A Tale of Two Countries: Constitutionalizing the Mandatory Minimum Sentence

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I. INTRODUCTION

Mandatory minimum sentences have always played a role in Canadian criminal law, and indeed, in the common law of the United Kingdom (UK). Parliament, especially in recent years, drastically expanded the use of mandatory minimum sentencing, calling for higher sentences to be imposed on offenders. This has resulted in a corresponding increase in challenges to the constitutionality of that legislation, specifically alleging that the impugned mandatory sentences infringe an individual's right to be free from cruel and unusual treatment or punishment. However, these challenges are often based on an imagined offender, or a reasonable hypothetical, rather than the offender before the court.

The UK also imposes mandatory minimum sentences, including for firearms offences. Moreover, the mandatory sentences in the UK call for significantly more severe sentences than the sentences that Canadian courts struck down as being cruel and unusual punishment. This article, therefore, looks at the firearms laws of the UK and how they have structured the mandatory minimum sentence for firearm offences. The provisions in the UK mandating minimum sentences for particular offences contain an "escape clause" which permits judges to deviate from the mandatory minimum sentence in "exceptional circumstances." As a result, judges in

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the UK must deal with the offender and the facts of the case before them, rather than a reasonable hypothetical scenario. This article argues that Parliament's incorporation of similar language in Canadian sentencing provisions would have two salutary effects: (1) placing the emphasis on the offender before the court, thereby eliminating the reasonable hypothetical and (2) restoring the role of Parliament in providing guidance on sentences while preserving the role of the judiciary to craft a sentence for each offender which does not violate our constitutional principles.

II. Mandatory Minimum Sentences in Canada

Mandatory minimum sentences have been a feature of Canadian criminal law since the very first *Criminal Code*.[1] Their use has expanded over time, and, notably under the government of Pierre Trudeau, mandatory minimum sentences were introduced for using a firearm while committing, attempting to commit or during flight after committing or attempting to commit an indictable offence.[2] In 1995, the Chrétien government further expanded the use of mandatory minimum sentences in the *Firearms Act*. This *Act* introduced higher mandatory minimum sentences for criminal negligence causing death, manslaughter, attempted murder, sexual assault, aggravated sexual assault, and other specific indictable offences while the offender is armed.[3] Following Jean Chrétien, in 2005, the Martin government further amended the *Criminal Code* by creating 19 new mandatory minimum sentences for a variety of sexual offences involving children.[4] The Harper government further expanded the use of mandatory minimum sentences through both the *Safe Streets and Communities Act*[5] and the *Protection of Communities and Exploited Persons Act*[6] by both increasing the minimum sentence for some pre-existing mandatory minimums and introducing approximately 40 new mandatory minimum sentences.

The purpose behind these mandatory minimum sentences was, in part, to increase consistency in sentencing – a laudable goal as disparate

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1 *Criminal Code, 1982*, SC 1892, c 29, ss 94, 133, 136, 326, 327, 401. There were also mandatory minimum fines: ss 93, 95–96.

2 *Criminal Law Amendment Act, 1977*, SC 1976-77, c 53, s 3.

3 *Firearms Act*, SC 1995, c 39, s 139.

4 *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32, ss 3, 4, 7, 9.1, 10.1.

5 SC 2012, c 1.

6 SC 2014, c 25, ss 18–20.

sentences have been a recognized problem since the 1970s.[7] As Professor Hogg starkly noted, "[s]tudies of sentencing practices uniformly show outrageous disparities in the sentences that judges impose in similar cases."[8] Through the imposition of mandatory minimum sentences, Parliament has imposed a floor that sentences cannot go below. Through the imposition of a mandatory minimum, Parliament has provided guidance to the courts as to how it views sentencing precedents and the criminal behaviour offenders engage in.

