



Mandatory Minimum Penalties in Canada: Analysis and Annotated Bibliography

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1.0 Introduction: An Overview of Canadian Mandatory Minimum Penalties

This document summarizes core findings on Mandatory Minimum Penalties (MMPs) in Canada. Information and evidence are drawn from refereed publications and journals, policy/position papers, and key monographs; these publications focus on the Canadian MMP experience. This paper reviews core research findings and ideas on MMPs in Canada by showing how they are defined, their history, how they are used, and how they impact key legal system players in the sentencing process. Furthermore, this paper presents arguments supporting MMPs and arguments critiquing MMPs. An annotated bibliography of sources is appended to this document; this bibliography presents a variety of articles concerning MMPs in Canada with some relevant international articles. The annotations contain brief summaries of each article along with a set of keywords.

1.1 Defining Mandatory Minimum Penalties

Mandatory Minimum Penalties (MMPs) - also called Mandatory Minimum Sentences (MMS) - are described in academic literature and among practitioners as legislated sentencing floors where the minimum punishment is predetermined by law. The mandatory minimum penalty requires judges to impose a specific type and minimum length/extent/severity of sentence to an offender upon conviction for specified criminal offences (Fearn 2011; Tonry 1996, 2009). Judges cannot give a sentence below the predetermined sentencing floor, even when there may be compelling arguments, rules, or principles to do so (see for instance Paciocco 2014). MMPs are different from sentences given by a judge who determines an appropriate sentence by looking to existing jurisprudence, statutory principles of sentencing, case circumstances, and sentencing submissions from counsel.

In Canada, mandatory minimum penalties can be found in the Canadian *Criminal Code* and the *Controlled Drugs and Substances Act*. Mandatory punishment does not necessarily mean mandatory imprisonment. Rather, MMPs may include imprisonment, prohibitions and/or fines.

1.2 A Brief History of MMPs in Canada

Mandatory minimum penalties “are not the norm in this country” (R. v. Wust [2000] S.C.J. No. 19, [2000] 1 S.C.R. 455 at para 18), but they are also not new. While the history of MMPs can be traced to colonial times (see Fearn 2011), the Canadian criminal justice system “has always contained a certain class of offences mandating a minimum level of punishment” (Mangat 2014: 8). For instance, Canada has long had mandatory minimum penalties for first and second degree murder. According to a historical review of MMPs, six offences in 1892 carried a minimum term of imprisonment. These offences included engaging in a prize fight (three months), frauds upon the government (one month), stealing post letter bags (three years), stealing post letters (three years), stopping the mail with intent to rob (five years), and corruption in municipal affairs (one month) (Crutcher 2001).

Since 2006, there has been an increase in the number of offences that have MMPs. For example, in 2012, amendments to the *Controlled Drugs and Substances Act (CDSA)* added MMPs for particular drug offences in certain circumstances (Public Prosecution Service of Canada 2014, Sec. 6-2; *Controlled Drugs*

and *Substances Act*, 2003). There are currently an estimated 100 offences in the *Criminal Code* and *Controlled Drugs and Substances Act* that require a mandatory minimum penalty (Parkes 2012a).

1.3 MMPs in Practice

Mandatory Minimum Penalties are used in various circumstances, for various offences, in various jurisdictions. In Canada, they are most frequently tied to particular types of criminal offences. They can also be applied to a particular type of offender, for example, a repeat offender. Finally, MMPs may also be used in conjunction with other offences: the Canadian victim surcharge is a good example of this. This section briefly describes how MMPs are used, with a specific emphasis on Canadian practice.

1.3.1 Types of Offences

MMPs can apply to certain offences (e.g., selling a particular drug, possessing a certain gun) or to specific repeat offenders (e.g., violent offenders or impaired drivers). Politicians may implement these MMPs as a response to public perception that these types of crimes (or offenders) are especially egregious or irredeemable.

MMPs are defined for various types of offences. In Canada, a few examples of offences that carry a mandatory minimum penalty include: treason (life – s. 47(1)); use of a firearm in the commission of an offence (by indictment on first offence one year – s. 85); trafficking firearms (three years for first offence – s. 99(1)); sexual interference (by indictment on first offence one year – s. 151); first and second degree murder (life – s. 235(1)); impaired driving (by summary conviction on first offence -- \$1000 fine); aggravated sexual assault (five years for a first offence – s. 273(2)(a)(i)); importing or exporting more than one kilogram of a schedule I drug (one year – s. 6(3) *CDSA*); producing six or more cannabis plants (6 months – s. 7(2)(b)(i)).

1.3.2 Offenders

Mandatory minimum penalties apply only to adults in Canada; there are no offences with mandatory minimum punishments that apply to youth offenders (Bala 2015).

Experts on this subject describe how certain types of offenders are subject to mandatory minimum penalties. For instance, in the United States, the well-known ‘three-strike’ legislation requires MMPs for offenders convicted of multiple crimes, including mandatory 25 years to life sentences for offenders convicted of a third offence after two serious (felony) crimes (Gabor and Crutcher 2002). There is no such ‘three-strike’ rule in Canada, but repeat violent offenders and offenders with repeated convictions for impaired driving offences may face MMPs (*Criminal Code*, Sec 255).

1.3.3 Victim Surcharge

Mandatory minimum penalties also include the *victim surcharge* which is a fee imposed upon all offenders upon conviction, in addition to the sentences that are specific to their offence. The surcharge is a type of MMP since it is imposed on all offenders. The fee does not go directly to victims, but rather serves to fund victim services (Dupuis 2013). While there is debate about whether the victim surcharge

is a *sentence*, it functions in a similar way as other MMPs when statutory provisions limit judicial discretion. The surcharge has a pre-determined formula to determine the monetary penalties.¹

The current victim surcharge policy requires everyone convicted of a criminal offence to pay a surcharge of \$100 for a summary offence, \$200 for an indictable offence, or 30% of any fine imposed by the court. The victim surcharge is an example of a blanket MMP that does not distinguish between types of offending or offenders. In the past, Canadian judges were allowed to waive the surcharge; however, this discretion was removed in 2013.

1.4 The Principles of Sentencing and Judicial Discretion

Mandatory minimum penalties are often seen to conflict with the fundamental and longstanding principles of sentencing that are presented in common law and statute. Some of these principles are found in Section 718 of the *Criminal Code*. The section describes the fundamental purpose of sentencing as contributing to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Section 718.1 sets out the fundamental principle of sentencing – that it must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Judges follow the guidelines set forth in Section 718 to ensure that sentences meet the objectives set forth in the *Criminal Code*. Within this framework, judges are able to justly exercise discretion.

Judicial discretion allows judges to impose sentences on offenders that are appropriate in a specific case. It refers to power to make legally binding decisions and decide among a variety of choices within a set of rules, standards, or principles. Discretion is not unfettered or whimsical; it is exercised, constrained and guided by jurisprudence, the facts of a case, and existing sentencing legislation.

To clarify the nuances and the everyday process of criminal sentencing in Canada, a large body of common law, jurisprudence, and legislation guides the sentencing process. Some of the grand considerations/principles in law include proportionality, parity, and restraint. When sentencing, judges must consider different sentencing options for different legal circumstances (multiple sentences, presentence custody, dangerous offenders, aggravating and mitigating factors), for different types of offenders (youth, disabled, Indigenous), and for specific types of criminal offences (mischief, homicide, arson, exporting drugs, robbery and so on). Therefore, judicial discretion and the everyday practice of

¹ For debate, see for instance: R. v. Michael, 2014 CarswellOnt 10487; R. v. Cloud, 2014 QCCQ 464; R. v. Javier, 2014 ONCJ 361; R. v. Flaro, 2014 ONCJ 2.

sentencing results in expected variability in the actual sentences, processes, limits, and rationales of punishment (Ashworth 2010; Fiske 2007; Manson 2001; Packer 1968; Perrier and Pink 2007).

There are remedies that can be sought through the appeal courts that can overturn sentences when they are deemed improper. Judges are guided by precedent and statute to ensure that sentencing is legally consistent and proportional. Indeed, judicial discretion is seen as an essential part of the common-law justice system. Judicial discretion, among other factors, is central to debates surrounding MMPs in Canada.

2.0 Debate

Mandatory minimum punishments have been debated in political, academic, advocacy, and legal circles. Generally, supporters of MMPs cite the need to limit judicial discretion, respond to public opinion concerning crime, address police-reported crime problems, and reduce sentencing disparity. Critics of MMPs highlight the ineffectiveness of MMPs as crime control policy and describe a host of unintended consequences that include increased costs, the muting of proportionality in sentencing, a reduction in judicial discretion, a transfer of power from a relatively open sentencing process to more hidden bargaining led by prosecutors and defence counsel, and the disproportionate application of MMPs to minority groups. Academics and representatives of non-government organizations have argued that MMPs cost too much and divert resources from alternative programs that effectively prevent crime (Mangat 2014; CCPA 2012). This section will highlight some of the arguments for and against MMPs drawn from the literature.

2.1 Arguments Supporting MMPs

Legislative arguments for MMPs are commonly coloured by utilitarian goals (Fearn 2011) that may include: deterrence; incapacitation; and retribution. These types of sentences are used as mechanisms to protect the public and to control sentencing disparity.

2.1.1 Sentencing Disparity

Proponents of MMPs argue that removing judicial discretion leads to more equality in the sentencing process. Decades of sentencing research shows differences in sentences handed down to members of various groups based on intersectional factors such as race, ethnicity, gender, etc.; the MMP approach is intended to erase common sentencing disparities by having a predetermined sentence for certain crimes (Fearn 2011). Regardless of cultural, economic, or social differences, everyone receives the same minimum sentence when they commit an MMP offence.

2.1.2 Reducing Judicial Discretion

There has been a longstanding and common history of politicians calling for limits on judicial discretion in the criminal sentencing process (Mangat 2014; Campbell 2011). For instance, advocates of MMPs note that maximum and minimum limits on sentencing ensures consistency in sentencing and prevents defendants and their lawyers from 'judge-shopping' (Caylor and Beaulne 2014).

2.1.3 Exercising Public Will in a Democracy

Public opinion is often cited as one of the major reasons for politicians to craft MMPs, however the public's view on sentencing is often mixed. There is some evidence that the Canadian public supports strong penalties for some types of crime. However, the public's perception that sentences are lenient is not tantamount to support for MMPs. In a 2005 poll, 74% of respondents expressed the view that sentencing is too lenient (Roberts, Crutcher and Verbrugge 2007: 83). More than half of the sample (58%) viewed MMPs as a good idea (Roberts, Crutcher and Verbrugge 2007: 90). Moreover, if certain types of offences are considered, there is general public support in Canada, Britain, and the USA for harsh penalties/mandatory minimums for homicide (Roberts, Crutcher and Verbrugge 2007; Anand and Roach 2010). Also according to public opinion research in Canada, over half (57%) of surveyed Canadians believe that mandatory minimums "often or sometimes result in the imposition of an unfair sentence" while 75% expressed a strong support for judicial discretion (Roberts, Crutcher and Verbrugge 2007: 96).

2.2 Arguments against MMPs

Critics of MMPs have argued that some penalties violate *the Charter*, that MMPs are an expensive and ineffective way to control crime, that by removing judicial discretion, MMPs make sentencing less transparent, and that MMPs disproportionately affect racial minorities, such as Indigenous Canadians.

2.2.1 Constitutional Concerns

In this report we do not review the state of common law and constitutional law concerning MMPs. However, there have been several constitutional challenges to MMPs that specifically cite sections 7 and 12 of the *Charter*. For example, in 2008, the Supreme Court ruled on the *R v. Ferguson* case which upheld MMPs as constitutional, but concluded that constitutional exemptions are not an appropriate remedy for laws that violate section 12 of the *Charter* (Berger 2009). The court ruled that an appropriate response would be to strike down the law (Berger 2009; Dufraimont 2008).

