six months (s. 286.1(2)(a)) One year (s. 286.1(2)(b)) Two years (s. 286.2(2)) Five years (s. 286.3(2))
Tougher Penalties for Child Predators Act (2015)	One year (s. 163.1(2)) One year (s. 163.1(3)) One year (s. 163.1(4)(a)) Six months (s. 163.1(4)(b)) One year (s. 163.1(4.1)(a)) Six months (s. 163.1(4.1)(b)) One year (s. 171) Six months (s. 171.1(2)(a)) 90 days (s. 171.1(2)(b)) Six months (s. 172.1(2)(b)) Six months (s. 172.2(2)(b)) Six months (s. 212(4)(a)) One year (s. 212(4)(b)) Six months (s. 271(b))

In addition, a significant proportion of Conservative criminal justice legislation originated from the passing of private members' bills (PMBs). This strategy was not coincidental; in fact, it allowed the Harper government to "pursue constitutionally suspect amendments such as mandatory minimum sentences to the *Criminal Code* with minimal, or non-existent, constitutional scrutiny" (Kelly & Puddister, 2017, p. 394). In spite of these efforts, the courts have seemingly abandoned a deferential approach in favour of striking down many of these mandatory minimums.

Chapter 4. Early Constitutional Challenges to Mandatory Minimum Sentencing (1987-2008)

4.1. The Initial Challenge: *R v Smith* (1987)

The first SCC case on the protection offered by s. 12 of the *Charter* (1982) appeared to encourage challenges to mandatory minimum sentences. *R v Smith* (1987) [hereinafter *Smith*] challenged s. 5 of the (former) *Narcotic Control Act* (1961), which prohibited importing and/or exporting any narcotic into/from Canada. In *Smith* (1987), the *Narcotic Control Act*'s (1961) mandatory seven-year minimum for importing narcotics was found to be cruel and unusual punishment.[28] The offence caught too wide a range of conduct, extending from the importation of a minute amount of marijuana that was for personal use all the way to large scale trafficking in dangerous drugs by those involved in organized crime. The provision also generated disparity in that the "domestic possessor" would spend little to no time incarcerated simply by virtue of being *within* the country (*R v Smith*, 1987, para. 15).

The *Smith* (1987) case charted the way forward for s. 12 jurisprudence. Among the important contributions made by the case was the elucidation of the test for this *Charter* (1982) provision. A majority found the section would be violated if the minimum sentence were of such a length as to be grossly disproportionate to the gravity of the offence (i.e., "more than merely excessive") (*R v Smith*, 1987, para. 54). To be grossly disproportionate, the sentence must be sufficient to "outrage standards of decency" (*R v Smith*, 1987). An additional contribution of the case was the introduction of hypotheticals to the s. 12 analysis. Even if the punishment was not grossly disproportionate given the facts of the case before the court, the majority ruled that the punishment would be unconstitutional if it would be grossly disproportionate in hypothetical situations considered by the court. The court struck down the offensive provision because it could have been used to send a "small offender" to prison for at least seven years even though the accused himself was not a "small offender," but rather had imported over $100,000

[28] This provision had previously been examined in the pre-*Charter* case *R v Shand* (1976), where the Court of Appeal for Ontario reversed the County Court of Ontario's decision that the seven-year mandatory minimum in s. 5(2) amounted to cruel and unusual punishment (*R v Smith*, 1987, para. 35-36).

worth of 85-90% pure cocaine from Bolivia in South America. A third important contribution of the *Smith* (1987) case was the role played by s. 1 of the *Charter* (1982) in a s. 12 analysis. Based on the *Smith* (1987) ruling, it appears it will be very difficult for the Crown to establish a s. 12 violation can be justified under the *Oakes* test for s. 1. It would be difficult to show that a punishment that is grossly disproportionate to what is appropriate for the offence and offender is somehow proportionate under the *Oakes* analysis, either in the sense of being minimally impairing, or by being capable of being shown to not have a disproportionately severe effect on the persons to whom the law applies.

The *Smith* (1987) decision, nonetheless, appears to be an anomaly in s. 12 jurisprudence. In the 28 years that followed the *Smith* (1987) ruling, the SCC failed to find a s. 12 violation arising from the application of a mandatory minimum sentence.[29] According to Stuart (2012), the "judicial record … has indeed thus far been one of retreat and timidity" (para. 63). Several of these earlier decisions are described below.

4.2. Subsequent Failed Challenges

Table 4-1. Early Constitutional Challenges to Mandatory Minimum Sentences post-*Smith* (1987) (1987-2008)

Case	Impugned Provision	Minimum
R v Lyons (1987)	Part XXI	Indeterminate
R v Luxton (1990)	s. 214(5)(e) s. 669(a)	Life without possibility of parole for 25 years
R v Goltz (1991)	s. 88(1)(c)	Seven days
R v Morrisey (2000)	s. 220(a)	Four years
R v Latimer (2001)	s. 235 s. 745(c)	Life without possibility of parole for 10 years
R v Ferguson (2008)	s. 236(a)	Four years

4.2.1. *R v Lyons* (1987)

R v Lyons (1987) [hereinafter *Lyons*] reaffirmed the test of gross disproportionality established in *Smith* (1987). Mr. Lyons argued that the dangerous

[29] However, minimum sentencing provisions had been struck down in several other countries, including India, Sri Lanka, South Africa, Mauritius, and Papua New Guinea (Gray, 2017, p. 412).

offender (DO) provisions, which result in an indeterminate sentence of imprisonment, violated the guarantee in section 12. The SCC examined two issues underlying the provisions: (1) the validity of the designation itself, and (2) the "indeterminate" quality of the punishment. Addressing the indefinite sentence of imprisonment, the SCC held:

> There can be no doubt that detention *per se*, and preventive detention in particular, is not cruel and unusual in the case of dangerous offenders, for the group to whom the legislation applies *has been functionally defined so as to ensure that persons within the group evince the very characteristics that render such detention necessar*y [emphasis added]. (*R v Lyons*, 1987, para. 45)

The legislation includes particular criteria for a DO designation to apply. The DO provisions are engaged when an offence in question is designated a "serious personal injury offence"[30] (outlined in s. 687(a) and (b)) and when an offender exhibits conduct that is habitual, violent, and "substantially or pathologically intractable" (*R v Lyons*, 1987, para. 43). The way the court gauges the appropriateness of a DO designation is laid out in s. 688(a)(i)-(iii) and s. 688(b). Importantly, this legislation contained several safeguards, including discretion afforded to the court in the designation of an individual as a DO and an opportunity not to sentence such individual to an indefinite period of imprisonment. The parole process also mitigates the uncertainty generated by the indeterminate aspect of the legislation; the Parole Board reviews the DO designation after three years and every two years following the initial review. The SCC concluded that legislation targeting or classifying a particular group of offenders withstands constitutional scrutiny when the criteria are tailored, rational, and "reasonably" proportionate (*R v Lyons*, 1987, para. 44). As such, the DO provisions did not violate s. 12 of the *Charter* (1982)

4.2.2. *R v Luxton* (1990)

R v Luxton (1990) [hereinafter *Luxton*] similarly reaffirmed the test of gross disproportionality established in *Smith* (1987) and upheld in *Lyons* (1987). Mr. Luxton challenged the combined effect of s. 214(5)(e) and s. 669 of the *Code* (1985). Subsection 214(5)(e) prohibited murder and classified it as first-degree if it was committed in combination with one of the designated offences (in this case, forcible

[30] Two of the four convictions against Mr. Lyons fell within this ambit.

confinement). The punishment meted in s. 669 was life imprisonment without possibility of parole for 25 years. The SCC held that the sections were tailored to a certain group of offenders, required a specific type of *mens rea* (subjective foresight of death), and included "various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole" (*R v Luxton*, 1990, para. 9). As murder is typically considered the most serious offence in the *Code* (1985), the elements of the offence are sufficiently specific to ensure that the severity of punishment reflects the gravity of the offence and blameworthiness of the offender. Lamer CJ noted the inclusion of safeguards also suggests Parliament "provided for some sensitivity to the individual circumstances of each case when it comes to sentencing," although arguably limited (*R v Luxton*, 1990, para. 9).

4.2.3. *R v Goltz* (1991)

In *R v Goltz* (1991) [hereinafter *Goltz*], the mandatory seven-day imprisonment term for driving with a suspended license under s. 88(1)(c) of the *Motor Vehicle* Act (1979) was upheld. Despite failing the minimal impairment branch of the *Oakes* test at the Court of Appeal, the SCC ultimately overturned this decision and declared the mandatory minimum constitutional. The Court recognized that while the test of gross disproportionality "does not go as far as a complete individualization of sentencing," this alone could not invalidate a law that represents "legitimate legislative concern" (*R v Goltz*, 1991, para. 36-37). Factors that must be weighed in ascertaining whether a punishment is "grossly disproportionate" include:

> … whether the punishment is necessary to achieve a penal purpose, whether it is founded on recognized sentencing principles, whether there exist valid alternatives to the punishment imposed, and to some extent whether a comparison with punishments imposed for other crimes in the same jurisdiction reveals great disproportion. (*R v Goltz*, 1991, para. 27)

Furthermore, while it is the responsibility of the Court to strike down unconstitutional legislation on this basis, it must do so while balancing the need for protection of the public and other penal aims, including deterrence (*R v Goltz*, 1991, para. 36). The gravity of the offence, the potential for prohibited drivers to evade detection by the police, the procedural/regulatory safeguards in place, and the "range of intermediate opportunities to mend his ways, to inquire into the reasons for the prohibition, and to

appeal the Superintendent's decision" all factored into the Court's conclusion that the provision did not impose cruel and unusual punishment on Mr. Goltz or a hypothetical offender (*R v Goltz*, 1991, para. 48, 57).

The top court further restricted the potential for s. 12 by whittling away at the availability of hypothetical situations to justify finding a s. 12 violation. Many s. 12 claims fail to establish gross disproportionality on the facts of the case, but rather, tend to rely on hypothetical situations that could give rise to a s. 12 violation, as was the case in *Smith* (1987). In *Goltz* (1991), Gonthier J. indicated the court should restrict itself to "reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases" (para. 42). He also noted that a reasonable hypothetical was one that "could commonly arise in day-to-day life" (*R v Goltz,* 1991, para. 69). The narrowing of the availability of hypotheticals to use in a s. 12 analysis continued with Gonthier J.'s follow-up majority judgment in *R v Morrisey* (2000) [hereinafter *Morrisey*].

4.2.4. *R v Morrisey* (2000)

In *Morrisey* (2000), the SCC held that the mandatory four-year minimum sentence of imprisonment for criminal negligence causing death with a firearm (s. 220(a) of the *Code* (1985)) did not constitute cruel and unusual punishment and thus, failed to infringe s. 12 of the *Charter* (1982). While Mr. Morrisey did not intend to discharge the firearm (the general principle being that unintentional conduct is less blameworthy than intentional conduct), Gonthier J. noted that s. 220(a) also captures conduct that demonstrates a "wanton or reckless disregard the life or safety of others" (*R v Morrisey*, 2000, para. 19). In fact, the nature of the offence is unique in that individuals accused of criminal negligence "do not intend the results they cause" (*R v Morrisey*, 2000, para. 40). Recognizing that s. 220(a) could be "committed in an almost infinite variety of ways" (*R v Morrisey*, 2000, para. 31), the SCC nonetheless focused on the common element of all s. 220(a) offences – the seriousness of the harm committed (i.e., death) (*R v Morrisey,* 2000, para. 35, 49). Despite several mitigating factors, it held that the aim of the provision is not to punish "accidents" or the "merely unfortunate;" rather, its scope is consistent with Parliament's intention to prohibit "… a marked departure from the standard care employed by a reasonable person" (*R v Morrisey*, 2000, para. 1). In other words, the provision is specific enough to capture particular conduct that warrants the minimum sentence. Citing the stability of the number of "accidental deaths involving

firearms" in Canada each year (*R v Morrisey*, 2000, *para*. 43), the sentencing principles of deterrence and denunciation were once again reinforced.

The offence of causing death by criminal negligence involving a firearm is clearly not an offence that commonly arises in day-to-day life, but rather is, by its very nature, a rare occurrence. This required a different approach to the particularized inquiry. Gonthier J.'s answer was to follow what the lower courts had done, and look at actual reported cases where criminal negligence involved the use of a firearm. However, he only looked at two types of situations: (1) individuals playing with loaded guns that go off, killing someone, and (2) hunting incidents where a shot is made towards an object in the woods, which turns out to be an innocent victim. In adopting this approach, the hypotheticals he reviewed involved situations where the four-year mandatory minimum would be viewed as an appropriate penalty. Gonthier J. refused to look at all of the reported cases as acceptable hypotheticals in determining the validity of the offence in question. He was concerned that not all of the actual cases were ones that could be described as "common examples" of the offence, with each case turning on its own "idiosyncrasies" (*R v Morrisey*, 2000, para. 50). According to him, the best approach was to develop reasonable hypotheticals that reflect common types of cases that occur, "developing imaginable circumstances which could commonly arise with a degree of generality appropriate to the particular offence" (*R v Morrisey*, 2000, para. 50). The SCC's decision in *Morrisey* (2000) is generally acknowledged to have continued narrowing the reasonable hypothetical test.

4.2.5. *R v Latimer* (2001)

In *R v Latimer* (2001) [hereinafter *Latimer*], Mr. Latimer was initially charged with first-degree murder for killing his disabled daughter, Tracy (an act of "mercy killing"). At both his first and second trials, Mr. Latimer was convicted of second-degree murder. The jury was unaware that second-degree murder carried a mandatory minimum sentence of life imprisonment (without parole eligibility for 10 years). The jury recommended one-year imprisonment, without eligibility for parole. As a result, the sentencing judge granted Mr. Latimer a constitutional exemption from the mandatory minimum and sentenced him to one-year imprisonment and one-year probation. This exemption was overturned by the Court of Appeal and upheld by the SCC. The SCC concluded that the mandatory minimum sentence for second-degree murder was constitutional and did not amount to

"cruel and unusual punishment" under s. 12 of the *Charter* (1982). Citing *R v Guiller* (1985), the SCC reiterated the significance of judicial deference:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency. (*R v Latimer*, 2001, para. 24)

No reasonable hypotheticals were submitted to the Court and consequently, sole focus fell on the particularized inquiry. In its assessment, the SCC discussed the level of culpability required for a murder conviction. Consistent with *Luxton* (1990), the *mens rea* requirement for second-degree murder is subjective foresight of death, indicating a high degree of moral blameworthiness. The SCC recognized the "important role" played by the mandatory minimum for murder (in particular), an offence that relies primarily on the sentencing objective of denunciation. Despite this, the Court cautioned:

> The choice is Parliament's on the use of minimum sentences, *though considerable difference of opinion continues on the wisdom of employing minimum sentences from a criminal law policy or penological point of view*. [emphasis added] (*R v Latimer*, 2001, para. 88)

By restoring the minimum sentence, the *Latimer* (2001) decision reaffirmed limitations surrounding constitutional exemptions, a role properly belonging to the executive and not the judiciary (*R v Latimer*, 2001, para. 89-90).

4.2.6. *R v Ferguson* (2008)

In *R v Ferguson* (2008) [hereinafter *Ferguson*], the SCC held that the four-year mandatory minimum sentence of imprisonment under s. 236(a) of the *Code* (1985) did not violate s. 12 of the *Charter* (1982). Ferguson, an RCMP officer, was convicted of manslaughter with a firearm and granted a CSO of two years less a day by the trial judge. This sentence was later overturned by the Court of Appeal, which imposed the mandatory four-year sentence of imprisonment. At the SCC, McLachlin C.J. referred to Arbour J.'s comments in *Morrisey* (2000). She noted the "overlap" between s. 236(a) and

s. 220(a),[31] the latter of which was upheld as constitutionally valid (*R v Ferguson*, 2008, para. 11). Furthermore, she determined that the presence of mitigating factors did not "reduce Constable Ferguson's moral culpability to the extent that the mandatory sentence is grossly disproportionate in his case" (*R v Ferguson*, 2008, para. 28).

Continuing the discussion started in *Latimer* (2001), McLachlin C.J. clarified whether a constitutional exemption is an appropriate remedy for mandatory minimum provisions that are generally constitutional, but may "produce an unconstitutional result" in a single case or minority of cases (*R v Ferguson*, 2008, para. 38). Her decision provides four reasons for dismissing the use of constitutional exemptions in mandatory minimum cases: first, it is inconsistent with the existing jurisprudence; second, it constitutes an intrusion into the legislative sphere; third, it distorts the "remedial scheme" of the *Charter* (1982); and fourth, it undermines the rule of law (*R v Ferguson*, 2008, para. 40). She acknowledged that in some cases, alternatives to striking down legislation (e.g., constitutional exemptions) could, in fact, be more intrusive (*R v Ferguson*, 2008, para. 50, 52). The wording of s. 236(a) did not allow judicial discretion and as such, judges are not permitted to depart from the mandatory minimum even if the case at hand is one that is "exceptional" (*R v Ferguson*, 2008, para. 54). The appropriate mechanism for addressing unconstitutional legislation is through s. 52 and not s. 24(1)[32]:

> 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 … 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, para. 73)

It has been argued that the inability of judges to provide remedy via a constitutional exemption has contributed to the plethora of mandatory minimum cases being struck down as cruel and unusual punishment under s. 12 (Stuart, 2012, para. 62).

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[31] Section 220(a) prohibits criminal negligence causing death, the offence at issue in *Morrisey* (2000).

[32] Section 52(1) deems laws inconsistent with the *Charter* (1982) to be of no force or effect, while s. 24(1) allows remedies to be imposed when state conduct infringes an individual's *Charter* right(s) (i.e., unconstitutional law vs. unconstitutional state action).

Chapter 5. A Reawakening: *R v Nur* (2015) and *R v Lloyd* (2016)

5.1. Pre-*Nur*: *R v Smickle* (2012) and *R v Charles* (2013)

Two cases heard by the Ontario Superior Court of Justice (and upheld by the Ontario Court of Appeal) helped renew interest in the mandatory minimum issue, paving the way for the SCC's decisions in *Nur* (2015) and *Lloyd* (2016). Both *R v Smickle* (2012) [hereinafter *Smickle*] and *R v Charles* (2013) [hereinafter *Charles*] addressed the constitutionality of s. 95, the provision subsequently struck down in *Nur* (2015).

In *Smickle* (2012), police officers entered an apartment and found the offender in possession of a loaded firearm. Mr. Smickle's cousin was the subject of the warrant, the tenant of the apartment, and the owner of the firearm. Mr. Smickle argued that he was merely posing with the firearm as a prop and taking photographs on his laptop; police evidence supported this finding – the firearm was (a) dropped immediately, (b) unlikely cocked by Mr. Smickle (given the time between the police entering the apartment and Mr. Smickle dropping it), (c) never pointed at the police, and (d) not held in Mr. Smickle's dominant hand, for example.

The court made several observations specific to the three-year minimum sentence required by s. 95(2). First, it acknowledged that the substantive offence involves mere possession, "regardless of the circumstances of that possession" (*R v Smickle*, 2012, para. 52). As such, it does not necessarily involve violence. Second, the court recognized the challenges posed by hybrid offence schemes that impose a minimum sentence only when proceeding by indictment:

> In creating the hybrid offence with no minimum sentence on summary conviction, Parliament recognized that there will be circumstances in which possession of a loaded prohibited weapon will not require any term of imprisonment, and indeed could justifiably result in an absolute or conditional discharge. (*R v Smickle*, 2012, para. 53)

The court determined that the appropriate sentence length absent the mandatory minimum was one-year. A more severe sentence could not be justified by denunciation or deterrence. But for these primary sentencing objectives, a sentence less than one

year may have been warranted. Furthermore, the court found that a more severe sentence was inconsistent with additional sentencing principles such as rehabilitation and restraint. In the court's view, Mr. Smickle's case should have been "diverted into the summary conviction stream" (*R v Smickle*, 2012, para. 87). Given these considerations and the potential 300% sentence increase created by the mandatory minimum, Molloy J. found the provision grossly disproportionate to the particular circumstances of Mr. Smickle.

In addition to this determination, the court offered several reminders. First, the Crown's suggestion that the appropriate remedy was to reduce Mr. Smickle's sentence (rather than declare the provision of no force and effect) was inconsistent with *Ferguson* (2008). Second, the "safety valve" approach, whereby the Crown elects to proceed summarily to avoid the imposition of a disproportionate, minimum sentence on indictment, was previously rejected in *Smith* (1987). Finally, in failing to find the violation justifiable under s. 1, the court identified several problems with this minimum sentence that contributed to both its arbitrariness and disproportionality:

> … the imposition of a three-year penitentiary term on a person who does not deserve it, is a significant deprivation of liberty and a severe deleterious effect … Further, there are other deleterious effects of the mandatory minimum regime, including (1) the sentence inflation for persons who, although not deserving a sentence of less than a one-year sentence, must now receive at least three years; (2) the danger of increased recidivism by incarcerating youthful first-offenders for extended periods of time with hardened criminals; (3) contributing to the over-crowded conditions in our correctional facilities; (4) the systemic disincentive for guilty pleas and early resolutions if the minimum sentence will be three years in prison for any offender charged with the indictable offence; and (5) as the Supreme Court noted in Smith, the unfair advantage given to the Crown as an accused will be under pressure to plead guilty to a lesser included offence in order to avoid the risk of the mandatory minimum. (*R v Smickle*, 2012, para. 121)

With no minimum sentence binding the court and a belief that Mr. Smickle possessed a very low risk of recidivism, Molloy J. did not hesitate using her discretion to impose a CSO rather than a custodial sentence.

In contrast to *Smickle* (2012), *Charles* (2013) (the companion case to *Nur* (2013)) addressed the constitutionality of the five-year minimum sentence for a second or subsequent offence under s. 95(2)(a)(ii). The circumstances of the offence began when

police entered a residence following a 911 call. During their search, they discovered a defaced firearm and ammunition in Mr. Charles' bedroom. Mr. Charles did not possess a firearms license; in fact, he was violating a firearms prohibition order at this time. Unsurprisingly, the court found that a five-year minimum sentence would not be grossly disproportionate for an individual committing repeated firearms offences. However, relying on the hypothetical established in *Nur* (2013)[33], the court agreed that the minimum five-year sentence violated s. 12. Cronk J.A. argued:

> I again emphasize that if the three-year mandatory minimum sentence is grossly disproportionate on conviction for a first s. 95(1) offence in the *Nur* reasonable hypothetical, it defies logic and principle to conclude that a five-year mandatory minimum penalty is constitutionally valid simply because the s. 95(1) offender has also been previously convicted and sentenced for a s. 84(5) listed offence. (*R v Charles*, 2013, para. 73)

The decisions in *Charles* (2013) and *Nur* (2013) were subsequently appealed to the SCC, initiating an unprecedented trend for s. 12 jurisprudence and contributing to the demise of the mandatory minimum regime.

5.2. *R v Nur* (2015) and *R v Lloyd* (2016)

In recent years, the SCC has renewed expectations that s. 12 is a viable mechanism to control the spread of mandatory minimum sentences. *Nur* (2015) signalled a shift away from the restrictive line of cases that followed *Smith* (1987), ultimately holding that the mandatory three-year minimum for a first offence and five-year minimum for a second or subsequent offence(s) involving the possession of a prohibited or restricted firearm that is loaded or with accessible ammunition, violated s. 12. In making this ruling, the top court affirmed that the use of hypotheticals is appropriate in cases where the facts of the case do not support a s. 12 claim. It found that the prior cases could be reconciled by focussing on whether the minimum sentence would be grossly disproportionate in "reasonably foreseeable cases." The SCC softened its approach to the use of hypotheticals set out in *Morrisey* (2000), encouraging the use of reported cases as hypotheticals since they show the range of actual real-life conduct covered by the offence. Such situations are not only reasonably foreseeable, the Court notes, "they actually happened" (*R v Nur*, 2015, para. 72).

[33] The licensing infraction, discussed below.

The SCC outlined a two-step process to use in mandatory minimum s. 12 cases. First, the judge determines the appropriate proportionate sentence for the offender in the case before the court, in what has come to be referred to as the "particularized inquiry." The court must then determine whether the mandatory minimum sentence is grossly disproportionate when compared to that appropriate sentence. If so, s. 12 has been violated. If not, the court should move on to the second step, to look at reasonably foreseeable hypotheticals to determine whether the mandatory minimum sentence would be grossly disproportionate when imposed on others. If so, then at this stage the court will find that s. 12 is violated. Once a violation has been found, the court should move on to determine whether the infringement can be justified under s. 1 of the *Charter* (1982).

The SCC used the hypothetical analysis to look at the broad range of conduct caught by the *Code* (1985) provision in question. The prohibition would apply to a serious offender who carries a loaded prohibited or restricted firearm as part of a criminal enterprise they are engaged in. The provision would also apply to an otherwise law-abiding gun owner who commits a licencing infraction by safely storing their properly licensed gun, along with some nearby ammunition, in a residence other than the one to which the licence applies, such as in a vacation home. The SCC used the licencing example to present a situation that would result in a grossly disproportionate sentence if the mandatory minimum were applied.

In *Lloyd* (2016), the SCC returned to the assessment of the constitutionality of a mandatory minimum in the drug law context. This time, the court focussed on the mandatory one-year prison sentence for possession for the purpose of trafficking or trafficking in a controlled substance where the offender has a conviction for a prior serious drug offence in the preceding ten years. As in *Nur* (2015), the offender in *Lloyd* (2016) did not argue that the mandatory minimum was unconstitutional as applied to him; however, the case would turn on the use of hypotheticals once again. Also, as in *Nur* (2015), the contested provision covered a wide range of behaviour, some of which is much less blameworthy than others. At one end of the continuum is the professional drug dealer who trafficked in large amounts of dangerous drugs for profit, with numerous prior convictions for drug trafficking-related offences. At the other end of the continuum is an addict who is found in possession of a small amount of drugs (s)he intended to share with family or friends, and who has a nine-year old prior conviction for possession

of marijuana. The same one-year mandatory minimum sentence of imprisonment would apply in both situations if the provision were considered constitutionally sound.

The court had little trouble finding the mandatory minimum sentence violated s. 12 of the *Charter* (1982). The Court noted:

> …mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences. (*R v Lloyd*, 2016)

Clearly, severe mandatory minimum sentences that can be committed in various ways and apply in a wide range of circumstances need to either have their reach narrowed or include a "safety valve." A safety valve would allow sentencing judges to grant exemptions from the mandatory penalty in appropriate circumstances (*R v Lloyd*, 2016, para. 36). Parliament would then be tasked with outlining a framework for this approach, limited only by *Charter* (1982) requirements. In *Lloyd* (2016), McLachlin CJ reiterated

> There is no precise formula and only one requirement — that the residual discretion allow for a lesser sentence where application of the mandatory minimum would result in a sentence that is grossly disproportionate to what is fit and appropriate and would constitute cruel and unusual punishment. (*R v Lloyd*, 2016, para. 36)

As in *Nur* (2015), the SCC in *Lloyd* (2016) was unwilling to uphold the offensive provision under s. 1 of the *Charter* (1982). The Court acquiesced to the government's claim that it was pursuing an important objective in combatting the illicit drug trade, and that this measure was rationally connected to that goal; however, the government's claim faltered on the latter two aspects of the *Oakes* analysis. The law was neither minimally impairing nor proportional between the harmful effects of the law on those subject to such penalties and any possible good arising from them being subject to this law. As a result of this prior case law, courts at all levels and in most provinces/territories have continued to strike down remaining mandatory minimums in the *Code* (1985) and *CDSA* (1996). Unsurprisingly, none of the impugned provisions have been salvageable under s. 1 of the *Charter* (1982).

Chapter 6. Analysis of Case Law Developments post-*Nur* (2015)

Recent years have witnessed declining crime rates throughout most western countries. Canada is no exception. Canada's crime rate dropped 23 percent between 2007 and 2017, declining in eight out of those 11 years (Allen, 2018, p. 6). Despite this, Canada's incarceration rates have remained fairly stable. The stability of incarceration rates, particularly at the federal level, flies in the face of declining crime rates and diminishing case processing rates. At least part of the explanation for stable federal incarceration rates may be the increased number of mandatory minimum sentences that have made their way into the *Code* (1985) and the *CDSA* (1996) in recent years.

6.1. Drug Offences

Declining crime rates can also be found in relation to Canada's drug offences. Overall, Canada witnessed a 20 percent reduction in the number of police recorded drug offences between 2007 and 2017 (Allen, 2018, p. 40). Offences pertaining to the trafficking and production of cannabis dropped a remarkable 45 percent over that same time frame (Allen, 2018, p. 40).

Drug offence rates appear to be particularly immune to any marginal deterrent effects, as low-level drug offenders tend to be caught by mandatory minimums and are easily replaceable (Gabor & Crutcher, 2002, pp. 13, 17). This has led academics to conclude: "MMS do not appear to influence drug consumption or drug-related crime in any measurable way" (Gabor & Crutcher, 2002, p. 18). Despite evidence refuting the impact of mandatory minimum sentences, several amendments were made to the *CDSA* (1996) in 2012 that institute mandatory minimum periods of incarceration for a variety of offences related to trafficking, importing/exporting and the production of various drugs.[34]

[34] The various offences are found in s. 5, 6, and 7 of the *CDSA* (1996).

6.1.1. Trafficking Offences

Table 6-1. Summary of Cases – Drug Trafficking (7)

		Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v Bradley-Luscombe* (2015)	s. 5(3)(a)(ii)(A) s. 5(3)(a)(ii)(C)	Two years	Yes	*[35]
	R v Dickey (2016)	s. 5(3)(a)(ii)(C)	Two years	Yes	Yes
	R v Jackson-Bullshields (2015)	s. 5(3)(a)(i)(C)	One year	No	Yes
	R v Lloyd (2016)	s. 5(3)(a)(i)(D)	One year	No	Yes
	R v Robinson (2016)	s. 5(3)(a)(ii)(A)	Two years	No	Yes
VALID	*R v Boutcher* (2017)	s. 5(3)(a)(ii)(B)	Two years		
	R v Carswell (2018)	s. 5(3)(a)(ii)(B)	Two years		

Paragraph 5(3)(a) of the *CDSA* (1996) sets a variety of mandatory minimums for trafficking or possession for the purposes of trafficking in various narcotics, methamphetamine, amphetamines, and cannabis-related products.[36] These offences carry a maximum life penalty, and a minimum punishment of one year imprisonment if relevant aggravating factors are present, such as the offence being committed by a criminal organization, the use or threatened use of violence in the commission of the offence, a weapon was carried, used or a threat to use it arose during the commission of the offence, or the offender had been convicted of, or served a period of imprisonment, for a designated drug offence during the preceding 10 years. The mandatory minimum prison sentence is set at two years if the trafficking-related offence has different aggravating factors, including the commission of the offence near a school or place frequented by children under 18, the commission of the offence inside a prison, or the offender involved a person under 18 in the commission of the offence.

Seven cases have examined the constitutionality of trafficking-related offences in the *CDSA* (1996): (1) *R v Boutcher* (2017) [hereinafter *Boutcher*], (2) *R v Bradley-Luscombe* (2015) [hereinafter *Bradley-Luscombe*], (3) *R v Carswell* (2018) [hereinafter *Carswell*], (4) *R v Dickey* (2016) [hereinafter *Dickey*], (5) *R v Jackson-Bullshields* (2015)

[35] * Indicates the court did not consider reasonable hypotheticals.

[36] The relevant substances are set out in Schedules I and II of the *CDSA* (1996).

[hereinafter *Jackson-Bullshields*], (6) *Lloyd* (2016), and (7) *R v Robinson* (2016) [hereinafter *Robinson*]. Five of these cases found the provisions to violate s. 12 of the *Charter* (1982) in a way that cannot be justified under s. 1. As noted above, *Lloyd* (2016) found that the commission of a trafficking-related offence with a prior substance-related conviction in the last 10 years should not carry the mandatory one-year minimum. Even before *Lloyd* (2016), the British Columbia Provincial Court in *Jackson-Bullshields* (2015) found the provision that provides a mandatory minimum for trafficking while in possession of a weapon was in violation of s. 12. The accused was convicted of trafficking by selling a small amount of heroin to an undercover police officer, while armed with a folding knife that was carried for personal protection. While the court did not find the mandatory minimum grossly disproportionate on the particularized inquiry of this offender, it did identify hypothetical scenarios where the one-year minimum would be grossly disproportionate.

Only two of the five trafficking-related mandatory minimum cases (those deemed unconstitutional) found a s. 12 infringement on the particularized inquiry: (1) *Dickey* (2016), and (2) *Robinson* (2016). *Dickey* (2016) involved a Crown appeal from sentences imposed in three distinct cases dealing with the same type of offence: dial-a-dope cocaine-trafficking or possession for the purposes of trafficking in circumstances where young people were either involved in the offence, or the offence was committed in a place frequented by persons under 18 years of age. These offences carry a mandatory minimum sentence of two years imprisonment. The Crown sought the imposition of the mandatory minimum for all three offenders. The trial court had found an appropriate sentence for Mr. Dickey would have been six months in prison. In light of the mandatory penalty, a sentence being four times as long would amount to the imposition of cruel and unusual punishment in the view of both the sentencing judge and the British Columbia Court of Appeal. The eight-month sentence imposed on Mr. Bradley-Luscombe, who committed his dial-a-dope sale while being driven by a 17-year-old, was also found to be sufficiently disparate from the two-year mandatory minimum, such that imposing the minimum two-year sentence would have been disproportionate on the facts of the case. In *Robinson* (2016), the court noted that even the Crown thought that, absent the two-year mandatory minimum, a 12-month sentence would be appropriate for the offender. The court was struck that the mandatory minimum did not just require doubling what the Crown thought was an appropriate sentence, but that it would result in the imposition of

a federal penitentiary sentence as opposed to a provincial reformatory sentence. For this reason, the court felt the mandatory minimum was cruel and unusual for this particular offender.

In *Boutcher* (2017), Faour J. addressed the constitutionality of the two-year mandatory minimum for trafficking in illegal drugs with the aggravating factor of bringing the drugs into a prison. The offender had brought drugs into a penitentiary for her boyfriend. Because the judge found the mandatory minimum was not grossly disproportionate on the facts of this case, he sentenced Ms. Boutcher to two years in a penitentiary with additional sentences running concurrently. Curiously, the judge did not address the suitability of the mandatory minimum sentence in the context of reasonable hypotheticals. Neither did the court refer to the British Columbia Court of Appeal decision in *Dickey* (2016) or the rulings in *Robinson* (2016) and *Jackson-Bullshields* (2015), all of which found the mandatory minimums for trafficking with aggravating factors present to be invalid.

Like *Boutcher* (2017), the offender in *Carswell* (2018) was convicted of trafficking a Schedule I substance (N-methyl-3, 4-methylenedioxyamphetamine, "MDMA") to the grounds of a penitentiary, triggering the two-year minimum sentence in s. 5(3)(a)(ii)(B). The court noted that a Mr. Simpson, the father of Ms. Carswell's child, arranged the delivery without her "permission or knowledge" (*R v Carswell*, 2018, para. 9). Ms. Carswell was not formerly involved in drug trafficking and did not appear to commit the offence for financial gain; however, Currie J. found no evidence of threats or duress. While Ms. Carswell "got caught up in it" [the drug trade], her moral culpability was high given that the offence required planning and deliberation (*R v Carswell*, 2018, para. 25-26). The court emphasized that the offence would attract a custodial sentence, typically in the range of 18 months to four years (absent the mandatory minimum). As a result, the two-year minimum sentence was deemed excessive, but not grossly disproportionate. Furthermore, the court held the provision was sufficiently narrow to capture only those individuals who (a) traffic a Schedule I or II substance, (b) possess the substance for the purpose of trafficking, and (c) traffic to a specific location (e.g., penitentiary grounds). The court did not examine any hypotheticals, and merely acknowledged that there are no reasonably foreseeable circumstances where the minimum sentence would meet the threshold of gross disproportionality.

6.1.2. Importing/Exporting Offences

Table 6-2. Summary of Cases – Importing/Exporting Drugs (2)

		Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v CS* (2017)	s. 6(3)(a.i)	Two years	Yes	Yes
	R v Duffus (2018)	s. 6(3)(a)(i)	One year	No	Yes

The original importing offence that set out a mandatory minimum prison sentence of seven years under the *Narcotic Control Act* (1961) was struck down in *Smith* (1987). The provisions in the *CDSA* (1996) imposed a one-year mandatory minimum for importing or exporting more than a kilogram of a marijuana-related substance (Schedule II drugs), or less than one kilogram of a Schedule I drug, such as opioid narcotics, cocaine, synthetic pain killers, methamphetamine and amphetamines, where the importation/exportation was for the purposes of trafficking, a position of trust or authority was abused, or the person used their authority to access a restricted area to commit the offence. It also sets out a mandatory minimum two-year prison sentence for importing or exporting more than a kilogram of a Schedule II drug. Two cases have addressed the constitutionality of these provisions and both found a violation of s. 12: (1) *R v CS* (2018) [hereinafter *CS*], and (2) *R v Duffus* (2017) [hereinafter *Duffus*].

In *Duffus* (2017), André J. of the Ontario Superior Court of Justice declared s. 6(3)(a)(i) of the *CDSA* (1996) invalid. The sentencing of Mr. Duffus, who had imported about five kilograms of marijuana into the country via an airport, did not involve a situation the judge felt would produce cruel and unusual punishment if the mandatory minimum of one-year imprisonment were imposed. However, the case turned on the use of hypothetical scenarios. The court employed a minor variation on the *Smith* (1987) hypothetical, noting that the importation of a small amount of marijuana to share with friends, or to give to a friend or relative suffering from a debilitating illness, would not merit a one-year prison sentence. Such a sentence was found to be “so excessive as to outrage standards of decency” (*R v Duffus*, 2017, para. 65). This conclusion was aided by the court’s review of case law developed post-*Smith* (1987), largely from the 1990s, much of which involved the imposition of a CSO to be served in the community. However, in the end, André J. imposed a 12-month custodial term, the same duration as the mandatory minimum he had just declared invalid. Perhaps the amount of drug being

imported was viewed as justifying such a sentence. Alternatively, the court may not have been presented with arguments that the *Code* (1985) sentencing provisions making a CSO unavailable for any indictable offence involving the importation of drugs should also be considered invalid.