However, many of those mandatory minimum sentences have run afoul of the courts – which have found that many of the mandatory minimum sentences enacted contravene s. 12 of the *Canadian Charter of Rights and Freedoms*, which prohibits cruel and unusual treatment or punishment. Indeed, of all *Charter* challenges to mandatory minimum penalties in the last ten years, 69% of constitutional challenges to mandatory minimums for drug offences were successful. In that same time period, 49% of constitutional challenges to mandatory minimum penalties for firearms offences were successful.[9] Yet, many of the provisions have been struck down, not based on the individual before them, but rather on a "reasonable hypothetical."[10]

This concept was first introduced in *R v Smith*.[11] *Smith* involved an individual who pled guilty to importing seven and a half ounces of cocaine into Canada, an offence which carried with it a mandatory sentence of seven years in custody. Although that may have merited a seven-year sentence, the Supreme Court of Canada nevertheless struck down the

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7 Sarah Krasnostein, "*Boulton v. The Queen*: The Resurrection of Guideline Judgments in Australia?" (2015), 27:1 Current Issues Crim Just at 41–42. "Since the 1970s, empirical research has repeatedly demonstrated that unregulated discretion is directly correlated with unwarranted inter-judge disparity in sentencing outcomes."

8 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2005) (loose-leaf updated 2019, release 1) at 53.5 [emphasis added].

9 Department of Justice Canada, "Mandatory Minimum Penalties and the Courts" (18 February 2021), online: *Government of Canada* <www.canada.ca/en/department-justice/news/2021/02/mandatory-minimum-penalties-and-the-courts.html> [perma.cc/7RUV-9FRC].

10 See e.g. *R v Nur*, 2015 SCC 15 [*Nur*]; *R v Robertson*, 2020 BCCA 65; *R v Serov*, 2017 BCCA 456; *R v Dickey*, 2016 BCCA 117; *R v Boulton*, 2016 ONSC 2979; *R v John*, 2018 ONCA 702; *R v Trottier*, 2020 QCCA 703; *R v Hood*, 2018 NSCA 18; *R v Charboneau*, 2019 ABQB 882; *R v Lalonde*, 2017 ONSC 2181.

11 [1987] 1 SCR 1045 [*Smith*].

legislation as it would be grossly disproportionate for a hypothetical youth returning to Canada with a small quantity of marijuana.[12]

In *R v Goltz*, the Supreme Court further developed the reasonable hypothetical jurisprudence. There it was held that:

> If the particular facts of the case do not warrant a finding of gross disproportionality, there may remain another aspect to be examined, namely a *Charter* challenge or constitutional question as to the validity of a statutory provision on grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases.[13]

Accordingly, courts are first to look to the individual before them when deciding if the impugned provision violates the *Charter*. If the section in question would not be cruel and unusual treatment or punishment for the individual before them, courts then can consider a reasonable hypothetical offender. Guidelines have developed around the application of a reasonable hypothetical:

1) A reasonable hypothetical example is one that is not far-fetched or only marginally imaginable as a live possibility.[14] It cannot be based on "remote or extreme examples."[15]

2) The reasonable foreseeability of a hypothetical scenario is not confined to situations that are likely to arise in the general day-to-day application of a law. Rather, the inquiry is targeted at what may reasonably arise.[16]

3) When construing hypotheticals, courts may be guided by real life cases, provided that the relevant facts are sufficiently reported.[17] However, courts are not bound to limit hypotheticals to the cases available to them.[18]

The use of the reasonable hypothetical and s. 12 of the *Charter* itself deserves its own paper, which is not the purpose of this article. Rather, with that foundational background established, the author proposes turning to a comparative analysis of UK and Canadian firearms laws, in particular the sentencing provisions related to s. 95 of the *Criminal Code*. S. 95 makes it an offence to possess either a loaded prohibited or restricted firearm, or a restricted or prohibited firearm with readily accessible ammunition. In May

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12 *Ibid* at 1081–082.
13 *R v Goltz*, [1991] 3 SCR 485 at 505–06 [emphasis in original].
14 *Ibid* at 506.
15 *Ibid* at 515.
16 *Nur*, *supra* note 10 at paras 67–68.
17 *Ibid* at para 72.
18 *R v Morrisey*, 2000 SCC 39 at para 33 [*Morrisey*].

