Ottawa Law Review
Revue de droit d'Ottawa

Return to *Smith*? Harper-Era Mandatory Minimum Sentences in Canadian Courts (2008–2023)

Brendan Dell

Volume 55, numéro 2, 2023–2024

URI : https://id.erudit.org/iderudit/1114754ar
DOI : https://doi.org/10.7202/1114754ar

Aller au sommaire du numéro

Éditeur(s)

Ottawa Law Review / Revue de droit d'Ottawa

ISSN

0048-2331 (imprimé)
2816-7732 (numérique)

Découvrir la revue

Citer cet article

Dell, B. (2023). Return to *Smith*? Harper-Era Mandatory Minimum Sentences in Canadian Courts (2008–2023). *Ottawa Law Review / Revue de droit d'Ottawa*, *55*(2), 327–362. https://doi.org/10.7202/1114754ar

Résumé de l'article

Après la décision de la Cour suprême du Canada dans l'affaire *R c Smith* (1987), qui annulait une peine minimale obligatoire [ci-après PMO] pour trafic de stupéfiants, il a fallu attendre près de trois décennies avant que la Cour n'annule une autre PMO. Au cours de ces 28 années, la Cour a fait preuve de retenue judiciaire et de déférence à l'égard du gouvernement en ce qui concerne la constitutionnalité des PMO. Toutefois, en 2015, la Cour a invalidé une PMO promulguée par le gouvernement Harper dans l'affaire *R c Nur*. La PMO en question dans l'affaire *Nur* était l'une des plus de 40 dispositions de PMO introduites par le gouvernement Harper entre 2006 et 2015.

Vu que la détermination des peines implique la compétence exclusive du Parlement de légiférer en matière de droit criminel, le pouvoir judiciaire discrétionnaire relatif aux peines et l'article 12 de la *Charte*, ces dispositions de l'ère Harper offrent une occasion unique d'étudier les rôles institutionnels en matière de détermination des peines et la constitutionnalité de telles dispositions.

Cet article donne un aperçu complet des PMO adoptées par le gouvernement Harper et examine la façon dont ces dispositions ont été traitées par les tribunaux canadiens, en se concentrant notamment sur le critère constitutionnel de l'article 12 de la *Charte*. En analysant les affaires portées devant les cours d'appel et la Cour suprême du Canada dans lesquelles les PMO de l'ère Harper étaient contestées au regard de la *Charte*, l'article constate que ces dispositions sont invalidées à un taux élevé (76 %). Les conclusions indiquent un assouplissement de la retenue judiciaire et de la déférence des tribunaux à l'égard du gouvernement dans ce domaine et soulignent des problèmes importants que pose l'aspect de hypothèse raisonnable du test de l'article 12. En fin de compte, l'article plaide pour une meilleure compréhension des rôles complémentaires du législateur et du pouvoir judiciaire en matière de détermination des peines.

Return to *Smith*? Harper-Era Mandatory Minimum Sentences in Canadian Courts (2008–2023)

Brendan Dell

FOLLOWING THE SUPREME Court of Canada's decision in *R v Smith* (1987), which struck down a mandatory minimum sentence (MMS) for drug trafficking, it took nearly three decades before the Court would nullify another MMS. This 28-year span saw the Court exhibit judicial restraint and deference to the government regarding the constitutionality of MMS. However, in 2015, the Court invalidated an MMS enacted by the Harper government in *R v Nur*. The MMS in *Nur* was one of over 40 MMS provisions introduced by the Harper government between 2006 and 2015.

As sentencing policy engages Parliament's exclusive jurisdiction to legislate criminal law, judicial discretion in sentencing, and section 12 of the *Charter*, these Harper-era sentencing provisions provide a unique opportunity to study the institutional roles in sentencing and the constitutionality of such provisions.

This article offers a comprehensive overview of the MMS enacted by the Harper government and examines how these provisions have been treated by Canadian courts, particularly focusing on the constitutional test for section 12 of the *Charter*. By analyzing appellate-level and Supreme Court cases featuring *Charter* challenges to Harper-era MMS, the article found that these provisions are being struck down at a high rate (76%). The findings indicate a loosening of judicial restraint and deference to government in this area and highlight significant issues with the reasonable

APRÈS LA DÉCISION de la Cour suprême du Canada dans l'affaire *R c Smith* (1987), qui annulait une peine minimale obligatoire [ci-après PMO] pour trafic de stupéfiants, il a fallu attendre près de trois décennies avant que la Cour n'annule une autre PMO. Au cours de ces 28 années, la Cour a fait preuve de retenue judiciaire et de déférence à l'égard du gouvernement en ce qui concerne la constitutionnalité des PMO. Toutefois, en 2015, la Cour a invalidé une PMO promulguée par le gouvernement Harper dans l'affaire *R c Nur*. La PMO en question dans l'affaire *Nur* était l'une des plus de 40 dispositions de PMO introduites par le gouvernement Harper entre 2006 et 2015.

Vu que la détermination des peines implique la compétence exclusive du Parlement de légiférer en matière de droit criminel, le pouvoir judiciaire discrétionnaire relatif aux peines et l'article 12 de la *Charte*, ces dispositions de l'ère Harper offrent une occasion unique d'étudier les rôles institutionnels en matière de détermination des peines et la constitutionnalité de telles dispositions.

Cet article donne un aperçu complet des PMO adoptées par le gouvernement Harper et examine la façon dont ces dispositions ont été traitées par les tribunaux canadiens, en se concentrant notamment sur le critère constitutionnel de l'article 12 de la *Charte*. En analysant les affaires portées devant les cours d'appel et la Cour suprême du Canada dans lesquelles les PMO de l'ère Harper étaient contestées au regard

hypothetical aspect of the section 12 test. Ultimately, the article argues for a better understanding of the complementary roles of the legislature and judiciary in sentencing.

de la *Charte*, l'article constate que ces dispositions sont invalidées à un taux élevé (76 %). Les conclusions indiquent un assouplissement de la retenue judiciaire et de la déférence des tribunaux à l'égard du gouvernement dans ce domaine et soulignent des problèmes importants que pose l'aspect de hypothèse raisonnable du test de l'article 12. En fin de compte, l'article plaide pour une meilleure compréhension des rôles complémentaires du législateur et du pouvoir judiciaire en matière de détermination des peines.

CONTENTS

Return to *Smith*? Harper-Era Mandatory Minimum Sentences in Canadian Courts (2008–2023)

Brendan Dell

I. INTRODUCTION

In pursuit of a 'tough-on-crime' policy agenda, the Stephen Harper-led Conservative government (2006–2015) focused much of its criminal justice policy on sentencing reform. As highlighted by Puddister in 2021, the Harper government's sentencing policy agenda aimed to increase the severity of sentencing in Canada.[1] Among these amendments to sentencing policy was an overwhelming focus on enacting new—and increasing existing—mandatory minimum sentences (MMS). MMS are a unique sentencing tool as they restrict the discretion from judges in sentencing—an area that is largely guided by the individual characteristics and circumstances of offenders, as well as the discretion and expertise of judges. This restriction of discretion, along with concerns for defendants' *Charter*-protected rights—namely the right to be free from cruel and unusual treatment or punishment—are the most common criticisms of MMS.[2]

Although MMS are critiqued for their potential negative impacts on *Charter* rights, they had, prior to the Harper government, historically been upheld by the Supreme Court of Canada as a constitutional sentencing

* PhD student, Political Studies, Queen's University. The author thanks Kate Puddister and Mark Harding for their invaluable guidance and feedback on the development of this project. The author also thanks Dave Snow for feedback on a previous version of this article. Finally, the author thanks the editors and anonymous reviewers of the *Ottawa Law Review* for their helpful feedback.

1 Kate Puddister, "How the Canadian Sentencing System Impacts Policy Reform: An Examination of the Harper Era" (2021) 43:2 Law & Pol'y 149 [Puddister, "Policy Reform"].

2 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 12.

tool. It has now been fifteen years since the enactment of the first of many MMS by the Harper government. Since then, many of these provisions have been challenged in court on the basis that they violate certain *Charter* rights. Given the restraint by courts and significant deference allotted to Parliament up until 2008 in this policy area, this paper is interested in answering one central question: how have Canadian courts treated Harper-era MMS when subjected to *Charter* challenges? This paper answers this question by 1) providing an overview of all MMS enacted by the Harper government and 2) analyzing all legal decisions featuring a *Charter* challenge to a Harper-era MMS at the Supreme Court of Canada and provincial appellate court level.

This paper finds that the Harper government enacted over fifty MMS, a significant departure from previous governments. Additionally, this paper finds that between 2008 and March of 2023, there have been 41 cases challenging 51 MMS provisions. Of the 51 challenges, 39 (76%) have found that the MMS violates the *Charter* and could not be justified as a reasonable limit. These mandatory minimum sentencing provisions are largely being struck down on the basis that they are grossly disproportionate when applied to reasonable hypothetical examples. Accordingly, this paper also explores the institutional roles of courts and legislatures in sentencing in light of courts' application of "reasonable hypothetical" tests. This paper ultimately demonstrates how both the legislature (through the mass enactment of MMS provisions) and the judiciary (through the inconsistent application of the *Charter's* section 12 constitutional test) could benefit from a more robust understanding of the complementary institutional roles in sentencing.