In *CS* (2018), the offender (an Aboriginal woman), was convicted of importing 1971.5 grams of cocaine from Surinam in violation of *CDSA* (1996) provision 6(3)(a.i); her boyfriend at the time set up this arrangement for which she was to be paid $20,000. The court spent a significant amount of time reviewing the impact of minimum sentences on Aboriginal offenders and their contribution to the over-incarceration of Aboriginal peoples. Several problems were identified, including the undermining of Gladue principles, and constraints on judicial discretion to consider intersectional, contextual, and mitigating factors. The court relied on expert testimony that explained:

> For drug crimes that carry mandatory minimum sentences, the challenge is to consider how, *and in what particular ways*, individualized information (as well as the restorative justice principles contained in section 718) will be taken into consideration in the sentencing process where mandatory minimums apply. In this regard, scholars note that with respect to Indigenous people, "two statutory provisions are at odds with one another: the statute prescribing a mandatory minimum sentence, which stresses denunciation and deterrence, and paragraph 718.2(e), which stresses rehabilitation and restoration. (*R v CS*, 2018, para. 26)

Fortunately for Ms. S, while the Crown proposed a three and a half year sentence (much lower than the initial six to eight year sentencing range sought), it later rescinded the application to seek the minimum sentence, arguing: "… the appropriate sentence in *exceptional circumstances* of this case is 18 months" [emphasis added] (*R v CS*, 2018, para. 35). The court held this was not an abuse of process and within prosecutorial discretion. Paradoxically, these types of circumstances pose problems for the courts in that they are neither defined nor exhaustive (yet, restricted by nature of being "exceptional"). Furthermore, there is no direction to or from appellate courts on how to interpret exceptional circumstances within the s. 12 framework, and whether such circumstances may be considered if they are merely embedded within reasonably foreseeable hypotheticals (*R v CS,* 2018*,* para. 86-87).

A second issue that arose was the tendency of courts (e.g., in New South Wales, Australia) to tie sentencing ranges to the weight of imported substances and the

consequences of arbitrary, mathematical "quantitative guidelines" on individualized sentencing (*R v CS*, 2018, para. 82-83). This approach was rejected for failing to distinguish between Schedule I drugs, which do not possess the same "degrees of dangerousness" (*R v CS*, 2018, para. 159).

The court found that the "exceptional circumstance" consideration ought to apply to offenders who "take positive steps to control addiction prior to sentencing," supporting a sentence in the nine to 18-month range (*R v CS*, 2018, para. 167). Given that the *Safe Streets and Communities Act* (2012) allows an exemption only for offenders who "successfully complete" an approved drug treatment program and the fact that the constitutional issue suffered from "self-inflicted mootness," the two-year minimum sentence was grossly disproportionate (*R v CS*, 2018, para. 171). A sentence 25% and 6-months longer than the proportionate one (therefore, requiring the sentence to be served at a federal penitentiary) amounted to cruel and unusual punishment. At the same time, Hill J. rejected a suspended sentence with probation, an intermittent sentence, and a custodial sentence less than 18 months. The offender received an 18-month sentence, reduced to 17 months and nine days after accounting for pre-trial custody.

6.1.3. Production Offences

The current *CDSA* (1996) sets out a variety of offences pertaining to the production of prohibited substances. Section 7 is a fairly complex provision, containing a general prohibition on producing substances set out in Schedules I through IV. All of the production offences involving Schedule I or II drugs carry mandatory minimum periods of incarceration. Furthermore, the maximum punishment was raised from seven years to 14 years as a result of the *Safe Streets and Communities Act* (2012) (*R v Hydrobec*, 2018, para. 52). The production provisions also contain a list of aggravating factors in s. 7(3) that will raise the mandatory minimum. These aggravating factors include using a third party's real property for the commission of the offence, generating a potential security, health or safety hazard for persons in the area who are under 18 years of age, generating a potential safety hazard in a residential area, and employing a trap or other device likely to cause death or bodily harm. While s. 7 applies to Schedule III and Schedule IV drugs, there are no mandatory minimums for these offences. Production offences involving Schedule I and II drugs, other than cannabis production, have not yet

been challenged in court. However, there are mandatory minimum penalties attaching to such production activity.

More than 5 but Less than 201 Plants

Table 6-3. Summary of Cases – Drug Production (Marijuana; 6-200 plants) (6)

		Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R c Chouinard* (2018)	s. 7(2)(b)(i)	Six months	Yes	Yes
	R c Hydrobec (2018)	s. 7(2)(b)(i)	Six months	No	Yes
		s. 7(2)(b)(v)	Two years	Yes	*
	R v Boudreau (2018)	s. 7(2)(b)(i)	Six months	Yes	*
	R v Boulton (2016)	s. 7(2)(b)(i)	Six months	No	Yes
	R v Elliott (2016)	s. 7(2)(b)(i)	Six months	No	Yes
	R v Vu (2015)	s. 7(2)(b)(i)	Six months	Yes	Yes
		s. 7(2)(b)(ii)/ s. 7(3)(c)	Nine months	Yes	Yes

If the number of plants being produced is five or less, no mandatory minimum attaches. Case law has addressed the provisions dealing with growing between 6 and 200 plants, typically small to medium size operations. Challenges to the mandatory punishments for growing lesser numbers of plants tend to focus on the gross disproportionality of the minimum sentence as applied to situations where trafficking is technically a reason for growing the marijuana, but it is not the classic profit-driven, organized crime-related scenario that leads to street trafficking. Rather, the reported cases in this area often involve situations where a person is making a modest profit from the production and sale of marijuana, or they give the product away or sell it for little or no profit to those who intend to use the drug for pain management or some other compassionate rationale. Cases involving larger quantities of drugs, approaching the 200-plant level, often focus on situations where individuals may have licencing authority to grow some marijuana; however, they exceed the scope of the authority granted to them in a minimal or technical way.

The least serious of the production offences carrying a mandatory minimum prison sentence involve growing more than 5 but fewer than 201 plants, where the marijuana is grown for the purpose of trafficking. Several cases found the six-month mandatory minimum attaching to this offence to be a s. 12 violation, and no cases have found it valid. These include: (1) *R c Chouinard* (2018) [hereinafter *Chouinard*], (2) *R c*

Hydrobec (2018) [hereinafter *Hydrobec*], (3) *R v Boudreau* (2018) [hereinafter *Boudreau*], (4) *R v Boulton* (2016) [hereinafter *Boulton*], (5) *R v Elliott* (2016) [hereinafter *Elliott*], and (6) *R v Vu* (2015) [hereinafter *Vu*]. In four of these cases (*Chouinard* (2018), *Hydrobec* (2018), *Boudreau* (2018), and *Vu* (2015)), judges found a violation of the particular offender's rights, while five of the six cases found a violation after conducting an analysis of reasonable hypotheticals (the exception being *Boudreau* (2018)).

In *Boulton* (2016), Quinlan J. dealt with a s. 12 challenge raised by a man who had been convicted of keeping a 105-plant marijuana grow operation in his own garage. He admitted the operation was kept for financial reasons. While the application of a six-month sentence of incarceration was found not to be cruel and unusual on the facts of the case, the court accepted the reasonable hypothetical posited by the defence, which involved a 19-year-old student growing six plants to use and share with various non-specific persons.

In *Elliott* (2016), the British Columbia Court of Appeal upheld a sentencing judge's ruling that s. 7(2)(b)(i) of the *CDSA* (1996) violated s. 12 of the *Charter* (1982) and could not be saved by s. 1. The offender assisted a co-accused in growing 195 marijuana plants in the basement of the co-accused's home in a residential community. The trial judge found the mandatory minimum would not be grossly disproportionate if applied to Mr. Elliott; however, she found the mandatory minimum to be unconstitutional when applied to a hypothetical scenario. As a result, the offender's sentence was suspended and he was placed on probation for two years. In the unsuccessful Crown appeal, the British Columbia Court of Appeal rejected the hypotheticals relied upon by the trial judge, but adjusted them slightly to create scenarios where the application of the law would produce a sentence that violated s. 12 of the *Charter* (1982). One of those hypotheticals was similar to the one applied in *Boulton* (2016), whereby "a university student found growing seven marijuana plants in his basement apartment intending to keep one plant for himself and give six to friends…" would attract the mandatory six-month minimum (*R v Elliott*, 2017, para. 70). Similarly, a 65-year-old woman who used marijuana to relieve migraines and who grew seven plants in her vegetable garden, planning to keep one for herself and give six to similar chronic pain sufferers in her support group, would also attract the mandatory minimum. These scenarios would produce grossly disproportionate punishments in the view of the British Columbia Court of Appeal.

The Court of Appeal in *Elliott* (2017) found three problematic aspects of the legislation under review. First, while the legislation appears to target serious drug crimes, it captures far more than this, applying to normally law-abiding individuals who happen to grow small quantities of marijuana to share with others, including individuals who are growing the product for largely altruistic reasons, such as alleviating the pain of others. This shows a markedly wide range of qualitatively different acts that are caught by the same provision. Second, the legislation captures commercial grow operators who sell to organized crime groups, thereby displaying high moral culpability, but the law also applies to rural, elderly persons who grow the product with the intention of giving it away to chronic pain sufferers, an act that attracts very low moral culpability. Third, the broad nature of the concept of "trafficking," as it applies in Canadian drug law, leads to the broad application of this provision. The concept does not just involve commercial, profit-driven sales transactions, but includes circumstances where people give the product to another person, free of charge. Given these concerns, and the court's finding that prior to the enactment of the mandatory minimum a non-custodial disposition would be appropriate in situations captured by the hypotheticals, the court had no trouble upholding the trial judge's finding that the mandatory six-months period of incarceration would be grossly disproportionate in such cases.

In addition to *Boulton* (2016) and *Elliott* (2016), *Vu* (2015) also found s. 7(2)(b)(i) invalid. This case actually involved the offender cultivating a much larger grow operation than envisioned in s. 7(2)(b)(i): 1020 plants. The grow operation also used a hydro bypass on property in a residential area. Based on the Crown's argument that the bypass constituted a public safety hazard in a residential area, this aggravating factor, combined with the number of plants, led to the Crown seeking the mandatory three-year minimum prison sentence, two years for the number of plants and an additional year for the aggravating factor arising from the public safety risk. While the mandatory minimum was not grossly disproportionate on the facts of the case, the court entertained various hypothetical scenarios involving different numbers of plants and various offence-related circumstances. A hypothetical that resonated with the court involved a law-abiding person with a license to grow 500 marijuana plants, who made a mistake and possessed 506 plants. If all the plants were to be sold, a conviction for possessing the extra six plants for the purpose of trafficking would result in a six-month mandatory minimum under s. 7(2)(b)(i). The court held that this would be a grossly disproportionate sentence,

as would one where the s. 7(3)(c) aggravating factor of a public safety hazard was present, even though the offender had no actual knowledge or recklessness about the hazard produced by the bypass. The court found the resulting one-year mandatory minimum under s. 7(2)(b)(ii) would constitute cruel and unusual punishment. It is odd that the court rendered the provisions dealing with between 6 and 200 plants invalid, yet the fact scenario before the court involved the more serious offence of producing more than 500 plants. This appears to have arisen as a result of the particular hypothetical envisioned by the court. If the grower had a permit to grow 500 plants they could not be charged with an offence related to their growth; it is the extra 6 plants envisioned in the hypothetical that attract a penal response, thereby triggering concern with the penalty provision in s. 7(2)(b)(ii).

This trend of striking down production provisions in the *CDSA* (1996) continued in recent case law. In *Boudreau* (2018), the constitutionality of s. 7(2)(b)(i) was again challenged. The offender pled guilty to growing a total of 50 plants hidden in three rooms of his home. The judge described the operation as "more sophisticated" than an amateur setup, although there was no commercial aspect and no aggravating *CDSA* (1996) factors present (*R v Boudreau*, 2018, para. 46, 50). In fact, the circumstances of this case mirrored some of those envisioned by the court in previously proposed (and successful) hypotheticals: personal use and re-distribution to friends. Mr. Boudreau had approval to use marijuana to manage arthritis symptoms; however, the purpose of re-distribution "import[ed] the element of trafficking" (*R v Boudreau*, 2018, para. 97). The court determined the range of sentence (absent the mandatory minimum) to be a three thousand to five thousand dollar fine and a 12-month probationary sentence, the latter of which was deemed a form of deterrence by the Nova Scotia Court of Appeal. Many aggravating elements were absent in this case; the circumstances were not (strictly speaking) "harmful" and the "offender" was not a "danger to the public" (*R v Boudreau*, 2018, para. 150):

> He [Mr. Boudreau] was not, however, selling the illicit substance to vulnerable persons or customers for pure greed or profit; he was only accommodating friends. There is no suggestion that Mr. Boudreau was aware that his product was used for resale on the black market. While I am aware that courts have recognized that commercial grow operations can have a negative impact on neighbourhoods, attract organized criminal activity, and violent crimes, there is no such concerns raised in the case at bar. (*R v Boudreau*, 2018, para. 128-129)

Equipped with the decisions in these preceding cases, all which struck down the six-month minimum sentence, it is perhaps unsurprising that the courts continued to declare s. 7(2)(b)(i) constitutionally invalid in *Chouinard* (2018) (who was convicted in the same operation as the offenders in *Hydrobec* (2018)) and *Hydrobec* (2018). These two cases involved individuals of various roles at a horticultural equipment business ("Hydrobec") that sold cannabis production equipment to producers. Mr. Chouinard was an employee and manager at Hydrobec, who claimed that the minimum sentence was grossly disproportionate to him because of his limited participatory role (i.e., an accomplice rather than a principal), his lack of knowledge regarding the number of plants and the intention of the producers he was selling to, and because he received no direct monetary benefits.

The court held that a mandatory minimum sentence applies regardless of an individual's mode of participation, although it may be considered a mitigating factor. At the same time, it did not agree with the Crown's two-year sentence proposal. Mr. Chouinard's moral blameworthiness was low, as he had not smoked marijuana since 2014, had no criminal record and no intention to profit from his offence, and lead a pro-social lifestyle. Asselin J.C.Q. found that a lengthy custodial sentence was unnecessary, as Mr. Chouinard presented little risk to the public. Furthermore, prior case law showed offenders with increased blameworthiness receiving sentences far below two years. The minimum sentence was declared grossly disproportionate to Mr. Chouinard in particular and on the basis of reasonable hypotheticals. Mr. Chouinard received a 30-day sentence and two years probation.

Mr. Chouinard's co-workers were also convicted of production offences in the CDSA, two under s. 7(2)(b)(i) (Mr. Belley and Mr. Deblois)[37] and one under s. 7(2)(b)(v) (Mr. Dion).[38] They argued that they, too, acted merely as accomplices, as they were unaware of both the number of plants and the intentions of the producers they sold equipment to. The court affirmed that an individual may be convicted under these sections despite not knowing the number of plants grown or that "(s)he acted for the purposes of trafficking" (*R c Hydrobec*, 2018, para. 14). As Mr. Belley was the owner of two businesses, the Crown sought a three-year sentence; for the other two offenders,

[37] 115 plants, bulk cannabis and other items were seized.

[38] The police seized 600 plants from Mr. Dion, in addition to 11-12 pounds of cannabis in bulk.

the Crown sought a two-year sentence. Several mitigating factors were present for all three offenders; in particular, the pre-sentence reports were all generally favourable and there was little to no risk of recidivism. To punish on the basis on deterrence was rejected, given little empirical evidence to support the deterrent effect of minimum sentences. Furthermore, Asselin J.C.Q. noted that no principled basis existed for punishing Mr. Dion more severely. The court determined that the appropriate sentence was 30-days imprisonment and a period of probation for all three accused. As such, a two-year sentence was found to be grossly disproportionate to Mr. Dion in particular. While a six-month sentence was not found to be grossly disproportionate for Mr. Belley and Mr. Deblois in particular, it did not withstand an analysis of reasonable hypotheticals.

201-500 Plants

Table 6-4. Summary of Cases – Drug Production (Marijuana; 201-500 plants) (7)

		Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*Director of Criminal and Penal Prosecutions c Martin* (2016)	s. 7(2)(b)(iii)	One year	Yes	*
	R v Morell (2017)	s. 7(2)(b)(iii)	One year	No	Yes
	R v Ngyuen (2017)	s. 7(2)(b)(iv)/ s. 7(3)(c)	18 months	No	Yes
VALID	*Director of Criminal and Penal Prosecutions c Landry* (2016)	s. 7(2)(b)(iv)	18 months		
	R v Li (2016)	s. 7(2)(b)(iii)	One year		
	R v Picard (2016)	s. 7(2)(b)(iii)	One year		
	R v Serov (2017)	s. 7(2)(b)(iii)	One year		

As the number of prohibited plants increase, the likelihood of a declaration of invalidity diminishes.[39] However, not all cases involving significant numbers of plants led to rulings upholding the legislation. Three cases found the impugned *CDSA* provisions invalid: (1) *Director of Criminal and Penal Prosecutions c Martin* (2016) [hereinafter

[39] This is limited to the identified cases, which were reported and accessible through (i.e., uploaded to) an online legal database. Additional relevant cases likely exist, but were unavailable for analysis.

Martin], (2) *R v Morell* (2017) [hereinafter *Morell*], and (3) *R v Ngyuen* (2017) [hereinafter *Ngyuen*].

In the Québec case *Martin* (2016), the offender pled guilty to producing marijuana after he was found working a grow operation with 260 plants. The grow operation was situated on property that did not belong to the offender, thereby satisfying the aggravating provisions found in s. 7(3)(a); however, the prosecution opted not to prove the aggravating circumstances. The Director of Criminal and Penal Prosecutions sought the imposition of the mandatory minimum one-year prison sentence instead of the 18 months applicable where the aggravating factor is established. The defence concentrated on the mitigating factors in the case. The offender was characterized as a gardener rather than the mastermind behind the production. He stood to make a minimal amount of money from his involvement in the operation. He was 51 years of age, had no prior record and no problem with drug use. He was the father of four children. The grow operation work occurred during a difficult financial time. He had significant medical and orthodontic costs for his son. He was not involved in the inception of the grow operation. He showed remorse, pled guilty, and cooperated with the police. He reimbursed Hydro Québec for electricity used through a bypass for the operation. His arrest resulted in the loss of his job, although he had acquired a new job. He was considered highly unlikely to reoffend. Given the extent of the mitigating factors and the lack of any aggravating factors other than the offence being committed for financial gain, the court concluded the mandatory minimum would be grossly disproportionate on the facts of the case, and refused to apply the mandatory minimum to the accused.

The court went on to consider hypothetical scenarios that could also justify refusing to apply the mandatory minimum sentence. It concluded that a scenario involving a person who was only occasionally involved in the grow operation, such as a neighbour watering plants for someone, should not receive the mandatory minimum. Similarly, an addict who, after their arrest, successfully undergoes addiction therapy, ceasing all drug use and all connections to the drug trade, should not receive the mandatory minimum.

In *Morrell* (2017), the offender was convicted of running a marijuana grow operation of 239 plants in the basement of his home. The Crown identified the sentencing range to be between 90-days (served intermittently) and one-year

imprisonment. Skarica J. agreed that this was the appropriate range for an individual convicted of running a marijuana grow operation with no criminal record; a one-year sentence relative to this range was not considered grossly disproportionate for Mr. Morrell. With respect to reasonable hypotheticals, the court analyzed two cases decided prior to the enactment of the minimum sentence in s. 7 of the *CDSA* (1996). In both those cases, the offenders cared for a significant amount of plants (1507 and 2000). Given their limited participatory role, one received a conditional discharge and the other received a suspended sentence and probation. These provided the circumstances for a reasonable hypothetical where the minimum sentence would violate s. 12 of the *Charter* (1982). Moving on to an analysis of decisions in *Tran* (2017), *Pham* (2016), and *Vu* (2015) (all which found *CDSA* (1996) provisions invalid), the court refused to examine additional case law and declared the minimum sentence invalid.

In *Ngyuen* (2017), the offender challenged an 18-month minimum sentence after being convicted of producing 265 plants (524 including those in a vegetative state) and operating a hydro-electrical bypass (a potential public safety hazard in a residential area). This setup was deemed "moderately sophisticated" (*R v Ngyuen*, 2017, para. 24). While the British Columbia Provincial Court previously declared s. 7(2)(b)(iii) (which attracts a one-year minimum sentence) constitutional,[40] it found that an additional six-months imprisonment (a combined effect of s. 7(3)(c) and s. 7(3)(b)(iv)) would constitute cruel and unusual punishment. Relying on a previously established hypothetical,[41] the court determined that the words "potential public safety hazard" and "residential area" were too broadly defined:

> When I examine s. 7(3)(c) of the *CDSA*, that section increases by 50% the mandatory minimum jail sentence to marijuana producers who grow marijuana in a residential area … given the breadth of the words they chose to describe those aggravating factors and the evolution of the case law in British Columbia, every marijuana production of 201 up to 500 plants that occurs in a residential area will attract a 50% increase in punishment where, regardless of their particular circumstances or degree of participation. No other specific aggravating factors, such as the

[40] The range of sentence is between a suspended sentence and one-year imprisonment, although in the case of Mr. Ngyuen, a custodial sentence would apply.

[41] The hypothetical involved circumstances "where an offender, who was a party to the offence, participated on a time limited basis in the grow operation" (*R v Ngyuen*, 2017, para. 55).

> presence of a hydro bypass, need be present for this section to apply. (*R v Ngyuen*, 2017, para. 91)

Furthermore, the provision did not allow a sentencing judge to consider an offender's personal background, in particular: the mode of participation (in the hypothetical, an individual who is not a principal and whose participation is "time limited"), the fact that the individual receives no share of profits, and the fact that there exists a "spectrum of risks" in residential grow operations (*R v Ngyuen*, 2017, para. 94). Consequently, s. 7(3)(c) and s. 7(2)(b)(iv) did not withstand constitutional scrutiny.

Most offenders convicted of raising 201 to 500 plants were not as fortunate as Mr. Martin, Mr. Morell, and Mr. Ngyuen. Four cases have upheld the constitutionality of these *CDSA* (1996) provisions: (1) *Director of Criminal and Penal Prosecutions c Landry* (2016) [hereinafter *Landry*], (2) *R v Li* (2016) [hereinafter *Li*], (3) *R v Picard* (2016) [hereinafter *Picard*], and (4) *R v Serov* (2017) [hereinafter *Serov*].

In *Li* (2016), Bird J. had no difficulty in upholding the s. 7(2)(b)(iii) one-year mandatory minimum for offenders running a grow operation with over 200 plants, even where the offender was a mere gardener and faced a virtual certainty of deportation as a permanent resident sentenced to over six months in prison. The judge imposed the mandatory one-year minimum despite noting that the offender's wife had joined him in Canada from China and they had a young daughter who was born in Canada. The *Immigration and Refugee Protection Act* (*IRPA*) (2001) renders everyone sentenced to six months or more inadmissible to Canada on the grounds of serious criminality. Bird J. noted: "I cannot permit this factor [immigration deportation] to dominate the process. The prospect of deportation alone cannot transform what would otherwise be a constitutionally acceptable sentence into one that is grossly disproportionate" (*R v Li*, 2016, para. 30). The court was concerned that placing too great an emphasis on deportation would effectively create a separate sentencing regime for individuals facing deportation as a consequence of being sentenced.

Picard (2016) involved the sentencing of a woman who ran marijuana grow operation from her own home, producing approximately 500 plants. The court characterized the setup as a "relatively sophisticated grow op" designed for the "continuous production" of marijuana that was being "carried out for profit" (*R v Picard*, 2016, para. 22). Given this, plus some factors considered in mitigation, the court felt a

custodial sentence in the six- to nine-month range would be appropriate. Consequently, the mandatory one-year minimum period of incarceration was higher than appropriate, but not sufficiently high as to be characterized as grossly disproportionate. The court found the proposed hypothetical did not contain facts that would actually result in a conviction; accordingly, the argument based on the hypothetical also failed, resulting in the court upholding s. 7(2)(b)(iii) as valid.

In *Serov* (2017), Duncan J. initially found the 18-month mandatory minimum prison sentence for producing 201-500 plants with the aggravating circumstance of using another's property was valid, both on the facts of the case and in relation to a reasonable hypothetical; however, she reopened the issue after the decisions in *Lloyd* (2016) and *Dickey* (2016) were handed down. As a consequence, she found the provision was actually invalid, and could not be upheld under s. 1 of the *Charter* (1982). Duncan J. went on to assess the constitutionality of the 201-500 plant mandatory sentence without the aggravating circumstance, under s. 7(2)(b)(iii). This offence imposes the lower mandatory minimum prison term of one-year. Both on the facts of the case, and in the situation of a reasonable hypothetical, she found that the mandatory penalty was valid, and went on to impose a 12-month prison sentence. In *Landry* (2016), the court also looked at the mandatory 18-month prison sentence for producing 201-500 plants with the aggravating factor of using another's property. The facts involved a 49-year old man with trouble making child support payments, who chose to produce marijuana for profit, being caught with a 318 plant grow operation. On these facts, the court concluded the 18-month minimum was a proportionate sentence. The court failed to move on to look at reasonable hypotheticals.

More than 500 Plants

Table 6-5. Summary of Cases – Drug Production (Marijuana; 500+ plants) (7)

		Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v Ling* (2017)	s. 7(2)(b)(v)	Two years	No	Yes
	R v McGee (2016)	s. 7(2)(b)(v)	Two years	Yes	*
	R v Pham (2016)	s. 7(2)(b)(v)	Two years	No	Yes
		s. 7(2)(b)(vi)/ s. 7(3)(c)	Three years	No	Yes
	R v Tran (2017)	s. 7(2)(b)(v)	Two years	No	Yes
VALID	*R v Hanna* (2015)	s. 7(2)(b)(v)	Two years		
	R v Hofer (2016)	s. 7(2)(b)(v)	Two years		
	R v Kennedy (2016)[42]	s. 7(2)(b)(v)	Two years		
		s. 7(2)(b)(vi)/ s. 7(3)(c)	Three years		

As the number of plants increase, one can assume that we are dealing with cases involving fairly large scale grow operations. The mandatory minimum sentences increase to two years for grow operations of such size, and three years if relevant aggravating factors are present. Several cases have successfully challenged the constitutional validity of these two provisions: (1) *R v Ling* (2017) [hereinafter *Ling*], (2) *R v McGee* (2016) [hereinafter *McGee*], (3) *R v Pham* (2016) [hereinafter *Pham*], and (4) *R v Tran* (2016) [hereinafter *Tran*].

In *McGee* (2016), Schultes J. dealt with a case involving a 60-year-old man with no prior record who kept a 600 plant grow operation in the crawl space of a home he rented. Since the property belonged to a third party, this exposed the offender to the highest mandatory minimum available under the *CDSA* (1996): three years imprisonment. After reviewing a considerable amount of case law, the court concluded that an appropriate sentence, absent the mandatory minimum, would have been 10 months in prison. The court then noted the three-year mandatory minimum under s. 7(2)(b)(vi) was 3.6 times higher than an appropriate sentence (*R v McGee*, 2016, para. 95). This was sufficient for Schultes J. to conclude the mandatory minimum was grossly disproportionate on the facts of the case. However, when the court looked at the mandatory two-year penalty, which attaches in the absence of a listed aggravating

[42] Unreported, as cited in *R v McGee* (2016) and *R v Tran* (2017).

factor, in accordance with s. 7(2)(b)(v), the court found that length of sentence to "operate very unfortunately" for this offender, but it would not be grossly disproportionate (*R v McGee*, 2016, para. 110). However, the court went on to entertain hypothetical scenarios in which an offender played only a very minor act of assistance to a person running a large scale grow operation, where their involvement spanned a short period of time. In such scenarios, the mandatory two-year term would be grossly disproportionate. The court later found these s. 12 violations could not be saved by s. 1 and imposed a 10-month prison sentence on the offender.

The decision in *McGee* (2016) echoed an earlier ruling in *Pham* (2016), a judgment of Code J. in the Ontario Superior Court of Justice, which came to the same conclusion regarding the invalidity of s. 7(2)(b)(v) and s. 7(2)(b)(vi). Upon executing a search warrant, police found 1110 plants in a three-bedroom apartment where the offender appeared to have been the gardener or caretaker. The court accepted that the grow operation constituted a public safety hazard in a residential area due to the poor state of the electrical wiring, and the threat constituted by widespread mold in the apartment. This satisfied the requirements of the statutory aggravating factor in s. 7(3)(c), triggering a mandatory minimum prison sentence of three years. This was found to be grossly disproportionate since it would be satisfied even if the offender was not the person responsible for the public safety hazard, applying the reasoning set out in *Vu* (2015). Absent the statutory aggravating factor, production of over 500 plants still attracts a two-year mandatory minimum period of incarceration. Code J. in *Pham* (2016) went on to address hypotheticals involving this lesser penalty, finding it, too, was grossly disproportionate. This time, he relied on hypotheticals involving licencing scenarios, such as a circumstance where a licence to grow had expired, or where the licence does not cover the number of plants, but the offender believes the licence covers the number of plants. In the end, both mandatory minimums were found to be invalid, and Mr. Pham was sentenced to 10 months incarceration plus 18 months on probation.

In Ontario, the ruling in *Pham* (2016) was followed in *Tran* (2017). The offender had assisted the principal in a 992-plant grow operation. Due to his lesser role, Goodman J. found an appropriate sentence range to be 12 to 24 months. While the applicable two-year mandatory minimum for producing more than 500 plants was not grossly disproportionate on the facts of the case, the court found that a reasonable hypothetical involving a licenced grower exceeding the 500 plant maximum would be a

situation in which the mandatory minimum is grossly disproportionate. Accordingly, Mr. Tran was sentenced to one-year imprisonment.

In *Ling* (2017), the offender was convicted under s. 7(2)(b)(v) for his role as a "gardener" to a grow operation of 1025 atypically large marijuana plants (para. 2). Quinlan J. rejected the assertion that Mr. Ling held an "honest but mistaken belief" with respect to the legality of the grow operation; rather, he remained "ignorant to the truth" (*R v Ling*, 2017, para. 35-37). Defence counsel sought a suspended sentence and probation, while the Crown sought a 20-month to two-years less a day sentence. The minimum sentence (even accounting for "collateral immigration consequences" under the *IRPA* (2001)) was not deemed grossly disproportionate for Mr. Ling. However, relying on hypotheticals from *Pham* (2016), *Boulton* (2016), and *Elliott* (2016), the court found that s. 7(2)(b)(v) was broad enough to disproportionately impact individuals in reasonably foreseeable circumstances: regulatory licensing cases, a "generous university student," and a "caring migraine-sufferer" (*R v Ling*, 2017, para. 45). Thus, the two-year minimum sentence was found unconstitutional.

Two cases have upheld the provisions as valid: (1) *R v Hanna* (2015) [hereinafter *Hanna*], and (2) *R v Hofer* (2016) [hereinafter *Hofer*]. In the early pre-Lloyd British Columbia case of *Hanna* (2015), Beames J. dealt with an offender who was found growing 1,260 plants in his residence, a fairly large-scale operation. The two-year mandatory minimum prison sentence was found not to be grossly disproportionate on those facts, given that an appropriate sentence would be in the 9- to 15-month range. The hypothetical advanced by defence counsel failed to convince the judge that a two-year sentence would be grossly disproportionate as well. In another British Columbia case, *Hofer* (2016), the two-year mandatory minimum for producing over 500 plants was also considered valid. The offender was involved in a large-scale operation with 1,628 plants found at the location. The two-year mandatory minimum was found not to be grossly disproportionate to the 12- to 18-month sentence the judge would have imposed absent the mandatory minimum. Several hypotheticals were addressed; however, the court found all of them involved offenders aiding in the large-scale production of marijuana, which shows intent to engage in serious criminal behaviour, thereby generating circumstances in which a two-year prison sentence would not be grossly disproportionate. Failing to advance a sympathetic hypothetical was also fatal in *Kennedy* (2016), where the offender was caught producing 884 plants in a grow

operation using a hydro by-pass that was found to justify a finding of aggravation requiring a three-year mandatory minimum (as cited in *R v McGee*, 2016, para. 136-138, as cited in *R v Tran*, 2017, para. 66).

6.1.4. Summary

A total of 29 cases have challenged the constitutionality of provisions within the *CDSA* (1996). Of these 29 cases, slightly over two-thirds (20 cases or 69%) have struck down the attached minimum sentence. Nine of the 20 cases (45%) found a violation on the particularized inquiry, while 11 cases (55%) did not. 16 of the 20 cases (80%) found a violation after considering reasonable hypotheticals, while four cases (20%) did not move on to this part of the s. 12 analysis.

6.2. Sex Offences

The courts must balance two disparate interests when denouncing offences of a sexual nature, and especially those committed against children: society's interest in protecting vulnerable groups (i.e., preventing children from being victims of sexual abuse/exploitation) and individual offenders' liberty interests (by extension, the limitation of state interference in personal activities). These represent a category of offences where striking such balance has been particularly challenging. The courts have acknowledged that the length of imprisonment for individuals convicted of sexual offences against children can be "very wide" (*R c Jomphe*, 2016, para. 26), ranging from three to 48 months (*R c Perron*, 2015, para. 18). This may be partly explained by the fact that mandatory minimum penalties attach to a variety of behaviours and to diverse circumstances (*R c Jomphe*, 2016, para. 60; *R v Hood*, 2016, para. 78).

Changes to legislation have been made to account for these special considerations. In 2005, Parliament amended the *Code* (1985) to include s. 718.01, which requires judges to "give primary consideration to the sentencing objectives of denunciation and deterrence" where an offence is committed against a child ("a person under the age of eighteen years"). Furthermore, abuse of a position of trust or authority and abuse of a child both constitute aggravating factors under s. 718.2(ii.1) and s. 718.2(iii).

One factor that adds complexity to the nature of sexual offences is the age of consent. Courts have indicated that where the age of consent differs by a few months, it is possible that a mandatory minimum penalty may not survive *Charter* (1982) scrutiny. Furthermore, while s. 150.1 of the *Code* (1985) stipulates that individuals under the age of 16 cannot consent to sexual activity,[43] it also provides various exceptions. For example, s. 150.1(2) and s. 150.1(2.1) generate age ranges and cut-offs for the defence of consent. As long as the relationship does not involve abuse of a position of trust, dependency, or exploitation, an individual who is 12 or 13 can consent to sexual activity if their partner is less than two years older, while an individual who is 14 or 15 can consent to sexual activity if their partner is less than five years older. However, it is unclear whether the courts treat these cut-offs as absolute.

[43] Similarly, parents cannot consent for their children (see *R c Caron Barette*, 2018, para. 19).

6.2.1. Sexual Interference and Invitation to Sexual Touching

Table 6-6. Summary of Cases – Sexual Interference (24)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R c Caron Barrette* (2018)	s. 151(a)	One year	Yes	Yes
	R c Jomphe (2016)	s. 151(a)	One year	Yes	Yes
	R v Ali[44] (2017)	s. 151(a)	One year	*	*
	R v AW (2018)	s. 151(a)	One year	Yes	*
	R v BJT (2016)	s. 151(a)	One year	Yes	*
	R v Drumonde (2018)	s. 151(b)	90 days	No	Yes
	R v Ford (2017)	s. 151(a)	One year	No	Yes
	R v Hood (2018)[45]	s. 151(a)	One year	No	Yes
		s. 153(1.1)	One year	No	Yes
		s. 172.1	One year	No	Yes
	R v Horswill (2018)	s. 151(a)	One year	No[46]	Yes
	R v Hussein (2017)	s. 151(a)	One year	*	*
	R v JED (2018)	s. 151(a)	One year	No	Yes
	R v JG (2017)	s. 152	90 days	Yes	Yes
	R v ML (2016)	s. 151(a)	One year	No	Yes
	R v Sarmales (SJD) (2017)	s. 151(a)	One year	*	*
	R v Scofield (2019)	s. 151(a)	One year	Yes	Yes
	R v SJP (2016)	s. 151(a)	One year	Yes	Yes
	St-Cyr c R (2018)	s. 151(a)	One year	No	*
VALID	*R c Desmarais* (2017)	s. 151(a)	One year		
		s. 152(a)	One year		
	R v AKB (2018)	s. 151(a)	One year		
		s. 163.1(4)(a)	One year		
		s. 718.3(7)	–		
	R v CF (2016)	s. 151(a)	90 days		
	R v EMQ (2015)	s. 151(a)	One year		
	R v Gumban	s. 152(b)	90 days		
	R v JE (2018)	s. 151(b)	90 days		
	R v SA (2016)	s. 151(a)	45 days		

[44] While the circumstances of the offence and offender, and sentencing decision are unreported, *Ali* (2017) affirmed the decisions in *ML* (2016), *Sarmales* (2017), and *Hussein* (2017). Sheard J. found that the minimum punishment prescribed in s. 151(a) was of no force or effect and as such, Mr. Ali's sentence would be decided in absence of the mandatory minimum.

[45] The initial decision in *Hood* (2016) found these provisions to violate Ms. Hood's s. 12 *Charter* (1982) rights, in particular.

[46] The sentencing judge upheld s. 151(a) as valid; the details of the constitutional challenge were not reported. However, the British Columbia Court of Appeal noted that the judge erred in declaring the mandatory minimum constitutional given the contrary decision in the companion case *Scofield* (2019). Mr. Horswill received a 14-month sentence and this did not form the basis of the appeal (rather, Mr. Horswill appealed the sentencing judge's decision that a CSO was unavailable to him). Therefore, for purposes of this research, *Horswill* (2018) is assumed "invalid" as a result of reasonable hypotheticals.

By indictment, the maximum punishment for sexual interference and invitation to sexual touching (s. 151 and s. 152) is 14 years imprisonment and the minimum punishment is one-year imprisonment. By summary conviction, the maximum punishment is a term of imprisonment not more than two years less a day and the minimum punishment is 90 days imprisonment. The maximum penalties for these offences increased (from ten years and from a term of imprisonment not exceeding eighteen months, respectively) under Bill C-26 (the *Tougher Penalties for Child Predators Act* (2015)); the minimum penalties remain unchanged since increasing from 45 days and from 14 days under Bill C-10 (the *Safe Streets and Communities Act*) in 2012. Notably, a charge of sexual interference or invitation to sexual touching applies only where victims are under the age of 16.[47]

The courts have consistently struck down mandatory minimum sentences for sexual interference and invitation to sexual touching. The 17 decisions invalidating these minimums are: (1) *R c Caron Barrette* (2018) [hereinafter *Caron Barette*], (2) *R c Jomphe* (2016) [hereinafter *Jomphe*], (3) *R v Ali* (2017) [hereinafter *Ali*], (4) *R v AW* (2018) [hereinafter *AW*], (5) *R v BJT* (2016) [hereinafter *BJT*],[48] (6) *R v Drumonde* (2018) [hereinafter *Drumonde*], (7) *R v Ford* (2017) [hereinafter *Ford*], (8) *R v Hood* (2018) [hereinafter *Hood*], (9) *R v Horswill* (2018) [hereinafter *Horswill*], (10) *R v Hussein* (2017) [hereinafter *Hussein*], (11) *R v JED* (2018) [hereinafter *JED*], (12) *R v JG* (2017) [hereinafter *JG*], (13) *R v ML* (2016) [hereinafter *ML*], (14) *R v Sarmales* (*SJD)* (2017) [hereinafter *Sarmales*], (15) *R v Scofield* (2019) [hereinafter *Scofield*], (16) *R v SJP* (2016) [hereinafter *SJP*], and (17) *St-Cyr c R* (2018) [hereinafter *St-Cyr*].