Other MMP cases have come before Canadian courts to address concerns about constitutional and larger historical issues. In January 2016, the courts heard *R v. Lloyd*, which raised concerns regarding mandatory minimum penalties for drug offences, Indigenous heritage, and the impact of colonialism. Last year in *R. v. Nur* 2015 SCC 15, a majority of the court found mandatory minimum penalties for firearm offences to have the potential to be grossly disproportionate. Specifically, the decision stated that "mandatory minimums imposed by s. 95(2)(a) [imprisonment for three years for first time offenders, and five years for repeat offenders] are inconsistent with s. 12 of the *Charter* and are therefore declared of no force or effect under s. 52 of the *Constitution Act, 1982*."

Further, the victim fine surcharge has fuelled debate about whether it is a sentence, and whether/how such surcharges should be applied (see *R. v. Michael* 2014 Carswell Ont 10487; *R. v. Cloud* 2014 QCCQ 464; *R. v. Javier* 2014 ONCJ 361; *R. v. Flaro* 2014 ONCJ 2). There has been debate about how to deal with people unable to pay such fees such as requiring community service in lieu of paying.

2.2.2 MMPs are Ineffective at Deterring Crime

Some of the evidence found suggests that harsh penalties – like MMPs – are ineffective at deterring crime (Radelet and Akers 1996; Doob, Webster and Gartner 2014). Tonry (1996: 134) captures the current state of MMPs in North America when he writes:

The greatest gap between knowledge and policy in American sentencing concerns mandatory penalties. Experienced practitioners and social science researchers have long agreed, for practical and policy reasons [...], that mandatory penalties are a bad idea. That is why nearly every authoritative nonpartisan organization that has considered the subject [...has] repealed most of the mandatory penalty provisions [....]

Even when there is a drop in crime in jurisdictions with MMPs, careful analysis often shows that reduction in crime started before the implementation of MMPs and that most crime trends are indicative of large nation-wide shifts in offending (see for instance Piquero 2005).

2.2.3 The Disappearance of Proportionality in Sentencing

Legal scholars, judges and academics argue that MMPs are a one-size-fits-all model that conflicts with the sentencing guidelines and the principles of proportionality in the *Criminal Code*. These principles require judges to consider the gravity of the crime and the degree of responsibility of the offender when handing down a sentence (Cassell and Luna 2011; Mangat 2014; Pomerance 2013; Sylvestre 2013), as well as the background of the offender (especially in the case of Indigenous peoples).

MMPs are effective at muting various legal principles, especially proportionality (Doob, Webster, and Gartner 2014; Paciocco 2015). The starting point – the minimum – tends not to be scrutinized, which Roach (2001: 403) argues to be “a just distribution of punishment while being agnostic about the justness of the starting point or anchor for their finely calibrated scale.” The tension with proportionately has been recognized by the Supreme Court of Canada in *R. v. Wust* [2000] S.C.J. No. 19 at para 18 & 22:

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

Consequently, it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. This is entirely possible in this case, and, in my view, such an approach reflects the intention of Parliament that all sentences be administered consistently, except to the limited extent required to give effect to a mandatory minimum.

2.2.4 Exceptions for the Application of Mandatory Penalties

Unlike other jurisdictions with mandatory minimum penalties, Canada does not have a safety valve or a provision for judicial discretion in certain instances (Roberts, Crutcher and Verbrugge 2007). These safety valves can allow judges to use alternatives to MMP legislation in those cases where they feel the MMP cannot be fairly or justly applied. The idea of a safety valve is important as it permits the acknowledgement of variation in the severity of criminal conduct at the time of sentencing.

Politicians in favour of MMPs often cite public opinion polls showing strong support for harsh penalties. However, more nuanced reviews of public opinion often reveal a desire for exemptions in specific cases,

which can be considered support for proportionality and judicial discretion. When asked a general question on MMPs in Canada, almost all of those polled supported a mandatory sentence of life imprisonment for murder; however, when the circumstances of Robert Latimer – originally sentenced to life imprisonment for the murder of his disabled daughter – were described, nearly 75% of those polled voted against imposing a mandatory sentence of life imprisonment (Mangat 2014: 24).

2.2.5 Costs of MMPs

A number of reports focus on the costs of MMPs including increased court costs, increased correctional costs, and hard-to-calculate social costs. This is especially the case when resources are diverted away from programs that aim to prevent crime (Bernstein 2013; Mangat 2014; CCPA 2012). In 2013, the Parliamentary Budget Officer noted that since 2002, per capita spending, in real terms, had increased 23%. During the same period, Canada's crime rate declined 23% (Story and Yalkin 2013: 1). The reason for the increased costs are not just because more people are going to prison. When mandatory minimum penalties are on the table, there is some evidence that people are more likely to go to trial rather than plead guilty because the stakes are high (Pomerance 2013). Also, cases are taking longer to complete (Gabor 2001; Tonry 2009) and people are being sentenced to longer prison terms (Gabor and Crutcher 2002).

2.2.6 Racial Disparity

MMPs disproportionately affect disadvantaged persons and members of minority groups, such as Indigenous Canadians (CCPA 2012; Mangat 2014; Mauer 2010; CCJS n.d; Tonry, 2009). Mandatory minimums do not allow judges to consider the role of social context in criminal sentencing and, as a result, vulnerable people may be adversely and disproportionately impacted by MMPs (Farrell 2003; Lawrence and Williams 2006; Oberdorfer 2003; Spohn 2015; Tonry 2009). Chartrand argues that the application of minimum imprisonment penalties on Aboriginal peoples is contrary to the stated penal objectives of the Supreme Court of Canada in *R. v. Gladue* which recognized that a different analysis and approach is required by judges when sentencing Aboriginal offenders, one ‘... which may specifically make imprisonment a less appropriate or less useful sanction.’ (2001: 450).

2.2.7 Displacing Discretion and Hiding Justice

Tonry (1996:135) notes that “mandatory penalty laws shift power from judges to prosecutors.” This means that MMPs contribute to a growth of prosecutorial powers (Mauer 2010). In a system where judges are granted discretion to sentence, the sentencing process is open and transparent; judges clearly state their reasons for specific penalties. When power is transferred to prosecutors (who decide what to charge individuals with), the decision-making process lacks the same level of openness and transparency.

Prosecutors can choose the likely punishment by choosing which offence to charge, the method of proceeding, and influence the course of justice by plea bargaining/negotiating with defence counsel. In shifting discretion, judges and legal scholars have noted that MMPs undermine trust in the judiciary and reduce transparency by shifting power to the prosecutor's office (Gabor and Crutcher 2002). For instance, prosecutors can still choose how to proceed with a case (summary or indictment) and prosecutors can still offer plea deals to lesser or included offences, or they can include additional offences – so the discretion of prosecutors determines who gets an MMP or dampens the possible application of the MMP by altering the sentencing range (Bjerk 2005). This means that even when there is evidence to support a charge carrying an MMP, prosecutors can sidestep this process (Tonry 1996, 2009), leaving the MMP “at the mercy of those who apply them” (Ulmer 2012: 8). On one hand, this

may allow prosecutors to have a role in MMPs if the potential sentence is seen as too harsh (Mauer 2010). On the other hand, giving discretion to prosecutors, and not to judges, challenges the commitment of the justice process to open and impartial determinations of sentences and compromises the plea bargaining process (Paciocco 2015; Tonry 1996, 2009).

2.2.8 MMPs Grounded in Politics

Most of the recent academic discussions characterize the growth in MMPs as evidence of the increasingly politically charged nature of policy development where reforms have come not from an empirically or evidence-based need for more punitive policy, but from political maneuvering (Morgan, 2000; Pomerance 2013; Ulmer 2012). The political push for MMPs is often framed as a means of “protecting the public” or ensuring “truth/equality in sentencing.”

Paciocco (2015: 174) has observed that these “minimum sentences are enacted by governments not because of a commitment to sound justice policy but rather to create political advantage by taking ‘tough on crime’ measures.” The political support of punitive policy relies on and advances political and symbolic goals (Tonry 1996) over crime control goals. This leads to a number of unintended consequences (see Tonry 2009). Some of the consequences that we highlight include: increased costs, reduced judicial discretion, less transparency in justice and legal decision-making, an incentivized plea process, and disproportionately impacted racialized populations.

3.0 Conclusion

This report has tried to draw attention to the policy, legal and academic discussions on mandatory minimum punishments. While it has focused on the Canadian context, it has also examined the broader theme of implementing harsher criminal punishments in various other jurisdictions; the point of consensus is that there are tensions between the political goals of MMPs and the outcomes of MMPs as a crime control strategy. As an exercise in evidence-based criminological and legal research, not political science, the consensus in research can be described by Tonry’s (1996: 134) in his 1996 observation:

Evaluated in terms of their stated substantive objectives, mandatory penalties do not work. The record is clear [...] that mandatory penalty laws shift power from judges to prosecutors, meet with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh.

Given this point of consensus and existing themes, it is important to provide a comprehensive review of the existing academic literature, government and non-governmental organizational reports to inform policy, debates, and reviews of MMP legislation in Canada.

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5.0 Annotated Bibliography

This annotated bibliography provides a comprehensive catalogue of research, evaluations and critical commentary on MMPs. This work draws on national and international evidence on mandatory minimums.

Searches were conducted using online academic databases including PsychINFO, HeinOnline, LexisNexis Academic, LexisNexis Quicklaw, Scholar Portal, and Google Scholar. Searches of government websites were also conducted including Public Safety Canada, Department of Justice Canada, and Correctional Service Canada. Additionally, searches were conducted using **Google Book** and **Google** to obtain a thorough list of studies from key researchers. Finally, searches of Carleton University and the University of Ottawa library catalogue were used to identify relevant monographs and recent doctoral dissertations. The university catalogues provide citations for monographs and international doctoral work that has been defended.

This search strategy provided a comprehensive a list of relevant academic, governmental, NGO, media, and other sources. The focus was on sources from the **1990s to 2015**.

Anand, S., & Roach, K. (2010). *Inertia, Uncertainty, and Canadian Homicide Law: An Introduction to the Special Issue*. *Alberta Law Review*, 47, 643-650.

Issues with homicide law in Canada need to be exposed, particularly in the context of ambiguities, judicial attitudes, and the general efficacy of homicide law. Focusing on homicide sentencing, there is a general unwillingness to reform the mandatory minimum sentence of life imprisonment for some homicide offences. This unwillingness has also been seen in England and Wales. Any reform of homicide law in Canada not only needs to consider reforming sentencing but it also has to clarify the distinctions among murder, manslaughter, and infanticide as well as clarify the defence of provocation.

Keywords: murder, s. 229(c), Criminal Code, objective foresight of death, Martineau, unlawful object, fault requirement, principles of fundamental justice

Bala, N. (2015). *Changing Professional Culture and Reducing Use of Courts and Custody For Youth: The Youth Criminal Justice Act and Bill C-10*. *Saskatchewan Law Review*, 78, 127-180.

Reviewing 2012 amendments to the *Youth Criminal Justice Act*, the author argues that there have not been fundamental changes to the operations of youth law in Canada. While there have been “get tough” approaches for adult offenders, common criticisms pointing to similar punitive shifts in youth law are likely to impact a very small number of youth offenders. Less publicized changes to the *Youth Criminal Justice Act* may actually reduce rates of incarceration among youth. In addition to reviewing changes in youth law, the place of mandatory minimums for youth are briefly discussed. While mandatory minimum sentences are often said to be a key part of punitive criminal justice reforms offered in Bill C-10, there are no minimum sentences for youth and no offences with mandatory custody for youth.