II. MANDATORY MINIMUMS, JUDICIAL DISCRETION, AND THE *CHARTER*

In Canada, the authority for sentencing policy falls under the exclusive jurisdiction of the federal government.[3] For some offences, the *Criminal Code* lays out a maximum sentence and, in some cases, a mandatory minimum sentence.[4] Offences are classified as summary offences, which are less serious offences; indictable offences, which are more serious offences; and hybrid offences, which can be tried either as summary or indictable at

3 *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(27).

4 RSC 1985, c C-46.

the discretion of the Crown prosecutor. Thus, sentencing in Canada can be referred to as a "multiactor sentencing system because policymakers, prosecutors, and judges can all make decisions that impact the structure of the sentencing system."[5]

Most criminal cases in Canada are settled without a trial due to guilty pleas or plea agreements between the prosecutor and the accused. Therefore, sentencing is considered by some to be the vital aspect of the criminal law's fact-finding, decision-making process.[6] Given this, "judges in criminal courts have long understood their role to include exercising their discretion, in the full context of the case's facts, to ensure that the sentence fits the seriousness of the offence."[7] The ability of a judge to exercise discretion flows from the constitutional doctrine of the separation of powers and is an aspect of judicial independence. In practice, judicial discretion in sentencing is largely guided by common law precedents and the principles and purposes of sentencing set out in the *Criminal Code*.

Since the mid-1990s, policymakers in Canada have begun to rely on a mandatory minimum sentencing approach to control crime. These require judges to impose a minimum length sentence of incarceration or fine on an offender upon conviction for certain criminal offences. Where there is a MMS, a "judge can give a more severe sentence but cannot impose a sentence below the legislatively established minimum floor, even if the application of other sentencing rules and principles dictate that a lesser sentence is appropriate" or just.[8] Some have argued that MMS significantly alter the criminal justice framework by restricting the discretion from judges over punishing offenders "in pursuit of greater certainty and consistency in sentencing."[9] As a result, MMS have been described by Canadian courts as a "forceful expression of governmental policy in the area of criminal law."[10]

Mandatory minimum sentencing tools have received a great deal of attention from academics and legal experts in the past decade, as the Harper government "promoted law-and-order legislation in response to

5 Puddister, "Policy Reform", *supra* note 1 at 152.

6 Lincoln Caylor & Gannon G Beaulne, *Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences* (Ottawa: Macdonald-Laurier Institute, 2014) at 7.

7 *Ibid*.

8 David M Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015) 19:2 Can Crim L Rev 173 at 174.

9 Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 Appeal 89 at 93.

10 *Ibid* at 90; *R v Nasogaluak*, 2010 SCC 6 at para 45; *R v Nur*, 2015 SCC 15 at para 132 [*Nur*].

the public's perception that Canada's criminal sentencing regime was overly lenient with offenders."[11] This legislation has been met with criticism from members of the media and academia.[12] Specifically, Doob and Webster claim that much of the sentencing legislation under the Harper government was politically motivated—to appeal to voters who support the tough-on-crime mantra.[13]

The three issues that are most debated regarding MMS are their impact on judicial discretion, the accused's *Charter* rights, and racialized individuals. Regarding judicial discretion, proponents of MMS have argued that "excessive judicial discretion in sentencing results in unacceptable disparities in sentencing between offenders found guilty of the same crime."[14] Due to this, some say MMS are effective tools to uphold the rule of law by ensuring the "even, equal, and proportionate application of sentences to offenders guilty of the same offence."[15] "Rather than eliminating a judge's ability to assess a proportionate sentence," proponents of MMS argue that they "set a stable sentencing range for an offence."[16]

Opponents of MMS, however, warn that the restriction of judicial discretion is dangerous. Some argue that MMS reduce transparency and accountability in the sentencing process by shifting discretion from judges to prosecutors and police.[17] Research demonstrates that "reducing judicial discretion [in sentencing] does not create consistency," rather, "it merely shifts discretion towards" other criminal justice actors, namely prosecutors.[18] For example, "prosecutors have the power to proceed, dismiss, or stay a charge and, in some cases involving hybrid offences, they also have the option to proceed summarily and avoid MMS altogether."[19] The most problematic aspect of shifting discretion is that it is shifting from independ-

11 Caylor & Beaulne, *supra* note 6 at 2.

12 Renee Pomerance, "The New Approach to Sentencing in Canada: Reflections of a Trial Judge" (2013) 17:3 Can Crim L Rev 305.

13 Anthony N Doob & Cheryl Webster, "Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century" in Michael Tonry, ed, *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives* (Chicago: The University of Chicago Press, 2016) 359 at 362.

14 Darcie Bennett & Scott Bernstein, *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences* (Vancouver: Pivot Legal Society, 2013) at 22.

15 Caylor & Beaulne, *supra* note 6 at 16.

16 *Ibid.*

17 Debra Parkes, "From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 SCLR 149 at 150–51.

18 Bennett & Bernstein, *supra* note 14 at 22.

19 *Ibid.*

ent and impartial judges towards prosecutors who have an adversarial role in the criminal justice system.[20] This ultimately compromises impartiality of the sentences that are imposed. Additionally, "judges are obliged by law to seek to ensure that their sentencing decisions are equal, consistent, and proportional."[21] In contrast, prosecutors are not legally obligated to do so, nor do internal prosecutorial decisions form part of the public record, like a sentencing decision.[22] Overall, the resulting lack of openness and accountability from shifting discretion to other criminal justice actors has the potential to undermine the integrity of the entire sentencing process.

MMS also carry disproportionate consequences for those already over-represented in the criminal justice system, such as Black Canadians and Indigenous Peoples.[23] Faizal Mirza makes the argument that the shift of discretion towards the police and prosecution disproportionately affects Indigenous Peoples and Black Canadians who experience systemic discrimination, racist policing, and the racist application of prosecutorial discretion.[24] Specifically regarding Indigenous Peoples, the removal of judicial discretion makes it difficult or impossible for judges to give meaningful consideration to the *Gladue* sentencing principles, codified in section 718.2(e) of the *Criminal Code*, which recognize the systemic and historic factors that affect Indigenous offenders.[25]

Most critics identify section 12, which protects the rights of individuals not to be subject to cruel and unusual treatment or punishment, as the *Charter* right that is most likely to be infringed as a result of MMS. MMS are "vulnerable to s.12 challenges because they are inflexible, and thus restrict the ability of the judiciary to consider contextual factors," resulting in disproportionate sentences.[26] However, sentences will only be found cruel and unusual if they are grossly disproportionate — more than merely harsh — when compared to the seriousness of the offence and

20 Paciocco, *supra* note 8 at 174.

21 *Ibid* at 187.

22 *Ibid*.

23 Parkes, *supra* note 17 at 167; Kate Puddister, "Protecting Against Cruel and Unusual Punishment: Section 12 of the Charter and Mandatory Minimum Sentences" in Emmett Macfarlane, ed, *Policy Change, Courts, and the Canadian Constitution* (Toronto: University of Toronto Press, 2018) 189 at 194 [Puddister, "Cruel and Unusual Punishment"]; Elizabeth Sheehy, "The Discriminatory Effects of Bill C-15's Mandatory Minimum Sentences" (2010) 70:2 CR (6th) 302.

24 Faizal R Mirza, "Mandatory Minimum Prison Sentencing and Systemic Racism" (2001) 39:2 Osgoode Hall LJ 491 at 492.

25 Pomerance, *supra* note 12 at 314.

26 Bennett & Bernstein, *supra* note 14 at 28.

the blameworthiness of the offender.[27] In this respect, courts had, in the eras preceding the Harper government's enactments of MMS, generally exercised strong restraint by deferring to Parliament in most section 12 cases, citing Parliament's jurisdiction over legislating sentences to which the judiciary must adhere. Therefore, section 12 of the *Charter* sets a highly deferential standard of review. Due to this, in practice, a finding of cruel and unusual treatment or punishment had been a rare event.

III. MANDATORY MINIMUM SENTENCING JURISPRUDENCE AT THE SUPREME COURT OF CANADA

The treatment of MMS in Canadian courts has evolved over time. This section provides an overview of the key mandatory minimum cases decided by the Supreme Court of Canada since the adoption of the *Charter* in 1982.

