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**Mandatory Minimum Penalties of Imprisonment:
An Historical Analysis**

By Nicole Crutcher, B.A.

**A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of**

Master of Arts

Department of Law

**Carleton University
Ottawa, Ontario
April 3, 2000
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**Mandatory Minimum Penalties of Imprisonment:
An Historical Analysis**

**Submitted by Nicole Crutcher, B.A.
in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

Chair, Department of Law

**Carleton University
April 28, 2000**

Abstract

This thesis will examine mandatory minimum penalties within the penalty structure of the *Canadian Criminal Code* and the *Opium and Narcotic Drug Act* (later to become the *Narcotic Control Act*). Since the inception of the *Criminal Code* in 1892, there has been a gradual increase in the number of minimum penalties but there has never been a historical documentation of the legislative attempts at adding and repealing this mode of punishment nor have the legislative debates been traced, until now. In addition, various inquiries into the criminal justice system since 1938 that have looked, either directly or indirectly, at minimum penalties has maintained that they are not an effective or desired mode of punishment. A case law analysis reveals that there has been an increase in the number of reported appeals where the issue is the fairness of mandatory minimum penalties. In order to determine the direction legislators should take with regards to minimum penalties, it is imperative that we first fully understand them in an historical context. Given the absence of a history of minimum penalties, this thesis is meant to be a building block for future reform endeavours.

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motivated me, so now Aunt Kay, yes, I AM FINISHED!!!

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and we're still not half way done.

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INTRODUCTION

Mandatory Minimum Penalties of Imprisonment:

An Historical Analysis

*Apart from death, imprisonment is the most drastic sentence imposed by law. It is the most costly, whether measured from the economic, social or psychological point of view*¹

The topic of this thesis, mandatory minimum penalties of imprisonment² in the *Canadian Criminal Code* and the *Narcotic Control Act*, first came to my attention as I was working for a criminal defence attorney for my undergraduate criminology placement. A minimum penalty is a sanction legislated by the House of Commons which dictates that if an offender is convicted of a specified offence, it is mandatory that the judge impose, at the very least, the minimum penalty prescribed by law. In the many hours I spent in courtrooms, I was struck by the unfairness that some offenders were subjected to when a minimum penalty was imposed. My concern was furthered by the occasional comment by sentencing judges that their hands were tied in such cases and they could do nothing to alleviate the offender's predicament. In some of the cases, I felt that the penalty meted out was too harsh in light of the circumstances surrounding both the offence and the offender. I was acutely aware that my experience in this area was very limited and I was determined to learn more about mandatory minimum penalties. I

¹Law Reform Commission of Canada, 1976: Part II, p.10.

²This includes all penalties of imprisonment for which a minimum length has been legislated by Parliament. This thesis includes the mandatory life terms as minimum penalties because the sentencing judges in those cases are bound by law to impose a life sentence, however, the parole ineligibility periods are fixed at a minimum of twenty-five years for first degree murder and high treason and between ten to twenty-five years for second degree murder. This means that judges are bound by law to send an offender to prison for a minimum amount of time, regardless of the circumstances of the offence or offender.

assumed that in order to understand minimum penalties, I would have to look at the history of their use in the Canadian criminal justice system in addition their applied use in the case law setting. To be quite honest, when creating an outline for what I intended to examine in this thesis, I thought that my work would predominantly involve reading the literature pertaining to the history of minimum penalties in Canada. After an exhaustive search, I determined that no one had ever published a history of minimum penalties in Canada. While minimum penalties are more of the exception than the rule in the *Criminal Code*³, only thirty-one offences carry minimum terms in the current *Code* (See Appendix B)⁴, I had assumed that such a rigid penalty structure would have been thoroughly researched by the Canadian government or legal academics to determine the appropriateness of using this mode of punishment. This was not the case.

As the opening quote stresses, imprisonment is a drastic measure and should be used with restraint and care. Mandatory minimum penalties however, ultimately remove the courts' ability to accomplish this. Therefore, I determined that the most important contribution to understanding minimum penalties and to provide a context for the on-going debates was to add to the literature a detailed account of their use, starting with the very first *Canadian Criminal Code* and bringing to light the government reports and case law to clarify the issues and related research with this mode of punishment. In order to determine the direction legislators should take with regards to minimum penalties, it is

³The analysis of minimum penalties in this thesis includes both the *Criminal Code* and the *Opium and Narcotic Drug Act*, later to become the *Narcotic Control Act*. When the *Narcotic Control Act* was repealed in 1996 to become the *Controlled Drugs and Substances Act* which does not include any mandatory minimum penalties.

⁴*The Criminal Code of Canada 1999*, R.S.C. 1985, c. 46.

imperative that we fully understand and comprehend the origins of this mode of punishment. The only way to achieve this is to look to the past and examine the legislative attempts at introducing minimum penalty legislation and the arguments that have been debated.

The *Criminal Code* has been the main source of mandatory minimum penalties in Canada's criminal justice system. During the middle of the 20th century, the *Opium and Narcotic Drug Act*, later to become the *Narcotic Control Act*, also contributed to the number of minimum penalty provisions. The original *Criminal Code*, passed in 1892, contained six offences which carried a minimum penalty³ (see Appendix A). Magistrates were not confined by these sections however as the option to grant a conditional discharge was available. By 1906, two other options were made available to judges and magistrates, suspending the sentence and imposing a fine in lieu of punishment. Since the inception of the *Code*, there has been a gradual increase in the number of bills tabled that contained mandatory minimum penalties. The majority of bills were not passed, but the sheer numbers should indicate that there is a strong desire in Parliament to maintain and add minimum penalties to the criminal justice system.

Chapter one in this thesis examines the first sixty-two years of the *Criminal Code* (1892-1954). This period saw relatively little activity in the way of adding minimum penalties (See Appendix A). There were a few sections that were added and repealed, only to be added again. For example, the minimum penalty for theft from the mail was

³The Criminal Code of the Dominion of Canada, as Amended in 1893, with commentaries, annotations, precedents of indictments, & c., 7c. By Henri Elzear Tachereau, L.L.D. (Toronto: The Carswell Co.(Ltd.), Law Publishers, Etc. 1893.

included in the 1892 *Code*, was repealed in 1944, added again in 1948 (with a shorter penalty) and amended yet again in 1954 and finally repealed in 1969. A similar scenario also occurred with the offence of using a firearm during the commission of an offence. This clearly demonstrated the uncertain nature of minimum penalties in general. This period (1892-1954) saw twenty-nine attempts at legislating minimum terms, of which, sixteen were successful and fourteen minimum penalty provisions were repealed⁴. A number of sentencing options were available to both judges and offenders to reduce the rigidity of mandatory minimum penalties and ultimately allowed the imposition of a sanction that was appropriate given the nature of the offence and the offender. A judge could suspend a sentence or grant a conditional discharge as well impose a fine in lieu of a punishment. However, in 1954, the only comprehensive *Criminal Code* revision by an independent body that was assigned the task of evaluating and modifying the *Code* was done and resulted in a number of changes. In the final version of the Bill that was passed into law, all minimum penalty provisions were repealed, with the exception of theft from the mail, driving while intoxicated and driving while impaired⁵. The new *Code* also contained a number of important changes to the sentencing options available to judges of the time. The new sections pertaining to fines in lieu of a punishment, conditional discharge and suspended sentence excluded minimum penalties from their application. The removal of option clauses for use with minimum penalties has been sustained into present day.

⁴There were twenty-three separate attempts to repeal minimum penalty provisions, seven were from the first attempt at a revision in 1952 and seven more were from the successful 1954 revision.

⁵*The Criminal Code of Canada*, S.C. 1955, c. 146.

Chapter two addresses the attempts at legislating minimum penalties in the latter half of this century (1955-1999). Again, some interesting patterns emerged from this analysis. The first is that the nature of offences that carried a mandatory minimum penalty in the original *Criminal Code* had shifted. In the original *Code*, the majority of offences were not directed at crimes against individuals, but instead at the maintenance of legitimacy of Canadian institutions. As time went on, the focus of offences that carried minimum penalties shifted and has since been directed at offences against the person.

Starting in the late 1960's, a dramatic increase in the number of attempts to legislate minimum penalties began. It should be noted that the vast majority of Bills that were introduced, and continue to be introduced are private members Bills, not government Bills. This points to 'populism' which is essentially about jumping on the band-wagon and 'getting tough on crime'. The importance of the distinction between these two types of Bills is that the introduction of private members' Bills in this area are not necessarily based on historical information or statistics.

There were thirty-four attempts to legislate minimum penalties between 1955 and 1981 and nine succeeded. The number of attempts at repealing minimum penalties was ten, with six succeeding during this same time frame (1955-1981). In the sixteen years to follow (1982-1998), another thirty attempts were made with an astounding twenty-one successes. There was only one repeal and it was not the result of Parliamentary decision-making, but instead a result of challenges to the Supreme Court of Canada. Repeals of these provisions appear to be a relatively rare phenomenon with the last one occurring in

1969. In addition, the attempts at introducing bills that aim to repeal a minimum have been non-existent in the last three decades.

Within the last year (1999), there have been twelve attempts at legislating minimum penalties, nine have died on the order paper and three are still before the House. The first few months of 2000 have also witnessed the introduction of Bills that include mandatory minimum sentencing provisions. Clearly, there has been a striking increase in legislative activity surrounding this mode of punishment and it is logical to conclude that the pattern will continue.

Chapters one and two also include the arguments that have been made in the House of Commons regarding minimum penalties. It is important to note that although society has changed, the same arguments (for and against mandatory minimum penalties) have been repeated since 1892, yet nothing has been resolved. The main proponents of minimum penalties claim that these penalties are effective deterrents, that they reduce sentencing disparity and serve to denounce unlawful conduct. Another argument repeated over time is that minimum penalties are needed for the “protection of the public” and that without them, sentences would be too lenient. Opponents of minimum penalties have rebutted with the argument that this mode of punishment has not been proven to be an effective deterrent and through limiting judicial discretion they prevent just and fair sentences from being meted out. This side of the debate also claims that it is much more difficult to get a conviction in cases where there is a minimum penalty if it is felt by the jury that the offender does not deserve the punishment, thus circumventing justice. In addition, in arguing against mandatory minimum penalties it has been stated

that they are inconsistent, as there are a number of offences found within the *Code* that are more serious, yet do not carry minima⁶. As chapter two illustrates, more recent arguments have centred around cost related concerns and prison over-population.

In chapter three of this thesis, the conclusions from various committees and commissions that have looked at issues concerning penalties are addressed. The first commission that examined sentencing related topics was established in 1938 and was unequivocally opposed to minimum penalties because they hinder judicial discretion⁷. As time went on, more and more attention was being paid to minimum penalties to the point where a whole chapter was devoted to discussing them in the 1987 report of the Canadian Sentencing Commission⁸. Over the years, a number government committees and commissions have looked at mandatory minimum penalties and, with the exception of one⁹, have concluded that they are an expensive and ineffective mode of punishment. These committees and commissions had either directly or indirectly advocated the abolishment of mandatory minimum penalties, supporting judicial discretion and/or proposing the use of restraint in sentencing. There has been general support for the maintenance of the minimum penalties for the offences of high treason and murder¹⁰.

⁶In the past, offences such as rape did not carry a minimum penalty, whereas selling insurance without a licence did. Presently, most of the very serious offences, when committed with a firearm do carry a four year minimum penalty, however, these same offences when not committed with a firearm, while still serious, do not carry a minimum term.

⁷ *Royal Commission to Investigate the Penal System of Canada* (Ottawa: King's Printer, 1938) at 170.

⁸ *Report of the Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) chapter 8.

⁹ *Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections: Taking Responsibility* (Ottawa, Queen's Printer, August, 1988).

¹⁰ *Report of the Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 179.

However, these results have not prevented the government and individual Members of Parliament, session after session, from introducing legislation that includes mandatory minimum penalties (see Appendix D for a list of all the Bills that have been introduced that attempt to add or repeal a minimum penalty).

Chapter three also looks at how the use of mandatory minimum penalties is further complicated by the findings of the 1987 report of the Canadian Sentencing Commission that determined that the majority of Canadians are unaware of which offences carry minimum penalties, thus effectively negating the deterrent aspect of this penalty structure¹¹. The question then becomes: why is this mode of punishment still being used, and used with increasing frequency and severity? It may be due to the fact that there has never been a compilation of the history of minimum penalties and therefore very few people are likely to be aware of the past problems that have occurred as a result of these penalties. Another possibility is that when there is public demand for harsher and more certain penalties, mandatory minimum penalties satisfy that demand. As noted by the 1988 report by the Standing Committee on Justice and Solicitor General, *Taking Responsibility*, the media have played a key role in shaping public perceptions of the criminal justice system and have inflamed Canadians with their sensationalised accounts of especially heinous crimes¹². The media accounts often fail to mention the complex details of both the offence and the sentencing process, which ultimately leave the public

¹¹ *Ibid.* at 91.

¹² Canada, *Reports of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections: Taking Responsibility* (Ottawa: Queen's Printer, August 1988) at 59.

with the impression that the system is 'soft' in criminals¹³. Therefore, the mandatory minimum penalties provide harsh, certain punishments that the public will support.

Given the recent and dramatic increase in the number of minimum penalties (See Appendix B), it is very important to ask ourselves what purpose they serve and whether a serious examination of the history of their use will prevent the repeating of mistakes.

Chapter four deals with the case law concerning mandatory minimum penalties and has also yielded a number of very interesting findings. The most salient finding is that the courts are extremely reluctant to strike down the legislation in this area. Prior to the enactment of the *Canadian Charter of Rights and Freedoms*¹⁴ in 1983, there were only two reported appeals of minimum penalties¹⁵. The cases that came after the *Charter*, as stated previously, challenged the constitutionality of minimum sentences based on violations of sections 9 (arbitrary imprisonment), 12 (cruel and unusual punishment), and to a lesser extent, 7 (life, liberty and security of the person). A test¹⁶ was set out in 1987 to determine whether a minimum penalty is grossly disproportionate to the circumstances of the offence. As is evident from the rarity of successful appeals, the test is clearly not meant to find a section in violation of the *Charter* with ease.

Another interesting, but expected pattern that has emerged is that with the increase in minimum penalties, there has been a corresponding increase in the number of

¹³ A.N. Doob & J.V. Roberts, *An Analysis of the Public's view of Sentencing* (Ottawa: Department of Justice, 1983).

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁵ *R. v. Shand*, [1976] 30 C.C.C.(2d) 23; 35 C.R.N.S. 202 and; *R. v. Appiah*, [1976] O.J. No. 658.

¹⁶ For details of the test, see *R. v. Smith* (1987) in chapter four.

reported appeals¹⁷. Clearly, with more offenders being subjected to minimum penalties, there is an increase in the likelihood that an appeal will be launched. The main conclusion that is drawn from the case law chapter is that, while judges may impose relatively harsh minimum penalties, which may or may not be justified by the circumstances surrounding the crime, there is little that judges can do in these situations as the penalties are unlikely to be so harsh that they would be found to be grossly disproportionate to the offence by an appellate court.

It should also be noted that this increase in appeals is a very costly consequence of mandatory minimum penalties. Court costs as well as the costs to the Legal Aid systems are enormous. Given that the Parliamentary debates in addition to the various commissions and committees have found that cost is a major factor that must be considered in criminal law reform, the increase in the number of minimum penalties will likely draw attention to this issue. Lastly, the case law analysis demonstrated that mandatory minimum penalties can become a “ceiling”¹⁸ and do influence the duration of the penalty that is imposed.

The examination of the history, commission and committee findings, and the case law analysis raised serious questions as to the appropriateness and fairness of mandatory minimum penalties. What is clear is that there is a definite lack of knowledge

¹⁷The number of appeals starts to increase with the enactment of the one year minimum penalty for using a firearm during the commission of an offence. In 1995, the minimum four year term for using a firearm during the commission of specified offences has resulted in an increased number of reported appeals. Given the time it takes to reach any Court of Appeal, it fits with the pattern that there were four appeals in 1997, six appeals in 1998 and are currently two appeals before the S.C.C..

¹⁸The term ‘ceiling’ refers to a situation when the minimum penalty becomes the maximum sentence that is meted out by the judge. This means that a judge would rarely impose a penalty that is above the minimum.

surrounding the past use of minimum penalties. This is cause for concern because the effectiveness of this mode of punishment cannot be truly established without a complete understanding of minimum penalties. Ultimately, the use of mandatory minimum penalties in present day Canada is not based on a solid body of information. This has likely led to the problems that are outlined in the proceeding chapters of this thesis as well as the newer concerns relating to recent initiatives within the system, which are discussed below.

New Concerns

There are two relatively recent developments in the criminal justice system that may cause a great deal of friction and uncertainty in the future. They are the enactment of principles and purposes of sentencing¹⁹ and the trend toward restorative justice-based measures²⁰. What becomes abundantly clear from analysing these two law reform initiatives is that they are fundamentally contradictory to mandatory minimum penalties. Ultimately, due to this basic and inherent opposition, it is imperative that minimum penalties, restorative justice and the principles of sentencing must be addressed in relation to each other.

Theories of Sentencing and Section 718 of the *Criminal Code*

Before delving into the antithetical nature of minimum penalties and the current

¹⁹*The Criminal Code of Canada*, 1999 R.S.C., 1985, c. 46, s. 718.

²⁰Although no official government release has been issued that overtly states that the system is moving toward restorative justice-based initiatives when possible, it has been confirmed by the Restorative Justice Division of the Solicitor General in addition to the numerous initiatives listed in the 1998 report of Correctional Service of Canada, *Inventory of Canadian Events and Initiatives Related to Restorative Justice*.

principles of sentencing as set out in section 718 of the *Criminal Code*²¹ (see Appendix C), it is beneficial to identify the various theories used to meet objectives of sentencing. These underlying theories, as found in section 718 of the *Code*, aim to support the various goals of sentencing that are reiterated throughout this thesis and should be kept in mind when reading the findings of the chapters.

There are a number of goals that imposing a penalty may aim to achieve²². As outlined in section 718(a) of the *Criminal Code*, punishment of an offender should denounce unlawful conduct. Denunciation has been defined as “a communication process which uses the medium of language to express condemnation”²³.

The second goal of sentencing that can be found in section 718(b) of the *Code* is deterrence (both general and specific). The debates from the House of Commons most commonly refer to deterrence as the purpose of imposing a penalty. General deterrence refers to the use of a penalty as a means of sending a message to prevent other potential offenders from committing the offence based on the punishment²⁴. The goal of specific deterrence, also referred to as individual deterrence, is “to discourage the sanctioned offender from re-offending”²⁵. In critiquing the role of deterrence in sentencing, the 1987 report of the Canadian Sentencing Commission stated that it “is a general and limited consequence of sentencing...[and] it is not a goal that can be attained with

²¹ *The Criminal Code of Canada*, 1999 R.S.C., 1985, c. 46, s. 718.

²² Although it is important to address these theories, their presence in this paper is limited to the role of identifying and placing the various arguments that are used to either support or invalidate minimum penalties. Thus, a critique and further discussion of the theories are beyond the scope of this paper.

²³ *Ibid.* at 142.

²⁴ *Report of the Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 135.

²⁵ *Ibid.* at 135.

precision to accommodate particular circumstances”²⁶.

Incapacitation is another aim of imposing a penalty that can be found in section 718(c) of the *Code*. Custodial penalties are the only means of meeting this objective and are often used as a means of protecting the public²⁷. While there are different types of incapacitation, they all follow the same ideology which is to imprison an offender to prevent him or her from re-offending²⁸.

Also included in the sentencing section, specifically section 718(d) of the *Criminal Code* is the goal of rehabilitating the offender. As reported by the Canadian Sentencing Commission, “[t]he very limited success of rehabilitation was due to the fact that it was thought possible to achieve this goal mainly through incarceration and indeterminate sentences”²⁹.

Retribution, also called reparation “stresses the obligation to punish persons guilty of a crime...[and] is oriented more towards past blameworthy behaviour than towards the consequences of punishment in the future”³⁰. The Sentencing Commission criticized this aim of punishment as it is based on a level of morality instead of a purpose³¹. This goal of sentencing can be found in section 718(e) of the *Criminal Code*.

Finally, the last aim of imposing a penalty and is outlined in the *Criminal Code*, specifically, section 718(f) is just deserts or proportionality. This theory maintains “that

²⁶*Ibid.* at 139.

²⁷*Ibid.* at 135.

²⁸*Ibid.* at 135.

²⁹*Ibid.* at 139.

³⁰*Ibid.* at 141.

³¹*Ibid.* at 141.

an offender deserves punishment to restore a balance which played in his [sic] favour when he [sic] flouted the rules by which other citizens abide”³². This also ensures that the offender takes responsibility for his/her actions.

With reference to these theories of sentencing, the House of Commons passed into law the fundamental principles and purposes of sentencing in 1995 (section 718 of the *Criminal Code*, see Appendix C)³³. It would appear that all of the above mentioned theories were incorporated into the purposes of sentencing as outlined in section 718. Parliament chose not to clearly define a single philosophy in this respect and has instead opted to include all theories, regardless of consistency with the other theories or other aspects of the penalty structure.

In addition, section 718.2 lists a number of goals that sentencing should aim to achieve. Again, as with the theories that are found in the section, the principles of sentencing run the gamut. Mitigating and aggravating factors are specified in section 718.2(a) as a way of determining what an appropriate penalty should be. The section also states that similar penalties should be imposed for similar offences and offenders; penalties should not be unduly long or harsh; custodial sanctions should not be imposed if there are other options that would be appropriate; and *all options other than imprisonment should be considered, especially in the case of aboriginal offenders*.

When looking at these sections of the *Criminal Code*, it becomes clear that mandatory minimum penalties are not compatible or consistent with some of the

³²*Ibid.* at 143.

³³*Criminal Code of Canada*, R.S.C. 1999, c. 46, s. 718.

fundamental purposes and principles of sentencing. This causes one to question what role minimum penalties play in the criminal justice system and how their continued (and increased) use is justified.

Restorative Justice

The Canadian government has made special efforts, through various programs to institute the use of restorative justice-based approaches in the criminal justice system³⁴. Restorative Justice is a broad policy initiative that attempts to reduce the use of imprisonment by using alternative measures. More specifically, “the offender becomes accountable to those he or she has harmed”³⁵. There is no one method of restorative justice, but instead a common ideology is maintained, getting offenders, victims and the community involved to repair the harm that resulted from the offenders’ actions. There are a number of restorative justice-based programs and initiatives across Canada. These include such programs as the Youth Justice Committees and Community Conferencing in Alberta; workshops on the Aboriginal Perspective on Restorative Justice and Victim-Offender Reconciliation Program in B.C.; the Restorative Parole Project in Manitoba; the Nova Scotia Restorative Justice Program; and Scarborough Justice Council in Ontario³⁶. These programs are aimed at aiding the offenders and their victims in what could effectively be called, a healing process. Mandatory minimum penalties are based

³⁴Correctional Service of Canada, *Inventory of Canadian Events and Initiatives Related to Restorative Justice* (September, 1998).

³⁵*Restorative Justice: Victims, Communities and Offenders* (Centre for Restorative Justice and Mediation, School of Social Work, University of Minnesota, 1996).

This is a document that has been used by the Solicitor General of Canada.

³⁶Correctional Service of Canada, *Inventory of Canadian Events and Initiatives Related to Restorative Justice* (September, 1998).

on deterrence, incapacitation, retribution, and denunciation and are completely antithetical to the concept of restorative justice, yet the two are currently co-existing in the same system and have undoubtedly crossed paths.

Although it could be claimed that restorative justice would not be appropriate in cases where minimum penalties are involved, this is not necessarily the case. The recent firearm provisions that were passed in 1995 apply to a wide range of offences and it is possible that restorative justice would be an appropriate avenue for some offenders.

Simply stated, the problem is that the justice system appears to be moving in two directions: increasing the use of restorative justice initiatives as well imposing harsher punishments, such as minimum penalties. As with the concerns regarding mandatory minimum penalties and the principles and purposes of sentencing as set out in the *Criminal Code*, restorative justice and minimum penalties are bound to clash and create inconsistencies and uncertainties in the criminal justice system. The government needs to recognize that these are inherent problems in the current Canadian system. As with the sentencing principles, restorative justice and minimum penalties cannot effectively co-exist in the same system because both are striving to achieve polar opposite results.

Mandatory minimum penalties have invoked a great deal of debate despite the complete lack of information on the history of their use. Regardless of one's position on the issue, it is imperative to address the pattern of use for minimum penalties in order to fully comprehend the nature of these punishments. What becomes abundantly clear is that the use of minimum penalties has been steadily increasing despite their controversial

nature. In addition, the increased use of this mode of punishment is questionable³⁷ in light of recent initiatives such as the fundamental principles of sentencing now found in the *Criminal Code*³⁸ and the increase in restorative justice based initiatives³⁹. The *Charter* also poses a problem for minimum penalties in that it has provided a new basis for challenging these sanctions. Therefore, given the concerns expressed above with regards to the principles of sentencing and restorative justice initiatives in conjunction with the historical account, government commissions and committees, and the case law analysis regarding mandatory minimum penalties, it is clear that this mode of punishment needs to be seriously reconsidered by the Canadian government, Parliamentarians and the public in order to ensure Canadians a fair and just system.

³⁷This statement is reflected in the recent Supreme Court of Canada case, *R. v. Gladue*, [1999] 1 S.C.R. 688. A more in depth discussion of this case can be found in the conclusion.

³⁸*The Criminal Code of Canada 1999*, R.S.C. 1985, c. 46, s. 718.

³⁹Correctional Service of Canada, *Inventory of Canadian Events and Initiatives Related to Restorative Justice* (September, 1998).

CHAPTER ONE

An Historical Account of Mandatory Minimum Penalties: 1892 - 1954

The Origins of the *Criminal Code of Canada*

An analysis of mandatory minimum penalties in Canada is incomplete without an in depth account of the history of the penalty structure of the *Canadian Criminal Code*⁴⁰. Until this point, there had never been an exhaustive examination of the use of mandatory minimum penalties of imprisonment in the criminal justice system. There has been a great deal of discussion as to what exactly the definition of a *Code* is. The meaning provided in the 1955 edition of *Martin's Criminal Code* is that it is "a complete and co-ordinated body of law, approved by legislation and arranged under the public authority, in which laws are enacted and to be specifically applied by the courts are set forth in a brief manner and according to their relation to each crime or condition"⁴¹. The *Code* outlines the maximum penalty that is allowed for each offence. For a small number of offences, the *Code* also explicitly states a minimum penalty that is mandatory⁴². Canada's *Criminal Code* has a relatively short history due to the fact that until 1867, Canada was a British colony and thus subject to English laws. English law was, and still is, primarily based on statutes, with only a few offences found in the common law. British law was directly transferred to all of its colonies, including Canada. However, in 1867, the *British North American Act* proclaimed Canada an independent country, thus

⁴⁰The *Opium and Drug Act*, predecessor to the *Narcotic Control Act* will also be examined.

⁴¹*The Criminal Code of Canada: Martin's Criminal Code* (Toronto: Cartwright & Sons, Ltd., 1955) at 3.

⁴²The number of offences that have carried mandatory minimum penalties range between a low of 2 between 1969 and 1976 to 31 in 1995 to present.

Canada was free to make its own laws and determine the penalties that would be meted out⁴³. In the twenty-five years following the enactment of the British North America Act, Canada's penalty system was in a state of disarray⁴⁴. Each province and territory maintained its own separate set of statutes and punishments for criminal offences⁴⁵. Provincial systems were based on English law, but often, the laws were changed to meet the varying needs of the different regions⁴⁶. This haphazard approach to Canadian criminal law was increasingly under fire⁴⁷. Possibly in response to these criticisms, Bill 32 was introduced into the House of Commons for the purpose of codifying criminal law in Canada⁴⁸. The passage of the *Canadian Criminal Code* in 1892 played both a prominent and important role in Canada's legal history. This departure from English common law marked Canada's foray into a unique legal system not found in any other British colonies at that time. Thus, it is important to examine the course of events that led up to the passage of the *Criminal Code*. The nature of the Canadian penalty structure, specifically mandatory minimum penalties will be the focal point of this investigation. This inquiry begins in England in the mid-to-late 1700's and follows the use and attempts at using mandatory minimum penalties in the original *Criminal Code*, the *Opium and Narcotic Drug Act*, and the *Narcotic Control Act* to present day Canada.

⁴³*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3. (formerly *British North American Act, 1867*).

⁴⁴D. Owen Carrigan *Crime and Punishment in Canada: A History* (Toronto: McClelland & Stewart Inc., 1991).

⁴⁵*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3. (formerly *British North American Act, 1867*).

⁴⁶D. Owen Carrigan *Crime and Punishment in Canada: A History* (Toronto: McClelland & Stewart Inc., 1991).

⁴⁷*Ibid.*

⁴⁸*House of Commons Debates* (May 12, 1891) at 156.

During the 18th century, the bulk of offences in English law carried the mandatory sentence of death.⁴⁹ This was based on the theory of general deterrence, specifically, if the punishment was particularly harsh, it would prevent people from committing crimes⁵⁰. Since Canada was an English colony, all laws and punishments were extended to the North American settlement. The end of the 18th century witnessed a change of view regarding punishment for criminal offences. Due to the rigidity of criminal penalties during this time period, the death penalty for almost all offences, the pardon had become a common occurrence, much to the chagrin of British utilitarians⁵¹. The core of utilitarian thought was based on the idea that punishment should be both proportional to the offence and certain in its delivery⁵². Their main argument concerning this issue was that the pardon undermined the effect of the punishment by introducing uncertainty⁵³. However, the pardon was one of the few alternatives that judges or magistrates had to offset the unyielding nature of capital punishment⁵⁴.

The increased use of the pardon and growing objections to an inflexible punishment structure led to the development of several Commissions in England to address the problem. Canada, experiencing similar problems as in England, responded

⁴⁹ B. Wright, "Harshness and Forbearance: The Politics of Pardons and the Upper Canada Rebellion" in C. Strange, ed., *Qualities of Mercy: Justice, Punishment, and Discretion* (Vancouver: University of British Columbia Press, 1996) 80.

Towards the end of the 1700's, there were about 200 offences which carried the death penalty in England.

⁵⁰ *Ibid.* at 80.

⁵¹ *Ibid.* at 78.

⁵² *Ibid.* at 78.

⁵³ *Ibid.* at 78.

⁵⁴ *Ibid.* at 80.

with a number of reforms. In 1833, Canada enacted a change to the criminal justice system that saw the “reduc[ti]on [of] capital offences from an uncertain two hundred felonies to a certain 12 specific capital offences”⁵⁵. Specifically, the 1833 *Act* was intended to decrease the number of offences that carried a sentence of death and find other modes of punishment for those offences that had been modified⁵⁶.

The *Act* also outlined the use of imprisonment, banishment⁵⁷ and transportation⁵⁸ as the substitute punishments for offences that were capital prior to this piece of legislation coming into effect⁵⁹. Imprisonment was rarely used as a mode of punishment at this time. Jails and prisons were primarily used for housing those individuals who were awaiting their trial or sentencing hearing, or as a place to penalize those who were unable to pay fines⁶⁰. The decision to increase the use of imprisonment in the *Act* directly coincides with the commitment of the province of Upper Canada to build the first federal prison, Kingston Penitentiary in 1835. It was felt that Kingston Penitentiary, and penitentiaries in general, “would provide an environment of discipline, order and

⁵⁵*Ibid.* at 82.

⁵⁶J. D. Blackhouse, “Crime in the London District, 1828-1837: A Case Study of the 1833 Reform of Upper Canadian Penal Law” (1981) 6 *Queen’s Law Journal* 544.

High treason, murder, petit murder, rescuing a person convicted of murder, rape, carnal knowledge of a girl under ten years of age, sodomy, robbing the mail, burglary, arson, or accessory before the fact to any of these offences still carried the death penalty.

⁵⁷Banishment was when an individual was convicted of an offence and was forced to leave the country for either life, or a time period specified by the magistrate, judge, or legislatures.

⁵⁸Transportation, also known as deportation, required an offender to move to another country, often one of the colonies that needed populating. It was also considered an effective means of ridding the Mother country of undesirable individuals. The use of transportation began to decline due to the cost of sailing convicted offenders to far away lands.

⁵⁹Wright, *supra* note 49 at 82.

⁶⁰D. Owen Carrigan *Crime and Punishment in Canada: A History* (Toronto: McClelland & Stewart Inc., 1991) at 304.

authority for the reformation of criminals”⁶¹.