Keywords: youth justice, Youth Criminal Justice Act, Bill C-10, punitive shifts

Barnett, L., MacKay, R., & Valiquet, D. (2007). *Bill C-2: An Act to amend the Criminal Code and to Make Consequential Amendments to Other Acts*. *Library of Parliament: Legislative Summary*. Available online: http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C2&Parl=39&Ses=2

This is a summary of Bill C-2, the *Tackling Violent Crime Act*. This legislation groups together five bills from the first session of the 39th Parliament. The five broad categories of legislative measures will: create two new firearm offences and provide escalating mandatory sentences of imprisonment for serious firearm offences; reverse the onus on those seeking bail when accused of serious offences involving firearms or other regulated weapons; make it easier to have someone declared a dangerous offender; introduce a new regime for the detection and investigation of drug-impaired driving; increase the penalties for impaired driving; and raise the age of consent for sexual activity from 14 to 16 years.

Keywords: legislative summary, gun crime, history, serious firearms offences

Berger, B. L. (2009). *A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and R. v. Ferguson*. *The Supreme Court Law Review*, 47, 101-125.

This article discusses the Supreme Court of Canada case of *R v. Ferguson* which ended the use of constitutional exemptions to reduce the gravity of harsh sentences imposed in minimum sentencing cases. In this context, *R v. Ferguson* should not just be read as a limit on constitutional exemptions. The case stands for intervention in the politics of minimum sentences. The argument suggests that because *R v. Ferguson* forces judges to make a declaration of an invalid law when it violates section 12 of the *Charter*, the consequence is the possible improvement of the substance of the law. By taking away the constitutional exemption with a mandatory minimum punishment, judges do not need to be shy in striking down legislation based on the facts of a case when a mandatory sentence inflicts cruel and unusual punishment. In so doing, this puts pressure on politics in a way that offering a constitutional exemption cannot. The principle also provides a way to “moderate and discipline the politics of minimum sentences” (para 24). This contribution also reviews the lack of social science evidence on mandatory minimums as an effective crime control strategy and the general perils of mandatory sentencing, including the creation of pre-trial incentives.

Keywords: *R v. Ferguson*, sentencing, charter remedies, section 12, cruel and unusual punishment, pre-trial incentives

Bernstein, S. (2013). *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences*. Pivot Legal Society. Available online: http://www.pivotlegal.org/throwing_away_the_keys_the_human_and

This report assesses the scope, nature, and effects of the *Safe Streets and Communities Act* (alternately known as Bill C-10 and the “Omnibus Crime Bill”) on low-income drug users. It also examines whether new criminal law provisions will raise constitutional issues, particularly in the context of Charter-protected groups, such as Aboriginal people and people with disabilities (including drug dependence). Pivot Legal Society concludes that several provisions of the *Safe Streets and Communities Act*, including mandatory minimum sentences for certain drug offences, are unlikely to achieve their stated goals of deterrence and disruption of organized crime. In addition, certain provisions of the Bill are likely to be expensive and may violate the Charter.

The authors argue that few drug dependent offenders conduct cost-benefit analyses before committing crime so harsher penalties will not deter them. Longer sentences are associated with deepening drug dependence, transmission of diseases, psychological harms, failure to develop healthy coping and interpersonal skills, learned dependence on the prison institution, loss of supportive and protective relationships, loss of future employment opportunities and elevated rates of recidivism.

As for dealing with organized crime, participants interviewed for this study expressed the opinion that, given the structures of the drug trade, the organized crime provisions would allow higher-level drug traffickers to continue escaping arrest and prosecution while leaving easily replaceable street-level dealers to potentially face longer sentences.

Keywords: *Safe Streets and Communities Act*, Bill C-10, costs, constitution, Charter

Blakey, G. R. (2004). Mandatory Minimums: Fine in Principle, Inexcusable When Mindless. Notre Dame Journal of Law, Ethics & Public Policy, 18, 329-341.

This contribution argues that mandatory minimum penalties for gun and drug offences have turned sentencing policy into issues of politics. Accordingly, what is needed is a principled approach to mandatory sentencing to make sure that severe punishment are not the only approach taken to MMPs. This is especially important because there is a risk that mandatory sentences are unconstitutional because they conflict with the prohibitions on cruel and unusual punishments.

This author argues that the Supreme Court needs to step in to draft 'principled' rules around sentencing.

Keywords: Severe Punishment, Sanctions (Law), Laws, regulations and rules, Constitution

Cameron, J. (2001). The Death Penalty, Mandatory Prison Sentences, and the Eighth Amendment's Rule Against Cruel and Unusual Punishments. Osgoode Hall Law Journal, 39(2), 427-448.

Despite similarities in section 12 of the *Canadian Charter of Rights and Freedoms* and the Eighth Amendment to the United States Constitution, American sentencing law explains why Canada should not adopt the American approach to minimum sentences. Existing US jurisprudence is of little value in Charter interpretation, especially in the context of the death penalty. The death penalty has motivated some members of the United States Supreme Court to reject the Eight Amendment's application to mandatory minimum sentences. In Canada, where capital punishment has been abolished, this consideration is irrelevant. Furthermore, the United States Supreme Court concluded that given state jurisdiction over criminal justice, constitutional oversight of sentencing is inappropriate. But in the Canadian context, section 91(27) of the Constitution Act, 1867, does not make section 12 of the Charter irrelevant. Canada can learn from American problems when reviewing mandatory sentences. Prisons in the U.S. are extremely crowded and mandatory sentences impose sentences that are disproportionately harsh. Prosecutors have been bestowed with more power at the expense of the discretion of judges. Accordingly, the author concludes that Canadians should challenge the Supreme Court of Canada's reluctance to invalidate mandatory sentences under the Charter.

Keywords: Canada, United States, section 12 of the Charter, Eighth Amendment to the Constitution, section 91(27) of the Constitution Act, comparative analysis, capital punishment, cruel and unusual punishment, federalism, judicial process, criminal sentences

Campbell, C. M. (2015). Popular punitivism: Finding a balance between the politics, presentation, and fear of crime. Sociology Compass, 9(3), 180-195.

Popular punitive approaches to criminal justice consist of policies like three strikes, mandatory minimums, and zero tolerance. This contribution chronicles some of the content on popular punitiveness and how it comes to exist in certain social contexts. The popular punitive approach brings

together politics, public attitudes/sentiments and media representations of crime to operate with a narrow conception of punishment. This conception of punishment focuses on deterrence and rational choice and, accordingly, differs from evidence-based models of punishment. Practically speaking, the popular punitive approach has implications for marginalized populations because the systemic problems of these groups are made into criminal justice issues.

In the United States, young Black and Hispanic men have been increasingly overrepresented in corrections settings. These groups make up close to half of the incarcerated population, but only about 13–15 percent of the general public. This article argues that the punitive approach is a shift from *inclusive* social policies such as welfare to *exclusive* policies that place barriers before members of marginalized populations.

Keywords: punitiveness, public attitudes, marginalization

Campbell, G. S. (2011). Are Mandatory Minimum Sentences a Mandatory Necessity? Public Law Advocacy. Available online: <http://blog.publiclawadvocacy.com/2011/08/are-mandatory-minimum-sentences.html>

There has been debate about mandatory minimum punishments for years. Some early cases from the late 1980s and early 1990s include gun and drug cases where lawyers argued that mandatory punishments amounted to cruel and unnecessary punishment. While some mandatory punishments might make sense (e.g., minimum fine for driving without insurance), in general, MMPs are seen to be ineffective.

In general, there is little awareness of likely penalties for specific incidents and evidence shows that many offenders commit crimes without considering the consequences so harsher penalties do not deter crime. Longer periods of incarceration are shown to exacerbate addictions, mental illness, isolation from the community and reduced job opportunities – all factors that affect recidivism.

Keywords: effectiveness, cruel and unnecessary punishment, outcomes

The Canadian Centre for Policy Alternatives (CCPA), MB and the John Howard Society of Manitoba (2012). BILL C-10: The Truth About Consequences. Available online: <http://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2012/03/Bi11%20C-10%20The%20Truth%20About%20Consequences.pdf>

In this report, the authors calculate the costs of Bill C-10 and provide alternative uses for public funds that would have alternative outcomes. The authors are critical of mandatory minimum sentences. They argue that mandatory punishments increase costs, divert resources from effective treatment programs, and do not reduce crime. This report also notes that even though C-10 is a Federal bill, the costs will be primarily paid for by the provinces. According to this article, “The Correctional Service of Canada is predicting an 8 per cent increase in inmates per year. At the provincial level, the increase will likely be three or four times higher (putting it in the range of 24 to 32 per cent) given that the vast majority of minimum sentences will be served as ‘provincial time’. Added to that, the provinces will see an increase in remand wait times, as mandatory minimums make plea bargains less attractive, causing more cases to proceed to trial.”

Keywords: costs, Bill C-10, outcomes

Canadian Criminal Justice Society (CCJS). "Position Paper: Mandatory Minimum Sentences." Available online: https://www.ccja-acjp.ca/en/pp/pp_mandatory_minimum.html

The Canadian Criminal Justice Society argues that mandatory minimum punishments do not achieve their goals. They disproportionately affect people from minority groups such as Aboriginals, and they eliminate options for absolute and conditional discharges, probation and conditional sentences. The best evidence shows that offenders do not consider the length of their sentences before committing crimes and that keeping non-violent offenders incarcerated for long periods of time with fewer rehabilitation options makes recidivism upon release more likely. The authors also point out that mandatory punishments encourage defendants to go to trial rather than accept pleas, thus raising court costs.

Keywords: minority groups, outcomes, negative effects, severity

Cano, M. V., & Spohn, C. (2012). Circumventing the penalty for offenders facing mandatory minimums: Revisiting the dynamics of "sympathetic" and "salvageable" offenders. Criminal Justice and Behavior, 39(3), 308-332.

Decision makers can mitigate the negative effects of rigid and harsh sentencing regimes. Specifically, prosecutors can play an important role in departing from mandatory sentencing. The authors argue that this is likely a result of offences that are seen as less serious and offenders who are seen as more worthy of being "given a break". This is fed by the larger idea that prosecutors can depart from sentencing for "sympathetic" and "salvageable" offenders. Exploring the departure from mandatory sentences, this work assessed 1,515 drug offender cases from three US judicial districts. It was found that 41% of the cases received some form of departure from mandatory sentencing. In the cases that received a departure, there was an average reduction in the sentence by 50%. The authors also show that women, accused with a post-secondary education, those not held in pre-trial custody, and US citizens were more likely to benefit from a departure in sentencing. On the other hand, drug type, the race of the offender and the offender's role in the offence (i.e., minor role, aggravated role, normal role) did not have an impact on the likelihood of receiving a departure.

Keywords: Hispanic offenders, departures, drug addicts, cultural differences, prisoners, federal courts, fines & penalties

Caylor, L., & Beaulne, G. G. (2014). Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences. A Macdonald-Laurier Institute Publication. Available online: <http://www.macdonaldlaurier.ca/files/pdf/MLIMandatoryMinimumSentences-final.pdf>

Mandatory minimum sentences are nothing new as they have existed in various forms for years and are designed, in part, to promote consistency in sentencing. They theorize that mandatory minimum sentences "can promote proportionality and the rule of law". They are also a Parliamentary response to public perception that the judiciary is often lenient with criminal offenders. This report provides a list of offences that carry mandatory minimum penalties and offers a list of cases where mandatory penalties have been identified as unconstitutional.