[47] A charge of sexual interference applies to an individual who (for a sexual purpose) "touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years," whereas invitation to sexual touching applies to an individual who "invites, counsels or incites a person under the age of 16 years" to engage in the above act(s) (*Criminal Code*, 1985, s. 151, 152).

[48] This case is not publically available, but has been referred to in several other decisions. In BJT (2016) (also referred to as *Taylor*), the offender (who suffered from "cognitive deficits") received a nine-month sentence for shaving his 15-year old daughter's pubic hair at her request (as cited in *R v JG*, 2017, para. 52). The 12-month minimum was deemed constitutionally invalid based on reasonable hypotheticals (as cited in *R v JED*, 201, para. 103). A similar incident had occurred when the daughter was 13-years old, although the court felt that a suspended sentence was merited in that instance (as cited in *R v Hussein*, 2017, para. 25).

In *AW* (2018), the offender was convicted of touching his granddaughter while she slept (a significant breach of trust according to the court). Defence counsel sought a four to six-month CSO, while Crown counsel sought a nine to 12-month sentence of imprisonment. The court accepted that while Mr. AW possessed a low risk to reoffend sexually, his prospects for rehabilitation were "guarded" (*R v AW*, 2018, para. 27-28). Linehan Prov. Ct. J. found the appropriate sentencing range to be between four and six months, and imposed the highest end of that range to "give effect to the increased seriousness attributed to such offences by Parliament" (*R v AW*, 2018, para. 36). He reasoned that a 12-month sentencing floor elevated the appropriate sentence for this offender to a range between 14 and 16 months. A sentence two to three times the proportionate length led the court to declare the one-year minimum sentence unconstitutional. Although a CSO was unlikely to endanger the community, a period of imprisonment was necessary to meet the objectives of denunciation and deterrence.

In *ML* (2016), the 56-year old offender was convicted of touching (for a sexual purpose) his daughter's 15-year old half-sister. Although the incident occurred only once, Mr. L was in a position of trust over the victim, whom he considered his "daughter" (*R v ML*, 2016, para. 28). The Crown proposed a sentencing range of 12 to 15 months, consistent with the (present) one-year minimum sentence under s. 151(a). Defence counsel argued for a sentence less than 90 days, a length lower than the 90-day minimum sentence that preceded the increase in August 2012 (*R v ML,* 2016, para. 2). Both parties agreed that if the appropriate sentence were in the range of nine to 15 months, then the sentence would not meet the threshold of gross disproportionality. Affirming the necessity of a custodial sentence, Linhares de Sousa J. held the accurate range to be six to 15 months imprisonment. The mandatory minimum was two times the length of the sentence at the lowest end of this range. Unfortunately for Mr. L, the circumstances of the particular offence and offender merited a nine-month sentence; the court subsequently found a three-month difference did not constitute cruel and unusual punishment. However, it did find that s. 151(a) violated s. 12 of the *Charter* (1982) in reasonably foreseeable situations. Defence counsel used only reported cases as examples of reasonable "hypotheticals," making objections based on "unreasonableness" moot. These earlier decisions supported sentences between 60 and 90 days; therefore, reliance on reported cases worked in favour of invalidating the

minimum sentence. Bound by precedent, the Ontario Superior Court of Justice affirmed *ML* (2016) in the subsequent case *Sarmales* (2017).

In *SJP* (2016), the 41-year old offender was convicted of sexual interference against his toddler daughter; the single incident occurred while he was passed out drunk, and sleep-deprived. The Crown elected to proceed by indictment, resulting in a one-year minimum sentence as opposed to the 90-day minimum when the Crown proceeds summarily. Defence counsel sought a 45- to 90-day sentence, while the Crown argued that a four to eight month sentence (absent the mandatory minimum) was both appropriate and constitutionally sound. After a review of the relevant case law, Ross Prov. Ct. J. examined a circumstance unique to the case before him: "… the victim, barely 2 years old, has not suffered any actual harm, physical, emotional or psychological. She would have no sense of being violated or hurt" (*R v SJP*, 2016, para. 109). Settling on the higher end of a range between three and five months, the court then engaged in a ratio approach. Such an approach has not previously been used in other cases examining the constitutionality of a mandatory minimum sentence, although it is comparable to an analysis of "unreasonable delay" under s. 11(b) of the *Charter* (1982) (*R v SJP*, 2016, para. 115). Identifying cases that have survived s. 12 constitutional scrutiny with ratios of 4:3 and 3:2, Ross Prov. Ct. J. argued that a ratio of slightly more than 2:1 (i.e., a minimum more than double that of the fit sentence) was grossly disproportionate and violated s. 12. It is unclear whether a 2:1 ratio would still result in grossly disproportionate punishment if the difference in length between the appropriate sentence and minimum sentence were not very significant. [49]

In *St-Cyr* (2018), the offender appealed the 12-month minimum sentence imposed by the Court of Québec (Criminal and Penal Division). Mr. St-Cyr was 19-years old and his victim 14-years old, a difference of four and a half years. The circumstances of the offence took place at a party, where the offender accompanied the victim to the back woods to urinate. The offender and the victim disagreed about the kind of sexual encounter took place. In order to proceed with sentencing, the Québec Court of Appeal ultimately found:

[49] The shortest minimum sentence currently prescribed in the Code (1985) is 14 days (under s. 430(4.11), "mischief relating to war memorials" for a second offence). It is debatable whether a 14-day minimum sentence would be grossly disproportionate to a hypothetical 7-day sentence (absent the mandatory minimum) even though the ratio is also 2:1.

> While the scenario proposed by the prosecution portrayed a very serious assault, one put forward by the appellant and accepted by the judge rather suggests sexual touching that could not be consensual given the age of the victim. It goes without saying that both are highly objectionable and are criminal offenses, but, other things being equal, the appropriate sentence is not necessarily the same for each of them. (*St-Cyr c R*, 2018, para. 41)

Citing *Perron* (2016), sentences for offences under s. 151 and s. 152 range widely, from three to 48 months. He argued that sentences exceeding 12 months are reserved for "circumstances much more serious than present here" (*St-Cyr c R*, 2018, para. 51). The court identified the following factors that shift a sentence toward the lower end of that range: lack of coercion, lack of a position of authority or relationship of trust between the offender and victim, and lack of a criminal record. It also identified factors that shift a sentence toward the higher end: conduct that spans a lengthy period of time, a position of authority or relationship of trust between the offender and victim, and contact with the victim in violation of a prohibition order. Considering the Québec Court of Appeal decision in *Caron Barette* (2018) (which struck down the minimum sentence in s. 151(a)) and lack of aggravating factors, the court imposed a 90-day intermittent sentence with 18-months probation. This sentence was, in effect, nine months (equivalent to three quarters) shorter than the mandatory minimum and consistent with the lowest end of the established sentencing range.

An additional factor the courts have addressed in constitutional analyses of s. 151 and s. 152 is whether voluntary participation by a person under the age of 16 (despite inability to *legally* consent) should be considered at sentencing. For example, the offender's conduct in *Jomphe* (2016) was described as "… acts committed in the context of a loving relationship" (para. 14). Similarly, the offender in *Caron-Barette* (2018) had a consensual relationship with the victim, support from the victim's parents, and (at one point) lived with the victim's family. The court noted an absence of aggravating factors often present in sexual interference cases, such as physical and/or psychological abuse, and abuse of a position of trust and/or authority (*R c Caron Barrette*, 2018, para. 16). However, it affirmed that the victim's consent was not a mitigating factor at sentencing (*R c Caron Barette*, 2018, para. 56).

In *Hussein* (2017), the 27-year old offender was convicted of sexual interference with a 14-year old victim (a 13-year age gap). The court found Mr. Hussein failed to "take

reasonable steps to ascertain her [the victim's] true age" and to cease relations with the victim after her mother explicitly informed him of her daughter's age (*R v Hussein*, 2017, para. 13). The Crown sought a two- to three-year sentence, while the defence sought a seven- to ten-month sentence. Although Code J. affirmed recent case law striking down the minimum sentence in s. 151, he also reflected: "None of the above authorities capture an important aspect of the case at bar, namely, the fact that the accused and the complainant saw themselves as being in some kind of a relationship" (*R v Hussein*, 2017, para. 36). Because the aggravating and mitigating factors were relatively balanced and the circumstances of the offence were "neither the worst nor the best," he imposed a 15-month sentence with two years probation (*R v Hussein*, 2017, para. 34). Ultimately, Mr. Hussein's total sentence was three months longer than the one-year mandatory minimum prescribed in s. 151(a).

In *JG* (2017), the court examined the constitutionality of s. 152 (invitation to sexual touching). There was a five-year and 35 day age gap between Mr. G, who was 19-years old and in his final year of high school, and the victim, who was 14-years old and in her first year of high school. The "romantic boyfriend/girlfriend" relationship was described as "open and obvious," "consensual and respectful and devoid of any exploitative behaviour," and lacking "coercive conduct … undue influence, persuasion or manipulation" (*R v JG*, 2017, para. 7). Although the victim's parents alerted the police, the presentence report indicated the victim felt no adverse emotional or psychological effects and that she "does not feel victimized at all in this matter!" (*R v JG*, 2017, para. 18). The crux of the issue was the excess 35-days in the age gap, as this prevented the "close in age exception" as a *full* defence for Mr. G (*R v JG*, 2017, para. 22).[50] Thomas J. explained: "Does otherwise, absolutely, legally acceptable behaviour become criminal simply on an account of one of the participants having a birthday a month too soon, or the other, a month too late? I determined with some reluctance, that it did" (*R v JG*, 2017, para. 22). He then diverted the constitutional analysis away from discussion of guilt and innocence, and toward discussion of punishment and penalty (the proper scope of s. 12).

[50] Initially a s. 7 challenge, Mr. G argued that s. 150.1 deprived him of the defence of consent, thereby infringing his liberty interests under s. 7 of the *Charter* (1982). This part of the application was dismissed.

The Crown sought the minimum 90-day sentence of imprisonment, while defence counsel recommended a conditional discharge. The court reviewed several factors (age difference, nature of relationship, extent of illegal activity, demonstration of contrition, relationship at trial, and sentence), comparing Mr. G to similarly situated offenders.[51] Thomas J. found the appropriate disposition to be a suspended or non-custodial sentence and 12 months probation. As the mandatory minimum required Mr. G to serve a custodial sentence when it was unwarranted, s. 152 was constitutionally invalid. Despite success of the particularized inquiry, defence counsel also proposed two reasonable hypotheticals. The court did not engage in a full analysis of these scenarios, although Thomas J. remarked:

> It has been said that all *Charter* cases can in effect be viewed as reasonable hypothetical cases. That is particularly true of the case at bar. The very sympathetic or attenuated factual circumstances, combined with its teetering on the temporal borderline of a complete near in age defence, make this case one where the imposition of a 90 day jail sentence for a young, first-time offender on the margins of criminality and of moral blameworthiness, is in and of itself a reasonable hypothetical. (*R v JG*, 2017, para. 72)

Mr. G received a suspended sentence and 12 months probation; the attached ancillary orders were sufficient to satisfy the objectives of denunciation and deterrence.

The developmental and intellectual capacity of individuals charged with sexual offences often varies and it has been argued that defects in such capacities may diminish personal responsibility (i.e., circumstances where an accused's intellectual age, for example, does not match his or her biological age) (see *R. v. Ford*, 2017, para. 10). Thus, the court held in *Ford* (2017) that "s. 151(a) will "catch" within its application circumstances -- *whether of the [circumstances of the] offence or of the offender or both* -- where the imposition of a mandatory minimum sentence of one-year imprisonment would be grossly disproportionate" [emphasis added] (para. 10). In other words, an offender's mitigating personal circumstances alone may be sufficient to declare a minimum sentence "cruel and unusual" for that offender or for a hypothetical offender, even where his or her conduct falls within the scope of the applicable provision.

Scofield (2018) involved a "mentally challenged" (likely undiagnosed fetal alcohol spectrum disorder (FASD)) offender who had sexual relationships with two fifteen-year

[51] See *R v AB*, (2015) OJ 6088.

old girls (para. 7). While both girls were "willing participants," s. 150.1(1) prohibits individuals under the age of 16 from consenting to sex.[52] Crown counsel argued that the circumstances of Mr. Scofield's offences warranted a sentence of imprisonment while defence counsel sought a CSO.[53] The decision detailed the extent of Mr. Scofield's cognitive impairments, identifying them as a "causal factor" in the commission of his offences (*R v Scofield*, 2018, para. 48). Importantly, the presence of these deficits suggested that Mr. Scofield was unlikely to benefit from a custodial sentence involving sex offender treatment. The court stated: "… it is argued that he is an offender who is far from the norm. Because of his low level of cognitive functioning, this case calls for a highly-individualized sentence that cannot be accomplished with the term of imprisonment mandated by s. 151(a)" (*R v Scofield*, 2018, para. 70). Rather, custodial sentences between nine and 18 months are typically reserved for offenders who abuse a position of trust or authority or who use violence, intimidation, or threats, and for cases where there is a large age gap between the victim and offender. Despite knowing that the victims were 15 years of age, Mr. Scofield likely did not understand the implications of this age difference:

> … I note that Mr. Scofield's diminished mental capacity could arguably have fit the "close in age exception" under s. 150.1(2.1) and has been a defence to the s. 151 charges because, as I understand it, the consent provisions in the *Code* allow for the kind of sexual experimentation that is normal among teenage persons who are exploring their sexuality, but condemn exploitive situations where significantly older persons take advantage of someone who is sexually immature and who is vulnerable to harm from sexual relations. (*R v Scofield*, 2018, para. 98)

Finding the appropriate sentence to be a six-month CSO, Weatherill J. argued that a custodial sentence that emphasized specific deterrence was unnecessary given Mr. Scofield's rehabilitative potential. The minimum sentence was found grossly disproportionate because it caught both sexual predators and individuals of lower moral blameworthiness, and because it could not adequately address needs of offenders with mental illness:

> This rationale presupposes that offenders who contravene s.151(a) of the *Code* either have a predilection for engaging in sexual relations with

[52] In all cases except where the court finds an offender made a mistake of age.

[53] Four counts were stayed in exchange for a guilty plea. While Crown counsel initially sought a 24- to 36-month sentence, it agreed not to seek more than the one-year minimum sentence.

> underage minors or are just cruel and inhumane. This rationale also presupposes that such acts result in exploitation and abuse of children. What other rationale would someone have to engage in sexual acts with children? And I accept that, for the most part, there is a perfectly rational connection between the harm done to children by such sexual acts and the need to send a strong message to society that these acts are intolerable by imposing a minimum sentence of 12 months' imprisonment … To argue that he should have known his acts were inherently harmful, and thus a one-year jail sentence is warranted is to replace the long-standing constitutional principle of ***subjective fault*** with a generalized, objective, "reasonably foreseeable" fault requirement. It would be asking me to close my eyes to the effect that Mr. Scofield's cognitive deficits had on the commission of these offences. That is wrong in law and wrong on the facts of this case. (*R v Scofield*, 2018, para. 124-126)

The court refused to read-in the 90-day minimum (when proceeding summarily), reminding that alternatives remain available to Parliament, including a "tailored approach to the application of the mandatory minimum" or by allowing broader judicial discretion (*R v Scofield*, 2018, para. 34). On appeal, the court held that while it would substitute the length of sentence (i.e., increasing it to one-year), the trial judge did not err in choosing a CSO as a disposition. Given the "rare" circumstances of the offender, a CSO could accomplish the objectives of denunciation and deterrence (*R v Scofield*, 2019, para. 70).

Where an offender demonstrates rehabilitative potential, other principles of sentencing (proportionality, parity, and restraint) may also warrant a non-custodial sentence (see *R v Hood* (2016)). In *Hood* (2016), the court imposed a 15-month CSO, arguing that this type of sentence is intended to be punitive and thus, can achieve the primary sentencing objectives of denunciation and deterrence. The offender was charged with various sex-related offences committed against former students, although it was determined that these offences occurred while Ms. Hood was experiencing symptoms of mania. She was eventually diagnosed with bipolar disorder, whereby "her mania rendered her profoundly disinhibited and prone to risk taking, elevated by a sense of invincibility, and impaired by defective insight and inhibition" and her offences the result of "spontaneous opportunity rather than malicious acts of calculation, grooming and planning" (*R v Hood*, 2016, para. 40).

The court did not examine any reasonable hypotheticals at the initial sentencing hearing. However, the Nova Scotia Court of Appeal found that while a nine-month

custodial sentence was actually not grossly disproportionate for Ms. Hood,[54] it could be for hypothetical offenders. As such, it did not interfere with the sentencing judge's decision. Furthermore, it remarked:

> With the minimum sentence rendered inoperable, as confirmed above, this disposition was available to the judge. Note, as well, s. 742.1(f) where Parliament took the time to list the offences for which this provision was not intended. Of the many sex-related offences in the *Criminal Code*, only sexual assault is listed. Ms. Hood was charged with, but not convicted of sexual assault. Had Parliament wished to exclude the three offences at play in this appeal, it surely would have listed them there. (*R v Hood*, 2018, para. 163)

Courts have also recognized that principles of deterrence and denunciation are less effective in cases where an offence is committed as a result of mental illness, a factor that tends to decrease an individual's moral blameworthiness (*R v JED*, 2017, para. 49). In *JED* (2017), the court grappled with minimum sentencing for offenders with significant mental health challenges. The offender committed the offences during a two-year period where his autism spectrum disorder (ASD) was undiagnosed. The two victims were the offender's nieces. The defence sought a suspended sentence and three years probation, while the Crown sought a three and a half to four year sentence. Given the statutory duty to impose consecutive sentences for sexual offences committed against multiple victims,[55] Mr. D faced a two-year minimum sentence.

To further complicate the analysis, the court agreed that the offences constituted a "major sexual assault" (*R v JED*, 2017, para. 21). In Manitoba, where courts use a starting point approach,[56] the starting point for major sexual assault is four to five years (*R v JED*, 2017, para. 21). Justifying a "downward departure" from the starting point,

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[54] The court felt that an additional three months did not constitute grossly disproportionate punishment relative to a nine-month sentence of imprisonment (which was the appropriate sentence absent the mandatory minimum, as identified by the sentencing judge).

[55] The *Criminal Code* (1985) was amended in 2015 to reflect this (s. 718.3(7)(b)).

[56] In *Arcand* (2010), the Alberta Court of Appeal summarized three steps to this approach. First, the court of appeal "clearly describes the category created" (*R v Arcand*, 2010, para. 104). Next, it sets the category's starting point based on factors such as "collective court experience, comparisons to other cases, and a consensus view of the social values and policy considerations relating to the category of crime in question" (*R v Arcand*, 2010, para. 105). Finally, it tailors the sentence to the particular circumstances of the offence and offender in light of the starting point, and objectives and principles of sentencing. Importantly, starting points differ from minimum sentences in that "*deviations from the starting point in service of proportionality are an inseparable aspect of the starting point approach*" (*R v Arcand*, 2010, para. 106).

Rolston Prov. Ct. J. held: “The events that lead JED to court are unlike many of those who face similar charges” (para. 20). These circumstances included: the fact that Mr. D was in a position of trust “unwillingly” and made attempts to avoid being in such a position, Mr. D’s medical and developmental challenges (cerebral palsy, attention deficit hyperactivity disorder (ADHD), neurological deficits, and suicidal ideation), and test results supporting evidence of “major trauma” (likely some form of abuse) (*R v JED*, 2017, para. 40). The court acknowledged that Mr. D’s ASD “contributed in a substantial way to the offence” (*R v JED*, 2017, para. 46) and that his offending “related to a lack of understanding his situation clearly … as opposed to criminal thinking” (*R v JED*, 2017, para. 41). Furthermore, sex offenders with ASD are unlikely to benefit from sex offender counseling in custodial settings (due to struggles with group involvement), limiting rehabilitative efforts.

Rolston Prov. Ct. J. opined that a CSO could have been a “compromise” to the minimum sentence, while also balancing the objectives of deterrence and denunciation, and rehabilitation (*R v JED*, 2017, para. 68). With these considerations in mind, he held the appropriate range of sentence to be probation to nine months incarceration, arguing:

> It is clear that specific deterrence is no more achieved through more jail than it has been through and treatment specialized to his needs. Further, it seems that protection of the public is also more likely achieved with this offender by virtue of proper treatment. (*R v JED*, 2017, para. 67)

He determined that s. 151 breached Mr. D’s s. 12 rights and that it was, therefore, unnecessary to examine reasonable hypotheticals. Interestingly, the court also found that Mr. D’s s. 9 rights were infringed by the minimum sentence, an unprecedented declaration. A custodial sentence in this case was arbitrary because a “lack of appropriate resources to provide meaningful treatment” hinders Mr. D’s potential for rehabilitation with no enhancement to public safety (*R v JED*, 2017, para. 84). Mr. D received a three-month sentence to be served intermittently, with three years probation.

In *Drumonde* (2018), the court found the 90-day minimum sentence in s. 151(b) did not violate the particular offender’s s. 12 rights; however, the minimum sentence did violate the s. 12 rights of offenders in hypothetical scenarios. The Crown sought the minimum sentence for Ms. Drumonde and agreed to allow the sentence to be served intermittently. Defence counsel sought a conditional discharge with three years probation. Ms. Drumonde was convicted with her ex-partner, whom she met online when

she was 13 and he was 22; they began a relationship when she turned 16. Pringle J. rejected the theory that the two offenders pursued the victim, who was tutored by Ms. Drumonde's partner, for purposes of sexual gratification or luring; however, she did find that Ms. Drumonde was "intense and obsessive," and her messages "romantic, intimate, passionate, and longing" (*R v Drumonde*, 2018, para. 6). Although there was a seven-year age gap between Ms. Drumonde and the victim, the court deemed the discrepancy "not all that great" (*R v Drumonde*, 2018, para. 32). A mitigating circumstance was that Ms. Drumonde genuinely reached out to provide support to the victim; however, she was also found to be in some position of trust. Unfortunately, this case received abundant media coverage labeling the offence as a "gang sexual assault" (*R v Drumonde*, 2018, para. 37). Particular aggravating factors necessitated a custodial sentence, including: the frequency (despite being "minimally invasive") of the contact, the vulnerability of the victim, and the notice from the victim's parents and Children's Aid Society (CAS) to end the relationship (*R v Drumonde*, 2018, para. 42-43).

Ms. Drumonde ultimately received a 45-day CSO and three years probation, which was not "grossly disproportionate" to the minimum sentence. Moving forward with an analysis of reasonable hypotheticals, the court held:

> … there are "infinitely variable ways" in which the offence of sexual interference can be committed … While the Crown doubts that such a scenario is reasonable, I have dealt with the single unwanted kiss in a number of cases, albeit involving adults. (*R v Drumonde*, 2018, para. 58)

The court concluded that the minimum sentence in s. 151(b) was, consequently, unconstitutional. Furthermore, citing *Ford* (2017), *Hood* (2016), and *Scofield* (2018), Pringle J. also distinguished two particular factors that may contribute to a "grossly disproportionate" sentence in cases of sexual interference: Aboriginal status, and mental health issues:

> … it is not far-fetched to hypothesize an offender who is aboriginal, has emotional disorders or mental health issues who commits such an offence. Indeed, sentencing courts deal with such offenders on a daily basis. (*R v Drumonde*, 2018, para. 74)

Concomitantly, these factors do not always lead the court to declare the minimum sentence invalid. Some of the cases validating the mandatory minimum in s. 151

involved similar factors, but nonetheless did not result in grossly disproportionate punishment.

In total, seven cases have upheld the mandatory minimum in s. 151: (1) *R c Desmarais* (2017) [hereinafter *Desmarais*], (2) *R v AKB* (*Barran)* (2018) [hereinafter *AKB*], (3) *R v CF* (2016) [hereinafter *CF*], (4) *R v EMQ* (2015) [hereinafter *EMQ*], (5) *R v Gumban* (2017) [hereinafter *Gumban*], (6) R *v JE* (2018) [hereinafter *JE*], and (7) *R v SA* (2016) [hereinafter *SA*].

In *AKB* (2018), the offender was convicted of sexual interference and making child pornography. Although both offences carry a minimum 12-month sentence of imprisonment, the requirement that the sentences be served consecutively (s. 718.3(7)) was the basis of the constitutional challenge. The Crown sought a global sentence of 30 months (18 months for the sexual interference offence served consecutive to a 12-month sentence for the child pornography offence) while defence counsel sought a global sentence between 12 and 18 months, to be served concurrently. This suggests that the appropriate sentence could have been anywhere from six months longer than the mandated minimum, to between six and 12 months shorter (or some other length at the discretion of the judge).

The range of sentence proposed by the Crown and the range of sentence proposed by defence counsel were not completely disparate, as the upper and lower bounds (18 months and 12 months, respectively) overlapped. The imposition of consecutive or concurrent sentences clearly affects sentence length, but it also has implications for totality restraints. As proportionality is "expressed through" the totality principle, a cumulative sentence should not "exceed the overall culpability of the offender" (*R v M(CA)*, 1996, para. 42). Determining that the sentences in this case should be served consecutively, S.W. Konyer J. argued: first, absent the statutory requirement in s. 718.3(7), there exists precedence for the imposition of consecutive sentences in circumstances like Mr. B, and second, the provision is sufficiently tailored to "child sexual offenders [who] also commit child pornography offences in relation to their victims" (*R v AKB*, 2018, para. 32). The court then imposed a 30-month sentence, consistent with the Crown's request.

Courts have generally held that the scope of s. 151 does not present problems found in provisions like the one struck down in *Nur* (2015). Rather, Felix J. described the constitutional challenge in *CF* (2016) as a "different animal" (para. 23). He explained:

> There is no innocent firearms licensee. There is no marijuana producer suffering because of poor math skills … the offender captured by s. 151(a) of the *Criminal Code* is an adult possessed of the specific intent to engage with a child in a sexual manner. In my respectful view Parliament's penological goal is focused, narrow, and specific … (*R v CF*, 2016, para. 25)

The offender in this case engaged in inappropriate sexual conduct with the younger sister of his (then) girlfriend. He was a young, first-time offender who suffered from developmental deficits and mental health problems, a victim of child sexual assault, and had been physically assaulted while in custody. After credit for pre-trial remand, the remaining portion of the minimum sentence to be served was an additional 43 days. Several considerations appeared to mitigate the potential severity of the sentence, including the availability of an intermittent sentence and the fact that legislation requires offenders be released after serving two-thirds of their sentence.[57] Neither Mr. F nor the court proposed a sentencing range. Felix J. affirmed: "There is no discernable trend or applicable range in this area of law," concluding that the appropriate sentence for this particular offender was between 60 and 90 days (*R v CF*, 2016, para. 55). While a sentence 30 days more than the minimum was deemed "disproportionate," it was not grossly so (*R v CF*, 2016, para. 60). The particular circumstances of the offender were "sympathetic" but did not warrant a sentence below the minimum. The court could not generate a hypothetical that would result in a grossly disproportionate sentence.

EMQ (2015) also involved an Aboriginal offender with neurological impairment and a history of abuse.[58] In this case, the offender fondled the 14-year old babysitter of his young daughter while intoxicated. At this time, he was violating several conditions of an undertaking, including abstinence from alcohol and prohibited contact between himself and the mother of his child. The Crown sought a 15-month sentence (between

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[57] Under the *Corrections and Conditional Release Act* (1992), federal offenders (with few exceptions) who have not received parole are conditionally released after serving two-thirds of their sentence ("statutory release") and serve the rest of this sentence in the community.

[58] The offender's father, who had attended a residential school, abused him as a child. Furthermore, three factors contributed to the offender's impaired memory of the offence: a head injury sustained after falling from the second storey of a building, abuse of alcohol, and a potential FASD diagnosis.

12 and 30 months), while defence counsel proposed a range of 60 to 90 days. Absent the mandatory minimum, the appropriate sentence was nine months imprisonment and two years probation. However, in light of the mandatory minimum, the appropriate sentence inflated to 13 months imprisonment.

It appears the court in *EMQ* (2015) was forced to balance two (arguably conflicting) policy directives. While Gladue principles mandate consideration of Aboriginal background, the court cautioned: "… the existence of the minimum sentence necessarily limits the practical impact of s. 718.2(e) … the court's discretion … must be exercised within the limits imposed by any constitutionally valid mandatory minimum sentence" (*R v EMQ*, 2015, para. 124-125). Importantly, the court held that the increasing range of sentence for s. 151(a) was not a result of the increasing mandatory minimum per se, but rather, a pattern manifesting prior to this increase (*R v EMQ*, 2015, para. 131). A sentence in excess of four months was not deemed grossly disproportionate. As the proposed hypothetical mirrored the circumstances of the particular offender and current offence, the court refused to engage in further analysis.

The conflict between mandatory minimums and sentencing for Aboriginal offenders can also be observed in *SA* (2016). The offender in this case was convicted of fondling his 14-year old stepdaughter on two occasions. At the time of the offences, the minimum sentence was 45 days. The offender requested a CSO or a 14-day sentence of imprisonment served intermittently, while the Crown proposed a one-year sentence. Both the offender and victim were members of a small Aboriginal community. Disagreeing with the victim's grandmother, several individuals from the community and a Sentencing Circle testified that a custodial sentence was inappropriate and that a traditional form of justice and "healing" was preferred (*R v SA*, 2016, para. 21-25).

Upholding the mandatory minimum custodial sentence, the court suggested the ability for the offender to serve his sentence intermittently mitigated some of the concerns about the impact of imprisonment. However, in his reasons, Del Frate J. was critical of several components of the s. 12 framework. Highlighting his dissatisfaction with the SCC's directive to "use common sense and experience," he remarked: "There is no indication of what this means. The end result is a totally subjective decision which may end up in a myriad of different interpretations" (*R v SA*, 2016, para. 61-62). Critiquing the use of reasonable hypotheticals, in particular, he maintained:

> One must ask the rhetorical question of why such an analysis is necessary if the sentencing judge determines that the appropriate penalty is the mandatory minimum or higher. Surely, logic dictates that under those circumstances this analysis is not necessary. (*R v SA*, 2016, para. 73)

Finally, Del Frate J. used this case as a platform to question the Crown's election (i.e., to proceed by indictment), positing that a charge of common assault would have sufficed and been consistent with the decision in *R v Jordan* (2016).[59]

In its review of the case law, the court in *JE* (2018) determined that a non-custodial sentence was also unavailable for cases of sexual interference proceeding summarily (s. 151(b)); sentences tended to range from the 90-day minimum up to two years less a day. The 23-year old offender was convicted of having consensual sexual intercourse with his 15-year old, infatuated "best friend" (*R v JE*, 2018, para. 6). The Crown sought the 90-day minimum sentence and agreed it could be served intermittently. Mr. JE was aware of the victim's age, at one point even suggesting that they wait until she was 16, and was considered her "mentor" (*R v JE*, 2018, para. 54, 56). As such, the court found that the minimum sentence was not grossly disproportionate on the particularized inquiry, and declined to address reasonable hypotheticals.

Whether an offender is convicted under s. 151(b) or s. 152(b) appeared to have little impact on the constitutional analysis when the minimum sentence was 90 days. In *Gumban* (2017), the offender was a school custodian who attempted to groom a 14-year old student, eventually showing him pornographic images and asking if the student wanted to "touch his penis" (*R v Gumban*, 2017, para. 7). Crown counsel sought a 90-day intermittent sentence with 12-18 months probation, while defence counsel argued for a two to three year suspended sentence. Although Mr. Gumban was designated a "low risk" for sexual reoffending and was a first-time offender, several aggravating factors were identified, including pre-meditation and a breach of trust; as Mr. Gumban worked in a school, he was considered to be in a position of authority. The case law once again proved to be problematic, given the "broad range of sentences" imposed on child sex offenders, often dependent on the number of victims, the number of charges,

[59] *Jordan* (2016) set a new framework for determining unreasonable delay under s. 11(b) of the *Charter* (1982), creating a presumptive ceiling of 18-months for cases tried in provincial court and 30-months for cases tried in superior court (or in provincial court following a preliminary inquiry).

and the specific type of sex offence (*R v Gumban*, 2017, para. 21). The court refused to emphasize rehabilitation, highlighting the statutory requirement set out in s. 718.01. It also rejected a suspended sentence, stating that a custodial sentence is the "norm" and such sentences have, in fact, been increasing (*R v Gumban*, 2017, para. 59). It is possible Mr. Gumban felt a lengthier suspended sentence might offset the need for even a short period of imprisonment; however, he nonetheless received a 90-day intermittent custodial sentence.

In *Desmarais* (2017), defence counsel actually argued for a 90-day intermittent sentence with probation (while Crown counsel sought the one-year minimum sentence). The court found the appropriate range of sentence to be between nine and 12 months. Mr. Desmarais had, on more than one occasion, fondled his wife's six-year old granddaughter. It was revealed that similar conduct also occurred 26 years earlier and had required "psychological intervention" (*R c Desmarais*, 2017, para. 10). As a result, the one-year minimum sentence did not constitute cruel and unusual punishment for this particular offender. While acknowledging the variety of conduct captured under s. 151 and s. 152, the court argued that none of the proposed hypotheticals were "realistic enough" to support a finding of gross disproportionality (*R c Desmarais*, 2017, para. 39). Several factors explain the willingness of the court to impose a 90-day intermittent sentence in *Gumban* (2017) and not *Desmarais* (2017): (1) the frequency of Mr. Desmarais's offences likely merited a more severe sentence, (2) Mr. Desmarais was charged under both s. 151 and s. 152, and (3) the Crown proceeded by indictment rather than summarily (as it had in *Gumban* (2017)).

6.2.2. Child Pornography

Table 6-7. Summary of Cases – Child Pornography (12)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v Boodhoo* (2018)	s. 163.1(3)	One year	No	Yes
	R v Swaby (2018)	s. 163.1(4)	90 days	Yes	Yes
	R v Zhang (2018)	s. 163.1(4)(b)	Six months	No	Yes
VALID	*R c Ibrahim* (2017)	s. 163.1(3) s. 163.1(4)	One year One year		
	R v AR (2017)	s. 163.1(1) s. 163.1(2) s. 163.1(4)	– Six months 90 days		
	R v Butler (2017)	s. 163.1(4) s. 163.1(3)(a)	45 days One year		
	R v Cristoferi-Paolucci (2017) [60]	s. 163.1(2)(a) s. 163.1(4)(a) s. 163.1(4.1)(a)	One year Six months Six months		
	R v John (2017)	s. 163.1(4)	Six months		
	R v LeCourtois (2016)	s. 163.1(4)	45 days		
	R v Machulec (2016)	s. 163.1(4)(b)	45 days		
	R v Walker (2017)	s. 163.1(4)	45 days		
	R v Watts (2016)	s. 163.1(3) s. 163.1(4)	One year One year		

Material that "counsels," "advocates," "encourages," or "induces" sex with children is prohibited (*R v AR*, 2017, para. 17-20).[61] The definition of "child pornography" is set out in s. 163.1(1) of the *Code* (1985) and includes photographic, film/video, other visual, audio, and written materials; anyone under the age of 18 is considered a "child." Individuals convicted of the possession (s. 163.1(4)) and access (s. 163.1(4.1)), distribution (s. 163.1(3)), and/or making of child pornography (s. 163.1(2)) are all subject to mandatory minimum sentences. If the Crown proceeds by indictment, the mandatory minimum for the possession of child pornography is one year (s. 163.1(4)(a)); if the Crown proceeds by summary conviction, the punishment decreases by one-half and results in a six-month mandatory minimum (s. 163.1(4)(b)). Both sections contain

[60] *Cristoferi-Paolucci (*2017) found a single provision (s. 153(1.1)(a), one year minimum sentence) constitutionally invalid based on reasonable hypotheticals (out of four challenged provisions), but was nonetheless categorized as "valid" for purposes of this research.

[61] Many of the sentencing principles relevant to child pornography were set out in the earlier decision *R v Sharpe* (2001) [hereinafter *Sharpe*].

maximum sentences (ten years and two years less a day, respectively). Accessing child pornography (s. 163.1(4.1)) attracts the same minimum and maximum penalties as possession (outlined in s. 163.1(4.1)(a) for indictable offences and s. 163.1(4.1(b) for summary conviction offences). Both distribution of (s. 163.1(3)) and making (s. 163.1(2)) child pornography are punishable by a one-year mandatory minimum and a maximum punishment of 14 years.

Prior to 2005, the offence of possessing child pornography did not attract a mandatory minimum sentence (*R v Swaby*, 2017, para. 12). The initial 14-day (where the Crown proceeded by summary conviction) and 45-day (where the Crown proceeded by indictment) minimums were introduced following the passing of Bill C-2, *An act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act,* S.C. 2005, c 32 [Bill C-2] (*R v Swaby*, 2017, para. 12). The minimums have since been increased twice: first, to 90 days and six months following the passing of the *Safe Streets and Communities Act* (2012), and second, to six months and one year following the passing of the *Tougher Penalties for Child Predators Act* in 2015 (*R v Swaby*, 2017, para. 13).

Several courts have ruled on the constitutionality of the child pornography provisions, although only three cases have resulted in a declaration of invalidity: (1) *R v Boodhoo* (2018) [hereinafter *Boodhoo*], (2) *R v Swaby*, (2018) [hereinafter *Swaby*], and (3) *R v Zhang*, (2018) [hereinafter *Zhang*]; *Boodhoo* (2018) concerned s. 163.1(3) (distribution of child pornography), while both *Swaby* (2018) and *Zhang* (2018) concerned s. 163.1(4)(b) (possession of child pornography). In each case, the impugned provision was struck down due to analysis of reasonable hypotheticals. *Swaby* (2018) was the only case where the particularized inquiry also succeeded.

In *Boodhoo* (2018), the distribution charge emanated from photographs taken to advertise a 16-year-old victim's sexual services.[62] The offenders argued that there was a legally relevant difference between the facts of their case and other distribution cases involving, for example, photographs of young children for purposes of exploitation. They likened their conduct to "assisting a nearly adult sex worker to advertise her work" (*R v*

[62] This case involved two additional charges under s. 286.2(2) (receiving material benefit from sexual services provided by a person under 18 years) and s. 286.3(2) (procuring a person under the age of 18 years). The victim was forced to continue sex work against her wishes and was not paid in accordance with the verbal agreement made (*R v Boodhoo*, 2018, para. 7).