Until recently, it had been the accepted view that the judiciary had been deferential to the legislative adoption of MMS. The Supreme Court of Canada has generally taken a deferential approach in cases concerning the constitutionality of MMS by setting a high threshold of gross disproportionality for a mandatory minimum to constitute cruel and unusual treatment or punishment.[28] Prior to Harper-era MMS, the Supreme Court of Canada had only declared one MMS unconstitutional: *R v Smith*.[29] In *Smith*, the majority found that a seven-year MMS for importing a narcotic into Canada was grossly disproportionate, amounted to cruel and unusual punishment, and could not be justified under section 1 of the *Charter*.[30] Importantly, in *Smith*, the Court declared that a punishment would contravene section 12 only if it is grossly disproportionate.[31] To be grossly disproportionate, the sentence must be "so excessive as to outrage standards of decency," and so disproportionate that Canadian citizens would find the punishment "abhorrent or intolerable."[32] Additionally, in *Smith*, the Court used the "reasonable hypothetical" example to determine if the impugned MMS was unconstitutional. As Puddister notes, a MMS can violate the *Charter* "if a court is presented with a hypothetical case of another person, who may not be the intended target of the law, who would be subject

27 Parkes, *supra* note 17 at 153.
28 *Ibid* at 152.
29 1987 CanLII 64 (SCC) [*Smith*].
30 *Ibid* at 1047.
31 *Ibid* at 1046.
32 Paciocco, *supra* note 8 at 192; *Smith*, *supra* note 29 at 1047.

to the same mandatory sentence, resulting in gross disproportionality."[33] "The Court's use of the reasonable hypothetical in *Smith* could have foreshadowed increasing judicial activism" when reviewing the constitutionality of MMS.[34] However, this was not the case. In the decades following *Smith*, as enactments of MMS increased, Canada saw "constitutional minimalism" when it came to assessing the constitutionality of MMS.[35]

Between the *Smith* decision in 1987 and 2015, the Supreme Court of Canada was presented with four opportunities to consider the constitutionality of MMS: *R v Goltz*, *R v Morrisey*, *R v Latimer*, and *R v Ferguson*.[36] First, in *Goltz,* the Court held that the seven day mandatory minimum period of imprisonment for driving while prohibited was not grossly disproportionate.[37] After emphasizing the importance of deference to Parliament, the Court stated that any hypothetical case used to demonstrate gross disproportionality must be *reasonable*.[38] The Court then took a narrow notion of what would be considered a "reasonable hypothetical example" by elaborating that courts are not to consider "remote or extreme" examples but only "imaginable circumstances which could commonly arise in day-to-day life."[39]

Nine years later, in *Morrisey*, the Court upheld the four-year MMS for criminal negligence causing death with a firearm.[40] Again, the Court insisted that any reasonable hypothetical must be "common," "going so far as to exclude the facts of real, reported cases that were considered unusual or rare."[41] In the 2001 *R v Latimer* case, while upholding the constitutionality of the MMS for second degree murder, the Court took a highly deferential stance, stating that "[t]he choice is Parliament's on the use of minimum sentences, though considerable difference of opinion continues on the wisdom of employing minimum sentences from a criminal law policy or penological point of view."[42] Finally, in the 2008 *Ferguson* case, the Court upheld the constitutionality of the MMS for manslaughter with

33 Puddister, "Cruel and Unusual Punishment", *supra* note 23 at 193.

34 Chaster, *supra* note 9 at 95.

35 Parkes, *supra* note 17 at 154; Kent Roach, "Searching for *Smith*: The Constitutionality of Mandatory Sentences" (2001) 39:2&3 Osgoode Hall LJ 367 at 384.

36 *R v Goltz*, 1991 CanLII 51 (SCC) [*Goltz*]; *R v Morrisey*, 2000 SCC 39 [*Morrisey*]; *R v Latimer*, 2001 SCC 1 [*Latimer*]; *R v Ferguson*, 2008 SCC 6 [*Ferguson*].

37 *Goltz*, *supra* note 36 at 488.

38 *Ibid* at 517.

39 *Ibid* at 515–16.

40 *Morrisey*, *supra* note 36 at para 58.

41 Parkes, *supra* note 17 at 154.

42 *Latimer*, *supra* note 36 at para 88.

a firearm.[43] Notably, the Court rejected the use of constitutional exemptions found in section 24(1) of the *Charter* "as an appropriate remedy for unconstitutional" MMS.[44] This is important to consider given the Harper government's mass enactment of MMS that followed. The elimination of the possible use of section 24(1) to address unconstitutional MMS may have had an impact on how MMS *Charter* cases are challenged and on how courts treat these cases.

Given the lack of success for those challenging the constitutionality of MMS, the Supreme Court of Canada became reluctant to declare any MMS unconstitutional post-*Smith*. This trend was characterized by Roach as moving from activism to minimalism in interpreting section 12 of the *Charter*.[45] For decades, scholars have lamented this minimalist and deferential approach to the constitutional assessment of MMS.[46] Further, Roach states that the concern by the Supreme Court of Canada in *Smith* regarding whether an MMS is "grossly disproportionate in light of what is necessary to deter or rehabilitate particular offenders, has been replaced by deference to Parliament's decision to stress punitive purposes of sentencing over restorative ones."[47] Roach called for a return to the activism exhibited by the Court in *Smith* by arguing that "vigorous judicial enforcement against cruel and unusual punishment by striking down mandatory sentences has the potential to produce a robust and democratic dialogue between the courts and the legislature."[48]

Until 2015, some scholars believed it unlikely that the Supreme Court of Canada would entertain different arguments to rule MMS unconstitutional.[49] Paciocco argued that fundamental change in MMS jurisprudence would only occur "if the Court changes its mind about whether deference to Parliamentary sovereignty continues to warrant preventing trial judges from fulfilling their recognized constitutional duty to give offenders proportionate sentences."[50] However, as will be discussed below, in 2015 the Supreme Court of Canada began to depart from its post-*Smith* deferential approach to section 12 by striking down two MMS for possessing loaded

43 *Ferguson*, *supra* note 36 at para 2.
44 *Ibid* at para 57.
45 Roach, *supra* note 35 at 412.
46 Parkes, *supra* note 17 at 161.
47 Roach, *supra* note 35 at 412.
48 *Ibid* at 411.
49 Paciocco, *supra* note 8 at 199.
50 *Ibid*.

prohibited firearms in *R v Nur*.[51] Following *Nur*, the Supreme Court of Canada delivered its ruling on *R v Lloyd*, where the majority struck down a MMS regarding the possession of drugs for the purpose of trafficking.[52] Some felt *Nur* and *Lloyd* might reinvigorate the protection against cruel and unusual punishment in relation to MMS.[53] This willingness from the Court to depart from its minimalist approach increases the importance of section 12 of the *Charter* for those convicted of offences that carry MMS.[54]

IV. HARPER-ENACTED MANDATORY MINIMUM SENTENCES: BY THE NUMBERS

A. Mandatory Minimum Sentences Enacted

The Harper government passed 11 bills that contained at least one new or increased MMS. From these 11 bills, 51 MMS were created or increased between 2006–2015 in the *Criminal Code* and the *CDSA*. These include 29 new MMS, and the minimum sanction for 22 pre-existing MMS were increased.[55] The remainder of this paper focuses on the 51 MMS that were created or increased in the *Criminal Code* and *CDSA* that concern sentences of imprisonment or fines. A high-level breakdown of the 51 MMS can be found below in Table 1.

Over one-third (n=19) of the MMS that were created or increased dealt with hybrid offences in the *Criminal Code* or *CDSA*. In most cases, the Harper government created or increased the MMS for both the summary and indictable elements of the hybrid offence. Similar to other studies in

51 *Nur*, *supra* note 10 at para 4.

52 *R v Lloyd*, 2016 SCC 13 at para 2 [*Lloyd*].

53 Puddister, "Cruel and Unusual Punishment", *supra* note 23 at 205.

54 *Ibid*.

55 The Harper government introduced other MMS (which included terms of imprisonment and fines) in other bills; however, these offences and sentences were not under the *Criminal Code* or CDSA. For example, non-*Criminal Code* or CDSA MMS include minimum fines enacted to set guideposts for higher sentences for environmental offences in Bill C-16 (*Environmental Enforcement Act*), and in Bill C-31 (*Protecting Canada's Immigration System Act*) which amended the *Immigration and Refugee Protection Act* to add an MMS for organizing entry into Canada (50 persons or more) for three or five years of imprisonment depending on certain factors. Additionally, MMS-like provisions that add mandatory minimum driving prohibitions for street racing and driving offences such as dangerous operation of a vehicle, criminal negligence, and operation of a motor vehicle while disqualified from doing so, were enacted by the Harper government in Bill C-19 (*An Act to amend the Criminal Code* (*street racing*) *and to make a consequential amendment to the Corrections and Conditional Release Act*) and in Bill C-2 (*Tackling Violent Crime Act*).

the existing literature, where both the summary and indictable MMS were introduced or increased for the same hybrid offence, this paper only counts the offence as one MMS.[56]

Interestingly, 42 out of the 51 MMS (82%) that were introduced or increased came from just four bills, two of which were introduced in the Harper government's final session in power. These included Bill C-26[57] (*Tougher Penalties for Child Predators Act*, enacted in 2015), which introduced or increased nine MMS and Bill C-36[58] (*Protection of Communities and Exploited Persons Act*, enacted in 2015), which introduced or increased seven MMS. The other two bills were omnibus crime bills in Bill C-2[59] (*Tackling Violent Crime Act*, enacted in 2008), which added or increased six MMS, and Bill C-10[60] (*Safe Streets and Communities Act*, enacted in 2012), which contained 20 MMS. Omnibus bills generally "seek to amend, repeal, or enact several Acts," and are characterized by the fact that they have several related, but separate parts.[61] Bill C-2 and Bill C-10 grouped together five and nine separate bills, respectively, that were introduced in a previous session of Parliament but not passed into law.

While the Harper government was in power for nine years, it governed as a minority government for the first five years until the Conservative Party won a majority government in the 2011 federal election. The inefficiency of ruling as a minority government was strongly reflected in the data.[62] To illustrate, of the 51 Harper government MMS, only 12 (24%) were passed in the first five years in office (2006-2011), while the remaining

56 Parkes, *supra* note 17 at 149.

57 *An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015.

58 *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015.

59 *An Act to amend the Criminal Code and to make consequential amendments to other Act*, 2nd Sess, 39th Parl, 2008.

60 *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1st Sess, 41st Parl, 2013 [Bill C-10 2012].

61 Robert Marleau & Camille Montpetit, *House of Commons Procedure and Practice*, 1st ed (House of Commons, 2000) at 5.

62 Richard S Conley, "Legislative Activity in the Canadian House of Commons: Does Majority or Minority Government Matter?" (2011) 41:4 Am Rev Can Studies 422.