The problems surrounding the criminal justice systems of both Canada and England were not confined to the issue of punishment. There had been much interest in both countries to change from a system of laws found in statutes and the common law to one based upon a written compilation. The debates regarding codification began in the late 1700's in England at the urging of the prominent legal philosopher, Jeremy Bentham. Bentham asserted that codification would “systematize the law but would also radically circumscribe the power of the bench to create judicial legislation in the form of precedent”⁶². This matter was continually discussed and in 1837 a report written for the English Parliament “was unequivocally critical of an unwritten system which, however flexible and adaptable, could not be intelligent to the mass of the population and therefore have very little deterrent effect”⁶³. This sentiment was echoed in England again in 1858 after another commission recommended the codification of the common law⁶⁴. Around the same time, the Canadian Law Journal denied the benefits of a *Canadian Code* stating that it would not be as flexible as statute and common law, instead, it would lead to vagueness and uncertainty⁶⁵. Specifically, it was thought that a *Code* would not be able to contend with the vast complexity of possible situations that a less rigid system would be more adept at dealing with.

⁶¹ *Ibid.* at 327.

⁶² D. H. Brown (ed) *The Birth of a Criminal Code: The Evolution of Canada's Justice System* (Toronto: University of Toronto Press, 1995) at 24.

⁶³ G. Parker, “The Origins of the Criminal Code” in D. H. Flaherty ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: Butterworths, 1981) at 250-51.

⁶⁴ *Ibid.* at 252.

⁶⁵ *Ibid.* at 254.

The debate whether to codify English criminal law raged on with both sides equally vehement in their positions. In 1874, England's Lord Chancellor stated his official opinion and proposed the codification of the criminal law. The main supporter, as well as author of the English *Code* was Sir James Fitzjames Stephen. In support of codification, he maintained that a *Code* would reduce the power of the magistrate and return the power to the legislatures⁶⁶. The significance of this particular aspect of codification is that the legislators, who were public representatives, would be able to act on behalf of their constituents. Essentially, the people would, indirectly, have a greater say in the laws that govern their society. Magistrates were appointed, therefore their judgments, which were binding precedents, became law. This may not have been viewed as a very democratic means of making criminal law.

The first reading of the *Criminal Code* in British Parliament occurred in 1878. It was debated the following year. This drive to codify English criminal law came to an apex in 1880, and was ultimately defeated during the same year. Eleven years later, Canada also made an attempt to enact a codified criminal law. The *Canadian Code* was taken almost verbatim from the English legislation written by Stephen, this time however, the endeavour was successful.

Prior to the enactment of the *Canadian Criminal Code* in 1892, there had been a lack of uniformity between the provinces regarding both criminal offences and punishments⁶⁷. To complicate matters even further, precedents were not inter-provincial

⁶⁶ D. H. Brown, "The Genesis of the Canadian Criminal Code of 1892" (Toronto: University of Toronto Press, 1989) at 29.

⁶⁷ Brown, *supra* note 62 at xi.

thus, a ruling in one province was not recognized as binding in another⁶⁸. Sir John Thompson, the Minister of Justice in 1892 was the driving force behind the effort to codify criminal law in Canada. He had studied the circumstances surrounding England's attempt at codification and identified the weakness that contributed to its demise. Thompson did not have a hand in the drafting of the *Code*, and instead left the matter to George Burbidge and Robert Sedgewick⁶⁹ who essentially copied the English *Code* Stephen had drafted in England eleven years before⁷⁰. On May 12, 1891, Thompson first read into Parliament, Bill 32, *An Act Respecting the Criminal Law*⁷¹. He stated that the purpose of the legislation was "to provide the maximum punishment for the gravest kind of...offence, leaving it to the discretion of the court to mitigate the punishment according to the circumstances"⁷². Very little discussion on the new Bill occurred, most pertained to the abolishment of the terms 'felonies' and 'misdemeanours'. Thompson indicated that the Bill was to be printed and distributed throughout the country for consideration⁷³. There was no further deliberation or mention of the Bill in Parliament during that year, possibly due to the extensive time that it took to have the Bill printed and sent around the country. When re-introduced the following session, Thompson maintained that the Bill had not been amended to any great extent from the last session⁷⁴. The second

⁶⁸ Brown, *supra* note 66 at 100.

⁶⁹ Brown, *supra* note 62 at 33.

Burbidge was the deputy Minister of Justice and Sedgewick was his successor.

⁷⁰ Parker, *supra* note 63 at 260.

⁷¹ *House of Commons Debates* (May 12, 1891) at 156.

⁷² *House of Commons Debates* (May 19, 1892) at 2840.

⁷³ *House of Commons Debates* (May 12, 1892) at 2840.

⁷⁴ *House of Commons Debates* (Mar. 8, 1892) at 106.

reading took place on April 12th, 1892. Revised copies of the amended Bill were not available for the members of Parliament to go over, but Thompson asked for, and was granted permission to move ahead with the Bill, verbally outlining the changes⁷⁵.

Thompson was able to describe the changes that were made, but he did so in such a vague and abstract way, that it minimized their importance⁷⁶. This resulted in very few challenges to the Bill and on July 9, 1892, the *Canadian Criminal Code* received royal assent. The *Code* was proclaimed to be in force and effect on July 1, 1893.

The ease with which the *Code* was passed in Canada has been the subject of a great deal of discussion. It has been argued that the *Criminal Code* was considered an ideal means to both create uniformity within criminal law, while at the same time, fostering a feeling of unity among the provinces⁷⁷. In addition, the fact that British criminal law was lengthy and dense as opposed to the relatively shorter and laconic law of Canada may have played a key role for the passage of the *Canadian Criminal Code*⁷⁸. However, it is also possible that Canada, with its relatively short history, lacked the deep-seated and rigorous resistance to codification that was apparent in England⁷⁹. Canada did not have the long-standing political conundrum on codification that existed in England and this may have contributed to the two very different outcomes of what was essentially the same piece of legislation. Although the reasons and purposes of enacting a *criminal Code* are, in and of themselves, important, perhaps even more important for

⁷⁵ *House of Commons Debates* (April 12, 1892) at 1312.

⁷⁶ Brown, *supra* note 66 at 133.

⁷⁷ Brown, *supra* note 66 at 92.

⁷⁸ Brown, *supra* note 66 at 39.

⁷⁹ Brown, *supra* note 66 at 70.

the purposes of this thesis, is the result. Ultimately, the passage of the *Canadian Criminal Code* changed the landscape of criminal law in Canada from the moment it was brought into force. All criminal law would be legislated, and thus more easily read and available for the average Canadian.

Through an examination of the *Criminal Code* and its amendments, it is possible to trace the history and pattern of the penalty structure, particularly the use of mandatory minimum penalties from 1892 until present. An analysis of the *Opium and Narcotic Drug Act*, which became the *Narcotic Control Act* in 1961 will also be included as it has also been a source of mandatory minimum penalties. In addition, is also beneficial to look at the various penalty provisions that allowed a magistrate or judge to individualize the sanction, even in cases of mandatory minima. The remainder of this section will present a history of the use of mandatory minimum penalties and the penalty option clauses in the Canadian criminal justice system over the last 107 years.

Research Methodology

All Bills that were introduced into Parliament regarding the *Code*, *Opium and Narcotic Drug Act*, and the *Narcotic Control Act*, were researched by reading and recording the pertinent aspects from the daily debates from the House of Commons. However, there some problems as many of the Bills were introduced, and some were even passed without much debate at all therefore, the substance of the Bill was unknown⁸⁰. To alleviate this problem, it was necessary to read the Bill itself⁸¹. It was

⁸⁰This was a relatively minor problem in the earlier years of the *Criminal Code*. However, beginning in the 1960's, more and more large Bills were passed that neglected to debate the minimum penalties found in them. This problem has grown enormously in the last ten years.

⁸¹This was done at the National Library of Canada and the Library of Parliament.

possible to look at almost all the Bills, regardless of what reading it went to. To prevent the likelihood that a piece of legislation would be missed, everything was double checked with the *Revised Statutes of Canada*⁸² and was triple checked with the available editions of the *Criminal Code of Canada*.

Although it can be claimed that no Bills that were passed into law were missed, this assertion cannot be made for Bills that did not pass into law. Some Bills are not printed if they are read only once and some Bills have simply been lost. With these caveats in mind, it is now possible to proceed with the examination of the history of mandatory minimum penalties in Canada.

The First Era of the *Criminal Code of Canada*: 1892-1927

When the very first *Criminal Code of Canada* came into force and effect in July of 1893, there were a total of six offences that carried mandatory minimum penalties (See Appendix A)⁸³. These included engaging in a prize fight, frauds upon the government, corruption in municipal affairs, stealing post letter bags, stealing letters and stopping the mail with the intent to rob⁸⁴. The majority of these offences were aimed at ensuring the legitimacy in public institutions where abuses could occur. Given the small number of offences that carried minimum penalties, they were clearly more of an

⁸²The *Revised Statutes of Canada* were published in 1906, 1927, 1952, 1970 and lastly, in 1985. The 1952 edition did not include a copy of the *Criminal Code* because a complete revision had been done by a Royal Commission, and passed into law by Parliament in 1954. The details of this revision are found further in this chapter.

⁸³The *Criminal Code of the Dominion of Canada, as Amended in 1893*, with commentaries, annotations, precedents of indictments, & c., 7c. By Henri Elzear Tachereau, L.L.D. (Toronto: The Carswell Co.(Ltd.), Law Publishers, Etc. 1893.

This number includes only those offences for which a mandatory minimum incarceration term was the penalty. There were 22 offences that carried a mandatory minimum fine. Although there was a high rate of imprisonment for failure to pay the fine, the terms were not fixed, and therefore will not be included.

⁸⁴*Ibid.*

exception than the rule. The *Code* also contained a section that provided an option for conditional release for first time offenders as long as the penalty imposed by the judge was less than two years. The section also directed that these two restrictions could be negated if, given the offender's age, character, and the nature and circumstances of the offence indicated that it would be best if the offender was conditionally released⁸⁵. This section provided an additional option for the sentencing judge to use his or her discretion.

There were also two optional sections that provided offenders with a pardon, also known as royal mercy and the royal prerogative. These two sections are essentially the same and provided that a pardon may be granted to anyone, from those who were sentenced to death to those who were imprisoned for non-payment of fines⁸⁶. The Crown was given the discretion to extend a pardon to an offender which may result in an offender being released from prison or having a past conviction deleted from his or her record. The royal prerogative stated that Her Majesty had the power to grant mercy and is not limited by anything included in the *Code*⁸⁷. Clearly, there were options available to judges and magistrates that could aid in the prevention of unfair or unjust sentences from being imposed.

An additional option was created in a Bill⁸⁸ introduced in 1899 that established *The Ticket of Leave Act* which was to be used in conjunction with custodial sanctions for

⁸⁵The Criminal Code of the Dominion of Canada, *supra* note 83 at section 971.

⁸⁶The Criminal Code of the Dominion of Canada, *supra* note 83 at section 966.

⁸⁷The Criminal Code of the Dominion of Canada, *supra* note 83 at section 940.

⁸⁸Bill 171, *An Act to Provide for the Conditional Liberation of Penitentiary Convicts*, 4th sess., 8th Parl., 1899.

criminal offences. The *Act* provided that anyone convicted of an offence and sentenced, a “licence” to remain at large, regardless of the offence or length of punishment⁸⁹. This licence is valid as long as the individual was not convicted of any other indictable offences⁹⁰ and reports at the prescribed intervals to the police⁹¹. The majority of debates on this Bill were procedurally based in addition to the effects that the equivalent legislation was having in England. There was some criticism that the legislation was not needed as it would serve the same purpose as the pardon. In addition, opponents of the Bill maintained that it would bring uncertainty to the sentencing process and decrease the deterrent effect of the punishment and ultimately result in an increase in crime⁹². Those in favour of the Bill asserted that it was needed to prevent unfair sentences from being meted out to offenders that would be harmed by being sent to jail⁹³. Despite the opposition to the Bill, it was read a third time and passed, thus creating an additional option for those who felt their punishments were unfair.

The first *Revised Statutes of Canada* that included the *Criminal Code* were published in 1906. The mandatory minimum penalty provisions remained unchanged. However, the sentencing option clauses available to the judge or magistrate were modified. The *Code* now included a section that permitted a fine to be given in lieu of another punishment as long as the sentence was not longer than five years⁹⁴. Therefore, all the minimum penalty provisions could fall under this section and granted the courts

⁸⁹*Ibid.* at s.2.

⁹⁰*Ibid.* at s.6.

⁹¹*Ibid.* at s.9.

⁹²*House of Commons Debates* (Aug. 5, 1899) at 9606.

⁹³*House of Commons Debates* (Aug. 7, 1899) at 9728.

⁹⁴*Criminal Code of Canada*, R.S.C. 1906, c. 146, s. 1035.

the power to impose a fine in place of the prison term.

In addition to the pardon⁹⁵, another section was added to the *Code* when the *Revised Statutes of Canada* were compiled which added a conditional release section, thus expanded the scope of the sentencing option to include those offences that carried terms that were longer than two years⁹⁶. The only stipulation was that the Crown had to concur in the decision to grant a conditional sentence in these situations.

Again, it is possible to conclude that the sentencing judge or magistrate had a great deal of discretion when imposing a sanction on offenders, even within the context of mandatory minimum penalties.

Aside from the minor changes that occurred in the 1906 *Revised Statutes of Canada*, the House of Commons debated very few *Criminal Code* amendments that were of a substantive nature. The majority of changes were spelling corrections, translation rectifications and procedural changes. The daily debates from the House of Commons revealed that there were no *Criminal Code* amendments regarding mandatory minimum penalties from 1892 until 1907.

In 1908, a Bill⁹⁷ that intended to add a mandatory minimum penalty of one year for any offence that was committed with a weapon to the *Criminal Code* was introduced⁹⁸. The Bill received a first reading but died on the order table. There was no further debate regarding this proposed amendment to the *Criminal Code* during that Parliamentary session.

⁹⁵*Criminal Code of Canada*, R.S.C. 1906, c.146, 1076.

⁹⁶*Criminal Code of Canada*, R.S.C. 1906, c. 146, s. 1081.

⁹⁷Bill 78, *An Act to Amend the Criminal Code of Canada*, 4th sess., 10th Parl., 1908.

⁹⁸*House of Commons Debates* (Jan. 22, 1908) at 1669.

An interesting Bill⁹⁹ was introduced in 1912 that included a mandatory term of imprisonment of six months for participating in a Canadian election in anyway if the individual was not a Canadian citizen¹⁰⁰. This attempt went to a first reading where it died on the order table.

In 1915, a Bill¹⁰¹ was tabled that resulted in the first successful creation of a minimum penalty of three months for anyone convicted a third or subsequent time of being a keeper or inmate of a common bawdy house¹⁰². There was surprisingly little debate regarding this addition. The main argument was based on the idea that the women and girls who were working in these places needed help and that a jail term would aid in the reform of these sex-trade workers¹⁰³. The Bill was read a third time and passed without further debate¹⁰⁴.

In 1917, a Bill¹⁰⁵ similar in nature to the one attempted in 1912 was introduced. It also prohibited participation in elections, however, it emphasized the country of origin of the offender. This Bill intended to impose a mandatory minimum penalty of two years if an individual engaged in the Canadian elections, either directly or indirectly, who was from one of the countries that was not an ally to Canada or Great Britain¹⁰⁶. Similar to

⁹⁹Bill 5, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 12th Parl., 1912.

¹⁰⁰*Ibid.*

¹⁰¹Bill 74, *An Act to Amend the Criminal Code of Canada*, 5th sess., 12th Parl., 1915.

¹⁰²An inmate referred to a woman who worked in the bawdy house. A keeper referred to an individual who managed the common bawdy house.

¹⁰³*House of Commons Debates* (Mar. 18, 1915) at 1227.

¹⁰⁴*Ibid.* at 1228.

¹⁰⁵Bill 59, *An Act to Amend the Criminal Code of Canada*, 7th sess., 12th Parl., 1917.

¹⁰⁶This bill was introduced during the first World War which may be reflective of the global political scene at the time. The activities listed in this bill were very innocuous, such as driving voters to the polls and distributing election related pamphlets.

the other Bills that have been already discussed, this Bill went to first reading when it died on the order table¹⁰⁷.

During this same session, a Bill¹⁰⁸ that addressed insurance fraud, specifically selling insurance without a licence or certificate issued by a governing agency, included a minimum penalty of three months' imprisonment for anyone convicted under this section. The debates regarding this Bill did not mention the penalty at all, instead the main area of discussion was on the benefits and importance of such a law¹⁰⁹. The Bill was read a third time and passed without mentioning the minimum penalty that was contained in the legislation¹¹⁰.

In 1921, a Bill¹¹¹ was passed that created two new mandatory minimum penalties¹¹². The penalty for the offence of injuring persons by 'furious driving'¹¹³ while impaired carried a minimum seven day term for a first offence, one month for a second conviction and three months for any subsequent conviction. The main debates for this section of the Bill did not directly concern the penalty, but instead the importance of protecting the public and the difficulties in determining drunkenness¹¹⁴. In addition, this Bill¹¹⁵ outlined a new offence of stealing an automobile that also carried a minimum

¹⁰⁷*House of Commons Debates* (May 31, 1917) at 1892.

¹⁰⁸Bill 54, *An Act to Amend the Criminal Code of Canada*, 7th sess., 12th Parl., 1917.

¹⁰⁹*House of Commons Debates* (June 7, 1917) at 2105.

¹¹⁰*House of Commons Debates* (Aug. 11, 1917) at 4388.

¹¹¹Bill 138, *An Act to Amend the Criminal Code of Canada*, 5th sess., 13th Parl., 1921.

¹¹²*House of Commons Debates* (May 26, 1921) at 3938.

¹¹³Although no definition for furious driving was included in either the debates or the Bill, it appears to be the equivalent of dangerous driving.

¹¹⁴*House of Commons Debates* (May 26, 1921) at 3911.

Those debates surrounded the best and most technologically advanced way to determine drunkenness.

¹¹⁵Bill 138, *An Act to Amend the Criminal Code of Canada*, 5th sess., 13th Parl., 1921.

penalty of one year in jail. This section was not applicable to the sentencing options in the *Criminal Code* that allowed for a fine in place of punishment. However, there was no stipulation that the offender could not be given a conditional or suspended sentence. The discussion in the House regarding this Bill is very interesting. There was some criticism that the minimum penalty for the offence was not consistent with other offences of similar nature, namely stealing a horse and buggy¹¹⁶. In response to this, a Member stated that the theft of automobiles was organized¹¹⁷. Specifically, criminal organizations arranged to have the cars taken to shops where their serial numbers were removed and the cars were resold¹¹⁸. Proponents of the Bill also contended that when a car was stolen, in an effort to get away with the vehicle, it was driven recklessly through the streets and people were being injured or killed, whereas this was not the case when a horse and buggy was stolen¹¹⁹. In addition, it was stated that there had not been a dramatic increase in the theft of horses and buggies, while there had been for automobiles¹²⁰. Another criticism that was discussed in the House was that the minimum penalty was not proportionate to the offence¹²¹ and that the removal of judicial discretion was not warranted¹²². Those in favour of the legislation did not directly deal with these criticisms, but instead stated that the option of a suspended sentence was still available to

¹¹⁶*House of Commons Debates* (May 26, 1921) at 3913.

¹¹⁷*Ibid.* at 3916.

¹¹⁸*Ibid.*

¹¹⁹*Ibid.*

¹²⁰*Ibid.* at 3914.

¹²¹*Ibid.* at 3913.

¹²²*Ibid.* at 3914.

the judge¹²³. Despite the obvious differences of opinion of the Bill, it was read a third time and passed¹²⁴.

In 1922, the first mandatory minimum penalty was added to the *Opium and Narcotic Drug Act*¹²⁵. The purpose of the Bill¹²⁶ was to deter people from engaging in drug related behaviours. The amendment called for a minimum six month jail term for those who have possession of a drug, or are convicted of trafficking, importing or exporting a drug. Very little debate took place for this Bill, with the bulk of it applauding the use of a harsh penalty, the mandatory six months, as a way of deterring those who traffic drugs. Oddly, the Bill also included that other offences were subject to the minimum, yet the main concern was directed at traffickers as they were viewed as evil individuals who lure young people into developing a habit and ruining their lives¹²⁷. The Bill was read a third time and passed¹²⁸.

Three years later, in 1925, the legislators again attempted to add a mandatory minimum penalty to the *Criminal Code*. The purpose of this Bill¹²⁹ was to provide a minimum term of thirty days for anyone convicted of lying about the contents of a car, vessel or package. There were no debates concerning this penalty in the House. The Bill went to the third reading after which it was sent to the Senate for approval. The

¹²³*Ibid.* at 3915.

¹²⁴*Ibid.* at 3918.

¹²⁵The very first legislated laws against opium and other narcotics was passed in 1908 without the inclusion of any mandatory minimum terms.

¹²⁶Bill 137, *An Act to Amend the Opium and Narcotic Drug Act*, 1st sess., 14th Parl., 1922.

¹²⁷*House of Commons Debates* (June 15, 1922) at 3015.

¹²⁸*House of Commons Debates* (June 15, 1922) at 3025.

¹²⁹Bill 147, *An Act to Amend the Criminal Code of Canada*, 4th sess., 14th Parl., 1925.

Senate, passed the Bill but amended it to exclude the mandatory minimum penalty¹³⁰. In the Senate debates of this Bill, their concerns were not based on the minimum penalty, but instead in the wording of the Bill that asserted an individual who was simply unaware of the contents could be found guilty of this offence¹³¹. Thus they reasoned that it was inappropriate to include a minimum penalty in legislation where the criminal intent could be absent for a conviction.

During the first thirty-five years (1892-1927) of the *Criminal Code*, there had been eleven attempts at legislating minimum penalties, of which, seven were successful, including the four added to the *Opium and Narcotic Drug Act*. By the end of this period, there were thirteen offences under the criminal justice umbrella that carried a mandatory term of imprisonment. In instances when there were debates regarding the use of minimum penalties, the discussions focussed on three main arguments to support this mode of sanction: protection of the public, deterrence, and protection of women and girls. There were several options¹³² available to judges and magistrates that could prevent an unfair penalty from being imposed on an offender: conditional or suspended penalty or a fine in lieu of a punishment. The offender could also have received a penalty reprieve through a pardon, royal prerogative or the *Ticket of Leave Act*. Clearly, the use of mandatory minimum penalties was a relatively rare mode of punishment at this time. In addition, the rigidity of the penalty itself was not as it appeared, there were options available, and ultimately the judge or magistrate could fit the sentence to the offender.

¹³⁰ *House of Commons Debates* (June 12, 1925) at 4975.

¹³¹ *Debates of the Senate* (June 25, 1925) at 676.

¹³² The sentencing options available in the *Criminal Code* were also applicable to the *Opium and Narcotic Drug Act*.

This would not always be the case.

A Period of Evaluation and Reform: 1928-1954

The *Opium and Narcotic Drug Act* was amended and consolidated in 1929 and as a result, two new offences were added that carried mandatory minimum terms. The Bill¹³³ provided a six month minimum term for any dentist, physician or veterinary surgeon who prescribed, gave, or sold a drug without there being medical justification. In addition, the Bill also created the offence of sending, or attempting to send drugs through the mail, which also carried a six month mandatory term of imprisonment. The previous offences of possession, trafficking, importing and exporting of drugs maintained their minima of six months. There was some debate as to whether the minimum for trafficking was too lenient and there was a great deal of support for increasing it since it was viewed as the root of the addiction problem¹³⁴. Concerns were raised over having a minimum penalty for possession of a drug because an addict was viewed as someone who was physically ill and that his or her condition may be of no fault of their own¹³⁵. The prevailing thought at the time appeared to be that these offenders should not be sent to prison, but instead, to a treatment centre to overcome their addiction¹³⁶. The debates did not appear to sway other members on this matter and the Bill was read a third time and passed without amendments¹³⁷.

The first repeal of a mandatory minimum penalty occurred in 1931. The Bill¹³⁸

¹³³Bill 4, *An Act to Amend and Consolidate the Opium and Narcotic Drug Act*, 3rd sess., 16th Parl., 1929.

¹³⁴*House of Commons Debates* (Feb. 12, 1929) at 62.

¹³⁵*House of Commons Debates* (Feb. 12, 1929) at 67.

¹³⁶*House of Commons Debates* (Feb. 12, 1929) at 67.

¹³⁷*House of Commons Debates* (May 16, 1929) at 2554.

¹³⁸Bill 113, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 17th Parl., 1931.

aimed at removing the entire section pertaining to engaging in the business of insurance without a permit or licence, which carried a minimum penalty of one month imprisonment. There were no reasons given as to why the section should be repealed but the Bill was read a third time and passed¹³⁹.

In 1933, the House of Commons introduced a Bill¹⁴⁰ that would provide a minimum term of one year in jail if an individual was convicted of carrying a concealed weapon¹⁴¹. The debates centred around the type of weapon used and the age of those using the weapons¹⁴². There was some concern that the penalty was too severe and that in cases where this offence would apply, it was best to rely upon judicial discretion¹⁴³. This Bill went to third reading and was passed¹⁴⁴. However, when the Bill went to the Senate, it was passed without the minimum penalty provision¹⁴⁵. As with the 1925 decision by the Senate to exclude the minimum penalty, the reasoning here was also based on the fact that an individual could carry a weapon without any intent to do harm and the legislation did not clarify that¹⁴⁶.

In 1935, the House of Commons was able to successfully pass a *Criminal Code* amendment Bill that included a mandatory minimum penalty for driving a car while under the influence of narcotics or alcohol¹⁴⁷. The minimum penalty for the section was seven

¹³⁹ *House of Commons Debates* (July 24, 1931) at 4148.

¹⁴⁰ Bill 53, *An Act to Amend the Criminal Code of Canada*, 4th sess., 17th Parl., 1933.

¹⁴¹ *House of Commons Debates* (Mar. 29, 1933) at 3522.

¹⁴² *Ibid.*

¹⁴³ *Debates of the Senate* (April 6, 1933) at 395.

¹⁴⁴ *House of Commons Debates* (Mar. 30, 1933) at 3537.

¹⁴⁵ *House of Commons Debates* (April 28, 1933) at 4397.

¹⁴⁶ *Debates of the Senate* (April 6, 1933) at 395.

¹⁴⁷ *House of Commons Debates* (May 26, 1935) at 2296.

days for a first offence, three months for the second and one year for any subsequent convictions. The Bill¹⁴⁸ excluded the application of suspended sentences and fines in lieu of punishment for those convicted. Debates for this Bill were aimed at concerns about removing judicial discretion, especially when it was still incredibly difficult to determine if an individual was drunk or intoxicated¹⁴⁹. No response was given to this concern although it could have been argued that the offender still could get a pardon or royal prerogative, or apply for early release under the *Ticket of Leave Act*. Even though there were some unresolved issues regarding this Bill, it was passed after a third reading¹⁵⁰.

A Bill¹⁵¹ providing a minimum penalty of two years for using a firearm during the commission of an offence was introduced in 1938. It was a rather large Bill that dealt with a number of issues, which may explain why there were no debates in the House regarding the new punishment. The Bill received a third reading and passed in June 1938¹⁵². This was not the last time Parliament would be touching on the topic of mandatory minimum penalties for firearms offences.

Another provision was attempted six years later, in 1941. This Bill¹⁵³ endeavoured to add a minimum jail term of 6 months for failure to stop after an accident¹⁵⁴. This would increase the penalty from a fine of \$500 and a maximum term of imprisonment of six months to a minimum of six months. The Bill only reached first

¹⁴⁸Bill 73, *An Act to Amend the Criminal Code of Canada*, 6th sess., 17th Parl., 1935.

¹⁴⁹*House of Commons Debates* (May 29, 1935) at 3163.

¹⁵⁰*House of Commons Debates* (June 20, 1935) at 3860.

¹⁵¹Bill 137, *An Act to Amend the Criminal Code of Canada*, 3rd sess., 18th Parl., 1938.

¹⁵²*House of Commons Debates* (June 28, 1938) at 4342.

¹⁵³Bill 10, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 19th Parl., 1941.

¹⁵⁴*House of Commons Debates* (Feb. 17, 1941) at 796.

reading and died on the table¹⁵⁵. As with almost every Bill that is only read once, it was not debated in the House.

In 1944, a private members Bill¹⁵⁶ was the second attempt at repealing two of the mandatory minimum penalty provisions since the enactment of the *Criminal Code*. The purpose of this Bill was to remove a three-year minimum term for a conviction for theft of post-letters and theft of post-letter bags¹⁵⁷. The reason given for the revocation of this punishment in the House debates was that it was difficult to get a jury to convict when the penalty was at the very least, three years¹⁵⁸. The Bill was passed, thus repealing the mandatory minimum penalties, leaving only the maximum in place¹⁵⁹.

During the same session, the Members of Parliament had a lengthy debate regarding the use of mandatory penalties that was unrelated to any Bill. The House acknowledged that times as well as opinions change and thus amendments must be made to keep the *Code* current¹⁶⁰. In addition, it was stated that public opinion plays a very large role in what is an appropriate penalty, and when convictions are difficult to obtain from a jury, when the verdict is 'not guilty' in light of evidence to the contrary, justice is defeated¹⁶¹. A 'not guilty' verdict should be based on the facts of the case and not the punishment. The "juries have been the protectors of the people, unfairness, harshness and the rigidity against change which have too often characterized law makers who are

¹⁵⁵ *Ibid.*

¹⁵⁶ Bill 139, *An Act to Amend the Criminal Code of Canada*, 5th sess., 19th Parl., 1944.

¹⁵⁷ *House of Commons Debates* (June 15, 1944) at 3830.

¹⁵⁸ *Ibid.*

¹⁵⁹ *House of Commons Debates* (June 28, 1944) at 4326.

¹⁶⁰ *Ibid.* at 4309.

¹⁶¹ *Ibid.* at 4310.

behind advancing public opinion”¹⁶². Clearly, the House had recognized one of the larger problems with mandatory minimum penalties. An individual may be guilty of a given offence, but the jury may not feel that the punishment fits the characteristics of the crime or the offender and therefore does not find him/her guilty. In response to this, it was argued that a minimum penalty may be served conditionally¹⁶³. There was no mention of the pardon, royal prerogative or *Ticket of Leave Act* as alternatives available to prevent unfair penalties. No further mention of revising or studying the use of mandatory minimum penalties for any of the other offences was debated during that session.

The next mention of *Criminal Code* amendments with regards to minimum penalties occurred four years later in 1948 with the introduction of a Bill¹⁶⁴ that would create a mandatory penalty of six months for driving while impaired, without option of a fine in lieu of punishment¹⁶⁵. There was already a minimum penalty of seven days in place. The Bill was read a second time and was adjourned, but eventually died on the table¹⁶⁶.

During this same year an additional Bill¹⁶⁷ was introduced for the purpose of re-instating the minimum penalties for theft of post-letters and post-letter bags. Prior to the abolishment of this minimum penalty in 1944, these offences carried mandatory minimum penalties of three years’ imprisonment. It was acknowledged that it had only been four

¹⁶²*Ibid.*

¹⁶³*Ibid.* at 4321.

¹⁶⁴Bill 207, *An Act to Amend the Criminal Code of Canada*, 4th sess., 20th Parl., 1948.

¹⁶⁵*House of Commons Debates* (April 23, 1948) at 3256.

¹⁶⁶*House of Commons Debates* (June 8, 1948) at 4914.

¹⁶⁷Bill 337, *An Act to Amend the Criminal Code of Canada*, 4th sess., 20th Parl., 1948.

years since the minima were repealed and its return was questioned in the House¹⁶⁸. The introducer of the legislation maintained that experiencing the offences without the minimum over the previous two years demonstrated that a minimum was indeed needed¹⁶⁹. The reason given as to why was not based on an increase in theft from the mails, but because some of the penalties that were imposed were viewed as preposterous¹⁷⁰. Some offenders who were convicted under these sections were receiving terms of imprisonment that were sometimes only one hour to a few days in duration¹⁷¹. Therefore it was concluded that the removal of the minima was a failure and the Post Office Department had asked for another to be put in place¹⁷². There were some admissions in the House that juries are reluctant to convict when a mandatory minimum penalty was involved, but it was maintained that as long as the penalty was not too harsh, the problem would be solved¹⁷³. In addition, there was some indication that there was a sentencing disparity problem across Canada, and it was felt that minimum penalties would resolve this concern¹⁷⁴. This has continued to be an issue that it still used in minimum penalty debates. Although there was clearly disagreement regarding this Bill based on the above concerns, the Bill was read a third time and passed¹⁷⁵. The result was that stealing from the post office, post-letters and post-letter bags would once

¹⁶⁸ *House of Commons Debates* (June 7, 1948) at 5188.