Keywords: public opinion, constitution, consistency in sentencing

Chartrand, L. N. (2001). Aboriginal Peoples and Mandatory Sentencing. Osgoode Hall Law Journal, 39(2), 449-467.

The author examines the impact of mandatory minimum sentencing on Aboriginal people in Canada with special attention paid to the mandatory minimum sentencing provisions for firearms offences. The author argues that the imposition of mandatory minimum imprisonment sentences will have a disproportionately negative effect on Aboriginal people as Aboriginal men are more likely to face gun sanctions than non-Aboriginals. Moreover, the author expects that firearms-related mandatory minimum sentences will result in a finding of "cruel and unusual" punishment under section 12 of the Charter. The mandatory punishments also impact Parliament's objectives as reflected in section 718.2(e) of the *Criminal Code* which requires sentencing judges to pay "particular attention to the circumstances of Aboriginal offenders." The author further sets out preliminary arguments that mandatory minimum sentences applied to Aboriginal offenders violate sections 12 and 15 of *the Charter*.

Keywords: Aboriginal people, R. v. Gladue, section 718.3(e), section 12 of the Charter, firearms

Chasse, K. (2009). Plea bargaining is sentencing. Canadian Criminal Law Review, 14(1), 55-77.

Plea bargaining is a sentencing process in Canada, and the plea bargaining process facilitates a trial penalty, where there is generally reward for those people who plead guilty and penalty for those who elect for a trial. The use of plea bargaining is conceptualized as a process of coercing guilty pleas. The increased use of MMPs in Canada has a ripple effect on the whole system as some offenders may avoid pleading guilty to crimes with MMPs or may plead guilty to other crimes to avoid going to trial. MMPs also limit options that prosecutors can offer for pleas.

Keywords: plea bargaining, trial penalty, guilty plea, coercion

Crutcher, N. (2001). The legislative History of Mandatory Minimum Penalties of Imprisonment in Canada. Osgoode Hall Law Journal, 39, 273-285.

This article examines the history of minimum penalties in the *Criminal Code*. Since the enactment of the first *Criminal Code*, six offences with a minimum term of imprisonment has grown to twenty-nine offences. Historically, early mandatory minimum penalties were directed at enforcing the legitimacy of public institutions, but since then, they have changed to focus on offences against the person. It is clear that the number of bills introduced with mandatory punishments in each parliamentary session has grown steadily, as popularity of minimum penalties has grown among Members of Parliament. Elected officials appear to prefer these punishment because mandatory minimum sentences are rigid and certain, resulting in politicians that seem to be "tough on crime." In looking at mandatory penalty bills over time, there appears to be little tolerance for repeat offenders and offences where a firearm is used.

Keywords: Canada, Criminal Code, bills, "tough on crime", legislative history

Doob, A. N., & Cesaroni, C. (2001). The Political Attractiveness of Mandatory Minimum Sentences. Osgoode Hall Law Journal, 39, 287-304.

This article illustrates why discussions of mandatory minimum sentences are relevant despite the fact that mandatory minimum sentences are perceived as an ineffective crime-control strategy. However, the deterrence message MMPs deliver is functional for politicians and is rarely challenged by judges. The authors contrast the recommendations from various commissions with the views and policies promoted by political leaders and the sentences decided by judges. Recent evidence supports the claim that mandatory minimum sentences do not deter crime more than less harsh and more proportionate sentences. It even demonstrates that mandatory minimums can disrupt the sensible operation of the justice system. In 1987, the Canadian Sentencing Commission noted that since 1952, all Canadian commissions have recommended that mandatory minimum penalties be abolished. The drive to legislate and the difficulty to evaluate mandatory minimum sentences is attractive to politicians who have ulterior motives, like attracting more voters. One must consider the public and their opinion of crime. Through mass media, crime has become a prominent fact of life for the middle class. To the extent that the public does not care much about the impact on people found guilty, the attitude may well be that it is right to impose severe sentences. The authors suggest that a possible approach to remedying the public/political relationship with MMPs is to discuss the financial costs of mandatory sentences.

Keywords: Canadian Sentencing Commission (CSC), tough on crime, politicians, judges, three strikes law, cost, politics

Doob, A. N. (2011). The unfinished work of the Canadian sentencing commission. Canadian Journal of Criminology and Criminal Justice, 53(3), 279-297.

Sentencing difficulties exist because sentencing has been neglected in policy development work. For this reason, the problems outlined by the Canadian Sentencing Commission (1987) have not been addressed. Some of these overlooked problems include: the lack of systematic information about sentencing; the absence of an adequate penalty structure; mandatory minimum sentences; and parole and early release. To find solutions to these problems, some cues can be found in important decision on sentencing (*R. v. Arcand*) where the court concluded that five “sentencing truths” must be addressed. These truths include: judicial agreement that sentencing is one of the most controversial subjects in criminal policy; the notion that all judges would agree on the result of a given case if they knew the facts; the fact that judge shopping occurs in Canada; the absence of uniform approaches to sentencing, many of the sentencing objectives outlined in the Code cannot be realized; and if courts do not act to administer justice and public confidence diminishes, Parliament will.

Key Words: Canadian Sentencing Commission, *R. v. Arcand*, public confidence, politics

Doob, A., Webster, C. M., & Gartner, R. (2014). *Issues Related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence And Incapacitation. Research Summaries from Criminological Highlights*. Available online: <http://criminology.utoronto.ca/criminological-highlights/>

This report summarizes the best available peer-reviewed evidence on harsh sentences and mandatory minimum sentences. The authors engage with core themes from the literature including: severity of sentences; public opinion; sentencing outcomes; discretion; incapacitation; and deterrence theory. They show that no informed criminologist would argue that crime is deterred or that severe sentences will reduce the rate of crime in society. In fact, crime increases in some cases. This work stands as one of the most complete (as of 2014) reviews of the core literature.

Keywords: deterrence theory, research summaries, punishment severity

Dufraimont, L. (2008). *R. v. Ferguson and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12. The Supreme Court Law Review, 42, 459-478.*

Commenting on the Supreme Court of Canada decision in *R. v. Ferguson*, the author argues that this case makes it possible that section 12 of the *Charter* will not offer protections to individuals in the context of mandatory minimum penalties. The case also stands to clarify the use of constitutional exemptions in Canada, where constitutional exemptions are broadly rejected as a section 12 remedy. Instead, laws that violate section 12 should be struck down. Further, the author reviews the current status of mandatory minimum punishments and dimensions of a section 12 analysis in the context of mandatory sentences. The author contends that one of the major problems with mandatory minimum punishments is that they make it possible that there will be grossly disproportionate sentences in a variety of circumstances. This analysis concludes with implications for charter remedies, including the possibility of using constitutional exemptions.

Keywords: *R. v. Ferguson*, section 12, charter remedies, constitutional exemptions, disproportionate sentences

Dumont, H. (2001). *Disarming Canadians, and Arming Them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime. An Essay on an Apparent Contradiction. Osgoode Hall Law Journal, 39(2), 329-365.*

There is a contradiction between supporting a total ban of firearms in Canada, while opposing the tough mandatory minimum sentences set out in the *Firearms Act*. Reflecting on personal experience after the tragedy at the École Polytechnique, the author argues that as irrational fear and insecurity increase, Canadians tend to “decrease their concern for liberty, tolerance and justice” (p. 274). The author states that tolerance is a quality that is distinctly Canadian and as such, argues that tolerance and peace is what drives her support for stricter firearm laws. Drawing on the history of women, that the roots of feminism support crime control that is more moderate and humane. Women should apply the lessons learned from their powerlessness in the past and change their view of punishment correspondingly. Using a legal standpoint, the author conducts constitutional and systemic analysis to show the unconstitutionality of minimum sentences as penalties that are “cruel, unjust, and ineffective in

controlling violent crime” (p. 277). In conclusion, an alternative theory to criminal justice should be developed to change the present demand for harsh sentencing, some promising aspects of restorative justice may help change this current trend.

Keywords: Firearms Act, gun crime, tolerance, feminism, restorative justice

Dupuis, T. (2013). Bill C-37: Increasing Offenders' Accountability for Victims Act. Library of Parliament: Legislative Summary. Available online:
http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C37&Parl=41&Ses=1

This is a summary of Bill C-37: *Increasing Offenders' Accountability for Victims Act* written by the Library of Parliament. It provides the specific details of this Act, including MMPs and victim surcharge.

Keywords: victim surcharge, Bill C-37

Fearn, N. E. (2011). Mandatory sentencing. In Courts, law, and justice (pp 159-172). Edited by William J. Chambliss. Thousand Oakes, CA: Sage.

Mandatory sentences are contextualized as a sentencing enhancement which aim to increase the sentence of a convicted criminal by lengthening the sentence, requiring time in prison, and/or denying probation. The goals of these approaches are deterrence and incapacitation, and the primary vehicle for these mandatory schemes include three strikes statutes, or truth in sentencing statutes. This contribution also offers a brief history of these types of laws along with the current state of mandatory sentencing in the USA. The book chapter concludes with the points of consensus and distention in the rationale, effectiveness, and liabilities of mandatory sentencing schemes.

The author notes that MMPs do not reduce criminal activity, but they may contribute to the skyrocketing prison population in the United States and the significant increases in the economic and social costs associated with imprisoning more individuals and doing so for longer periods of time.

Keywords: goals of mandatory sentencing, history

Gabor, T. (2001). Mandatory minimum sentences: A utilitarian perspective. Canadian Journal of Criminology, 43(3), 385 – 414.

Mandatory sentences are too diverse to make concrete claims about their cost effectiveness. Accordingly, policy makers and the public need nuanced research when these types of penalties are considered and/or adopted. One option for research consists of a systematic, nonpartisan research program. While there is a need for research, the mandatory minimum sentence scheme has a considerable amount of controversy, and has many limitations. First, there may be atypical cases that challenge the use of mandatory minimum sentences. These cases are not the only challenges to mandatory sentences. Other critiques show evidence where mandatory punishments: waste resources; remove incentives to plead guilty; leverage huge human and fiscal costs; disproportionately impact minorities; undermine public accountability; create pressure on the prison system; allow for charge change in plea bargaining process; challenge principles of proportionate sentencing; prevent

consideration of special circumstances; and may be excessively harsh. Second, existing empirical evidence on punitive laws (i.e., three strikes laws in the USA) show that these types of policies do not reduce violent crime or protect the public but they do increase criminal justice costs. Third, there is a lack of utility of mandatory punishments based on existing evidence - especially because these punishments are predicated on the assumption that the public knows about the penalties for criminal offences. Existing evidence shows that the public generally has limited knowledge of penalties for offences and statutory minimum penalties.

Keywords: criminal sentences, criticism, criminal intent, legal reform

Gabor, T., & Crutcher, N. (2002). Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures. Available online: http://www.justice.qc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr02_1/rr02_1.pdf

This report assesses the utilitarian aspects of mandatory minimum penalties including the crime prevention, fiscal, and social consequences of mandatory minimums penalties, as well as impediments to their implementation. These aspects are assessed using relevant social science and legal literature from 1980 to 2000.

Some of their findings include the observation that many offenders are not rational actors and do not calculate the potential cost of their crime before committing it. Also few people are knowledgeable and aware of the punishments for specific crimes. Therefore, harsher penalties are unlikely to deter crime (p. 7).

Keywords: criminal sentences, utilitarian perspectives, costs.

Grant, I. (2001). Rethinking the Sentencing Regime for Murder. Osgoode Hall Law Journal, 39, 655-701.