39 MMS (76%) were passed in the final four years in office as a majority government (2012–2015).

The Harper government was focused on being tough-on-crime, which emphasized the use of incarceration in sentencing, as 49 of the 51 (96%) MMS passed by the Harper government added new or increased existing minimum terms of imprisonment (as opposed to fines). Additionally, the MMS passed by the Harper government had a strong focus on sexual offences. Just under two-thirds (32 or roughly 63%) of the MMS passed by the Harper government dealt with sexual offences including child sexual offences, sexual assault, and prostitution-related offences. The remaining 19 MMS added or increased by the Harper government dealt with firearms (seven or roughly 14%), drugs (five or roughly 10%), impaired driving (three or roughly 6%), property (one or roughly 2%), fraud (one or roughly 2%), an offence concerning the killing or injuring of certain animals (one or roughly 2%), and the mandatory minimum victim surcharge, which can apply to many types of offences (one or roughly 2%).

Some of the MMS created by the Harper government were complex in their application. For example, Bill C-2 made the use of a firearm in the commission of eight different offences in the *Criminal Code* carry a mandatory minimum sentence of incarceration of five years for the first offence and seven years for the second offence.[63] Another example of the complex nature of the Harper-era MMS are the repeat offence MMS. For example, the six-month mandatory minimum term of imprisonment introduced in 2010 for motor vehicle theft in Bill S-9[64] applies only for third or subsequent offences, while the mandatory minimum terms of imprisonment for selling contraband tobacco products enacted in 2014 in Bill C-10[65] applies for the second offence and increases for third and fourth offences.

63 The provision applies to the following eight offences: attempted murder (section 239), discharging a firearm with intent (section 244), sexual assault with a weapon (section 272), aggravated sexual assault (section 273), kidnapping (section 279), hostage-taking (section 279.1), robbery (section 344), and extortion (section 346). Although this provision applies to eight separate offences in the *Criminal Code*, it is considered as one MMS because it was enacted in one provision, not eight separate provisions.

64 *An Act to amend the Criminal Code* (*auto theft and trafficking in property obtained by crime*), 3rd Sess, 40th Parl, 2010.

65 *An Act to amend the Criminal Code* (*trafficking in contraband tobacco*), 2nd Sess, 41st Parl, 2014.

TABLE 1. HARPER-ERA MMS

Bill	Parliament, Session	Number of MMS	New or Increased Existing MMS	Imprisonment or Fine	Type of Offences
Bill C-2	39th, 2nd	6	Increased	Both	Firearm, impaired driving
Bill C-13	39th, 2nd	2	New	Both	Impaired driving
Bill C-14	40th, 2nd	2	New	Imprisonment	Firearm
Bill S-9	40th, 3rd	1	New	Imprisonment	Property
Bill S-21	40th, 3rd	1	New	Imprisonment	Fraud
Bill C-10	41st, 1st	20	Both	Imprisonment	Sexual, drug
Bill C-37	41st, 1st	1	New	Fine	N/A[66]
Bill C-10	41st, 2nd	1	New	Imprisonment	Drug
Bill C-26	41st, 2nd	9	Increased	Imprisonment	Sexual
Bill C-35	41st, 2nd	1	New	Imprisonment	Assaults
Bill C-36	41st, 2nd	7	New	Both	Sexual
Total		**51**			

The complex nature of the MMS are further demonstrated in the hybrid offence MMS. As mentioned earlier, 37% of the MMS that were introduced or increased by the Harper government dealt with provisions in the *Criminal Code* or *CDSA* that were hybrid offences and, in most cases, the Harper government created or increased the MMS for both the summary and indictable avenues of the hybrid offence. However, there were instances where the government introduced or increased MMS for either the summary element of a hybrid offence only or the indictable element only. In addition, six MMS introduced by the Harper government included certain conditions or factors needing to be met for the MMS to be engaged. These were evident in the MMS for drug offences in the 2012 Bill C-10. For example, the MMS for the offence of trafficking a substance included in Schedule I or Schedule II of the CDSA can be one year of imprisonment or two years of imprisonment depending on whether certain aggravating factors apply.[67]

66 The MMS provision in Bill C-37 is the mandatory victim fine surcharge. Since this MMS is not attached to a specific offence, it is coded as N/A.

67 For this specific offence, Clause 39 states there will be a minimum punishment of imprisonment for one year if certain aggravating factors apply: the offence was committed for a criminal organization; there was the use or threat of the use of violence in the commission of the offence; a weapon was carried, used or threatened to be used in the commission of the offence; or the offender had been convicted of a designated substance

B. Harper Mandatory Minimum Sentences Constitutionally Challenged in Court

Following the enactment of MMS provisions by the Harper government, the constitutionality of many of these provisions has been challenged in court. The following section provides an analysis of every provincial appellate and Supreme Court of Canada case that featured a *Charter* challenge of a Harper-era MMS provision between January 2008 and March 2023.

Since the enactment of the first Harper government MMS, there have been 41 cases that constitutionally challenged Harper-era MMS provisions at the provincial appellate courts and the Supreme Court of Canada. Appellate court decisions that were eventually appealed to and heard by the Supreme Court of Canada were not included.[68] The first provincial appellate court challenge of a Harper-era MMS occurred in 2013, and the number of challenges increased over time and peaked in 2018 with appellate courts hearing 11 cases that challenged 15 MMS provisions. Of the 41 cases, 51 Harper-era MMS provisions were challenged on the basis that they violate a *Charter* right. 33 cases challenged a single MMS provision, six cases challenged two MMS provisions, and two cases challenged three MMS provisions.

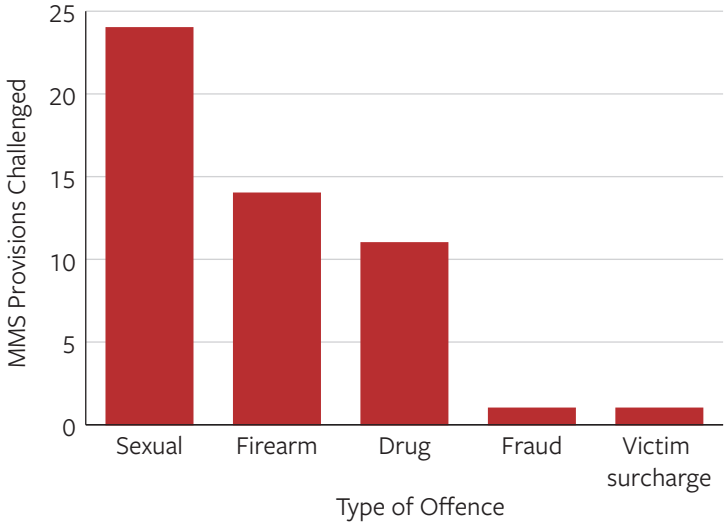
The Ontario Court of Appeal heard the most cases of any appellate court, hearing 11 of the 41 cases (27%). The British Columbia Court of Appeal heard the second most cases (nine of the 41 cases, or 22%), followed by the Quebec Court of Appeal (six of the 41 cases, or 15%), and the Supreme Court of Canada (five of the 41 cases, or 12%). Additionally, over two-thirds of the cases (28 of the 41 cases, 68%) had unanimous judgments, while the remaining 13 cases (32%) were split decisions containing at least one dissent. None of the Supreme Court of Canada decisions were unanimous, with each containing a dissenting opinion.

---

offence, or had served a term of imprisonment for such an offence, within the 10 previous years. Clause 39 also amends the CDSA to impose a minimum punishment of imprisonment for a term of two years if certain other aggravating factors apply, including that the offence was committed in or near a school, on or near school grounds, or in or near any other public place usually frequented by persons under the age of 18 years, or if the offender used the services of a person who is under 18 years of age, or involved such a person, in committing the offence or committed the offence in a prison.

68 By strictly including cases' final dispositions, it allows for a consistent approach to counting cases and an accurate picture regarding which MMS have been upheld or struck down. The following appellate court cases were not included: *R v Nur*, 2013 ONCA 677; *R v Charles*, 2013 ONCA 681; *R v Lloyd*, 2014 BCCA 224; *R v Boudreault*, 2016 QCCA 1907; *R v Tinker*, 2017 ONCA 552; *R v Hills* 2020 ABCA 263 [*Hills* ABCA]; and *R v Hilbach* 2020 ABCA 332.

FIGURE 1. MMS PROVISIONS CHALLENGED BY TYPE OF OFFENCE



As Figure 1 illustrates, MMS provisions for sexual offences were challenged most frequently (47%, with 24 challenged provisions). Recall that 32 MMS provisions (63%) enacted by the Harper government were for sexual offences, demonstrating that the MMS provisions challenged most frequently in court were the MMS that received most attention by the Harper government. MMS provisions for firearm offences were challenged 14 times (27%) and MMS provisions in the *CDSA* for drug offences were challenged 11 times (22%). MMS provisions for firearm offences and drug offences were the second and third most MMS provisions enacted by the Harper government (seven provisions or 13% for firearm offences; five provisions or 10% for drug offences). This, again, suggests that the proportion of MMS provisions challenged in court largely mirrors the proportion of MMS provisions enacted by type of offence by the Harper government.