¹⁶⁹ *House of Commons Debates* (June 14, 1948) at 5188.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.* at 5203.

again carry a minimum term of imprisonment, however, instead of three years, the penalty would be a one year term of imprisonment¹⁷⁶.

In 1949, a Bill¹⁷⁷ was read into Parliament that contained three new mandatory minimum penalties. The purpose of this amendment was to add a six-month minimum penalty for a driver who does not stop after an accident. Unfortunately, the legislation was vague and did not specify whether it only pertained to the driver who was directly involved in the accident, or whether it is extended to drivers who witnessed it or were involved in some other way. There is some indication that this section of the Bill only concerned witnesses and those drivers who were not directly involved in the accident because another clause also included a minimum penalty of six months if an individual was convicted of 'hit and run'¹⁷⁸. Lastly, as with the Bill from the previous session, there was an attempt to increase the mandatory minimum penalty for drinking and driving from seven days to six months for a first offence¹⁷⁹. This Bill was read a third time but was withdrawn without any explanation.

During the same session, it was decided by the Department of Justice that a complete overhaul of the *Criminal Code* was required because one had not been done since the *Code's* inception in 1892¹⁸⁰. The *Criminal Code* Revision Committee(CCRC) was formed to update the Code and rid it of obsolete sections¹⁸¹. The purpose for the CCRC was to

¹⁷⁶*Ibid.* at 5189.

¹⁷⁷Bill 3, *An Act to Amend the Criminal Code of Canada*, 1st sess., 21st Parl., 1949.

¹⁷⁸*Ibid.*

¹⁷⁹*Ibid.*

¹⁸⁰*House of Commons Debates* (June 25, 1951) at 4662-4663.

¹⁸¹*House of Commons Debates* (Nov. 16, 1951) at 1089.

- (a) revise ambiguous and unclear provisions;
- (b) adopt uniform language throughout;
- (c) eliminate inconsistencies, legal anomalies or defects;
- (d) rearrange provisions and parts;
- (e) seek to simplify by omitting and combining provisions;
- (f) with the approval of the statute revision commission omit provisions which should be transferred to other statutes;
- (g) endeavour to make the *Code* exhaustive of the criminal law; and
- (h) effect such procedural amendments as are deemed necessary for the speedy and fair enforcement of the criminal law¹⁸².

The Committee systematically went through the *Code* and submitted its final report and draft of the *Criminal Code Bill* to Parliament in January 1952. Other piece-meal revisions would be done in the future, but none as comprehensive as this one. Never again was a committee established wherein its sole task was to revise the *Criminal Code* using defined purposes and goals.

While this large scale revision was going on, another Bill¹⁸³ was introduced into Parliament that removed the minimum penalty of seven days for a first conviction of driving while intoxicated, but not the minimum penalties set out for second or subsequent offences. Again, the reason given as to why the section should be repealed was that it was too difficult to prove whether or not an individual was intoxicated¹⁸⁴. In addition, the Bill also set out to repeal the minima for theft of postal letters and letter bags¹⁸⁵. This Bill also included a provision that would prevent the offence of stopping the mail with intent to rob from being applicable to the suspended sentence provision in

¹⁸² *House of Commons Debates* (Jan. 23, 1953) at 1273.

¹⁸³ Bill 391, *An Act to Amend the Criminal Code of Canada*, 4th sess., 21st Parl., 1951.

¹⁸⁴ *House of Commons Debates* (June 25, 1951) at 4666.

¹⁸⁵ *House of Commons Debates* (June 19, 1951) at 4281.

the *Code*¹⁸⁶. Also found in this Bill was a section that would repeal the two year minimum penalty for committing an offence with a firearm. The section had only been added in 1938 but was causing judicial problems¹⁸⁷. The debates did not mention the repeal and the only discussion related to it was that this section was actually just a consolidation of sections that were found in the *Code* at that time¹⁸⁸. The majority of debate focussed on registration and definition of firearm¹⁸⁹. The Bill was successful and passed¹⁹⁰.

Referring back to the revisions, many sections of the *Code* were either eliminated or condensed. The draft *Code* was introduced as Bill 93¹⁹¹ and debates began at the second reading on January 23, 1953. There were many changes found in the draft, one of the most important being that the CCRC recommended “that minimum punishments and higher maximums [*sic*] for subsequent offences both be abolished in order to leave a greater discretion to the courts”¹⁹². However, Parliament’s response to this suggestion was that it was not a viable option and the minima for driving while intoxicated, driving while impaired and certain mail theft offences were maintained¹⁹³. Bill 93 went to second

¹⁸⁶Bill 391, *An Act to Amend the Criminal Code of Canada*, 4th sess., 21st Parl., 1951.

¹⁸⁷The main problem with this legislation was whether the added offence of using a firearm during the commission of an offence constituted double punishment.

¹⁸⁸*House of Commons Debates* (June 25, 1951) at 4631.

¹⁸⁹*House of Commons Debates* (June 25, 1951) at 4631.

¹⁹⁰*House of Commons Debates* (June 26, 1951) at 4690.

¹⁹¹Bill 93, *The Criminal Law Amendment Act*, 7th sess., 21st Parl., 1952-1953.

¹⁹²*House of Commons Debates* (Jan. 23, 1953) at 1274.

¹⁹³*Ibid.*

reading that year but died on the table¹⁹⁴. The Bill¹⁹⁵ was re-introduced in the following session where some of the mandatory penalty clauses were further debated¹⁹⁶.

Prior to the discussion on the substantive changes that occurred in the draft, Parliament again would deviate in the new Bill from the CCRC submission, stating that “it did not feel that it could, at this time, accept the recommendation of the royal commission in respect to the abolition of minimum punishments for all these offences”¹⁹⁷. However, the Bill did repeal seven mandatory minimum penalty provisions that had been in place prior to the revision.

The new draft *Code* was amended to include three mandatory minimum penalties for driving while intoxicated, driving with impaired ability and theft of postal matter¹⁹⁸. Section 222 of the draft *Code*, driving while intoxicated, provided upon summary conviction a minimum of seven days imprisonment for the first offence, one month for a second offence and three months for any subsequent offences¹⁹⁹. If the offender was found guilty of driving while intoxicated and charged indictably, a minimum of 30 days imprisonment for a first offence and three months for any subsequent offences had to be imposed²⁰⁰. There was some concern regarding a minimum penalty and the various

¹⁹⁴ *Ibid.*

It is likely that the Bill died because it was so long and there were a number of debatable issues in it. It was unlikely that the Bill could have been fully considered in the time remaining in the session.

¹⁹⁵ Bill 7, *The Criminal Law Amendment Act*, 1st sess., 22nd Parl., 1953-1954.

The inclusion of two such similar offences, driving while impaired and driving while intoxicated were likely needed due to the difficulty in proving intoxication at this time.

¹⁹⁶ *House of Commons Debates* (Nov. 16, 1953) at 32.

The Bill was re-introduced as Bill 7.

¹⁹⁷ *House of Commons Debates* (Dec. 15, 1953) at 953.

¹⁹⁸ *The Criminal Code of Canada*, S.C. 1955, c. 146.

¹⁹⁹ *The Criminal Code of Canada*, S.C. 1955, c. 146, s.222.

²⁰⁰ *The Criminal Code of Canada*, S.C. 1955, c. 146, s.222.

offenders that may fall under its umbrella²⁰¹. The matter was dropped, but re-considered later when the debates turned to another section carrying a minimum penalty. Section 223 of the draft *Code* intended to provide a minimum penalty of fourteen days imprisonment upon a second conviction for driving while ability is impaired²⁰². In the event of a conviction for any subsequent offences, the offender would be given a minimum of three months in jail²⁰³. Many members felt that there is a difference between an offender who is an alcoholic and a “Saturday Night” drunk and that the two should not be subject to the same punishment²⁰⁴. An option that the members preferred was to legislate mandatory licence suspensions instead of prison time, however, it was soon noted that this type of penalty would fall under the jurisdiction of the provinces, specifically the Ministry of Transportation and therefore could not be legislated by the federal government²⁰⁵. Thus, it was concluded that a mandatory minimum penalty for the two offences would be the best way to achieve the punishment purposes for this situation, general and specific deterrence²⁰⁶.

A mandatory minimum was also considered for the offence of criminal negligence causing death in operation of a motor vehicle²⁰⁷. It was suggested that a minimum of three months in prison be legislated for the offence, however, it was rejected on the basis that juries are reluctant to convict when a minimum punishment is in place because they

²⁰¹ *House of Commons Debates* (Feb. 25, 1954) at 2465.

²⁰² *The Criminal Code of Canada*, S.C. 1955, c. 146, s.223.

²⁰³ *Ibid.*

²⁰⁴ *House of Commons Debates* (Feb. 25, 1954) at 2465.

²⁰⁵ *House of Commons Debates* (April 1, 1954) at 3560.

²⁰⁶ *Ibid.* at 3576.

²⁰⁷ *House of Commons Debates* (Feb. 25, 1954) at 2457.

sometimes see similarities between themselves and the offender²⁰⁸. It may be easier for juries to see how an accident could happen to anyone, whereas driving while impaired is an overt choice. For this reason, and likely others, a mandatory minimum penalty for this offence was not legislated. It is interesting to note that the same argument could have been made for driving with an impaired ability or driving while intoxicated, yet it was not considered in the debates.

There were no debates concerning section 298, theft of postal matters. This section in the new *Criminal Code* was a compilation of all the other sections that pertained to this type of offence. The offence of stopping the mail with intent to rob was dropped from the *Code* completely. Interestingly, the predecessors of this section: stealing post letters and post letter bags, had been repealed in 1944, reinstated with a one year minimum in 1948 and had the minimum decreased to three months in 1954 with this Bill²⁰⁹. Despite the precarious history of this offence, there were no discussions on this matter.

The section pertaining to the suspension of sentence in the old *Code* was modified and incorporated into the new version²¹⁰. The main difference between the two was that, in the revision, a suspended sentence could not be used for offences that carried a minimum penalty. Similarly, the new *Code* also removed the availability of imposing a fine in lieu of punishment²¹¹ for offences which carried mandatory minimum penalties. The House of Commons did not debate on the issue of removing the

²⁰⁸*Ibid.*

²⁰⁹The minimum penalty was finally repealed completely in 1969.

²¹⁰*The Criminal Code of Canada*, S.C. 1955, c. 146, s. 638.

²¹¹*The Criminal Code of Canada*, S.C. 1955, c. 146, s. 662.

applicability of these sentencing options from offences that carried minimum penalties. This removes the only two options that had previously been available to judges that could prevent unjust and unfair penalties. Perhaps limiting the applicability of these sections was thought to be justified given Parliament's action in maintaining only three offences that carried minimum penalties.

The pardon²¹² was maintained in this revised *Code* but was reworded, however, it kept the essential elements. The royal prerogative was maintained in its exact form²¹³. The only other option available to offenders after the revision was to apply for early release under the *Ticket of Leave Act*. This large scale revision, the only one ever to be conducted was passed in April 1954²¹⁴.

During the debates to pass a Bill²¹⁵ concerning the *Opium and Narcotic Drug Act*, the issue of minimum penalties was again raised. From the debates it is clear that the feeling within the House was that those found in possession of a drug should be treated akin to an individual who is ill with a physical malady and thus should not be sent to jail at all, let alone for a minimum period of time²¹⁶. In response to this criticism, the minimum penalty was defended as being necessary to provide the addict with

²¹²*The Criminal Code of Canada*, S.C. 1955, c. 146, s. 655.

The use of the pardon has changed since this time in that it is now only used after the punishment has been served and can only be apply in cases where the offender wants the conviction expunged from his/her record. The nature and details of this change are beyond the scope of this paper.

²¹³*The Criminal Code of Canada*, S.C. 1955, c. 146, s. 658.

The practical use of this section is unknown as it is beyond the scope of this paper.

²¹⁴*House of Commons Debates* (April 8, 1954) at p. 3927.

²¹⁵Bill 422, *An Act to Amend the Opium and Narcotic Drug Act*, 1st sess., 22nd Parl., 1954.

The inclusion of this Bill was solely based on the informative nature of the debates that surround it.

²¹⁶*House of Commons Debates* (June 1, 1954) at 5319.

treatment²¹⁷. Additionally, there was support for maintaining the minimum because it was felt that the judges hearing the cases often had “a sympathetic heart, not fully appreciating the situation” which resulted in the minimum not being imposed in some cases²¹⁸. Lastly, there was a concern for the possibility that an innocent person would be convicted and sent to jail for possession, as the law was rather vague and could include those individuals who were simply in the same environment with the owner of the drugs²¹⁹. In response to this fear, it was stated that the option of being charged with ‘constructive possession’, which is basically possession through association, was available, but this concern was simply thought to be an evidentiary matter²²⁰. However, in the debates, it was generally agreed that a minimum penalty was required in the cases of trafficking because it was compared to murder and therefore the offenders should be subject to a similar penalty²²¹. These commonly heard opinions did not impact on the Bill as it was not amended to include an increase in penalties for trafficking of narcotics.

Conclusion

In the twenty-six year period between 1928 and 1954, the *Criminal Code* witnessed an increase in activity regarding mandatory minimum penalties, both in terms of legislation as well as general debates. There were eighteen attempts²²² to add mandatory minimum penalties to the *Criminal Code* and *Opium and Narcotic Drug Act*,

²¹⁷ *House of Commons Debates* (June 1, 1954) at 5319.

There were a number of debates regarding trafficking yet there was no substantial reference to treatment.

²¹⁸ *House of Commons Debates* (June 1, 1954) at 5319.

²¹⁹ *House of Commons Debates* (June 1, 1954) at 5320.

²²⁰ *House of Commons Debates* (June 1, 1954) at 5320.

²²¹ *House of Commons Debates* (June 1, 1954) at 5320.

²²² The attempts listed are referring to the individual offences and corresponding penalties that were in each of the Bills.

of which, nine were successful. The minimum penalty for using a firearm during the commission of an offence was somewhat precarious in nature as it was added in 1938, only to be repealed thirteen years later. As stated earlier, in the case of theft from the mails, the minimum penalty was also unstable and was amended several times. This flip-flop could be said to possibly be a symptom of the underlying uncertainty within Parliament on the issue of mandatory minimum penalties. Lastly, there were seven attempts outside of the revision to repeal minimum penalties, all of which were successful²²³. The revision itself repealed seven²²⁴ minimum penalty provisions and left three sections in the *Criminal Code*. The *Opium and Narcotic Drug Act* was not revised and contained five minimum terms at the end of this time period, bringing the total to eight offences.

Thankfully, the debates over the first sixty-two years (1892-1954) of became increasingly more elaborate and were able to provide insight into the arguments surrounding minimum penalties. The main reasons given to repeal a minimum penalty were: removal of judicial discretion; problems getting juries to convict if there was a minimum penalty involved; some offences were difficult to prove, such as driving while impaired; and finally, there was some concern about grouping different degrees of offending under an umbrella that carried such a rigid penalty²²⁵. Conversely, there were very few arguments given to support the use of minimum penalties. The main concerns

²²³One of the successful repeals was for a seven day minimum for a first conviction of impaired driving. The minimum 14 days for a second offence and 90 days for any subsequent convictions were maintained.

²²⁴This does not include the number of repeals that were attempted with the first draft *Code* that did not pass into law. If those numbers were included, the total number of repeals based on the revision would be fourteen, with seven succeeding.

²²⁵This refers to the discussion on drunks versus ‘Saturday night drunks’ with regards to drinking and driving offences.

were based on the existence of sentencing disparities and penalties that were far too lenient. In addition to changes in the penalty structure of the *Criminal Code* and *Opium and Narcotic Drug Act* was the removal of judge-based penalty options in cases where minimum penalties had been inscribed. By the end of this period, only the *Ticket of Leave Act*, the pardon and the royal prerogative were still available to relieve offenders from unfair penalties that were imposed²²⁶. Clearly, the increase in debate regarding this subject, as well as the uncertainty involved at this level of decision making reflect the controversial nature of minimum terms of imprisonment. This is not a unique time period as these debates have become more amplified over the course of the following forty-five years.

²²⁶ The practical use of these provisions are unknown and beyond the scope of this paper.

CHAPTER TWO

The Debates Rage On: 1955-1999

After the Revision: 1955-1981

This period reflects the continuing debates and issues that surround mandatory minimum penalties within the law-making process. There was no legislative activity in the first three years following the 1954 revision, however, this pattern would not be maintained.

The introduction of a Bill²²¹ in 1957 was to foreshadow changes to come in the *Opium and Narcotic Drug Act*. Although it was not possible to review the Bill it was feasible to get a copy of the Senate Bill on which it was based. The Senate Bill²²² intended to repeal the sections pertaining to physicians, dentists and veterinarians as well as the minimum penalties that accompanied them. The reason for the repeal was that the sections were unnecessary²²³. The Bill also repealed the section pertaining to sending drugs through the mail but did not elaborate on why this was done. The minimum six month terms for possession, trafficking, importing and exporting were maintained. Unfortunately, the Bill was introduced at the end of the session where it was not debated and died after the first reading.

In 1958, the House began debates on the merits of mandatory minimum penalties

²²¹Bill 239, *The Narcotic Control Act*, 1st sess., 22nd Parl., 1957.

This was originally a Senate Bill, K-13. This Bill was the precursor to the 1961 Bill C-100 which established the *Narcotic Control Act* and drastically changed the penalty structure for drug crimes.

²²²Bill K-13, *The Narcotic Control Act*, 1st sess., 22nd Parl., 1954.

²²³Bill K-13, *The Narcotic Control Act*, 1st sess., 22nd Parl., 1954.

The source of this statement came from the explanatory notes found in the Bill provided by the Senate. Because this bill occurred after the revision in 1954, it was included in this time frame.

based on the possibility of increasing the minimum three month term to six months to be imposed on all those convicted of theft from the mails²²⁴. Those who were not in favour of minimum penalties maintain that such penalties were too rigid²²⁵. In addition, it was challenged that judges and magistrates were appointed to their positions because of their good judgement and common sense and that they should be given the opportunity to put these skills to use²²⁶. Those members of the House who advocated mandatory penalties contended that the offender was eligible to apply for a ticket-of-leave²²⁷. The purpose of this debate was to draw the issue of mandatory minimum penalties to the attention of the Minister of Justice²²⁸. The Minister responded to the discussion by stating that there will always be differences in opinions regarding this subject and that it is a relatively minor issue given that only three offences carried mandatory minimum penalties. He was basically admitting that the issue was unresolvable because different people view minimum penalties differently and thus, it was best to leave the situation as is. In addition, he stated that the option to apply for a ticket-of-leave is a capable remedy to deal with the unwarranted and unjust penalties that had, on occasion, occurred²²⁹.

The Minister went on to state that mandatory minimum penalties are “in some cases in order [so] that necessary measures of rehabilitation, reform and training may be instituted²³⁰. However, the Minister admitted that when penalties across Canada become

²²⁴*House of Commons Debates* (Aug. 7, 1958) at 3211.

²²⁵*Ibid.*

²²⁶*Ibid.* at 3212.

²²⁷*Ibid.*

²²⁸*House of Commons Debates* (Aug. 7, 1958) at 3212.

The Minister of Justice and Attorney General at this time was Mr. Fulton.

²²⁹*House of Commons Debates* (Aug. 7, 1958) at 3212.

²³⁰*Ibid.* at 3213.

more uniform and when a system of pre-sentence reports is established, it may be possible to abolish mandatory minimum penalties completely²³¹. Unfortunately, the Minister did not elaborate on why he thinks that these two particular events would make such a difference to the penalty structure in Canada or how they relate to mandatory minimum penalties. In the end, the Minister agreed that the issue needs further study and asserted that it would be addressed²³².

In a rather surprising turn of events, not four days after the above discussions took place, the government introduced a Bill²³³ that repealed the *Ticket of Leave Act* and replaced it with the National Parole Board. The purpose of this Bill was to set up a program that would deal exclusively with the early release of offenders back into society and was based on the recommendations of the Fauteux committee that had reported two years earlier²³⁴. The reason given for repealing the *Ticket of Leave Act* was that it was no longer useful because it could not deal with the large numbers, the complexity of the corrections system, and was considered obsolete²³⁵. The legislation provided the Board with the power to grant parole to any inmate, with the inclusion or exclusion of conditions. There were no guidelines set out for who would get early release or the nature of the conditions that could be placed on an offender. The Bill was read a third time and passed²³⁶.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ Bill C-49, *National Parole Board Act*, 1st sess., 24th Parl., 1958.

²³⁴ *House of Commons Debates* (Aug. 18, 1958) at 3727.

²³⁵ *Ibid.*

²³⁶ *Ibid.* at 3729.

In 1961, a Bill²³⁷ to repeal the *Opium and Narcotic Drug Act* and establish the *Narcotic Control Act* was read into Parliament. There were a number of interesting changes included in the Bill. The introducers of the Bill acknowledged that there was a strong desire to maintain the minimum terms for both possession and trafficking of narcotics, however, research showed that the best deterrent for these offences was to have higher maxima²³⁸. After some debate, in which it was explained that addicts would not be deterred by a prison sentence (as they were considered to have an illness) and support for abolishing the minimum penalty for possession increased²³⁹. The legislation did not include minima for possession or trafficking, but instead added a seven year minimum for importing or exporting narcotics²⁴⁰. The reason for the harshness of the penalty was that the offence was largely motivated by profit and thus it was important to offset profitability with a lengthy minimum punishment²⁴¹. Another motivating factor for the seven year minimum was that the majority of drugs consumed in Canada were imported and therefore, the laws must target that area²⁴². The logic behind the law was that it was intended to remove the supply of the narcotics and consequently, remove the demand²⁴³. In addition, the Bill repealed the sections and the penalties for the offences of prescribing drugs for non-medical reasons and sending drugs through the mail. There were no debates on the removal of these sections. The Bill was read a third time and

²³⁷Bill C-100, *Provision for the Control of Distribution and Sale of Narcotics*, 4th sess., 24th Parl., 1961.

²³⁸*House of Commons Debates* (June 7, 1961) at 5980.

There was no elaboration as to the source or any citation given.

²³⁹*House of Commons Debates* (June 7, 1961) at 5996.

²⁴⁰Bill C-100, *Provision for the Control of Distribution and Sale of Narcotics*, 4th sess., 24th Parl., 1961.

²⁴¹*House of Commons Debates* (June 7, 1961) at 5981.

²⁴²*House of Commons Debates* (June 7, 1961) at 5982.

²⁴³*House of Commons Debates* (June 7, 1961) at 5982.

passed²⁴⁴.

It was not until 1967 that the issue of minimum penalties was again discussed. One Member of Parliament suggested that instead of providing a mandatory fourteen days in jail for a second conviction for impaired driving, the offender should have his/her licence suspended for two years²⁴⁵. The suggestion was not debated in the House. Incidentally, there was no mention of the fact that an attempt to legislate a driver's licence suspension does not fall within the powers of the federal government. As stated earlier, this power to grant and suspend a licence falls within provincial jurisdiction, specifically with the Ministry of Transportation (or its equivalent).

During the 1967-68 Parliamentary session, no efforts were made to introduce or repeal any mandatory minimum penalties. However, there was some discussion on a review of the *Criminal Code*, similar to the revision that occurred in the early 1950's²⁴⁶. The criticism was that the laws were not in tune with what was going on in Canadian society²⁴⁷. In addition, there was some indication that the law treated the rich differently than it treated the poor but the debates did not elaborate as to how²⁴⁸. This inference may relate to the fact that mandatory minimum penalties removed discretion from the judge and placed it in the hands of the police and Crown attorneys. For example, police officers would have it within their discretion to let a wealthier offender off with a warning but proceed with the arrest of a poor offender. Crown discretionary power lies

²⁴⁴ *House of Commons Debates* (June 12, 1961) at 6219.

²⁴⁵ *House of Commons Debates* (Feb. 2, 1967) at 12609.

²⁴⁶ *House of Commons Debates* (Nov. 2, 1967) at 3796.

²⁴⁷ *Ibid.* at 3800.

²⁴⁸ *Ibid.* at 3801.

in the fact that he/she may either proceed with, reduce or drop the charges all together in cases where it was warranted. The Minister of Justice replied that he would look into the situation, although nothing was committed to or done during that session²⁴⁹.

The following year, several *Criminal Code* amendment Bills were proposed, of which, one proposed a new minimum and another repealed two sections that contained minimum penalties. The first Bill²⁵⁰ aimed to create a minimum penalty of thirty days if one was convicted of cruelty to animals. This Bill was only read once and died on the table. The second attempt was found in a large omnibus Bill²⁵¹ which was essentially a review of the *Criminal Code*. It is important to note that this review was different from the 1954 revision in that it was done by the government of the day, not an independent body. There is no direct link, but this Bill may have been a response to the criticisms that were vocalized during the previous session. This review of the *Criminal Code* was very important to Canadians as it was an election issue for Pierre Trudeau in his bid to become Prime Minister²⁵². Information for the review and the ultimate amendments included in this Bill were gathered from both private and public spheres as well as from various members from the legal profession²⁵³. In section 15 of the Bill, the offence of driving while intoxicated was repealed. There were no debates on this that would indicate the reason for the repeal, however, it may be due to the fact that there was also

²⁴⁹*Ibid.* at 3800.

²⁵⁰Bill C-142, *An Act to Amend the Criminal Code of Canada*, 1st sess., 28th Parl., 1968.

²⁵¹Bill C-150, *An Act to Amend the Criminal Code, the Parole Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff Act and the National Defence Act*, 1st sess., 28th Parl., 1969.

²⁵²*House of Commons Debates* (Jan. 23, 1969) at 4718.

²⁵³*Ibid.*

the section pertaining to driving while impaired, thus the section may have been viewed as redundant. In addition, the repeal could also have been a result of difficulties that occurred in the courts in proving intoxication. The Bill also repealed the minimum penalty for theft from the mail, leaving the section with the maximum punishment of ten years imprisonment. This Bill was passed and received Royal Assent in June of 1969²⁵⁴.

During the proceeding Parliamentary session, there was some debate regarding another large reform. The main criticisms were directed at the inadequacies of attempts that were being made to amend the *Criminal Code*, specifically, that the reforms were based on the cost of the change rather than the impact²⁵⁵. Much of this criticism could have been the result of the Ouimet Report²⁵⁶ which had been released just prior to this debate and emphasized the negative attributes of minimum penalties. One Member of Parliament stated that a committee was needed to study the report because “the real reforms in it are far-reaching and if we do not get at it soon, by the time we do get at it the reforms it suggests will themselves [sic] need reforming”²⁵⁷.

Possibly in response to the concern expressed in the House and from the Ouimet Report, a Bill²⁵⁸ establishing the Law Reform Commission was introduced. The purpose of the Commission was to remove any out-dated or anachronistic laws, as well as to ascertain new ways of dealing with the constantly evolving social and political arena in Canada²⁵⁹. The Bill was read a third time and passed, thus enacting the first Commission

²⁵⁴ *House of Commons Debates* (June 27, 1969) at 10713.

²⁵⁵ *Ibid.*

²⁵⁶ The findings of the Commission are discussed in the following chapter.

²⁵⁷ *House of Commons Debates* (Oct. 31, 1969) at 366.

²⁵⁸ Bill C-186, *An Act to Establish the Law Reform Commission of Canada*, 2nd sess., 28th Parl., 1970.

²⁵⁹ *Ibid.*

in Canada given the unique task of evaluating and suggesting reforms for the *Criminal Code*²⁶⁰.

During the 1970's, the House of Commons witnessed a continual drive to institute new mandatory minimum penalties. Year after year, the same Bills were introduced, always receiving one reading before dying on the table. One set of Bills attempted to create a minimum penalty of one year for anyone convicted of cattle rustling²⁶¹. Another set of Bills attempted to address the issue of cruelty to animals, specifically illegally owning, harbouring or processing of animals which included a minimum penalty of three months imprisonment upon conviction²⁶². One of the attempts included an even longer minimum of six months for a conviction of cruelty to animals²⁶³.

Several drinking and driving Bills were also pursued during this time, and all but one met with the same fate as the previously mentioned Bills, they were all given a first reading and were never debated in the House. Two of the Bills read into Parliament aimed at creating a minimum penalty of three months if an individual, other than the driver, died as a result of the driver being impaired²⁶⁴.

One of these Bills²⁶⁵, however, did pass and created minimum penalties of fourteen days for a second offence and three months for failing or refusing to provide a

²⁶⁰House of Commons Debates (Nov. 12, 1970) at 6860.

²⁶¹Bill C-199, *An Act to Amend the Criminal Code of Canada*, 1st sess., 29th Parl., 1973-1974.

Bill C-252, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 29th Parl., 1974.

Bill C-337, *An Act to Amend the Criminal Code of Canada*, 1st sess., 30th Parl., 1974-1976.

²⁶²Bill C-46, *An Act to Amend the Criminal Code of Canada*, 1st sess., 29th Parl., 1973-1974.

Bill C-207, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 29th Parl., 1974.

²⁶³Bill C-328, *An Act to Amend the Criminal Code of Canada*, 1st sess., 30th Parl., 1974-1976.

²⁶⁴Bill C-260, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 29th Parl., 1974.

Bill C-351, *An Act to Amend the Criminal Code of Canada*, 1st sess., 30th Parl., 1974-1976.

²⁶⁵Bill C-71, *An Act to Amend the Criminal Code of Canada*, 1st sess., 30th Parl., 1974-1976.

breath sample and having blood alcohol over 80 milligrams of alcohol per 100 millilitres of blood. This Bill also created minimum penalties for two offences, betting, pool-selling and book-making as well as placing bets on behalf of others. As a result of this Bill, both offences carried a fourteen day minimum term for a second offence and three months for any subsequent offences. Unlike the drinking and driving offences included in this Bill, there was no mention of the new punishments for these offences in the debates.

However, the debates did outline one of the purposes of this Bill which was “to strengthen the provisions of the *Criminal Code* where problems have persisted, such as...drinking and driving offences”²⁶⁶. There was general support for the relevant sections of the Bill as deaths as a result of drinking and driving was the main point of consideration for the Bill, stating that laws needed to address the offence²⁶⁷. Only one Member of Parliament stated that the imposition of this minimum penalty would limit judicial discretion and instead of instituting a minimum, suggested it may be more beneficial to encourage judges to co-ordinate their penalties to satisfy the public demand for harsher sanctions²⁶⁸. Ultimately, the Bill was read a third time and passed²⁶⁹ with one Member stating that he “hope[d] that those penalties will be noted, that they receive wide publicity to reduce the numbers of impaired driving cases”²⁷⁰.

The 1970's also saw an increase in the number of Bills for minimum penalties in the *Narcotic Control Act*. The first of these Bills²⁷¹ attempted to re-establish the six

²⁶⁶ *House of Commons Debates* (Nov. 18, 1975) at 9203.

²⁶⁷ *House of Commons Debates* (Nov. 18, 1975) at 9213.

²⁶⁸ *House of Commons Debates* (Jan. 27, 1976) at 10359.

²⁶⁹ *House of Commons Debates* (Jan. 27, 1976) at 10363.

²⁷⁰ *House of Commons Debates* (Jan. 27, 1976) at 10361.

²⁷¹ Bill C-172, *An Act to Amend the Narcotic Control Act*, 2nd sess., 29th Parl., 1974.

month minimum for possession for a first summary conviction and added two years plus a day for any subsequent offences. In addition, the Bill also aimed at creating a seven year minimum penalty for an indictable offence of possession. A minimum penalty of ten years for a first conviction for trafficking and 25 years for any subsequent convictions was also included in the Bill. Lastly, the Bill intended to increase the seven year minimum in place for importing or exporting narcotics to a ten year term of imprisonment. The Bill was given first reading but died on the order table. During the following session, another Bill²⁷² that was very similar in nature to the previous one mentioned was introduced. It also aimed at creating a six month minimum for the first conviction of possession of a narcotic as well as the same penalty for any subsequent convictions, however, it did not specify summary or indictable convictions. The minimum terms for trafficking, importing and exporting were the same as the previous Bill. This Bill was also only read once before it died.