Boodhoo, 2018, para. 23). Bale J. found the one-year minimum sentence was not grossly disproportionate for the particular offenders or the presented hypothetical offender. However, he noted the provision did not account for a variety of factors that could impact the gravity of the offence and blameworthiness of the offender, including:

> … the number of images distributed, the number of persons given access to the images, the age of the person depicted, the age of the offender, the explicit nature of the images, or whether any offence was committed in acquiring the images. (*R v Boodhoo*, 2018, para. 27)

Concocting a scenario of his own, Bale J. found the mandatory minimum in s. 163.1(3) problematic in cases where, for example, an 18-year-old forwards a "sext" from his 17-year-old girlfriend (unknown to her) to *one* friend. Consequently, the one-year minimum term of imprisonment was deemed invalid.

Possession of child pornography is distinct from other related offences (making child pornography, for example) in that the consequences that flow from the *actus reus* are always indirect; in other words, it does not involve direct harm to the victim(s) in the strict sense (*R v Swaby*, 2017, para. 76; *R v Swaby*, 2018, para. 32). The offenders in *Swaby* (2018) and *Zhang* (2018) both presented unique (and arguably, sympathetic) personal circumstances for consideration at sentencing. In *Swaby* (2018), the court was primarily concerned with two issues: first, the impact of Mr. Swaby's impairments and their relation to his moral blameworthiness, and second, the types of sentences that were available for the offences committed by Mr. Swaby. Marchand J. categorized *Swaby* (2017) within the "hardest sentencing decisions" (para. 1) he had made; in his review of the cited case law, he did not find a single case that "involved an offender with Mr. Swaby's level of cognitive impairment or the type of reduced moral blameworthiness found by the sentencing judge" (*R v Swaby*, 2018, para. 83). Mr. Swaby was described as "child-like," possessing an IQ in the 0.01 percentile, and suffering from both persistent depressive disorder and likely a schizoaffective disorder (*R v Swaby*, 2018, para. 21, 25-26). Marchand J. was especially concerned that Mr. Swaby compared viewing child pornography with viewing a video of a person breaking their leg (*R v Swaby*, 2018, para. 74). The severity of these impairments suggested that Mr. Swaby was not the "typical" offender (*R v Swaby*, 2018, para. 72). Furthermore, the court determined these impairments to be "causally related" to Mr. Swaby's offences (*R v Swaby*, 2018, para. 41). Affirming that CSOs, suspended sentences, and intermittent sentences had all been

available at some point for such offences, the court concluded that the minimum sentence in s. 163.1(4) was so broad that it would result in offenders serving custodial sentences despite valid, non-carceral alternatives (*R v Swaby*, 2018, para. 97). Mr. Swaby ultimately received a four-month CSO followed by two years probation.

In *Zhang* (2018), the offender did not intentionally seek out child pornography (and the file names did not reveal their content), but he neglected to delete it; the court considered this a mitigating factor since it did not perpetuate further demand for child pornography. However, Mr. Zhang viewed the videos several times, which posed the risk of inciting particular offenders to commit such offences. The fact that Mr. Zhang was a Chinese international student whose immigration status was at risk, and that Mr. Zhang was "ignorant" of Canadian law, were also considered mitigating factors (*R v Zhang*, 2018, para. 40). The provision was ultimately struck down after reviewing the broadness of its application, "from receiving and retaining one unrequested photograph of child pornography in the context of a relationship to actively searching and compiling collections of children being sexually abused" (*R v Zhang*, 2018, para. 85). While the six-month minimum sentence was not grossly disproportionate for Mr. Zhang, he received a 111-day intermittent sentence (rather than a 120-day custodial sentence) to be served two days at a time (30 weeks). Bentley J. did not feel a difference of 9 days, which would bar the availability of an intermittent sentence, provided more deterrent or denunciatory effects.

Most of the cases challenging the constitutionality of the child pornography provisions in the *Code* (1985) have upheld the minimum sentences. These include: (1) *R c Ibrahim* (2017) [hereinafter *Ibrahim*], (2) *R v AR* (2017) [hereinafter *AR*], (3) *R v Butler* (2017) [hereinafter *Butler*], (4) *R v Cristoferi-Paolucci (JC)* (2017) [hereinafter *Cristoferi-Paolucci*], (5) *R v John* (2017) [hereinafter *John*], (6) *R v LeCourtois* (2016) [hereinafter *LeCourtois*], (7) *R v Machulec* (2016) [hereinafter *Machulec*], (8) *R v Walker* (2017) [hereinafter *Walker*], and (9) *R v Watts* (2016) [hereinafter *Watts*].

In *LeCourtois* (2016), the offence was committed when the mandatory minimum sentence was 45 days. The court held that even if a non-custodial sentence were appropriate for a hypothetical offender at that time, a "brief period of incarceration" would not be grossly disproportionate since custodial sentences can be served intermittently (*R v LeCourtois*, 2016, para. 14). Whether the circumstances of the offence involved less

depraved material, accidental discovery or voluntary distribution by the subject, a brief period of access or possession, and/or subsequent destruction of the material, did not impact the appropriateness of the minimum sentence. This view was closely adopted in *Walker* (2017), who was also subject to a 45-day mandatory minimum.

In light of these decisions, it is unsurprising that the 45-day minimum did not withstand constitutional scrutiny in cases with more aggravating circumstances. In *Machulec* (2016), the offender was found to have, in his possession, 7694 "separate" images of realistic, anime-style child pornography (para. 25). These images were non-violent in nature, but were discovered by his tenant's daughter. Crown counsel proposed a sentencing range of six to 18 months, settling on a sentence between eight and 12 months for Mr. Machulec, in particular. Defence counsel suggested a range of three to nine months, seeking a CSO between three and six months. The court acknowledged the difficulty in sentencing for simple possession of child pornography, highlighting the increases of minimum sentences and lack of appeal decisions for such cases. It identified several consequences of child pornography, most related to risk of harm, including: cognitive distortions, fuelling fantasies/inciting offences, grooming, and abusing children in the production. A beneficial consequence was that criminalizing possession of child pornography aided prosecution of creators and distributors of child pornography. As such, Munroe J. found a custodial sentence necessary and refused to impose a CSO.

In its assessment of "remorse and receptivity to rehabilitation," Crown and defence counsels agreed that Mr. Machulec did not believe possession of the particular images was illegal:

> … since he did not know the illegality of the act of possessing this material, it is impossible for Mr. Machulec to understand the severity of it. The conclusion … punishes the offender for honest ignorance of the illegal nature of his conduct" (*R v Machulec*, 2016, para. 35)

However, Monroe J. disagreed with the "timeframe," positing: "What is the appreciation of the conduct now when the offender does know the conduct's illegality?" (*R v Machulec*, 2016, para. 36). In addition, no assessment was provided to support or refute whether Mr. Machulec possessed a sexual interest in children. Despite the presence of several mitigating factors, the nature and quantity of the material was particularly

concerning. The court affirmed the range identified by Crown counsel and found no gross disproportionality on the particularized inquiry.

Two hypothetical scenarios were submitted. The first (smaller quantities of cartoon images that display no sex acts) was rejected on grounds of unreasonableness, with the court questioning the intention of an individual possessing such images. The second hypothetical was based on variations rejected in *LeCourtois* (2016), where the court did not find the minimum sentence grossly disproportionate. Consequently, it was decided there was no *Charter* (1982) violation and Mr. Machulec received an eight-month custodial sentence.

The offences in *AR* (2017) and *John* (2017) were committed when the stipulated minimum sentence was six months. *AR* (2017) presented an opportunity for the court to consider circumstances not envisioned in *Sharpe* (2001) (para. 22). This case involved online communication between two middle-aged men discussing incest role play and age play, suggesting that material written in "story format" might be protected from the ambit of s. 163.1(1) (*R v AR*, 2017, para. 22). The court found that Parliament's intention in drafting this provision was to: "criminalize content that 'actively promote[d] the commission' of such offences," and that "viewed objectively, sends the message that sex with children can and should be pursued" (*R v AR*, 2017, para. 17). Prohibited conduct includes "inducements" that are "overt" *and* "subtle or implied" (*R v AR*, 2017, para. 19). The conduct captured in s. 163.1 is not limited to an "individually prepared story or document," but can also include material related to "communicative acts" (*R v AR*, 2017, para. 24).

While Mr. R sought a suspended or intermittent sentence, Crown counsel submitted that the appropriate range was between six and eight months. Focus was placed on whether Mr. R's written material constituted child pornography and whether there are legally relevant distinctions between such materials. The court distinguished three general categories that all satisfy the *Code* (1985) definition of "child pornography." These include illicit visual or written material involving (1) imaginary children, and/or (2) real children.[63] The third category concerns "actual images" of children (*R v AR*, 2017,

[63] Judge Latimer admitted the distinction between real and imaginary children was "not so neat" in the case of Mr. R: "While children were not directly compelled to participate in AR's writing, his

para. 12). Such categorization highlights the potential risk of re-victimization (i.e., requiring involvement of real children), although "written material – even that which contains references to actual children – does not require exploitation or abuse as a condition precedent to its creation. Its existence, nevertheless, presents a risk of harm to children" (*R v AR*, 2017, para. 12). Material that does not involve actual children and/or actual sexual abuse is not shielded from the reach of s. 163.1. Whether the child pornography qualifies as written material or actual images is irrelevant; denunciation is a predominant sentencing principle that is case-specific and contextual. As a result, the offender received a total seven-month sentence (seven months for making child pornography and three months for possessing child pornography, served concurrently). The court refused to consider reasonable hypotheticals.

This decision was later affirmed in *John* (2017), where the court acknowledged that full appreciation of sentencing principles in child sex offence cases requires imposition of sentences "well over the mandatory minimums" (para. 32). In this case, Woollcombe J. determined the appropriate sentence for possession of child pornography was between six to eight months and three years, a range much higher than the mandated minimum (*R v John*, 2017, para. 33). The mandatory minimum did not offend s. 12 of the *Charter* (1982) and Mr. John subsequently received a 10-month sentence.

Courts have denied that lengthier sentences for possession of child pornography are *a result of* increasing the legislated mandatory minimum; rather, judges have routinely imposed longer sentences for such offences *in spite of* the mandatory minimum (*R v Butler*, 2017, para. 27). The court in *Butler* (2017) noted that, following the introduction of the original 45-day minimum in 2005, sentences for possession of child pornography have ranged between 12 and 24 months (para. 28). "Low" sentences for child pornography-related convictions have not been observed since the introduction of this initial minimum (*R v Butler*, 2017, para. 28). In other words, offenders charged with such offences consistently receive sentences higher than the minimum. In cases of serial child sexual offenders and/or cases where the circumstances of the offence are particularly egregious, such offenders will almost certainly receive a *custodial* sentence higher than the stipulated minimum.

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stepdaughters are referred to, and their pictures used as props in the dialogue between AR and MM" (*R v AR*, 2017, para. 24).

In *Cristoferi-Paolucci* (2017), the offender was charged with several offences, including child luring, sexual exploitation, and the production, possession, and access of child pornography.[64] The victims were two teenaged boys, who were each coached by Mr. Cristoferi-Paolucci; the court considered him "at all times, in a position of both trust and authority" (*R v Cristoferi-Paolucci*, 2017, para. 8). Over a period of nine months, Mr. Cristoferi-Paolucci requested photographs and videos of a sexual nature from the boys. He acquired 12-13 photographs and 5 videos from one victim; the second victim ignored the requests. Although Mr. Cristoferi-Paolucci argued that his conduct was a form of self-entertainment, the court felt it was predatory in nature. McWatt J. held the appropriate sentencing range to be between 12 months and two years less one-day, emphasizing the higher end of that range. Mr. Cristoferi-Paolucci initially sought a custodial sentence between nine and 12 months; he later sought a CSO within the court's identified range. Speaking to pertinent sentencing objectives, the court held:

> I will add that *Mr. Paolucci needs to be specifically deterred.* He acknowledged during the trial that what he did was "stupid and immature". He was unable or refused to admit, however, that what he did to the two victims was harmful. *In terms of rehabilitation, there is certainly a prospect for it* in the applicant's case based on some of the mitigating factors I have outlined, but I have no medical or other independent evidence about his risk to reoffend like this in the future. [emphasis added] (*R v Cristoferi-Paolucci*, 2017, para. 45)

As s. 172.1(2)(a) had previously been struck down in *R v Morrison* (2017), the court did not address its constitutionality and maintained that it need not impose the minimum sentence. Section 153(1.1)(a) was deemed invalid on the basis of reasonable hypotheticals.[65] However, the child pornography provisions (s. 163.1(2) (s. 163.1(2)(a) at the time of the offence), s. 163.1(4)(a) (at the time of the offence), and s. 163.1(4.1)(a)) were all upheld. The court did not feel that the minimum sentences for these offences (six months and one year) were grossly disproportionate to the circumstances of Mr. Cristoferi-Paolucci or a hypothetical offender.

The courts appear to be unwilling to invalidate the minimum sentences for offences related to child pornography even in cases where (a) an offender's

[64] While consecutive sentences are typically imposed for offences involving more than a single victim, the Crown agreed that the resulting 40-month sentence would be excessive and thus, proposed that the sentences be served concurrently.

[65] These scenarios generally involve first-time offenders and brief contact, akin to a "serious lapse in judgment" in the view of the court (*R v Cristoferi-Paolucci*, 2017, para. 65).

circumstances are sympathetic, and/or (b) where more mitigating factors are present. In *Watts* (2016), the Crown sought an 18-month sentence, an addition of the minimum sentences in s. 163.1(3) and s. 163.1(4). In its determination of the gravity of the offence, the court analyzed Mr. Watts' collection and described it as "disgusting, as opposed to horrific" (*R v Watts*, 2016, para. 32). At the same time, the collection was expansive and accessed over a lengthy time period (18 months). It was also distributed directly to a friend and indirectly to others through a file-sharing program.

Several mitigating circumstances were used to argue against the mandatory minimums. Mr. Watts experienced intergenerational trauma as a result of his Aboriginal heritage, including effects from a family history of residential school attendance, addiction and previous sexual abuse. These details were reflected in a Gladue report submitted to the court. Mr. Watts argued that his offences coincided with his drug use, while the court recognized that they "may be related to his own unresolved history of child abuse" (*R v Watts*, 2016, para. 35). The court suggested that Mr. Watts' risk for recidivism could eventually be managed by a significant probationary period with attached conditions; however, it rejected the appropriateness of merely a fine, probation, an intermittent custodial sentence, or a CSO. Emphasis was placed on specific deterrence and the imposition of a sentence proportionate to Mr. Watts' high moral blameworthiness. The court reasoned that rehabilitation could be achieved *following* incarceration, with probation and continued work with a psychologist. Consequently, it found no violation of s. 12 on the particularized inquiry. Defence counsel then relied on a slight fact variation of the hypothetical entertained but rejected in *R v Schultz* (2008). Other proposed hypotheticals faced a similar fate, failing to engage the impugned provision. As a result, Mr. Watts received an 18-month sentence, equivalent to the stipulated mandatory minimums.

In *Ibrahim* (2018), the offender appealed his 18-month sentence in fear of losing his immigration status. Unlike *Zhang* (2018) (but in line with *Pham* (2016), which concerned provisions in the *CDSA* (1996)), the court refused to mitigate the sentence on this "artificial" basis; the sentencing judge had appropriately weighed the seriousness of the offence, the blameworthiness of the offender, and the impact of a custodial sentence on Mr. Ibrahim (*R c Ibrahim*, 2018, para. 34). It noted that the *IRPA* (2001) contained

other safety mechanisms to protect against deportation (*R c Ibrahim*, 2018, para. 36).[66] Moving on to the second branch of the s. 12 test, Bélanger J. C. A. then reviewed the two circumstances where a hypothetical may be rejected as "unreasonable." First, when the description is "vague and imprecise" (suggesting lack of context) or the background of the hypothetical offender is too varied or unclear ("excessive sampling") (*R c Ibrahim*, 2017, para. 83; *R c Ibrahim*, 2018, para. 20). Second, if the offender may have a legal defence (*R c Ibrahim*, 2017, para. 85). The hypotheticals presented by Mr. Ibrahim suffered from these deficiencies and failed to resonate with the court.

6.2.3. Sexual Assault

Table 6-8. Summary of Cases – Sexual Assault (5)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R c Gagnon* (2018)	s. 271(b)	Six months	No	Yes
	R v Deyoung (2016)	s. 271(a)	One year	No	Yes
	R v ERDR (2016)	s. 271(a)	One year	No	Yes
	R v MacLean (2018)	s. 271(a)	One year	Yes	Yes
	R v MJ (2016)	s. 272(2)(a.2)	Five years	Yes	Yes

Sexual assault against any individual is prohibited under s. 271 of the *Code* (1985). Special attention is paid to children in that a minimum term of imprisonment applies *only if* the victim is under the age of 16. The maximum term of imprisonment also differs if the victim is under the age of 16. If the Crown proceeds by indictment, the mandatory minimum is one year (s. 271(a)) and the maximum term of imprisonment is 14 years (as opposed to the 10 year maximum if the individual is 16 years of age or older). If the Crown proceeds summarily, the mandatory minimum is six months (s. 271(b)) and the maximum term of imprisonment is two years less a day (as opposed to the 18-month maximum if the individual is 16 years of age or older). Section 272 applies to instances of sexual assault where a weapon is used, a third party is threatened, or bodily harm is caused. Sexual assault with a firearm always attracts a minimum sentence. If a firearm is used and the offence is committed for criminal and/or gang-related purposes (s. 271(2)(a)), the minimum term of imprisonment is five years for a first

[66] The court noted that reductions in sentence to protect against deportation have occurred in cases where the offender was sentenced to six months imprisonment (the cutoff being less than six months imprisonment); as such, the sentence was reduced only by a single day (*R c Ibrahim*, 2018, para. 40).

offence (s. 271(2)(a)(i)) and seven years for a second or subsequent offence (s. 271(2)(a)(ii)). In any other case in which a firearm is used, the minimum term of imprisonment is four years (s. 271(2)(a.1)). Like s. 271, there is specific mention of offences committed against children; subsection (a.2) mandates a minimum term of imprisonment if the victim is under the age of 16. The maximum term of imprisonment for all of these provisions is 14 years. While the subsections pertaining to aggravated sexual assault (s. 273) also contain mandatory minimums, the courts have not yet had the opportunity to address their constitutional validity.

The courts have addressed the constitutionality of s. 271 in five cases: (1) *R c Gagnon* (2018) [hereinafter *Gagnon*], (2) *R v Deyoung* (2016) [hereinafter *Deyoung*], (3) *R v ERDR* (2016) [hereinafter *ERDR*], (4) *R v MacLean* (2018) [hereinafter *MacLean*], and (5) *R v MJ* (2016) [hereinafter *MJ*]. In each case, the impugned section was found to be invalid in hypothetical scenarios. Only one case found a violation on the particularized inquiry (*MJ* (2016)) and in fact, one court did not conduct the particularized inquiry at all (the Ontario Superior Court of Justice in *MacLean* (2018)).

Deyoung (2016), *MacLean* (2018) and *ERDR* (2018) have all successfully challenged s. 271(a). In *Deyoung* (2016), the offender pled guilty to sexual assault of a 14-year old girl; a sexual interference charge under s. 151 was withdrawn. While a one-year minimum sentence was not grossly disproportionate for Mr. Deyoung, Atwood Prov. Ct. J. found the broad range of conduct captured under s. 271 problematic (*R v Deyoung*, 2016, para. 38). He argued that although Mr. Deyoung had unprotected sexual intercourse without ascertaining the age of the victim, sexual assault could also include “the least touching that affects the sexual integrity of a victim” (*R v Deyoung*, 2016, para. 39). Consistent with other cases involving sexual offences committed against children, consent and the *Code* (1985) provisions encompassing it were significant considerations at sentencing. The court recognized that the age of consent was raised by two years following amendments in 2008, from age 14 to age 16 (*R v Deyoung*, 2016, para. 40). Consequently, Mr. Deyoung’s conduct was legally permissible prior to this increase. However, the court was primarily concerned with the disparities caused by the close-in-age exemptions provided under s. 150.1(2) and s. 150.1(2.1). Atwood Prov. Ct. J. proposed the following two hypotheticals to demonstrate this:

> Take the case of an adult, one-day shy of the adult's twentieth birthday, having non-exploitive, consensual and minimally forceful sexual contact with a 15-year-old minor on the minor's birthday. Assume no position of trust or dependency. In virtue of sub-s. 150.1(2.1) of the *Code*, the adult would have a complete defence in virtue of being less than five years older than the complainant. But change the scenario by a day or two--a just-twenty adult and a just-fifteen, or fifteen-less-a-day minor? The subsection would no longer offer a defence … Consider next an adult eighteen years of age having consensual, non--exploitive sexual contact with a minor fourteen years of age less a day. No close-in-age-exemption would be available to the adult in virtue of sub-s. 150.1(2) of the *Code* which allows only a two-year difference in age for minors under fourteen. But if the adult and the minor were to wait until the minor's birthday the next day, the five-year exemption under 150.1(2.1) would apply, and no criminality would arise. (*R v Deyoung*, 2016, para. 43-44)

Section 271(a) did not minimally impair the rights protected by s. 12 of the *Charter* (1982). The court implied that provisions prescribing minimum sentences would be more likely to survive constitutional scrutiny with the accompaniment of an exception clause. Section 5(3)(a)(i)(D) of the *CDSA* (1996) was presented as an example.[67] Despite these findings, Mr. Deyoung nonetheless received the one-year minimum sentence of imprisonment. It appears the court felt that offenders convicted of sexual assault generally receive sentences more severe than the stipulated minimum. A one-year sentence did, in effect, account for the mitigating factors in the case at hand.

The hypotheticals presented in *Deyoung* (2018) were also relied on in *MacLean* (2018). In *MacLean* (2018), the 21-year old offender had sexual intercourse with a 12- (almost 13-) year old girl on a single occasion; the encounter was consensual. The Crown sought a 12-month sentence (equivalent to the legislated minimum), while defence counsel sought a maximum 90-day sentence or a suspended sentence. Reiterating the discussion in *Deyoung* (2018), the court contended:

> The type of conduct that can constitute a sexual assault can range from the touching of the leg of a person in a sexual way to a violent rape. Not surprisingly, therefore the range of sentences for sexual assault is as wide ranging as the scope of human behaviour that can attract criminal liability under the offence of sexual assault. (*R v MacLean*, 2018, para. 30)

[67] Section 10(5) of the *CDSA* (1996) allows a judge not to impose the minimum sentence if the offender completes an approved drug treatment program.

Murphy J. did not believe Mr. MacLean knew the victim's age until after the offence, distinguishing this from circumstances where an offender *proceeds knowing* the victim's age. The latter conduct was deemed more blameworthy even though failure to ascertain age (when the victim is a "child," as defined by the *Code* (1985)) also attracts criminal fault, albeit a lesser degree. Mr. MacLean received a 90-day intermittent sentence, which allowed him to continue his university studies.

In *ERDR* (2018), a 26-year old man with ASD was convicted of sexually assaulting his niece. Although this case also involved a single incident, there were additional factors to account for at sentencing, including the lack of penetration and the offender's position of trust towards the victim. Like *MacLean* (2018), defence counsel sought a maximum 90-day sentence (served intermittently) or a suspended sentence. The Crown sought a 16- to 18-month sentence. After determining the appropriate range of sentence was between nine and 18 months, the court concluded that the one-year minimum was not grossly disproportionate for the particular offender. Nonetheless, it held that the minimum sentence could be grossly disproportionate based on reasonable hypotheticals, referring to the "stealing a kiss" scenario.[68]

Gagnon (2018) is the only case that has challenged s. 271(b) (and it did so successfully). Mr. Gagnon was convicted of touching the genitalia of his friend, a 13-year old boy, who attended the same school.[69] The Crown sought the minimum term of imprisonment (six months), while defence counsel sought a suspended sentence with a probationary period. The court held the appropriate range of sentence for Mr. Gagnon was between two and nine months, settling on a four-month sentence absent the mandatory minimum. Because the minimum fell between this range and because the difference of two months was not grossly disproportionate in the view of the court, the particularized inquiry failed. However, the court concluded that the provision could result in a grossly disproportionate sentence for a hypothetical offender, especially in circumstances where the conduct rests at the low end of the spectrum of sexual assault. Interestingly, the court opted to impose the six-month minimum sentence despite finding

[68] This scenario involves "a young, just turned 18-year-old, with no record, who steals a kiss from, or perhaps lays a hand on a 15 almost 16-year-old's leg while on a bus, or touches her on the breast at a party while he is intoxicated" (*R v ERDR*, 2016, para. 28).

[69] Mr. Gagnon was also charged with touching a child (for a sexual purpose) (s. 151(b)), but this charge was stayed to prevent prosecution of multiple convictions arising from the same set of circumstances.

that the provision offended s. 12 *and* despite its previous remarks regarding the appropriate sentence for Mr. Gagnon (i.e., four months).

One case has (successfully) challenged the provision concerning sexual assault causing bodily harm to a person under 16 (s. 272(2)(a.2)). In *MJ* (2016), the offender had inserted a thermometer into his infant niece's vagina (causing vaginal bleeding and bruising), eventually ejaculating into her diaper. While speaking with police, he attempted to commit suicide by slitting his throat and wrists. Assessments revealed that he had several mental health issues, "learning difficulties," and a diagnosis of Asperger's syndrome that rendered him "significantly compromised in psychosocial functioning" (*R v MJ*, 2016, para. 16). A forensic psychiatrist recommended rehabilitation of the offender, suggesting that the focus (of determining the appropriate sentence) should be on "how to most effectively treat the Applicant to minimize his risk" (*R v MJ*, 2016, para. 17). The court maintained that decisions related to institutional placement "cannot dominate the analysis of the constitutionality of the mandatory minimum sentence," and that the circumstances of the offence required a custodial sentence (*R v MJ*, 2016, para. 20-21). Defence counsel sought a 24- to 30-month sentence against a five-year minimum sentence of imprisonment.

Despite the gravity of the offence and the position of trust occupied by the offender, the court struck down the impugned provision on the particularized inquiry. Lengthier sentences for this offence tended to be imposed in cases involving (at least) one of several aggravating factors absent in Mr. J's case. Furthermore, review of the case law showed sentences less than five years being imposed in cases involving "more serious conduct" (*R v MJ*, 2016, para. 39). The court recognized that absent the mandatory minimum, the offender could serve two years less a day in a reformatory rather than a federal institution, followed by a three-year period of probation. Accounting for pre-trial custody and credit for time spent on bail, the total sentence (and therefore, period of supervision) would succeed the five-year mandatory minimum. The court questioned the Crown's decision to charge under s. 272(2)(a.2) rather than s. 271, criticizing a four-year disparity for offenders who commit minimal bodily harm: "The facts of a low-end sexual assault causing bodily harm may look virtually the same as the facts of a high-end sexual assault…" (*R v MJ*, 2016, para. 49). The court concluded that the term "bodily harm" was overly broad, encompassing conduct ranging from "a one-time fondling over the clothing to repeated acts of the most intrusive nature" (*R v MJ*, 2016,

para. 53). Unsurprisingly, it refused to uphold the provision even after examining reasonable hypotheticals.

6.2.4. Sexual Exploitation

Table 6-9. Summary of Cases – Sexual Exploitation (2)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v Okoro* (2018)[70]	s. 153(1.1)(b)	90 days	No	Yes
VALID	*R v EJB* (2018)	s. 153(1.1)(a)	One year		

Sexual exploitation is prohibited by s. 153 of the *Code* (1985), which states

> **Sexual exploitation**
>
> **153 (1)** Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who
>
> > **(a)** for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or
> >
> > **(b)** for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person

It is a hybrid offence that is punishable by a one-year minimum and 14-year maximum sentence where the Crown proceeds by indictment (s. 153(1.1)(a)) and a 90-day minimum and a two years less a day maximum sentence where the Crown proceeds by summary conviction (s. 153(1.1)(b)). The other various provisions in this section provide a definition of "young person" (i.e., a person who is 16 or 17 years of age) (s. 153(2)) and of "consent" in cases of a victim with a disability (s. 153.1(1)-(6)).[71] Section 153(1.1) allows a judge to infer whether the relationship in question is exploitative. Two cases

[70] While Mr. Okoro was also charged with sexual assault, the constitutional analysis focused on the 90-day minimum sentence under s. 153(1.1)(b).

[71] There is no stipulated minimum sentence in cases of a victim with a disability.

have raised the constitutional validity of s. 153 (one addressing s. 153(1.1)(a) and the other addressing s. 153(1.1)(b)): (1) *R v EJB* (2018) [hereinafter *EJB*], and (2) *R v Okoro* (2018) [hereinafter *Okoro*].

In *EJB* (2018), the Alberta Court of Appeal overturned the two years less a day CSO and replaced it with a four-year sentence of imprisonment. At the initial sentencing hearing, a six-month to one and a half year sentence was found to be the proportionate range. The trial court rejected the Crown's argument that the starting point sentence established in Alberta for major sexual assault was to be applied. The offender was convicted of having a sexual relationship with his 16-year old niece (by marriage, a difference of 19 years).[72] Defence counsel sought a CSO, suspended sentence, or 90-day intermittent sentence.

While the minimum sentence was deemed constitutional in Mr. B's particular circumstances, it was initially found to be grossly disproportionate for a hypothetical offender (relying on a scenario established in *Cristoferi-Paolucci* (2017)). First, the Alberta Court of Appeal found that the imposed sentence was not proportional to the gravity of the offence and responsibility of the offender, and was therefore demonstrably unfit. This was (largely) a result of the trial judge erroneously establishing certain factors as mitigating (such as initiation by the victim), while failing to consider additional aggravating factors (such as failure to use a condom). Second, the hypotheticals relied on by the trial judge were too remote and/or far-fetched. She did not account for the higher moral blameworthiness that accompanies a specific intent offence. Furthermore, the offence described in the hypothetical was not akin to sexual exploitation and possessed facts that were not reasonably foreseeable. The Court of Appeal clarified the standard for "reasonableness," outlining the following guidelines: the hypothetical must address the same offence as charged, the hypothetical should not contain facts that may result in an acquittal or facts created to diminish the offender's culpability, and two different offences, as defined by Parliament, with the same minimum sentence should not be compared. Mr. B received a four-year sentence, a departure from the Nova Scotia Court of Appeal's decision in *Hood* (2018).

[72] The Court of Appeal also clarified the meaning of "sexual exploitation," stating: "Conduct which amounts to exploitation must have both a physical and mental element, both of which will be volitional, and both of which will be based on an adult consciously taking advantage of a young person for a sexual purpose" (*R v EJB*, 2018, para. 72).

In *Okoro* (2018), the offender was sentenced on various counts of sexual exploitation and sexual assault. The offences took place during class, where the two victims[73] were Mr. Okoro's students. The sexual contact was brief in duration (although not isolated) and over clothing, violations deemed "less serious" by the court (*R v Okoro*, 2018, para. 20). At the same time, the victims were considered vulnerable in their role as students and because Mr. Okoro "opportunistically sexually assaulted them under the guise of giving them extra help" (*R v Okoro*, 2018, para. 16). Potential deportation for a minimum five years did not appear to be a mitigating factor. After establishing a range between an intermittent sentence and a six-month penitentiary term, Bacchus J. found the proportionate sentence (when adjusting for totality and restraint) was four months imprisonment followed by a two-year probationary period. This adjustment prevented Mr. Okoro from serving a lengthier six-month sentence (three months per victim). While the court rejected the hypothetical proposed by the offender, it agreed there were circumstances where the minimum sentence would be grossly disproportionate:

> The mandatory minimum sentence regime does not discriminate with respect to the age of the offender or the nature of the touching and it does not allow the court to consider the plethora of mitigating circumstances which may render a 90 day jail sentence crushing and grossly disproportionate. (*R v Okoro*, 2018, para. 59)

Thus, the overall sentence consisted of three months imprisonment for the sexual exploitation offences (concurrent), and one-month imprisonment for the sexual assault offences (concurrent to each other and consecutive to the sexual exploitation counts).

Interestingly, Bacchus J. also found an opportunity to discuss the minimal impairment branch of the *Oakes* test when applied to the offence of sexual exploitation. Differentiating an exploitative relationship from a breach of trust, he directed courts to consider the age difference between the offender and victim (among "other factors") in the former cases, but not necessarily in the latter cases.

[73] The sexual assault charges concerned a victim who was of legal age at 19-years old.

6.2.5. Child Luring

Table 6-10. Summary of Cases – Child Luring (8)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v BS* (2018)	s. 172.1(1)(b)/ s. 172.1(2)(a)	One year	Yes	Yes
	R v Morrison (2017)	s. 172.1(2)(a)	One year	Yes	*
	R v Randall (2019)	s. 172.1(2)(b)	Six months	No	Yes
VALID	*Lavoie Santerre c Attorney General of Canada* (2016)	s. 172.1(2)(a)	One year		
	R v Allen (2018)	s. 171.1(2)(a)	90 days		
	R v Clarke (2018)	s. 172.1(1)(a) s. 171.1(1)(b)	One year Six months		
	R v Duplessis (2018)	s. 172.2(2)(b)	Six months		
	R v Wheeler (2017)	s. 172.2(2)(a)	One year		

The cases in this section involve offenders charged under s. 172.1 (child luring) and s. 172.2 (agreement or arrangement to commit a sexual offence against a child). The subsections identify predicate offences triggering these provisions, dependent on the victims' age:

> **Luring a child**
>
> **172.1 (1)** Every person commits an offence who, by a means of telecommunication, communicates with
>
> > **(a)** a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subsection 153(1), section 155, 163.1, 170, 171 or 279.011 or subsection 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2);
> >
> > **(b)** a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or
> >
> > **(c)** a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person … [emphasis added]

Section 172.2 subsection (1) reads: “Every person commits an offence who, by a means of telecommunication, *agrees with a person, or makes an arrangement with a person, to commit an offence* …” [emphasis added] and includes the same offences and age cutoffs as s. 172.1(1).

Like other sex offences, the minimum and maximum sentences for child luring have grown increasingly punitive. Prior to 2007, s. 172.1 prescribed no minimum sentence, but included a maximum five-year penalty (*Lavoie-Santerre c Attorney General of Canada*, 2016, para. 18). Between 2007 and 2012, the minimum sentence was six months, while the maximum doubled (*Lavoie-Santerre c Attorney General of Canada*, 2016, para. 18). Since 2012, the offence attracts a 12-month minimum sentence and a 14-year maximum sentence (*Lavoie-Santerre c Attorney General of Canada*, 2016, para. 18). Three cases have deemed provisions under s. 172.1 invalid: (1) *R v BS* (2018) [hereinafter *BS*], (2) *R v Morrison* (2017) [hereinafter *Morrison*], and (3) *R v Randall* (2019) [hereinafter *Randall*].

In *BS* (2018), the offender was convicted of both sexual interference (s. 151) and child luring (s. 172.1); each prescribe a one-year minimum sentence of imprisonment when the Crown proceeds by indictment (s. 172.1(2)(a)). Mr. S committed these crimes over a three-year period and on multiple occasions; the victim was 13 years old (a 25-year age difference) and part of his extended family. The court declined to re-examine the constitutionality of s. 151, which was previously struck down in *Scofield* (2018). However, it found s. 172.1(1)(b) was also constitutionally invalid; a one-year sentence was twice the appropriate punishment for Mr. S. Crown counsel argued that “reading in” a 90-day minimum (i.e., the minimum when proceeding summarily) was a sufficient remedy. Citing *ERDR* (2016), Sharma J. rejected this approach and held:

> It is a clear and gross intrusion into the legislative sphere for this Court to purport to state what a mandatory minimum should be … A mandatory minimum sentence is inherently a policy-focused and political decision, reserved for Parliament. Sentencing judges are guided by the mandatory considerations in the *Criminal Code* and the common law. To declare what a mandatory minimum sentence should be for all offenders would be antithetical to the task of a sentencing judge … Crown points out that if the minimum sentence is struck down for offences that are prosecuted by indictment that would create an anomaly. There would be a constitutional mandatory minimum sentence where Crown proceeds summarily, but not when the Crown proceeds by indictment. While that is true, it is a problem for Parliament to address and not this Court. There is nothing inherently

> unconstitutional or clearly absurd about that result, even if it seems illogical. (*R v BS*, 2018, para. 14-16)

Mr. S received a total 18-month sentence, 12 months for sexual interference and six months for luring, to be served consecutively. As the offences did not constitute "one endeavour," and to give "sufficient weight" to each offence, the court refused to impose concurrent sentences (*R v BS*, 2018, para. 22).

This successful challenge followed the Ontario Court of Appeal's decision in *Morrison* (2017). In *Morrison* (2017), the offender posted an advertisement in the casual encounters section of Craigslist. A police officer posed as a 14-year old girl, and began speaking with Mr. Morrison for a period of two-months; the conversations were sexual in nature despite "teenage-appropriate" language suggesting the girl was underage (*R v Morrison*, 2017, para. 16). Mr. Morrison argued that the website's age requirement (18 years of age) led him to believe he was merely role-playing with an adult (although there were no indicators in the advertisement that Mr. Morrison sought role-play or that it was limited to individuals over the age of 18). A pertinent consideration for the court was whether Mr. Morrison believed he was speaking to an underage person and whether he took reasonable steps to ascertain her age. Furthermore, the circumstances leading up to his arrest and conviction did not result in "actual" harm, creating uncertainty about whether a sexual offence would have occurred at all (*R v Morrison*, 2017, para. 105).

The appropriate sentence was four months imprisonment (absent the mandatory minimum), although Gage J. (the trial judge) imposed a 75-day intermittent sentence after declaring the minimum sentence unconstitutional. The Crown appealed the declaration of invalidity and the fitness of sentence. The Ontario Court of Appeal reiterated that child luring is an inchoate offence that punishes preparatory conduct intended to "facilitate a designated offence involving the sexual exploitation of a young person," and not simply communication via computer to an individual who is underage or of legal age (*R v Morrison*, 2017, para. 39). It accepted the trial court's conclusion that while Mr. Morrison did not take reasonable steps to ascertain the age of the individual he communicated with, the Crown did not prove Mr. Morrison subjectively believed the person to be underage. Akin to punishing negligence less than criminal intention, Gage J. described Mr. Morrison as "indifferent" to the age of the individual and found that this was less blameworthy than circumstances where an offender "knows or actively hopes" such individual is underage (*R v Morrison*, 2017, para. 105). Agreeing that the "range of

seriousness under s. 172.1 is evidently very wide," the Court of Appeal refused to consider reasonable hypotheticals or interfere with the trial court's decision (*R v Morrison*, 2017, para. 128).[74]

The offender in *Randall* (2018) was also caught through a sting operation, a seemingly common policing strategy for child luring offences. While Mr. Randall's advertisement specified "any age," the police responded as a 15-year old "girl" (*R v Randall*, 2018, para. 6). Over 48 hours, Mr. Randall was caught sending sexually explicit videos and messages, and attempting to meet her with a knapsack of "devices" (*R v Randall*, 2018, para. 8). At the time of the offence, Mr. Randall reported taking Lorazepam and drinking alcohol, a combination that "diminished self control" (*R v Randall*, 2018, para. 22). Following the offence, he switched to psychotherapy, which supposedly eliminated a "causation factor" and provided an opportunity for him to address his own prior sexual abuse (*R v Randall*, 2018, para. 22).