2008, Parliament passed legislation that mandated a three-year minimum sentence for a first offence, with a five-year minimum sentence for a second or subsequent offence.[19] Those provisions were subsequently challenged as violating s. 12 of the *Charter*, which the Supreme Court dealt with in the *Nur* decision.

The factual basis in *Nur* is that a man ran into a community centre in Toronto and told staff that he was afraid of someone waiting outside for him. Staff put the community centre on lockdown and called the police. When police arrived, they saw four men standing outside the community centre who scattered. Police observed Nur throw a loaded, .22-calibre semi-automatic firearm under a car. He was charged with possession of a loaded, prohibited firearm contrary to s. 95(1) of the *Criminal Code*.[20]

Those facts are provided because both the Ontario Court of Appeal and the Supreme Court of Canada upheld a 40-month sentence for a 19-year-old, with no criminal record, from a supportive, law-abiding family who came to Canada as refugees. At the time of the offence, the offender was going to high school. He was doing well in school and planned to go to university. He worked several part-time jobs and volunteered in the community. Teachers and past employers praised his performance and his potential. One teacher described him as "an exceptional student and athlete who excelled in the classroom and on the basketball court… an incredibly gifted youth with unlimited academic and great leadership skills."[21]

However, *Nur* is also the case that struck down the mandatory minimum. The law was struck down not based on the case before the Court but rather based on an imaginary case or, as the Court put it, a reasonable hypothetical. The Supreme Court held that s. 95 could capture behaviour closer to the regulatory end of the scale of gun offences.[22] An example of how s. 95 could capture behaviour closer to a regulatory breach may be found in the case of *R v Snobelen*.[23] In *Snobelen*, the accused had purchased a ranch in Oklahoma, including all equipment and contents. Included in those contents was a Colt .22 calibre semi-automatic handgun, along with ammunition. The accused never used the weapon. A couple years later, the

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19 *Tackling Violent Crime Act*, SC 2008, c 6, s 8.
20 *Nur*, *supra* note 10 at paras 17–20.
21 *Ibid* at para 21.
22 *Ibid* at para 82.
23 [2008] OJ No 6021 (QL).

accused sold the ranch and had the belongings shipped to Canada. Three or four months after the move, the accused was unpacking the contents when he located the handgun and ammunition. He intended to dispose of them but left them in his night table.[24] The accused was 53 years of age with no criminal record and an excellent employment history, including serving as an Ontario cabinet minister.[25] In the circumstances, the judge imposed an absolute discharge.[26] Still, that individual, and that fact scenario, were encompassed in s. 95. If the mandatory minimum sentence were in play at that time, Mr. Snobelen could have been subject to a mandatory minimum sentence of three years incarceration. It is that type of offender, and that type of factual circumstance, that led the Supreme Court of Canada to hold that the moral blameworthiness of that behaviour, absent any real risk or harm to the public, would result in a three-year sentence being grossly disproportionate.[27]

The reasonable hypothetical has been subject to criticism, both in academia and in the judiciary.[28] As Peter Hogg noted, the reasonable hypothetical is a "relentless application of the most innocent offender principle."[29] The difficulty with the reasonable hypothetical is that the imagined impact on an imagined person may never occur in reality. As courts are not bound by real life cases,[30] they are limited only by counsel's and the judge's imagination and are ruling on cases without a full factual backing. As Justice Watt noted in *R v Levkovic*, "[i]t is difficult to understate the importance of a factual basis in constitutional challenges."[31] The Supreme Court has noted in other constitutional cases that absent a factual foundation to adjudicate the constitutional issue, courts should decline to rule on constitutional questions in the abstract.[32] This criticism dates back to the *Smith* decision itself where Justice McIntyre, dissenting, noted that "[u]nder s. 12 of the *Charter*, individuals should be confined to arguing that

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24 *Ibid* at paras 3–10.

25 *Ibid* at para 18.

26 *Ibid* at para 46.

27 *Nur, supra* note 10 at para 83.

28 *R v Hills*, 2020 ABCA 263 at paras 120–292, per Justice Wakeling.

29 Hogg, *supra* note 8 at 53–57.

30 *Morrisey, supra* note 18 at para 33.

31 2010 ONCA 830 at para 28, aff'd 2013 SCC 25.