During the 1974-1976 Parliamentary session, a Bill²⁷³ attempted to address the issue of using a firearm while committing an offence was introduced. The Bill called for a minimum penalty of five years for anyone convicted of possessing a firearm during the commission of an offence, regardless of whether the firearm was used or not²⁷⁴. The reason given for the Bill was based on the argument that there had been an increase in crimes using firearms because the penalties were not harsh enough²⁷⁵. This Bill also

²⁷²Bill C-258, *An Act to Amend the Narcotic Control Act*, 1st sess., 30th Parl., 1974.

²⁷³Bill C-379, *An Act to Amend the Criminal Code of Canada*, 1st sess., 30th Parl., 1974-1976.

²⁷⁴*Ibid.*

²⁷⁵*House of Commons Debates* (Feb. 19, 1975) at 3354.

This statement was read and accepted into Parliament without any reference to statistics or a source in which the assertions were based.

stated that the offender would be ineligible for parole until the five year term was completed. This Bill only went to first reading where it died on the order table²⁷⁶.

The problem of drinking and driving appears to be one of the larger concerns of the Members of Parliament as they had made several efforts to create minimum penalties for the various offences related to impaired driving. As was seen earlier, there was a strong desire to establish a minimum penalty for anyone who kills someone as a result of drinking and driving. In 1975, another Bill²⁷⁷ was introduced that intended to legislate a minimum nine month term for impaired driving when death results, a six month minimum when the result is injury and an automatic three year license suspension. The Bill was read once but died on the table²⁷⁸. A year later, the same Bill²⁷⁹ was reintroduced but met with the same fate as its predecessor.

During this time, the issue of mandatory minimum penalties in and of themselves were being debated. In discussing whether a minimum ten year penalty should be added to the *Criminal Code* for kidnapping, the Minister of Justice, Otto Lange replied that "the general position we [the Department of Justice] have taken is that minimum sentences, on the whole, are undesirable because judicial discretion can serve better results"²⁸⁰. However, there is no indication as to why the Minister did not extend this logic to the mandatory minima already in place by repealing all the pertinent sections. About a year later, the debate was picked up again and several interesting points were

²⁷⁶House of Commons Debates (Feb. 19, 1975) at 3354.

²⁷⁷Bill C-391, *An Act to Amend the Criminal Code of Canada*, 1st sess., 30th Parl., 1975.

²⁷⁸House of Commons Debates (May 20, 1975) at 5916.

²⁷⁹Bill C-218, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 30th Parl., 1976-1977.

²⁸⁰House of Commons Debates (July 8, 1975) at 7341.

made. One of the main concerns was that mandatory minimum penalties were illogical²⁸¹. For example, offences such as impaired driving carried a minimum penalty, but the more serious ones, such as kidnapping and extortion did not²⁸². Another criticism stated that mandatory minimum penalties serve to limit judicial discretion²⁸³. In response to that charge, one Member of Parliament stated that if it were not for the lack of public support in the penalties that judges were imposing, there would not be continued support and a need for minimum penalties²⁸⁴. These debates did not resolve the obvious disagreements regarding the use of mandatory minimum penalties. Clearly, the Department of Justice was not in favour of legislating more minimum penalties, yet the Members of Parliament, and most likely their constituents, did support that particular mode of punishment.

The Bill²⁸⁵ that abolished the death penalty and created mandatory minimum penalties for murder and high treason was passed in 1976. In the case of first degree murder²⁸⁶, which is classified as murder that is planned or premeditated, the mandatory term of imprisonment would be life with eligibility of parole after twenty-five years. However, included in this legislation was a 'faint hope clause' which established that an offender could apply for a review of the parole eligibility period after serving fifteen years of his or her sentence. In the case of murders that were not planned, second

²⁸¹ *House of Commons Debates* (June 27, 1976) at 10356.

²⁸² *Ibid.* at 10355.

²⁸³ *House of Commons Debates* (June 27, 1976) at 10357.

²⁸⁴ *Ibid.*

²⁸⁵ Bill C-84, *An Act to Amend the Criminal Code of Canada*, 1st sess., 30th Parl., 1976.

²⁸⁶ First degree murder was considered to be planned and deliberate murder, contracted murder, murder of a police officer or prison guard (in the course of their duties), murder committed during a hijacking of an air-craft, kidnapping or certain sexual offences (including rape and attempted rape).

degree murder would apply which would carry a mandatory life sentence with parole eligibility at ten to twenty-five years as set by the judge at the time of sentencing. In addition, high treason, which also carried the death penalty, was amended to carry the same penalty as first degree murder. The 'faint hope' clause was also applicable to this section

There was an enormous amount of debate regarding this Bill, however, the vast majority centred around the moral and criminological implications of abolishing the death penalty. However, one of the main concerns with these minima was whether the period of incarceration was so long that it could be considered cruel and inhumane²⁸⁷ and that the likelihood of adaptability of the offender to outside life would be problematic²⁸⁸. Some of the main criticisms of the penalty were that with such a long term, it was felt that the offenders would have nothing to lose and thus be a threat to the prison guards as well as other inmates²⁸⁹. There was some support that the minimum would actually serve as a deterrent, but there was little agreement as to whether it, or the death penalty would be a more effective mode of punishment²⁹⁰. A few comments on the general problems regarding minimum penalties were made, although it could be said that they were lost in the extensive moral and ethical debates that encompassed this Bill. There were concerns that juries would be sympathetic and would acquit an offender in light of evidence to the contrary in order to prevent imposing a sentence that was considered unjustified²⁹¹.

²⁸⁷ *House of Commons Debates* (May 10, 1976) at 13374.

²⁸⁸ *House of Commons Debates* (May 10, 1976) at 13367.

²⁸⁹ *House of Commons Debates* (May 10, 1976) at 13374.

²⁹⁰ *House of Commons Debates* (May 6, 1976) at 13253.

²⁹¹ *House of Commons Debates* (May 10, 1976) at 13261.

There was a small group of members who felt neither the death penalty nor the minimum terms were the appropriate response stating that “they would call for the punishment to fit the crime...that justice be tempered with reason, emotion, mercy and love”²⁹². Judicial discretion was a concern and it was felt by this group that the sentencing judge should be permitted to take into account the circumstances surrounding the crime and the offender before imposing punishment²⁹³. However, the apprehension felt by these select few were ignored in the debates and the Bill was ultimately read a third time and passed by a very narrow margin of 130-124²⁹⁴.

In 1976, the first large scale attempt by the government to introduce gun control began with Bill C-83²⁹⁵. The main purpose of this Bill was to protect society against violent acts²⁹⁶. The majority of debates surrounding this Bill were based on the issue of gun control and not the *Criminal Code* amendments that pertained to punishment. The Bill called for the establishment of a one year mandatory minimum term that was to be served consecutively for a first conviction of using a firearm during the commission of an offence and a three year minimum for any subsequent convictions. A number of statistics were given during the debates that indicated that crime rates were increasing and the only way to prevent the increases was to impose harsher penalties for the purposes of deterrence and denunciation²⁹⁷. In response to these claims, one Member maintained that

²⁹² *House of Commons Debates* (June 10, 1976) at 14351.

²⁹³ *House of Commons Debates* (June 10, 1976) at 14354.

²⁹⁴ *House of Commons Debates* (July 14, 1976) at 15323.

²⁹⁵ Bill C-83, *The Criminal Law Amendment Act*, 1st sess., 30th Parl., 1976.

²⁹⁶ *House of Commons Debates* (March 8, 1976) at 11578.

²⁹⁷ *House of Commons Debates* (March 8, 1976) at 11579.

There were no citations for the statistics that were mentioned.

the harsh penalty provisions would not have an impact on criminal statistics because the laws do nothing to address the problem of the crime itself, which is mostly a social problem²⁹⁸. In addition, for the first time in the history of the debates surrounding mandatory minimum penalties, a connection was made regarding the increase in crime and increases in inflation and other negative aspects of the Canadian economy, stating that when the economy is poor and inflation is high, there are increases in crime rates²⁹⁹. Lastly, those in support of the legislation maintained that the mandatory penalties would be an effective deterrent because they removed some of the sentencing inconsistencies which were a concern³⁰⁰. There was no response recorded to this criticism. Possibly due to the lengthy debates that occurred for this Bill, it was not able to pass before the end of the session and died on the order table. However, the Bill was tabled the following session with a few minor amendments.

The new Bill³⁰¹ was essentially the same with regards to the minimum penalties stated in the above Bill. Given the extensive opposition in the previous session, there was a surprisingly great deal of support for this Bill as there was very little in the line of debates. The debates that were conducted were simply affirmations as to the need for a Bill such as this one and was ultimately read a third time and passed³⁰².

During the second session in 1976, another Bill³⁰³ was tabled that attempted to add a six month minimum penalty upon summary conviction for possession of a narcotic

²⁹⁸ *House of Commons Debates* (March 8, 1976) at 11585.

²⁹⁹ *House of Commons Debates* (March 8, 1976) at 11585.

³⁰⁰ *House of Commons Debates* (March 11, 1976) at 11716.

³⁰¹ Bill C-51, *An Act to Amend the Criminal Code*, 2nd sess., 30th Parl., 1977.

³⁰² *House of Commons Debates* (July 18, 1977) at 7770.

³⁰³ Bill C-298, *An Act to Amend the Narcotic Control Act*, 2nd sess., 30th Parl., 1976.

and seven years upon indictable conviction under the *Narcotic Control Act*. As is common in the majority of the Bills introduced, it only was read once before dying on the order paper.

There were two further attempts at establishing new minimum penalties during the 1976 Parliamentary session. The first Bill³⁰⁴ addressed changes to the *Criminal Code* and intended to create a minimum penalty of three months for anyone convicted of intimidating employees. As with many *Criminal Code* Bills, it received a first reading and died on the table.

The second Bill³⁰⁵ attempted to amend the *Narcotic Control Act*. The aim of this Bill was to create a minimum six month term for a summary conviction of possession of a narcotic and seven years for a conviction on indictment. It also intended to create a ten year minimum penalty for a first conviction of trafficking in narcotics and a twenty-five year minimum for any subsequent convictions. The Bill was read once before it died on the table.

It was not until 1981 that the issue of mandatory minimum penalties was again debated in the House of Commons. The discussion was not based around the introduction of a *Criminal Code* amendment Bill, but with regards to the fact that since the death penalty was abolished, there has been an increasing need and desire for harsher penalties³⁰⁶. The debates went to say that there should be a minimum twenty year prison term for anyone convicted of possession of a firearm while committing an offence³⁰⁷.

³⁰⁴Bill C-346, *An Act to Amend the Criminal Code of Canada*, 1st sess., 30th Parl., 1976-1977.

³⁰⁵Bill C-398, *An Act to Amend the Narcotic Control Act*, 3rd sess., 30th Parl., 1977.

³⁰⁶*House of Commons Debates* (Mar. 26, 1981) at 8623.

³⁰⁷*House of Commons Debates* (Mar. 26, 1981) at 8623.

The only response by those opposed to this suggestion that a penalty of that length was far too severe³⁰⁸. The matter was referred to a Standing Committee to look further into the issue, but the issue then disappeared from the debates³⁰⁹.

This twenty-six year period (1955-1981) saw a large increase in the number of Bills tabled that aimed at adding to the *Criminal Code* and *Narcotic Control Act* minimum penalties, or increasing ones that were already in place. In all, there were thirty-four attempts to institute minimum jail terms, of which nine were successful³¹⁰. This period clearly demonstrates the desire of some members to increase the severity of the penalty structure but at the same time also reveals that the majority of the Parliamentarians did not support the use of minimum penalties. When there were debates on the Bills, the reasons given for the use of these penalties were mostly based on deterrence and denunciation. Some of the proponents of these Bills also indicated that minimum penalties would reduce disparities as well as protect the public from dangerous offenders. One of the more unique justifications used to support an increase in the minimum penalty of seven years for importing or exporting narcotics was based on the economic concepts of supply and demand as well as cost-benefit ratios.

The arguments against mandatory minimum penalties were much more abundant and this may be indicative of the fact that only a small percentage were passed. One of the most pervasive arguments found in the debates was that minimum penalties simply did not deter offenders from committing crimes. Other objections, such as judicial

³⁰⁸ *House of Commons Debates* (Mar. 26, 1981) at 8623.

³⁰⁹ *House of Commons Debates* (Mar. 26, 1981) at 8623.

³¹⁰ This number includes the number of times an attempt was made to add a minimum penalty.

discretion and difficulties getting convictions, which can be found throughout earlier debates were also present during this time period (1955-1981). Lastly, in the debates pertaining to the longer minima for murder convictions, concerns over humaneness, rehabilitative prospects, dangers to correctional workers as well as inmates were coupled with the more traditional arguments of mandatory penalties (eg. deterrence, disparity, denunciation, just deserts, incapacitation, etc.).

There were ten attempts³¹¹ to repeal minimum terms and six were successful. There was very little in the way of discussion of these repeals. In fact, the only reason given for the repeals was that the sections themselves were unnecessary.

Perhaps one of the more interesting amendments was the deletion of the *Ticket of Leave Act* and the creation of the National Parole Board. The new Board would only look at sentences that were two years or longer, thus the restrictions placed by the legislation would remove one of the options that had been available to some offenders. The pardon and royal prerogative were still available, however, it is unclear how often these options were exercised.

A New Consideration - The Charter Era: 1982-1998

The first attempt at passing a Bill that included a minimum penalty during the *Charter* era was in reference to the *Narcotic Control Act*. This Bill³¹² was similar in nature to previous efforts to amend the *Act*. It provided a minimum penalty of seven years for a first conviction of trafficking and a fourteen year minimum for any subsequent

³¹¹This number includes the repeals that came with the amendments and compilation of the *Narcotic Control Act*. The repeals included the minima for trafficking, possession, sending drugs through the mail and the provision that made it an offence for physicians, dentists and veterinarians from prescribing drugs for non-medical reasons.

³¹²Bill C-223, *An Act to Amend the Narcotic Control Act*, 2nd sess., 32nd Parl., 1984.

convictions. As with its predecessors, it only went to first reading where it died on the order paper.

During the following session a large Bill³¹³ was submitted and while it did not aim at creating or repealing any minimum penalties, the subject was discussed. There was some debate regarding the use of mandatory minimum penalties in this Bill, however, it was decided against their use for several reasons. The first was based on public opinion, namely that the public did not support mandatory minimum penalties for a first offence, but would rather have fines used as the mode of punishment³¹⁴. However, it was indicated that there was public support for mandatory penalties for second and subsequent offences³¹⁵. In discussing the decision not to institute more minima, there was some reference to the experiences in the United States. According to the speaker, some of the states had a large number of offences which carried minimum penalties and had resulted in increased use of plea bargaining, increases in the number of cases appealed and a greater strain on the system of corrections, both financially and with prison over-population³¹⁶. The conclusion reached was that more mandatory minimum penalties would be too much of an expense and Canadians were not in favour of the added financial burden³¹⁷. Therefore, it was decided that until Canadians are prepared to pay for the cost of mandatory minimum penalties, increasing fines would have to

³¹³Bill C-18, *The Criminal Law Amendment Act*, 1st sess., 33rd Parl., 1986.

³¹⁴*House of Commons Debates* (Dec. 20, 1984) at 1386.

The debates indicated that the Department of Justice had conducted surveys and studies which support the statements made regarding public opinion but did not elaborate any further.

³¹⁵*Ibid.*

³¹⁶*Ibid.*

³¹⁷*Ibid.*

suffice³¹⁸.

Possibly, as a result of the conclusions reached after this debate, the issue of mandatory minimum penalties was not raised again until 1991. Another possible reason for this time lapse was the newly enacted *Canadian Charter of Rights and Freedoms*. Initially, the *Charter* garnered a great deal of attention and later provided a new basis for questioning the general use of minimum penalties.

Nineteen ninety-one witnessed a significant number of debates concerning the use of mandatory minimum penalties for the illegal use of a firearm. Firearms legislation³¹⁹ was introduced that would increase to five years, the one year minimum term for anyone convicted the first time of using a firearm during the commission of an offence. For subsequent convictions, the penalty would be raised from a minimum of three years to eight years³²⁰. Under this new Bill, an offender would be ineligible for parole and the penalty must be served consecutively to any additional sentence(s) received for the other offences³²¹. In addition, for the charge to be withdrawn or if plea bargaining was to be used, the consent of the Attorney General would be required³²². During the second reading of this Bill, there was some discussion that this provision may contravene sections 7 and 12 of the *Charter*³²³. However, the House was reassured that the

³¹⁸ *House of Commons Debates* (Dec. 20, 1984) at 1386.

³¹⁹ Bill C-324, *An Act to Amend the Criminal Code of Canada*, 3rd sess., 34th Parl., 1991.

³²⁰ *Ibid*

³²¹ *Ibid*.

³²² *Ibid*.

³²³ *House of Commons Debates* (Mar. 31, 1992) at 9124.

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

Section 12: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

minimum penalty would be able to pass the standard set out by the S.C.C. because the punishment would fit the crime and would thus be justified³²⁴. The proponents of the Bill stated that, while the punishment was harsh, it was justified “to send a powerful message of deterrence to anyone thinking of taking a gun along to commit an offence”³²⁵.

In opposition to this Bill, criticisms were aimed at the general concept of minimum penalties instead of the specific contents of the Bill. One of the main arguments dealt with the issue of judicial discretion, stating that creating minimum penalties prevented judges from meting out justice³²⁶ and reduced the judges’ ability to deal with the variety and complexity of situations that arise³²⁷. Another criticism was that the length of terms suggested were arbitrary and would have no effect upon recidivism³²⁸, but would instead weigh heavily on correctional resources³²⁹. Lastly, one Member stated that by simply passing a law such as this one would not rid Canadians of the problem of using a firearm during the commission of an offence³³⁰. The Bill was dropped from the order paper pursuant to S.O. 96(1) after its second reading³³¹.

Another attempt to re-introduce the Bill occurred about eight months later, but it was again dropped from the order paper for the same reason³³². One more attempt was made

³²⁴*House of Commons Debates* (Mar. 31, 1992) at 9125.

The test set out by the Supreme Court is based on proportionality. The test is called the Oakes test, based on the case in which it originated. The following case law chapter will elaborate on this.

³²⁵*House of Commons Debates* (Nov. 19, 1991) at 4987.

³²⁶*House of Commons Debates* (Mar. 31, 1992) at 9127.

³²⁷*Ibid.* at 9130.

³²⁸*Ibid.* at 9131.

³²⁹*Ibid.* at 9127.

³³⁰*Ibid.* at 9128.

³³¹*Ibid.* at 9131.

³³²*House of Commons Debates* (Dec. 3, 1992) at 14508.
This time the Bill was introduced as Bill C-389.

at getting this Bill through but it was read once before it died on the table³³³.

In 1994, Bill³³⁴ was read into Parliament that would create a minimum penalty of five years for anyone convicted of using a firearm during the commission of an offence. This penalty would be served consecutively to any other sentence received. In addition, this minimum penalty would apply to all those involved in the crime, regardless of whether they had contact with the firearm or not. The reason given for introducing the Bill was based on what Canadians apparently wanted, specifically, harsher penalties used as deterrents³³⁵. The Bill was read once but died on the table³³⁶.

A Bill³³⁷ a similar in nature to the one above was read into Parliament during the same session. This Bill included a number of very interesting sections. One attempted to create a five year minimum penalty for a first conviction of using a firearm during the commission of an offence. Unlike the other Bill, there were no specifications as to which offences this law would apply, leaving it open for all offences committed with a firearm. This Bill also aimed at providing a minimum ten year term for any subsequent convictions. The introducers of the Bill stated that its purpose was to act as a deterrent and it was reasoned that a penalty this harsh would be a successful impediment³³⁸. In addition, the Bill attempted to add a minimum three year term for theft of a firearm, the

³³³ *House of Commons Debates* (Dec. 11, 1992) at 15115.
This final time, the Bill was introduced as Bill C-394.

³³⁴ Bill C-293, *An Act to Amend the Criminal Code of Canada*, 1st sess., 35th Parl., 1994.

³³⁵ *House of Commons Debates* (Dec. 5, 1994) at 8645.
No evidence or statistics were given to support this assertion.

³³⁶ *House of Commons Debates* (Dec. 5, 1994) at 8645.

³³⁷ Bill C-260, *An Act to Amend the Criminal Code of Canada*, 1st sess., 35th Parl., 1994.

³³⁸ *House of Commons Debates* (Sept. 21, 1995) at 14746.

penalty of which was also aimed at deterring this crime³³⁹. The supporters of the Bill acknowledged that there are difficulties in getting juries to convict when the offence carries a minimum term as well as being an expensive mode of punishment, but maintained that they would put their 'faith' in the judges and juries to proceed in accordance with the law³⁴⁰. Lastly, proponents of the Bill claimed that its contents addressed the root of all crime, the criminal, and not the irrelevant aspects such as the background of the offender³⁴¹. Ultimately, the Bill was dropped from the order paper after its second reading³⁴².

In 1995, the government introduced and passed a Bill³⁴³ that added the most minimum penalties in one Bill in the history of the *Criminal Code* and *Narcotic Control Act*. The Bill called for a minimum of four years imprisonment for anyone convicted of using a firearm while committing the following offences: criminal negligence causing death, manslaughter, attempted murder, causing bodily harm with intent to wound, sexual assault, aggravated assault, kidnapping, hostage taking, robbery, and extortion. Perhaps one of the more interesting aspects of this section of the Bill was that the penalties were woven directly into the offences to decrease the likelihood of plea bargaining. Other amendments included using a replica firearm during the commission of an offence, importing or exporting restricted/prohibited weapons or firearms, making a weapon automatic fire, possession of weapons for trafficking, trafficking weapons,

³³⁹ *House of Commons Debates* (Sept. 21, 1995) at 14746.

³⁴⁰ *House of Commons Debates* (Sept., 21, 1995) at 14746.

³⁴¹ *House of Commons Debates* (Sept., 21, 1995) at 14749.

³⁴² *House of Commons Debates* (Sept., 21, 1995) at 14749.

³⁴³ Bill C-68, *Firearms Act*, 1st sess., 35th Parl., 1995.

possession of a weapon that was obtained through the commission of an offence, possession of a prohibited or restricted weapon or firearm with ammunition, and possession of prohibited or restricted ammunition, all of which carry a minimum term of one year. Lastly, the Bill also included the offences of possession of a firearm knowing it is unauthorized, and possession of weapons, device or ammunition knowing it is unauthorized carried a minimum 1 year term for a second conviction and 2 years less a day for any subsequent convictions. There was very little debate on these penalty sections and the majority of debates tended to focus on the concepts of gun control and gun registration as this was a large Bill that dealt with many aspects of firearms. There was a great deal of criticism for this Bill based on research done by the Department of Justice which stated that mandatory minimum penalties are ineffective because the public is largely unaware of them and therefore cannot be an effective deterrent³⁴⁴.

The cost to the corrections system was also a main concern in the debates asserting that it would be a very expensive piece of legislation that would also cause prison populations to soar³⁴⁵. Ironically, there was also a suggestion that the four year minimum was not harsh enough and that an eight year minimum should be substituted instead³⁴⁶. In response to this suggestion, the government stated that using mandatory minimum penalties were not favourable because they limit judicial discretion and that an eight year minimum would be an insult to that discretion in addition to probably offending the *Charter*³⁴⁷. It was clearly felt by the introducers of the Bill that the four

³⁴⁴ *House of Commons Debates* (Feb. 16, 1995) at 9712.

³⁴⁵ *House of Commons Debates* (June 13, 1995) at 13733.

³⁴⁶ *House of Commons Debates* (June 12, 1995) at 13622.

³⁴⁷ *House of Commons Debates* (June 12, 1995) at 13622.

year minimum would not offend the *Charter* and would not be an affront to judicial discretion. There were also concerns that the minimum would result in a ceiling being placed on the sentences meted out for these offences³⁴⁸. In light of all these criticisms, it is surprising that the Bill was read a third time and passed, adding an astonishing twenty new mandatory minimum penalties to the *Criminal Code*³⁴⁹.

During the same session another Bill³⁵⁰ was read into Parliament that was aimed at imposing a twenty-five year minimum term for a third conviction of a violent offence. This was a minimum sentence and not the minimum period for parole eligibility. Introducers of this Bill as well as similar Bills appear to lack an understanding of the term life imprisonment and parole eligibility periods associated with it. The purpose of the Bill was deterrence and the protection of society³⁵¹. In support of this legislation, it was stated that it would be less expensive to society to incarcerate these offenders than to let them continue offending³⁵². Criticisms of this Bill were levelled at the arbitrary nature of the penalty as well as the incompatibility of the penalty with the principles of sentencing, namely, proportionality³⁵³. It was also stated that the Bill would limit judicial discretion too much and that prison over-crowding would become a bigger problem than it already was³⁵⁴. The Bill was referred to the Standing Committee on Justice and Legal

³⁴⁸ *House of Commons Debates* (June 12, 1995) at 13621.

³⁴⁹ *House of Commons Debates* (June 13, 1995) at 13733.

³⁵⁰ Bill C-301, *An Act to Amend the Criminal Code of Canada*, 1st sess., 35th Parl., 1995.

³⁵¹ *House of Commons Debates* (June 8, 1995) at 13500-1.

³⁵² *House of Commons Debates* (June 8, 1995) at 13502.

³⁵³ *House of Commons Debates* (June 8, 1995) at 13501.

³⁵⁴ *House of Commons Debates* (June 8, 1995) at 13505-6.

Affairs and was withdrawn³⁵⁵.

In response to criticisms by various Members of Parliament that the justice system was not tough enough on dangerous and repeat offenders³⁵⁶, a Bill providing a minimum seven year penalty for impaired driving causing death was proposed in 1996³⁵⁷. Oddly, although the introduction of this Bill gave the impression that it was aimed at dangerous recidivists, it did not single out the repeat offender nor did it outline the circumstances where the offender would be considered 'dangerous'. This amendment was designed to be a deterrent for drinking and driving³⁵⁸. At the time this Bill was proposed, there was no minimum penalty in place for impaired driving causing death, but the maximum penalty of fourteen years existed. One of the main reasons why a minimum penalty was considered the most appropriate way of dealing with this was because there was a great deal of sentencing disparity across Canada for this crime with the majority of sentences at the lower end of the spectrum³⁵⁹. The reason stated for the short sentences was that "defence lawyers have chipped away at appropriate sentencing...the [sentencing] precedents in law today in no way reflect the seriousness, the tragedy of someone who chooses to drink and drive and kills"³⁶⁰. In opposition to the Bill, opponents claimed that drinking and driving was a social problem and that increasing the harshness of the penalty would not deter offenders from driving while

³⁵⁵ *House of Commons Debates* (June 8, 1995) at 16510.

³⁵⁶ *House of Commons Debates* (Feb. 28, 1996) at 34.

³⁵⁷ Bill C-201, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 35th Parl., 1996.

³⁵⁸ *House of Commons Debates* (Feb. 29, 1996) at 93.

³⁵⁹ *House of Commons Debates* (Mar. 19, 1996) at 946.

³⁶⁰ *Ibid.*

impaired³⁶¹. It was suggested that due to the diversity and complexity of offenders, a variety of different options needed to be available to deal with this problem³⁶². In addition, there was some question as to whether imposing a minimum penalty for this offence would be consistent with the fundamental purposes and principles of sentencing found in section 718 (See Appendix C) of the *Criminal Code*³⁶³. One Member of Parliament explained that providing a minimum for this offence would result in the minimum becoming the “ceiling” for terms and that judges would be prevented from using their discretion to determine the best possible punishment for each case³⁶⁴. Those opposing this Bill questioned the arbitrariness of the minimum, asking why it was necessary for this offence when there are several others in the *Code* that could also be considered just as serious, if not more so³⁶⁵. The Parliamentary debates were quite heated as one Member questioned the motives of those who introduced the Bill stating that they chose to cite cases that would purposely inflame emotions while not reflecting the norm, thus contributing to misinformation in order to further political agendas³⁶⁶. Another criticism was aimed at the effectiveness of a minimum penalty as a deterrent given that the Department of Justice determined that the majority of Canadians were not aware of which offences carried minimum penalties³⁶⁷. Lastly, the cost of such an

³⁶¹*Ibid.* at 948.

³⁶²*Ibid.*

³⁶³*Ibid.* at 949.

³⁶⁴*Ibid.*

A minimum term is often criticized for becoming what is termed, a “ceiling”. This refers to a process where the minimum term essentially becomes a maximum in that judges will not provide a term that is longer than the minimum.

³⁶⁵*Ibid.*

³⁶⁶*Ibid.* at 950.

³⁶⁷*Ibid.*

amendment for the criminal justice system and in particular, corrections, was considered too great to incur in light of the problems with the Bill³⁶⁸. The decision to continue forward with this Bill was put to a vote with the majority in favour of not allowing it to proceed³⁶⁹. Incidentally, several attempts were made to re-introduce the Bill, none of which were successful³⁷⁰.

In 1996, a Bill³⁷¹ was introduced that would create a new offence of aggravated procuring and living off the avails of child prostitution which would carry a minimum five year term of imprisonment. The Bill was intended to denounce this crime by using the legislative branch, rather than the judicial branch³⁷². There was some indication that there may be problems with possible *Charter* challenges with regards to the minimum penalty, but the Member introducing the Bill felt that it was a necessary deterrent³⁷³. The Bill went to a third reading and was passed³⁷⁴.

During this same session, the *Narcotic Control Act* was repealed and re-introduced in a Bill as the *Controlled Drugs and Substances Act*³⁷⁵. It is interesting to note that this piece of legislation did not include, nor did it intend to include any mandatory minimum penalty provisions. There were no debates that questioned the exclusion of this means of punishment. The Bill was read a third time and received royal

³⁶⁸ *Ibid.*

³⁶⁹ *House of Commons Debates* (Sep. 24, 1996) at 1653-4654.

³⁷⁰ Attempts to re-introduce this Bill occurred on December 2, 1996; February 7, 1996 and finally on October 24, 1997.

³⁷¹ Bill C-27, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 35th Parl., 1996.

³⁷² *House of Commons Debates* (June 10, 1996) at 3546.

³⁷³ *House of Commons Debates* (April 14, 1997) at 9674.

³⁷⁴ *Ibid.* at 9681.

³⁷⁵ Bill C-8, *The Controlled Drugs and Substances Act*, 2nd sess., 35th Parl., 1996.

assent in June 1996³⁷⁶.

This sixteen year period, 1982 to 1998 was the most successful at passing mandatory minimum penalty legislation. For the first time ever, there were no attempts made at repealing any sections, in fact, the last attempt at repealing a section was in 1969. This may be due to the fact that the public appears to support penalties that are mandatory and Members of Parliament, and the government of the day are not willing to alienate potential voters by introducing or supporting legislation that is not 'tough on crime'. In all, there were thirty attempts to pass mandatory minimum penalty provisions and a surprising twenty-one were successful. The fact that the vast majority of these sections were within the same Bill is inconsequential as any of them may have been removed in part without rejecting the Bill as a whole. There were very few arguments that were put forth in support of mandatory minimum penalties, which is surprising given the large number that were passed during this time. The most common justification was that minimum terms would serve as a deterrent. Reducing sentencing disparity was also present in support of this mode of punishment. There were two new arguments that were used to support these Bills. One stated that harsher, more rigid penalties addressed the root of crime, the offender, the other claimed that due to the influence of defence attorneys, penalties had been decreased to a point where they were no longer fitting for the crime. The arguments against minimum penalties were more abundant. Judicial discretion, cost and concerns regarding prison over-populating were some of the main issues. However, it was also claimed that these penalties do not deter, do not deal with

³⁷⁶ *House of Commons Debates* (June 20, 1996) at 4196.

the root of the crime problem, and have no effects upon recidivism. Other concerns included that mandatory minimum penalties may be in opposition to the fundamental principles of sentencing, they may create “ceilings” (that is the minimum penalty becomes the only penalty judges impose), and perhaps one of the bigger issues were possible *Charter* challenges which are based on the idea that various sections of the *Charter* are violated by the mandatory minimum penalties³⁷⁷. Clearly, there were far more persuasive arguments against mandatory minimum penalties than there were in support of it.

Lastly, it is important to note that there were no changes in the penalty options available to judges faced with sentencing offenders convicted of crimes that carry minimum terms. The only options were the pardon and the royal prerogative. Whether these two sections were, or are ever used is unknown.