Although the Crown sought a nine to 12-month sentence, this case revealed a discrepancy in punishments under s. 172.1: the one-year mandatory minimum (by indictment) had already been struck down, leaving the six-month mandatory minimum (by summary conviction) constitutionally suspect. According to Wakefield J., the result of this inconsistency was that

> … an indictable election lacks any minimum sentence, while the summary election does have a minimum. In other words, the least egregious offender against whom the Crown elects by way of indictment can receive a lower sentence than the same offender on the same facts would receive if proceeded summarily. (*R v Randall*, 2018, para. 4)

Absent the mandatory minimum, Wakefield J. provided two potential sentences: a six-month sentence, which accounted for the circumstances of the offence, and a three-month intermittent sentence, which accounted for the circumstances of the offender. The appropriate sentence increased to nine months after consideration of the six-month minimum and the fact that Mr. Randall was not the "least egregious" offender (*R v Randall*, 2018, para. 30).

[74] Interestingly, the SCC later reversed the conviction and ordered a new trial on other constitutional grounds. It did not address the s. 12 issue on this appeal. See *R v Morrison*, 2019 SCC 15.

Defence counsel admitted that, on the facts of the particular case, a nine-month sentence was not grossly disproportionate. However, the court eventually found the mandatory minimum unconstitutional based on reasonable hypotheticals. Several observations contributed to this finding. First, the minimum sentence under s. 172.1 precludes consideration of the victim's age and whether the child is real or imaginary, despite differences in resulting harm. Second, s. 172.1(1) prescribes the same minimum sentence as s. 151 and s. 152, with the only "substantive difference" being whether the victim is "beyond" or "within" touching distance – a difference that fails to account for potential increased harm when the victim is within touching distance (*R v Randall*, 2018, para. 35). Third, certain sections of the *Code* (1985) (such as s. 271 or s. 281) possess a minimum sentence for communicative acts and not necessarily completion of the offence, providing a lower "sentencing bar" in cases where actual harm results (*R v Randall*, 2018, para. 36).[75] Fourth, minimum sentences curtail a judge's ability to consider the personal circumstances of the offender, including their rehabilitative potential, and a sentencing option that reflects this. Lastly, despite lack of misconduct and the legitimacy of prosecutorial discretion:

> The prior holding that the minimum sentence of one year on indictable elections was unconstitutional has had an impact on the validity of the still surviving minimum sentence following a summary election and upon the public perception, in my view, of that impact on sentencing and the role the Crown plays in creating that impact … that public perception would be observing a Crown's decision to elect summarily to deprive an offender of having the same starting point in assessing an appropriate sentence. The least egregious offender would have a sentence potentially six months shorter as a benefit to an indictable election. The different sentencing starting points has created an automatic "scaling up" upon a summary election (*R v Randall*, 2018, para. 44-47)

Subsidiary consequences of the Crown's election to proceed summarily include the inability of permanent residents to appeal a deportation order, and a "disincentive to consent to summary election," increasing legal system costs and the likelihood of victims testifying twice (*R v Randall*, 2018, para. 49). The court concluded these served as "examples both individually and cumulatively far more than minimally impairing the infringed upon right to an appropriate sentence" (*R v Randall*, 2018, para. 53). Consequently, Mr. Randall received a 90-day intermittent sentence. While many

[75] An analogy to impaired driving offences was made, given that all impaired drivers present risk, but those who cause actual harm receive "escalated" sentences.

minimum sentences survive the rational connection branch of the *Oakes* test, Wakefield J. noted that this rationality can be "severely undermined" (*R v Randall*, 2018, para. 53). Where certain sections of the same offence prescribe a minimum sentence and others do not, there is potential for an offender to receive a more punitive sentence when Crown proceeds summarily, even if there is minimal harm.

The courts in five cases have upheld the validity of s. 172.1 and s. 172.2: (1) *Lavoie-Santerre c Attorney General of Canada* (2016) [hereinafter *Lavoie-Santerre*], (2) *R v Allen* (2019) [hereinafter *Allen*], (3) *R v Clarke* (2018) [hereinafter *Clarke*], (4) *R v Duplessis* (2018) [hereinafter *Duplessis*], and (5) *R v Wheeler* (2017) [hereinafter *Wheeler*]. In *Lavoie-Santerre* (2016), the offender contacted his young victims through social media in attempt to facilitate meetings; the conversations were sexual in nature. He was eventually caught in a police sting operation while meeting someone he believed to be a young girl. The court acknowledged that the offender suffered from Tourette's syndrome and possessed a "cognitive developmental delay," but did not agree that the appropriate sentence could be less than 12 months imprisonment (*Lavoie-Santerre c Attorney General of Canada*, 2016, para. 21). Following his first offence, Mr. Lavoie-Santerre violated his undertaking by using a computer and contacting another girl under the age of 16. A psychologist testified that the offender's deficits made it so he "always" posed the *risk* of reoffending (*Lavoie-Santerre c Attorney General of Canada*, 2016, para. 47). As the aim of s. 172.1 is to capture conduct that is preparatory or inchoate, the minimum sentence was not "cruel and unusual," as required by s. 12 of the *Charter* (1982). The court did not move on to consider reasonable hypotheticals.

In *Allen* (2018), the offender was convicted of making sexually explicit material available to a child[76] after directing an undercover officer (posed as a 14-year old girl) to two adult, pornographic websites over the span of several months. The Crown's position was that Mr. Allen's behaviours were intended to "lower a child's inhibitions" and "desensitize" her in preparation for committing sexual assault and/or sexual interference (*R v Allen*, 2018, para. 5). The evidence supported that he did, in fact, believe he was speaking with a 14-year old girl. Additionally, Crown counsel argued that the minimum sentence could not be grossly disproportionate, as Mr. Allen deserved a sentence in

[76] Paragraphs (a), (b), and (c) in s. 171.1(1) are identical to those in s. 172.1(1); however, s. 171.1(1) makes it an offence to "transmit, make available, distribute or sell sexually explicit material" to a child (*Criminal Code*, 1985, s. 171(1)).

excess of 90 days. Mr. Allen argued that several factors (e.g., lack of harm and an imaginary victim) justified a sentence below the range established in *Morrison* (2017) (between four months and two years) (*R v Allen*, 2018, para. 23). The court accepted that "making sexually explicit material available to children" is "an adjunct to, and part of, the grooming process inherent in child luring" and a "gateway" to sexual exploitation (*R v Allen*, 2018, para. 20). It agreed that, in such cases, incapacitation of the offender overrides his or her rehabilitative potential. Furthermore, review of the case law did not support a sentence below 90 days; *Morrison* (2017) was distinguished in that it dealt with a "merely reckless" offender, a standard lower than Mr. Allen's specific intent (*R v Allen*, 2018, para. 32-33). DiTomaso J. refused to consider reasonable hypotheticals given that he could not envision circumstances where a 90-day sentence would be "grossly disproportionate."

Clarke (2018) addressed the constitutionality of both s. 172.1(1)(a) and s. 171.1(1)(b) (in addition to a child pornography-related charge). Mr. Clarke was a 67-year old man who used the Internet to present and create an "identity" of himself as a teenaged boy; he solicited over 3000 sexually explicit images of teenaged girls between the ages of ten and 16 (*R v Clarke*, 2018, para. 50, 131). He had three prior sexual offence convictions for child luring and possession of child pornography (*R v Clark*, 2018, para. 62). Gorman Prov. Ct. J. described the recent offence as "planned, deliberate and considered," a "systematic" crime of "forethought, not crimes of opportunity or passion" (*R v Clarke*, 2018, para. 50, 130, 132). Defence counsel sought a 12-month sentence consecutive to the sentence Mr. Clarke was already serving, while the Crown sought a six to seven year sentence. In its review of the case law and hypothetical scenarios previously entertained, the court found that the minimum sentences in s. 172.1(1)(a) and s. 171.1(1)(b) did not impose grossly disproportionate punishment; however, the "wide spectrum" of conduct captured by 163.1(4.1) did violate s. 12 of the *Charter* (1982) in hypothetical scenarios (*R v Clarke*, 2018, para. 238).[77] Despite deeming s. 163.1(4.1) invalid, Mr. Clarke nonetheless received the one-year minimum sentence mandated in this subsection. The total sentence imposed was eight-years imprisonment, which was not only significantly higher than the mandatory minimums, but also a year higher than the sentence requested by the Crown.

[77] For purposes of this research, *Clarke* (2018) was considered "valid" due to its categorization as primarily a child luring case.

In *Duplessis* (2018), the offender was subject to a six-month minimum sentence, as the Crown proceeded by summary conviction. The circumstances of the offence involved Mr. Duplessis describing sexual acts he would commit against a mother and three-year old daughter, which he later construed as merely "role-playing." These victims were both fictitious and created as part of a police sting operation. The Crown sought a 15-month sentence of imprisonment, more than double the minimum, and two years probation. Defence counsel proposed three possible outcomes: a 15 to 18-month conditional CSO, a 90-day intermittent sentence if a period of incarceration was required, or a 6-month sentence if the mandatory minimum withstood constitutional scrutiny. Javed J. found that neither a CSO nor intermittent sentence was available given the nature of the offence. He clarified that failure to complete the offence(s) is not a mitigating factor, as the purpose of s. 172.2 is to catch offenders prior to criminal conduct. While noting that few sentencing decisions address s. 172.2, he felt that those discussing s. 172.1 were qualitatively similar enough for comparison.

Defence counsel once again relied on the decision in *Morrison* (2017) in attempt to argue that the sentencing floor should start at four months. The court rejected this assertion because Mr. Morrison had not actually arranged a meeting; rather, he had failed to take reasonable steps to ascertain the victim's age. Furthermore, the fact that the communication involved a third party rather than direct communication with a minor was not argued, although the court agreed that both provisions aim to protect vulnerable children. With respect to whether this case constituted a "super summary" offence, Javed J. conceded:

> *Morrison* dealt with a 1 year MMP, not a 6 month MMP, where arguably a consideration of proportionality and Crown discretion *may* be important. That too wasn't argued before me. The summary election may create an inflationary floor, however, I have chosen to simply ignore how the Crown chose to proceed as I consider the constitutional arguments in the abstract. Without deciding the issue, there may be a difference *vis a vis* proportionality if the defendant was facing a 1 year MMP as opposed to a 6 month MMP. (*R v Duplessis*, 2018, para. 41)

Starting with six months as the lower end of the sentencing range, several factors justified an upward departure from the minimum sentence: Mr. Duplessis knew the victim was three years old, described the commission of multiple sexual acts, involved elements of grooming, and encouraged a breach of trust between mother and daughter.

The appropriate sentence was found to be 12 months imprisonment (exactly double the minimum).

A related provision is s. 172.2(1), which prohibits agreeing to or arranging a sexual offence with a child. The one-year minimum sentence was challenged in *Wheeler* (2017). The court described the conduct captured by this provision as "prophylactic," meaning that such conduct "occurs on the way toward the commission" of the offence (*R v Wheeler*, 2017, para. 8). There are few details about Mr. Wheeler's particular offence, although it involved explicit online conversations with a mother (whose daughter was the intended victim). The court did not rely on the presented case law, as sentences for those offenders were complicated by sentences for additional offences, some consecutive and some concurrent. However, it identified the range of sentence for "similar" offences and offenders to be between 12 months and two years. The range of sentence for Mr. Wheeler, in particular, was between nine and 12 months. As Mr. Wheeler had travelled to a location in attempt to meet with the mother and child, his moral blameworthiness was high and the accompanying sentence did not, therefore, meet the threshold of gross disproportionality. The court did not consider any hypothetical scenarios.

6.2.6. Human Trafficking and Prostitution-related Offences

Table 6-11. Summary of Cases – Commodification of Sexual Activity (7)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R c Lalonde* (2017)	s. 212(4)	Six months	No	Yes
	R v Alvi (2018)	s. 286.1(2)(a)	Six months	Yes	Yes
		s. 286.1(2)(b)	One year	Yes	Yes
	R v Badali (2016)	s. 212(2)	Two years	No	Yes
		s. 212(4)	Six months	No	Yes
	R v Finestone (2017)	s. 279.011(1)(b)[78]	Five years	No	Yes
	R v JLM (2017)	s. 212(4)	Six months	No	Yes
	R v Robitaille (2017)	s. 286.2(2)	Two years	Yes	Yes
	R v Safieh (2018)	s. 286.3(2)	Five years	No	Yes
		s. 718.3(7)	–		

Section 286 consists of offences related to the "Commodification of Sexual Activity." This section replaces s. 212, which similarly prohibited prostitution-related offences. Receiving material benefit from sexual services provided by a person under the age of 18 (s. 286.2(2)) carries a two-year minimum sentence and a 14-year maximum sentence, the same penalties as those formerly prescribed under s. 212(2) ("living on the avails of prostitution of a person under the age of 18"). Prostitution of a person under 18 (formerly s. 212(4)) originally carried a six-month minimum sentence and a five-year maximum sentence. Its replacement, section 286.1(2), now prohibits "obtaining sexual services for consideration from a person under 18 years of age"; the maximum sentence has been raised to 10 years, while the minimum sentence remains six-months for a first offence, but one-year for each subsequent offence. There are no minimum sentences of imprisonment for these offences if they are committed against an individual that is 18-years of age or older, although there are minimum fines and maximum terms of imprisonment.

All seven cases raising constitutional challenges against these provisions have resulted in a declaration of invalidity. These include: (1) *R c Lalonde* (2017) [hereinafter

[78] Subsection (1) applies to a variety of conduct and reads: "Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person under the age of eighteen years, or exercises control, direction or influence over the movements of a person under the age of eighteen years, for the purpose of exploiting them or facilitating their exploitation…" (*Criminal Code*, 1985).

Lalonde], *R v Alvi* (2018) [hereinafter *Alvi*], *R v Badali* (2016) [hereinafter *Badali*], R *v Finestone* (2017) [hereinafter *Finestone*], *R v JLM* (2017) [hereinafter *JLM*], *R v Robitaille* (2017) [hereinafter *Robitaille*], and *R v Safieh* (2018) [hereinafter *Safieh*].

Lalonde (2017) addressed the constitutionality of the prior communication provision under s. 212(4), now repealed. At that time, the minimum sentence was six months imprisonment. While the court found the minimum sentence was not grossly disproportionate for Mr. Lalonde, who paid for the sexual services of two minors on multiple occasions, it accepted the hypotheticals relied on in *Badali* (2016). In that case, Glass J. found the prostitution-related provisions could impose grossly disproportionate punishment on hypothetical offenders, such as a heterosexual couple who rely on "the female partner [engaging] in sexual experiences for money and her male partner acts to draw in customers. And the female partner is under 18 years of age. She is the one to suggest this economic salvation" (*R v Badali*, 2016, para. 66).[79] In Glass J.'s view, these were "particular persons" that were "never contemplated" by the provisions (*R v Badali*, 2016, para. 66). The court in *Lalonde* (2017) also proposed one hypothetical of its own: an 18-year old asking a 17-year old classmate to flash her breasts for $25. The court found this scenario violated s. 12 because the individual would receive the mandatory minimum sentence *even if* the offer were refused. While the section was subsequently deemed invalid, Mr. Lalonde received a 12-month custodial sentence and a 12-month probationary term. Given the number of occasions the offence took place (four) and the significant sum of money Mr. Lalonde was willing to pay, the court rejected a CSO. At the same time, the 12-month sentence of imprisonment was six months shorter (and the probationary period 24 months shorter) than the sentence originally sought by the Crown.

In *JLM* (2017), the offender was convicted of communicating and obtaining the sexual services of his 16-year old niece. He appealed his seven-month sentence on grounds that the trial judge failed to consider the constitutionality of the six-month minimum sentence and the impact of his Aboriginality; he argued the fit sentence was a three-month CSO. The court acknowledged that Mr. JLM's upbringing was "unstable and

[79] Mr. Badali was convicted under both s. 212(2) and s. 212(4). He was the "owner" and/or "boss" of a "spa" offering the sexual services of underage girls, who he also had sexual intercourse with (*R v Badali*, 2016, para. 29-30). The minimum sentence was not grossly disproportionate for Mr. Badali, in particular, who had a lengthy criminal history (19 prior convictions).

abusive," stemming from intergenerational effects of colonialism and residential schools (*R v JLM*, 2017, para. 29). Furthermore, Mr. M suffered from several physical and mental health issues. Bennett J. A. agreed that both the sentencing judge and Crown failed to sufficiently consider the offender's Aboriginal background and "misconstrued" the approach to sentencing Aboriginal offenders:

> The judge's failure to give tangible effect to J.L.M.'s Aboriginal background; his requirement for a link between his background and offence; his conclusion that J.L.M. had not experienced any disadvantages related to his Aboriginal background; and his implication that J.L.M. lacked a sufficient connection to an Aboriginal community were significant errors. He failed to consider how J.L.M.'s background and systemic disadvantages created his criminogenic factors … his isolation; and his inability to comprehend the significance of his offence (even today). The judge also failed to take this into account when assessing J.L.M.'s moral culpability. These errors, in my opinion, rendered the sentence imposed demonstrably unfit. (*R v JLM*, 2017, para. 38)

The court determined the sentencing range to be between a suspended sentence and a six-month sentence of imprisonment (absent the mandatory minimum). The minimum sentence was struck down on both parts of the s. 12 inquiry as a result of its broad application and potential to capture less blameworthy conduct. The trial judge refused to impose a CSO, as Mr. M's "hermit" lifestyle made it so house arrest lacked a punitive element (*R v JLM*, 2017, para. 85). However, on appeal, Mr. M received a nine-month CSO. Bennett J. A. discussed the appropriateness of this disposition, acknowledging: first, longer CSOs can accomplish the objectives of deterrence and denunciation, and second, CSOs remove an offender's freedom to choose when (s)he comes and goes.

Saunders J. A. (dissenting) agreed to allow the appeal on grounds of reducing the sentence to the six-month mandatory minimum, but disagreed about the constitutional status of s. 212(4). She highlighted deficiencies with the majority's analysis of the particularized inquiry: first, while Mr. M's sentence may have been "disproportionate" or "excessive," it did not reach the threshold of gross disproportionality, second, a sentence within the identified sentencing range cannot be grossly disproportionate, and third, a CSO that is longer than a sentence of incarceration implies that the period of incarceration is not grossly disproportionate (i.e., if a conditional sentence itself is a sentence of incarceration, albeit served in the community). She also found the hypotheticals addressed were defective in that certain

conduct (such as a kiss) does not *prima facie* qualify as a "sexual service" and would not necessarily result in a charge or conviction.

In *Finestone* (2017), the offender (and his girlfriend, Ms. Robitaille) was a pimp convicted of forcing a 14-year old girl into prostitution. The victim's "services" were purchased over a six day period by between 20 and 30 "clients," although she received no compensation; in this regard, the offence was considered greed-based (*R v Finestone*, 2017, para. 19). Despite lack of violence or threat of violence, the court found the offenders "controlled and coerced" the victim, provided instruction on how to engage in prostitution, and refused to let her leave the hotel room (*R v Finestone*, 2017, para. 98). Mr. Finestone's personal circumstances appeared sympathetic, as he suffered from drug addiction, oppositional defiant disorder (ODD), ADHD, a mood disorder (not specified), and Asperger's syndrome. Furthermore, he possessed additional psychological issues stemming from alopecia, and from being a person of colour adopted into a Caucasian family. The court paid particular attention to his therapeutic and educational strides.

Greene J. described the offence as "a small operation, with little planning involved and … not a sophisticated project" (*R v Finestone*, 2017, para. 44). It involved several aggravating factors (vulnerability, a second victim, failure to ascertain the accurate age of the victim) and no mitigating factors; however, the conduct was not at the lower or higher end of the sentencing range. Defence counsel proposed a two- to two and a half year sentence, while Crown counsel sought the five-year minimum sentence. Given the dearth of sentencing decisions pertaining to child human trafficking, the court opted to compare sentences imposed for "a broader range of offences that includes similar conduct" (namely, living off the avails of prostitution and procuring) (*R v Finestone*, 2017, para. 59).

The court found the appropriate range to be between three and five years imprisonment. Explaining that personal circumstances and objectives apart from denunciation and deterrence "play a lesser role" in child sex offence cases, Greene J. found no s. 12 violation on the particular facts of the case. Six hypotheticals were examined: four proposed by the offender, and two by the court. The court rejected the

first three hypotheticals;[80] however, the others exemplified the broad range of conduct captured under s. 279.011(b), making it constitutionally unsound. While the court was, therefore, free to impose a sentence in absence of the mandatory minimum, Mr. Finestone received a four-year sentence of imprisonment.

Mr. Finestone's accomplice, Ms. Robitaille, was charged with receiving material benefit from the sexual services of a child under s. 286.2(2) of the *Code* (1985), as a result of Mr. Finestone spending some of the payments on her. The Crown sought the two-year minimum sentence, while defence counsel argued for a suspended sentence or CSO. Ms. Robitaille's role was limited to advising the victim on how to act and perform (i.e., how to engage in prostitution). She also confiscated the victim's phone and means of contact. However, a second victim "worked for" Ms. Robitaille, who kept the payment (although it was then returned to Mr. Finestone).

Ms. Robitaille's personal circumstances included a history of drug addiction, sexual abuse, and other traumas experienced as a child prostitute herself. The court accepted that Mr. Finestone was controlling, manipulative and at times abusive. A doctor testified that this abuse "interfered with Ms. Robitaille's judgment" (*R v Robitaille*, 2017, para. 35). While on bail, Ms. Robitaille made several positive changes in her life related to employment, education, counselling, and addiction. Though she was not diagnosed with any mood or personality disorder(s) following a suicide attempt, a doctor testified that one could evolve with lack of supports and that "Ms. Robitaille's rehabilitation would be better served through community programs" (*R v Robitaille*, 2017, para. 53). Greene J. concurred, explaining:

> Ms. Robitaille was sexually exploited as a young person and while at the time of these offences she was an adult, she was still being sexually exploited. In my view, this places Ms. Robitaille in a very unique position and allows the court to consider her potential and need for rehabilitation in conjunction with deterrence and denunciation. (*R v Robitaille*, 2017, para. 67)

This factor combined with the lack of "judicial application" of s. 286.2(2)[81] made it difficult to identify the appropriate range of sentence. The court noted that sentences of two years and more are justified for "traditional pimps" rather than "offending victims" who

[80] They were not captured by the relevant section or were deemed unreasonable.

[81] At the time, the offence in this form was new to the *Criminal Code* (1985).

receive material benefit for assisting them (*R v Robitaille*, 2017, para. 95). While victimization does not preclude criminal liability, Ms. Robitaille herself was "in the midst of her own victimization"; there existed no "meaningful gap" between her exploitation and the offence at bar (*R v Robitaille*, 2017, para. 96). With respect to the appropriate sentence, Greene J. concluded: first, the range for Ms. Robitaille would not exceed 22 months; second, absent Ms. Robitaille's unique circumstances, a sentence greater than two years would likely have been imposed; and third, a mandatory minimum triple the proportionate eight-month sentence is not constitutionally valid. Giving weight to denunciation and deterrence, a CSO was rejected. The court acknowledged, as it had in *Finestone* (2017), that where personal circumstances and other sentencing objectives "play a lesser role," it is more likely that a minimum sentence will survive constitutional scrutiny (*R v Robitaille*, 2017, para. 114).

In *Safieh* (2018), the offender challenged the constitutionality of both s. 286.3(2) and s. 718.3(7)(b). Mr. Safieh was subject to a 10-year minimum sentence (five years per victim to be served consecutively). The circumstances of the offence were that Mr. Safieh recruited two 16-year old girls to prostitute themselves from a hotel room in exchange for money and drugs. The group home where the girls resided notified the police. As a result of police intervention at the hotel, the girls never engaged in prostitution and the pictures taken of them undressed were never distributed.

Two hypotheticals were proposed. While the Crown agreed they were "reasonable," the court found they were modified to appear overly sympathetic and were less similar to Mr. Safieh's case than purported. It acknowledged that the crux of the issue was whether procurement, and not actual prostitution, occurred.[82] Even if the circumstances of the offence concerned an 18-year old offender and 17-year old victim in a boyfriend/girlfriend relationship (the basis of hypothetical one), an individual is nonetheless taking advantage of a minor deserving of protection. The disparity created by a two-year minimum sentence when tried as a youth but a five-year sentence when tried as an adult was irrelevant, assuming judges would not impose an adult sentence on a youth where it was unwarranted. If this were the basis of the constitutional issue, all minimum sentences in the *Code* (1985) would possess potential to infringe s. 12 (*R v Safieh*, 2018, para. 32). McKelvey J. argued that while s. 286.3(2) had a "significantly

[82] That the child actually engages in prostitution is not an element of the offence under s. 286.3(2).

narrower scope than some other provisions which have been found to violate s. 12", it nonetheless caught individuals of varying degrees of moral blameworthiness (*R v Safieh*, 2018, para. 13).

On the other hand, the basis of hypothetical two was modelled after the circumstances in *Robitaille* (2018). The result was that offenders who abuse or exploit children (for financial or other gain) are qualitatively different than "youthful sex trade workers who have been victims themselves of exploitation at the hands of their pimp" (*R v Safieh*, 2018, para. 14). The court agreed that such cases produce "exceptional circumstances" that should not attract the minimum sentence. The appropriate sentence for Mr. Safieh was between two and two and a half years imprisonment; a five-year minimum sentence was double the proportionate sentence, subjected a hypothetical offender to potential re-victimization, and displaced emphasis on rehabilitation. Therefore, the minimum sentence prescribed by s. 286.3(2) was deemed unconstitutional.

In addition to *Robitaille* (2017), *Alvi* (2018) was the only other decision in this set of cases to deem a human trafficking/prostitution-related provision constitutionally invalid on the particularized inquiry. At issue was the constitutionality of s. 286.1(2), a specific intent offence that requires communication *for the purpose of* obtaining sexual services of a minor (in exchange for money) (*R v Alvi*, 2018, para. 8). Mr. Alvi was arrested as part of a police sting operation, which targeted individuals seeking such services through online advertisements. As such, the case is distinct in that the "victim" was fictitious, and no exchange or receipt of sexual services could or did occur. Mr. Alvi was aware that the "victim" was 17-years old. The court found that the appropriate sentence for a youthful (20-years old), first time offender, who would likely be a productive citizen (Mr. Alvi was about to complete his engineering degree), was 90 days. Both mandatory minimums (a six-month minimum sentence for a first offence and a one-year minimum sentence for each subsequent offence) were, therefore, grossly disproportionate to Mr. Alvi in particular. The court considered one hypothetical raised in *Robitaille* (2017) and one hypothetical raised in *JLM* (2017). Given their success in those cases, it is unsurprising that s. 286.1(2) was also deemed unconstitutional on the hypothetical inquiry in *Alvi* (2018).

6.2.7. Incest

Table 6-12. Summary of Cases – Incest (2)

	Case	Section	Minimum
VALID	*R c MRM* (2019)	s. 155(2)	Five years
	R c YP (2018)	s. 155(2)	Five years

Under s. 155(1), "incest" involves sexual intercourse between an individual and his or her parent, child, brother, sister, grandparent or grandchild. Section 155(4) specifies that "brother" and "sister" include half-brothers and half-sisters. Prior to enactment of the *Safe Streets and Communities Act* (2012), s. 155(2) did not contain a minimum sentence and applied when the victim was under the age of 14 (*R v MRM*, 2019, para. 34). The current provision introduces a five-year minimum sentence and applies when the victim is under the age of 16. The two cases (*R c MRM* (2019) [hereinafter *MRM*] and *R c YP* (2018) [hereinafter *YP*]) challenging the constitutional validity of s. 155 both found the prescribed minimum sentence does not impose cruel and unusual punishment.

In *MRM* (2019), the offender (a Haitian immigrant) was initially charged with both sexual interference and incest. Because sexual contact is a constitutive element of incest, the court concluded that the offender's conduct amounted to a single criminal offence; accordingly, it did not engage in constitutional analysis of s. 151. The offender (beginning at 18-years old) was convicted of incest with his 12-year old sister. She eventually became pregnant with his child, who was born with various special needs and health issues. Although the offender and victim did not grow up together, the court held the relationship involved a breach of trust that extended over a significant period of time. Defence counsel sought a six-month sentence or less and two years probation, while Crown counsel argued for a five to six year sentence of imprisonment. Despite potentially severe consequences for the offender and lack of need for treatment or supervision, the court refused to impose a non-penitentiary sentence. While acknowledging the case law did not contain similar facts to the case at hand, it concluded

> What emerges from these decisions is the fact that decisions involving brother-sister incest do not justify a scale much different than the parent-

> child scale despite a certain difference in the relationship of trust … there is no case law that justifies a sentence as low as that demanded by the Applicant. The consequences of immigration do not affect the sentence in this case. (*R c MRM*, 2019, para. 76)

The appropriate sentence was the minimum five years imprisonment, thereby thwarting success of the particularized inquiry. The hypothetical proposed was rejected as "whimsical," and for having "no impact on the victim and the harm created by the alleged act" (*R c MRM*, 2019, para. 81-82). While the court altered the hypothetical to avoid these flaws,[83] it nevertheless found a three and a half to six year sentence appropriate. The court did not feel that the minimum sentence was "overly disproportionate," even if the potential offender received a sentence at the lowest end of that scale (*R c MRM*, 2019, para. 90). Importantly, Labrosse J. cautioned that a finding of gross disproportionality is contextual and not "a mathematical calculation as to whether the applicable sentence is 60%, 70% or 80% of the minimum sentence" (*R c MRM*, 2019, para. 89). The relevant considerations include: (1) incest is viewed as "socially repugnant" and "hateful," (2) the offence is "precisely" defined in the *Code* (1985), (3) the offence does not catch a "wide variety of behaviour or circumstance," and (4) whether the sentence is three and a half years or five years does not impact institutional decisions (*R c MRM*, 2019, para. 90).

A similar conclusion was reached in the earlier decision *YP* (2018). The offender in that case was convicted of incest after having penetrative vaginal sex with his 15-year old daughter. He had immigrated to Canada with his second wife and youngest two children after an outbreak of civil war in Nigeria; he eventually sponsored his two oldest daughters, who he previously abandoned. Neither the offender nor the victim testified; he denied the events occurring and the victim could not be found. Crown counsel sought the minimum five-year sentence (within a range of two to eight years), while defence counsel submitted that a 15-month sentence and probation was appropriate (within a range between six months and four years). The court highlighted the severity of the offence, arguing: "It is difficult to imagine a more heinous crime in the eyes of the Canadian community … incest necessarily implies a penetrating sexual relationship by a parent *whose legal and moral duty is to protect his child*" [emphasis added] (*R c YP*,

[83] The circumstances were: "It would be a brother and a sister, one major and the other minor, but close in age, who did not grow up together, with a single incident of sexual intercourse involving a delinquent who does not has no criminal history" (*R c MRM*, 2019, para. 82).

2018, para. 48). It refused to consider the offender's absence in the victim's life (from age three to 15) and lack of "significant emotional bond" as mitigating factors (*R c YP*, 2018, para. 50). Given scarce evidence related to risk of recidivism or rehabilitative potential, and no testimony to help assess remorse or regret, the only mitigating factor was lack of criminal record. The court identified the following applicable factors when sentencing individuals convicted of incest:

> The frequency and nature of the abuse, the length of time it occurred, the absence of threats or other forms of violence, the existence of circumstances such as a guilty plea, criminal record, recognition by the abusive parent severity of acts committed, the remorse, a possibility of rehabilitation or the completion of therapy thus decreasing the risk of recurrence… (*R c YP*, 2018, para. 56)

Relying on case law from 2001 to 2012, the court observed an increase in the severity of punishment, concluding that a "high concentration" of five-year sentences had been imposed within the range of 18 months to 10 years (*R c YP*, 2018, para. 56). Consequently, the minimum sentence prescribed by s. 155(2) was not grossly disproportionate to the circumstances of Mr. P. Neither was it grossly disproportionate to a hypothetical offender. A first scenario, which centered on a victim who is 15 years and 364-days old, was deemed irrelevant. A second scenario focused on an offender who commits a single incident of incest but admits his indiscretion, expresses remorse, and successfully completes treatment. The court accepted that while the decision in these circumstances "might have been different," it was not required to consider the most "sympathetic or exceptional" hypothetical offender (*R c YP*, 2018, para. 71). It admitted:

> It is true that, by definition, a minimum sentence does not take into account the frequency of the acts, their precise nature, the context, the degree of violence used, or the length of the period in which these acts were committed by a person accused. Despite this assumption, there are few reasonably foreseeable incest situations where the five-year sentence cannot be justified. (*R c YP*, 2018, para. 65)

Therefore, Mr. P received a five-year sentence of imprisonment and the minimum sentence for incest remains constitutionally valid.

6.2.8. Summary

A total of 60 cases have challenged the constitutionality of sex offence provisions within the *Code* (1985). Of these 60 cases, more than half (36 cases or 60%) have

struck down the attached minimum sentence. 14 of the 36 cases (38.9%) found a violation on the particularized inquiry, while 19 cases (52.8 %) did not. The courts in three cases did not engage in the particularized inquiry (3 cases or 8.3%).[84] 29 of the 36 cases (80.6 %) found a violation after considering reasonable hypotheticals, while seven cases (19.4%) did not move on to this part of the s. 12 analysis.

6.3. Weapons Offences

Following the mass shooting at *École Polytechnique* in Québec, heightened public concern about firearms control prompted a legislative response from Parliament. In 1995, firearms control in Canada was significantly impacted with the passing of Bill C-68, the *Firearms Act* (1995). The *Firearms Act* (1995) introduced a variety of provisions affecting firearms possession, transportation, transfer, exportation and importation, and licensing and registration. It also separated types of firearms into three categories: non-restricted, restricted, and prohibited. Resulting *Criminal Code* (1985) amendments targeted the latter two categories, imposing more severe sanctions for offences involving such firearms. This was accomplished primarily through the addition of mandatory minimum sentences. In fact, Roberts (2001) describes these mandatory minimum sentences as "the most comprehensive collection of mandatory minima in Canadian history" (p. 307). The mandatory minimum sentences for "serious firearms offences" were later increased as a result of the Conservative omnibus crime bill, the *Tackling Violent Crime Act* (2008). Currently, there are approximately 30 such firearms-related offences in the *Criminal Code* (1985), with mandatory minimum sentences ranging from one year to seven years; however, majority of these offences contain mandatory minimum sentences between four and five years.

[84] These courts recognized that the impugned provisions were already declared unconstitutional in prior case law.

6.3.1. Possession Offences

Table 6-13. Summary of Cases – Possession of Firearms (3)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v Nur* (2015)	s. 95(2)(a)(i)	Three years	No	Yes
		s. 95(2)(a)(ii)	Five years	No	Yes
VALID	*R v Chislett* (2016)	s. 96(2)(a)	One year		
	R v Ottie (2019)	s. 96(2)(a)	One year		

Prohibitions on the possession of firearms begin in s. 88 of the *Criminal Code* (1985). Section 95 and s. 96 are the only two provisions that have been constitutionally challenged. Section 95 (possession of a prohibited or restricted firearm with ammunition) is a hybrid offence that stipulates two mandatory minimum sentences. If the Crown proceeds by indictment, the mandatory minimum period of imprisonment is three years for a first offence (s. 95(2)(a)(i)) and five years for a second or subsequent offence (s. 95(2)(a)(ii)). The maximum punishment is ten years for both s. 95(2)(a)(i) and s. 95(2)(a)(ii). If the Crown proceeds by summary conviction, however, there is no mandatory minimum sentence, although there is a maximum sentence of one year (s. 95(2)(b)). Section 96 proscribes possession of a weapon obtained by the commission of an offence. Subsection 96(1) defines a "weapon" as a firearm, prohibited weapon, restricted weapon, prohibited device and/or prohibited ammunition. While s. 96 is also a hybrid offence, it differs from s. 95 in that the mandatory minimum does not distinguish first-time offenders from those who have committed two or more offences. If the Crown proceeds by indictment, s. 96(2)(a) mandates a one-year minimum sentence of imprisonment and a maximum ten-year sentence of imprisonment. Unlike s. 95, the minimum sentence in s. 96 has never increased (*R v Chislett*, 2016, para. 11).

The landmark case *Nur* (2015) was the first and only case to challenge s. 95, which was subsequently struck down in a 6:3 decision by the SCC. Two other cases address the constitutional validity of firearms-related possession offences. Both *R v Chislett* (2016) [hereinafter *Chislett*] and *R v Ottie* (2019) [hereinafter *Ottie*] found s. 96 constitutionally valid based on the particularized inquiry, although the court in *Chislett* (2016) did not move forward to the reasonable hypotheticals analysis.

In *Chislett* (2016), the offender stole several items (including a double-barrelled shotgun) while breaking and entering into a family home. He fled on a motorcycle from the family's garage and subsequently crashed it. According to doctors, Mr. Chislett sustained a serious brain injury that "wholly disabled" him and prevented him from "spontaneous adaptation to his current circumstances" (*R v Chislett*, 2016, para. 5-6). Defence counsel argued that the mandatory one-year penitentiary sentence put Mr. Chislett at risk of assault by fellow prisoners and thus, risk of additional brain trauma. Mr. Chislett also argued that he could not obtain the programming or treatment necessary for his recovery in a penitentiary setting, suggesting a CSO instead. Mulligan J. dismissed these claims, stating that the seriousness of the offence and high level of moral blameworthiness were not mitigated by circumstances "created by [one's] own criminal conduct" (*R v Chislett*, 2016, para. 26). Based on testimony from a Manager of Offender Programming, the court was satisfied Mr. Chislett could access needed medical care. The court did not hesitate imposing the one-year minimum sentence, which was actually at the lowest end of the identified one- to two-year sentencing range. The hypotheticals submitted by the defence were deemed "speculative," and unsupported by case law (*R v Chislett*, 2016, para. 45). There was no elaboration on factors that make a hypothetical merely "speculative." It is unclear exactly why the hypotheticals failed to move the court in this case and not others; arguably, the hypotheticals in *Chislett* (2016) are no more speculative than those in *Nur* (2015), for example.