This article investigates the current sentencing practices for murder convictions in Canada to identify its shortfalls and make suggestions for reform. The author argues that a mandatory life sentence for murder is too rigid and may result in unfair sentences and the inflexibility of the existing sentencing regime represents the most significant problem in Canadian homicide law. Cases like *R. v. Latimer* (1994) and cases in which women kill their abusive partners demonstrate the problems with the inflexibility of murder sentencing. The author recommends that the existing classification of murder into first and second degree, along with the long periods of parole ineligibility for murder sentences, should be abolished. This is because “the classification of murders into first- and second-degree has lost its usefulness since the abolition of the death penalty” and “it fails to adequately distinguish the most blameworthy killings from the relatively less blameworthy ones” (p. 13). Degrees of murder can also lead to overcharging, or in pressuring accused people into plea agreements to avoid the harsh penalties for first-degree murder. The author suggests a compromise that maintains the distinction between manslaughter and murder but allows judicial discretion to ensure that sentences for murder, as with other crimes, can be tailored to fit the crime.

Keywords: sentences (criminal procedure), murder, criminal sentences

Jung, S., Ahn-Redding, H., & Allison, M. (2014). Crimes and Punishment: Understanding of the Criminal Code. Canadian Journal of Criminology and Criminal Justice, 56(3), 341-366.

Innovative strategies are needed to help educate the public on laws and punishment in Canada. This study shows that young adult university students are generally unaware of crimes and their punishments. This has implications for deterrence theory and the idea that harsher punishment will reduce crime. Ultimately legal knowledge helps make sure that people are making sound decisions, but this is questioned when there is little knowledge of law and punishment. By surveying 301 university students to test their knowledge of the law, this research shows how knowledge of law among students generally consists of an ability to define theft, ages to use substances, and define sexual offences. There was less knowledge when it came to defining impaired driving, dangerous driving, sexual interference, and aggravated sexual assault. In the context of defining sentencing, university students were not accurate and tended to overestimate reoffending among offenders.

Keywords: public opinion, sentences (criminal procedure), public opinion polls

Kovandzic, T.V., Sloan, J. J., & Vieraitis, L. M. (2002). Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of "Three Strikes" in U.S. Cities (1980-1999). Criminology and Public Policy, 1(3), 399-424.

Three strike laws are not useful, potentially create more danger, and have lethal consequences. Quite simply these types of policies do not reduce crime. Using city level data, the author argues that cities with three strikes laws have short and long term increases in homicide rates. In the short term, homicide rates increase 13-14% while in the long term, increase 16-24% when compared to cities without three strikes law. While there is an increase in the homicide rate in cities with three strikes laws, there is no evidence that increasing homicide rates promoted the introduction of these laws. Rather, increase in homicide rates is partially explained using a rational decision making perspective. In this perspective, when penalties for offences are similar, people may try to avoid apprehension by killing victims, witnesses and law enforcement officers may be leading to an increase in the rate of homicide. The article concludes with a call for more assessments of the costs and benefits of harsh sentencing and criminal justice policies.

Keywords: Manslaughter, Public policy, Criminal sentences, three strikes

Kovandzic, T. V., Sloan, J. J., & Vieraitis, L. M. (2004). "Striking out" as crime reduction policy: The impacts of "three strikes" law on crime rates in U.S. cities. Justice Quarterly, 21(2), 207-239.

Existing evidence does not support the hypothesis that "three strike" laws reduce crime. The use of "three strikes" legislation as crime reduction policy creates new problems and is often not uniformly applied – for instance the differential use of plea bargains. This study argues that three strike laws do not cause the increase or decrease in crime rates. This study uses a multiple time series design with city level data from 1990 to 2000 for 188 US cities with a population of 100,000 or more. Among 188 cities, 110 passed three strikes laws between 1993 and 1996. Examining crime rates for homicide, robbery, assault, rape, burglary, larceny and motor vehicle theft while controlling for extraneous factors, there

was no evidence that a reduction in crime rates was attributable to three strikes policy. Interestingly, crime rates began decreasing before the passing of three strikes laws. The only effect of the three strikes laws was to increase the rate of homicide.

Keywords: three strikes, crime prevention, law enforcement, criminal law, criminal sentences, criminal statistics

Lawrence, S. N., & Williams, T. (2006). Swallowed Up: Drug Couriers At The Borders Of Canadian Sentencing. University of Toronto Law Journal, 56, 285-332.

This article examines women's social context as a factor when imposing sentences, specifically in the context of the minority female drug courier. The author argues that attempts to contextualize the circumstances of a drug courier will reinforce harsh sentencing practices, as drugs become associated with racialized communities. The authors argue that offences with mandatory minimum penalties have given some control of sentencing to the prosecutors who make charge decisions. While social context may be a way to analyze diminished responsibility of women based on their circumstances, it is ultimately shown that social circumstances are used to validate unequal law enforcement and penal practices.

Keywords: drug dealing, sentences (criminal procedure), controlled substances, court decisions, blacks, drug trafficking, criminal sentences, criminal justice, women, social impact, smuggling

Mangat, R. (2014). More Than We Can Afford: The Costs of Mandatory Minimum Sentencing. British Columbia Civil Liberties Association. Available online: https://bccla.org/our_work/more-than-we-can-afford-the-costs-of-mandatory-minimum-sentencing/

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

This report suggests that MMPS do not meet their stated objectives and in some cases (such as making sentencing more open and transparent), they achieve the opposite by shifting sentencing decisions from judges to prosecutors.

Keywords: Charter, efficiency, costs

Manson, A. (2012). Arbitrary disproportionality: A new charter standard for measuring the constitutionality of mandatory minimum sentences. Supreme Court Law Review, 57, 173 - 202.

The use of mandatory minimum sentences has increased in Canada and so too have the constitutional challenges. While most challenges use the cruel and unusual punishment or treatment arguments under section 12 of the *Charter*, the current state of jurisprudence lacks richness and as a result, fails to be a

useful tool to analyze mandatory minimum sentences. This is because jurisprudence is stuck on methodological problems of reasonable hypotheticals and exemptions which use/rely on assessing standards of decency and disproportionality. To assess the constitutionality of sentencing legislation, the author assesses and develops the concept of arbitrariness and proposes a new standard of constitutional validity called arbitrary disproportionality. Part of this new standard not only assesses punishment that is excessive or disproportionate but also assesses excessive or disproportionate punishment that is a result of arbitrary legislation.

Keywords: Proportionality (Law), Cruel and unusual punishment

Martin, D. L. (2001). Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions. Osgoode Hall Law Journal, 39, 513-527.

Mandatory minimum sentences can contribute to wrongful convictions. The author draws on two legal practices, plea bargaining and the development of informers, to show that the context of mandatory sentencing presents more opportunities for injustices. The author argues that pressures to solve cases and get guilty pleas can lead to abuse of mandatory minimum sentences when they are used to coerce people. The point is that mandatory minimum sentences serve the interests of solving cases and inducing guilty pleas but do so with more risk of injustice, especially wrongful convictions. The risk of wrongful conviction is much higher when vulnerable individuals face imprisonment, backed by the certainty of imprisonment for an offence that merits a mandatory sentence. In plea bargains, innocent people or battered women may plead guilty to lesser offences in order to avoid mandatory minimum sentences but consequently, this contributes to a wrongful guilty plea. Further, the threat of a mandatory minimum sentence can be used as a tool to develop informers. This leads to the common practice of allowing an informer to gain a benefit when they provide information, but there is often inadequate scrutiny of the information the informer provides.

Keywords: Comparative analysis, wrongful convictions (law), discrimination in criminal justice administration, criminal sentences

Mauer, M. (2010). The impact of mandatory minimum penalties in federal sentencing. Judicature, 94(1), 6-9.

It is important to assess the effect of mandatory minimum penalties on public safety and the extent that mandatory minimum penalties exacerbate existing racial disparities within the criminal justice system. When it comes to public safety, the author argues that there is no evidence showing that federal mandatory minimum penalties are causally linked to a reduction in crime. In fact, most research suggests this is an unlikely outcome of mandatory minimum penalties. There are too many data problems and implicit untested assumptions to make a simple claim that mandatory minimum penalties reduce crime. There are a number of claims that can be made about mandatory minimum penalties and their assumptions, including: certainty of punishment is the primary function of deterrence, not severity of the punishment; mandatory minimum penalties are ineffective with drug crimes; and mandatory minimum penalties can have a negative impact on recidivism. The author notes that drug crimes are

often fueled by addictions, which would be better treated as a medical issue rather than as a criminal issue. As for recidivism, longer periods of incarceration may exacerbate problems with addiction, mental illness, isolation from families and communities and lack of employment skills – all factors that lead to recidivism rather than successful reintegration into society. Not only are these types of penalties generally unproductive, they exacerbate racial disparities. Concretely, this is seen with the trend that whites are sentenced below the mandatory minimum penalty threshold more than non-whites. This is partly due to the fact that these sentences tend to affect a certain type of offender and certain types of offences. This author expresses the opinion that mandatory minimum penalties do not work, they shift power from judges to prosecutors and they often lead to disproportionate sentences that are too harsh. The author states that MMPs are counterproductive and that they need to be eliminated for fairer and more rational sentencing processes.

Keywords: Race discrimination, Laws, regulations and rules, Violent crime, Criminal records, Public safety, Fines & penalties, Criminal sentences

Mirsa, F. R. (2001). Mandatory Minimum Prison Sentencing and Systemic Racism. Osgoode Hall Law Journal, 39(2), 491-512.

This article focuses on the relationship of Black-Canadians and three elements of the criminal justice system: racist policing, prosecutorial discretion, and plea bargains. The improper administration of these three elements “helps to perpetuate a dangerous cycle or self-fulfilling prophecy rooted in falsehoods [...] Black people engage in more crime than other groups, therefore, a Black male is the epitome of a crime suspect, and thus systematically stopping and searching them on the street is a legitimate means of crime prevention.” The author argues that the police enforce the law in a discriminatory manner against Black people. An analysis of drug offences shows how racist policing occurs in both Canada and the United States. The author demonstrates that mandatory prison sentences “enhance the quasi-judicial role of prosecutors, providing Crown attorneys with greater leverage to convict a disproportionate number of Black persons” (p. 150). Furthermore, the retention and expansion of mandatory prison sentences will result in pressure for Black people to plead guilty to avoid lengthy imprisonment if convicted. Evidence shows that the expansion of mandatory minimum sentences heightens the reliance on plea bargaining by prosecutors and defence counsel.

Keywords: Canada, Black Canadians, racism, plea bargains, judicial process

Morgan, N. (2000). Mandatory sentences in Australia: Where have we been and where are we going? Criminal Law Journal, 24, 164-183.

Mandatory sentences in Australia are a political strategy that often come under criticism when highly publicized cases show that they can be applied in trivial or minor cases. While these types of sentences are typically justified based on deterrence and incapacitation, there is growing evidence that these sentences do not achieve their objectives. Mandatory sentences create new problems and the public has come to learn about these problems. For instance, the lack of a clear objective, the absence of a clear crime reduction/deterrent effect, disproportionate sentences and strategies to circumvent the

mandatory application of some sentences. These problems highlight the need for recognition of the important role of judicial discretion and alternative approaches in the sentencing process.

Keywords: comparative, Australia, outcomes, goals, proportionality

Newell, R. (2013). Making matters worse: The Safe Streets and Communities Act and the ongoing crisis of indigenous over-incarceration. Osgoode Hall Law Journal, 51, 199-249.