The Current Situation: 1999

In 1999, four Bills were tabled that intended to add minimum penalties to the *Criminal Code*, none of which were successful. The first Bill³⁷⁸ proposed adding a two year minimum term for a second or subsequent conviction of breaking and entering a dwelling house. This Bill only went as far as first reading³⁷⁹. The second Bill³⁸⁰ introduced provided for a five year minimum penalty for anyone convicted of sexual interference or invitation to sexual touching of children under the age of fourteen. As with the previously mentioned Bill, it only went to first reading before dying in the order

³⁷⁷These arguments are discussed at length in Chapter four, case law analysis.

³⁷⁸Bill C-475, *An Act to Amend the Criminal Code of Canada*, 1st sess., 36th Parl., 1999.

³⁷⁹*House of Commons Debates* (Feb. 11, 1999) at 11742.

³⁸⁰Bill C-504, *An Act to Amend the Criminal Code of Canada*, 1st sess., 36th Parl., 1999.

table³⁸¹.

A third Bill³⁸² that was presented during the last session aimed at establishing a minimum penalty of ten years for using a firearm, if it was not discharged, in the commission of an offence. This minimum was to be served consecutively to any other penalty that was imposed. The Bill³⁸³ also provided a twenty year minimum term if the firearm was discharged during the offence and twenty-five years if the firearm was discharged resulting in anyone but the offender or an accomplice being wounded, maimed, or disfigured. This Bill was read once before it died³⁸⁴.

Lastly, the fourth Bill³⁸⁵ proposed increasing the minimum penalty for using a firearm during the commission of an offence³⁸⁶ from four years to ten years, or twenty years if the firearm is discharged. In the event that someone other than those involved in the offence is injured, the minimum would be twenty-five years in prison³⁸⁷. An interesting thing happened during the debates as there is some confusion as to what the current minimum penalty was at the time of reading. Some felt that the minimum was one year for a first offence and three years for any subsequent offences. This confusion may be based upon the fact that there have been, and still are, two sections of the *Criminal Code* that are very similar. Section 85 provides a minimum of one year for the

³⁸¹ *House of Commons Debates* (April 29, 1999) at 14491.

³⁸² Bill C-516, *An Act to Amend the Criminal Code of Canada*, 1st sess., 36th Parl., 1999.

³⁸³ *Ibid.*

³⁸⁴ *House of Commons Debates* (June 2, 1999) at 15730.

³⁸⁵ Bill C-484, *An Act to Amend the Firearm Act*, 1st sess., 36th Parl., 1999.

³⁸⁶ The offences that this section would apply to are murder, manslaughter, attempted murder, assault causing bodily harm with intent, sexual assault, aggravated assault, kidnapping, hostage taking, robbery and extortion.

³⁸⁷ There was no indication that this referred to a minimum parole eligibility period so it is logical to assume that it did not refer to parole eligibility.

first conviction and three years for any subsequent convictions, whereas the four year minima are found directly in the offence sections. It is interesting to note that the law-makers are themselves misinformed as to which offences carry minimum penalties, yet advocate the use of minimum penalties based on the idea that offenders will be deterred by the punishment, when they themselves are unaware³⁸⁸. For deterrence to be effective, the penalty has to be known, which is clearly not the case of many Parliamentarians, and as will be seen in chapter three, many offenders are also unaware which offences carry minimum penalties. In opposition to the Bill, the issue of judicial discretion was addressed stating that these penalties should be appropriate to the individual as well as the circumstances surrounding the offence³⁸⁹. Additional criticisms stated that the sentences outlined in the Bill were 'absurd' in length and a violation of the principle of totality³⁹⁰. Also included in the debates against the Bill was the argument that there was disproportionality among sections within the *Criminal Code* and there were concerns that such penalties would not survive a *Charter* challenge³⁹¹. Not surprisingly, the Bill died on the order paper.

In the current session of the House of Commons, there are three Bills that are being considered by Parliament, of which, all have reached first reading. The first Bill³⁹² aims at adding a two year minimum penalty for a second or subsequent conviction of breaking and entering into a dwelling house. The second Bill³⁹³ is similar to others that

³⁸⁸ *House of Commons Debates* (April 15, 1999) at 17:45 pm.

³⁸⁹ *House of Commons Debates* (April 15, 1999) at 17:55 pm.

³⁹⁰ *House of Commons Debates* (April 15, 1999) at 17:55 pm.

³⁹¹ *House of Commons Debates* (April 15, 1999) at 18:00 pm.

³⁹² Bill C-219, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 36th Parl., 1999.

³⁹³ Bill C-265, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 36th Parl., 1999.

have been tabled in that it intends to create a minimum term of twenty-five years if convicted a third time of either rape or murder³⁹⁴. Again, as with other Bills that have been introduced that aim at adding a twenty-five year minimum penalty, this refers to the minimum term of imprisonment and not parole eligibility periods. Lastly, the third Bill³⁹⁵ attempts to add a four year mandatory minimum penalty if convicted of joy riding. The outcome of these Bills is not yet known, but based on past Bills that are similar in nature, it is unlikely that they will pass.

Clearly, if the past is any indication, this Parliamentary session suggests that the rate which Bills containing mandatory minimum penalties will continue to increase³⁹⁶.

Conclusion

One of the main patterns that has arisen as a result of this examination is the change in the nature of the offences which carry a minimum penalty. In the original *Criminal Code*, almost all of the offences that carried a mandatory minimum penalty were concerned with the corruption of individuals in who were working in positions where abuses could occur³⁹⁷. These were not offences against the person, but instead against Canadians and their institutions.

The nature of minimum penalties in the present system has since changed. Possibly with the exception of the drinking and driving offences, all the minimum

³⁹⁴There was no indication that this referred to a minimum parole eligibility period so it is logical to assume that it did not refer to parole eligibility.

³⁹⁵Bill C-426, *An Act to Amend the Criminal Code of Canada*, 2nd sess., 36th Parl., 2000.

³⁹⁶As noted in the introduction, the vast majority of bills that are introduced are private members bills and not government bills.

³⁹⁷For example, there minimum penalties for frauds upon the government, stealing post-letters, stealing post-letter bags, and corruption in municipal affairs.

penalties that are now found in the *Criminal Code* are attached to offences against the person. This change in focus is very interesting but unfortunately further analysis is beyond the scope of this thesis.

Undoubtedly, there has been a continual increase in the use and attempted use of mandatory minimum penalties in Canada. However, the option clauses that were available when the first minimum penalties were enacted are no longer found in the *Criminal Code*. Although there are a variety of arguments that both support and oppose the use of this mode of punishment, it appears that very little has been resolved in light of the Parliamentary debates. The protection of the public, deterrence, sentencing disparity, and denunciation are the main arguments that are being used to support the use of minimum penalties. Arguments that have been used against mandatory minimum penalties include the removal of judicial discretion, difficulties getting juries to convict, rigidity, inconsistency with other, more serious crimes, an ineffective deterrent and that they are too costly. The same justifications for both sides are still being used years after they were first heard despite the radical changes that have taken place both in society in general as well as the criminal justice system.

If the issue is at all to be dealt with in any effective or informative way, the pattern of use must be addressed and provided to those in decision-making positions in order to fully appreciate the complexities and consequences of this mode of punishment. It is crucial that we take a critical and informed look at where the justice system has been in the past and determine the objectives and outcomes we are attempting to achieve. This must be done in conjunction with other related aspects of the system to create a

coherent and logical system.

CHAPTER THREE

Findings from Commissions and Committees

The federal government has created many committees and commissions over the last sixty-two years that dealt with various issues surrounding sentencing in the criminal justice system. Many of the reports published by these bodies of inquiry have addressed the multiple factors that are either directly or indirectly related to mandatory minimum penalties. This chapter will look at a number of official government documents that are relevant to this topic to determine what officially government sanctioned research has yielded.

Nine reports during a sixty-two year time period are examined in this chapter³⁹⁷. As time went on, each report paid increasingly more attention to minimum penalties. With the exception of one³⁹⁸, all either directly, or by inference, stated that mandatory minimum penalties are an inappropriate means of punishment for all offences other than murder and high treason. A common element found in a number of the reports was the concern that the removal of judicial discretion from judges was transferred to Crown attorneys and the police. The problem here is that judges are accountable for their decisions, whereas the exercise of discretion by Crown attorneys and the police is informal and not subject to external scrutiny. In addition, a number of the reports advocated the use of restraint in sentencing, particularly with respect to the use of

³⁹⁷The nine reports are as follows: Archambault Commission (1938), Fauteux Report (1956), Ouimet Report (1969), Le Dain Commission (1973), Law Reform Commission of Canada: Principles of Sentencing and Disposition (1974), Law Reform Commission of Canada: Imprisonment and Release (1975), Law Reform Commission of Canada: Studies on Imprisonment (1976), Canadian Sentencing Commission Report (1987), and the Daubney Report: Taking Responsibility (1988).

³⁹⁸The 1988 Daubney Report is an exception to this statement.

imprisonment as a sanction.

There was general support for maintaining the minima for murder and high treason. Most reports stated that minimum penalties limited judicial discretion, are an ineffective deterrent and an expensive mode of punishment. Later reports expressed concern that the *Charter* may create some problems for mandatory minimum penalties in that they may violate sections 9 and 12. In addition, the issue of consistency with other offences that do not carry a minimum penalty was also considered. For example, minimum penalties have been in place for a variety of offences, ranging from gaming and betting and selling insurance without a licence to the most serious offence of murder.

The general consensus reports which spanned between 1938-1988 is that throughout the history of the criminal justice system, there has been very little official government support for the use of mandatory minimum penalties. Clearly, the continued use of such an ineffective penalty structure is surprising and questionable in light of these findings.

Research Methodology

In choosing the reports to analyse for the purpose of this thesis, I conducted a general library search of all reports that were the result of inquiries made into issues related to the Canadian criminal justice system. In addition, all reports listed in the 1987 report of the Canadian Sentencing Commission, which had also conducted the same sort of analysis, were looked at. With the exception of the 1988 Daubney Report from the Standing Committee on Justice and the Solicitor General, *Taking Responsibility*, there have been no further reports on sentencing or mandatory minimum penalties.

Archambault Commission: 1938

The Archambault Commission³⁹⁹ was the first Royal Commission that addressed mandatory minimum penalties and related issues. At the time this report was written, there were sixteen offences in the *Criminal Code* and *Opium and Narcotic Drug Act* that carried minimum penalties. The report outlined the problem of sentencing disparity which some claimed could be reduced by instituting minimum penalties. However, the Commission stated that disparity should be expected given basic difference in regions, experience and knowledge of the judge as well as characteristics of the offence⁴⁰⁰. The Commission maintained that sentencing disparity would not be resolved by removing judicial discretion and imposing minimum penalties⁴⁰¹. The report also stated that “imposing minimum penalties for certain offences, thus fettering judicial discretion of the trial judge or magistrate in individual treatment of special circumstances is inadvisable”⁴⁰² but did not elaborate further on the recommendation.

At the time that this report was published, suspended sentences, fines in lieu of punishment, the pardon, the royal prerogative and the *Ticket of Leave Act* were all options available for offences that carried minimum penalties. Of these options, the royal prerogative was by far the most vague and did not define or outline the circumstances in which it was used. In addressing the ambiguity associated with the provision, the Commission asserted that it was best not to clearly designate the circumstances in which the royal prerogative would be used because it was meant to be applied whenever mercy

³⁹⁹ *Royal Commission to Investigate the Penal System of Canada* (Ottawa: King's Printer, 1938).

⁴⁰⁰ *Ibid.* at 170.

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

was considered appropriate and should not be viewed as a right⁴⁰³. It would appear as though the Commission advocated a sentencing structure that would be able to take in to account all the complexities and differences that can occur in each case and offender. The issues relating to minimum terms that were discussed in this report would continue to plague debates as arguments regarding the usefulness and necessity of this punishment right into present day.

Fauteux Report: 1956

This report⁴⁰⁴ was published two years after the large scale *Criminal Code* revision was completed in 1954. At the time, there were only three offences in the Code that carried a minimum penalty and five in the *Opium and Narcotic Drug Act*. The Fauteux Committee had a number of interesting things to say about sentencing and in a more indirect manner, mandatory minimum penalties. The report stated that the primary purpose of punishment in the criminal justice system was to protect the public using general and specific deterrence⁴⁰⁵. In particular, the report was critical of the limits that were placed on certain sentencing options as a result of the revision. The Committee stated that the revised suspended sentence section was too rigid as it specifically excluded offences that carried a minimum penalty and recommended the removal of the limits as they impinged an informed judiciary from determining the most appropriate sanction⁴⁰⁶. The pardon was also addressed and it was recommended that

⁴⁰³ *Ibid.* at 235.

⁴⁰⁴ *Report of the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Ottawa: King's Printer, 1956).

⁴⁰⁵ *Ibid.* at 11.

⁴⁰⁶ *Ibid.* at 12.

the circumstances, such as number of convictions, engaging in law abiding behaviour and the nature of the offence and offender, should be overtly indicated as to when an ordinary pardon could be granted⁴⁰⁷. The rationale given by the Committee was that if an offender was aware of the types of behaviour that could influence whether they received a pardon or not, they would be more likely to engage in those positive behaviours⁴⁰⁸. With reference to minimum penalties, the Committee maintained that the appropriate severity and duration of a punishment should be left “exclusively” to the courts⁴⁰⁹. Clearly, the thinking of the Fauteux Committee was in line with what had been iterated by the Archambault Commission.

Quimet Report: 1969

This report⁴¹⁰ was the first to devote an entire chapter to sentencing and the issues surrounding it. As mentioned in the history chapter, this report appears to have influenced some of the debates that were heard in the House of Commons after it was released. Incidentally, the same year this report was published, the number of minimum penalties found within the *Criminal Code* and the *Narcotic Control Act* was an all-time low. In total, four offences that carried minimum terms with two penalties being repealed that same year⁴¹¹. This pattern would hold until 1976 when the minimum

⁴⁰⁷ Although not outlined in the *Criminal Code*, there were three kinds of pardons. The free pardon could be granted to those who demonstrated after the trial that there was new evidence that proved their innocence. The conditional pardon could be granted in cases in which an accomplice aided in the conviction of the principle offender. The ordinary pardon was much more broad and looked at the circumstances surrounding the offence and the offender.

⁴⁰⁸ *Report of the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Ottawa: King's Printer, 1956) at 135.

⁴⁰⁹ *Ibid.* at 136.

⁴¹⁰ *Report of the Canadian Committee on Corrections, Towards Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969).

⁴¹¹ This low number of offences that carried a minimum penalty was maintained until 1976.

penalties for murder, high treason and using a firearm during the commission of an offence were added to the *Criminal Code*.

As in the previous report, the Ouimet report asserted that the protection of the public was the paramount principle of the criminal justice system⁴¹² followed by deterrence (both general and specific), rehabilitation and, when necessary, confinement⁴¹³. Surprisingly given the importance placed on deterrence, the report acknowledged that the effectiveness of deterrence was not clear⁴¹⁴. It also stated that imprisonment should only be used as a last resort, when an offender has been determined to be dangerous and he/she needs to be separated from society⁴¹⁵. In addition, the report asserted that vengeance and retribution are not appropriate purposes for meting out punishment⁴¹⁶. Lastly, but perhaps most importantly, the Committee recommended that all mandatory minimum penalties (with the exception of murder) be repealed because “they constitute unwarranted restrictions on the sentencing discretion of the court”⁴¹⁷. Again, as with the previous document, the Committee did not elaborate on this statement.

Le Dain Commission: 1973

Although this report⁴¹⁸ deals primarily with the issue of the non-medical use of drugs, there are some interesting and relevant comments that were made with regards to

⁴¹²*Ibid.* at 185.

⁴¹³*Ibid.* at 194.

⁴¹⁴*Ibid.* at 189.

⁴¹⁵*Ibid.* at 190.

⁴¹⁶*Ibid.* at 194.

⁴¹⁷*Ibid.* at 210.

⁴¹⁸*Final Report of the Commission of Inquiry into the Non-Medical Uses of Drugs* (Ottawa: Queen's Printer, 1973).

the use of the criminal law in prosecuting drug related offences. At this time, the *Narcotic Control Act* was in effect and the only mandatory minimum penalty that was contained in it was the seven year minimum for importing or exporting narcotics. Even though this report was completed only four years after the Ouimet Commission, more advanced information was provided on the nature and effectiveness of punishment. For example, the report examined the relationship between the likelihood of being caught committing a crime and the effect it may have on deterrence. Specifically, the report stated it was very unlikely that one would be caught engaging in criminal activity, such as drug use, thus effectively negating the deterrence aspect of the punishment⁴¹⁹.

Ultimately, the opinion of the Commission was that mandatory minimum penalties “while assuring a certain minimum of severity for serious offences, limit judicial discretion [that is] required to deal appropriately with less serious offences”. The Commission did not elaborate on this statement, however, it could be inferred that unless a definitive distinction between serious and non-serious offences could be made, an arbitrary minimum penalty should not be used as it may result in unfair penalties being imposed on the less-serious offenders. Drawing a distinction between less and more serious offences could be difficult as it is subjective in nature. It is interesting to note that despite the apparent popularity of minimum penalties reflected in the numerous Bills that were introduced in the 1970's, the Commission was of the view that the maxima that were in place were severe enough to be effective⁴²⁰.

⁴¹⁹*Ibid.* at 54.

⁴²⁰*Ibid.* at 90.

The Principles of Sentencing and Disposition: 1974

This report was one of the first working papers⁴²¹ published by the Law Reform Commission of Canada. Although this paper did not address mandatory minimum penalties directly, it did look at the purposes and principles of sentencing in the criminal justice system. The report stated that “because of the doubtful effectiveness of imprisonment in reducing recidivism...the high costs of imprisonment, both the economic and social costs as well as direct and indirect costs, economy demands that imprisonment be used with restraint”⁴²². In addition, the report also stated that non-custodial penalties should be used unless the gravity of the offence, past convictions, the recent nature of past convictions, and risk of re-offending and committing a serious crime, indicated that a custodial sanction is required⁴²³. If one were to address these recommendations in relation to mandatory minimum penalties, a decidedly high level of incompatibility is observed. Predetermined penalties cannot take into account the number of possible people who will offend or the number of offenders who will be prosecuted thereby eliminating the control over the number of offenders sent to prison. Minimum penalties also do not take into account the various circumstances that were outlined by the report because they are rigid and do not allow for deviation from the prescribed legislation. The principle of restraint, which is emphasized in this report is not congruent with mandatory minimum penalty policies.

⁴²¹ Law Reform Commission of Canada, *The Principles of Sentencing and Disposition: Working Paper 3* (Ottawa: Information Canada, 1974).

⁴²² *Ibid.* at 13.

⁴²³ *Ibid.* at 13.

Imprisonment and Release: 1975

This was another working paper that was released by the Law Reform Commission of Canada⁴²⁴. Similar to the previous paper the Commission published, this one addressed the issues surrounding imprisonment and release. On the whole, the paper reflected that the Commission was generally opposed to the use of imprisonment as it was viewed as a means of exacting revenge⁴²⁵. The main criticism of the Commission was that prisons simply “serve as a dumping ground for minor social problems”⁴²⁶ in addition to being a very expensive mode of punishment that should only be used when all other options have been exhausted⁴²⁷. As with the previous report by the Law Reform Commission, this one also advocated policy directions that were contradictory to mandatory minimum penalties.

Studies on Imprisonment: 1976

This working paper by the Law Reform Commission of Canada provides a more in-depth analysis of punishment in Canada⁴²⁸. In particular, this working paper directly addresses the issue of mandatory minimum penalties. The Commission stated that, with regards to minimum penalties, “experience does not show that they have any obvious special deterrent or educative effect”⁴²⁹. The paper failed to elaborate on this statement or the basis for the conclusion. However, the Commission did go on to outline some of

⁴²⁴Law Reform Commission of Canada, *Imprisonment and Release: Working Paper 11* (Ottawa: Information Canada, 1975).

⁴²⁵*Ibid.* at 5.

⁴²⁶*Ibid.* at 6.

⁴²⁷*Ibid.*

⁴²⁸Law Reform Commission of Canada, *Studies on Imprisonment: Working Paper 11* (Ottawa: Information Canada, 1976).

⁴²⁹*Ibid.* at 24.

the problems associated with minimum punishments stating that they remove judicial discretion and thereby prevent judges from determining the most effective and suitable penalty for the offender in the given circumstances⁴³⁰. In addition, the Commission expressed concern regarding the use of net-widening policies, such mandatory minimum penalties, in light of the immense variety of situations that surround every offender and offence⁴³¹. They acknowledged that it is unlikely that all offenders who violate a particular law would require a sentence that has been predetermined⁴³².

The Canadian Sentencing Commission Report: 1987

The only commission that exclusively addressed the issues surrounding sentencing in Canada, released its final report in 1987⁴³³. At this time, there were ten offences in total that carried minimum penalties, three of which were mandatory life terms. During the same year, but after the report was published, the S.C.C. struck down the seven year minimum penalty for importing or exporting narcotics bringing the total number of offences that carried a minimum penalty to eight. In their report, the Canadian Sentencing Commission dedicated an entire chapter to the issue of mandatory minimum penalties. One of the questions they asked themselves was “whether mandatory minimum fines and terms of imprisonment constituted just and effective sanctions and whether there is a real need for their continued existence”⁴³⁴. After conducting extensive research and consultations, surveying judges, Crown attorneys,

⁴³⁰*Ibid.*

⁴³¹*Ibid.*

⁴³²*Ibid.*

⁴³³*Report of the Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987).

⁴³⁴*Ibid.* at 175.

defence lawyers and the public, the Commission determined with the exception of murder and high treason, that mandatory minimum penalties should be abolished because they “represent an over-reaction to excessive discretion and individualization of sentences and, in forbidding consideration of the circumstances of each offender, mandatory minima can lead to sentences which are unduly harsh”⁴³⁵. In addition, the Commission outlined some of the more pressing problems that arise out of the use of minimum penalties, such as instances when juries acquitted offenders, even in the presence of overwhelming evidence to convict⁴³⁶. This represents a major breakdown in the justice system. The Commission also acknowledged that an offender is less likely to enter a guilty plea when he/she knows that there will be a minimum term involved, since the offender has nothing to lose by prolonging the process and going to trial⁴³⁷. Ultimately, this adds a great strain to the criminal justice system.

The Commission also dealt with some of the arguments that have been, and are still being used to support mandatory minimum penalties. There has been wide-spread belief that a minimum punishment will act as a general deterrent and prevent others from committing the same crime based on the prescribed punishment. However, the Commission conducted a survey and determined that, not only is the public, on the whole, unaware of which offences carry minimum penalties, but that a significant number of those involved in the justice system are unaware as well⁴³⁸. This clearly defeats the

⁴³⁵ *Ibid.* at 179.

⁴³⁶ *Ibid.* at 180.

Clearly, this is a problem that is repeated both in previous reports as well as in the House of Commons.

⁴³⁷ *Ibid.* at 180.

⁴³⁸ *Ibid.* at 181.

ideology behind deterrence as a principle of sentencing.

Another argument that has been used to support the adoption of mandatory minimum punishments is that they reduce disparity and prevent biases and prejudices from entering into the penalty process. Everyone who commits a given offence receives the same minimum punishment, regardless of their race, age, social standing, gender, religion or other defining characteristic. The Commission felt that minimum penalties in and of themselves, do not have the same effect upon all offenders and therefore, since these characteristics cannot be considered, a penalty that may have a harsher impact on one and a more lenient impact on another, cannot be compensated for⁴³⁹. To compound this problem even further, biases can come into play earlier in the justice process as with plea bargaining, an offer can be made to certain offenders and not others⁴⁴⁰.

Related to this problem of bias is the issue of discretion. When the penalty is predetermined, the judge has very little choice when imposing a sentence that belongs at, or below, the legislated minimum. In fact, the Commission surveyed a group of judges and found that 57% felt that mandatory minimum penalties infringed upon their capacity to ensure fair sentences⁴⁴¹. With minimum penalties, the Crown has a different kind of discretion in that he/she can decide whether or not to proceed with the charge. The police also have discretion in that they either release an offender with a warning or arrest the individual. The main concern with this type of discretion is that there is little accountability that could ensure fair and just treatment.

⁴³⁹*Ibid.* at 186.

⁴⁴⁰*Ibid.* at 180.

⁴⁴¹*Ibid.* at 180.

The Commission also dealt with the problem of “ceiling” effects as a result of having minima in place. The existence of a minimum term, the Commission determined, does create a “ceiling” in that judges are less likely to impose a term that is above the minimum⁴⁴². This suggests that there is a wide range of offenders getting the same penalty, with little or no emphasis placed on other factors surrounding the offender and the offence. As will be seen in the following chapter, when the penalty imposed is above the minimum, it is inclined to be appealed, thereby also adding to the cost of the system.

Lastly, and perhaps most important, is the question of the *Canadian Charter of Rights and Freedoms*⁴⁴³. The Commission acknowledges that mandatory minimum penalties may contravene sections 9 and 12 of the *Charter*, which protect against arbitrary imprisonment and cruel and unusual punishment, respectively. The Commission maintained that a minimum penalty may violate section 9 because “it requires a judge to impose a sentence without regard to the circumstances of the offence or the offender”⁴⁴⁴, thus no factors are considered, effectively making the penalty arbitrary. As will be seen in the following chapter, there have been several appeals that claim various minimum penalties in the *Criminal Code* are arbitrary, although as of yet, none have been successful. The allegation that minimum penalties constitute punishment that is cruel and unusual is addressed in the report when it notes the Supreme Court of Canada decision in *R. v. Smith*, which was the first case to ever strike down a minimum penalty using

⁴⁴²*Ibid.* at 183.

⁴⁴³*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴⁴⁴*Report of the Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 184.

section 12 of the *Charter*. The Commission looked directly at the Court's concern with the equality of the effect that a minimum penalty had on those convicted. Their main worry was with the fairness of the minimum penalty for those who were "convicted of the least serious instances of the offence who are [*sic*] denied the right to sentencing consideration unconstrained by a minimum"⁴⁴⁵. This proved to be a reality in the aftermath of *Smith*. There were several appeals launched to effectively lower the custodial sanctions that individuals were serving for importing drugs. As will be seen in the examples chosen, many penalties were ultimately lowered garnering support for the fears that the Commission had. Although the Commission felt that it was necessary to raise concerns regarding the *Charter*, they maintained that they were not in a position to determine whether or not mandatory minimum penalties did violate sections 9 and 12 of the *Charter*⁴⁴⁶.

Ultimately, the Commission recommended that, with the exception of murder and high treason, all mandatory minimum penalties should be revoked⁴⁴⁷. The reason given for the recommendation was that minimum penalties "serve no purpose that can compensate for the disadvantages resulting from their continued use"⁴⁴⁸. Finally, the Commission criticized the rationale provided by Parliament that minimum penalties reflect the relative seriousness of the offence because there are other serious crimes that

⁴⁴⁵*Ibid.* at 185.

⁴⁴⁶*Ibid.* at 187.

⁴⁴⁷*Ibid.* at 189.

The report did not elaborate as to why the Commission felt that minimum penalties were justified and appropriate for murder and high treason.

⁴⁴⁸*Ibid.* at 188.

do not carry a minimum penalty⁴⁴⁹. Instead, the Commission asserted that Parliament could express the aspect of gravity through the use of maximum penalties⁴⁵⁰.

Therefore, it is clear that the Commission, in addressing the two questions they felt would best reflect the issues surrounding mandatory minimum penalties, determined that this mode of punishment is not effective and just, and their use should not continue.

Daubney Report: Taking Responsibility: 1988

This report⁴⁵¹ from the Standing Committee on Justice and the Solicitor General examines the many issues surrounding the penalty structure and corrections in Canada. In the chapter devoted to public opinion, the Committee addresses the role of the media in determining public perception of sentencing issues, and indicates that there has been a decrease in the credibility of the sentencing process⁴⁵². Perhaps the most common criticism is that the media tend to sensationalize the more horrific and shocking cases, compounding the effects by omitting some of the complexities of the cases due to time and space constraints⁴⁵³. In response to the general mistrust of the justice system, the public appears to be embracing mandatory minimum penalties to ensure certainty in the process⁴⁵⁴. Responding to this, there were some members of the Committee who felt that in order to emphasize the denunciatory aspect of punishment, mandatory minimum

⁴⁴⁹ *Ibid.* at 188.

⁴⁵⁰ *Ibid.* at 189.

⁴⁵¹ *Reports of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections: Taking Responsibility* (Ottawa: Queen's Printer, August 1988).

⁴⁵² *Ibid.* at 9.

⁴⁵³ *Ibid.* at 59.

⁴⁵⁴ *Ibid.* at 60.

penalties may be required⁴⁵⁵. Nevertheless, there were other members of the Committee, whom in keeping with the conclusions of the Law Reform Commission were opposed to minimum penalties because their effectiveness and cost, both social and financial, were questionable⁴⁵⁶. As with the report of the Sentencing Commission one year earlier, this report supported maintaining mandatory minimum penalties for murder and high treason, but did not advocate the abolishment of the penalties that were in place at that time⁴⁵⁷, but instead recommended that no new minimum penalties be added to the *Criminal Code* with the exception of a ten year minimum they supported for repeat, violent sex offenders⁴⁵⁸. This is rather surprising given the consistent support for the abolition of minimum penalties in the previous reports. This is the first time that a commission or committee recommended the creation of a new minimum penalty. The reason given to justify this new minimum penalty was that it is needed to protect the public and denounce the unlawful behaviour⁴⁵⁹. Possibly foreseeing a *Charter* challenge to this proposed legislation, the Committee attested that such a punishment would not be arbitrary because it would cast a very small net and only the most brutal and violent of offenders would be subject to this penalty⁴⁶⁰. Ironically, the Committee acknowledged that imprisonment was only a temporary solution and is not an effective deterrent⁴⁶¹. Furthermore, the report stated that the key is to ensure that the offender takes

⁴⁵⁵*Ibid.* at 68.

⁴⁵⁶*Ibid.* at 68.

⁴⁵⁷There were six minimum penalties in place plus three mandatory life sentences in place in 1988.

⁴⁵⁸*Ibid.* at 70.

⁴⁵⁹*Ibid.* at 70.

⁴⁶⁰*Ibid.* at 71.

⁴⁶¹*Ibid.* at 75.

'responsibility' for his/her behaviour and it is the role of the sentencing judge to determine what the befitting penalty should be⁴⁶².

This report is unique in that it is the only one that has advocated introducing a new minimum penalty. It is also different in how the Committee viewed minimum penalties and their notion of how the punishment system should work in Canada, that prisons should be used as a dumping ground for violent repeat sexual offenders. It would appear the Committee has created some incongruence with its thinking on mandatory minimum penalties and the way the system should effectively work.

Conclusion

These reports argued that minimum penalties are not an effective means of punishing offenders and should, with the exception of murder and high treason, be abolished. The costs of such a mode of punishment are extremely high, which is an important factor, especially given the conclusion that they are ineffective and have very little deterrent value. The main concern is the limitation that is placed upon judicial discretion in addition to concerns regarding where discretionary power is placed when it is removed from the judiciary. The reports advocated the importance of the circumstances surrounding the offender and the offence as appropriate considerations in determining a just and fair sentence. These factors cannot be truly addressed when a mandatory minimum penalty is in place. Clearly, there is very little support for mandatory minimum penalties within the text of these reports, thus their continued use is overwhelmingly against the recommendations given that support their abolition.

⁴⁶²*Ibid.* at 243.

CHAPTER FOUR

Case Law Analysis

From the inception of the *Canadian Criminal Code* and *Opium and Narcotic Drug Act* until 1954, a few options were available to judges and magistrates that increased judicial discretion in the face of mandatory minimum penalties and allowed judges to tailor the penalty to the circumstances of the offence and the offender⁴⁶³. This allowed those who impose penalties to consider such mitigating circumstances as age, character, antecedents of the offender, and the nature of the offence. Clearly, there were alternatives available to the courts to prevent an offender from receiving a mandatory minimum penalty that was unfair or inappropriate given the circumstances of the situation. Prior to the 1954 *Criminal Code* revision, there were no reported appeals based on the unfairness or inappropriateness of a penalty.