32 *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572, 60 DLR (4th) 1; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086, 73 DLR (4th) 686; *MacKay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4th) 385; *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras 47–51.

their punishment is cruel and unusual and not be heard to argue that the punishment is cruel and unusual for some hypothetical third party."[33]

The concept of using an imaginary case to interpret the Constitution is also foreign to other countries and other areas of law. For instance, when dealing with an extradition case, the House of Lords noted that "one is concerned with whether in this case the sentence would be grossly disproportionate. The fact that it might be grossly disproportionate in other cases is irrelevant."[34] The United States judiciary has also noted that "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency."[35]

III. Firearms Sentencing in the United Kingdom

At this point, we turn to jurisprudence in the UK, which also imposes mandatory minimum sentences for a variety of firearms offences – however, their legislation contains an important additional clause, which the author encourages our elected officials to incorporate into our *Criminal Code*. In so doing, the legislation would therefore gain compliance with the *Charter*, while still preserving the legislative intent behind the law.

When looking at sentencing in the UK, it is worth remembering that the ultimate question for sentencing in Canada is to craft a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender.[36] The Sentencing Council of the United Kingdom instructs judges to weigh an offence by looking at: (1) the culpability of the offender and (2) the harm caused by the offending.[37] We therefore see significant similarities between the guiding principles in Canadian and UK laws –

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33 *Smith*, *supra* note 11 at 1083–84 [emphasis in original].

34 *Wellington R, (On the application of) v Secretary of State for the Home Department*, [2008] UKHL 72 at para 35, [2009] AC 335, Lord Hoffman.

35 *New York v United States*, 326 US 572 at 583 (1946), per Justice Frankfurter. See also *Harmelin v Michigan*, 501 US 957, per Justice Scalia ("[b]ut for the same reasons these examples are easy to decide, they are certain never to occur" at 985–86).

36 *R v Friesen*, 2020 SCC 9 at para 30 [*Friesen*].

37 General guideline: overarching principle" (1 October 2019), online: Sentencing Council <www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> [perma.cc/9FGG-XNPD].

perhaps an unsurprising result given the close ties between the countries not only in their histories, but also in their legal frameworks. Given the common heritage Canada derives from the UK, the differing treatment towards mandatory minimum sentences becomes all the more interesting.

In the UK, the *Criminal Justice Act, 2003* mandates that when an offender is convicted of certain enumerated firearms offences, the court shall impose a sentence of at least five years for an offender aged 18 or over. If the offender is under the age of 18, the sentence is to be no less than three years. Those sentences are to be imposed "unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so."[38]

The question then becomes, what offences do those sections actually refer to, and are there comparable sections in the Canadian *Criminal Code*? For ease of reference, I have included a table outlining the wording of the relevant portions of the legislation in the UK and included comparator sections from the *Criminal Code*. Importantly the Canadian legislation is framed slightly differently, as it outlines three different classes of firearms: (1) non-restricted; (2) restricted; and (3) prohibited. Prohibited firearms include certain types of handguns, modified rifles or shotguns where the barrel is reduced to a particular length, automatic firearms, and other prescribed firearms in the regulations. Restricted firearms include all handguns that are not prohibited, firearms with a specified length of barrel, and other firearms prescribed by the regulations. Non-restricted firearms are those which do not fall into the other categories or have been prescribed as non-restricted.[39]

This chart includes a direct comparison between the definitions in the Canadian legislation to the legislation in the UK. Immediately following is a discussion on the provisions in the Canadian *Criminal Code* which deal with that offence.

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38 *Criminal Justice Act 2003* (UK) s 287(2).

39 *Criminal Code*, RSC 1985, c C-46, s 84(1) [*Criminal Code*].