Punitive policy changes, including the enactment of mandatory minimum sentencing provisions, will continue to have an impact on the over-representation of indigenous people. These types of changes perpetuate larger criminal justice issues. More specifically, it perpetuates colonial power dynamics and silences important indigenous voices. These larger issues are seen when limits on judicial discretion may not allow a *Gladue* analysis, thus ceasing strategies that can mitigate the effects of over-incarceration. Given that punitive legislation (i.e., the Safe Streets and Communities Act) will harm indigenous people, it is hoped that section 12 of the *Charter* litigation can be a tool to reduce the harm brought by this type of legislation.

Keywords: Imprisonment, Cruel and unusual punishment, Social aspects, Demographic aspects, Laws, regulations and rules, Canadian native peoples, Native North Americans, Charter of Rights-Canada, Criminal justice

Paciocco, D. M. (2015). The law of minimum sentences: Judicial responses and responsibility. Canadian Criminal Law Review, 19(2), 173-229

When mandatory minimum punishments remove judicial discretion, there may be tensions with the moral foundations of punishment. With these tensions, this contribution contends that there are ways for judges to reduce the perceived unfairness in the sentencing process. To do this, there are legal tools, rules of statutory interpretation, legal principles, and sentencing tools. More concretely, legal doctrine can enhance fairness in sentencing by limiting the reach of mandatory punishment, limiting the impact of minimum punishment with multiple charges, and limiting the impact of the victim fine surcharge. In this way, the author contends that there are legitimate ways to constrain the impacts of harsh penalties like mandatory minimum punishment. This contribution also offers an extensive review of the case law on mandatory minimum punishments.

Keywords: Criminal sentences, Judicial process, Prosecutions, discretion, fairness

Paciocco, P. (2014). Proportionality, discretion, and the roles of judges and prosecutors at sentencing. Canadian Criminal Law Review, 18(3), 241-268.

Mandatory minimum sentencing puts pressure on the proportionality principle in the sentencing process. Analyzing the *Anderson* case, the author contends that the idea that judges and prosecutors have distinct roles, where judges sentence and prosecutors do not, is disconnected from the actual practice of sentencing. For instance, charging decisions can determine an offender's sentence based on the minimum sentences associated with the crime, the presence of aggravating factors, election to

proceed by summary or indictment, and so forth. When judges are forced to apply MMPs, they are sometimes incapable of avoiding disproportionate sentences. The author recommends the creation of sentencing tools to ensure that judges can avoid applying disproportionate sentences. It is also recommended that prosecutors remember their ethical obligation to consider proportionality when exercising their charge discretion.

Keywords: Criminal procedure, Criminal sentences, Judicial discretion, Public prosecutors, Roles

Parkes, D. (2012a). Ipeelee and the pursuit of proportionality in a world of mandatory minimum sentences. For the Defence, 33(3), 22-27.

The case of *R. v. Ipeelee* (2012) challenges the logic of limiting judicial discretion. In *Ipeelee* the Supreme Court of Canada clarified that *Gladue* must be considered in all sentencing decisions involving Aboriginal people. This involves taking into consideration the systemic and background factors relevant to Aboriginal contact with the criminal justice system. In making this clarification, the need for individualizing sentence is apparent but there is an inevitable tension when new policies are being crafted for mandatory minimum sentences. These newly crafted mandatory minimum penalties present their own problems but particularly troubling is the lack of Canadian empirical research that assesses the effects of transferring decision-making power from judges to prosecutors when mandatory minimums are enacted.

Keywords: *R. v. Ipeelee*, sentencing, Aboriginals, system and background, Gladue

Parkes, D. (2012b). From Smith to Smickle: The Charter's Minimal Impact on Mandatory Minimum Sentences. Supreme Court Law Review, 57, 150-171.

This article argues that the goals, justifications and impacts of mandatory sentencing schemes should be examined closely by the courts. The author recommends more *Charter* scrutiny of mandatory minimum sentencing laws. More scrutiny promises engagement with the objectives and the actual consequences of mandatory punishment schemes. Focusing particularly on the application of section 12 of the *Charter*, this article briefly reviews existing case law. The *Smith* case stands for the principle that a section 12 analysis considers whether a minimum sentence amounts to cruel and unusual punishment based on the circumstances of the case/individual before the court or, a reasonable hypothetical. The author offers a summary of other common law developments and principles in the section 12 analysis. The evolution of principles and developments are linked with many other ideas, including: the role of the *Charter*; criminal code reform; the role of prosecutorial discretion; questions about the starting place for mandatory minimums; disproportionate impact on marginalized groups; and deferential versus activist judges.

Keywords: discretion, Laws, regulations and rules, case circumstances, reasonable hypothetical, *Charter*

Pelletier, R. (2001). The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons. Osgoode Hall Law Journal, 2, 469-489.

This article examines the failure of section 718.2(e) in its objective to remedy the over-representation of incarcerated Aboriginal people in Canadian prisons. Aboriginal people are subject to various background factors, including colonialism that must be taken into consideration when understanding the reasons behind Aboriginal over-representation in prisons. Section 718.2 is supposed to encourage judges to consider factors specific to Aboriginal offenders when passing sentence. However, the current trend of NOT applying section 718.2(e) for “serious” offences renders it useless. This means that the only Aboriginals who benefit from this decision are those unlikely to receive jail time anyways. Thus, the ruling is stripped of its intent to alleviate Aboriginal over-representation in prison. Practical problems that hinder the successful application of section 718.2(e) include inadequate training for counsel to deal with Aboriginal issues and a lack of funding for community-based alternatives. Furthermore, the Court’s inability to recognize the distinct purposes of section 718.2(e) and the original sentencing requirements found under section 742.1, will only aggravate the existing problem of Aboriginal over-representation. The author concludes by stating that we “can only hope that it will not take a more drastic increase in the Aboriginal prison population for the legislature and the courts to recognize their mistakes” (p. 180).

Keywords: Aboriginal people, *R. v. Gladue*, *R. v. Wells*, colonialism, systemic factors, section 718.2(e)

Phillips, M. (2015). The public interest criterion in prosecutorial discretion: A lingering source of flexibility in the Canadian criminal process? Windsor Review of Legal and Social Issues, 36, (QL).

The author states that the prosecutor’s duty to the public is the only legal principle that can justify interventions to prevent severe sentences like mandatory minimums. Part of serving the public interest includes considering when charges should or should not be brought to the court’s attention. With the creation of new mandatory minimum sentences, prosecutorial discretion is one of the few sources of flexibility that remains between the charging and sentencing phases of a criminal case. From a research perspective, it remains unclear how public interest shapes prosecutorial operations in Canada.

Keywords: prosecutorial discretion, public interest, flexibility

Piquero, A. R. (2005). Reliable information and rational policy decisions: Does gun research fit the bill? Criminology & Public Policy, 4(4), 779-789.

In 1999, Florida implemented a 10-20-Life law with incremental increases in the mandatory term of imprisonment for repeat offenders. This paper assesses whether or not changing the penalty for gun crime was responsible for the reduction in (violent gun) crime in Florida. By reviewing the data, the author shows that harsh sentences for gun crimes had almost no impact on crime rates. Violent crime rates in Florida have been decreasing since 1990, and the violent crime rate decreased more before the implementation of harsh mandatory sentencing laws than after their implementation. Further, this

research emphasizes the need to examine pre/post analytical statements of the effectiveness of laws. Rigorous analysis, not anecdotal claims, must be conducted before one considers whether laws have played an important factor in reducing violent crime.

Keywords: firearm offences, gun crime, Florida, evaluation, violent crime

Pomerance, R. M. (2013). The new approach to sentencing in Canada: Reflections of a trial judge. Canadian Criminal Law Review, 17(3), 305 – 326.

Amendments made to the *Criminal Code* in Bill C-10 introduced mandatory minimum sentences. These amendments, which include a reduction in credit for time served, restrictions on conditional sentences, and increases in mandatory minimum sentences, have changed the sentencing process for Canadian judges. The author argues that these changes lack sound legal principle and are motivated by political considerations. Implications of the effect of MMPs on Canadian criminal law and legal critiques of these changes are provided. One critique outlines the shift away from discretion in sentencing to a one-size-fits-all approach, and the use of incarceration as a primary sentence not just a last resort. While the costs are not yet known, it is suggested that these legislative changes can encourage coercive, false-plea environments, and contribute to sentencing disparity. Furthermore, the prosecutor is given much control and is the first actor capable of exercising legal discretion in a criminal case. Examples of the power of the prosecutor's discretion include the decision to proceed summarily or by indictment for offences where the choice is available, and when the prosecutor engages in plea bargaining. Another implication is that mandatory minimum penalties does not allow for the consideration of exception or extraordinary circumstances.

Keywords: Bill C-10, discretion, plea bargaining, critiques, judicial conscience

Public Prosecution Service of Canada.(2014). Public Prosecution Service of Canada Deskbook." Available online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/index.html>

The Public Prosecution Service of Canada Deskbook (PPSC Deskbook) is a compilation of the directives and guidelines that provide instruction and guidance to federal prosecutors, whether employees of the PPSC or private-sector agents, on how to exercise their prosecutorial discretion. It provides clear explanations on when mandatory minimum penalties apply to specific cases.

Keywords: handbook, prosecution, discretion

Puri, P. (2001). Sentencing the criminal corporation. Osgoode Hall Law Journal, 39, 661-653.

While most academics and criminal law experts view mandatory minimum sentences as undesirable, the author argues that this does not apply when criminal acts are committed by corporations. The article offers a comparison between individual and corporate offenders. Mandatory minimum sentences do not have the desired effect of deterring individuals from engaging in misconduct; individuals are not aware of changes in sentencing, nor do they engage in a rational cost-benefit analysis before acting. On the other hand, it is impossible to imprison a corporation, so generally they are fined. Assuming the

corporation as rational, it will do a cost-benefit analysis before engaging in any criminal behaviour. As such, heavy fines should be given to corporations that commit crimes that have a low likelihood of detection. Very few crimes that can be committed by corporations carry mandatory minimum sentences, and where minimum fines exist, they are set so low that effective deterrence is not achieved. The author concludes that the mandatory fine for a corporation found guilty of a criminal offence should at least equal the expected loss caused or profit gained from the wrongdoing.

Keywords: Law and economics, Ethical aspects, Corporations, Laws, regulations and rules, Corporate crime, Criminal sentences

Raaflaub, W. R. (2006). Mandatory Minimum Sentences. Library of Parliament. Available online:

The author argues that mandatory minimum sentences (MMS, also known as MMPs) “are generally inconsistent with the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as they do not allow a judge to make any exceptions in an appropriate case. However, this does not necessarily mean that a mandatory minimum sentence is unconstitutional.” The article provides data on crime rates both in Canada and in the US and the history of mandatory minimum sentences in the United States. The article mentions that there is some evidence that Canadians have committed fewer crimes involving guns since mandatory minimum sentences came into force, but whether the mandatory sentences are the reason for the decrease is unclear. Finally, this report summarizes some of the ‘incidental’ effects of MMPs such as fewer plea bargains and increased costs.

Keywords: Canadian laws, effects of mandatory punishment, just sentences, minorities,

Roach, K. (2013). Enforcement of the Charter – Subsections 24(1) and 52(1). The Supreme Court Law Review, 62, 473 – 537.

This article briefly introduces the historical background of *Charter* remedies and examines the remedies that are available to courts. *Charter* remedies serve many goals and have many constraints, but in all cases the remedy is highly dependent on context. One concern with *Charter* remedies (i.e. reading down or exemptions) is that they should not be used to alter clear legislative intent. The legislative intent concern is apparent in a 2008 decision (*R. v. Ferguson*, [2008] S.C.J. No. 6) on mandatory minimums where it was found to be inappropriate to use a constitutional exemption to alter the mandatory sentence. In using an exemption as a constitutional remedy, it moves mandatory minimum sentencing to a case-by-case analysis, and this differs from the legislated intent of the mandatory sentencing scheme. Mandatory minimums illustrate the available remedy: uphold the law so it applies in all cases; or strike it down so it does not apply in all cases.