The challenges to MMS focused on two *Charter* sections: section 12, the right to be free from cruel and unusual treatment or punishment; and section 7, the right to life, liberty, and security of the person. Section 12 was raised in every challenge (51 times), while section 7 was raised in just three cases.[69] When combining challenges under sections 7 and 12, the Harper-era MMS provisions were found to violate the *Charter* in 39 of 54 occurrences (72%).

69 *R v Forcillo*, 2018 ONCA 402 [*Forcillo*]; *Lloyd*, *supra* note 52; *R v Smickle*, 2013 ONCA 678.

As demonstrated by Table 2, MMS provisions were found to violate section 12 of the *Charter* 39 of the 51 times (76%) a provision was challenged. On the other hand, section 7 of the *Charter* was considered in three cases, all of which were unsuccessful. The relative dearth of section 7 cases is consistent with the notion that section 12 is the main avenue in the *Charter* for challenging the constitutionality of MMS provisions. With section 7 of the *Charter* being raised in just three cases, it is difficult to make any conclusive remarks regarding the potential impact it could have on *Charter* challenges to MMS provisions.

TABLE 2. RIGHTS VIOLATED VS. NOT VIOLATED BY *CHARTER* SECTION

***Charter* Section**	**Section 12**	**Section 7**	**Total**
Right violated by MMS	39 (76.4%)	0 (0%)	39 (72.2%)
Right not violated by MMS	12 (23.6%)	3 (100%)	15 (27.8%)
Total	**51 (100%)**	**3 (100%)**	**54 (100%)**

Finally, section 1 of the *Charter* had a minimal effect on the outcome of the constitutionality analysis when MMS provisions were challenged under the *Charter*. Where a section 12 violation was found, in most cases, the Crown did not dispute that it should be justified as a reasonable limit under section 1 of the *Charter*. In the few cases where a section 12 violation was found and the Crown *did* argue that the provision should be saved under section 1, the MMS provisions passed the first step of the proportionality analysis but failed at the minimal impairment stage.[70] Thus, in all cases where section 1 was considered by the courts, the MMS provisions could not be saved on the basis that the MMS provisions only minimally impaired the individual's *Charter* rights. It was at this step of the proportionality analysis where some judges held that Parliament did not consider a range of reasonable policy alternatives, such as providing residual judicial discretion in the form of a safety valve.[71] The finding that no section 12 violations could be justified under section 1 of the *Charter* is consistent with the relationship between section 1 and section 12 of the *Charter*. It is

70 *Caron Barrette v R*, 2018 QCCA 516 at para 108 [*Caron Barrette*]; *R v Trottier*, 2020 QCCA 703 at para 87 [*Trottier*]; *R v Dickey*, 2016 BCCA 177 at para 73; *R v JLM*, 2017 BCCA 258 at para 79 [*JLM*]; *Lloyd*, *supra* note 52 at para 49; *Nur*, *supra* note 10 at para 117; *R v Serov*, 2017 BCCA 456 at para 44 [*Serov*]; *R v Vu*, 2018 ONCA 436 at para 83 [*Vu*]; *R v Bertrand Marchand*, 2021 QCCA 1285 at para 129.

71 Safety valve legislation for MMS would provide judges with residual judicial discretion by allowing judges to depart from MMS in particular cases if the MMS would result in injustice. See *Vu*, *supra* note 70 at para 84.

understood that the legal threshold set by section 12 is so high that it would be difficult to find a violation of section 12 under gross disproportionality while simultaneously finding that that violation could be upheld as a reasonable limit.[72] This point was made clear by Justice McIntyre in *R v Smith*:

> Cruel and unusual treatment or punishment is treated as a special concept in the *Charter*. The prohibition is in absolute terms. No discretion to any sentencing authority is permitted, no exception to its application is provided. In this, s. 12 differs from many other sections conferring rights and benefits which speak of reasonable time, or without unreasonable delay or reasonable bail, or without just cause. Section 12, in its terms and in its intended application, is absolute and without qualification. It may well be said that, in s. 12, the *Charter* has created an absolute right, that is, a right to be free or exempt from cruel and unusual punishment.[73]

Due to the limited impact of section 1 on the outcome of the constitutionality analysis of the challenged MMS provisions, 39 of the 51 (76%) Harper-era MMS provisions were found unconstitutional by appellate level courts and the Supreme Court of Canada and were declared of no force and effect. This finding that over three-quarters of Harper-era MMS provisions challenged at the appellate court level and at the Supreme Court of Canada were found to be unconstitutional is significant and provides initial justification for the concerns regarding constitutionality of these policies enacted by the Harper government.

Table 3 sorts the challenged provisions by the type of offence. Drug offence MMS provisions were found to violate section 12 of the *Charter* in 100% (11) of the cases—indicating that the Harper-enacted MMS provisions in the *CDSA* were particularly problematic when under *Charter* scrutiny. Similarly, MMS provisions for sexual offences were found to violate section 12 of the *Charter* in 88% (21) of *Charter* challenges. Notably, MMS for firearm offences were found to violate section 12 in 43% (six) of *Charter* challenges, which is significantly lower than the other major types of offences.

72 Matthew A Hennigar, "Unreasonable Disagreement?: Judicial-Executive Exchanges about Charter Reasonableness in the Harper Era" (2017) 54:4 Osgoode Hall LJ 1245 at 1250.

73 *Supra* note 29 at 1085.

TABLE 3. MMS PROVISION OUTCOME RE: CONSTITUTIONALITY BY TYPE OF OFFENCE

Type of Offence	Provision violated right	Provision did not violate right	Total
Sexual	21 (87.5%)	3 (12.5%)	24
Firearm	6 (42.8%)	8 (57.2%)	14
Drug	11 (100%)	0 (0%)	11
Fraud	0 (0%)	1 (100%)	1
Victim surcharge	1 (100%)	0 (0%)	1
Total	**39**	**12**	**51**

When courts test the proportionality of MMS provisions under section 12 of the *Charter*, they engage in a two-step test. First, courts examine whether the MMS provision applies a sentence that is grossly disproportionate when applied to the offender before the court. Second, courts examine whether the MMS provision is grossly disproportionate for reasonable hypothetical offenders.

To further analyze how the section 12 *Charter* challenges discussed in this paper were decided, I analyzed this two-step test that guides the gross disproportionality aspect of each section 12 challenge. Out of the 51 MMS provisions that were challenged, the first step of the gross disproportionality test was considered 47 times.[74] Of those 47 times, the MMS provision was found to be grossly disproportionate when applied to the offender before the court only 11 times (23%). This demonstrates that the MMS provisions challenged in these cases are typically not considered grossly disproportionate when applied to the offenders before the court in these cases. Additionally, it demonstrates a high threshold to find a MMS unconstitutional, which is consistent with how the Supreme Court of Canada has historically treated this test. For example, in *R v Morrisey*, the majority stated that the threshold for finding a section 12 violation requires that "the court must be satisfied that the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable."[75] Additionally, in *R v Ferguson*, the Court reaffirmed this high threshold by stating that "this Court has repeatedly held, to be considered grossly disproportionate, the sentence must be more

74 In the other four cases, the court was not asked whether the MMS provision was grossly disproportionate for the offender before the court but was asked only to consider whether the MMS provision was grossly disproportionate for reasonable hypothetical offenders.

75 *Supra* note 36 at para 26.

than merely excessive. The sentence must be 'so excessive as to outrage standards of decency' and disproportionate to the extent that Canadians 'would find the punishment abhorrent or intolerable.'"[76]

The second step—the reasonable hypothetical aspect—was considered 41 times.[77] The impugned MMS provision was found to be grossly disproportionate when applied to a reasonable hypothetical scenario 33 times (80%). This is significant because it demonstrates that the majority of the MMS provisions were found to be unconstitutional in reasonable hypothetical scenarios, rather than unconstitutional for the particular offender in the case before the court.

Finally, Table 4 demonstrates how courts sentenced offenders in these cases, depending on whether the MMS provision was struck down or upheld. In cases where the MMS provision was found unconstitutional and struck down by the court, offenders were given a sentence exceeding the minimum in seven out of 33 cases (21%). In four out of 33 cases (12%), the offender received a sentence equal to the MMS. One reason why a court would hand down a sentence at or exceeding the MMS that was deemed unconstitutional is that the sentence was not found to be grossly disproportionate in the current offender's case, but unconstitutional for reasonable hypothetical offenders. In 22 of 33 cases (67%) where the MMS was struck down by the court, the offender was given a sentence that was less than the minimum sentence. While courts gave sentences less than the legislated minimum in 22 cases, MMS provisions are found to be grossly disproportionate to the current offender in just 11 cases. Unsurprisingly, in cases where the constitutionality of the MMS provisions was upheld, offenders were given sentences that exceeded the minimum sentence in five out of 12 cases (42%) and given a sentence equal to the MMS in the other seven out of 12 cases (58%).

76 *Supra* note 36 at para 14.

77 In the other nine challenges, the reasonable hypothetical was not considered for two reasons: either because the court did not find it necessary to consider it as it had already held the MMS was grossly disproportionate for the offender before the court; or because they were not introduced at the trial level, and thus could not be considered at the appellate level.