Research Methodology

This chapter maps out all the reported appeals based on the justness and fairness of mandatory minimum penalties. In researching this aspect of my thesis, only reported adult, appellate level cases were examined. Using the QuickLaw data base it was possible to analyse all reported cases dealing with this subject matter by searching in the criminal judgments data base⁴⁶⁴. One query term, which was suggested by a Quicklaw employee, was used. The search used was: “minimum /3 sentence penalty & @4 appeal”. This effectively searched all appellate level criminal cases that had the words

⁴⁶³The options included suspended sentences, fines in lieu of punishments, royal prerogative, royal mercy, and as of 1899, the *Ticket of Leave Act*.

⁴⁶⁴This search was finished on February 1, 2000 and only includes reported cases up to that date.

'sentence' or 'penalty' within three words of 'minimum'. All cases that challenged the issue of mandatory minimum penalties were evaluated for applicability. Included in this chapter are all the reported cases where at least one of the issues at appeal was the imposition of a mandatory minimum penalty. A total of 434 cases were recognized by QuickLaw.

The case law analysis has led to the discovery of some interesting patterns. The first, alluded to above was that there were no reported appeals until 1976, and during that year, there was only two. There may be several reasons for this, the most obvious is that the cases were simply not reported. Also, given that during this time period (prior to 1976), there were anywhere from, a low of two mandatory minimum penalties to a high sixteen in place. As stated in the history chapter, before the 1954 revision, there were options available to permit judges to vary the sentence and allow for less than the minimum permitted in the *Criminal Code* or *Opium and Narcotic Drug Act*. After the 1954 revision, when majority of the options were removed, there were only eight offences that carried minimum penalties and this number was decreased to four in 1961. The number was furthered decrease to two between 1969 and 1976. Another is that the Crown may have used discretion when pursuing charges so that those who would face a certain, unfair penalty, could be spared. The use of Crown discretion in this area appears to have become somewhat more overt in the last twenty years as the issue was discussed in a number of appeals⁴⁶⁵. The lack of appeals of mandatory minimum penalties could

⁴⁶⁵This issue was not a factor in the appeals, it was simply mentioned. No reasons were ever provided as to why this was not an appellate issue. There are likely many more cases where the issue was not openly addressed. It was however, mentioned in the following cases: *R. v. Bosley and Duarte*, [1970] 1 O.R. 777; *R. v. McPartland*, [1981] O.J.No. 114; *R. v. L'Heureux*, [1981] O.J. No. 95; *R. v. Kagan*, [1987] M.J. No.

also be due to the absence of any formal basis for an appeal, such as the *Canadian Bill of Rights*⁴⁶⁶ or the *Canadian Charter of Rights and Freedoms*⁴⁶⁷. There had only been two reported appeal prior to the enactment of the *Charter*, and although the *Bill of Rights* had been in force since 1960, there had not been one reported challenge using the legislation. Perhaps the absence of reported appeals may be based on the fact that a system for financial legal assistance, presently called Legal Aid, was not in existence. Given that an appeal can be a lengthy legal process, it is likely that the vast majority of offenders did not have access to the financial means necessary to launch such a costly action. It is also possible that there may be some other extraneous variable that could account for the long absence of appeals based on the fairness of mandatory minimum penalties.

As stated above, with the exception of two cases, all reported appeals occurred after the proclamation of the *Charter*, which stated the rights and freedoms of all Canadians⁴⁶⁸. Out of the reported appeals that were analyzed, all of those that were heard after *Charter* was brought into force used relevant *Charter* provisions in their arguments. What has also become apparent is that the Courts are extremely reluctant to grant appeals from mandatory minimum penalties based on possible *Charter* violations. In all, there were only two cases that were successful in this area, *R. v. Smith* (1987)⁴⁶⁹

75; *R. v. George*, [1992] N.S.J. No. 176.

⁴⁶⁶ *Canadian Bill of Rights*, R.S.C. 1985, Appendix III.

⁴⁶⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

⁴⁶⁸ Pertinent sections of the *Charter* are discussed later in the chapter.

⁴⁶⁹ *R. v. Smith*, [1987] 1 S.C.R. 1045.

This case will be discussed at length later in this chapter.

abolished the seven year minimum for importing narcotics and *R. v. Bill* (1997)⁴⁷⁰ successfully challenged the four year minimum penalty for using a firearm during the commission of the offence of manslaughter. However, the latter decision applied only to the offender in that particular case and not the *Criminal Code* section as a whole.

One other very important pattern that became evident was that with the increase in the number of offences that carried mandatory minimum penalties, there was a corresponding increase in the number of reported appeals. This should be expected for a few reasons. Clearly, the more common the punishment is, the more likely it is to be used and consequently, appealed. Perhaps one of the more interesting reasons is, given the absence of penalty alternatives and the rigid nature of mandatory penalties, more offenders realize that they have nothing to lose by challenging the validity of the punishment⁴⁷¹. However, it should be noted that there could be any number of reasons as to why there has been a substantial increase in the number of reported appeals in relation to mandatory minimum penalties.

A number of cases⁴⁷² were appealed simply because the offender received a penalty that was above the minimum outlined in the statute. As stated above, it is possible that some appeals were brought forward because the offender had little to lose.

⁴⁷⁰*R. v. Bill*, [1997] B.C.J. No. 3031.

This case will be discussed at length later in this chapter.

⁴⁷¹It should be noted that given that Legal Aid will pay for appeals in justified circumstances, financial restrictions are not likely to become a factor.

⁴⁷²*R. v. Carr*, [1978] N.J. No. 35; *R. v. Vramy*, [1979] O.J. No. 401; *R. v. Flannery*, [1982] O.J. No. 1885; *R. v. Howard*, [1983] B.C.J. No. 1242; *R. v. Cremer*, [1983] A.J. No. 130; *R. v. Wilson*, [1984] B.C.J. No. 1686; *R. v. Johnson*, [1985] B.C.J. No. 1944; *R. v. Peterson*, [1985] O.J. No. 234; *R. v. Harvey*, [1986] N.S.J. No. 168; *R. v. Guiller et al.*, (1986) 48 C.R. (3d) 226; *R. v. Chalmers*, [1987] B.C.J. No. 1373; *R. v. Carter*, [1995] B.C.J. No. 1429; *R. v. Leaver*, [1998] N.B.J. No. 238;

Another possibility was that, as many legislators had forecasted, the minimum term had become a “ceiling”.

Lastly, one final pattern was observed. There were a number of cases in which the sentencing judge imposed a term that was less than the minimum prescribed in the *Criminal Code*. In general, there were two reasons as to why the judges assigned lesser penalties, the most common was that the judges were either unaware or forgot to impose the minimum penalty⁴⁷³. A second reason was that the judges did not want to impose the minimum penalty because they thought it was inappropriate⁴⁷⁴.

In all, there have been eleven reported appeals of mandatory minimum penalties based on the premise that the sanction was too harsh, of which, only two were successful. The majority of the arguments were based on the *Charter*, and in particular, sections 9 (arbitrary imprisonment), 12 (cruel and unusual punishment) and to a lesser extent, 7 (life, liberty and security of the person). There have been no successful *Charter* challenges under sections 7 and 9, only for section 12. Twelve cases appealed the mandatory minimum penalty simply because it was over the minimum prescribed by law. An examination of the case law is important to permit a more indepth look at how the laws affected the individuals that they targeted.

The first reported case to challenge mandatory minimum penalties was in *R. v. Shand* (1976)⁴⁷⁵. In , *Shand*, the offender was given a penalty of two years less a day for importing narcotics into Canada which carried a minimum of seven years imprisonment.

⁴⁷³For example, see *R. v. Nanapay*, [1997] S.J. No. 500; *R. v. Anthony*, [1997] N.J. No. 74.

⁴⁷⁴For example, see *R. v. Wittstock*, [1984] B.C.J. No. 1718; *R. v. Aucoin*, [1987] N.S.J. No. 177.

⁴⁷⁵*R. v. Shand*, [1976] 30 C.C.C. (2d) 23; 35 C.R.N.S. 202.

The Crown appealed the penalty to the Ontario C.A. where counsel for the defendant claimed that the minimum violated section 2(b) of the *Canadian Bill of Rights and Freedoms* which stated that “...no law in Canada shall be construed or applied so as to impose or authorize the imposition of cruel and unusual treatment or punishment”⁴⁷⁶.

The appeal was allowed stating that the judge was not within his discretion to assign a lesser penalty and ignore the legislated minimum as it would effectively mean that there was no minimum penalty at all. As a result, the Court confirmed the minimum penalty and it was not deemed as cruel and unusual punishment and therefore not disproportionate to the offence. This finding was echoed in *R. v. Appiah* (1976)⁴⁷⁷.

These were the only two cases found prior to the *Charter* coming into force. As stated above, there are a number of reasons that could account for the rarity of this, however, once the *Charter* was enacted, a different story unfolds.

1982-1992: The First Decade of the *Charter* Era

The *Charter* was enacted on April 17, 1982, and set out certain rights and freedoms in sections 7 through 14. Sections 7, 9, and 12 have played a particularly active role in mandatory minimum penalty appeals. The appeals are based on whether there has been a violation of these rights, and if there has, can the violation be justified using a section 1 analysis⁴⁷⁸ of the *Charter*.

It is beneficial to first discuss the relevant *Charter* sections, followed by a

⁴⁷⁶*Canadian Bill of Rights*, 1960 (Can), c.44 s.2(b).

⁴⁷⁷*R. v. Appiah*, [1976] O.J. No. 658.

⁴⁷⁸Section 1 states that “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

chronological account of the pertinent case law. This will provide a clear picture of where the *Charter* has been with regards to minimum penalties, as well as the direction it appears to be heading.

Section 7

This section of the *Charter* states that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”⁴⁷⁹. This is a very broad section and has not used on its own in any of the *Charter* challenges relating to mandatory minimum penalties.

Section 9

Section 9 of the *Charter* states that “Everyone has the right not to be arbitrarily detained or imprisoned”⁴⁸⁰. This section may be applied either to the law or to the way it is applied. It appears that the appeals which have been launched based on this section have argued, unsuccessfully, that the predetermined length of the penalty is not grounded on anything other than the conviction for a given offence and are therefore imposed in an arbitrary fashion. The Ontario C.A. has defined arbitrary as “capricious, despotic or unjustifiable”⁴⁸¹. A variety of options are available in the event of a section 9 violation, such as stays, sentence reductions, or in some cases, the court may abstain from providing a remedy at all⁴⁸². If a law is found to violate this section of the *Charter*, the

⁴⁷⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 7.

⁴⁸⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 9.

⁴⁸¹ *R. v. Cayer*, (1988) 66 C.R. (3d) 30 (Ont. C.A.) at 43.

This Court indicated that this definition came from *Black's Law Dictionary* (5th ed., 1979).

⁴⁸² D. Stuart, *Charter Justice in Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 1996) at 251.

courts may, under section 52, declare it of no force and effect, ultimately leaving the decision to re-word or revise the law in the hands of Parliamentarians.

Section 12

Section 12 of the *Charter* states that “Everyone has the right not to be subject to any cruel and unusual treatment or punishment”⁴⁸³. The first case to go to the S.C.C. and challenge a law under this section of the *Charter* was *R. v. Smith* (1987)⁴⁸⁴. This case has outlined the test for determining whether a piece of legislation is in violation of section 12 of the *Charter*.

Section 1

Although the use of this section is rarely outlined in the cases, it is still beneficial to understand the nature of the section. The use of this section is referred to as the Oakes test as it was established by the S.C.C. in *R. v. Oakes* (1986)⁴⁸⁵. Section 1 states that “the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law and can be demonstrably justified in a free and democratic society”⁴⁸⁶. In order to determine whether a law or punishment can be justified under section 1, the Supreme Court Justices determined that two criteria must be assessed. The first is that the limitation

⁴⁸³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 12.

This section bares an obvious similarity to section 2(b) of the *Canadian Bill of Rights*, that could be considered section 12's precursor.

⁴⁸⁴ *R. v. Smith*, (1987) 58 C.R. (3d) 193 (S.C.C.).

The details of this case can be found later in this chapter.

⁴⁸⁵ *R. v. Oakes*, (1986) 50 C.R. (3d) 1.

⁴⁸⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 1.

must be important enough to justify violating the freedom or right⁴⁸⁷. Secondly, the violation has to be proportional to three things: does the structure of the legislation effectively realize its purpose; is the violation as minimal as possible; and is there a balance between the intent and the consequences of the legislation⁴⁸⁸. If the answer to the principles set out is yes, then the legislation is a justifiable limit upon Canadian's rights and freedoms

The *Charter* added a new concern to the penalty structure in Canada. It is possible to take a closer look at the case law and determine the pervasiveness of the *Charter* in relation to imposing penalties as well as any possible patterns that might have emerged. A chronologically organized analysis of the reported appellate level cases will reveal several interesting aspects of the evolution and current state of mandatory minimum penalties in Canada.

Within a year of the *Charter* coming into effect, a number of appeals were launched to challenge the law based on the new freedoms. The first of such appeals was *R. v. Newall et al.* (1982)⁴⁸⁹. It should be noted that there are two *Newall* cases in this chapter. Although they both stem from the same set of charges, they refer to two different people, a father and a son with the same last name, and coincidentally, the same first name. The appeals are separate and occurred at different times. The respondents in this case claimed that the seven year minimum term for importing narcotics was a violation of sections 7 and 9 of the *Charter* because there was a difference between

⁴⁸⁷*R. v. Oakes*, (1986) 50 C.R. (3d) 1 at 30.

⁴⁸⁸*R. v. Oakes*, (1986) 50 C.R. (3d) 1 at 30-31.

⁴⁸⁹*R. v. Newall et al. (No.4)*, (1982) 70 C.C.C. (2d) 10.

'hard' and 'soft' drugs that should warrant different penalties. Counsel for the defendants maintained that if there was a violation, it could not be justified in a section 1 analysis. In addressing this case, the B.C.S.C maintained that the minimum term was fixed by Parliament based on deterrence and the protection of the public⁴⁹⁰. In addition, the Court outlined four other rules that must be kept in mind when imposing a penalty for this particular offence, namely, type of narcotic, quantity of narcotic, size of importing operation, and the nature of the involvement of the accused⁴⁹¹. The Court admitted that in some instances, the punishment may appear unfairly harsh but emphasized that parole eligibility periods should be taken into account⁴⁹². In response to the defendants' arguments, the Court, in acknowledging that there are differences between 'soft' and 'hard' drugs, the effects are irrelevant and therefore the section was not a violation of section 7. With respect to section 9 of the *Charter*, the Court determined that it did not apply to this case as it viewed 'arbitrary detention' as referring to due process, not duration or mode of punishment⁴⁹³. The Court ultimately dismissed the appeal.

One year later, the issue was again addressed in the case *R. v. Randall and Weir* (1983)⁴⁹⁴ which also asserted that the penalty of seven years for importing narcotics into Canada was a violation of sections 7, 9 and 12 of the *Charter*. Again, the issue was whether it was appropriate to include 'soft' drugs with 'hard' drugs where there is such a harsh minimum penalty in place. The N.S.C.A. echoed the decision in *Newall* (1982)

⁴⁹⁰*Ibid.* at para 28.

⁴⁹¹*Ibid.* at para 28.

⁴⁹²*Ibid.* at para 32.

⁴⁹³*Ibid.* at para 40.

⁴⁹⁴*R. v. Randall and Weir*, (1983) 58 N.S.R (2d) 234.

and maintained that the seven year minimum was in place as a deterrent and that the type of drug involved was irrelevant. With regards to the section 9 challenge, the Court again followed *Newall* (1982) and held that this section referred to due process and was not applicable in this case. Lastly, it was held that the punishment was not violation of section 12 of the *Charter*. The Court dismissed the appeal without further elaboration. The case was not appealed to a higher court.

The last reported case that addressed the issue of mandatory minimum penalties to occur during the first year of the *Charter* was *R. v. Tardiff* (1983)⁴⁹⁵. The respondent was appealing the fourteen day minimum term for a second conviction of drinking and driving based on a section 7 challenge. There was little in the way of submissions from either side to support or argue against the challenge. The Saskatchewan C.A. dismissed the appeal on the grounds that the minimum sentence was justified given the protection of public element of the sanction.

One of the most important *Charter* cases was heard in *R. v. Smith*⁴⁹⁶ in 1987 by the S.C.C.. Prior to delving into *Smith*, it should be noted that there are two *Smith* cases, one that deals with the penalty appeal that was heard by the S.C.C. and the other that deals with the new penalty that Mr. Smith was given after the S.C.C. decision. Mr. Smith was originally charged with a number of others involved in a scheme to import drugs into Canada. He was the only one who appealed his penalty. After the S.C.C. had decided the case, Smith was referred back to the sentencing court with the others who were involved and new penalties for all offenders involved were determined. The S.C.C. case

⁴⁹⁵*R. v. Tardiff*, (1983) 9 C.C.C. (3d) 223.

⁴⁹⁶*R. v. Smith*, (1987) 58 C.R. (3d) 193 (S.C.C.).

discussed here set the test for what constitutes a violation of section 12 of the *Charter* and has been to date, the only case to declare a minimum penalty of no force and effect. In *Smith*, the issue before the court was whether the mandatory minimum punishment of seven years for importing drugs into Canada provided by section 5(2) of the *Narcotic Control Act*, violated section 12 of the *Charter*. The appellant, Edward Smith was convicted of importing 7 ½ ounces of 85% pure cocaine at an approximate street value of \$150,000 and was given a sentence of eight years by the trial judge. Smith appealed the penalty to the B.C. County Court where the judge determined that the minimum was a violation of section 12 of the *Charter* because judges in these cases were not left with an outlet to prevent an inappropriately harsh penalty from being meted out⁴⁹⁷. The position of the Crown however, was that he/she could use discretion in pursuing charges against an individual for importation or possession, depending upon the circumstances of the case which would prevent an unjust penalty. The case was appealed further to the Supreme Court of B.C. where the decision of the County Court was not upheld based on the reasoning that the Courts were not to be the ones to determine the validity of a law if there was a policy rationale to support the legislation, which, in this instance, there was⁴⁹⁸. Thus, the penalty, and minimum penalties in general, were not arbitrary, cruel or unusual, nor did they outrage standards of decency or were disproportional. The case was further appealed to the S.C.C. where it took approximately three years to be decided⁴⁹⁹.

⁴⁹⁷*R. v. Smith*, (1984) 35 C.R. (3d) 256.

⁴⁹⁸*R. v. Smith*, (1984) 39 C.R. (3d) 305; 11 C.C.C. (3d) 411.

⁴⁹⁹The appeal to the Supreme Court was granted on April 24, 1984. The decision was given on June 25, 1987. The reasons for the delay were not included in the decision.

The S.C.C. had, in the past, been very reluctant to declare minimum penalties to be a contravention of the *Charter*, however, in this case, the S.C.C. held that the seven year minimum penalty was declared to be a breach of the section 12 of the *Charter* and asserted that the punishment be of no force and effect. Lamer, J., in writing the majority opinion, maintained that in order to ascertain whether a punishment violates section 12 of the *Charter*, court must “first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender”⁵⁰⁰. Once this is determined, the Court must establish whether, given the above characteristics and the punishment imposed, the penalty would inflame the public because of its excessive nature⁵⁰¹. Lastly, the Court would have to consider the effect of the penalty that is imposed, which is not necessarily about the length of the penalty, but the nature and context within which it is administered⁵⁰².

In this particular case, the Court held that while the seven year minimum, in and of itself was not cruel and unusual, it was when looking at the extremely broad range of circumstances it could be applied to⁵⁰³. Counsel for the defence submitted a hypothetical situation to demonstrate the unfairness of the penalty to the Court. The situation involved a first time offender, in college or university who brings one marijuana

⁵⁰⁰ *R. v. Smith*, [1987] 1 S.C.R. 1045 at para 55.

This test comes from another S.C.C. case, *R. v. Miller* [1977] 2 S.C.R. 680.

⁵⁰¹ *R. v. Smith*, [1987] 1 S.C.R. 1045 at para 54.

⁵⁰² *R. v. Smith*, [1987] 1 S.C.R. 1045 at para 56.

⁵⁰³ *R. v. Smith*, [1987] 1 S.C.R. 1045 at para 64.

cigarette, for personal use into Canada. By law, this individual would be subject to the seven year term. It is with this example that the S.C.C. applied their test. The Court also maintained that relying upon the discretion of the Crown not to charge an offender such as the one outlined in the example, is also inconsistent with section 52 which asserts that it is the duty of the Courts to address possible *Charter* violations and not rely upon, or assign the prosecution or any on in aiding to avert the violation.

When determining whether the section 12 violation could pass a section 1 analysis, the S.C.C. looked at whether the encroachment could be justified based on the importance of such a penalty. They concluded that the importation of drugs was so serious that it did justify the seven year minimum⁵⁰⁴. However, it is in the second part of the Oakes test that the legislation failed. In analysing the legislation, the Court must ascertain whether the penalty is proportional to the circumstances and there are three aspects to determine proportionality. The first is whether the punishment was developed to accomplish a given purpose. In this case, the S.C.C. held that the offending section casts too wide a net to effectively achieve the legislative objective⁵⁰⁵. The second aspect of the test for proportionality is whether the legislation impinges the right as little as possible, in which the Court asserted that the legislation failed because small time offenders could be punished using a less rigid and less harsh penalty⁵⁰⁶. The last aspect of the test is to assess whether there is congruence between the effects of the punishment and the objective. Again, the Court maintained that because of the wide net that was

⁵⁰⁴*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 72.

⁵⁰⁵*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 72.

⁵⁰⁶*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 72.

cast by this legislation, the penalty is not proportional to the offence⁵⁰⁷. In addition, Lamer, J. also outlined other problems associated with the minimum penalty in that juries are unlikely to convict if the minimum is viewed as unfair, as well as creating uneven plea bargaining positions, in favour of the Crown⁵⁰⁸. Incidentally, these arguments are the same as those heard in the preceding chapter. Thus, the rights impinged by this section cannot be justified by a section 1 analysis.

It should be noted that majority opinion determined that because the legislation was found to be a breach of section 12 of the *Charter*, it was not necessary to determine whether it was also a violation of sections 7 and 9.

Only one member of the S.C.C. provided a dissenting opinion in the case. McIntyre, J. agreed with the test for gross disproportionality, but added that the determination of violation should not be based on a hypothetical case. Although McIntyre, J. did admit that this is not necessarily a reasonable assertion because there are some who lack the financial resources to launch a *Charter* appeal⁵⁰⁹, he did maintain that it is extremely important in these hypothetical cases that the right does impinge a constitutionally protected activity⁵¹⁰. Clearly, the importation of narcotics is not a right protected by the *Charter*. McIntyre, J. then went on to determine whether the legislation violated section 12. He maintained that “the question is not whether the sentence is too severe, having regard for the particular circumstances of offender “A”, but whether it is

⁵⁰⁷ *R. v. Smith*, [1987] 1 S.C.R. 1045 at para 72.

⁵⁰⁸ *R. v. Smith*, [1987] 1 S.C.R. 1045 at para 72.

⁵⁰⁹ *R. v. Smith*, [1987] 1 S.C.R. 1045 at para 78.

⁵¹⁰ *R. v. Smith*, [1987] 1 S.C.R. 1045 at para 79.

cruel and unusual, an outrage to standards of decency, having regard to the nature and quality of the offence committed, and therefore too severe for any person committing the same offence”⁵¹¹.

He then went on to outline the test that he felt should be used for determining what is cruel and unusual, which is essentially the same as the one set out by Lamer, J. except that McIntyre added that “the punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards”⁵¹². In addressing the test for gross disproportionality, McIntyre, J. felt that, in this case, the first branch could not succeed because the appellant would show that the seven year minimum is excessive and an outrage to the public in general, and not just in certain cases⁵¹³. He also maintained that one must look at the actual penalty that would be served, taking into account time served before mandatory parole is granted⁵¹⁴. Given these considerations, McIntyre, J. concluded that the actual penalty served for offenders given the seven year minimum is not a violation of section 12 of the *Charter* and does not offend public standards⁵¹⁵. In determining whether the punishment is required to achieve a valid social aim, McIntyre, J. asserts that when enacting the legislation, Parliament was aiming at preventing the importation of drugs, which he views as a very

⁵¹¹*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 85.

⁵¹²*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 93.

⁵¹³*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 94.

⁵¹⁴*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 95.

McIntyre, J., points out that offenders are eligible for day parole, on a seven year sentence, after serving fourteen months, release on mandatory supervision after 28 months and full parole after 56 months.

⁵¹⁵*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 95.

effectual social objective⁵¹⁶. In addition, he points out that Parliament had more resources than the courts to determine the appropriate penalty⁵¹⁷.

Lastly, McIntyre, J. addressed the third aspect to the test, that is whether the punishment is imposed arbitrarily and not in conjunction with a rationale in relation to ascertained or ascertainable criterions⁵¹⁸. Although the majority decision determined that arbitrariness does not come into play when looking at the cruel and unusualness of a section, McIntyre, J. felt that it should be addressed. He stated that “legislation is arbitrary on its face if it imposes punishment for reason or in accordance with criteria which are not rationally connected with the objects of the legislation”⁵¹⁹. In the context of this case, the appellant claimed that the minimum term was arbitrary because it did not consider any mitigating or aggravating factors. McIntyre, J. concluded that the term was not arbitrary because it seeks to achieve a specific aim, deter the importation of narcotics, in addition to protecting the public⁵²⁰. Since Parliament had chosen to demonstrate that the offence of importing narcotics is serious enough to warrant a seven year minimum, McIntyre, J. concluded that it is therefore not arbitrary⁵²¹.

In dealing with the section 7 argument, McIntyre, J. asserted that given that it is such a broad provision, the same grounds that were covered in his discussion on section 12 would be applicable here and have the same result⁵²².

⁵¹⁶*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 96.

⁵¹⁷*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 97.

⁵¹⁸*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 99.

⁵¹⁹*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 102.

⁵²⁰*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 103.

⁵²¹*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 103.

⁵²²*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 106.

Clearly, in his dissenting opinion, McIntyre, J. determined that the mandatory minimum penalty of seven years provided by section 5(2) of the Narcotic Control Act was not so grossly disproportionate as to outrage public norms in this regard⁵²³.

It is interesting to note that the issue of what sentence Smith should be given went back to the B.C.C.A. where it was determined that an appropriate penalty in his case was six years⁵²⁴.

The decision in *Smith* did not find that the very nature of mandatory minimum penalties are “cruel and unusual”, just that this particular seven year minimum was. However, Lamer J. did state that he was in favour of adopting the opinion of the Canadian Sentencing Commission which stated that minimum penalties should not be considered a viable means of punishment⁵²⁵. At present, this remains the leading case for determining the constitutionality of mandatory minimum penalties⁵²⁶.

The same year that *Smith* was decided, another case, *R. v. Aucoin* (1987)⁵²⁷ was heard by the N.S.S.C. - Appeal Division and determined the validity of the minimum penalties for drinking and driving offences. The appellant had been convicted a third time of a drinking and driving offence, which carried a minimum term of ninety days. At

⁵²³*R. v. Smith*, [1987] 1 S.C.R. 1045 at para 109.

⁵²⁴*R. v. Saulnier, et al.*, [1987] B.C.J. No. 2497.

The details of Smith as well as the others that were addressed in this appeal are later in this chapter

⁵²⁵*R. v. Smith*, (1987) 58 C.R. (3d) 193 (S.C.C.) at 242.

This excludes the use of minimum penalties for murder and high treason.

⁵²⁶*R. v. Morrissey* is currently the Supreme Court of Canada to address the issue of the four year minimum penalty for using a firearm in the commission of a serious offence.

⁵²⁷*R. v. Aucoin*, [1987] N.S.J. No. 177.

trial, the judge sentenced Mr. Aucoin to forty days and to seek curative treatment⁵²⁸.

The Crown appealed the penalty on the grounds that it was not in accordance with the drinking and driving sections of the *Criminal Code*. Counsel for the defendant cross-appealed stating that the minimum term was unconstitutional, but did not elaborate as to which sections were violated. The Court ruled that the minimum penalty was not unconstitutional and remitted the case back to the sentencing judge for imposition of the ninety day term.

The first case to apply the *Charter* to the mandatory life terms provided for second degree murder was heard in *R. v. Mitchell* (1987)⁵²⁹. In this case, the respondent maintained that the mandatory life sentence and the ten year minimum parole eligibility period for second degree murder violated sections 7, 9 and 12 of the *Charter*. In deciding the case, the N.S.S.C.- Appeal Division used the gross disproportionality test as set out in *Smith*. Counsel for Mr Mitchell used the hypothetical situation argument to illustrate there are so many varying circumstances in which the offence could be committed, that in some cases, the minimum could be considered cruel and unusual. The Court held that there are other charging options available, such as constructive murder and manslaughter, that do not carry a minimum and could be used in cases where the intent to murder is absent. Therefore, the Court maintained that it was extremely unlikely that a situation would arise in which an individual would be unjustly charged and convicted of second degree murder. In response to the section 7 argument, the Court

⁵²⁸ There was a section in the Code that allowed a judge to, instead of convicting an individual under one of the drinking and driving sections, to sentence them to seek curative treatment. This section was not applicable to any convictions in which a mandatory minimum sentence is found.

⁵²⁹ *R. v. Mitchell*, [1987] N.S.J. No. 430.

ruled that the penalty would be in accordance with the principles of fundamental justice and that because of the rights accorded to an accused individual in due process, the denial of liberty is justified. The Court held that due process also protects the offender from arbitrary detention, the arguments for sections 9, as well as sections 7 and 12 failed and the appeal was dismissed.

In the 1987 response to *Smith*, the defence in *R. v. Newall* (1988)⁵³⁰, which had originally been heard in 1982, challenged the penalty based on the idea that the existence of the seven year minimum term had inappropriately or unfairly increased the range that would have been appropriate for the offence and the offender. In the original case, Mr. Newall was charged and convicted in 1982 of importing narcotics into Canada and was given a twelve year term. At the time of his conviction (in a separate appeal to the one previously discussed), *Newall* had appealed his penalty to the B.C.C.A. on the grounds that it violated section 9 of the *Charter*. The judge in the case rejected the challenge stating that the penalty was not arbitrary as the defendant was convicted and sentenced after a trial and not wrongfully detained. In addition, the Court determined that the duration of the penalty itself was not unconstitutional and that for a minimum penalty to be considered a violation of the *Charter*, the focus of the appeal should be on the rationale and policy objectives for minimum penalties and not individual laws. The Court considered whether the penalty would have been an infringement if *Smith* had been decided differently or if there was no minimum penalty in existence⁵³¹. It was determined

⁵³⁰*R. v. Newall*, [1988] B.C.J. No. 1014.

⁵³¹This idea that minimum penalties increase the terms given out in certain cases was also the issue in *R. v. Nelson-Kent*, [1988] B.C.J. No. 1174. As in *Newall*, the Court ruled that that was not the case.

that the outcome of *Smith* and the mandatory minimum penalty in general did not influence the penalty laid out in this case in any way and that the penalty was fit and appropriate. This case addresses the commonly held belief that minimum penalties influence the sanctions that are meted out and that the minimum can become the “ceiling”⁵³² or it can result in significantly higher penalties in cases that appear, or are worse than ones where the minimum was imposed. There have been a number of appeals launched specifically because they are above the minimum, and thus surpass the “ceiling”. However, none of these appeals have been successful as the courts have declared that the sentences were fit and justified.

A set of cases that were dealt with in the aftermath of *Smith* was the appeal to the S.C.C. from the B.C.C.A. that considered the penalties of several offenders. In *R. v. Saulnier*; *R. v. Morneau*; *R. v. McDonald*; *R. v. Romy*; *R. v. Chalmers*; *R. v. Andrews*; and *R. v. Smith*⁵³³ (1987), the B.C.C.A. heard from seven offenders who had originally been charged with *Smith* for importing narcotics into Canada and had received either the minimum penalty or longer. It should be noted that this was the second *Smith* case as the appeal of the minimum penalty was dealt with separately by the S.C.C. and the present case deals with the re-sentencing of the offenders involved. These were the first cases that were appealed after the S.C.C. decision in *Smith*.

⁵³²The term ‘ceiling’ refers to a maximum sentence, with exceptions, that is usually given. It is not just given to those offenders who are at the lower end of the spectrum for the severity of the specified crime that was committed, but the vast majority of offenders.

⁵³³*R. v. Saulnier*; *R. v. Morneau*; *R. v. McDonald*; *R. v. Romy*; *R. v. Chalmers*; *R. v. Andrews*; and *R. v. Smith* [1987], B.C.J. No. 2497.

All of their cases were dealt with at the same time.