Keywords: *Charter* remedies, legislative intent, Supreme Court, exemption, striking down legislation

Roberts, J. V. (2003). *Public opinion and mandatory sentencing: A review of international findings*. *Criminal Justice and Behavior*, 30(4), 483-508.

It is important to ask questions about the relationship between public opinion and mandatory sentencing. To do this, the author reviews the most recent public opinion findings between 1982 and 2002. While public opinion is typically used to support the imposition of mandatory sentencing legislation, rigorous empirical support for these public attitudes are never described. So while deterrence and denunciation are the utilitarian goals of mandatory minimum punishments, the public is actually quite divided on the use of mandatory penalties. Generally, there is limited public support for deterrence and denunciation in sentencing as desert-based sentencing is often viewed more favourably among the public. Accordingly, there is limited public support for the principles that are said to guide mandatory sentencing. Furthermore, there is limited support for mandatory sentencing especially when the public is informed about the potential impact of mandatory minimums. For example, the public often supports MMPs when considering them in the abstract, but when given details of specific cases, the public often considers a wider range of potential penalties as more appropriate. Interestingly, while politicians often advance mandatory sentences based on public support and promises of deterrence, the public is generally not aware of mandatory penalties which further questions the impact of deterrence.

Keywords: public opinion, criminal sentencing, criminology, international research

Roach, K. (2001). *Searching for Smith: The Constitutionality of Mandatory Sentences*. *Osgoode Hall Law Journal*, 39, 367-412

In this article, the author examines a series of cases, from *R. v. Smith* to *R. v. Latimer* to highlight the Supreme Court of Canada jurisprudence on the constitutionality of mandatory minimum sentences. The article demonstrates that there is increasing interest in constitutional minimalism and a corresponding reluctance to rely on hypothetical offenders. The author concludes by stating that the Supreme Court has abandoned many of the premises of *Smith*, thereby giving Parliament the dominant role in deciding where to enact mandatory sentences. Changes in sentencing since the decision in *Smith* show the increased acceptance of courts to allow parliament to emphasize the punitive purposes of sentencing by enacting mandatory minimum sentences. More conclusively, *R. v. Morrisey* suggests that the Court may succumb to a legislative crime control agenda that uses mandatory sentences to punish and deter crimes that fall short of absolute liability offences. The decision of whether to have mandatory sentences now appears to be almost exclusively at the discretion of Parliament, when only the independent judiciary can “withstand the political allure of mandatory sentences” (p. 239). The author states that a voice in support of individualized justice “would be a welcome addition to our ongoing democratic dialogues on crime and punishment” (p. 262).

Keywords: Canada, *R. v. Smith*, *R. v. Latimer*, *R. v. Morrisey*, constitutional minimalism, hypothetical offenders

Roberts, J. V., Crutcher, N., & Verbrugge, P. (2007). Public attitudes to sentencing in Canada: Exploring recent findings. Canadian Journal of Criminology and Criminal Justice, 49(1), 75-107.

There has been little change in public attitudes towards criminal sentencing in recent years. This study of public perception on criminal sentencing assesses opinions on the severity of sentencing, the purpose of sentencing, and mandatory sentencing among representative groups of Canadians (n = 1501 & n = 2343). While the surveyed Canadians often see sentencing as lenient, the authors argue that this perception is based on media stories concerning sentencing and criminal justice. As for the objectives of sentencing, it is argued that Canadians may be embracing more restorative notions of sentencing over punitive ones. This is especially the case for minor crimes but it is expected that serious crimes and repeat offenders will still attract punitive public opinion. In the context of mandatory minimum punishment, research shows that almost half of respondents cannot cite at least one offence with a mandatory minimum – including the highly publicized and well known mandatory minimums for impaired driving. So while the mandatory minimums aim to denounce and prevent crime, Canadians do not know much about them. However, the results suggest that there is some public support for mandatory minimums, especially for serious crimes like homicide. But at the same time, there is public support for discretion in the sentencing process along with an awareness that mandatory minimum punishment can create injustice.

Keywords: Public opinion, Sentences (Criminal procedure), Criminal justice, Criminal sentences, Public opinion surveys

Roberts, J. V. (2013). Sentencing guidelines in England and Wales: Recent developments and emerging issues. Law & Contemporary Problems, 76(1), 1-25.

This article explores the recent development of sentencing guidelines in England and Wales and concludes that it is too early to determine whether or not sentencing guidelines have promoted more consistent sentencing. Until recently, the authority of the guidelines lacked the mandate and resources to monitor the application. The article presents the new format of sentencing guidelines in England, which will serve as a model for all future guidelines issued by the Sentencing Council for England. The new format includes nine steps, of which step one (principal factual elements of the offence) and step two (additional factual elements) employ primary and secondary factors to determine crime seriousness and culpability. Step three takes into account provisions in the *Serious Organized Crime and Police Act 2005*. Step four invokes sentence reductions for a guilty plea. In step five, courts consider whether it would be appropriate to impose an extended sentence. In step six, the totality principle is applied for cases in which the court is sentencing an offender for more than a single offense, or where the offender is currently serving a sentence. Step seven outlines that sentencers should consider whether to make a compensation order or any other orders. In addition, courts must give reasons and explain the effect of the sentence on the offender as outlined in step eight. Lastly, courts must consider whether to give credit for time spent on remand or on bail.

Keywords: Sentencing, U.K, Europe, Litigation Process, International comparisons, Criminal sentences, sentencing guidelines

Roberts, J. V. (2012). Structuring sentencing in Canada, England and Wales: A tale of two jurisdictions. Criminal Law Forum, 23(4), 319.

The author provides a history of sentencing policy and practice by offering a comparison between sentencing practices in Canada and England and Wales. This work shows how England can be a good example for Canada when it comes to learning how to structure sentencing in a way that promotes consistency. English sentencing guidelines allow considerable flexibility and variation to judges when determining a sentence. Some important lessons that are learned from reforms in England include: the need to develop detailed guidelines; strategies to address judicial skepticism; clarification on the differences from US-style sentencing grids; and partnerships between guideline developers and appellate courts.

Keywords: Criminal sentences, Jurisdiction, sentencing policy, U.K, Europe, Litigation Process (K41), International comparisons, Criminal sentences

Roberts, J. V. (2005). Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models. Ottawa: Department of Justice, Research and Statistics Division.

This study examines minimum sentences in Canada, England and Wales, Scotland, Ireland, South Africa, Australia and New Zealand to discuss current trends regarding the use of mandatory sentences of imprisonment. Almost all mandatory sentencing legislation in foreign jurisdictions allow for judicial discretion, allowing the courts to depart from legislated mandatory sentences whenever exceptional circumstances are identified. In some jurisdictions judges need to provide written reasons when using their discretion to impose a sentence below the mandated minimum. It is notable that Canada is one of the few common law jurisdictions examined that does not have a judicial discretion clause that would allow the judiciary to depart from the minima. England and Wales, as well as Scotland have a seven year minimum sentence for a third conviction of drug trafficking; these jurisdictions have specific legislation that allows judges to impose less than the minimum. South Africa mandates minimum sentences of imprisonment for a small range of serious offences such as murder, rape, robbery and serious economic crimes. In South Africa, mandatory minimum sentences for drug offences were created in 1971, but have since been repealed. None of the identified states and territories of Australia mandated minimum sentences of imprisonment for drug offences. Finally, New Zealand is a good example of a jurisdiction that has not introduced mandatory minimum sentences of imprisonment for serious crimes and drug crime.

Roberts, J. V. (2001). Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process. Osgoode Hall Law Journal, 39, 305-327.

The author investigates the nature and consequences of the mandatory minimum sentences created by Bill C-68 in 1995. This contribution argues that new statutory minima should not have an inflationary effect on sentence lengths for all firearms offences nor any other unrelated crimes. The author writes that doing so “ignores the core tenets of Canadian sentencing policy” (p. 308). Given the circumstances,

judges should continue to sentence offenders as they had before 1995. Mandatory minima are unpopular among judges, who view them as an intrusion into their discretion. The author concludes by calling for the creation of a Permanent Sentencing Commission to promote policy development that is both rational and coherent. A Sentencing Commission could: provide the Department of Justice and Parliament with an examination of the research done on the benefits and negatives of mandatory sentencing; make Parliament aware of how it is that mandatory minimum sentence legislation is being implemented; provide models for ways in which to structure new mandatory minima; and remind Parliament when legislative proposals come in conflict with the sentencing framework established by Parliament in 1996.

Keywords: Bill C-68, Permanent Sentencing Commission, firearms offences, impact of mandatory minimal sentencing

Roberts, J.V., & Bebbington, H.H. (2013) Sentencing Reform in Canada: Promoting a Return to Principles and Evidenced-based Policy. Canadian Criminal Law Review, 17, 327-347.

This article provides a brief overview of the mandatory minimum sentencing regime in Canada. The authors compare the legislative and political process behind the Canadian mandatory punishment regime against developments in England and Wales, and Israel. They conclude that the Canadian model undermines principled sentencing by eliminating the discretion of the courts and that this erodes public confidence in the judiciary as the institution becomes more perfunctory in its sentencing. The English mandatory minimum punishment model is systematic and provides a safety valve for judicial discretion, and the English follow a series of steps to determine the seriousness of the offence and then find a suitable sentence length. The English judiciary has responded positively and there are few cases where the safety valve is used. The Israeli model is similar. Israeli courts must develop a Proportionate Sentencing Range (PSR) that considers factors relating to the offence. There is a step by step guideline that does not unduly restrict discretion. The authors conclude that the best mandatory minimum punishment regimes are designed in consultation with the judiciary; they recognize that these consultations can compromise constitutionality tests for judges as judges are often required to pass judgment on laws. With this in mind, they recommend the development (by statute) of a permanent and independent sentencing commission that develops, publishes, and keeps up to date guidelines for all Criminal Code offences.

Keywords: Canada, England & Wales, Israel, Proportionality, Discretion, Constitutionality, sentencing commission

Sankoff, Peter. (2013). The Perfect Storm: Section 12, mandatory minimum sentences and the problem of the unusual case. Constitutional Forum, 22(1), 3-17.

Reviewing section 12 of the *Charter* and the reforms to sentencing made by past governments, the author argues that there has been less consideration of the impact of sentences on the person and less consideration of the potential for a sentence to be cruel and unusual. The author confirms that the

courts cannot invoke constitutional exemptions in specific cases; if the court finds the law unconstitutional it must strike that law down. As a result, the author argues that a 'perfect storm' has entered the justice system: we have a section 12 analysis that only addresses common cases, multiple new mandatory minimum punishment provisions, and no way of remedying individually problematic applications short of striking down a statute. Examples of the 'storm' are found in some of the recent case law including: *R.v. Nur* (firearms case, hybrid, where MMP applies to indictment as opposed to summary); and *R.v. Smickle* (first time offender, selfies with loaded firearm, caught in police raid at that moment, Crown indicts and asks for mandatory three year sentence). The 'storm' is further complicated as Crown policies constrain a prosecutor's power to proceed summarily, forcing indictment and eventually leading to appeals.

Keywords: Section 12, Judicial discretion, Charter, *R.v. Nur*, *R.v. Smickle*

Sewrattan, C. (2013). Apples, oranges, and steel: The effect of mandatory minimum sentences for drug offences on the equality rights of Aboriginal peoples. University of British Columbia Law Review, 46(1), 121-155.