Provision in the UK[40]: Section 5(1) A person commits an offence if he has in his possession, or purchases or acquires	**Definitions in the *Criminal Code*[41]**
(a) any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;	Prohibited firearm (c) an automatic firearm, whether or not it has been altered to discharge only one projectile with one pressure of the trigger
(ab) any self-loading or pump-action other than one which is chambered for .22 rim-fire cartridges;	Restricted firearm (b)(iii) is capable of discharging centre-fire ammunition in a semi-automatic manner
(aba) any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon, a muzzle-loading gun or a firearm designed as a signalling apparatus	Restricted firearm (c) a firearm that is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise
(ac) any self-loading or pump-action smooth-bore gun which is not chambered for .22 rim-fire cartridges and either has a barrel less than 24 inches in length or is less than 40 inches in length overall;	Restricted firearm (b) (ii) has a barrel less than 470 mm in length, and (iii) is capable of discharging centre-fire ammunition in a semi-automatic manner
(ad) any smooth-bore revolver gun other than one which is chambered for 9mm. rim-fire cartridges	
(ae) any rocket launcher, or any mortar, for projecting a stabilised missile, other than a launcher or mortar designed for line-throwing or pyrotechnic purposes or as a signalling apparatus	
(af) any air rifle, air gun or air pistol which uses, or is designed or adapted for use with, a self-contained gas cartridge system	
(c) any cartridge with a bullet designed to explode on or immediately before impact, any ammunition containing or designed or adapted to contain any such noxious thing as is mentioned in paragraph (b) above [noxious liquid, gas or other thing] and, if capable of being used with a firearm of any description, any grenade, bomb (or other like missile), or rocket or shell designed to explode as aforesaid	

40 *Firearms Act 1968*, (UK) s 5 [*Firearms Act UK*].

41 *Criminal Code, supra* note 39, s 84(1).

s. 5(1A) Subject to section 5A of this Act, a person commits an offence if, he has in his possession, or purchases or acquires (a) any firearm which is disguised as another object	

The offences in the Canadian *Criminal Code* then tie back to those definitions. As outlined above, ss. 5(1)(a), (ab), (aba) and (ac) of the UK law are directly analogous to what Canada has defined as being either a prohibited or restricted firearm. Accordingly, possession of those weapons in either Canada or the UK would be a violation of the law. Importantly, the provisions in the UK legislation impose those penalties for the mere possession of those firearms – even unloaded without readily accessible ammunition. Indeed, the UK legislation's most analogous comparison in Canadian law would be ss. 91 and 92 of the *Criminal Code*. Those provisions outlaw the unauthorized possession of prohibited or restricted weapons, much like the UK legislation does. S. 95 of the *Criminal Code* deals with offenders who are in possession of either a restricted or prohibited firearm that is either loaded or with readily accessible ammunition.[42]

However, whereas the simple possession provisions in the UK would carry a mandatory minimum sentence of five years for an individual over 18, in Canada, ss. 91 and 92 carry no mandatory minimum penalty for a first offence whatsoever. Rather, Canada imposed a mandatory penalty for s. 95, which not only requires a restricted or prohibited firearm, but also requires that firearm to be either loaded or have readily accessible ammunition. S. 95, therefore, deals with a more severe crime. As noted by the Supreme Court, s. 95 firearms present the most significant danger to public safety.[43]

Why then, given this comparison, was the mandatory minimum sentence struck down in *Nur* for what is a more serious crime? Indeed, the mere possession of that same gun, unloaded, in England would have brought a five-year sentence for an adult or three years for a youth. How then does Canada declare three years for an adult with a loaded gun to be cruel and unusual treatment or punishment? The answer lies in the use of the reasonable hypothetical. Rather than ruling on the case before them, the court instead ruled on an imaginary case. Defenders of this approach may assert that the judiciary is ensuring that mandatory minimum sentence

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42 *Criminal Code*, *supra* note 39, ss 91, 92, 95.

43 *Nur*, *supra* note 10 at para 13.

is constitutional, regardless of the circumstances. An attempt to limit the use of the reasonable hypothetical could lead to criticism – namely, how can the judiciary properly maintain their role of ensuring that cruel and unusual punishment is not imposed? In response, we look to the UK legislation, which contains a clause that keeps the focus on the individual before the court:

> The court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.[44]

If this wording were to be added to the mandatory minimum sentences in Canada, then there would have been no need for the courts to resort to the reasonable hypothetical. Rather, the analysis would have been restrained to the offender before the court and whether, in those specific circumstances, there were "exceptional circumstances related to the offence or to the offender" which would justify not imposing the sentence mandated by Parliament. This would have the benefit of restoring Parliament's proper role in crafting legislation and providing guidance, while preserving judicial independence and ensuring that the sentence imposed in any individual case does not conflict with the *Charter*.