In the first case, *R. v. Saulnier* (1987)⁵³⁴, the accused had originally been sentenced to 8 years imprisonment for importing 600 pounds of marijuana into Canada. Apparently, Mr. Saulnier was the mastermind behind the attempt and had recruited another individual, Morneau, who is also dealt with in this appeal. The B.C.C.A judge felt that given the level involvement by Mr. Saulnier, his sentence should be amended to five years. Oddly enough, this case was heard and decided around the same time as *Newall*, yet the outcome was very different. In fact, it could be claimed that *Saulnier* contradicts the decision in *Newall* in that the minimum penalty did appear to have an effect on the length of the penalty given because the final term was lower than the minimum.

In *R. v. Morneau* (1987)⁵³⁵, the accused had much less involvement in the scheme to import drugs than Mr. Saulnier. In fact, his role was that of Mr. Saulnier's bodyguard. Given his limited involvement, his penalty, which originally was seven years, was reduced to three. Again, this supports the assertion that mandatory minimum penalties do have an effect on the length of the penalty as the term that was eventually imposed on Mr. Morneau was lower than the minimum.

In the case of *R. v. McDonald* (1987)⁵³⁶, the accused was convicted of importing 4.9 ounces of low-grade cocaine and 2 pounds of marijuana and was given the minimum seven year term. At the time of trial, Mr. McDonald was a 20-year-old college student and had no previous convictions. Given his youth and character in combination

⁵³⁴*R. v. Saulnier*, [1987] B.C.J. No. 2497.

⁵³⁵*R. v. Morneau*, [1987] B.C.J. No. 2497.

⁵³⁶*R. v. McDonald*, [1987] B.C.J. No. 2497.

with deterrence objectives, his penalty was remitted to time served, which had been three and one-half years.

The case of *R. v. Romy* (1987)⁵³⁷ was also dealt within this appeal. He was originally given seven years for importing 5.4 ounces of cocaine and an additional three years, to be served concurrently for intent to traffic. He had no previous record and was given a three and one-half year penalty in place of the seven and three year terms.

Another case in this appeal is *R. v. Chalmers* (1987)⁵³⁸. The accused had been sentenced to seven years for importing narcotics into Canada. The appellant was a female and was heavily influenced by an older man who had instructed her to attempt to import 404 pounds of pure cocaine into Canada. She had three children and a record that was unrelated to drugs. The Court determined that she should instead be given a five year penalty.

In *R. v. Andrews* (1987)⁵³⁹, the appellant acted as a courier and was convicted of importing varying amounts of cocaine into Canada on different occasions. He had two prior convictions for the same offence approximately ten years prior to this one. Originally, he was given an eight year penalty, but it was reduced to five years.

Lastly, the case that sparked everything and went to the S.C.C. was considered. The facts of the case of *R. v. Smith* (1987)⁵⁴⁰ have already been stated, however there were a few other factors that were addressed in the re-sentencing of this offender. There

⁵³⁷*R. v. Romy*, [1987] B.C.J. No. 2497.

⁵³⁸*R. v. Chalmers*, [1987] B.C.J. No. 2497.

⁵³⁹*R. v. Andrews*, [1987] B.C.J. No. 2497.

⁵⁴⁰*R. v. Smith*, [1987] B.C.J. No. 2497.

were no outside influences that coaxed or encouraged him to engage in this behaviour.

At the time of his arrest, he was a student attending art school and had two prior convictions for possession of narcotics. As stated earlier, his penalty was reduced to six years.

There are two interesting conclusions that can be inferred from the decision in *Smith et al.* (1987). The first is that it is clear that the minimum penalty did influence the duration of the penalty given that all the offenders ultimately received terms that were lower than the minimum. This case also demonstrates the importance of aggravating and mitigating factors in determining a penalty. In some cases, it was past convictions, in others, it was the level of involvement, and still in others, it was the amount and type of drug that was being imported. This fact, in and of itself, provides support for one of the main arguments against mandatory minimum penalties in that there is too much variation in the nature of the offence and the offenders to legislate a fair and just penalty to be applied so broadly.

In 1989, *R. v. Dobson* (1989)⁵⁴¹, the S.C.C. dismissed an appeal that challenged the mandatory of life sentence (with parole eligibility of twenty-five years) for first degree murder. The basis of the appeal was that the penalty violated sections 7, 9 and 12 of the *Charter*. The application to the Court was dismissed without reasons.

In 1990, an interesting case was heard by the S.C.C. in *R. v. Luxton*⁵⁴². There

⁵⁴¹*R. v. Dobson*, [1989] S.C.C.A. No. 276.

The arguments given in the Supreme Court of Canada appeal were not the same as heard in the appeal to the provincial court in *R. v. Dobson*, [1985] O.J. No. 32. The arguments there were based on other, unrelated legal issues.

⁵⁴²*R. v. Luxton*, [1990] 2 S.C.R. 711.

were a few issues before the court. The first issue challenged the penalty structure for first and second degree murder, as well as the validity of these sanctions in relation to sections 7, 9 and 12 of the *Charter*. In the majority decision delivered by Lamer, J., the Court maintained that the difference in the level of blameworthiness between first and second degree murder justified the penalties and thus did not contravene sections 7 and 9 of the *Charter*. In addition, it was held that the life terms were not a violation of section 12 as they are not excessive given the seriousness of the crime, nor would the penalties be said to outrage publicly held standards of decency, and consequently, the appeal was dismissed.

In *R. v. Bowen* (1990)⁵⁴³, a similar case as the one previously mentioned was heard by the Alberta C.A. Counsel for the defendant argued that the minimum term for first degree murder was unconstitutional because it did not allow for mitigating factors to be considered. Specifically, the defence stated that the minimum penalty violated sections 7, 9, and 12 of the *Charter*. In this case, there was some doubt as to whether Mr. Bowen had committed first degree murder, but given that the victim was a police officer, the charge was maintained. The main thrust of the appellant's argument is that there is such a wide range of situations and circumstances that could surround the offence, that the mandatory life sentence (without eligibility of parole for twenty-five years) could be disproportionate in some cases. The fact that an offender could apply for parole after serving fifteen years under the 'faint-hope' clause was not an issue addressed by the appellant. Cote, J., in delivering the decision stated that it was highly unlikely that

⁵⁴³*R. v. Bowen*, [1990] A.J. No. 925; 2 C.R. (4th) 225; 59 C.C.C. (3d) 515; 79 Alta L.R. (2d) 264.

the facts of a case in which a conviction for first degree murder is registered would consider the mandatory life term as so grossly disproportionate that it would outrage the public standards of decency. The Court asserted that it could not think of a context in which a life sentence for this offence would be disproportionate and challenged the counsel for the appellant to come up with one. The defence was not able to give the court an example of this and the Court rejected the section 12 challenge.

The section 7 challenge was also rejected by the Court based on the reasoning that it refers to a situation when an individual is deprived of their liberty because of a significant injustice. The Court emphasized that the punishment for murder is proportional to the blameworthiness of the offence, thus the section 7 challenge was also dismissed.

Lastly, the appellant had claimed that the minimum penalty violated section 9 of the *Charter*. The Court held that the penalty was not arbitrary and based their reasoning on the idea that simply because the term is lengthy, does not mean that it is arbitrary and in fact the offence has a long history with this penalty. Therefore the section 9 argument was dismissed as well, with a dismissal of the appeal following.

In 1992, there were two appeals based on the constitutionality of mandatory minimum penalties. The first, *R. v. Somer*⁵⁴⁴ (1992) addressed whether the minimum penalty of fourteen days for a second offence of failing to provide a breathe sample infringes upon section 12 of the *Charter*. The Ontario Court of Justice (Provincial Division) dismissed the appeal stating that the goal of the sentence, to protect the public,

⁵⁴⁴*R. v. Somer*, [1992] O.J. No. 833.

and the tool used to achieve that would not outrage standards of public decency and was thus not grossly disproportional to the offence.

Approximately one month after *Somer* (1992) was decided, another similar case, *R. v. Riopelle*⁵⁴⁵ (1992), also challenged the constitutionality of the minimum penalty of fourteen days imprisonment for failing to provide a breathe sample, claiming it violated sections 9 and 12 of the Charter. In deciding this case, the Ontario Court of Justice referred to *Smith* (1987) for guidance. Counsel for the appellant provided a hypothetical situation and the Court determined that it was hardly shocking enough to outrage the standard of decency of the public and thus the minimum penalty would not be viewed as grossly disproportionate⁵⁴⁶. In addition, the Court addressed the purpose of the legislation, protection of the public, which also supported the decision that the minimum term is not a violation of sections 9 or 12 of the *Charter*. The appeal was dismissed.

The Recent State of the Case Law: 1993-1999

In 1993, a case was before the B.C.C.A. that dealt with the mandatory minimum term of imprisonment of fourteen days for a second conviction for drinking and driving⁵⁴⁷. In *R. v. Kumar*⁵⁴⁸ (1993), the Crown appealed the Provincial Court decision that which that the penalty violated the guarantee against cruel and unusual treatment found in section 12 of the *Charter*. The judge asserted that an individual who was not impaired could be subjected to a minimum jail term simply for refusing a breath test.

⁵⁴⁵ *R. v. Riopelle*, [1992] O.J. No. 3906.

⁵⁴⁶ *R. v. Riopelle*, [1992] O.J. No. 3906 at para 27 & 28.

⁵⁴⁷ There was no minimum penalty for a first offence. For a third or subsequent offences, the minimum penalty was and still is 90 days.

⁵⁴⁸ *R. v. Kumar*, [1993] B.C.J No. 2266.

This fact was coupled with the nature of the pertinent *Criminal Code* sections which does not provide a time frame in which the first and second offence have occurred⁵⁴⁹.

The offences could be decades apart, but still count as a relevant conviction within the provisions found in the *Criminal Code*. The B.C.C.A. determined that the section impinged upon section 12 in this particular case⁵⁵⁰ and could not be justified in a section 1 analysis⁵⁵¹. The Crown appeal was dismissed and the Court directed the Crown to speak to an appropriate sentence in line with the circumstances of the offender and the offence. The case was appealed to the S.C.C. where it was dismissed without reasons⁵⁵².

In *R. v. Born With a Tooth*⁵⁵³ (1994), the respondent appealed the minimum one year consecutive term for the use of a firearm while willfully obstructing a peace officer in the execution of his duty stating that it infringed his rights under section 12 of the *Charter*. Specifically, the defendant's argument was based on the fact that because the minimum one year term was half of the maximum penalty, it was an unfair penalty and that a remedy under section 24(1)⁵⁵⁴ would be appropriate in this case. The Alberta Court of Queen's Bench dismissed his appeal stating that when taking into account the

⁵⁴⁹*R. v. Kumar*, [1993] B.C.J No. 2266 at para 9.

R. v. Kumar, (1994) S.C.C.A No. 47 was appealed to the S.C.C. where it was dismissed the appeal without reasons. An interesting comment was made by the judge in that there was no indication that 'over 80', which he viewed as an arbitrary number, and refusing to provide a breath sample resulted in harm to the public. For these reasons, as well as the ones listed in the body of the section on this case, a minimum penalty of any duration would be a violation of sections 7, 9 and 12 and would consequently not be justified under a section 1 analysis.

⁵⁵⁰*R. v. Kumar*, [1993] B.C.J No. 2266 at para 53.

⁵⁵¹*R. v. Kumar*, [1993] B.C.J No. 2266 at para 72.

⁵⁵²*R. v. Kumar*, [1994] S.C.C.A. No. 47.

⁵⁵³*R. v. Born With a Tooth*, [1994] A.J. No. 713.

⁵⁵⁴Section 24(1) states that "Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

gravity of the offence, personal characteristics of the offender and the purposes of sentencing, the minimum penalty did not violate the *Charter*. In addition, the Court maintained that it was Parliament's intent to protect the public from crimes committed using firearms when passing this legislation.

In 1995, the minimum penalties for committing certain crimes with a weapon (see Appendix B) was amended to include a minimum sentence of four years imprisonment. The backlash of this amendment increased the number of appeals based on the penalty for these offences. There was one appeal in 1997 and an additional six in 1998⁵⁵⁵.

The first appeal, *R. v. Bill* (1997)⁵⁵⁶ is especially interesting because it not only challenges the four year minimum term for using a firearm when committing the offence of manslaughter, but it challenges one of the fundamental principles of sentencing outlined in section 718 of the *Criminal Code*. The appellant argued that the minimum term was a violation of section 12 of the *Charter*. Some details regarding the facts of the case are necessary to fully appreciate the arguments. Mr. Bill, an aboriginal man, was convicted of manslaughter with a firearm as a result of an altercation on the reserve where he lived. There was a group of feared men called the Warriors who also lived on the reserve and a week prior to the events in question, Mr. Bill had been beaten up by members of the Warriors as he walked home. The Court acknowledged that there had been no provocation on Mr. Bill's part, he was simply not liked by certain members of the group. One week later, another altercation occurred at the Bill residence that was

⁵⁵⁵Of those six, five were heard together to address the four year minimum penalty for robbery with a firearm.

⁵⁵⁶*R. v. Bill*, [1997] B.C.J No. 3031.

sparked by a few members of the Warriors. As a result of the actions of the Warriors, Mr. Bill's mother called the local R.C.M.P detachment and reported the incident. The officers arrived and took down the information and left without locating any of the individuals involved in the dispute. Later in the evening, while walking to a store, Mr Bill ran into the wife of one of the Warriors and words were exchanged whereupon Mr. Bill retreated to his residence. His brother left the home in the direction of the last quarrel and when hearing this, Mr. Bill grabbed his rifle and headed out. The facts of the case are somewhat hazy after this point as all parties had been consuming alcohol and were uncertain as to the exact chain of events. The two groups met and the Warriors were armed with hockey sticks and had started swinging them. Mr. Bill testified that at this point he was very afraid as well as angry and anxious, he ultimately fired the rifle killing one of the Warriors. The Court was satisfied that the killing was unintentional and reverted back to *Smith* (1987) to determine if the penalty imposed was a violation of the *Charter*. Although it was acknowledged by the Court that there could be an infinite number of ways that the offence of manslaughter could come about, it was clear that the intention of Parliament was to create the added factor of using a firearm to reflect the seriousness of the act. In assessing whether the penalty was proportional, the Court asserted that the principles of sentencing as outlined in the *Criminal Code* must also be considered as s. 718(e) of the *Code* specifically highlights that the circumstances of aboriginal offenders should especially be taken into account⁵⁵⁷. The aspects surrounding the consequences of sentencing Mr. Bill to the minimum term and sending him to a

⁵⁵⁷This sentencing factor was the focus of a S.C.C. case, *R. v. Gladue* in 1999 which is discussed in the conclusion of this thesis.

federal institution away from his culture was also considered in conjunction with the rationale behind the law. Lastly, the Court looked at the penalties from other similar cases across Canada, both prior to, and after the four year minimum came into effect. The Court stated that in enacting this law, Parliament was very vocal as to the purpose of the legislation, to deter the use of firearms during the commission of an offence. For murder, the purpose of using a firearm is clear, however, with manslaughter, this is not the case because there are any number of ways it can happen. Given these arguments, coupled with the fact that prior to this legislation, the average penalty in a case such as this one was between a suspended sentence and one year, the Court found that the penalty would be grossly disproportionate in this case. The only possible purpose of this sanction would be based on deterrence, which is inconsistent with the context surrounding the offender as well as the offence. In a rare decision, the Court held that the minimum penalty for manslaughter with a firearm, in denying the application of mitigating and aggravating factors for this offence, would be grossly disproportionate and would be a violation of Mr. Bill's rights under section 12⁵⁵⁸. In addition, the Court stated that it did not need to look at hypothetical cases in which a lesser penalty would be appropriate because they had found several actual cases in their research. In concluding the decision, the Court stated that the Crown would be permitted to make a section 1 argument, however, this either has not happened yet, or was unreported.

In *R. v. Wust*; *R. v. Arthurs*; *R. v. Gatz*; *R. v. Arrance*; *R. v. Sykes*⁵⁵⁹ (1998), all the appellants were challenging the validity of the minimum penalty for robbery with a

⁵⁵⁸The decision in this case appears to refer only to the defendant and not the *Code* section.

⁵⁵⁹*R. v. Wust*; *R. v. Arthurs*; *R. v. Gatz*; *R. v. Arrance*; *R. v. Sykes* [1998], B.C.J. No. 1076.

firearm on the basis that it violated section 12 of the *Charter*. The appeals were dismissed as a whole based on the gross disproportionality test outlined in *Smith*. The Court went through the circumstances of each of the respondents and looked carefully at the personal characteristics of the offender as well as the offence. It was determined that the four year minimum penalty for robbery with a firearm was not grossly disproportionate and thus not an infringement of the *Charter* guarantee⁵⁶⁰. Each of these cases was appealed to the S.C.C. where they were dismissed without reasons⁵⁶¹.

The case of *R. v. M.D.R.* (1998) dealt with many of the issues that were raised in *Bill* (1997). In this case, the appellant was a Native Indian who was convicted of discharging a firearm with intent to endanger human life and was given the minimum penalty permitted by law of four years. Counsel for the appellant argued that the punishment was a violation of section 12 of the *Charter*. As with *Bill* (1997), the offence ensued from an ongoing dispute between the families of the accused and the victim. On the evening of the offence, an altercation took place in which the victim had obtained a baseball bat and ran towards a friend of the accused at which point Mr. R fired a shot from a gun he had, resulting in the death of the victim. As with other cases of this nature, the N.B.C.A. asserted that it was necessary to address this case on the basis of the test for gross disproportionality as set out in *Smith* (1987). In doing so, the Court looked at such factors as the gravity of the offence, the personal characteristics of

⁵⁶⁰ *R. v. Wust; R. v. Arthurs; R. v. Gatz; R. v. Arrance; R. v. Sykes* [1998], B.C.J. No. 1076 at para 70.

⁵⁶¹ *R. v. Wust*, [1998] S.C.C.A. No. 321.
R. v. Arthurs, [1998] S.C.C.A. No. 390.
R. v. Gatz, [1998] S.C.C.A. No. 391.
R. v. Arrance, [1998] S.C.C.A. No. 392.
R. v. Sykes, [1998] S.C.C.A. No. 325.

Mr. R and the circumstances of the offence to determine if the penalty imposed was appropriate in this situation. The Court held that the offence was, in their view, very serious and although the Mr. R had a tumultuous background, he had a significant record, including a previous conviction for using a firearm during the commission of an offence, for which he was under a mandatory firearm prohibition order at the time of the offence. Lastly, the offence itself was part of an on-going feud where no one else was injured and the victim had been charging at another individual in what appeared to be an attempt to cause him bodily harm. Taking these factors into account, the Court concluded that the penalty was appropriate to the offence and was not grossly disproportionate. Therefore, the appeal was dismissed. It is interesting to note that despite the similarities between this case and *Bill* (1997), the outcomes were very different.

Currently there are two cases before the S.C.C. that are addressing the constitutionality of mandatory minimum penalties. The first case, *R. v. Morrissey* (1998) challenges the constitutionality of the *Criminal Code* provision that provides a minimum of four years for a conviction for criminal negligence causing death with a firearm. Although the S.C.C. has not yet decided the case, it is still possible to look at the facts and decisions leading up to the this point. At trial⁵⁶², the sentencing judge found that the four year minimum was a violation of section 12 of the *Charter* and imposed on Mr. Morrissey a term of three years⁵⁶³. The Crown appealed the penalty to the N.S.C.A.⁵⁶⁴

⁵⁶²*R. v. Morrissey*, (1996) 154 N.S.R. (2d) 578.

⁵⁶³The actual penalty was two years, plus the time he had spent in pre-trial custody.

⁵⁶⁴*R. v. Morrissey*, [1998] N.S.J No. 116.

where the original penalty was set aside and the four year minimum was imposed. The test set out in *Smith* (1987) was used to determine whether the sanction was inappropriate given the facts of the case and the characteristics of the offender. It was determined that, while the penalty of the Court would have been three years, the additional one year was not significant enough to be considered grossly disproportionate to the offence. In addition, the Court acknowledged that it was important to determine if there were any reasonable hypothetical situations in which the punishment may be considered cruel and unusual. However, in delivering the decision, the Court outlined some of their concerns with the concept of a hypothetical situation, in that “a hypothesis lacks the factual depth of real events which are normally available to underpin the court’s analysis”⁵⁶⁵. The trial court had looked at five real cases and this is where the legislation had failed⁵⁶⁶. However, the C.A. had found flaws in all but two of the cases and in those two, they determined that the four year minimum would not command public outrage. In addition, the Court held that the use of a firearm requires great care and when a firearm is handled in a wanton fashion, there is a risk to others. Thus, the Court looked to the level of blameworthiness in determining whether the penalty is constitutionally valid. Consequently, the appeal was dismissed.

The second case, *R. v. Latimer* (1999)⁵⁶⁷ challenges the mandatory life sentence for second degree murder as being a violation of section 12 of the *Charter*. This case has been going on for some time and has a lengthy history. At his first trial in 1994, Mr.

⁵⁶⁵*R. v. Morrissey*, (1996) 154 N.S.R. (2d) 578 at para 37.

⁵⁶⁶*R. v. Morrissey*, [1998] N.S.J. No. 116 at para 53.

⁵⁶⁷*R. v. Latimer*, [1999] S.C.C.A. No. 40.

Latimer was given the mandatory life term with ten years before parole eligibility when he was convicted of second degree murder for the death of his twelve year old quadriplegic daughter, Tracey. She was in a state of constant pain as she also suffered from severe cerebral palsy. Mr. Latimer had put his daughter in his truck and hooked a hose from the tail-pipe to the exhaust and asphyxiated her. Counsel for the defendant appealed the penalty to the Sask. C.A.⁵⁶⁸ for an order that would exempt him from receiving the mandatory life sentence because it would constitute a violation of section 12 of the *Charter*. The majority in the case dismissed the appeal based on the reasoning that it was in the hands of Parliamentarians, not the Courts, to determine what action should be taken in a case such as this⁵⁶⁹. Therefore, the test of gross disproportionality was not conducted as it was not deemed appropriate for this case. In his dissent, Bayda, C.J.S. disagreed with the majority and felt that, in this particular case, the legislation was a violation of section 12 of the *Charter* and conducted the test for gross disproportionality. He first looked at the characteristics of the offence and the offender and determined “that the appellant did not commit an irrational, depraved, brutal act...motivated by some base impulse or emotion such as hate, anger [or] greed” and was therefore not in the same category as others who are charged with this offence⁵⁷⁰. On the day the offence occurred, Mr. Latimer had received a phone call stating that his daughter would have to go in for further surgery, which meant more pain. Bayda, C.J.S. went on to cite several unreported cases in which a primary care-giver or family member

⁵⁶⁸ *R. v. Latimer*, (1995) 99 C.C.C.(3d) 481 (Sask. C.A.).

⁵⁶⁹ *R. v. Latimer*, (1995) 99 C.C.C.(3d) 481 (Sask. C.A.) at para 81.

⁵⁷⁰ *R. v. Latimer*, (1995) 99 C.C.C.(3d) 481 (Sask. C.A.) at para 115.

had committed a similar crime and had been charged with a lesser offences and/or given a suspended sentence.

Upon further analysis of the case using the test, Bayda, C.J.S. looked at the element of public outrage and produced letter after letter of opinions from the public that were appalled and outraged at the penalty that Mr. Latimer was given. Lastly, Bayda, C.J.S. maintained that factors such as deterrence, rehabilitation, and public protection needed to be addressed. He concluded that this offender does not need to be deterred or rehabilitated and the public did not need to be protected from him as the likelihood of re-offending was extremely low⁵⁷¹. Therefore, the punishment is a violation of section 12 of the *Charter* and could not be justified by a section 1 analysis. The violation of section 7 was not considered in light of the section 12 violation.

Following the decision of the Sask. C.A., counsel for Mr. Latimer filed an appeal to the S.C.C. based on procedural errors⁵⁷². The appeal was granted, and the S.C.C. ordered a new trial. The new trial was heard in 1997 before a judge and a jury⁵⁷³. Mr. Latimer was again convicted of second degree murder, but this time the judge determined that the minimum ten year parole ineligibility period would be considered cruel and unusual and granted him a “constitutional exemption”. He was sentenced to one year in jail, followed by one year of probation. Not surprisingly, the Crown appealed the penalty based on its inaccuracy in the face of the law⁵⁷⁴. The Sask. C.A.

⁵⁷¹ *R. v. Latimer*, (1995) 99 C.C.C.(3d) 481 at para 162.

⁵⁷² *R. v. Latimer*, (1997) 4 C.R. (5th) 1 (S.C.C.).

⁵⁷³ *R. v. Latimer*, [1997] S.J. No. 701.

⁵⁷⁴ *R. v. Latimer*, [1998] S.J. No. 731.

held that it was not within the judge's power to impose a penalty that was less than the prescribed minimum⁵⁷⁵ and allowed the Crown appeal, imposing the mandatory life sentence with eligibility for parole after ten years⁵⁷⁶.

Counsel for the defendant has appealed the decision to the S.C.C.⁵⁷⁷ on the grounds that the ten year mandatory minimum parole ineligibility period is, in this case, cruel and unusual punishment and thus a violation of section 12 of the *Charter* and cannot be justified by section 1. The appeal has been granted but arguments for either side have not yet begun.

Conclusion

There has been a steady increase in the number of reported appeals based on the fairness of a penalty. This is likely a result of two variables, the first is the enactment of the *Charter* which gave individuals' basic rights which were translated into arguments against minimum penalties. Sections 7, 9 and especially 12 have played a very active role in the appellate process. The second factor is the increase in the number of minimum penalties that are now in effect. Crown discretion may have reduced the number of appeals, however, the extent to which this may be a catalyst will never be known.

The courts can be said to consistently refrain from striking down the legislation in this area and have only done so twice. Many of the judicial opinions expressed in the judgements of the cases in this chapter maintained that they felt it was the duty of Parliament, not the courts to determine what the appropriate penalty for a crime should

⁵⁷⁵*R. v. Latimer*, [1998] S.J. No. 731 at para 64.

⁵⁷⁶*R. v. Latimer*, [1998] S.J. No. 73 at para 73.

⁵⁷⁷*R. v. Latimer*, [1999] S.C.C.A. No. 40.

be. The next few years should prove to be very interesting as the Courts deal with the numerous new mandatory minimum penalties that have been in effect for about four years.

Conclusion

Mandatory minimum penalties create issues that have been virtually ignored by legislators. This is complicated by the fact that their history, until now, has not been documented. The frequency with which these penalties are used has increased five times since the first *Criminal Code* was enacted in 1892. What is more disconcerting is that the original *Code* included sentencing options that would allow a judge or magistrate to tailor the penalty to “fit” the circumstances of the offence and the offender. This aspect of the history of minimum penalties sheds an interesting light on the circumstances in which they were included in the original *Code* indicating that their use was an acceptable mode of punishment so long as options remained open to judges and magistrates.

As time went on, more minimum penalties were enacted until 1954 when a complete revision of the *Code* was undertaken. Although it was recommended by the committee established to revise the *Code* that minimum penalties be excluded from the new version, Parliament decided that that particular mode of punishment was required, but only for a few offences. However, Parliament also removed all of the sentencing options that had been available to judges. It may be inferred that by repealing almost all the minimum penalties that previously had been found in the *Code*, it was a justifiable trade-off to eliminate the applicability of judicially-based penalty options. Offenders could still receive a penalty reprieve through the various mercy granting sections of the *Code*, but they would be required to spend some time in jail or prison before a remission could be granted. At the closing of the 20th century, mandatory minimum penalties have jumped drastically in number and there have not been any legislative attempts at

repealing these penalty sections since 1969⁵⁷⁸. In addition, options available to judges in cases where the penalty appeared harsh and unfair are now non-existent for convictions where a minimum penalty is involved.

One pattern that has emerged is with regards to the nature of the offences that carried mandatory minimum penalties in the original *Criminal Code* in comparison to the current offences. The offences included in the 1892 *Code* were aimed at ensuring the legitimacy of public institutions. However, the vast majority of mandatory minimum penalties that are now found within the *Code* are based on offences against the person. This is a significant and interesting pattern which is unfortunately beyond the scope of this thesis, but deserves further investigation and analysis.

The historical analysis of minimum penalties has also demonstrated that while times have changed, the arguments used to support and oppose minimum penalties have not. The main arguments applied to advocate the use of mandatory minimum penalty provisions state that they are an effective deterrent and can protect the public from the offender. The protection of the public is grounded in the theory of incapacitation, however, it is limited in that it is only temporary and does nothing to prevent the offender from re-offending once he/she is released. With regards to the argument that mandatory minimum penalties serve as a deterrent, it is clear that this is likely not the case. Evidence from the Canadian Sentencing Commission suggests that the general public, as well as those within the criminal justice system are uncertain as to which offences carry minima, thus negating any of the deterrent effect that the punishment may

⁵⁷⁸This does not include the 1987 decision in *R. v. Smith* which held the minimum seven year penalty for importing narcotics of no force or effect. This refers to legislative attempts only.

have provided⁵⁷⁹. Those opposing mandatory minimum penalties often argued the ineffectiveness of deterrence in response to this. Nevertheless, despite the concerns over the validity of this argument and 100 years of debate, it is still being in used in the House of Commons.

Concern regarding sentencing disparity is also the basis of argument for proponents of mandatory minimum penalties. It is claimed that sentencing disparity is minimized by including minimum terms because it creates at least some uniformity in the imposition of sanctions across Canada. However, there is a counter-argument that claims that some disparity should be expected and welcomed as it ensures that offenders are receiving the most appropriate and effective sanction.

There are a number of arguments put forth to oppose the use of mandatory minimum penalties. Perhaps the most salient is that mandatory minimum penalty provisions severely curtail judicial discretion. Judges are left with no recourse in cases where an offender is facing a minimum term even when the punishment appears to be harsh and unfair in light of the circumstances surrounding the offender and offence. To compound this problem even further is the transfer of discretion from the judge to the Crown attorney and police. The Crown can decide whether or not to pursue a charge or reduce it. The police have it within their discretion to officially charge an offender or release him/her off with a warning. This is a significant worry because there is little accountability at these levels.

Another complication associated with mandatory minimum penalties is that there

⁵⁷⁹Canada, *Report of the Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 181.

can be difficulties getting juries to convict despite overwhelming evidence of guilt. In an effort to prevent the offender from receiving the prescribed punishment, juries will instead acquit the accused. This occurrence seriously hinders the courts' ability to ensure that justice is served.

Related to the above argument is that mandatory minimum penalties are too rigid and cannot take into account the complexities of situations that come before the courts. As demonstrated in the case law chapter, this rigidity has led to unfair and unjust penalties. Appeals in this area have been relatively unsuccessful as the test to determine whether a penalty is cruel and unusual is difficult to pass. There have only been two successful challenges to date. The rigidity of minimum penalties has also resulted in some members of the judiciary refusing to impose the minimum prescribed term. The 1987 Canadian Sentencing Commission determined that a significant number of judges felt that the existence of minimum penalties hampered their ability to impose an appropriate sanction⁵⁸⁰.

Perhaps the argument against mandatory minimum penalties which appears to be of most importance to the public is the enormous cost to the courts and correction systems. When an offender is charged with an offence that carries a minimum term, he/she has little to lose by going to trial, which can be a very expensive process. In addition, mandatory minimum penalty provisions significantly increase the numbers of offenders going to prison as there are no alternatives available that would permit other options from being used. This places a very heavy burden on the system of corrections

⁵⁸⁰Canada, *Report of the Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 180.

in Canada which may not be equipped to deal with the large influx of inmates as a result of new mandatory minimum penalty provisions, such as the ones introduced in 1995.

Even though the arguments against the use of mandatory minimum penalties are by far the most persuasive, in the piecemeal legislating of these penalties, legislators have consistently ignored the lessons of history. In all fairness, this may be due to the fact that prior to this point, there had never been a compilation of legislative attempts and corresponding arguments to inform legislators of these things. However, given the nature of the political arena, it may be that a compilation such as this has been purposely ignored as the public appears very keen on supporting a justice system that imposes both harsh and certain punishments. Mandatory minimum penalties ensure such a system.