TABLE 4. CASE SENTENCE OUTCOME BY MMS PROVISION CONSTITUTIONALITY

Sentence Outcome	Sentence Exceeding MMS	Sentence Equal to MMS	Sentence Less Than MMS	Total
MMS struck down	7	4	22	33[78]
MMS upheld	5	7	0	12
Total	**12**	**11**	**22**	**45[79]**

1. Courts' Application of the Reasonable Hypothetical Test

As discussed above, of the 51 MMS provisions that were challenged for violating the *Charter*, the reasonable hypothetical test was applied 41 times. Of those 41 times, the MMS provision was found to be grossly disproportionate when applied to a reasonable hypothetical scenario 33 times (80%). However, throughout the cases, there was a general inconsistency with respect to courts' application of the reasonable hypothetical tests. In some cases, the defence counsel provides the court with the reasonable hypothetical scenario, and the court only considers reasonable hypotheticals provided by the defence counsel.[80] In other cases, if the defence counsel was only concerned with the application of the MMS to their immediate case and not reasonably foreseeable applications of the law, the courts would not consider any reasonable hypothetical scenario and would end the section 12 analysis at the application to the offender before the court.[81] However, in some cases, courts constructed their own reasonable hypothetical scenario and applied it to the impugned MMS provision.[82] The reasonable hypotheticals crafted by judges ranged from being strictly based on characteristics from previous cases—which, arguably, is not at all a

78 The total does not include cases concerning victim surcharges and cases where there is a global sentence (where the offender was convicted for multiple offences and given a global sentence). Including the global sentence in one of the three categories would create inaccuracies because the global sentence would include the sentences for other/multiple offences not subject to a MMS.

79 The total number sentence outcomes is 45, not 41 because in four cases multiple offenders were sentenced in one case.

80 *R v John*, 2018 ONCA 702; *R v Ookowt*, 2020 NUCA 5; *R v Forcillo*, 2018 ONCA 402.

81 *R v Itturiligaq*, 2020 NUCA 6 at para 96. In this case, reasonable hypotheticals were not considered by the sentencing judge; thus, the appellate judges stated that assessing hypotheticals afresh on appeal was "less than ideal" (*Ibid*).

82 *R v Plange*, 2019 ONCA 646 at paras 70–78; *R v Ford*, 2019 ABCA 87 at paras 13–17; *R v Scofield*, 2019 BCCA 3 at paras 82–83; *R v Hood*, 2018 NSCA 18 at paras 150–54 [*Hood*]; *R v Elliott*, 2017 BCCA 214 at paras 68–79; *JLM*, *supra* note 70 at para 60.

hypothetical scenario, but engaging with precedent to those loosely based on previous cases—to those that were completely hypothetical.[83]

For cases in which a same or very similar provision was already considered by the court, the court, in some instances, would adopt the reasonable hypotheticals from those cases and apply them to case before them.[84] Similarly, some courts considered comparable cases in the case law in addition to reasonable hypotheticals submitted by the defence.[85] For example, a case at the Nova Scotia Court of Appeal took reasonable hypothetical scenarios from previous cases and modified them to fit the case before them.[86] This approach is similar to the reasonable hypothetical analysis that was outlined by the Supreme Court of Canada in *Nur*: "The judge may wish to start with cases that have actually arisen…and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable."[87] Similarly, if the MMS for the summarily punishment of a hybrid offence was challenged, courts would apply the same reasonable hypotheticals that were considered in that case for the indictable MMS provision.[88] Finally, while most appellate courts considered new reasonable hypothetical scenarios—differing from those presented at the trial level—some courts only strictly reviewed the trial judge's decision on the reasonable hypothetical scenario.[89]

In *R v Hills*, the most recent Supreme Court of Canada case on MMS, the majority, in response to strong criticisms from Alberta Court of Appeal Justices O'Ferrall and Wakeling, clarified that the use of reasonably foreseeable hypotheticals is an accepted and appropriate tool to explore the constitutionality of an impugned provision.[90] In doing so, the Court set out a structured framework for constructing a reasonable hypothetical example—essentially admitting that "earlier case law did not often explain or explore what went into the construction of a reasonable hypothetical."[91]

83 For an example of a completely hypothetical scenario, see *Hood*, *supra* note 82 at para 150. For an example of a case that relies on previous case facts, see *Caron Barrette*, *supra* note 70 at paras 93–97.

84 *Vu*, *supra* note 70 at para 65; *R v EO*, 2019 YKCA 9 at paras 49–54; *R v BJT*, 2019 ONCA 694 at paras 71–72; *R v Joseph*, 2020 ONCA 733 at para 150; *Trottier*, *supra* note 70 at para 81; *R v Cowell,* 2019 ONCA 972 at para 125; *Serov*, *supra* note 70 at paras 35–39.

85 *Hills* ABCA, *supra* note 68 at paras 56–69; *Caron Barrette*, *supra* note 70 at paras 93–94.

86 *R v MacDonald*, 2014 NSCA 102 at paras 39–40 [*MacDonald*].

87 *Supra* note 10 at para 62.

88 *R v Swaby*, 2018 BCCA 416 at paras 90–97; *R v Alexander*, 2019 BCCA 100 at paras 51–53.

89 See e.g. *R v McGee*, 2017 BCCA 457.

90 2023 SCC 2 at paras 68–75 [*Hills* SCC].

91 *Ibid* at para 76.

The majority then doubled down on the Court's more recent approach to reasonable hypotheticals in *Nur*, *Lloyd*, and *Boudreault*, all of which have permitted broader applications with more detailed hypotheticals.

The majority in *Hills* sets out five parameters for constructing reasonable hypothetical scenarios. First, the hypothetical must be *reasonably foreseeable*.[92] Second, the hypothetical *may include reported cases*, however, while these cases are potentially helpful, they should neither be used as a "license" nor a "straitjacket."[93] Third, they must be *reasonable in view of the range of conduct in the offence in question*, meaning that the entire hypothetical—not just its individual elements—must be reasonably foreseeable.[94] Fourth, *personal characteristics may be considered*, as long as they do not create remote or far-fetched examples.[95] The majority justified this criterion on the basis that Parliament sets penalties with a certain offender in mind without fully considering how the MMS applies to "offenders with reduced moral blameworthiness due to their disadvantaged circumstances, including marginalization or systemic discrimination."[96] Finally, while not required, the Court noted that *hypotheticals are best tested though the adversarial process*, insofar as "[a]ll parties should ideally be afforded a fair opportunity to challenge or comment upon the reasonableness of the hypothetical before making submissions on its constitutional implications."[97]

Given that just five of the 41 cases discussed in this paper are Supreme Court of Canada cases, the provincial appellate courts most often have the "final say" on the constitutionality of MMS provisions in Canada. However, the application of the reasonable hypothetical aspect of the section 12 analysis for MMS shows inconsistency in how these MMS provisions are scrutinized on *Charter* standards by appellate courts in Canada. As the reasonable hypothetical stage of the section 12 analysis is where most MMS provisions are found unconstitutional, inconsistency in the application of this test should be an area of concern.

92 *Ibid* at paras 78–80.
93 *Ibid* at para 81.
94 *Ibid* at paras 82–83.
95 *Ibid* at para 91.
96 *Ibid* at para 90.
97 *Ibid* at para 93.

V. DISCUSSION

A. Institutional Roles in Sentencing: Healthy Dialogue or Dysfunctional Relationship Between the Legislature and Judiciary?

The authority for sentencing policy in Canada falls under the exclusive jurisdiction of the federal government.[98] However, sentencing is a distinct area of criminal justice policy because it directly impacts how the judiciary functions. The judicial branch is largely viewed as separate from the representative branches (legislative and executive) of government; this separation is characterized as "judicial independence."[99] Flowing from the constitutional doctrines of the separation of powers and judicial independence, "judges in criminal courts have long understood their role to include exercising their discretion…to ensure that the sentence fits the seriousness of the offence."[100] Thus, sentencing in theory creates an institutional division of labour, in which Parliament enacts sentencing policies and judges apply the law with the discretion granted to them.[101] However, as mentioned, MMS provisions alter this institutional dynamic by effectively restricting much of the discretion judges possess in sentencing.

One way to understand the data presented above is to consider this a version of healthy dialogue between the two branches of government in this specific policy area. Recall that Roach argued that there is potential, through "vigorous judicial enforcement" against section 12 violations, for a "robust and democratic dialogue" between the legislature and the judiciary.[102] Thus, this antagonistic sequence between the Harper government and the courts might be reflective of a healthy dialogue between the two branches. Viewed this way, in effect, the Harper government was able to assert itself as Canada's tough-on-crime government, while the courts have been able to mitigate the impact of these constitutionally suspect laws through "vigorous" enforcement against cruel and unusual punishment.

However, for a number of reasons, this view is not entirely convincing. First, in the written reasons of these cases, discussion of institutional

98 *Constitution Act*, *supra* note 3, s 91(27).

99 Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 83.

100 Caylor & Beaulne, *supra* note 6 at 7.

101 Lauren Witten, "Proportionality as a Moral Process: Reconceiving Judicial Discretion and Mandatory Minimum Penalties" (2016–2017) 48:1 Ottawa L Rev 81 at 95.

102 Roach, *supra* note 35 at 411.

dialogue was nearly non-existent, as this discussion was found in just two cases.[103] This may indicate that the courts do not view institutional dialogue as being particularly relevant and that it may be difficult for Parliament to reconcile many of these MMS provisions with section 12 of the *Charter*. For example, as demonstrated above, once a violation of section 12 is found, there is little room for debate regarding a reasonable limit under section 1. In effect, this aspect of section 12 jurisprudence narrows Parliament's options to respond because it is not possible to respond with a more minimally impairing MMS provision. Additionally, as will be explored more in-depth in this section, Canadian courts' lack of clarity and consistency in the application of the reasonable hypothetical test makes it difficult for Parliament to know how it can respond to the invalidations. This effectively narrows the possibility for a healthy and effective dialogue in this area of law. Instead, this sequence between the Harper government and the judiciary is more nuanced than a healthy dialogue. Thus, this section discusses how these institutions have respected or disrespected their respective roles in sentencing under Harper's MMS policy, with a focus on the judiciary.