In *Ottie* (2019), the court held that the appropriate sentence absent the mandatory minimum was between 10 and 15 months. While Blok J. acknowledged that Mr. Ottie's personal circumstances were "in his favour,"[85] they did not outweigh the gravity of the offence (*R v Ottie*, 2019, para. 63). In particular, Mr. Ottie's conduct attracted significant blameworthiness given the *mens rea* element of s. 96: *specific intent* that the weapon was obtained in the commission of an offence, whether a result of actual knowledge or willful blindness (*R v Ottie*, 2019, para. 63). The court rejected both submitted hypotheticals, one involving an offender who attracted a similar level of blameworthiness (despite being a party to the offence) and one where the "offender"

[85] Including that he was a young, first-time offender, who entered a guilty plea, expressed remorse, and retained community support (*R v Ottie*, 2019, para. 63).

was protected by an "innocent possession defence"[86] (*R v Ottie*, 2019, para. 94-103). The one-year mandatory minimum fell within the appropriate sentencing range for Mr. Ottie, and s. 96 consequently survived constitutional scrutiny a second time.[87]

6.3.2. Use in the Commission of a Criminal Offence

Table 6-14. Summary of Cases – Use of Firearm in the Commission of a Crime (5)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v Antwi* (2016)[88]	s. 85(4)	–[89]	Yes	Yes
	R v Superales (2018)	s. 85(3)(a)	One year	Yes	*
VALID	*R v Al-Isawi* (2017)	s. 85(3) s. 85(4)	One year –		
	R v Cogo (2015)	s. 85(3)(a)	One year		
	R v Piroli (2018)[90]	s. 85(4)	–		

Section 85 of the *Criminal Code* (1985) prohibits the use of a firearm (s. 85(1)) or imitation firearm (s. 85(2)) in the commission of an indictable offence, with the exception of several more serious offences listed in s. 85(1)(a).[91] These latter offences are addressed in other *Criminal Code* (1985) sections and require longer minimum sentences (between four and seven years). Section 85 also applies to attempts to commit an indictable offence (s. 85(1)(b) and s. 85(1)(c)), and flight from committing or attempting to commit an indictable offence (s. 85(1)(c) and s. 85(2)(c)). Notably, these

[86] This exception is also legislated in subsection (3), which effectively excludes any person "who comes into possession of anything referred to in that subsection by the operation of law and who lawfully disposes of it within a reasonable period after acquiring possession of it" (*Criminal Code*, 1985, s. 96).

[87] The court initially had difficulty establishing a sentencing range, as individuals convicted of possession of stolen firearms were previously (i.e., prior to the 1995 amendments) charged under *Criminal Code* (1985) sections related to possession of stolen property (*R v Ottie*, 2019, para. 32).

[88] The court did not engage in a constitutional analysis of the predicate offence under s. 85(3).

[89] – Indicates no stipulated minimum sentence; rather, the offender challenges the imposition of consecutive sentences.

[90] The court did not engage in a constitutional analysis of the predicate offence under s. 85(3)(a).

[91] These offences include: section 220 (criminal negligence causing death), 236 (manslaughter), 239 (attempted murder), 244 (discharging firearm with intent), 244.2 (discharging firearm — recklessness), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), subsection 279(1) (kidnapping) or section 279.1 (hostage taking), and 344 (robbery) or 346 (extortion) (*Criminal Code*, 1985, s. 85(1)(a)).

firearms offences are punishable by the same mandatory minimums under s. 85(3). In other words, the mandatory minimum sentences are the same whether the offence involves an imitation firearm or actual firearm, and whether the commission of the offence is successful or not. While both s. 85(3)(a) and s. 85(3)(b) contain the same maximum sentence (14 years), the mandatory minimum period of incarceration depends on the number of offences a person has previously committed. For a first offence, the mandatory minimum is a one-year term of imprisonment (s. 85(3)(a)). For a second or subsequent offence, the mandatory minimum is elevated to three years imprisonment (s. 85(3)(b)).

Although there is limited information about the impact of minimum sentences in Canada, one exception is a study of s. 85 by Meredith, Steinke, and Palmer (1994). While the study is now dated, it suggests an important role played by prosecutors and through the practice of plea-bargaining (Meredith, Steinke, & Palmer, 1994, as cited in Roberts, 2001, p. 10). As the probability of conviction dropped in the examined cases, approximately two-thirds of s. 85 charges were eventually "stayed, withdrawn, or dismissed" (Meredith, Steinke, & Palmer, 1994, as cited in Roberts, 2001, p. 10).

Five cases involving the use of a firearm or imitation firearm in the commission of a criminal offence have been challenged. Two of these cases found violations of s. 12 (*R v Antwi* (2016) [hereinafter *Antwi*] and *R v Superales* (2018) [hereinafter *Superales*]), while the other three did not (*R v Al-Isawi* (2017) [hereinafter *Al-Isawi*], *R v Cogo* (2015) [hereinafter *Cogo*], and *R v Piroli* (2018) [hereinafter *Piroli*]). Both *Antwi* (2016) and *Superales* (2018) found a violation of s. 12 on the particularized inquiry. While Aston J. in *Superales* (2018) did not go on to discuss reasonable hypotheticals, Fragomeni J. determined that the impugned provision in *Antwi* (2016) was also unconstitutional based on reasonable hypotheticals.

In *Antwi* (2016), the offender did not challenge the one- or three-year mandatory minimum sentence; rather, he argued that their potential "stacking effect" constituted cruel and unusual punishment (para. 16). Subsection 85(4) requires sentences for offences under s. 85(1) or s. 85(2) to be served consecutively to "any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1) or (2)" (*Criminal Code*, 1985,

s. 85(4)). As a result, Mr. Antwi faced a nine-year sentence: three consecutive one-year sentences for using an imitation firearm while committing each of three bank robberies and one six-year sentence he had already received for charges related to the same "series of events" (*R v Antwi*, 2016, para. 2).

A primary consideration for the court was whether this requirement of consecutive sentences offended the principle of totality. The Crown argued the appropriate sentence for the present charges was 15 years concurrent to Mr. Antwi's six-year mandatory minimum sentence, although it could be reduced by three years to account for the totality principle (i.e., a total 12-month sentence). Absent this reduction, the Crown's sentence recommendation was almost twice as long as the one advanced by Mr. Antwi (who sought between eight and a half to nine years served concurrently). Fragomeni J. did not explain exactly why the mandatory minimum sentence was grossly disproportionate to Mr. Antwi in particular, although this was ultimately his conclusion. While Mr. Antwi possessed a "*minor* criminal record" [emphasis added] and was "relatively young" (27 years old), the offence involved some premeditation ("casing" notes and bank addresses) and was motivated by greed (*R v Antwi*, 2016, para. 11-13). The court subsequently entertained a hypothetical involving a young, female, Aboriginal, first offender, who "waves" an imitation firearm while uttering threats to six school classmates bullying her (*R v Antwi*, 2016, para. 15). Whether these circumstances could be construed as "reasonably foreseeable" and not "overly sympathetic" did not trouble the court, which found that s. 85(4) also violated this part of the s. 12 inquiry.

The circumstances in *Cogo* (2015) are comparable to those in *Antwi* (2016), yet the court deemed s. 85(3)(a) and s. 85(4) constitutional in *Cogo* (2015).[92] Mr. Cogo was described as "immature, naïve and easily influenced by peers" and a "vulnerable" individual who likely served as an "immature dupe" for his co-accused, Mr. Halane (*R v Cogo*, 2015, para. 17, 20, 29). Mr. Halane was described as an "opportunistic and manipulative criminal," who had a history of recruiting individuals like Mr. Cogo to assist the commission of robberies (*R v Cogo*, 2015, para. 20). However, Chen Prov. Ct. J. questioned Mr. Cogo's "candidacy for rehabilitation," which appeared to diminish mitigating factors that could have supported a contrary decision (*R v Cogo*, 2015, para. 21). Discussing the role of incarceration in rehabilitating offenders, Chen Prov. Ct. J.

[92] Mr. Cogo was a youthful (21 years old), first-time offender, whose offence involved premeditation.

claimed that it is "consistent with, and even necessary to rehabilitation" (*R v* Cogo, 2015, para. 42). It seems the only significant differences between *Cogo* (2015) and *Antwi* (2016) were: (1) the weight given to the objective of rehabilitation, and (2) the submission of reasonable hypotheticals in *Antwi* (2016) and not in *Cogo* (2015).

Superales (2018) also concerned a young offender who used an imitation firearm; however, Mr. Superales wore a mask and committed only a single robbery (of a gas station). There appears to be at least two factors that contributed to Aston J.'s decision to strike down s. 85(3) on the particularized inquiry: (1) significant mitigating factors, including Mr. Superales' diagnosis of major depressive disorder and suicidal ideation, and (2) disagreement with the court's decision in *Al-Isawi* (2017), which upheld both s. 85(3) and s. 85(4). In *Al-Isawi* (2017), the British Columbia Court of Appeal maintained that use of an imitation firearm is equivalent to use of a "real" firearm (para. 39). This conclusion was inferred from the fact that Parliament enacted the same penalties for s. 85(1) and s. 85(2), and because the difference between the two types of firearms "does not impact the harm to the victim who would not know the difference" (*R v Al-Isawi*, 2017, para. 39-40). In that case, the court affirmed s. 85(2) was sufficiently narrow to capture only conduct posing high risk of harm to the public (i.e., dangerous conduct) and by extension, only culpable offenders of high blameworthiness (*R v Al-Isawi*, 2017, para. 66, 73; *R v Cogo*, 2015, para. 32-33)). Stromberg-Stein J. A. held that a conviction under s. 85(2) must satisfy two specific criteria: (1) there is an "independent" conviction for an indictable offence (i.e., the offence where the imitation firearm was used), and (2) *use* of an imitation firearm, and not merely *possession* of an imitation firearm, is proven (*R v Al-Isawi*, 2017, para. 66). Disagreeing with this conclusion, Aston J. contended:

> It seems self-evident to me that there is a difference in the moral culpability of someone using a water pistol to commit a robbery and someone else using a loaded prohibited weapon. Whether an offender uses a real or imitation firearm does not make a difference to the degree of fear, alarm or trauma experienced by the victim. However, the potential for physical harm, even death, to a victim or some innocent bystander is radically different, a difference ignored by the wording of s. 85(3). (*R v Superales*, 2018, para. 50)

Consequently, he found a five-month sentence appropriate for Mr. Superales. Similar to problems raised in *Antwi* (2016), the "stacking effect" of s. 85(4) would have required

imposition of 17-month minimum sentence[93] in the case of Mr. Superales (*R v Superales*, 2018, para. 55). The court held that a sentence triple the appropriate one would be grossly disproportionate; s. 85(3) was struck down without further analysis of reasonable hypotheticals or of a s. 1 determination. It is possible that the disparate conclusions in *Antwi* (2016)/*Superales* (2018) and *Al-Isawi* (2017) were impacted by: (1) the weight attributed to the totality principle, and (2) the weight attributed to rehabilitative potential.

The stacking effect of consecutive firearms convictions was once again challenged in *Piroli* (2018). The court summarized

> The usual argument against mandatory minimum sentencing provisions is that they are generally inconsistent with the fundamental principle of proportionality. More particularly, they operate to block the sentence from reflecting mitigating factors. Even for offences that usually call out for deterrence and denunciation, mandatory minimums do not allow for judges to make any exception in an appropriate case. The situation is compounded when judges are obliged to impose consecutive mandatory sentences for a series of offences. (*R v Piroli*, 2018, para. 63)

The Crown reasoned that the 24-month minimum sentence (two counts) was not grossly disproportionate, as a single count merited a sentence in the range of 15-18 months. While Mr. Piroli undertook rehabilitative efforts to curb his drug use, they were tempered by a pre-sentence report indicating potential recidivism in the event of relapse. Furthermore, while the court found a "lengthy sentence [was] not necessary for particular deterrence" in this case, rehabilitation "remained secondary" to deterrence and denunciation (*R v Piroli*, 2018, para. 96-97). A factor that would have generated hardship for the accused was loss of employment; however, the court determined Mr. Piroli's employment would be impacted only if he received a sentence longer than two months. Given that Mr. Piroli would be eligible for parole after serving one third of his sentence, his employment status was not compromised in the view of the court. The appropriate sentence was 18 to 20 months, which did not violate the protection against cruel and unusual punishment under s. 12.

[93] Specifically, Aston J. would have sentenced Mr. Superales to a five-month concurrent sentence for robbery, being masked while committing said robbery, and using an imitation firearm, but for the consecutive one-year minimum mandated by s. 85(4).

Several hypotheticals were raised, with detailed Crown responses to each. Accordingly, the hypotheticals failed for several reasons: the circumstances did not merit consecutive sentences or support a conviction, the predicate offence was incorrect, and/or the hypotheticals involved offenders whose personal circumstances were overly sympathetic (*R v Piroli*, 2018, para. 22). The court agreed and imposed the minimum sentence (one-year per conviction) on Mr. Piroli.

6.3.3. Discharging Offences

Table 6-15. Summary of Cases – Discharging a Firearm (11)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R c Gunner* (2017)	s. 244.2(3)(b)	Four years	Yes	*
	R c Vézina (2017)	s. 244.2(3)(b)	Four years	Yes	*
	R v Cardinal (2018)	s. 244.2(3)(a)(i)	Five years	No	Yes
	R v Dingwall (2018)[94]	s. 244.2(3)(a)(i)	Five years	No	Yes
	R v Hills (2018)	s. 244.2(3)(b)	Four years	No	Yes
	R v Itturiligaq (2018)	s. 244.2(3)(b)	Four years	Yes	*
	R v Kakfwi (2018)	s. 244.2(3)(b)	Four years	No	Yes
VALID	*R v Dingwall* (2018)[79]	s. 244(2)(a)(i)	Five years		
	R v Mohammad (2017)	s. 244.2(3)(a)(ii)	Seven years		
	R v Mohamed (2016)	s. 244.2(3)(a)(i)	Five years		
	R v Oud (2016)	s. 244.2(3)(b)	Four years		
	R v Reis (2017)	s. 244.2(3)(b)	Four years		

Section 244 of the *Criminal Code* (1985) prohibits an individual from discharging a firearm with intent to cause bodily harm or danger to another person. Additionally, it is applicable even if said person is not the intended target. Subsection 244(2) imposes mandatory minimum sentences ranging from four to seven years, and is determined by two factors: whether discharging the firearm was for criminal and/or gang-related purposes (s. 244(2)(a)), and if so, whether the case involves a first-time offender (s. 244(2)(a)(i), five years), or an offender who has committed two or more offences (s. 244(2)(a)(ii), seven years). There is no maximum sentence for such offences. In any other case, the minimum period of imprisonment is four years and the maximum is 14

[94] For purposes of this research, this case was counted as both invalid and valid because both impugned provisions fell within this set of provisions, but one was unconstitutional and the other was not.

years (s. 244(2)(b)). Furthermore, s. 244.2(1) addresses *recklessly* discharging a firearm. The mandatory minimum sentences in this subsection mirror those in s. 244.

11 cases have examined the constitutionality of the various s. 244 provisions, six resulting in a declaration of invalidity: (1) *R c Gunner* (2017) [hereinafter *Gunner*], (2) *R c Vézina* (2017) [hereinafter *Vézina*], (3) *R v Cardinal* (2018) [hereinafter *Cardinal*], (4) *R v Hills* (2018) [hereinafter *Hills*], (5) *R v Itturiligaq* (2018) [hereinafter *Itturiligaq*], and (6) *R v Kakfwi* (2018) [hereinafter *Kakfwi*]. The remaining five cases found no violation of s. 12: (1) *R v Dingwall* (2018) [hereinafter *Dingwall*], (2) *R v Mohamed* (2016) [hereinafter *Mohamed*], (3) *R v Mohammad* (2017) [hereinafter *Mohammad*], (4) *R v Oud* (2016) [hereinafter *Oud*], and (5) *R v Reis* (2017) [hereinafter *Reis*].

Cardinal (2018) and *Kakfwi* (2018), companion cases from the Northwest Territories, and *Gunner* (2017) and *Vézina* (2017), both decided in Québec, all involved individuals who were suicidal at the time of their offences. The Northwest Territories Supreme Court found a violation of s. 12 based on reasonable hypotheticals in both *Cardinal* (2018) and *Kakfwi* (2018); the particularized inquiry failed to result in grossly disproportionate sentences for the offenders. In contrast, the *Charter* (1982) challenges in *Gunner* (2017) and *Vézina* (2017) succeeded because of the particularized inquiry; reasonable hypotheticals were not addressed in either case. The personal circumstances of Mr. Gunner and Mr. Vézina appear to have played a role in the court's decision to strike down s. 244.2. In each case, emphasis was placed on the objective of rehabilitation. This is an uncommon occurrence in cases involving firearms, as the courts have consistently stressed that rehabilitation is secondary to deterrence and denunciation.

In *Kakfwi* (2018), the court argued that the risk of harm or danger from recklessly discharging a firearm is not diminished in circumstances where an individual is suicidal (Kakfwi, 2018, para. 85). In fact, Charbonneau J. warned that such risk may be "enhanced": "A suicidal desperate person has nothing to lose and may act in the most reckless of ways" (*R v Kakfwi*, 2018, para. 85). Even if the objectives of general and specific deterrence play a lesser role in these cases, denunciation remains paramount (*R v Kakfwi*, 2018, para. 81). In other words, while individuals charged under s. 244.2(1) may not have intended harm (i.e., do not need to be deterred), firearms by their very nature always involve risk of harm, especially when used recklessly.

Similarly, in *Cardinal* (2018), the offender placed a firearm to his chin intending to commit suicide. A friend pushed it away and the bullet penetrated the door; after two additional shots were fired (another at the door and one at the snow), he finally convinced Mr. Cardinal to drop the weapon. Mr. Cardinal had not intended to hurt anyone but himself; however, he was reckless as to the possibility of harming others. Mr. Cardinal experienced a difficult childhood, witnessing alcoholism and domestic violence, eventually becoming addicted to substances. He spent two years at a treatment center when he was only nine years old and then bounced between group homes until he was 17. It was acknowledged that his girlfriend also died in an accident in 2015 and that this had a "profound impact" on him (*R v Cardinal*, 2018, para. 16). Nonetheless, he agreed that the minimum sentence was applicable to him. As such, the constitutional challenge relied solely on reasonable hypotheticals. Before proceeding, Charbonneau J. reiterated the seriousness of weapons-related offences in Northern Canada, given their prevalence and use for hunting, fishing, and trapping (*R v Cardinal*, 2018, para. 66).

The proposed hypothetical involved an Aboriginal individual with inter-generational trauma, who retrieves his father's gun while intoxicated and intends to commit suicide. However, the hypothetical was described as "fundamentally different and distinguishable from any of the facts or hypotheticals examined in other cases" in that the gun was pushed away and the bullet exited through a wall (*R v Cardinal*, 2018, para. 74). It was not directed toward any other individual and it was not discharged in "anger, retaliation, to scare others, or to stop police officers from putting an end to a dangerous situation" (*R v Cardinal*, 2018, para. 74). All parties agreed that this scenario was not "remote"; indeed, Charbonneau J. reflected:

> There is nothing remote about young men in northern Canada struggling with suicidal ideations and arming themselves with firearms in times of distress. There is also nothing remote about young aboriginal people suffering from lived and inter-generational trauma. Courts hear about such circumstances on a routine basis during sentencing hearings. This hypothetical, tragically, is actually very realistic. (*R v Cardinal*, 2018, para. 70)

A comparison between firearms provisions was undertaken;[95] unlike other provisions,[96] s. 244.2 does not require harm to be caused or intended (*R v Cardinal*, 2018, para. 76).

[95] A similar analysis was discussed in *Hussain* (2015).

Other factors to consider in the range of seriousness of the offence include: the number of shots fired, the aim of the firearm, and the circumstances that follow the discharging of the firearm (i.e., relinquishing the gun or not) (*R v Cardinal*, 2018, para. 77). These considerations combined with the personal characteristics of the offender (e.g., youth, Aboriginal background, suicidality, and geographical location of penitentiaries) work to reduce (as opposed to remove) the level of moral blameworthiness (*R v Cardinal*, 2018, para. 79). The minimum sentence was struck down and the Crown did not attempt to justify the provision under s. 1.

The courts continued examination of the relationship between mandatory minimums and Aboriginal offenders/Gladue principles in *Itturiligaq* (2018). In this case, Mr. Itturiligaq fired a single shot from a rifle in attempts to get his partner to head home with him from a friend's; this shot was aimed "above the front door near the roof line," eventually exiting through the roof (*R v Itturiligaq*, 2018, para. 8). Bychok J. identified the Nunavut Court of Justice as a "Gladue court," and reiterated his constitutional duty to consider the circumstances of the Inuit people (*R v Itturiligaq*, 2018, para. 19). The Crown sought the four-year minimum penitentiary sentence, while defence counsel argued that a two-year sentence was appropriate.

Unlike the British Columbia and Manitoba Courts of Appeal, the Nunavut Court of Justice struck down this section of the *Code* (1985) on the facts of the particular case. It distinguished the "isolated and remote neighbourhoods" of Nunavut from cities such as Toronto and Vancouver, while acknowledging the traditional and cultural use of firearms for hunting and fishing (*R v Itturiligaq*, 2018, para. 44, 57-58). In addition to Canadian law, the court recognized the conflict between gun violence and Inuit "societal values" ("Qaujimajatuqangit") (*R v Itturiligaq*, 2018, para. 62).[97] The aggravating factors included the inherent seriousness and dangerousness of the offence, which possesses a double

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[96] For example, manslaughter with a firearm, attempted murder with a firearm, and/or discharging a firearm *with intent* to cause bodily harm or endanger life (*R v Cardinal*, 2018, para. 76).

[97] These include: "… Inuuqatigiitsiarniq (respecting others, relationships and caring for people); Tunnganarniq (fostering good spirit by being open, welcoming and inclusive); Pijitsirniq (serving and providing for family or community or both); Aajiiqatigiinniq (decision making through discussion and consensus); Pilimmaksarniq or Pijariuqsarniq (development of skills through practice, effort and action); Piliriqatigiinniq or Ikajuqtigiinniq (working together for a common cause); Qanuqtuurniq (being innovative and resourceful); and Avatittinnik Kamatsiarniq (respect and care for the land, animals and the environment)" (*R v Itturilligaq*, 2018, para. 62).

mens rea requirement (*R v Itturiligaq*, 2018, para. 67). In his favour, Mr. Itturiligaq had participated in four rehabilitative programs while on remand. Questioning the appropriateness of imprisonment, Bychok J. reiterated:

> Nineteen years after Division from the Northwest Territories, Nunavut still sends its federal offenders to southern Canadian penitentiaries. Penitentiary time is intended for offenders who cause death or grievous bodily injury to others. Penitentiary time is intended for serial offenders of serious crimes. Penitentiary time is appropriate for offenders who have become hardened criminals. Penitentiary time over a thousand kilometres from home, family, friends and his culture can be expected to have a profoundly negative impact on Mr. Itturiligaq. Four years of penitentiary time in this case would sacrifice four years of his life and rehabilitation on the altars of denunciation and general deterrence. (*R v Itturiligaq*, 2018, para. 80)

Rehabilitation, and its importance in preventing recidivism, appeared to be the primary objective for this court and judgment. While imprisonment is not inconsistent with Inuit values, the principles of forgiveness, reconciliation, reintegration and restitution are predominant (*R v Itturiligaq*, 2018, para. 86-87). Finding the proportionate sentence to be two years less a day, the court held that a sentence double the proportionate one, in combination with additional factors such as where the penitentiary term is served and the role of mandatory minimums in the perpetuation of "systemic colonialism and discrimination," was inconsistent with s. 12 of the *Charter* (1982):

> Anglo-Canadian judicial concepts such as denunciation, deterrence and retribution do not rest easily with Inuit conceptions of reconciliation, reintegration and group harmony -- restorative justice … By the time cases are dealt with in court, many parties have already reconciled and have moved on with their lives. Resentment and stress are triggered when the justice system insists these proceedings continue to a legal resolution. Resentment, stress and anger often arise when offenders are sent to jail outside the community against the express wishes of the victim, family and sometimes the community. This analysis speaks directly to the issue of gross disproportionality. It speaks directly to our society's conception of what constitutes justice. Commentators have noted recently the perception that many courts have given mere "lip service" to *Gladue* principles. Not so in the Nunavut Court of Justice. As I stated earlier, judges of this Court have a moral as well as a constitutional duty to apply *Gladue* principles *meaningfully* when sentencing Inuit offenders. (*R v Itturiligaq*, 2018, para. 118-121).

However, even in cases where Gladue principles are sufficiently considered, a minimum sentence may nonetheless be warranted.

In *Dingwall* (2018), the female, Aboriginal offender challenged the five-year minimum punishment (for a first offence) prescribed in s. 244(2)(a)(i) and s. 244.2(3)(a)(i). A significant part of the constitutional analysis focused on whether punishment for *serious* firearms offences could be mitigated by personal circumstances and characteristics, including Gladue principles (*R v Dingwall*, 2018, para. 40). Several aggravating factors were present: the location and time of the offence (i.e., an occupied house in a "residential neighbourhood" in "early morning hours"), the number of shots fired (i.e., four) and consequently, the number of potential victims, pre-mediation as opposed to impulse, removal of the serial number and disposal of the firearm, and the fact that at the time of the offence, Ms. Dingwall was subject to court orders (*R v Dingwall*, 2018, para. 46).

The court considered various contextual factors in determining whether the minimum sentence amounted to unduly harsh punishment. Although Ms. Dingwall was found to be an aider and abettor (i.e., driving the getaway car) rather than the principal offender, Abrioux J. refused to consider this a mitigating factor. He also rejected the suggestion that willful blindness "involves a lesser form of *mens rea*" and clarified that it is akin to actual knowledge (*R v Dingwall*, 2018, para. 63). He did not seem to fully agree with Bychok J. on the role of Gladue principles, instead arguing that they play "a minor role" in sentencing for serious firearms offences (*R v Dingwall*, 2018, para. 73). Relative to the five-year minimum punishment, a sentence of four years and six months was not grossly disproportionate.

The court then considered reasonable hypotheticals, including one constructed with circumstances similar to Ms. Dingwall, and one based on the circumstances in *Cardinal* (2018). The court did not feel that the "Dingwall hypothetical" merited a sentence below the five-year minimum (*R v Dingwall*, 2018, para. 104). The "Cardinal hypothetical" was deemed "remote" and "speculative," as s. 244(1) has not been applied in circumstances where the person an individual discharges at is him- or herself (*R v Dingwall*, 2018, para. 107). While s. 244(2)(a)(i) was upheld, the court reached a different conclusion about s. 244.2(3)(a)(i). It found that the minimum punishment in this section constituted cruel and unusual punishment in the "Cardinal hypothetical," given the decreased seriousness of the offence (i.e., a single shot aimed at oneself), "sympathetic and mitigating" personal circumstances, and the diminished emphasis on denunciation and deterrence (*R v Dingwall*, 2018, para. 121-122, 127).

Courts have struck down the four-year minimum sentence even in absence of factors unique to Aboriginal and remote northern communities. In *Hills* (2018), the Alberta Court of Queen's Bench explored a hypothetical involving a young person shooting at a residence with a particular type of firearm (such as an air-powered rifle or pistol) that cannot penetrate its walls (*R v Hills*, 2018, para. 15-16).[98] Relying on expert testimony, Jerke J. reached a contrary conclusion to the earlier *Oud* (2016) decision and struck down s. 244.2(3)(b). Like *Kakfwi* (2018), the notion of risk was explored, with the court ultimately determining that there is "little to no risk" of harm or danger to persons residing in a residence that is shot at with a firearm incapable of causing such harm (*R v Hills*, 2018, para. 16). Furthermore, s. 244.2(1) could capture conduct where harm is neither intended nor caused (i.e., conduct of reduced blameworthiness) (*R v Hills*, 2018, para. 25). The court in *Oud* (2016) denied that discharging a firearm was an appropriate response to hypothetical bullying, given the inherent dangerousness of firearms and the double *mens rea* requirement stipulated in s. 244.2 (*R v Oud*, 2016, para. 39). It also emphasized that Parliament could not have intended s. 244.2 to apply only to gang violence (*R v Oud*, 2016, para. 36). "New expert evidence" was cited as a contributor to the conflicting views of the courts in *Oud* (2016) and *Hills* (2018) (*R v Hills*, 2018, para. 26).

In contrast, the court in *Reis* (2017) argued that the nature of the conduct captured under s. 244.2 could not fall at the "lower end of the blameworthiness spectrum" (para. 20). The offender fired five shots following a conflict with two individuals. A bullet penetrated one of the individuals, although it was not fatal. Crown counsel sought a five- to six-year sentence, while defence counsel argued that the proportionate sentence was 12-months imprisonment and bail. Acknowledging the increase in gun violence in Canada, Akhtar J. rejected defence counsel's proposition that the court should rely on precedents pre-dating the minimum sentence (i.e., cases where sentences were not "driven by the statutory penalty") (*R v Reis*, 2017, para. 16). The sentencing range was seven- to 11-years, as previously established by the appellate courts (*R v Reis*, 2017, para. 18). Imposing a six-year sentence, the court found that while the offence was not pre-meditated and unlikely to have occurred absent instigation, it was also not a "split-second decision of bad judgment" (*R v Reis*, 2017, para. 31). Furthermore, absence of significant harm was due to "inexperience" and "a

[98] A similar hypothetical was previously proposed and rejected in *Oud* (2016).

huge stroke of luck rather than design" (*R v Reis*, 2017, para. 28). The court rejected two hypotheticals put forward by Mr. Reis. The first hypothetical was inapplicable because of legal justification (i.e., self-defence).[99] The constitutional challenge was subsequently dismissed after the second hypothetical was deemed "fanciful" (*R v Reis*, 2017, para. 51).

Like *Dingwall* (2018), the offender in *Mohammad* (2017) argued that as a party to an offence, his reduced culpability merited a decreased sentence. The co-accused pled guilty to all charges apart from the s. 244.2 offence, and ultimately received a sentence of three years and 131 days. On the other hand, Mr. Mohammad's case went to trial, where he was found guilty of the s. 244.2 offence and thus subject to the five-year minimum sentence of imprisonment. Bourgeois J. denied that the disparate sentences imposed on the offenders required a decree of invalidity (*R v Mohammad*, 2017, para. 16). The principle of parity does not necessitate the same sentence for a principal and a co-accused, especially if they enter different pleas to the offence and their cases are resolved independently (*R v Mohammad*, 2017, para. 16).

In *Mohamed* (2016), the circumstances surrounding the offence were also similar to *Dingwall* (2018) in that the firearm was shot "at least" four times, in the early morning on a residential street, and the decision was neither "momentary" nor "fleeting" (*R v Mohamed*, 2016, para. 8). However, the particular offender in this case had a prior firearms conviction and had previously served the minimum five-year sentence of imprisonment; as such, he was now liable to a seven-year minimum punishment (i.e., for a second offence). The court reasoned that Mr. Mohamed's moral blameworthiness was high in light of his prior conviction. Furthermore, discharging a firearm during the commission of an offence requires a significantly higher sentence than the three-year range mandated for simple possession. Wadden J. found that these circumstances required a sentence "no less than six years," and as high as eight or nine years (*R v Mohamed*, 2016, para. 15). Whether the sentence began at the lower end of the range or not, the mandatory minimum was not grossly disproportionate. In fact, Mr. Mohamed ended up receiving a sentence at the higher end of the range (eight years).

[99] Citing the movie *Jackass*, this second hypothetical also relied on the court considering a pellet gun to fall within the statutory definition of the *Criminal Code* (para. 51).

6.3.4. Trafficking and Importation Offences

Table 6-16. Summary of Cases – Trafficking/Importing Firearms (8)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R c Lefrançois* (2018)	s. 99(2)(a)	Three years	Yes	*
		s. 103(2)(a)	Three years	Yes	*
	R v De Vos (2018)	s. 99(2)(a)	Three years	Yes	*
	R v Friesen (2015)	s. 99(2)(a)	Three years	Yes	Yes
	R v Harriott (2017)	s. 99(2)(a)	Three years	Yes	Yes
	R v Hussain (2015)	s. 99(2)(a)	Three years	No	Yes
	R v Irkootee (2018)	s. 99(2)(a)	Three years	Yes	Yes
	R v Shobway (2015)	s. 99(2)(a)	Three years	No	Yes
	R v Trepanier (2016)	s. 99(2)(a)	Three years	No	Yes

Trafficking and importation of weapons and/or firearms is prohibited by s. 99 of the *Code* (1985). The punishment for firearms trafficking is contained within s. 99(2); the minimum period of imprisonment is three years for a first offence and five years for a second or subsequent offence. Trafficking and importation of all other weapons is covered under s. 99(3), where the minimum period of imprisonment drops to one year. Both subsections contain a maximum punishment of ten years imprisonment.

All eight cases challenging the provisions relating to trafficking and importation of a restricted weapon have been found to violate s. 12: (1) *R c Lefrançois* (2018) [hereinafter *Lefrançois*], (2) *R v De Vos* (2018) [hereinafter *De Vos*], (3) *R v Friesen* (2015) [hereinafter *Friesen*], (4) *R v Harriott* (2017) [hereinafter *Harriott*], (5) *R v Hussain* (2015) [hereafter *Hussain*], (6) *R v Irkootee* (2018) [hereinafter *Irkootee*], (7) *R v Shobway* (2015) [hereinafter *Shobway*], and (8) *R v Trepanier* (2016) [hereinafter *Trepanier*]. Each of these cases address the constitutionality of s. 99(2); the courts have not yet examined s. 99(3). All but three cases (*Hussain* (2015), *Shobway* (2015), and *Trepanier* (2016)) found a violation of s. 12 based on the particularized inquiry, with only some courts considering reasonable hypotheticals.

De Vos (2018), *Shobway* (2015), and *Harriott* (2017) all involved drug-addicted individuals who sold or transferred firearms to pay off drug debts. In *De Vos* (2018), the offender legally purchased three firearms to transfer to his drug dealer. The police only recovered two of these firearms. However, significant mitigating circumstances convinced the court that the three-year minimum sentence was grossly disproportionate

for Mr. De Vos, in particular. Mr. De Vos was presently drug-free, suggesting significant "rehabilitative potential" (*R v De Vos*, 2018, para. 44). Furthermore, he was the sole witness in the successful prosecution of his drug dealer (*R v De Vos*, 2018, para. 18). In receiving 18-months imprisonment, Mr. De Vos' sentence is relatively consistent with the higher end of the sentencing range identified in *Shobway* (2015).

In *Shobway* (2015), the court determined the appropriate sentence was between 12 and 18 months. Mr. Shobway was a licensed gun owner familiar with firearms regulations; despite this, he sold two firearms to his drug dealer. The three-year mandatory minimum was deemed "excessive," but did not meet the standard of gross disproportionality (*R v Shobway*, 2015, para. 19). The court entertained its own hypothetical, noting that Mr. Shobway's offence was committed in a rural community with a Canadian Forces Base housing approximately four thousand soldiers (*R v Shobway*, 2015, para. 21). It was reasonably foreseeable that living family members could inherit a soldier's handgun upon death (*R v Shobway*, 2015, para. 21). As a result, s. 99 cast too wide of a net (e.g., by catching licensing and regulatory infractions) in the same vein as s. 95 in *Nur* (2015) (*R v Shobway*, 2015, para. 22).

While trafficking cocaine, the offender in *Harriott* (2017) made a hollow offer of a handgun to an undercover police officer. Mr. Harriott, in fear of repercussion, was working to pay off his own drug debt and did not want to lose his dealer's client. However, this gun did not exist and was never sold or located. The court held the appropriate sentencing range to be between three and six months imprisonment, making the mandatory minimum six to 12 times the proportionate sentence. Skarica J. did not sentence Mr. Harriott, but suggested between 21 and 30 months imprisonment for all counts.

Lefrançois (2018) is the only case to challenge the constitutionality of s. 103(2)(a)[100] (in addition to s. 99(2)(a)). The offender was a gun enthusiast who trafficked and imported illegal weapon devices via parcel from an individual in the United States. While the requisite documentation was legal in the United States, it was not legal in Canada. Evidence supported that the circumstances of the offence involved a degree of

[100] Section 103(1) makes it an offence to import or export a firearm/weapon *knowing* it is unauthorized (*Criminal Code*, 1985, s. 103(1)). A first offence carries a three-year minimum sentence, while a second or subsequent offence carries a five-year minimum sentence.

planning, in attempt to evade police detection. Mr. Lefrançois did not possess a criminal record and had several firearms licenses, which allowed him to possess restricted and unrestricted firearms. The Crown sought a sentence between 36 and 42 months; defence counsel argued against a penitentiary sentence and instead, suggested pecuniary punishment or community service. Mr. Lefrançois did not introduce any hypotheticals and as such, the analysis focused solely on the particularized inquiry.

The court noted that incapacitation was not a primary objective, given that Mr. Lefrançois was neither dangerous nor prone to recidivism. It also acknowledged that Mr. Lefrançois would lose his employment, which diminished chances of reintegration. Lastly, Mr. Lefrançois would not be able to possess firearms, eliminating his ability to: (1) engage in a significant hobby of his, and (2) reapply for firearms licenses and permits. At the same time, premeditation of the offences indicated that the level of moral blameworthiness was not insignificant. The court delineated three general categories of offenders: (1) individuals involved in criminal and gang-related activity or activity that exposes the public to significant harm (i.e., those likely deserving at least the minimum sentence), (2) individuals who commit less aggravating acts that nonetheless expose the public to potential harm, and (3) individuals who commit "regulatory offences." According to the court, Mr. Lefrançois fell within the second category; it did not identify (in precise terms) the degree of difference between the three categories, nor did it clarify the type of relationship the second category has to the first or third categories. The court found the appropriate sentence to be one-year imprisonment, with emphasis on the "golden rule(s)" of proportionality and restraint rather than general deterrence (*R c Lefrançois*, 2018, para. 148).[101] The three-year minimum sentence was, therefore, grossly disproportionate and violated s. 12.

In *Friesen* (2015), the offender was convicted of selling a firearm to a depressed individual who eventually committed suicide with it. While Mr. Friesen's business was licensed to sell non-prohibited firearm ammunition, it was not licensed to sell firearms themselves. This case involved some aggravating factors, including the facts that Mr. Friesen had not inquired whether the victim could legally possess a firearm and that he continued to sell firearms illegally even after the death of the victim. After reviewing

[101] Citing "several hundred studies," it agreed that the empirical evidence does not currently support the proposition that minimum sentences deter criminal behaviour (*R c Lefrançoi*s, 2018, para. 46).