The imposition of mandatory minimum sentences works to perpetuate systematic disadvantage among Aboriginal people, while at the same time these sentences deny affirmative attempts to address systemic problems. The author argues that mandatory minimum sentences deny protections under 718.2(2) of the *Criminal Code of Canada*. The author critiques mandatory minimum sentences and their impact on Aboriginal people using existing social science research and government reports to make the claim that mandatory minimum sentences will severely impact the liberty of Aboriginal people and therefore are likely to lead to a section 15(1) violation. It is troubling that Aboriginal people cannot benefit from a clear remedy to deal with systemic disadvantage and over-incarceration and, more so, this denies Aboriginal people equality under the law.

Keywords: Aboriginal people, section 718.2(2), section 15

Sheehy, E. (2001). Battered women and mandatory sentences. Osgoode Hall Law Journal, 39, 529-555.

The author argues for the repeal of mandatory minimum sentences given to battered women on trial for the homicide of their violent partners. There are numerous ways in which self-defence is distorted by the mandatory life sentence for murder, as self-defence is often abandoned as a trial strategy and battering is instead pleaded in mitigation in a sentence bargain. In addition, self-defence argued by battered women is perceived as a psychological syndrome or stereotype rather than a rational reaction to life-threatening violence. Finally, self-defence may need to be retold to make it more compelling for a jury, as a response to the low value society places on women's lives and on women's credibility. In referring to the Kondejewski trial (1998), the author demonstrates that the prosecutor has too much leverage and the mandatory minimum for murder exacerbates the unequal power between the Crown and the accused. The author concludes that only a repeal of the mandatory life sentence can reset the power imbalance; substantive reform is not a promising strategy at this point in time. In repealing the mandatory life sentence, opportunities will be provided to battered women to proceed to trial and have

their actions presented as self-defence, manslaughter, not murder. Even the most positive reforms cannot alleviate the pressure to plea or the distortion of defences that result from a murder trial.

Keywords: Women criminals, Discrimination in criminal justice administration, Social aspects, Self-defense (Law), Abused women, Laws, regulations and rules, Murder, Battered women, Criminal sentences

Shuman, L. D. (2012). Pulling the Trigger: Shooting Down Mandatory Minimum Sentencing for Victims Who Kill Their Abuser. Howard Law Journal, 56, 983-1017.

This article highlights the rates at which women are being incarcerated for killing their male abusers. The author argues that former victims of domestic violence transform into victims of unfair criminal justice system processes. Despite victimization, the public may hold stereotypical views about battered women which works to downplay serious violence, sometimes see violence as deserving, or paint a death as unjustifiable. Oftentimes women will opt for a plea bargain, reasoning that it is a less risky option than going to trial; avoiding the 'trial penalty'. The author concludes that the definition of self-defence is inapplicable to battered women but some solutions may be found in the *Domestic Violence Survivors Justice Act (DVSJA)* from the State of New York. The DVSJA would allow for judicial discretion and alternatives to incarceration thereby bypassing mandatory minimum regulations to protect abused women. The author concludes by stating that New York's proposed DVSJA should serve as a model provision that other states should adopt.

Keywords: family violence, self-defence law

Spratt, M. (2016). More Than Sunny Ways Needed to Address Mandatory Minimums. Canadian Lawyer.

An opinion piece by a respected Ottawa-based lawyer who argues that the new Canadian government should move quickly to repeal mandatory minimum penalties and roll back the 'reforms' implemented by the last Canadian government. The past changes to Canada's justice system "did not happen all at once but slowly as evidence-based policy gave way to partisan ideology."

Keywords: law reform, evidence-based policy

Spratt, J. B., Webster, C. M., & Doob, A. N. (2013). Punishment severity and confidence in the criminal justice system. Canadian Journal of Criminology and Criminal Justice, 55(2), 279-292.

This article empirically tests the assertion that Canadians would have more confidence in the criminal justice system if sentences were harsher. It argues that there is virtually no relationship between the punitiveness of a province's courts and the views that citizens hold regarding the criminal justice system. This challenges the justification for the greater use of imprisonment over the past decade that aims to restore public confidence in the justice system. However, there is a lack of public knowledge around

sentencing so opinions from the Canadian public should be understood as beliefs, not fully informed attitudes. The authors conclude that “punitiveness (at least as measured by the rate at or duration for which offenders are imprisoned) is not related to increased public confidence in the criminal justice system (at least, as captured by perceptions of sentencing leniency or overall confidence in the courts/justice system)” (pg. 287).

Keywords: punitiveness, perceptions, confidence in the criminal justice system

Stewart, J. (2001). Sentencing in the States: The Good, the Bad, and the Ugly. Osgoode Hall Law Journal, 39, 413-425.

In this article, the author, President of the Families Against Mandatory Minimums Foundation (FAMM) and also the sister of a marijuana user who spent five years in prison, describes the unjust nature of mandatory minimum sentence for drug-related offences. The author highlights that mandatory sentences have been in existence in the American justice system for over two hundred years and that the negative affect of these laws has been stunning. They have not led to a reduction in drug use and drug dealers themselves are rarely apprehended. Rather, the users have been the ones being sent to prison for five to ten years. These laws have led to the booming prison population in the United States, and as such, the prison system is keeping many people who do not deserve to be incarcerated. Accordingly, FAMM wants legislators to allow judges to determine a sentence, wants to expose the disproportionate impacts of mandatory sentencing, and wants to present personal stories to show the injustices of mandatory sentencing.

Keywords: United States, drug offences, Families Against Mandatory Minimums Foundation (FAMM),

Story, R., & Yalkin, T. R. (2013). Expenditure Analysis of Criminal Justice in Canada. Ottawa, ON: Office of the Parliamentary Budget Officer. Available online: http://pbo-dpb.gc.ca/web/default/files/files/files/Crime_Cost_EN.pdf

This report is the first multi-year study of the aggregate expenditures on criminal justice in Canada. This report estimates criminal justice spending in Canada for the federal, provincial, and territorial governments between 2002 and 2012, including police capital and youth justice expenditures. This analysis serves as a starting point to support an understanding of the expenses of Canada’s criminal justice system and its components over time, and it equips parliamentarians with the information needed to better scrutinize expenses. This report provides hard data that expenditures on criminal justice are increasing, which appears to confirm what those opposed to MMPs have argued – namely that MMPs increase costs.

Keywords: costs, justice spending

Sylvestre, M. (2013). The (Re)Discovery of the Proportionality Principle in Sentencing in Ipeelee: Constitutionalization and the Emergence of Collective Responsibility. The Supreme Court Law Review, 63, 461-481.

Proportionality is a longstanding principle of sentencing. It means that a sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender. The author argues that this principle has recently been rediscovered by the Supreme Court of Canada when it was recognized as a principle of fundamental justice under section seven of the *Charter*. This is called the constitutionalization of the proportionality principle, which is when proportionality is given constitutional status. When the proportionality principle was given more attention, it was also given more substance when the court considered the importance of degree of responsibility. Using the *Ipeelee/Ladue* cases as a point of departure, the author clarifies issues with the sentencing of Aboriginal offenders and principles of sentencing. The argument suggests that when proportionality has constitutional status, mandatory minimum sentences are at odds with the need for judicial discretion in sentencing processes.

Keywords: Proportionality (Law), Indigenous peoples, Laws, regulations and rules, *Ipeelee*, Aboriginal, fundamental justice

Tonry, M. H. (1996). Mandatory penalties. In Sentencing Matters, Edited by M. H. Tonry. New York: Oxford University Press.

Mandatory minimums illustrate a great gap between criminal justice knowledge and policy. These policies achieve few of their purported goals. For instance, justifications that are rooted in deterrence theory do not have clear empirical support. Further, sentencing data shows that prosecutors will sometimes circumvent the mandatory minimums even when there is evidence to support the charge. The author recommends the inclusion of presumptive offences instead of mandatory minimum offences, having sunset clauses, giving more discretion to correctional officers/practitioners, and limiting where mandatory penalties can be applied by focusing them on only the most serious offences.

Keywords: evidence-based policy, empirical support, consequences, policy reform, solutions, sunset clause, discretion

Tonry, M. (2009). The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings. Crime & Justice, 38(1), 65–114.

This contribution summarizes research on mandatory penalties, their implementation, and operation. It is argued that mandatory penalties are often poorly thought out and planned, that they do not have an effect on the crime rate, and that they signal the presence of a large gap between policy and existing knowledge on criminal justice policy. Further, the justifications for these types of policies lack rigorous support. The author argues that these types of penalties should be repealed. Practically speaking, mandatory penalties can cause injustice in individual cases. Existing research shows that when mandatory penalties are seen to be too severe, decision makers can circumvent them by moving sentencing decisions out of the courts and into the offices of Crowns and counsel, where they become

part of a plea process. Further, research shows that the number of trials increases with mandatory penalties because the penalties are harsh and there is sometimes no benefit for a guilty plea. There is also consensus that there is no deterrent effect of mandatory penalties; they are not associated with reductions in crime rates. The author suggests solutions, such as abolishing mandatory penalties, having “sunset” clauses which would set time limits on mandatory penalties unless legislatures re-enact them, and creating presumptive offences where penalties are debated.

Keywords: evidence-based policy, consequences, policy reform, sunset clauses, presumptive offences

Spohn, C. (2015). Evolution in sentencing research. Criminology & Public Policy, 14(2), 225-232.

Assessing the relationship between race and sentencing is essential to understanding justice in western nations. After tracing the history of this research from the 1930s onwards, the author shows how race is an important factor in almost all criminal justice system processes. The author begins with how charges are laid and goes onwards to the sentencing process. Given the race dimensions of processes within the criminal justice system, there have been inadequate attempts to be responsive to the problems of racial disparity. While mandatory minimum penalties are not the general focus on this paper, the author takes the position that mandatory sentencing statutes and three strikes policies should be repealed because they are race-linked and not inherently neutral.

Keywords: race, sentencing, sentencing disparity, three strikes, race-link

Ulmer, J. T., Kurlychek, M. C., & Kramer, J. H. (2007). Prosecutorial discretion and the imposition of mandatory minimum sentences. Journal of Research in Crime and Delinquency, 44(4), 427-458.

Data from eligible cases where a mandatory sentence could have been given in Pennsylvania indicates that only 18% of offenders in eligible cases actually received a mandatory minimum sentence. Prosecutors rely on a number of factors that include: offence severity; plea of guilt; and a criminal record. From a research perspective, it is important to note that these are not the only factors that determine sentencing as bias concerning race, age and sex may also affect whether or not someone is given a mandatory minimum sentence. More specifically, it is also shown that those who are young and those who go to trial are more likely to be given a mandatory minimum sentence. The fact that mandatory minimums are differently applied can be partially explained by public fear about minority crime.

Keywords: prosecutorial discretion, evaluation, judicial discretion, race, Hispanics, criminal justice, criminal sentences

Warner, K. (2007). Mandatory sentencing and the role of the academic. Criminal Law Forum, 18(3), 321-347.

Mandatory minimum sentences are one of many measures that signal a punitive turn in criminal justice policy. Despite the common discussion of mandatory sentencing as punitive policy, historical legal analysis shows that these types of sentences are not new. Focusing on mandatory sentencing in Australia, the author offers a comprehensive analysis of the history and rationale of these types of sentences. The author argues that this type of review/analysis provides important insight into the role of public opinion and wider academic debate about punitive sentencing policy. The increase in mandatory punishments reflects a broader shift in penal policy. As political and public voices increase in influence, expert voices decline in policy relevance. However, social science researchers still play an important role in influencing debate, showing injustices, reporting quality research, and presenting instrumental arguments against mandatory sentencing.

Keywords: European Law/public international law, criminal sentences, criminal justice, punitive

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