Some may see this as analogous to a constitutional exemption, which the Supreme Court ruled was not available in *Ferguson*.[45] However, in *Ferguson*, the Court ruled that "[i]f a minimum sentence is found to be unconstitutional on the facts of a particular case,"[46] the law imposing the sentence would have to be struck down. That is precisely what the proposed "escape clause" utilized in the UK accomplishes. It keeps the focus on the facts of the offender, the case before the court, and whether the sentence is appropriate for that individual. Indeed, in *Ferguson*, the Supreme Court noted the attractiveness of the argument for introducing a constitutional exemption.[47] However, part of the reason the Court declined to read in a constitutional exception was because it would infringe on the role of Parliament. The clear wording of the section was that it was to apply to everybody and reading in otherwise would be contrary to the intent of

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44 *Firearms Act UK*, *supra* note 40, s 51A(2) [emphasis added].
45 *R v Ferguson*, 2008 SCC 6.
46 *Ibid* at para 2 [emphasis added].
47 *Ibid* at para 40.

Parliament and introduce discretion when Parliament clearly intended to remove that discretion.[48] Rather than asserting that exceptions to mandatory minimum sentences could never be granted, the Court ruled that it was not the place of the courts to interfere in the legislative sphere.[49]

Moreover, in *R v Lloyd*, Chief Justice McLachlin (as she then was) expressly stated that if Parliament wished to maintain mandatory minimum sentences, they should construct a safety valve to allow judges to exempt outliers for whom the mandatory minimum sentence would constitute cruel and unusual punishment. She went on to note that this is commonly done in other countries and may require a sentencing judge to give reasons justifying the departure from the mandatory minimum. Importantly, for our purpose, McLachlin specifically cited the *Firearms Act* of the UK as an example of a judicial safety valve that could be a model for Canada.[50]

Introducing the wording of "unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so" would directly address the issue the Supreme Court identified in *Nur*. As noted by the Court, firearms offences are serious crimes, and firearms are inherently dangerous.[51] However, the Court was concerned that the wording of s. 95 could capture "licensing offences which involve little or no moral fault and little or no danger to the public."[52] That specific concern is precisely what the legislation from the UK addresses. In those incredibly rare situations, like a licensing offence that involves little or no moral fault and poses little or no risk to the public, then the courts would be able to deviate from the mandatory minimum penalty and utilize the Parliamentary created "escape hatch" to impose a fit and proper sentence. Free from the burden of ruling on an imaginary case, courts would then be free to focus on the offender before them, rather than having to consider what penalty might be appropriate for an imaginary offender in an imaginary situation.

The author is aware that recently the Government of Canada has introduced Bill C-22, which proposes to repeal several mandatory minimum sentences, including some mandatory sentences related to

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48 *Ibid* at paras 54–56.
49 *Ibid* at para 56.
50 2016 SCC 13 at para 36.
51 *Nur, supra* note 10 at paras 6, 83.
52 *Ibid* at para 83.

firearms.[53] As rationale for these changes, the government outlined that mandatory minimum sentences have resulted in "longer and more complex trials and a decrease in guilty pleas, which has compounded the impact for victims, who are more often required to testify."[54] Bill C-22 was introduced on February 18, 2021, and the backgrounder to the legislation outlines that it is to work together with Bill C-21 to ensure that courts are better equipped to impose sentences that keep communities safe.