The findings of various reports by independent commissions of inquiry into the use of mandatory minimum penalties have almost unanimously called for their repeal. Most of the official reports on sentencing and mandatory minimum penalties, which span a time frame of over sixty-two years, have yielded the same recommendation, abolish minimum penalties (with the exception of high treason and murder) and leave the imposition of a sanction to the discretion of the judiciary. The main conclusion of these reports is that minimum penalties hinder judicial discretion, are an ineffective deterrent, and are too expensive. However, support by the general public for this rigid means of punishing offenders appears to be strong, possibly as a result of media sensationalism and limited reporting on the factors that went into sentencing the offender⁵⁸¹. In light of the

⁵⁸¹Canada, *Reports of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections: Taking Responsibility* (Ottawa: Queen's Printer, August 1988) at 59.

findings of these committees and commissions, it is clear that the use of minimum penalties is not a recommended means of punishment and the law makers and the general public must be made aware of the full extent of the history and issues surrounding mandatory minima in order to determine the appropriate future steps that the criminal justice system must take.

The case law represents a different set of problems for mandatory minimum penalties. The courts are extremely reluctant to strike down federal legislation in this area and have set out a narrow test for gross proportionality. This test is very demanding and in the thirteen years since it was outlined in the 1987 ground-breaking S.C.C. case, *R. v. Smith*, only one case, *R. v. Bill* has been successful. Incidentally, the decision in *Bill* only applied to that particular case and not the penalty found within the *Criminal Code*. The *Charter* appears to be the defining piece of legislation that provided offenders with a basis of justification to appeal the sentences that were considered unfair. The vast majority of appeals challenge the validity of a sanction based on a violation of sections 9 and 12 of the *Charter*⁵⁸². It was section 12 that was violated in the *Smith* case and set the standard for what constitutes “cruel and unusual punishment”.

The case law has also shown that when the number of offences that carry a mandatory minimum increases, a corresponding increase is also seen in the number of reported appeals. As seen earlier, this will continue to contribute to the costs of the criminal justice system as well as Correctional Services in Canada.

The overwhelming impression from analysing the case law is that the judges have

⁵⁸² As was seen in chapter four, section 7 often appears as a basis for a violation in these cases, but is not usually dealt with as challenges to sections 9 and 12 seem to be of greater concern for the courts.

acknowledged that there is very little they can do when the imposition of an unjust penalty is going to occur. This inability of the judiciary to prevent unfairness can be seen in the number of reported cases listed in Chapter four wherein the judge assigned a lesser punishment than permitted by law. Even though the Crown ultimately appealed these cases and won, it clearly demonstrates the frustration experienced by the judiciary with regards to mandatory minimum penalties. The case law analysis has also illustrated that given the narrowness of the test for gross disproportionality, it is unlikely that a penalty which is simply unfair or unjustified would be deemed as grossly disproportionate.

With regards to mandatory minimum penalties and the principles and purposes of sentencing (as outlined in section 718 of the *Criminal Code*), it is improbable that the two can co-exist without producing inconsistencies and uncertainties within the Canadian penalty structure. The problems associated with minimum penalties arise when one looks more critically at sections 718(c), 718(1), 718(2)(d) and 718(2)(e). Section 718(d) emphasizes that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”⁵⁸³. It is very plausible that there will be cases where the offence carries a minimum penalty but the circumstances surrounding the offender as well the offence, do not warrant the minimum. In these cases, Parliament has effectively removed all options that would prevent this offender from going to jail. The offender could appeal the penalty stating that it is a violation of section 12 of the *Charter* protecting against cruel and unusual punishment, but as demonstrated in the above discussion on the case law, it is highly unlikely that a remedy would be made

⁵⁸³ *Canadian Criminal Code 1999*, R.S.C. 1985, c. 46, s. 718(c).

available. There is currently a case before the Supreme Court of Canada in *R. v. Latimer* (1999)⁵⁸⁴ where this problem appears to have become a reality. In this case, Mr. Latimer was convicted of second degree murder in death of his severely handicapped daughter and sentenced, as per the *Code*, to life in prison without eligibility for parole for ten years⁵⁸⁵. Although this case raises serious issues regarding the treatment of people with disabilities, by all accounts, there is no chance that Mr. Latimer will re-offend and he has lived his life in a productive, law-abiding manner. Yet the rigidity of the *Criminal Code* section states that he must serve at least ten years before eligibility for parole. It is possible to conclude that this penalty is not appropriate in light of section 718(c), and in fact, is likely inappropriate in reference to the entirety of section 718. However, in light of the case law outlined in this thesis and that the offence involved the purposeful taking of another life, there is some doubt that it would pass the gross disproportionality test. Cases such as these will continue to arise and grave injustices may follow if the current situation is not amended.

Section 718(1) of the *Code* states that a punishment must be proportional to the offence and the degree of responsibility of the offender (this is essentially the theory of just deserts)⁵⁸⁶. An offender may commit an offence where the degree of blameworthiness is relatively low and the penalty could be considered disproportionate

⁵⁸⁴*R. v. Latimer*, [1999] S.C.C.A. No. 40.

⁵⁸⁵High treason, first degree murder and second degree murder all carry a life sentence. However, the *Criminal Code* outlines a minimum parole eligibility period for these offences. High treason and first degree murder have a minimum parole eligibility period set at twenty-five years. Those convicted of second degree murder are eligible for parole between ten and twenty-five years as set by the judge at the sentencing hearing.

⁵⁸⁶*Canadian Criminal Code 1999*, R.S.C. 1985, c. 46, s. 718(1).

to the offence, but not so excessively to negate the penalty. Again, there is currently a case before the S.C.C. in which this section is of concern. In *R. v. Morrissey* (1998)⁵⁸⁷, the issue is whether the four year minimum for criminal negligence causing death with a firearm is cruel and unusual in light of the circumstances of the case. Mr. Morrissey had been drinking with his best friend whom he accidentally shot and killed. There is evidence that he had been so intoxicated at the time of the offence that he did not have the requisite intent for the crime. The *Criminal Code* does not permit this to be a factor in sentencing and Mr. Morrissey was convicted and given four years in prison. As with *Latimer*, it is very conceivable that the four year penalty is inappropriate given the circumstances surrounding the case and in light of the entire section 718 of the *Code*, however, it is improbable that it is “grossly disproportionate”.

Lastly, section 718(2)(d) states that a punishment should not be used if there is a less restrictive one available given the circumstances of the crime. As stated above, there have been, and will continue to be cases in which an offender should not be sentenced to incarceration, yet because of the minimum term set out in the *Criminal Code*, there is little to prevent the unfair penalty from being imposed. The same arguments could be made for section 718(2)(e). The S.C.C. addressed section 718 in a recent decision in *R. v. Gladue* (1999)⁵⁸⁸. Although this case does not address the issue of mandatory minimum penalties, it does clarify the use of section 718.2(e) of the *Criminal Code* with respect to Aboriginal offenders. The issue before the S.C.C. was to clarify whether this section of the *Code* should be given a narrow or wide reading and some statements made

⁵⁸⁷*R. v. Morrissey*, [1998] S.C.C.A. No. 278.

⁵⁸⁸*R. v. Gladue*, [1999] 1 S.C.R. 688; S.C.J. No. 19.

by the Court that are related to this thesis. In the majority opinion delivered by Cory, J. and Iacobucci, J. the court held that in sentencing offenders, the sentence “must be holistic and designed to achieve a fit sentence in the circumstances...the sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community”⁵⁸⁹. This decision pertained to all offenders, not just Aboriginal offenders as outlined in this section of the *Code*. Therefore, the S.C.C. has effectively advocated, through the fundamental principles of sentencing, that the courts should be carefully addressing and applying section 718 of the *Criminal Code*. The decision implies that sentencing courts should take in to account *all* the factors surrounding the crime in determining the appropriate sanction. This is inconsistent with mandatory minimum penalties because the nature of this mode of punishment does not allow for judges to consider many of the principles and purposes of sentencing that are outlined in section 718. For example, the section that was examined in the above case states that “all available sanctions, *other than imprisonment* that are reasonable in the circumstances should be considered for all offenders” (emphasis added)⁵⁹⁰. There are no other options other than a custodial sanction available in cases where there is a mandatory minimum penalty of imprisonment, regardless of whether another sanction would be more fitting given the circumstances of the offender and the offence.

Clearly, certain principles and purposes of sentencing outlined in section 718 of the *Criminal Code* work in opposition to mandatory minimum penalties. Until this

⁵⁸⁹*R. v. Gladue* [1999], 1 S.C.R. 688; S.C.J. No. 19 at para 81.

⁵⁹⁰*The Criminal Code of Canada, 1999*, R.S.C. 1985, c. 46, s. 718.2(e).

situation is remedied, offenders will be sent to prison for terms that are unwarranted, or may even be given a custodial sanction when it is not necessary or appropriate. This will undoubtedly cause a great deal of frustration and friction within the criminal justice system until it is rectified. The goals of sentencing in Canada need to be more definitive because as it stands now they cover all areas of the spectrum. Only once that is accomplished can an effective re-evaluation of the role and appropriateness of minimum penalties in the criminal justice system be completed.

Concerns regarding restorative justice initiatives and mandatory minimum penalties are justified in that the two concepts are completely incompatible with each other. An argument could be made that offences that carry minimum penalties would not be amenable to a restorative justice approach because of the underlying serious nature of the offences. The current *Code* contains many offences that carry minimum penalties that are less serious in nature and could be eligible for restorative justice-based initiatives. Therefore, given the recent commitment that the Canadian government has shown in instituting restorative justice-based measures, the incongruity between these two approaches to sentencing must be dealt with if there is to be any semblance of consistency and predictability in the criminal justice system.

Ultimately, mandatory minimum penalties produce a number of undesirable results that far outweigh their proposed usefulness. As we move into a new century, mandatory minimum penalties appear to be outdated in light of the new initiatives that are taking hold. Unfortunately, as the saying goes, "old habits die hard" and given the current opinions of the Canadian public coupled with the heavy volume of Bills that are

introduced into Parliament every session, the reality of the situation is that mandatory minimum penalties are bound to be around for some time. The issues and problems surrounding mandatory minimum penalties are not limited to Canada alone. Recent legislative activity with regards to minimum penalties has been occurring in all common law countries⁵⁹¹.

There are a number of possibilities that could alleviate the Canadian situation. One possible way that the problems associated with mandatory minimum penalties could be ameliorated would be to begin educational initiatives that would inform the public as to the true nature of minimum penalties, with particular attention paid to their cost, effectiveness and efficiency. In addition, it may be beneficial to educate those in the media about mandatory minimum penalties to prevent inaccuracies from being reported. Consequently, any future amendments to the mandatory minimum penalty structure would be better understood by an informed public and supported.

Another possibility would be to create option clauses for judges that would allow them to deviate from the mandatory minima found in the *Criminal Code*. This could be done either through the creation of new option clauses or extending the ones already in place to minimum penalties. The original *Criminal Code* was enacted with both minimum penalties and options to mediate those sanctions. It would appear that the minima were included with the idea that if the penalty was too harsh given the circumstances of the offence and offender, the judge or magistrate would be able to remedy the problem. These options could provide, what would amount to a built-in

⁵⁹¹See M. Tonry, *Sentencing Matters* (New York: Oxford University Press, 1996) for further exploration of the American context.

safety mechanism which was included in the first *Criminal Code* and remained there until 1954.

There would likely be a great deal of criticism levelled at any reform that appeared to be 'soft' on criminals, therefore, if this possibility was used in conjunction with an educational approach, acceptance could be more forthcoming. In addition, this would solve some of the larger problems associated with minimum penalties, such as removal of judicial discretion, difficulties getting juries to convict when a minimum penalty is in place, and reducing the costs associated with trials, appeals and prison-overpopulation.

A further possibility would be to abolish minimum penalties in full, or at least in part. As stated in Chapter three of this paper, almost all the official reports have either advocated the repeal of mandatory minimum penalties or encouraged judicial discretion. Although some of the reports recommended that minimum penalties be kept for murder and high treason, this would still cause some of the same problems, similar to those faced by the S.C.C. in *Latimer* (1999). Therefore, it would be more beneficial to abolish all minimum penalty provisions and rely on judicial discretion in determining the appropriate sanction. The repeal of minimum penalties would not only increase judicial discretion, but it would also level the playing field between the Crown and the accused. An accused would not be manipulated into entering a guilty plea for a less serious offence in order to avoid a mandatory jail term. This option would also decrease some of the cost that is associated with mandatory minimum penalties. As seen in Chapter three, a main concern in the House of Commons when debating minimum penalties becomes the cost of the

criminal justice and corrections systems. When an offender is charged with an offence that carries a minimum term, he or she is more likely to fight the charge than enter a guilty plea.

Lastly, it may be beneficial to review the *gross disproportionality test* to determine if the standards set by the S.C.C. are too high. If the standards are too high, ascertain a standard that would be more in line with the cases in which the sentences are unduly harsh. If the standards are not viewed as too high, determine other methods, such as “constitutional exemptions” that would allow individual omissions rather than having to repeal the section relating to the penalty.

This may be rather difficult as the S.C.C. took a great deal of time and effort in determining the test for gross disproportionality. The feasibility of this possible solution is also questionable as it is unlikely that the S.C.C. would come to a different conclusion. As stated in many of the cases in Chapter four, the court tends to rely heavily on the wisdom of Parliament in enacting appropriate legislation. The role of the court in these cases is to ensure that in light of the policy rationale set out by Parliament, that no law or penalty is an infringement of the *Charter*, and only then, can they provide a remedy.

Ultimately, what is needed is a more thorough and complete understanding of the history of mandatory minimum penalties in this country. In researching this thesis, it was shocking to discover that there existed no published source of mandatory minimum penalties (that now exist in Appendix A and B). In addition, issues relating to cost, reduced judicial discretion and the impact of unfair penalties need to be addressed for any workable policy to be implemented. Lastly, the use of minimum penalties must be

analysed in conjunction with other initiatives in the criminal justice system to ensure compatibility and consistency.

Mandatory Minimum Penalties: 1892 - 1954¹**Offences****Criminal Code of Canada**

	<u>1892²</u>	<u>1915</u>	<u>1917</u>	<u>1921</u>	<u>1922</u>	<u>1929</u>	<u>1931</u>	<u>1935</u>	<u>1938</u>	<u>1944</u>	<u>1948</u>	<u>1951</u>
Engaging in a Prize Fight	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos
Frauds Upon the Government	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon
Stealing Post Letter Bags	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	repealed 1 yr	repealed	repealed
Stealing Post Letters	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	3 yrs	repealed 1 yr	repealed	repealed
Stopping Mail with Intent to Rob	5 yrs	5 yrs	5 yrs	5 yrs	5 yrs	5 yrs	5 yrs	5 yrs	5 yrs	5 yrs	5 yrs	5 yrs
Corruption in Municipal Affairs	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon	1 mon
Keeper/Inmate of Bawdy House ³	~	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos	3 mos
Selling Insurance Without Licence	~	~	3 mos	3 mos	3 mos	3 mos	repealed	~	~	~	~	~
Injuring Persons While Furious Driving												
While Impaired	~	~	~	7 days	7 days	7 days	7 days	7 days	7 days	7 days	7 days	7 days
Stealing an Automobile	~	~	~	1 yr	1 yr	1 yr	1 yr	1 yr	1 yr	1 yr	1 yr	1 yr
Driving While Intoxicated	~	~	~	~	~	~	~	~	7 days	7 days	7 days	3 mos ⁴
Using Firearm During Offence	~	~	~	~	~	~	~	~	2 yrs	2 yrs	2 yrs	repealed
Opium and Narcotic Drug Act												
Possession of Drug/Narcotic	~	~	~	~	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos
Trafficking of Drug/Narcotic	~	~	~	~	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos
Importing/Exporting Drugs/Narcotics	~	~	~	~	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos
Sending Drugs/Narcotics by Mail	~	~	~	~	~	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos
Prescribing Drugs/Narcotics for Non-Medical Purposes	~	~	~	~	~	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos	6 mos

¹This chart only goes up to 1954 because a complete revision was completed that year. See appendix B for continuation of this chart.²Only the years in which amendments were passed are included. This is not the year the law came into effect.³This minimum only applied to third and subsequent convictions.⁴This was for a second offence. The penalty for a first offence had been 7 days, but that was repealed in 1951. The minimum for a second conviction remained unchanged.

APPENDIX B

Mandatory Minimum Penalties: 1955 - 1999

<u>Offences</u>	<u>1955</u>	<u>1961</u>	<u>1969</u>	<u>1976</u>	<u>1987</u>	<u>1995</u>
Criminal Code of Canada						
Theft of postal matter	3 mos	3 mos	repealed	~	~	~
Driving while intoxicated	7 days	7 days	repealed	~	~	~
Driving while impaired	14 days ¹	14 days	14 days	14 days	14 days	14 days
Blood alcohol over .80	~	~	~	14 days ²	14 days	14 days
Fail/Refuse to provide breath sample	~	~	~	14 days ³	14 days	14 days
Betting, pool-selling, book-making, etc.	~	~	~	14 days ⁴	14 days	14 days
Placing bets on behalf of others	~	~	~	14 days ⁵	14 days	14 days
High treason	~	~	~	Life ⁶	Life	Life
First degree murder	~	~	~	Life ⁷	Life	Life
Second degree murder	~	~	~	Life ⁸	Life	Life
Using a Firearm During an Offence	~	~	~	1 yr	1 yr	1 yr
Criminal Negligence Causing Death - Firearm	~	~	~	~	~	4 yrs
Manslaughter - Firearm	~	~	~	~	~	4 yrs
Attempted Murder - Firearm	~	~	~	~	~	4 yrs
Causing Bodily Harm with Intent to Wound - Firearm	~	~	~	~	~	4 yrs
Sexual Assault - Firearm	~	~	~	~	~	4 yrs
Aggravated Assault - Firearm	~	~	~	~	~	4 yrs
Kidnapping - Firearm	~	~	~	~	~	4 yrs
Hostage Taking - Firearm	~	~	~	~	~	4 yrs
Robbery - Firearm	~	~	~	~	~	4 yrs
Extortion - Firearm	~	~	~	~	~	4 yrs
Using Replica Firearm During Offence	~	~	~	~	~	1 yr
Importing/Exporting Restricted Weapon/Firearm	~	~	~	~	~	1 yr
Making Weapon into Automatic Fire	~	~	~	~	~	1 yr
Possession of Weapons for Trafficking	~	~	~	~	~	1 yr
Trafficking Weapons	~	~	~	~	~	1 yr
Possession of Weapon Obtained Through Commission Of Offence	~	~	~	~	~	1 yr
Possession of Restricted/Prohibited Weapon	~	~	~	~	~	1 yr
Possession of Restricted/Prohibited Ammunition	~	~	~	~	~	1 yr
Possession of Firearm Knowing it is Unauthorized	~	~	~	~	~	1 yr
Possession of Weapon/Device or Ammunition Knowing it is Unauthorized	~	~	~	~	~	1 yr
Opium and Narcotic Drug Act						
Possession of a Drug/Narcotic	6 mos	repealed	~	~	~	~
Trafficking a Drug/Narcotic	6 mos	repealed	~	~	~	~
Importing/Exporting Drugs/Narcotics	6 mos	7 yrs	7 yrs	7 yrs	repealed ⁹	~
Sending Drugs Through the Mail	6 mos	repealed	~	~	~	~
Prescribing Drugs for Non-Medical Purposes	6 mos	repealed	~	~	~	~

¹This applied to second convictions only, there was no minimum for a first conviction.²See note 2.³See note 2.⁴See note 2.⁵See note 2.⁶This is a life sentence with the minimum parole eligibility set at 25 years.⁷This is a life sentence with the minimum parole eligibility set at 25 years.⁸This is a life sentence with the minimum parole eligibility set between 10 and 25 years.⁹This section was declared in no force or effect by the S.C.C. in 1987.

Continued: Mandatory Minimum Penalties: 1955 - 1999

<u>Offences</u>	<u>1996</u>	<u>1999</u>
Criminal Code of Canada		
Theft of postal matter	repealed	~
Driving while intoxicated	repealed	~
Driving while impaired	14 days ¹⁰	14 days
Blood alcohol over .80	14 days ¹¹	14 days
Fail/Refuse to provide breath sample	14 days ¹²	14 days
Betting, pool-selling, book-making, etc.	14 days ¹³	14 days
Placing bets on behalf of others	14 days ¹⁴	14 days
High treason	Life ¹⁵	Life
First degree murder	Life ¹⁶	Life
Second degree murder	Life ¹⁷	Life
Using a Firearm During an Offence	1 yr	1 yr
Criminal Negligence Causing Death - Firearm	4 yrs	4 yrs
Manslaughter - Firearm	4 yrs	4 yrs
Attempted Murder - Firearm	4 yrs	4 yrs
Causing Bodily Harm with Intent to Wound -Firearm	4 yrs	4 yrs
Sexual Assault - Firearm	4 yrs	4 yrs
Aggravated Assault - Firearm	4 yrs	4 yrs
Kidnapping - Firearm	4 yrs	4 yrs
Hostage Taking - Firearm	4 yrs	4 yrs
Robbery - Firearm	4 yrs	4 yrs
Extortion - Firearm	4 yrs	4 yrs
Using Replica Firearm During Offence	1 yr	1 yr
Importing/Exporting Restricted Weapon/Firearm	1 yr	1 yr
Making Weapon into Automatic Fire	1 yr	1 yr
Possession of Weapons for Trafficking	1 yr	1 yr
Trafficking Weapons	1 yr	1 yr
Possession of Weapon Obtained Through Commission Of Offence	1 yr	1 yr
Possession of Restricted/Prohibited Weapon	1 yr	1 yr
Possession of Restricted/Prohibited Ammunition	1 yr	1 yr
Possession of Firearm Knowing it is Unauthorized	1 yr	1 yr
Possession of Weapon/Device or Ammunition Knowing it is Unauthorized	1 yr	1 yr
Living Off Avails of Child Prostitution	5 yrs	5 yrs
Opium and Narcotic Drug Act		
Possession of a Drug/Narcotic	repealed	~
Trafficking a Drug/Narcotic	repealed	~
Importing/Exporting Drugs/Narcotics	repealed ¹⁸	~
Sending Drugs Through the Mail	repealed	~

¹⁰This applied to second convictions only, there was no minimum for a first conviction.

¹¹See note 2.

¹²See note 2.

¹³See note 2.

¹⁴See note 2.

¹⁵This is a life sentence with the minimum parole eligibility set at 25 years.

¹⁶This is a life sentence with the minimum parole eligibility set at 25 years.

¹⁷This is a life sentence with the minimum parole eligibility set between 10 and 25 years.

¹⁸This section was declared in no force or effect by the S.C.C. in 1987.

APPENDIX C

Purpose and Principles of Sentencing⁵⁹²

718. Purpose - The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

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

718.1 Fundamental Principle - A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 Other Sentencing Principles - A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, nationality or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or
 - (ii) evidence that offender, in committing the offence, abused the offenders spouse or child,
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or
 - (iv) evidence that the offence was committed for the benefit of, or at the direction of or in association with a criminal organization
 shall be deemed to be aggravating circumstances;
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

⁵⁹²*Criminal Code of Canada*, R.S.C. 1985, c. 46, s. 718; 1995, c. 22, s. 6; 1997, c. 23, s. 17.

APPENDIX D

LIST OF BILLS¹

***all bold bills were passed into law**

Year	Penalty	Offence	Bill #
1908	1 yr	Using firearm during commission of offence	78
1912	6 mos	Participating in Canadian election by individual who was not a Canadian	5
1915	1 mon ²	Being an keeper/inmate of bawdy house	74
1917	3 mos	Selling insurance without a licence	54
	2 yrs	Participating in an election by individual who was from a country not an ally of Canada or Great Britain	59
1921	7 days	Injuring persons while furious driving	138
	1 yr	Stealing an automobile	138
1922	6 mos	Possession of drug/narcotic	137
	6 mos	Trafficking of drugs/narcotics	137
	6 mos	Importing/Exporting drugs/narcotics	137
1925	30 days	Lying about the contents of an automobile	147
1929	6 mos	Dentist/physician/veterinarian prescribing drugs	4
		Non-medical purposes	
	6 mos	Sending/attempting to send drugs through the mail	4
1931	3 mos	REPEAL: Selling insurance without a licence	113
1933	1 yr	Carrying a concealed weapon	53
1935	3 mos	Driving a car while intoxicated	73
1938	2 yrs	Using firearm during commission of an offence	137

¹The years listed refer to the year that the Bill was passed or in the case of Bills that did not pass, when they were introduced.

²This is for third and subsequent convictions.

Year	Penalty	Offence	Bill #
1941	6 mos	Failing to stop after an accident	10
1944	3 yrs	REPEAL: Theft of post-letters	139
	3 yrs	REPEAL: Theft of post-letter bags	139
1948	1 yr	Theft of post-letters	337
	1 yr	Theft of post-letter bags	337
	6 mos	Driving while impaired	207
1949	6 mos	Driver not stopping after an accident	3
	6 mos	Hit and run	3
	6 mos	Driving while impaired	3
1951	7 days	REPEAL: driving while intoxicated³	391
	1 yr	REPEAL: theft of post letters	391
	1 yr	REPEAL: theft of post-letter bags	391
	2 yrs	REPEAL: using firearm during commission of offence	391
1952	7 days	Driving while intoxicated	93
	14 days ⁴	Driving while impaired	93
	3 mos	Theft of postal matters	93
	1 yr	Repeal: stealing an automobile	93
	7 days	Repeal: injuring persons while furious driving while impaired	93
	3 mos	Repeal: engaging in a prize fight	93
	1 mon	Repeal: frauds upon the government	93
	5 yrs	Repeal: stopping the mail with intent to rob	93
	1 mon	Repeal: corruption in municipal affairs	93
	3 mos	Repeal: keeper/inmate of bawdy house	93
1954	3 mos	Theft from the mail	7
	7 days	Driving while intoxicated	7
	14 days ⁵	Driving while impaired	7
	1 yr	REPEAL: stealing an automobile	7
	7 days	REPEAL: injuring persons while furious driving while impaired	7
	3 mos	REPEAL: engaging in a prize fight	7
	1 mon	REPEAL: frauds upon the government	7

³Only the minimum penalty for the first offence was repealed, the minima for second and subsequent offences were maintained.

⁴This applied to second a second conviction, there was no minimum penalty for a first offence.

⁵See note 4.

Year	Penalty	Offence	Bill #
1954	5 yrs	REPEAL: stopping the mail with intent to rob	7
	1 mon	REPEAL: corruption in municipal affairs	7
	3 mos	REPEAL: keeper/inmate of bawdy house	7
1954⁶	6 mos	Repeal: dentist/veterinarian/physician prescribing drugs for non-medical purposes	K-13
	6 mos	Repeal: Sending/attempting to send drugs though the mail	K-13
1957	6 mos	Repeal: dentist/veterinarian/physician prescribing drugs for non-medical purposes	239
	6 mos	Repeal: sending/attempting to send drugs through the mail	239
1961	7 yrs	Importing/Exporting drugs	C-100
	6 mos	REPEAL: possession of drugs	C-100
	6 mos	REPEAL: trafficking of drugs	C-100
	6 mos	REPEAL: sending drugs through the mail	C-100
	6 mos	REPEAL: dentist/veterinarian/physician prescribing drugs for non-medical purposes	C-100
1968	7 days	REPEAL: driving while intoxicated	C-150
	3 mos	REPEAL: theft from the mail	C-150
	30 days	Cruelty to animals	C-142
1973	1 yr	Cattle rustling	C-199
	3 mos	Cruelty to animals	C-46
1974	1 yr	Cattle rustling	C-252
	3 mos	Cruelty to animals	C-207
	3 mos	Impaired driving causing death	C-260
	3 mos	Impaired driving causing death	C-351
	6 mos	Possession of a narcotic	C-172
	10 yrs	Trafficking of narcotics	C-172
	10 yrs	Importing/Exporting narcotics	C-172
	6 mos	Possession of a narcotic	C-258
	10 yrs	Trafficking of narcotics	C-258
	10 yrs	Importing/Exporting of narcotics	C-258

⁶This Senate Bill, while it was introduced in 1954, is dealt with separately as it was after the revision and part of a different, later set of Bills.

Year	Penalty	Offence	Bill #
1975	1 yr	Cattle rustling	C-337
	5 yrs	Possession firearm during offence	C-379
	9 mos	Impaired driving causing death	C-391
	6 mos	Impaired driving causing injury	C-391
	6 mos	Cruelty to animals	C-328
1976	Life ⁷	First degree murder	C-84
	Life ⁸	Second degree murder	C-84
	Life ⁹	High Treason	C-84
	1 yr	Using a firearm during commission of offence	C-51
	14 days ¹⁰	Breath sample over .80	C-71
	14 days ¹¹	Refusing to provide a breath sample	C-71
	14 days ¹²	Betting, pool-selling, book-making, etc.	C-71
	14 days ¹³	Placing bets on behalf of others	C-71
	9 mos	Impaired driving causing death	C-218
	6 mos	Impaired driving causing injury	C-218
	1 yr	Using a firearm during commission of offence	C-83
	6 mos	Possession of narcotics	C-298
	3 mos	Intimidating employees	C-346
1977	6 mos	Possession of narcotics	C-398
	10 yrs	Trafficking narcotics	C-398
1984	7 yrs	Trafficking narcotics	C-223
1991	5 yrs	Using a firearm during commission of offence	C-324
1992	5 yrs	Using a firearm during commission of offence	C-389
	5 yrs	Using a firearm during commission of offence	C-394
1994	5 yrs	Using a firearm during commission of offence	C-293
	5 yrs	Using a firearm during commission of offence	C-260
	3 yrs	Theft of a firearm	C-260

⁷With minimum parole eligibility of twenty-five years.

⁸With parole eligibility between ten and twenty-five years.

⁹With minimum parole eligibility of twenty-five years.

¹⁰This was for a second offence, there was no minimum for a first offence.

¹¹See note 10.

¹²See note 10.

¹³See note 10.

Year	Penalty	Offence	Bill #
1995	4 yrs	Criminal negligence causing death with firearm	C-68
	4 yrs	Manslaughter with firearm	C-68
	4 yrs	Attempted murder with firearm	C-68
	4 yrs	Causing bodily harm with intent to wound with firearm	C-68
	4 yrs	Sexual assault with firearm	C-68
	4 yrs	Aggravated assault with firearm	C-68
	4 yrs	Kidnapping with firearm	C-68
	4 yrs	Hostage taking with firearm	C-68
	4 yrs	Robbery with firearm	C-68
	4 yrs	Extortion with firearm	C-68
	1 yr	Using replica firearm during commission of offence	C-68
	1 yr	Making a firearm automatic fire	C-68
	1 yr	Importing/Exporting restricted/prohibited weapons or firearms	C-68
	1 yr	Possession of weapons for trafficking	C-68
	1 yr	Trafficking weapons	C-68
	1 yr	Possession of weapons obtained through commission of an offence	C-68
	1 yr	Possession of prohibited/ restricted weapons/firearms with ammunition	C-68
	1 yr	Possession of prohibited/restricted ammunition	C-68
	1 yr	Possession of firearm knowing it is unauthorized	C-68
	1 yr	Possession of weapon/device/ ammunition knowing it is unauthorized	C-68
	25 yrs¹⁴	Third conviction of a violent offence	C-301
1996	5 yrs	Living off the avails of child prostitution	C-24
	7 yrs	Impaired driving causing death	C-201
1999	2 yrs¹⁵	Breaking/entering a dwelling house	C-475
	5 yrs	Sexual interference of a child under 14 yrs	C-504
	5 yrs	Invitation to sexual touching of child under 14 yrs	C-504
	10 yrs	Using a firearm during commission of offence, not discharged	C-516
	20 yrs	Using a firearm during commission of offence and discharging the firearm	C-516

¹⁴This is likely supposed to be a mandatory life sentence, not a twenty-five year minimum penalty. This piece of legislation is clearly poorly drafted.

¹⁵This minimum was to apply to second and subsequent convictions, not for a first offence.

Year	Penalty	Offence	Bill #
	25 yrs	Using a firearm during commission of offence, discharging it and it results in the wounding, maiming or disfiguring of anyone (other than those involved in the offence)	C-516
	10 yrs	Using a firearm during commission of offence	C-484
	20 yrs	Using a firearm during commission of offence and discharging the firearm	C-484
	25 yrs	Using a firearm during commission of offence and firearm is discharged resulting in injury to anyone not involved in the offence	C-484
	2 yrs ¹⁶	Breaking/entering a dwelling house	C-219
	25 yrs	Third conviction for rape	C-265
	25 yrs	Third conviction for murder	C-265

¹⁶ *Ibid.*

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