Parliament's intention in passing Bill C-10 (*An Act to amend the Criminal Code (minimum penalties for offences involving firearms*) *and to make consequential amendment to another Act* (2007)), Ouellette J. argued:

> The facts of this case do not deal with those issues [drug trafficking or gang activity]. The facts of this case concern the failure to follow certain licensing requirements … There would have been no offence had Mr. Friesen complied with the legislation … Mr. Friesen would likely have been able to acquire the required business license… (*R v Friesen*, 2015, para. 23).

In Mr. Friesen's favour, the victim had not committed and did not plan to commit a criminal offence with the firearm. Given the facts of the particular case, the court ruled the three-year minimum sentence invalid. The provision was also invalid based on the facts of the "family heirloom" hypothetical, which was similarly raised in *Shobway* (2015). The court did not engage in a s. 1 analysis, preferring to rely on the reasoning laid down in *Nur* (2015).[102]

In delivering Mr. Friesen's sentence, Ouellette J. affirmed that while deterrence and denunciation remain the primary sentencing objectives for firearms-related offences, the transfer of a non-restricted firearm should be treated differently than a prohibited or restricted firearm; however, the courts do not appear to agree on this conclusion (*R v Friesen*, 2015, para. 59). With "support of the community," Mr. Friesen received a six-month CSO, a five thousand dollar fine, and a 10-year weapons prohibition order (*R v Friesen*, 2015, para. 65). Given that s. 99 is among those offences ineligible for a CSO, it is unclear whether the court was legally permitted to impose this type of sentence.[103]

The offender in *Hussain* (2015) had a significantly more serious criminal record than any of the other offenders challenging s. 99 (14 prior criminal charges), which included violations of firearms prohibition orders but no weapons offences. Crown counsel identified the range of sentence for s. 99 offences to be between three and five years, seeking a total five and a half year sentence (the trafficking charge accounting for

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[102] In Ouellette J.'s view, s. 1 should be applied to s. 95 and s. 99 in the same way, given that they both target "the issues of gang violence, street violence and illegal activity" (*R v Friesen*, 2015, para. 37).

[103] Even if the court felt that a CSO was available following invalidation of the minimum sentence, an offender who commits an indictable offence that is punishable by a maximum 10-year sentence of imprisonment and involves the use of a firearm is not eligible for a CSO according to s. 742.1(e)(iii) (*Criminal Code*, 1985).

four of those years). Defence counsel sought an 18-month sentence, 12 months for the trafficking charge and an additional six months consecutive for breach of the firearms order. To determine the validity of the three-year minimum sentence, the court considered the type and state of firearm transferred by Mr. Hussain. The gun in question (a shotgun, as opposed to a prohibited or restricted firearm) could be "lawfully purchased" and "associated with legitimate activities"; the one seized from Mr. Hussain was also unloaded and unaltered (*R v Hussain*, 2015, para. 24). Defence counsel argued that s. 99, therefore, captures conduct that would not warrant a three-year minimum sentence (i.e., individuals who do not traffick firearms for profit) (*R v Hussain*, 2015, para. 23, 26). The court recognized the definition of "transfer" is worded too broadly, applying even in circumstances where the weapon is merely "offered" and not "relinquished" (*R v Hussain*, 2015, para. 29). Furthermore, unlike s. 95, the provision does not differentiate between an unloaded and loaded firearm (*R v Hussain*, 2015, para. 30).

Several hypotheticals were rejected, including: "the show off," "the wayward American," "the hollow offer," and "Grandpa's gun" (*R v Hussain*, 2015, para. 46-65). The court agreed that such hypotheticals were of "marginal assistance," but ultimately proposed its own (*R v Hussain*, 2015, para. 100).[104] It held:

> While an offence under s. 99(1) incorporates a *mens rea* component not found in s. 95, in my view s. 99 casts a net broad enough that it, like s. 95, can capture conduct that involves little to no moral fault and little to no danger to the public. (*R v Hussain*, 2015, para. 98)

The court treated s. 12 as absolute and did not attempt to engage in the s. 1 analysis. Mr. Hussain received a sentence of four years and six months. Arguably, a lengthier sentence is reasonable given that the circumstances of the offence took place while Mr. Hussain was on bail and subject to a firearms prohibition order.

In *Irkootee* (2018), the offender sold the rifle he stole while intoxicated to an individual without a firearms license. The impetus for disposing the rifle quickly was the potential harm it posed to his children. At the time of sentencing, s. 99 had already been deemed unconstitutional by at least two other courts (Alberta Queen's Bench and the

[104] An experienced and licensed hunter lends a firearm to his brother, who is making a rare visit and is a "responsible user of a firearm," so that the two can go hunting together. He knows his brother does not possess the requisite license (*R v Hussain*, 2015, para. 100-102).

Ontario Court of Justice) (*R v Irkootee*, 2018, para. 8). Relying on *Friesen* (2015) (who received a six-month CSO), Mr. Irkootee argued for a one-year CSO; while he admitted the facts of his case were more serious, he did not believe his conduct fell within the purview of s. 99 (i.e., conduct amounting to "crime, drugs and guns") (*R v Irkootee*, 2018, para. 18). Focusing on the wording of s. 99 and the specific intent required for conviction, Crown counsel argued that Mr. Irkootee's blameworthiness was high enough to justify a sentence between 18 months and two years less a day. Trafficking-related offences (compared to possession offences) indicate a particular level of knowledge (i.e., knowledge that the firearm cannot simply be transferred) (*R v Irkootee*, 2018, para. 51). Furthermore, the objective of s. 99 includes "limit[ing] the availability of untraceable firearms," especially in jurisdictions where firearms are "widespread" (*R v Irkootee*, 2018, para. 29).[105] The severity of punishment granted by s. 99 is consistent with other *Code* (1985) provisions pertaining to firearms (e.g., s. 239, s. 271, and s. 273) (*R v Irkootee*, 2018, para. 41).

The court held that the prevalence of firearms in Nunavut is a relevant fact, but one that provides limited assistance (given the use of firearms in non-criminal activities, such as hunting) (*R v Irkootee*, 2018, para. 59). The circumstances of Mr. Irkootee's offence were not "the type that typically appear before this court" (*R v Irkootee*, 2018, para. 59) according to Johnson J., who reflected:

> One of the problems with an MMP is that the usual sentencing discretion conferred on judges is removed so that no exceptions can be crafted for situations such as this one where an Indigenous person in a remote northern community selling a rifle is treated the same as a gang member or organized crime member running an organized business in trafficking in handguns in a City. (*R v Irkootee*, 2018, para. 67)

Recognizing that a CSO is prohibited for offences carrying a minimum sentence,[106] the court identified the range of sentence to be between six and 12 months imprisonment. When factoring in Gladue principles and the objective of rehabilitation, the appropriate sentence was six months imprisonment, the lowest end of that range. Consequently, a sentence six times this length was not a proportionate punishment. Even if the particularized inquiry had failed, the minimum sentence under s. 99(2) was already

[105] The court observed that Nunavut has the highest suicide rate in Canada and firearms offences occur weekly (*R v Irkootee*, 2018, para. 30).

[106] As stipulated by s. 742.1(b) (*Criminal Code*, 1985).

struck down based on hypothetical offenders envisioned in *Friesen* (2015) and *Shobway* (2015).

The court in *Trepanier* (2016) also relied on the scenarios established in *Friesen* (2015) and *Shobway* (2015) to invalidate s. 99(2) (in particular, the "family heirloom"/inheritance hypothetical). Mr. Trepanier himself was convicted of selling firearms and ammunition to individuals who did not possess Purchase and Acquisition licenses. On the premises, there were numerous sales recording errors and improperly stored firearms. The court acknowledged the following facts specific to Mr. Trepanier's case[107]: the firearms sold were long guns rather than handguns or restricted weapons, these long guns did not appear to be connected to criminal or gang activity, and the motivation was not greed. Jackson Prov. Ct. J. held the sentencing range to be between 12 and 18 months imprisonment. Acknowledging that recreational use of firearms in rural New Brunswick is "commonplace" (like Nunavut), the provision resulted in grossly disproportionate punishment for Mr. Trepanier and hypothetical offenders (*R v Trepanier*, 2016, para. 26).

6.3.5. Robbery

Table 6-17. Summary of Cases – Robbery (6)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v Hilbach* (2018)	s. 344(1)(a)(i)	Five years	Yes	Yes
VALID	*R c Perron* (2016)	s. 344(1)(a.1)	Four years		
	R v Bernarde (2018)	s. 344(1)(a.1)	Four years		
	R v McIntyre (2018)	s. 344(1)(a)(i)	Five years		
	R v McIvor (2018)	s. 344(1)(a)(i)	Five years		
	R v Stocker (2017)	s. 344(1)(a)(i)	Five years		

Robbery is defined in s. 343 of the *Criminal Code* (1985):

343 Every one commits robbery who

> **(a)** steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;

[107] *Friesen* (2015) was the case considered most similar.

> **(b)** steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
>
> **(c)** assaults any person with intent to steal from him; or
>
> **(d)** steals from any person while armed with an offensive weapon or imitation thereof.

There is no stipulated mandatory minimum for robbery committed without the use of a firearm, although an individual may be liable to imprisonment for life (s. 344(1)(b)). If a firearm is used in the commission of an offence or in association with a criminal organization, the mandatory minimum period of imprisonment is five years for a first offence (s. 344(1)(a)(i)), seven years for a second or subsequent offence (s. 344(1)(a)(ii)), and four years in all other cases where a firearm is used in the commission of an offence (s. 344(1)(a.1)).

Six cases have challenged the constitutional validity of the provisions pertaining to robbery. A single case has found a violation of s. 12: *R v Hilbach* (2018) [hereinafter *Hilbach*] on both the particularized inquiry and analysis of reasonable hypotheticals. The remaining five cases upheld s. 344: (1) *R c Perron* (2016) [hereinafter *Perron*], (2) *R v Bernarde* (2018) [hereinafter *Bernarde*], (3) *R v McIntyre* (2018) [hereinafter *McIntyre*], (4) *R v McIvor* (2018) [hereinafter *McIvor*], and (5) *R v Stocker* (2017) [hereinafter *Stocker*].

In *Hilbach* (2018), an Aboriginal offender was subject to the five-year minimum period of imprisonment for his role in an armed robbery. At sentencing, Dunlop J. took judicial notice of the historical treatment of Aboriginal peoples, stating that Mr. Hilbach committed the offence to gain money for transportation to his grandmother's home (*R v Hilbach*, 2018, para. 35).[108] This combination of poverty and isolation to the Maskwacis reserve informed the court's assessment of Mr. Hilbach's personal responsibility (*R v Hilbach*, 2018, para. 35). The court determined that the proportionate sentence was two years less a day. As the mandatory minimum was more than double the length of the proportionate sentence and would have required Mr. Hilbach to serve his sentence in a

[108] Dunlop J. held: "That circumstance was a byproduct of the reserve system which sought to isolate Aboriginal people in reserves, on a small portion of the land they formerly occupied … It is no surprise that young people, like Mr. Hilbach, are attracted to those communities, and then find difficulty surviving there" (*R v Hilbach*, 2018, para. 35). Mr. Hilbach's grandmother was his only surviving guardian.

federal penitentiary,[109] the court held that s. 344(1)(a)(i) was constitutionally invalid (*R v Hilbach*, 2018, para. 42-43). Mr. Hilbach received a two-years less a day sentence.

Hilbach (2018) appears to be the exception in this set of constitutional challenges. In *Perron* (2016), the court upheld the four-year mandatory minimum in s. 344(1)(a.1). Mr. Perron had no criminal record and was a young addict trying to repay his drug debt. Given the objective seriousness of the offence, the court could not envision any case where a sentence less than four years would be appropriate (although this case was decided two years before *Hilbach* (2018)) (*R c Perron*, 2016, para. 57). The Northwest Territories Court of Appeal similarly reviewed the constitutionality of s. 344(1)(a.1) in *Bernarde* (2018). Despite several mitigating factors, including an FASD diagnosis,[110] a four-year sentence was not grossly disproportionate to Mr. Bernarde. Several elements exemplified the seriousness of the offence: involvement of a firearm, directly pointing the firearm at the victim, and Mr. Bernarde's attempt to hide his face (implying a degree of planning). According to Charbonneau J., earlier case law involving an offender with mental illness and/or addiction all found s. 344(1)(a.i) constitutional, despite potentially severe effects on the particular offenders. No reasonable hypotheticals were presented. On appeal, the court clarified that failure of the sentencing judge to compose a hypothetical when the applicant did not submit one is not a reviewable error (*R v Bernarde*, 2018, para. 10).

The court in *Stocker* (2017) also refused to move forward to the second part of the s. 12 test when Mr. Stocker failed to submit a reasonable hypothetical. As the appropriate sentence was four years, the court found that the five-year minimum sentence was not grossly disproportionate for Mr. Stocker in particular. The purpose of the firearm used in the offence was "intimidation and [to] frighten" the victim into submission (*R v Stocker*, 2017, para. 39). Furthermore, Rogers J. argued that the elements of the offence provided in s. 344(1)(a)(i) are sufficiently narrow:

> … no room is left for imaginary circumstances that would lessen the gravity of the offence or the culpability of the offender. Put another way, the offence is defined by the *Code* with sufficient specificity as to weed

[109] An offender who is sentenced to two years or more will serve his/her sentence in a federal penitentiary (*Criminal Code*, 1985, s. 743.1(1)).

[110] Mr. Bernarde was 23 years old, but assessed to have cognitive capabilities of a nine-year old (*R v Bernarde*, 2018, para. 3).

> out the reasonable possibility that someone who does not deserve a lengthy sentence be convicted of it. (*R v Stocker*, 2017, para. 33)

Despite admitting that the sentencing objectives of specific deterrence, rehabilitation, and incapacitation are not paramount for an individual with no prior criminal or anti-social behaviour, the focus of the analysis was the inherent dangerousness of firearms (*R v Stocker*, 2017, para. 38). Unfortunately, the pre-sentence report did not contain a Gladue component, despite Mr. Stocker identifying as Aboriginal. Whether this consideration would have impacted the length of sentence is questionable.[111]

Additional robbery cases have made their way to the appellate courts. In *McIvor*, (2017), the offender proposed various arguments against the mandatory minimum, suggesting: (1) discrepancy between s. 344(1)(a)(i) and s. 91 and s. 95, which both account for whether the firearm is loaded, (2) potential arbitrariness of a one-year increase for robbery with a *prohibited* firearm and not with a non-prohibited firearm, and (3) failure to account for the shorter length of the firearm (*R v McIvor*, 2017, para. 8-11). The court rejected these arguments, proposing a range of sentence between three and a half to four years imprisonment. There are factors specific to prohibited firearms offences, including the possibility of concealment and alteration, which help offenders evade detection. The risk is elevated even if no actual harm occurs because a threat that the firearm may be used in the future remains. Ahktar J. in *McIntyre* (2017) reached a similar conclusion by finding that the elements of s. 344(1)(a)(i) render it a "true crime," with no potential to catch conduct that is merely regulatory in nature (*R v McIntyre*, 2017, para. 51). Mr. McIvor received a five-year sentence that was upheld on appeal. Mr. McIntyre initially received a six-year sentence, but was later released as a result of the significant period of time he spent in pre-trial custody.

[111] The court opined in *McIntyre* (2018) that *Gladue* factors have "limited bearing," "no effect," and "limited practical application" in cases involving mandatory minimum sentences (*R v McIntyre*, 2018, para. 39, 43-45).

6.3.6. Criminal Negligence, Manslaughter, and Attempted Murder

Table 6-18. Summary of Cases – Criminal Negligence, Manslaughter, Attempted Murder (with Firearm) (6)

	Case	Section	Minimum
VALID	*R c Lacroix* (2016)	s. 236(a)	Four years
	R v Dockrill (2016)	s. 220(a)	Four years
	R v Forcillo (2018)	s. 239(1)(a)(i)	Five years
	R v McMath (2015)	s. 236(a)	Four years
	R v Penner (2017)	s. 236(a)	Four years
	R v Ziegler (2017)	s. 239(1)(a.i)	Four years

Criminal negligence causing death is prohibited by s. 220 of the *Code* (1985). Subsection 220(a) pertains to cases where a firearm was used, and sets the minimum term of imprisonment at four years. The maximum sentence for criminal negligence, with or without (s. 220(b)) the use of a firearm, is imprisonment for life. The same mandatory minimum and maximum applies to the offence of manslaughter with or without the use of a firearm, as proscribed in s. 236(a) and s. 236(b) of the *Code* (1985), respectively. Section 239 imposes mandatory minimum sentences for attempted murder ranging from four to seven years, and is determined by two factors: (1) whether the commission was for criminal and/or gang-related purposes (s. 239(1)(a)), and if so, (2) whether the case involves a first-time offender (s. 239(1)(a)(i), five years) or an offender who has committed two or more offences (s. 239(1)(a)(ii), seven years). In any other case where a firearm is used, the minimum period of imprisonment is four years (s. 239(a.1)). In attempted murder cases that do not involve a firearm, the minimum term of imprisonment is also four years (s. 239(b)). The maximum sentence for these provisions is imprisonment for life. All six cases challenging these provisions found no constitutional violations. These cases are: (1) *R c Lacroix* (2016) [hereinafter *Lacroix*], (2) *R v Dockrill* (2016) [hereinafter *Dockrill*], (3) *R v Forcillo* (2018) [hereinafter *Forcillo*], (4) *R v McMath* (2015) [hereinafter *McMath*], (5) *R v Penner* (2017) [hereinafter *Penner*], (6) *R v Ziegler* (2017) [hereinafter *Ziegler*].

Like its predecessor *Morrisey* (2000), *Dockrill* (2016) upheld the mandatory four-year minimum sentence for criminal negligence causing death. Anticipating retaliation related to his drug trafficking, Jason Dockrill provided a firearm to his father (Mr. Dockrill) to use for protection in the event of confrontation. One night during a home invasion, Mr.

Dockrill recklessly discharged this firearm, intending to shoot one of the intruders; he mistakenly shot and killed Jason instead. Mr. Dockrill did not submit any reasonable hypotheticals; he maintained that his particular circumstances were distinct from those considered in *Morrisey* (2000) and that the more recent decision in *Nur* (2015) justified re-evaluation of s. 220's constitutionality. While the court entertained these "new" circumstances, it held that the elements of s. 220 were sufficiently narrow to capture only offenders of high moral blameworthiness (*R v Dockrill*, 2016, para. 109).[112] The prohibition against careless or reckless use of firearms exists precisely because the consequences are often irreparable, even if they are unintentional and unanticipated.

Like criminal negligence causing death, the mandatory minimum for manslaughter attaches to conduct that is deemed reckless or careless. Such circumstances involve an accused person who displays "a marked departure from the standard of care of a reasonable person" (*R v Penner*, 2017, para. 24). The courts have been clear that the minimum four-year sentence stipulated in both s. 220 and s. 236 will continue to survive constitutional scrutiny. Because of the earlier decisions in *Morrisey* (2000) and *Ferguson* (2008), little room is left to establish gross disproportionality in the recent case law. The three cases challenging the minimum sentence in s. 236 all exemplify the gravity of such offences. They also suggest that the objective seriousness cannot be overridden by mitigating, sympathetic, and/or compassionate personal circumstances. First, Mr. Lacroix (under the influence of alcohol) accidentally shot a two-and-a-half-year-old child while showing the mother how to load and discharge a firearm for self-protection. Second, Mr. Penner shot and killed his fiancée while handling a firearm that accidentally discharged; he did not know the gun was loaded. Finally, Mr. McMath discharged a loaded firearm he kept for "predator control," killing his estranged wife; he was intoxicated, did not have a firearms license, and was not trained in handling a firearm safely.

The courts have reiterated that while these sections target a broad range of conduct ("near murder to near accident") and often involve offenders lacking intention, the serious consequences (i.e., death) justify a sentence that reflects the significant level of moral blameworthiness (*R v Penner*, 2017, para. 69; *R v McMath*, 2015, para. 43). Acknowledging the various situations where the "handling" and "use" of a firearm may

[112] This offence targets "wanton or reckless disregard for the lives or safety of other persons" in addition to negligence that causes death (*Criminal Code*, 1985, s. 219(1)).

occur, Ross J. explained: "… the intention of Parliament was to describe a series of overlapping terms to cover the entire field in order to ensure that all aspects of interaction with firearms fell within the ambit of the section" (*R v McMath*, 2015, para. 55). Furthermore, while deterrence or rehabilitation may not be principal sentencing objectives, irresponsible use of firearms must be denounced given the risk they always present.[113]

Because the courts have consistently upheld the minimum sentences for criminal negligence causing death and for manslaughter, it is unsurprising that the minimum sentence for attempted murder has also survived constitutional scrutiny. *Forcillo* (2016) involved the shooting death of a knife-wielding suspect by a responding police officer. Mr. Forcillo was acquitted of the second-degree murder charge arising from facts surrounding the first volley of shots. However, he was convicted of attempted murder as a result of the second volley of shots, which was deemed "unreasonable, unnecessary and excessive" (*R v Forcillo*, 2016, para. 35). The court determined that Mr. Forcillo satisfied the *mens rea* requirement (specific intent to kill) because his conduct was not impulsive, justified, or in self-defence. This supported the imposition of a more severe sentence than one that may attach to manslaughter, where such intention is absent. The court conceded, "… a sentence for attempted murder will vary in length along a spectrum which focuses on the nature and duration of actual harm as opposed to intended harm," but maintained that this did not impact the gravity of the offence (*R v Forcillo*, 2018, para. 52). This reasoning was echoed in *Ziegler* (2017).

The offender in *Ziegler* (2017) modified a flare gun to discharge a bullet, using this weapon to fire a shot at his landlord. Although the landlord was not seriously injured, the court argued that fortuitous circumstances do not reduce the gravity of the offence or an individual's moral blameworthiness (*R v Ziegler*, 2017, para. 70). A conviction for attempted murder requires proof of specific intent to kill, unlike the offence of murder (*R v Ziegler*, 2017, para. 66). Accordingly, Renke J. observed:

> The mandatory minimum sentence turning on the use of a firearm in committing attempted murder does not suffer from this problem of excessive scope or reach as compared with the legislative objective of

[113] Interestingly, Ross J. in *McMath* (2015) argued that negligent behaviour could be deterred, given the possibility of serious harm to others and/or oneself, and thus, the potential to be subject to a serious judicial response (para. 96).

> denouncing and deterring homicidal gun violence. The mandatory minimum sentence is not engaged by mere negligence or recklessness and is not engaged in a broad array of fault circumstances. Its application turns on a very tightly defined *mens rea* and on the commission of significantly blameworthy conduct. (*R v Ziegler*, 2017, para. 155)

Although Mr. Ziegler's personal circumstances involved trauma and "psychological issues," the latter were related to his emotions and character, and not his cognitive skills (*R v Ziegler*, 2017, para. 101). The proportionate sentence was four to six years imprisonment, even for a hypothetical offender who may receive "less than optimum health treatment in prison" (*R v Ziegler*, 2017, para. 147). Mitigating circumstances (including health issues, lack of criminal record, low risk to reoffend, and steps towards rehabilitation) failed to eliminate the necessity of a custodial sentence.

6.3.7. Summary

A total of 40 cases have challenged the constitutionality of weapons provisions within the *Code* (1985). Of these 40 cases, slightly under half (19 cases or 47.5%) have struck down the attached minimum sentence. 11 of the 19 cases (57.9%) found a violation on the particularized inquiry, while 8 cases (42.1%) did not. 13 of the 19 cases (68.4%) found a violation after considering reasonable hypotheticals, while 6 cases (31.6%) did not move on to this part of the s. 12 analysis.

6.4. Other Challenged Provisions

Table 6-19. Summary of Cases – Miscellaneous Offences (5)

	Case	Section	Minimum	PI Violation?	RH/F Violation?
INVALID	*R v Plange* (2018)	s. 380(1.1)	Two years	No	Yes
VALID	*Lachance c R* (2017)	s. 253/ s. 255(1)(a)(ii)	30 days		
	R v Chung (2018)	s. 462.37(4)	Five years		
	R v Lake (2016)	s. 254(5)/ s. 255(1)(a)(iii)	Four months		
	R v Newborn (2018)	s. 235 s. 745(c) s. 745.4	Life		

While majority of the challenged mandatory minimums are attached to drug-, sex-, or weapons-related offences, the minimum sentences in five other provisions have also been challenged: (1) fraud over one million dollars (s. 380(1.1)) in *R v Plange* (2018) [hereinafter *Plange*], (2) operating a motor vehicle while impaired (second offence) (s. 255(1)(a)(ii), now repealed) in *Lachance c R* (2017) [hereinafter *Lachance*], (3) imprisonment in default of payment of fine (s. 462.37(4)) in *R v Chung* (2018) [hereinafter *Chung*], (4) failure or refusal to comply with breath demand (subsequent offences) (s. 254(5) and s. 255(1)(a)(iii), both now repealed) in *R v Lake* (2016) [hereinafter *Lake*], and (5) second degree murder and parole eligibility for second degree murder (s. 235 and s. 745(c)/s. 745.4) in *R v Newborn* (2018) [hereinafter *Newborn*]. Of these five cases, *Plange* (2018) is the only one where a minimum sentence has been found constitutionally invalid.

In *Plange* (2018), the two-year minimum sentence for fraud over one million dollars was struck down by the Ontario Superior Court of Justice. Mr. Plange submitted fraudulent CRA direct deposit forms and was sent $41,831,073 from seven corporations, although he could not access it. The court held that the mandatory minimum was not grossly disproportionate for this particular offender. While Mr. Plange's initial motivation for the offence was to obtain money to pay off his gambling debt, Nakatsuru J. found that he was also motivated by "greed and stupidity" (*R v Plange*, 2018, para. 24).

Plange (2018) provided an interesting opportunity for the court to explore a *Code* (1985) provision that is interpreted as both broad and narrow. The Crown contended that the one million dollar "threshold" was specific enough for s. 380(1.1) to withstand constitutional scrutiny (*R v Plange*, 2018, para. 31); defrauding a corporation or government of more than a million dollars suggests a "large scale" and "sophisticated" operation (*R v Plange*, 2018, para. 31). However, the legal definition and elements[114] of fraud enable the provision to capture a variety of conduct and individuals of differing moral blameworthiness. Several reasonable hypotheticals were presented, including a

[114] Section 380(1) catches individuals who, "by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service" (*Criminal Code*, 1985).

slight fact variation[115] of Mr. Plange's case. In striking down the minimum sentence in s. 380(1.1), the court maintained

> … even small acts of deceit, dishonesty, or other fraudulent means that cause no economic loss where the offender is unaware of the potential scope of the consequence, would be sent to the penitentiary. For s. 380(1.1) purposes, there is no such thing as a harmless white lie, even if done for altruistic purposes. Even though the $1 million threshold may appear at first blush to be a high one, it does not provide an adequate filter to screen out these outlier cases. (*R v Plange*, 2018, para. 42)

Defence counsel sought a 12- to 15-month CSO. Mr. Plange subsequently received an 18-month sentence of imprisonment (13 months and 18 days after pre-trial credit), significantly lower than the six to seven year sentence sought by the Crown.

Unlike *Plange* (2018), the other four cases found no violations of s. 12. The applicants in *Chung* (2018) challenged s. 462.37(1), which requires forfeiture of property that is the proceeds of crime. The circumstances involved a stolen lottery ticket worth 12.5 million dollars. While a fine can be imposed in lieu of forfeiture, a minimum five-year sentence of imprisonment applies in default of payment of a one million dollar fine (or more). One interesting issue that arose was how to account for sentencing principles when the minimum term of imprisonment is the default outcome. Crown counsel proposed several lines of argument, including: default terms of imprisonment are "tailored to the amount of money illegally taken" and apply only in default of payment, they deter individuals seeking to profit from crime, and other sentencing objectives are considered during the initial sentencing hearing (*R v Chung*, 2018, para. 29). The court agreed that the default term of imprisonment is not grossly disproportionate because of several factors: the court has discretion in determining the length of time an offender has to pay the fine, additional time can be granted, the default term of imprisonment is reduced if partial payment is made, and imprisonment cannot be imposed in cases where the offender cannot pay the fine (*R v Chung*, 2018, para. 40). Based on these grounds, the court found the provision to be constitutionally valid, rejecting hypotheticals based on the decreased value or absence of assets (*R v Chung*, 2018, para. 17).

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[115] To obtain a one million dollar mortgage, a self-employed individual insignificantly "overstates" his/her income. (S)he does not believe this is dishonest given fluctuation of income from year to year. While the lender would not have provided the loan knowing the individual's true income, "the lender suffers no economic harm and, as expected, profits from the interest payments" (*R v Plange*, 2018, para. 36).

In *Lachance* (2017), the 30-day minimum sentence prescribed in s. 255(1)(a)(ii) was upheld. The offender was caught while driving impaired (more than two times the legal limit); he had been charged five years earlier for driving impaired three times the legal limit. The court reflected on the objective seriousness of the offence, which at the time constituted 10% of all Canadian court proceedings and remains punishable by a maximum 18-month sentence when the Crown proceeds summarily (*Lachance c R*, 2017, para. 34). With respect to Mr. Lachance in particular, Dubois J. provided two rationales in support of the mandatory minimum. First, Mr. Lachance was not deterred from committing the same offence a second time and had also violated other driving provisions on multiple occasions between the offences. The sentencing principles of denunciation and deterrence, which remain the primary objectives for offences subject to a mandatory minimum, had to be satisfied. Second, another monetary fine (which he received for the first offence) would be inappropriate given the court's tendency to impose a "graduation of sentences" (i.e., subsequent offences are punished more severely) (*Lachance c R*, 2017, para. 43). No reasonable hypotheticals were submitted and consequently, the court did not engage in this part of the s. 12 analysis.

Lake (2016) also concerned the offence of impaired driving, although this charge was dropped because the Crown tendered a late Notice.[116] Rather, the offender was successfully charged under s. 254(5) for failing to comply with a breathalyzer demand, an offence subject to the same punishments as impaired driving (s. 255(a)). Unlike Mr. Lachance, Mr. Lake had *two* prior impaired driving convictions, which triggered the 120-day minimum sentence in s. 255(a)(iii). However, the total record showed *five* prior impaired driving convictions between 1980 and 2016 (one conviction post-dated the s. 254(5) offence under consideration). The court held that the mandatory minimum was not grossly disproportionate for Mr. Lake, as an individual with six impaired driving convictions represents an ongoing "danger to the public" (*R v Lake*, 2016, para. 45). Aggravating circumstances surrounding the offence also supported this conclusion.[117] Once again, the court did not consider reasonable hypotheticals and in fact, this part of the s. 12 analysis failed to be mentioned.

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[116] An offender must be notified of the Crown's intent to seek greater punishment, as required by s. 727(2) of the *Criminal Code* (1985).

[117] Mr. Lake refused to comply with the breathalyzer demand nine times and claimed he could not do so because he had only one lung, which was patently false (para. 38).

In *Newborn* (2018), the minimum life sentence for second-degree murder (as required by s. 235) was upheld; the period of parole ineligibility (10 to 25 years) stipulated in s. 745 to s. 745.4 was also deemed constitutionally valid. The offender had beaten and stomped the victim to death aboard a train. The sentencing reasons referred to various reports detailing the nature and severity of Mr. Newborn's neuropsychological impairments and development deficits. A Gladue report also highlighted intergenerational effects, including substance abuse and mental illness. Despite conflicting expert opinions about whether Mr. Newborn possessed requisite intent, the jury found him guilty of second-degree murder.[118] Neither defence counsel nor the court proposed any reasonable hypotheticals, and consequently, the s. 12 analysis was limited to the particularized inquiry. The Crown sought the minimum life sentence, while defence counsel argued for a nine to 10.5 year sentence (the sentence for manslaughter plus 50% of that sentence to account for the jury's finding of intent). The court held that the appropriate sentence for Mr. Newborn, absent the mandatory minimum, would be life imprisonment without parole for 15 years. Burrows J. discussed several sentencing objectives, concluding that a custodial sentence was necessary to satisfy denunciation, deterrence, and protection of the public. He argued that no sentence could provide adequate reparation to the victim's family or promote greater acknowledgment of harm/responsibility than Mr. Newborn already demonstrated.

6.4.1. Summary

A total of five cases have challenged the constitutionality of other[119] minimum sentencing provisions within the *Code* (1985). Of these five cases, a single case (20%) struck down the attached minimum sentence and did so on the basis of reasonable hypotheticals. The other four cases (80%) failed to find the impugned provisions unconstitutional. In the future, it would be interesting to explore whether courts approach "other" minimum sentences differently from those pertaining to drug offences, sex offences, and weapons offences. If a trend exists, where courts are more likely to uphold "other" provisions with minimum sentences compared to drug, sex, and weapons

[118] That is, the jury determined that Mr. Newborn intended to cause death or intended to cause bodily harm knowing that death was likely/reckless as to whether such bodily harm would cause death (para. 19).

[119] That is, minimum sentencing provisions that apply to offences apart from drug offences, sex offences, and weapons offences.

offences with minimum sentences, one may question whether this is the result of a difference in statutory wording (e.g., certain sections use wording that is more sufficiently tailored), a difference in the inherent seriousness between the groups of offences, or some other factor(s).

6.5. Concluding Discussion

The case law analysis demonstrates the diversity of circumstances in which mandatory minimum sentencing provisions apply. However, the courts do not appear to favour the "blanket application" (Hennigar, 2017, para. 44), "one size fits all" nature of these laws; they have, in fact, invalidated the mandatory minimum in more than half of the cases (76 out of 134 cases, equivalent to 56.7%). Specifically, the particularized inquiry succeeded in 34 out of 76 cases (44.7%) (34 out of 73 cases or 46.6% when accounting for three cases that did not engage in the particularized inquiry). 59 of the 76 cases (77.6%) found a violation after considering reasonable hypotheticals. However, this total increases to 100% (all 59 cases) when adjusting for the 17 cases that did not engage in an analysis of reasonable hypotheticals.

The courts have stressed that determining whether a punishment is grossly disproportionate is a contextual process and not "a mathematical calculation" (*R c MRM*, 2019, para. 89). Fears that elimination of mandatory minimums will result in more lenient sentences are generally unfounded; the appropriate sentence in many of the examined cases was equivalent to or higher than the stipulated minimum. Furthermore, in certain cases the sentence imposed was consistent with a prior minimum penalty. For example, the court in *Jomphe* (2016) held that the appropriate sentence was 90 days imprisonment, which exceeds the prior 2012 minimum penalty of 45 days imprisonment under s. 151(a), but is significantly lower than the current one-year minimum sentence. This suggests that, when proceeding by indictment, a sentence for a s. 151(a) offence may be proportionate where it is greater than 45 days imprisonment, but under one-year imprisonment.

The SCC has established a test for determining whether legislation imposes "cruel and unusual punishment," thereby violating s. 12 of the *Charter* (1982). However, what exactly constitutes "grossly disproportionate" punishment that "outrages standards of decency" is less clear. The case law analysis suggests that the courts are willing to

consider a variety of factors to ensure a mandatory minimum sentence of imprisonment is constitutionally sound. A provision imposing a mandatory minimum is less likely to survive constitutional scrutiny when it covers a wide range of conduct and criminality (i.e., the scope of the legislation is too wide), it captures offenders of differing levels of moral blameworthiness (i.e., the offence involves a spectrum of intent), the language of the section contains words that are not narrowly defined and/or offence elements that are too broad, the section lacks the availability of exceptions to or protections against the minimum sentence, and/or there is a *justifiable* alternative to the minimum sentence (i.e., a non-carceral sentence that provides sufficient denunciation and deterrence). Finally, it is important to dispel the misconception that judicial discretion and judicial deference are mutually exclusive concepts. In mandatory minimum cases, both have a role to play in fashioning an appropriate, proportionate sentence:

> The court acknowledges that it must show deference to Parliament's sentencing choices. However, an assessment of the constitutionality of one of those choices is not proof of a lack of deference. Indeed, Parliament itself has stated that "an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances": s. 718.2 *Criminal Code*. And, indeed, Parliament itself rejects punishments which are cruel and unusual. (*R v Ford*, 2017, para. 34-35)

Chapter 7. Moving Forward: Policy Implications and Conclusion

"Mandatory minimum sentences offer another example of a march toward regress."
– Michael Tonry (2013, p. 471)

7.1. Fixing the Mandatory Minimum Approach

Several alternatives to mandatory minimum sentencing have been suggested, and a recent Department of Justice Canada report outlines approaches adopted in other jurisdictions.[120] While the judiciary continues to invalidate mandatory minimum sentencing provisions, less invasive (and less costly) options are available to legislators. As a result of *Ferguson* (2008), the SCC has clarified that constitutional exemptions from mandatory minimum sentences are neither available nor appropriate. However, there are other ways relief from (some or all) mandatory minimum sentences can be achieved.

7.1.1. Safety Valves – Permitting Judicial Discretion

The most straightforward alternative to the mandatory minimum approach is for the legislature to support judicial discretion, by allowing judges to depart from the specified minimum sentence. This may be accomplished through the inclusion of an escape clause or "safety valve," which may apply generally (i.e., subject to judicial interpretation) or in exceptional circumstances. The principal task for Parliament, then, is identifying the circumstances where a departure is permitted (and/or not permitted) (Dandurand, 2016, p. 5).[121] Exhaustive or non-exhaustive circumstances could be enumerated in legislation, limiting or enhancing the impact of broader judicial discretion (Dandurand, 2016, p. 23). Another consideration could be permitting judges to apply sentencing discounts, by reducing the minimum sentence on the basis of identified criteria (e.g., an early guilty plea, assistance to and/or cooperation with the state) (see Dandurand, 2016).[122]

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[120] See Dandurand (2016) and Chaster (2018) at para. 105-11.

[121] A system akin to the treatment of aggravating and mitigating factors in Canada.

[122] However, this may pose problems for proportionality requirements.

This approach retains the overall practice of mandatory minimum sentencing in that it assumes judges will impose the minimum sentence in most cases (Dandurand, 2016, p. 22). However, it also protects against minimum sentencing provisions that produce unjust outcomes in the minority of individual cases (e.g., in the "interest of justice") (Dandurand, 2016, p. 22). McLachlin CJ noted in *Lloyd* (2016) that "residual judicial discretion for exceptional cases is *a technique widely used* to avoid injustice and constitutional infirmity in other countries" [emphasis added] (para. 36). Different examples of escape clauses or "safety valves" can be found in several jurisdictions, including: Australia (Northern Territories, Victoria, New South Wales, and South Australia), England and Wales, South Africa, Israel, Sweden, New Zealand, Scotland, and the United States (some states and some federal laws) (Dandurand, 2016).