As of the time of this writing, both bills are only at first reading before the House of Commons,[55] so it will remain to be seen if they are passed into law or what the final wording of the law will be. However, Bill C-21, as it is presently worded, proposes to increase the maximum available sentence for s. 95 offences from ten years to 14 years.[56] Although laudable, this proposed change appears to reflect a desire on the part of Parliament that sentences for those types of crimes should increase. As noted by the Supreme Court in *Friesen*, "[t]o respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than the sentences imposed in cases that preceded the [statutory changes]."[57] However, that goal is not congruent with the backgrounder to reduce the impact on victims, "who are more often required to testify."[58] Indeed, by increasing the maximum penalty to 14 years, Parliament will be increasing the number of times a victim may have to testify. That is because a charge, which has a maximum penalty of 14 years or more, carries with it the option for a preliminary hearing, an option not currently available with the maximum penalty being ten years.[59]

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53 Department of Justice Canada, "Bill C-22: Mandatory Minimum Penalties to be repealed" (last modified 18 February 2021), online: Government of Canada <www.canada.ca/en/department-justice/news/2021/02/bill-c-22-mandatory-minimum-penalties-to-be-repealed.html> [perma.cc/7YWZ-4ZYN] [Department of Justice, "Bill C-22"].

54 *Ibid.*

55 Bill C-21, *An Act to amend certain Acts and to make certain consequential amendments (firearms),* 2nd Sess, 43rd Parl, 2020–2021 (first reading 16 February 2021); Bill C-22, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act,* 2nd Sess, 43rd Parl, 2020–2021 (first reading 18 February 2021).

56 Bill C-21, *supra* note 53, s 14.

57 *Friesen, supra* note 36 at para 100.

58 Department of Justice, "Bill C-22" *supra* note 5.

59 *Criminal Code*, *supra* note 39, s 536(2).

Moreover, with regards to the proper penalty to be imposed, Nur – a 19-year-old with positive supports in the community, no criminal record, and excellent prospects for rehabilitation – received a sentence of 40 months. In other words, Nur himself received a sentence higher than the mandatory minimum penalty. By increasing the maximum penalty, Parliament is, in fact, increasing the penalties which will be sought for that type of criminal activity.

Introducing the "escape clause" provision that has been included in UK legislation would provide for individuals in exceptional circumstances to receive a sentence below the mandatory minimum, while still preserving the Parliamentary intention that offenders on the true crime end of the spectrum receive significant penalties for their actions.

The question would then become, what are exceptional circumstances? Thankfully, although that is the term used in the UK legislation, it is not a term unknown to Canadian law. The Manitoba Court of Appeal has outlined that, in exceptional circumstances, sentencing judges may impose a community-based sentence for an offence that would ordinarily attract a lengthy period of incarceration.[60] As noted by the Court of Appeal, exceptional circumstances will only be found in the clearest of cases involving multiple mitigating factors or a highly unusual motive for committing the offence.[61] The Court of Appeal has noted that "[s]entencing courts must take care not to conflate 'sympathetic circumstances' with 'exceptional circumstances.'"[62] Rather, as noted by the New Brunswick Court of Appeal, exceptional circumstances likely will not exist where an offender was "driven solely by greed," and the offending conduct occurred over a "considerable period of time."[63] As noted by Drapeau, the former Chief Justice of New Brunswick, "fair warning to sentencing judges, it is a reversible error of principle to 'categorize the ordinary as exceptional.'"[64]

Importantly however, introducing the mandatory minimum sentence with an "escape clause" for exceptional circumstances would allow for the jurisprudence to develop based on the actual offender and actual situations before the courts, thereby further contributing to the development of the common law.

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60 *R v Dalkeith-Mackie*, 2018 MBCA 118 at para 23.

61 *Ibid* at para 26. See also *R v Burnett*, 2017 MBCA 122 at para 29 [*Burnett*].

62 *Burnett*, *supra* note 59 at para 33.

63 *R v Chaulk*, 2005 NBCA 86 at para 8.

64 *Murdoch v R*, 2015 NBCA 38 at para 47, citing *R v Zenari*, 2012 ABCA 279 at para 8.

Parliament should consider the use of the "escape clause" wording,[65] as in the UK. This would restore the focus of the courts to the offender and the facts before the court, while ensuring that, in those truly rare and exceptional cases, cruel and unusual treatment or punishment is not imposed on those offenders to whom a mandatory minimum sentence would, in fact, be grossly disproportionate.

[65] The court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.