Before discussing the judiciary, however, it is worth having a brief discussion on the role of the legislature in crafting Harper-era MMS. Above, this paper demonstrated the Harper government's reliance on MMS and incarceration as a 'tough-on-crime' sentencing tool. The Harper government's 51 MMS provisions were unprecedented for a federal government in Canadian history. Moreover, research by Brendan Dell and Kate Puddister, which analyzed the parliamentary debates and committee hearings regarding the Harper-era MMS policies, demonstrated that the government showed a general disregard for concerns by the opposition on matters such as *Charter* compliance and federalism issues.[104] These debates and committee hearings demonstrated a clear divide between how the Harper government and the opposition parties viewed the institutional roles in sentencing. This, in addition to Doob and Webster's claim that these policies were politically motivated, makes clear the possibility that the

103 The cases being *R v Boudreault*, 2018 SCC 58 at paras 101–02; and *MacDonald, supra* note 86 at paras 118–19.

104 Brendan Dell & Kate Puddister, "Consequences of Weak Parliamentary Rights Review: A Study of Harper-Era Mandatory Minimum Sentences" in Emmett Macfarlane, ed, *Rights & Institutional Relationships: Parliamentary Systems of Rights Review in Canada and Beyond* (Toronto: University of Toronto Press) [forthcoming].

government had little regard for the constitutional implications of their MMS policies.[105]

It is important to reiterate that the federal government does have complete authority to craft MMS for offences it deems fit for such sentences. As noted above, the authority for sentencing policy in Canada falls under the exclusive jurisdiction of the federal government, which includes MMS. However, enacting MMS provisions and restricting discretion from judges on this scale between 2006 and 2015 is not ideal for the institutional dynamic in sentencing. Restriction of discretion on this scale significantly alters the institutional dynamic in sentencing by effectively shifting discretion to other actors in the criminal justice system—actors who do not play impartial roles. For example, given that police have the power to either arrest an individual or release them with a warning, Puddister writes that MMS can result in evasion by police because it could encourage police to avoid laying charges that carry an MMS that they perceive as disproportionate.[106]

Another example, discussed in section II, is the shifting of discretion to prosecutors. This is arguably the most problematic consequence of the restriction of judicial discretion because it places more power in the hands of an adversarial actor in the criminal justice system—one that is not legally obliged to ensure the equality and proportionality of sentences.[107] Thus, while Parliament is within their legislative authority to do so, the legislative action from the Harper government through the mass enactment of MMS communicates a disrespect and distrust of the role that the judiciary has to play in sentencing.

Just as Parliament has the authority to enact MMS policy, the courts, under section 52(1) of the *Constitution Act,* have authority to invalidate any law that is determined to be inconsistent with the provisions of the Constitution. Such determinations for MMS under section 52(1) from Canadian courts were historically rare. However, the most recent Supreme Court of Canada decisions regarding MMS have struck down those MMS provisions under section 12 of the *Charter*—a stark contrast from the previous three decades of the Court's jurisprudence on this topic. It is important to note that provincial courts of appeal have also been finding the Harper government-enacted MMS provisions unconstitutional at a high rate.

---

105 *Supra* note 13 at 359.

106 Puddister, "Cruel and Unusual Punishment", *supra* note 23 at 194.

107 Paciocco, *supra* note 8 at 174.

The research results from this paper do provide some evidence of a shift from judicial *minimalism* and deference to Parliament in MMS, to what could be considered judicial activism with much less of an emphasis on deference to Parliament in this policy area.[108] This shift may not be entirely on the part of the judiciary. It may be the case that, prior to the Harper government, existing MMS were better crafted and did not deviate from the accepted expectations on sentencing ranges for the particular offences. Thus, the mass enactment of politically motivated sentencing laws by the Harper government being reviewed by the courts may differ significantly from previously existing MMS, both in breadth and punitiveness.

In short, indeed, this shift from deference to activism should not be viewed as a set of simple changes as the substance of the MMS reviewed by the courts have changed as well. Additionally, recall the *Ferguson* decision that eliminated the possibility of using constitutional exemptions for MMS.[109] It should be noted that the elimination of the possibility of using this constitutional exemption may have impacted how the courts approach the constitutional issues at play in MMS cases.

While strong judicial activism is critiqued by those who believe democratically elected institutions are best positioned to shape laws, Roach argues that judicial activism, specifically regarding the invalidation of overly broad MMS, "can be defended on the basis that the independent judiciary" is a legitimate actor in this area of policy.[110] In other words, judicial activism could be defended in this specific area because the "judiciary is in a much better position than the elected legislature to evaluate the effects of mandatory penalties on particular offenders."[111]

Additionally, Roach notes the two contrasting perspectives that these institutions have regarding sentencing policy and MMS.[112] For example, when Parliament enacts MMS, it must take into consideration the seriousness of the offence and craft the MMS so that it deters and denounces

---

108 I recognize the myriad ways in which the concept of judicial activism is defined. In this paper, the activism concept I use is situated within the context of unelected judges employing the power to review and invalidate laws or actions of the democratic branches of government. For more on the complexity of defining judicial activism, see Emmett Macfarlane, "Revisiting Judicial Activism" in Kate Puddister & Emmett Macfarlane, eds, *Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change* (Vancouver: University of British Columbia Press, 2022) 41.

109 *Supra* note 36.

110 *Supra* note 35 at 410.

111 *Ibid*.

112 *Ibid* at 410–11.

the offence.[113] In the policymaking process, when Parliament considers offenders, Roach argues that they are presented in a stereotypical manner, like the "drug cartels, the Clifford Olsons, and the Paul Bernardos" that are on the top of the public's mind when they think of crime.[114] On the other hand, the courts' perspective likely differs because they are exposed to a wide variety of offenders who commit offences with varying degrees of culpability and levels of seriousness. These two differing perspectives are important to consider when evaluating how the institutions respect roles in sentencing and sentencing policy.

Additionally examining courts' discussion of the institutional roles in sentencing and their application of the reasonable hypothetical aspect of the section 12 test gives more to consider. In these cases, courts rarely engaged in an in-depth discussion of the roles of each institution in sentencing in their written decisions. Employing a low threshold to capture the courts' discussion of institutional roles, this paper found that roughly two-thirds of the cases discussed the institutional roles of courts and Parliament in sentencing and around one-third discussed judicial discretion and MMS.[115] However, cases featuring an *in-depth* discussion of these topics were more infrequent. Moreover, there was not a significant difference in the disposition of the cases between those that discussed institutional roles in sentencing and those that did not.

Overall, the infrequent discussion of the institutional roles in sentencing is interesting given the frequency at which the courts invalidated MMS provisions. This finding provides two potential implications. First, how courts view the institutional roles in sentencing may not help us understand the wave of invalidations of Harper MMS policies, at least not the way it is demonstrated or discussed in the courts' decisions. Second, while the courts have a general awareness of the institutional roles in this area of policy, they might not put much stock in this aspect when determining the constitutionality of these provisions.

Turning to the reasonable hypothetical test used by courts in section 12 jurisprudence, Chaster notes that the reasonable hypothetical application in *Smith* could have foreshadowed judicial activism for MMS jurisprudence.[116] However, this was not the case, as the next MMS that the Supreme Court

113 *Ibid*.

114 *Ibid* at 411.

115 For example, just one sentence that briefly mentions or comments on Parliament's role in general or specifically regarding sentencing met the threshold to be included in the count.

116 Chaster, *supra* note 9 at 95.

of Canada struck down came 28 years later in *R v Nur*.[117] Parkes discusses that the Court was more cautious about striking down MMS based on the impact on reasonably hypothetical offenders in the post-*Smith* era.[118] For example, Parkes demonstrates how the Court in *R v Morrisey* "insisted that the reasonable hypothetical must be common,…going so far as to exclude the facts of real, reported cases that were considered unusual or rare."[119]

Judicial review of Harper government's MMS provisions demonstrates a departure from Parkes' finding. Recall that when analyzing impugned MMS provisions under section 12 of the *Charter*, courts ruled that the MMS provisions were found to be grossly disproportionate to the offender 23% of the time this was considered. However, in contrast to this, the courts found that the MMS provisions violate the *Charter* for reasonable hypothetical offenders 80% of the time that it was considered. For every four out of five times the reasonable hypothetical test was considered, the MMS was found to violate section 12. This is significant, because it demonstrates a clear departure from the stringent application of the reasonable hypothetical test employed by the Supreme Court of Canada in the post-*Smith* cases. This finding supports Puddister's claim that *Nur* and *Lloyd* had the potential to reinvigorate the protection against cruel and unusual punishment under section 12.[120] However, it also raises several important questions: is the potential of judicial activism regarding the reasonable hypothetical test just now being realized by Canadian courts? If so, why now? Did the sheer amount of constitutionally suspect Harper-era MMS provisions finally trigger this, or are other factors at play?