Another variation is to replace the mandatory minimum approach with a presumptive minimum approach. A presumptive penalty scheme (supplementary to mandatory minimum sentencing in some jurisdictions) has been adopted in England and Wales, Connecticut, Minnesota,[123] and New South Wales, and typically requires judges to submit reasons for departure from a minimum sentence (Dandurand, 2016, pp. 37-38).[124] This approach is also observable in the United States, where the Supreme Court decision in *Booker* (2005) effectively converted all minimum sentences (as enacted in the Federal Sentencing Guidelines) to presumptive sentences. In support of this switch, Tonry (2009) argues: "Converting all mandatory minimum penalties to presumptive penalties would sacrifice few of the values sought to be achieved by such laws but would avoid many of the undesirable effects" (p. 103). In theory, presumptive penalties would allow Parliament to "express its policy judgment," without completely sacrificing judicial discretion (Tonry, 2009, p. 103).

[123] The Minnesota Sentencing Guidelines provide the following statement: "Although the Sentencing Guidelines are advisory to the court, the presumptive sentences are deemed appropriate for the felonies covered by them. Therefore, departures from the presumptive sentences established in the Sentencing Guidelines should be made only when substantial and compelling circumstances can be identified and articulated."

[124] A judge's reasons can be appealed by the prosecutor in some jurisdictions, such as Minnesota (Tonry, 2009, p. 103).

7.1.2. Reducing the Breadth of Mandatory Minimum Sentencing Provisions

Another approach to fixing the problems of mandatory minimum sentencing is by reducing their breadth. The various mandatory minimum sentencing provisions could be repealed, returning to a system where high maximum penalties are set out, but judges retain discretion to determine the proportionate sentence in any given case. Trial judges would be guided by sentencing ranges established by the various Courts of Appeal across the country, while appellate judges would be left to set out appropriate sentencing ranges (or starting points in those provinces that prefer such an approach). Sentencing judges would select a sentence from within the range, or at the appropriate starting point, but would be free to deviate if the circumstances merit such a departure. Unjustifiable departures would be subject to review and modification by the Courts of Appeal as unfit sentences.

Another measure that could be taken to minimize the negative effects of mandatory minimum sentencing is for the federal government to review those offences in the *Code* (1985) and *CDSA* (1996) that contain a minimum sentence and to eliminate those unlikely to survive constitutional scrutiny. Some minimum sentences could be retained, but drastically reduced to a level where they would stand a reasonable chance of being upheld by the courts. For example, courts had no trouble upholding the constitutionality of the sexual interference offence in the *Code* (1985) when the minimum sentence was 45 days or 90 days; however, once the minimum sentence was raised to one year, courts began to declare such punishment grossly disproportionate.

Another approach, raised by McLachlin C.J. in *Lloyd* (2016), is to restrict the scope of the circumstances in which an offence applies. This would narrow the reach of offences carrying mandatory minimum sentences "so that they only catch offenders that merit [them]" (*R v Lloyd*, 2016, para. 35). For example, a court may require proof that the offender is a professional drug dealer, intending to traffic for profit on the illicit drug market, before a minimum sentence could attach.

If legislators are unwilling to address the mandatory minimums problem, research suggests that other legal actors will through direct and indirect mechanisms. While the preferred method of Canadian courts has been to strike down unconstitutional law, it is well documented that judges (and prosecutors) find additional ways to circumvent

mandatory minimum sentences (for example, by interpreting the legislation "benevolently," or by compensating (i.e., "counterbalancing harshness") elsewhere in the sentencing process) (Doob & Webster, 2016, p. 403). Fortunately, alternative policy approaches to mandatory minimum sentencing are also available and should be considered.

7.2. Alternative Policy Approaches

7.2.1. Sentencing Grids

In the United States, sentencing guidelines at both the state and federal level have been used to address the issue of sentencing disparity. Minnesota was the first state to implement sentencing guidelines in 1980; over 20 states now follow some form of guidelines approach (Mitchell, 2017, p. 28; Kauder & Ostrom, 2008, p. 4).[125] The Federal Sentencing Guidelines were enacted with the passing of *The Sentencing Reform Act of 1984*. While initially mandatory, the guidelines became advisory following the Supreme Court decision in *Booker* (2005).

Briefly, the two-dimensional grid approach (the "Sentencing Table") consists of two factors, which make up the axis: crime seriousness and criminal history (Roberts, 2013, p. 6). An "Offence Level" between 1 and 43 indicates the seriousness of the crime. A "Criminal History Category" between I and VI is determined by the number of "Criminal History Points" (between 0 and 13+) an offender has received. Each matrix identifies a sentencing range in the number of months (Roberts, 2013, p. 6).[126] The table is further split into four "Zones" (A-D). Each Zone contains a set of sentencing ranges. Zones also restrict the type of sanction an offender may receive. For example, an offender cannot receive a probationary sentence in Zone C or D, but can in Zone A or B.

Between the 1970s and early 1980s, studies of the *presumptive* sentencing guidelines in Minnesota, Washington, and Oregon all supported the (state) guidelines' effect in reducing sentencing disparity (Tonry, 2012, p. 388-389). These effects were not found in studies of *voluntary* sentencing guidelines (Tonry, 2012, p. 388). Nonetheless,

[125] As sentencing differs from state to state, there is disagreement about the exact number of states following guidelines.

[126] In Minnesota, a sentence that is 15% lower or 20% higher than the presumptive sentence (under conditions) makes up the sentencing range and is *not* considered a "departure," per se.

approximately 80% of sentences "fall within the applicable guidelines or below them with government approval" (Tonry, 2012, p. 387). Furthermore, approximately 75% of district court judges agree that the American guidelines approach "best achieves the purposes of sentencing" (Tonry, 2012, p. 387).

The sentencing grid approach was rejected in several countries, including Canada and England and Wales (Roberts, 2013, p. 3). It has been argued that Canada rejected sentencing guidelines altogether because of fears that the guidelines would look more like this US version (Roberts, 2012a; Roberts, 2012b). England and Wales, on the other hand, opted to develop a guideline scheme that was flexible and in line with traditional English sentencing practice (Roberts, 2013, p. 3).

7.2.2. The English Approach: Flexible Sentencing Guidelines

Another approach to addressing sentencing disparity is to create structured sentencing guidelines such as those found in England and Wales. The English approach has developed significantly in the last decade with the enactment of both the *Criminal Justice Act* (2003) and the *Coroners and Justice Act* (2009), and the creation of the Sentencing Council for England. Apart from the United States, England and Wales is now the only jurisdiction with both "offence-specific guidelines" and "generic guidelines" (Roberts, 2013, p. 1). Definitive guidelines currently exist for the following offences: causing death by driving, attempted murder, assault, burglary, drug offences, sexual offences, environmental offences, fraud, bribery, money laundering, theft, health and safety offences, robbery, dangerous dog offences, bladed articles and offensive weapons, terrorism offences, breach offences, intimidatory offences, manslaughter, and child cruelty.[127]

Under the English framework, which allows considerable flexibility, sentencing judges experience a greater degree of discretion than those in the United States. Roberts and Ashworth (2016) identify three ways the English guidelines allow for judicial discretion: first, consideration of aggravating and mitigating factors allows judges to "move outside" an offence category range; second, a sentence is not confined to the offence category range, but can also fall within the total offence range; and third,

[127] These guidelines are accessible online at https://www.sentencingcouncil.org.uk.

departure from the guidelines is permitted in certain cases (p. 337). While legislation directs judges to comply with the guidelines (i.e., the wording has been amended from "must have regard to" to simply "must"), a judge may depart from the sentencing guidelines if "it would not be in the interests of justice to follow them" (Roberts, 2013, p. 21; Roberts & Ashworth, 2016, p. 336-337).

While sentencing guidelines are primarily intended to address sentencing disparity, they also protect against "episodic punitiveness" on part of the legislature and/or judiciary (Roberts, 2013, p. 15). In this respect, these sentencing guidelines are inconsistent with the mandatory minimum approach in that an individual sentence is to conform to proportionality requirements (Roberts, 2013, p. 15).

Table 7-1. Summary of English and Wales Sentencing Guidelines: Steps 1-9

Step One	Identify offence category.[128]
Step Two	Generate sentence by examining starting point and category sentence range, adjusting for aggravating and/or mitigating factors.[118]
Step Three	Determine reduction for assistance to state, if applicable.
Step Four	Determine reduction for guilty plea, if applicable.
Step Five	Consider appropriateness of "indeterminate or extended" sentence, if applicable.
Step Six	Apply totality principle and ensure sentence is proportionate.
Step Seven	Impose relevant orders.
Step Eight	Explain reasons for sentencing.
Step Nine	Allocate pre-trial (remand and/or bail) credit, if warranted.

Other jurisdictions have now enacted similar guidelines: New Zealand, Scotland, Northern Ireland, and South Korea (Roberts, 2012, p. 344). In Canada, discussion about

[128] See Roberts, 2013, p. 24: Category 1 indicates greater harm and high culpability, with a three-year custodial starting point and a two to six-year custodial sentencing range. Category 2 indicates greater harm and lower culpability *or* lesser harm and higher culpability, with a 12-month custodial starting point and a "high level community order to two-years custody" sentencing range. Category 3 indicates lesser harm and lower culpability, with a "high level community order" starting point and a "low-level community order to 26-weeks custody" sentencing range.

the implementation of sentencing guidelines occurred (and was subsequently rejected) following the conclusion of the Canadian Sentencing Commission in 1988 (Doob & Webster, 2016, p. 369; Roberts, 2013, p. 1). They have "never since been seriously considered" (Doob & Webster, 2016, p. 369). England and Wales may now provide a working model adaptable to the Canadian context, although a major challenge will be uniting inter-jurisdictional sentencing approaches across provinces (Roberts, 2012, p. 321).

7.2.3. Computer-assisted Sentencing

Another alternative to the mandatory minimum approach is the use of computer-assisted systems at sentencing. Importantly, these systems are intended to aid judges rather than replace judicial discretion, and would (ideally) accompany additional sentencing reforms.[129] Computer information systems are familiar to criminal justice and legal actors; they are typically employed by police and correctional agencies, and are used by court workers for a variety of tasks, such as scheduling. Several models for computer-assisted sentencing exist and a correct fit depends largely on what the intended nature, purpose, and scope of the system is (i.e., theoretical and operational considerations).

Computer information systems could assist with numerous potential tasks, from calculating sentences, maintaining consistency/tracking (dis)parity, or simply providing a centralized location for sentencing-related information, statistics, and variables. Once a purpose is identified, the next concern is the type of data that is needed from the SIS to achieve that purpose (quantitative, qualitative, or both) and how it is to be displayed.[130]

Computer-assisted sentencing has been used in several jurisdictions, including Scotland, New South Wales (Australia) (see Spears, 1994), Israel, Holland, and Portland (Oregon) (Miller, 2004, as cited in von Hirsch, Ashworth, & Roberts, 2009, p. 283). Sentencing information systems were unsuccessfully tested in five Canadian provinces

[129] Miller (2004) argues that in practice, "resource constraints" impact the effectiveness of such systems and the likelihood of their implementation (as cited in von Hirsch et al., 2009, p. 288).

[130] A survey of judges in New South Wales found the following variables to be most useful for comparative purposes: plea, age, criminal record, and "liberty status" at the time of the offence. The New South Wales system also generates tables and graphs showing various disposition-related frequencies (relative and absolute), and contains a full-text retrieval system for case law, statutes, and sentencing principles (Spears, 1994, p. 1108).

throughout the 1980s, although no such system is currently in place (Tonry, 2013, p. 468). While initially supportive, Canadian judges became largely disinterested in the experimental sentencing information system (SIS). As Doob (1989) recalls: "… when judges are reasonably confident, rightly or wrongly, about their own sentences, why would they want to examine others' decisions, especially if they knew (or thought) that these judges have different approaches?" (Doob, 1989, as cited in Miller, 2004, p. 10). In addition to reluctance, judges were not required to follow the guidance of the SIS; Parliament was silent on the type of authority SIS conferred on judges (Miller, 2004, as cited in von Hirsch et al., 2009, p. 284). It is clear that if a SIS is to be adopted, communication, cooperation, and commitment are required from the judiciary, provincial governments, and federal government.

7.3. Conclusion

> "*… we have gone from an original section 12 Charter analysis involving mandatory minimum sentences which involved significant deference to Parliament and the use of section 12 only in the clearest of cases, to an analysis in which mandatory minimum sentences are declared to be of no force or effect on a routine basis*" [emphasis added]. – Gorman Prov. Ct. J. (*R v Clarke*, 2018, para. 194)

Doob and Webster (2016) suggest that while legislation pertaining to sentencing has been negligible in the past century, there has been over two decades of discussion on sentencing reform in Canada (p. 360). However, the attitude of politicians and policymakers towards the "politics on crime and punishment" has been described as "benign neglect" (Tonry, 2013, p. 467). An opportunity for change came and has seemingly passed. In 2015, Prime Minister Justin Trudeau directed (former) Minister of Justice Jody Wilson-Raybould to review the sentencing reforms introduced by the previous Conservative government, with particular consideration to mandatory minimum sentencing. In 2016, (then) Green Party leader Elizabeth May introduced Bill C-269 (*An Act to amend the Criminal Code and the Controlled Drugs and Substances Act (sentencing) and to make consequential amendments to another Act*) in the House of Commons. She stated that the Bill's purpose was to

> … remove the use of mandatory minimum sentences for most criminal offences. They remain in place for murder and high treason, but we do now have, and we had at the time that many mandatory minimum provisions were brought into this place, adequate and in fact

> overwhelming evidence that mandatory minimum sentences do not reduce the crime rate. (Open Parliament, n.d.)

Bill C-269 died after first reading, but shows what efforts to eliminate mandatory minimums may look like.

The Liberal government has paid lip service in its reassurance that mandatory minimum sentencing remains a priority of criminal justice reform; five years later, there has been no observable action to fulfill its commitment. Doob and Webster (2016) reflect: "… criminal justice reform does not appear to be high on the list of priorities of the new government" (p. 413). Discouragement persists following re-election of Prime Minister Justin Trudeau's Liberal government in 2019 – the mandatory minimum issue seemingly disappeared from political dialogue and is noticeably absent from each party platform. The mandatory minimum problem has not escaped the minds of all. In February 2020, Bill S-208 (*An Act to Amend the Criminal Code (Independence of the judiciary*) was introduced in the Senate by Independent Senator Kim Pate. Proposed amendments would give judges discretion to (1) *not* impose a minimum sentence, (2) "consider all available options, other than the minimum punishment of imprisonment," (3) determine there is "no alternative to the minimum punishment of imprisonment … that is just and reasonable," and (4) provide written reasons for imposing a minimum sentence (Bill C-208, 2020, s. 718.3(1), s. 718.3(2), s. 718.5(1)(a), s. 718.5(1)(b), s. 718.5(2)). While the fate of Bill S-208 remains uncertain, it provides an example of what a safety valve may look like in the Canadian context.

There currently exists no advisory body (commission or council) tasked with observing and improving sentencing practice in Canada. A council akin to that of England and Wales would be beneficial in researching and advancing a comprehensive system of principled sentencing. For example, the mandate of the Sentencing Council for England includes publishing and issuing sentencing guidelines along with monitoring their operation and effect (*Coroners and Justice Act*, 2009, s. 127-130). Specifically, the Council examines court departures from the guidelines, and the influence on and relationship between the guidelines and additional factors influencing sentencing, sentencing disparity and consistency, and public confidence in the criminal justice system (*Criminal Justice Act*, 2009, s. 127-130; Roberts, 2013, p. 3).

It has been argued that Canada is now the country with the broadest interpretation of laws prohibiting cruel and unusual punishment (Gray, 2017, p. 392). Given the high cost associated with litigation, the federal government's review of the various offences carrying mandatory minimums should have received higher priority. Offenders continue to pay thousands of dollars to challenge various mandatory minimum provisions, often through the use of legal aid funds. Concomitantly, the state is paying large sums of money on lawyers to defend such legislation, much of which is knowingly doomed to be struck down. It seems clear that once the SCC's decisions in *Nur* (2015) and *Lloyd* (2016) were rendered, it would have been fairly straightforward to identify those provisions at greatest risk of being struck down. This is neither a new nor surprising feat; in fact, Stuart (2012) previously identified the *Charter* (1982) and judiciary as the "best hope" for sentencing reform (para. 16). Mandatory minimum sentencing, as the "preferred solution to crime," has failed (Greenspan & Doob, 2012). Canada is long due for change; this change begins when sentencing reform becomes the serious criminal justice policy issue it needs to be. The federal government would be off to a good start with review of mandatory minimum sentences.

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Tackling Violent Crime Act, SC 2008, c 6

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Appendix. Mandatory Minimum Sentences in the *Criminal Code* (1985) and *CDSA* (1996)

Code Section	Offence	Minimum Penalty	Validity
47(1)	High treason	Life	
85(3)(a)	Using a firearm in an offence – first offence	1 year	**Invalid**: *R v Superales*, 2018 ONSC 6367 **Valid**: *R v Cogo*, 2015 BCPC 453
85(3)(b)	Using a firearm in an offence – second or subsequent offence	3 years	**Valid**: *R v Al-Isawi*, 2016 BCSC 1691; 2017 BCCA 163
86(3)(a)(i)	Careless use of a firearm – first offence	2 years	
86(3)(a)(ii)	Careless use of a firearm – second or subsequent offence	5 years	
92(3)(b)	Unauthorized possession of a firearm – second offence	1 year	
92(3)(c)	Unauthorized possession of a firearm – third or subsequent offence	2 years less a day	
95(2)(a)(i)	Unlawful possession of a restricted or prohibited firearm – first offence	3 years	**Invalid**: *R v Nur,* 2015 SCC 15
95(2)(a)(ii)	Unlawful possession of a restricted or prohibited firearm – second and subsequent offences	5 years	**Invalid**: *R v Nur,* 2015 SCC 15
96(2)(a)	Possession of weapon obtained by commission of offence	1 year	**Valid**: *R v Chislett*, 2016 CanLII 85360; *R v Ottie*, 2019 BCSC 49
99(2)(a)	Weapons trafficking (firearm) – first offence	3 years	**Invalid**: *R c Lefrançois*, 2018 QCCQ 553; *R v De Vos*, 2018 ONSC 6813; *R v Friesen,* 2015 ABQB 717; *R v Harriott*, 2017 ONSC 3393; *R v Hussain,* 2015 ONSC 7115; *R v Irkootee*, 2018 NUCJ 32; *R v Shobway,* 2015 ONCJ 457; *R v Trepanier,* 2016 NBPC 2
99(2)(b)	Weapons trafficking (firearm) – second or subsequent offence	5 years	
99(3)	Weapons trafficking (non-firearm prohibited or restricted weapon)	1 year	
100(2)(a)	Possession for purpose of weapons trafficking (firearm) – first offence	3 years	
100(2)(b)	Possession for purpose of weapons	5 years	

	trafficking (firearm) – second or subsequent offence		
100(3)	Possession for purpose of weapons trafficking (non-firearm prohibited or restricted weapon)	1 year	
102	Making automatic firearm	1 year (if by indictment – hybrid offence)	
103(2)(a)	Importing or exporting (firearm) knowing it is unauthorized – first offence	3 years	**Invalid**: *R c Lefrançois*, 2018 QCCQ 553
103(2)(b)	Importing or exporting (firearm) knowing it is unauthorized – second or subsequent offence	5 years	
103(2.1)	Importing or exporting (non-firearm prohibited or restricted weapon) knowing it is unauthorized – first offence	1 year	
121.1(4)(a)(i)	Unlawfully selling tobacco products >10 kg – second offence	90 days	
121.1(4)(a)(ii)	Unlawfully selling tobacco products >10 kg – third offence	180 days	
121.1(4)(a)(iii)	Unlawfully selling tobacco products >10 kg – fourth or subsequent offence	2 years less a day	
151	Sexual interference	1 year (if by indictment); 90 days (as a summary conviction offence)	**Invalid**: *R c Caron Barrette,* 2018 QCCA 17287; *R c Jomphe*, 2016 QCCQ 11271; *R v Ali*, 2017 ONSC 4531; *R v AW*, [2018] NJ No 296; *R v BJT*, 2016 ONSC 6616; *R v Drumonde*, 2018 ONCJ 336; *R v Ford*, 2017 ABQB 322; *R v Hood*, 2016 NSPC 78; *R v Horswill*, 2018 BCCA 148; *R v Hussein,* 2017 ONSC 4202; *R v JED*, 2017 MBPC 33; *R v ML*, 2016 ONSC 7082; *R v Scofield*, 2018 BCSC 91; *R v Sarmales (SJD)*, 2017 ONSC 1869; *R v SJP*, 2016 NSPC 50; *St Cyr c R*, 2018 QCCA 768 **Valid**: *R c Desmarais*, 2017 QCCQ 7882; *R v AKB*, [2018] OJ No 974; *R v CF*, 2016 ONCJ 302;

			R v EMQ, 2015 BCSC 201 (pre *Nur*); *R v JE*, 2018 NSPC 4; *R v SA*, 2016 ONSC 5355
152	Invitation to sexual touching	1 year (if by indictment); 90 days (as a summary conviction offence)	**Invalid**: *R v JG*, 2017 ONCJ 881 **Valid**: *R c Desmarais*, 2017 QCCQ 7882; *R v Gumban*, 2017 BCPC 226
153(1.1)	Sexual exploitation	1 year (if by indictment); 90 days (as a summary conviction offence)	**Invalid**: *R v Cristoferi-Paolucci*, 2017 ONSC 4246; *R v Hood*, 2016 NSPC 78; *R v Okoro*, [2018] OJ No 2102 **Valid**: *R v EJB*, 2018 ABCA 239
155(2)	Incest (victim < 16 years of age)	5 years	**Valid**: *R c MRM*, 2019 ONSC 297; *R c YP*, 2018 QCCQ 2956
160(3)	Bestiality in presence of or inciting a child to commit bestiality	1 year (if by indictment); 6 months (as a summary conviction offence)	
163.1(2)	Making child pornography	1 year (if by indictment); 6 months (as a summary conviction offence)	**Valid**: *R v AR*, 2018 ONCJ 613; *R v Cristoferi-Paolucci*, 2017 ONSC 4246
163.1(3)	Distribution, etc. of child pornography	1 year (if by indictment); 6 months (as a summary conviction offence)	**Invalid**: *R v Boodhoo*, 2018 ONSC 7207 **Valid**: *R c Ibrahim*, 2017 QCCQ 11203; *R v Butler*, [2017] NJ No 396; *R v Watts*, 2016 ABPC 57
163.1(4)	Possession of child pornography	1 year (if by indictment); 6 months (as a summary conviction offence)	**Valid**: *R c Ibrahim*, 2017 QCCQ 11203; *R v AKB*, [2018] OJ No 974; *R v* AR, 2018 ONCJ 613; *R v Butler*, [2017] NJ No 396; *R v Cristoferi-Paolucci*, 2017 ONSC 4246; *R v John*, 2017 ONSC 810; *R v LeCourtois*, 2016 ONSC 190; *R v Machulec*, 2016 ONSC 1883; *R v Walker*, 2017 BCSC 1301; *R v Watts*, 2016 ABPC 57 **Invalid**: *R v Swaby*,

			2017 BCSC 2020; *R v Zhang*, 2018 ONCJ 646
163.1(4.1)	Accessing child pornography	1 year (if by indictment); 6 months (as a summary conviction offence)	**Valid**: *R v Cristoferi-Paolucci*, 2017 ONSC 4246
170	Parent or guardian procuring sexual activity (victim < 18 years)	1 year	
171	Householder permitting prohibited sexual activity (child < 18 years)	1 year	
171.1(2)	Making sexually explicit material available to child	6 months (if by indictment); 90 days (as a summary conviction offence)	**Valid**: *R v Allen*, 2018 ONSC 252; *R v Clarke*, [2018] NJ No 374
172.1(2)	Luring a child	1 year (if by indictment); 6 months (as a summary conviction offence)	**Invalid**: *R v BS*, 2018 BCSC 2044; 2018 BCSC 2286; *R v Hood*, 2016 NSPC 78; *R v Morrison*, 2017 ONCA 582; *R v Randall*, 2019 ONCJ 470 **Valid**: *Lavoie-Santerre c. Procureur general du Canada*, 2016 QCCQ 17287; *R v Clarke*, [2018] NJ No 374
172.2(2)	Arranging by phone for a person to commit a listed offence against a young person	1 year (if by indictment); 6 months (as a summary conviction offence)	**Valid**: *R v Duplessis*, 2018 ONCJ 912; *R v Wheeler*, 2017 ONSC 7604
173(2)	Exposure to a child < 16 years	90 days (if by indictment); 30 days (as a summary conviction offence)	
202(2)	Betting, pool-selling, book-making, etc.	14 days for a second offence; 3 months for each subsequent offence	
203	Placing bets on behalf of others	14 days for a second offence; 3 months for each subsequent offence	
220	Causing death by criminal negligence (firearm)	4 years	**Valid**: *R v Dockrill,* 2016 NSSC 56
235	Murder	Life	**Valid**: *R v Newborn*, 2018 ABQB 47
236(a)	Manslaughter (firearm)	4 years	**Valid**: *R c Lacroix*, 2016 QCCQ 12410; *R v McMath*, 2015 BCSC 440; *R v Penner*, 2017 BCSC 1688

239(1)(a)	Attempt to commit murder (restricted/prohibited firearm, or other firearm for a criminal organization)	5 years for first offence; 7 years for a second or subsequent offence	**Valid**: *R v Forcillo,* 2016 ONSC 4896; *R v Forcillo*, 2018 ONCA 402
239(1)(a.1)	Attempt to commit murder (firearm, any other case)	4 years	**Valid**: *R v Forcillo,* 2016 ONSC 4896; 2018 ONCA 402; *R v Ziegler*, 2017 ABQB 411
244(2)(a)	Discharging firearm with intent (restricted/prohibited firearm, or other firearm for a criminal organization)	5 years for first offence; 7 years for a second or subsequent offence	**Valid**: *R v Dingwall*, 2018 BCSC 1041
244(2)(b)	Discharging firearm with intent (any other case)	4 years	**Valid**: *R v Reis*, 2017 ONSC 1961
244.2(3)(a)	Discharging firearm – recklessness (restricted/prohibited firearm, or other firearm for a criminal organization)	5 years for first offence; 7 years for a second or subsequent offence	**Invalid**: *R v Cardinal*, 2018 NWTSC 12; *R v Dingwall*, 2018 BCSC 1041 **Valid**: *R v Mohamed*, 2016 ONCJ 492; *R v Mohammad*, 2017 ONCJ 297
244.2(3)(b)	Discharging firearm – recklessness (any other case)	4 years	**Invalid**: *R c Gunner*, 2017 QCCQ 12563; *R c Vézina*, 2017 QCCQ 7785; *R v Hills*, 2018 ABQB 945; R *v Itturiligaq*, 2018 NUCJ 31; *R v Kafkwi*, 2018 NWTSC 13 **Valid**: *R v Oud*, 2016 BCCA 332; *R v Reis*, 2017 ONSC 1961
253, 255(1)	Operation while impaired or over .08	$1000 for a first offence; 30 days for a second offence; 120 days for each subsequent offence	**Valid**: *Lachance c R*, 2017 QCCQ 11969
254, 255(1)	Refusing to provide a sample	$1000 for a first offence; 30 days for a second offence; 120 days for each subsequent offence	**Valid**: *R v Lake*, 2016 ABPC 232
255(2), 255(3.3)	Impaired driving causing bodily harm	$1000 for a first offence; 30 days for a second offence; 120 days for each subsequent offence	
255(2.1), 255(3.3)	Driving over .08 causing bodily harm	$1000 for a first offence; 30 days for a	

		second offence; 120 days for each subsequent offence	
255(2.2), 255(3.3)	Refusing to provide sample, accident causing bodily harm	$1000 for a first offence; 30 days for a second offence; 120 days for each subsequent offence	
255(3), 255(3.3)	Impaired driving causing death	$1000 for a first offence; 30 days for a second offence; 120 days for each subsequent offence	
255(3.1), 255(3.3)	Driving over .08, accident causing death	$1000 for a first offence; 30 days for a second offence; 120 days for each subsequent offence	
255(3.2), 255(3.3)	Refusing to provide sample, accident causing death	$1000 for a first offence; 30 days for a second offence; 120 days for each subsequent offence	
271	Sexual assault (complainant under 16)	1 year (if by indictment); 6 months (as a summary conviction offence)	**Invalid**: *R c Gagnon*, 2018 QCCQ 9569; *R v Deyoung*, 2016 NSPC 67; *R v ERDR*, 2016 BCSC 774; 2016 BCSC 1759; *R v MacLean*, 2018 NLSC 209
272(2)(a)	Sexual assault with a weapon, threats to a third party or causing bodily harm (restricted/prohibited firearm, or other firearm for a criminal organization)	5 years for a first offence; 7 years for a second or subsequent offence	
272(2)(a.1)	Sexual assault with a weapon, threats to a third party or causing bodily harm (firearm, any other case)	4 years	
272(2)(a.2)	Sexual assault with a weapon, threats to a third party or causing bodily harm (complainant under 16)	5 years	**Invalid**: *R v MJ*, 2016 ONSC 2769
273(2)(a)	Aggravated sexual assault (restricted/prohibited firearm, or other firearm for a criminal organization)	5 years for a first offence; 7 years for a second or subsequent offence	
273(2)(a.1)	Aggravated sexual assault (firearm, any other case)	4 years	
273(2)(a.2)	Aggravated sexual assault (complainant under 16)	5 years	
279(1.1)(a)	Kidnapping (restricted/prohibited	5 years for a first	

	firearm, or other firearm for a criminal organization)	offence; 7 years for a second or subsequent offence	
279(1.1)(a.1)	Kidnapping (firearm, any other case)	4 years	
279(1.1)(a.2)	Kidnapping (person under 16)	5 years	
279.01(1)(a)	Trafficking in persons (kidnap, commit an aggravated assault or aggravated sexual assault, or cause death to victim)	5 years	
279.01(1)(b)	Trafficking in persons (any other case)	4 years	
279.011(1)(a)	Trafficking of a person under the age of eighteen years (kidnap, commit an aggravated assault or aggravated sexual assault, or cause death to victim)	6 years	
279.011(1)(b)	Trafficking of a person under the age of eighteen years (any other case)	5 years	**Invalid**: *R v Finestone*, 2017 ONCJ 22
279.02(2)	Material benefit – trafficking of person under 18 years	2 years	
279.03(2)	Withholding or destroying documents – trafficking of person under 18 years	1 year	
279.1(2)(a)	Hostage-taking (restricted/prohibited firearm, or for a criminal organization)	5 years for a first offence; 7 years for a second or subsequent offence	
279.1(2)(a.1)	Hostage-taking (firearm, any other case)	4 years	
286.1(2)	Obtaining sexual services for consideration from person under 18 years	6 months for a first offence; 1 year for each subsequent offence	**Invalid**: *R c Lalonde*, 2017 ONSC 2181 (re predecessor: s. 212(4)); *R v Alvi*, 2018 ABPC 136 *R v Badali*, 2016 ONSC 788 (re predecessor: s. 212(4)/212(2)); *R v JLM*, 2017 BCCA 258 (re predecessor: s. 212(4))
286.2(2)	Material benefit from sexual services provided by person under 18 years	2 years	**Invalid**: *R v Robitaille*, 2017 ONCJ 768
286.3(2)	Procuring – person under 18 years	5 years	**Invalid**: *R v Safieh*, 2018 ONSC 4468
333.1(1)(a)	Motor vehicle theft	6 months for a third or subsequent offence (if by indictment)	
344(1)(a)	Robbery (restricted/prohibited firearm, or for a criminal organization)	5 years for a first offence; 7 years for a second or subsequent offence	**Invalid**: *R v Hilbach*, 2018 ABQB 526 **Valid**: *R v McIntyre*, 2017 ONSC 360; *R v*

			McIvor, 2017 MBPC 11; *R v Stocker*, 2017 BCSC 542
344(1)(a.1)	Robbery (firearm, any other case)	4 years	**Valid**: *R c Perron*, 2016 QCCQ 13089; *R v Bernarde*, 2018 NWTCA 7
346(1.1)(a)	Extortion (restricted/prohibited firearm, or for a criminal organization)	5 years for a first offence; 7 years for a second or subsequent offence	
346 (1.1)(a.1)	Extortion (firearm, any other case)	4 years	
380(1.1)	Fraud exceeding $1,000,000	2 years (if by indictment)	**Invalid**: *R v Plange*, 2018 ONSC 1657
430(4.11)	Mischief relating to war memorials	14 days for second offence; 30 days for each subsequent offence	
445.01(2)(a)	Killing law enforcement animal	6 months (if by indictment)	
462.37(4)(a)	Imprisonment in default of payment of fine	6 months (if fine is > $10,000 and < $20,000); 12 months (if the fine is > $20,000 and < $50,000); 18 months (if the fine is > $50,000 and < $100,000); 2 years (if the fine is > $100,000 and < $250,000); 3 years (if the fine is > $250,000 and < $1,000,000); 5 years (if the fine is > $1,000,000)	**Valid**: *R v Chung*, 2018 ONSC 6633

CDSA Section

5(3)(a)(i)(A)	Trafficking in substance/possession for purpose of trafficking (criminal organization)	1 year	
5(3)(a)(i)(B)	Trafficking in substance/possession for purpose of trafficking (used or threatened to use violence)	1 year	
5(3)(a)(i)(C)	Trafficking in substance/possession for purpose of trafficking (carried, used or threatened to use a weapon)	1 year	**Invalid**: *R v Jackson-Bullshields*, 2015 BCPC 411; 2015 BCPC 414
5(3)(a)(i)(D)	Trafficking in substance/possession for purpose of trafficking (person convicted of a designated offence, or	1 year	**Invalid**: *R v Lloyd*, 2016 SCC 13

	had served a term of imprisonment for a designated substance offence, within the previous 10 years)		
5(3)(a)(ii)(A)	Trafficking in substance/possession for purpose of trafficking (in or near a school, on or near school grounds or in or near any other public place frequented by persons under the age of 18 years)	2 years	**Invalid**: R v *Bradley-Luscombe*, [2015] BCJ No 1685; *R v Dickey*, 2016 BCCA 177; *R v Robinson*, 2016 ONSC 2819
5(3)(a)(ii)(B)	Trafficking in substance/possession for purpose of trafficking (in a prison or on its grounds)	2 years	**Valid**: *R v Boutcher*, 2017 NLTD(G) 111; *R v Carswell*, 2018 SKQB 53
5(3)(a)(ii)(C)	Trafficking in substance/possession for purpose of trafficking (used services of or involved person under 18)	2 years	**Invalid**: *R v Bradley-Luscombe*, [2015] BCJ No 1685; *R v Dickey*, 2016 BCCA 177
6(3)(a)(i)	Importing or exporting/possession for the purpose of exporting (for the purposes of trafficking)	1 year	**Invalid**: *R v Duffus*, 2017 ONSC 231
6(3)(a)(ii)	Importing or exporting/possession for the purpose of exporting (abused position of trust or authority)	1 year	
6(3)(a)(iii)	Importing or exporting/possession for the purpose of exporting (access to area restricted to authorized persons and used that access to commit offence)	1 year	
6(3)(a.1)(i)	Importing or exporting/possession for the purpose of exporting (Schedule I > 1 kg)	2 years	**Invalid**: *R v CS*, 2018 ONSC 1141
7(2)(a)(i)	Production of substance (Schedule I)	3 years (if any factors in 7(3) apply); 2 years (any other case)	
7(2)(a.1)(i)	Production of substance for the purposes of trafficking (Schedule II, other than marijuana)	1 year	
7(2)(a.1)(ii)	Production of substance for the purpose of trafficking (Schedule II, other than marijuana) with the aggravating factors found in s. 7(3)	18 months	
7(2)(b)(i)	Production of substance (marijuana) for the purpose of trafficking – more than 5 but less than 201 plants	6 months	**Invalid**: *R c Chouinard*, 2018 QCCQ 9370; *R c Hydrobec*, 2018 QCCQ 6447; *R v Boudreau*, 2018 NSPC 19; *R v Boulton*, 2016 ONSC 2979; *R v Elliott*, 2016 BCCA 214; *R v Vu*, 2015 ONSC 5834
7(2)(b)(ii)	Production of substance (marijuana)	9 months	**Invalid**: *R v Vu*, 2015

	for the purpose of trafficking – more than 5 but less than 201 plants with aggravating factors found in s. 7(3)		ONSC 5834
7(2)(b)(iii)	Production of substance (marijuana) for the purpose of trafficking – more than 200 but less than 501 plants	1 year	**Invalid**: *Directeur des poursuites criminelles et penales c Martin*, 2016 QCCQ 5592; *R v Morrell*, 2017 ONSC 5606 **Valid**: *R v Li*, 2016 ONSC 1757; *R v Picard*, 2016 BCSC 2052; *R v Serov*, 2017 BCCA 456
7(2)(b)(iv)	Production of substance (marijuana) for the purpose of trafficking – more than 200 but less than 501 plants with aggravating factors found in s. 7(3)	18 months	**Invalid**: *R v Nguyen*, 2017 BCPC 261; *R v Serov*, 2017 BCCA 456 **Valid**: *Directeur des Poursuites Criminelles et Penales c Landry*, 2017 QCCQ 3468
7(2)(b)(v)	Production of substance (marijuana) for the purpose of trafficking – more than 500 plants	2 years	**Invalid**: *R c Hydrobec*, 2018 QCCQ 6447; *R v Ling*, 2017 ONSC 5627; *R v McGee*, 2016 BCSC 2175; 2017 BCSC 594; 2017 BCCA 457; *R v Pham*, 2016 ONSC 5312; *R v Tran*, 2017 ONSC 651 **Valid**: *R v Hanna*, 2015 BCSC 986 (pre *Nur*); *R v Hofer*, 2016 BCSC 1442; *R v Kennedy*, 2016 ONSC 3438
7(2)(b)(vi)	Production of substance (marijuana) for the purpose of trafficking – more than 500 plants with the aggravating factors found in s. 7(3)	3 years	**Invalid**: *R v McGee*, 2016 BCSC 2175; 2017 BCSC 594; 2017 BCCA 457; *R v Pham*, 2016 ONSC 5312 **Valid**: *R v Kennedy*, 2016 ONSC 3438