Thus, the reasonable hypothetical aspect of the section 12 test and its application by the courts in this paper warrants further discussion. The reasonable hypothetical test is a unique one, because it requires courts to consider a hypothetical scenario to determine the constitutionality of the provision—a departure from the usual understanding that courts are reactionary institutions that rule on issues using the actual facts of the case brought before them. The Supreme Court of Canada itself offers the best defense of its use of the reasonable hypothetical test:

> Not only is looking at the law's impact on persons whom it is reasonably foreseeable the law may catch workable—it is essential to effective

117 *Supra* note 10.

118 Parkes, *supra* note 17.

119 *Ibid* at 154.

120 Puddister, "Cruel and Unusual Punishment", *supra* note 23 at 201.

> constitutional review. Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order. The protection of individuals' rights demands constitutional review that looks not only to the situation of the offender before the court, but beyond that to the reasonably foreseeable reach of the law. Testing the law against reasonably foreseeable applications will prevent people from suffering cruel and unusual punishment in the interim until the mandatory minimum is found to be unconstitutional in a particular case.[121]

By contrast, Hennigar notes that the application of the reasonable hypothetical in *Nur* and *Lloyd* calls into question then Justice McLachlin's argument that constitutional analysis under section 1 of the *Charter* is "an exercise based on the facts of the law at issue ..., not on abstractions."[122] Further, as Pinard states: "[i]f, by definition, hypotheticals are not facts that have been proven to the trier of fact according to the rules of evidence, they do not even have to be facts which exist in the real world and which can be empirically observed. They are, by definition, the product of the imagination."[123]

It is easy to recognize how this type of constitutional interpretation of duly enacted laws is unique and potentially problematic. In the 28-year period after *Smith*, the Supreme Court of Canada had a very narrow and consistent application of the reasonable hypothetical test. By contrast, this paper found that, not only were the courts finding MMS provisions unconstitutional when analyzed under the reasonable hypothetical test, courts were also not applying the test consistently. The inconsistent application of the reasonable hypothetical test results in two serious implications: 1) a demonstration of a lack of consideration for Parliament in this policy area, and 2) that Canadian courts employ an inconsistent method of constitutional interpretation of laws—which is the difference between a duly enacted law remaining on the books and it being struck down.

Regarding the first implication, if the courts say that Parliament is free to consider the range of punishment for criminal offences (including MMS),

---

121 *Nur*, *supra* note 10 at para 63.

122 Hennigar, *supra* note 72 at 1270–71; *RJR-MacDonald Inc v Canada*, 1995 CanLII 64 (SCC) at para 133.

123 Danielle Pinard, "Charter and Context: The Facts for Which We Need Evidence, and the Mysterious Other Ones" (2001) 14 SCLR 163 at 168.

how does Parliament navigate the crafting of these types of sentences if the constitutional test for MMS applied by courts is inconsistent? Peter Sankoff discusses potential problems with invalidating legislation under a reasonable hypothetical approach by illustrating how it is inconsistent with the idea that "dialogue" between Parliament and courts is important—something repeatedly mentioned by the Supreme Court of Canada.[124] Sankoff further argues that when legislation is struck down because of a single unusual application of the law (*i.e.*, the hypothetical offender), it leaves Parliament in a tricky position as to how to proceed.[125] In the same vein, by applying the reasonable hypothetical test inconsistently, courts do not give Parliament any guidance on how to craft MMS in ways that it can confidently predict it will be upheld if challenged in court. Roach has argued that judicial activism in striking down MMS does not necessarily mean that courts will have the final say on sentencing policy and MMS.[126] However, if the reasonable hypothetical test is applied inconsistently, Parliament lacks the guidance to legislate a reformed MMS, if it were motivated to do so. This is important because when making law, the government and the Department of Justice pays close attention to case law. Janet Hiebert notes that judicial influence in the Canadian legislative system can be identified through the application of the Supreme Court of Canada's section 1 proportionality analysis when scrutinizing legislation.[127] It follows that should the government choose to respond to a struck down MMS, there is a very real possibility that lawyers responsible for drafting these laws would rely on case law and the courts' use of reasonable hypothetical tests.

The second implication regarding the application of the reasonable hypothetical test speaks to tensions in the academic literature regarding which institutions should have the final say on legislation: the democratically elected legislature or the appointed judiciary. The legitimacy of the role that courts have in judicial review of democratically enacted laws could be further called into question if the method by which the provisions are being invalidated is being applied inconsistently across courts. These specific concerns are not novel. For example, Hennigar notes that

124 Peter Sankoff, "The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case" (2013) 22:1 Const Forum Const 3 at 11.

125 *Ibid*.

126 Roach, *supra* note 35 at 372.

127 Janet L Hiebert, "Governing Like Judges?" in Tom Campbell, KD Ewing & Adam Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011) 40 at 50.

some of the "blanket-application laws were invalidated during the Harper era on the rather flimsy basis of 'reasonable hypotheticals' rather than actual problems in practice."[128] Additionally, appellate court judge Justice Wakeling of the Court of Appeal of Alberta objects to using reasonable hypothetical scenarios to invalidate an MMS provision in instances where they do not accord with real-life.[129] Wakeling went as far as to say that the use of these hypothetical scenarios could "jeopardize the public's confidence in the judicial branch of government."[130]

Canadian courts' inconsistent application of the reasonable hypothetical aspect of the section 12 test will be worth following as these MMS provisions continue to be challenged in court. It is important to note that this paper does not argue that Canadian courts are wrong in striking down these MMS provisions; if the MMS being reviewed by the courts violate the *Charter*, they should be struck down. However, the legitimacy of such decisions will continue to be questioned if the method by which this is done is not applied consistently across Canadian courts.

VI. CONCLUSION

The Harper government was an outlier when it came to punitive criminal justice reform—especially its emphasis on sentencing and MMS. At the time, the government was relentlessly warned that its legislation was not appropriately reviewed for *Charter* consistency and infringed section 12 of the *Charter*.[131] Fifteen years later, this paper demonstrates that, for the most part, Canadian courts agree: Harper-era MMS are constitutionally suspect. In the five Supreme Court of Canada cases dealing with the constitutionality of pre-Harper MMS, four were upheld; in the five Supreme Court of Canada cases dealing with the constitutionality of Harper-era MMS, four were struck down. This rate of unconstitutionality is also reflected in the 36 appellate MMS court cases. Notably, these MMS are largely struck down when applied to reasonable hypothetical examples, not when applied to the offenders before the court. More problematically, the application of this test is inconsistent across Canadian courts and varies on a case-to-case basis.

---

128 Hennigar, *supra* note 72 at 1273.

129 Colton Fehr, "Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the Charter" (2021) 25:3 Can Crim L Rev 235 at 245; *Hills* ABCA, *supra* note 68 at para 140.

130 *Hills* ABCA, *supra* note 68 at para 263.

131 Dell & Puddister, *supra* note 104.

A Supreme Court of Canada majority in *Hills* did recently set out parameters regarding the construction of reasonable hypotheticals.[132] While these clarified guidelines are welcome, especially regarding including personal characteristics in cases of reduced moral blameworthiness due to disadvantaged circumstances, they stop short of a structured set of rules to prevent inconsistent application across Canadian courts. For example, the majority sets out that "[i]t is up to the offender/claimant to articulate and advance the reasonably foreseeable hypothetical," even though this paper has demonstrated that courts have been playing a role in creating the scenarios.[133] Additionally, the set of parameters in *Hills* did not prevent other actors (such as justices) from creating hypotheticals post-*Hills*. Nor did *Hills* discuss whether new examples may be presented and considered at the appellate level. Paradoxically, the majority noted that recent approaches to reasonable hypotheticals are less narrow, but also cited former Chief Justice McLachlin stating that "[l]aws should not be set aside on the basis of mere speculation."[134] While this may come down to semantics, it nonetheless demonstrates the difficulty with setting out structured parameters for the consistent application of a test that is hypothetical in nature.

This paper also highlights a generally dysfunctional relationship between the Harper-era legislature and the judiciary in sentencing. The rate at which the Harper government restricted judicial discretion in sentencing—*i.e.*, by enacting 22 new and increasing 29 existing MMS—demonstrates a general distrust and disrespect for the judiciary and its valuable role in sentencing. Likewise, the rate at which the judiciary is striking down these provisions on the basis that they violate the *Charter* in a single, unusual, hypothetical application of the law may demonstrate a lack of regard for the role that the legislature has in sentencing, especially when the constitutional test used by the courts is applied inconsistently. The inconsistent application of a hypothetical test used to determine the constitutionality of a law leaves the legislature in a tenuous position, with little guidance should it want to re-enact a similar law. Regardless, both the judiciary and the legislature are uniquely positioned when it comes to influencing sentencing, and both have legitimate and valuable roles to play. It is important that Parliament enacts sentencing laws where it believes it important to do so, and that it does so in a way that avoids cruel and

132 *Hills* SCC, *supra* note 90 at paras 78–93.

133 *Ibid* at para 93.

134 *Ibid* at para 92.

unusual punishment or treatment. It is also important that the judiciary ensures that sentencing policy is struck down where it violates offenders' rights. Yet, it is just as important that each institution recognizes the value that the other brings in the realm of sentencing.

As these provisions continue to be challenged in court, sentencing law will be interesting to follow in the post-Harper era. While the Trudeau government has addressed some MMS in Bill C-5, many Harper-era MMS remain on the books. Until there is significant sentencing reform to MMS—by repealing most MMS or enacting a safety valve mechanism for unjust applications—it remains likely that they will continue to infringe offenders' constitutionally protected rights. A robust—and most importantly, *consistent*—judicial application of the section 12 test is warranted.