

R. v. Nur: A Positive Step but not the Solution to the Problem of Mandatory Minimums in Canada

Janani Shanmuganathan
Di Luca Dann LLP

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>

 Part of the [Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Shanmuganathan, Janani. "R. v. Nur: A Positive Step but not the Solution to the Problem of Mandatory Minimums in Canada." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 76. (2016).
<https://digitalcommons.osgoode.yorku.ca/sclr/vol76/iss1/15>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

***R. v. Nur*: A Positive Step but not the Solution to the Problem of Mandatory Minimums in Canada**

Janani Shanmuganathan*

I. INTRODUCTION

Over the last several decades, Parliament has steadily increased the use of mandatory minimum sentences. Canada now ranks second in the world — behind only the United States — in the number of offences it has that carry mandatory minimums.¹ In *R. v. Nur*,² the Supreme Court of Canada declared unconstitutional the three-year mandatory minimum sentence for a first conviction for possession of a firearm. Prior to *Nur*, the Court had not struck down a mandatory minimum sentence since *R. v. Smith*,³ decided 30 years earlier. In the time between *Smith* and *Nur*, the Court was asked to consider the constitutionality of four other mandatory minimum sentences. But in each of these cases the Court upheld the constitutionality of these minimums. Viewed in this context, *Nur* is a key decision. It represents a critical step towards dismantling a mandatory minimum regime that has gained a foothold in Canada.

I argue, however, that while a positive step for those in favour of eliminating mandatory minimums, *Nur* is not the solution to the problem of mandatory minimum sentences in Canada. I first argue that the

* Associate at Di Luca Dann LLP and was co-counsel for the Respondent in *R. v. Nur* at the Supreme Court of Canada, and for the intervener Criminal Lawyers' Association (Ontario) in *R. v. Lloyd* at the Supreme Court of Canada.

¹ British Columbia Civil Liberties Association, News Release, "Mandatory Minimum Sentencing Costs Too Much" (8 September 2014), online: <<https://bccla.org/news/2014/09/mandatory-minimum-sentencingcosts-too-much>>.

² [2015] S.C.J. No. 15, 2015 SCC 15, [2015] 1 S.C.R. 773 (S.C.C.), affg [2013] O.J. No. 5120 (Ont. C.A.) [hereinafter "*Nur*"].

³ [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.), revg [1984] B.C.J. No. 1506 (B.C.C.A.) [hereinafter "*Smith*"].

Supreme Court's most recent decision in *R. v. Lloyd*⁴ may have blunted some of the optimism following its decision in *Nur*. Although *Lloyd* declared another mandatory minimum unconstitutional — this time in the context of drugs — the decision did so while denying the power to issue declaratory relief to provincial court judges and affording judges an ability to “opt out” of deciding constitutional challenges. In so doing, the Court may have forgone an opportunity to speak with a stronger judicial voice in favour of eliminating mandatory minimums.

Second, and perhaps more importantly, I argue that the problem of mandatory minimum sentences is one that is too big for the courts to cure on their own. Striking down unconstitutional mandatory minimums through the courts is to attack the problem in a piecemeal manner. Not only is this approach a painstakingly slow process, it is under-inclusive. The high bar for finding a section 12 breach means mandatory minimums will still be hard to successfully challenge. Mandatory minimum sentences are a problem created by Parliament, and they are a problem only Parliament can truly fix.

I begin Part II by reviewing the legal landscape preceding *Nur*. In Part III, I provide an overview of the decision in *Nur*. In Part IV, I identify some successful challenges to mandatory minimums that followed *Nur* in an effort to illustrate the groundbreaking nature of the decision. In Part V, I review the decision in *Lloyd* and argue that the decision may represent a “lost opportunity”. In Part VI, I discuss why the problem of mandatory minimum sentences may be a problem that only Parliament can fix. And finally, in Part VII, I examine how this problem has been treated in other jurisdictions to offer some possible solutions for our own. In so doing, this article represents an invitation to the new government to cure a problem exacerbated by its predecessor.

II. THE THREE DECADES BETWEEN *SMITH* AND *NUR*

Before *Nur*, the Supreme Court had declared a mandatory minimum sentence unconstitutional in only one case: *Smith*. In *Smith*, the Court found that a seven-year mandatory minimum for importing a narcotic into Canada was grossly disproportionate and amounted to cruel and unusual punishment.⁵ The Court used a reasonable hypothetical analysis

⁴ [2016] S.C.J. No. 13, 2016 SCC 13 (S.C.C.), affg [2014] B.C.J. No. 145 (B.C. Prov. Ct.), revg [2014] B.C.J. No. 1212 (B.C.C.A.) [hereinafter “*Lloyd*”].

⁵ *Smith, supra*, note 3, at paras. 65-69.

to find that it would be grossly disproportionate to subject a first time offender who imported a single “joint of grass” into Canada to a seven-year mandatory minimum sentence.⁶ The minimum breached section 12, could not be saved under section 1, and was struck down.⁷

Following *Smith*, but prior to *Nur*, the Supreme Court was presented with four other opportunities to consider the constitutionality of a mandatory minimum sentence: *R. v. Goltz*,⁸ *R. v. Morrissey*,⁹ *R. v. Latimer*¹⁰ and *R. v. Ferguson*.¹¹ In *Goltz*, the accused was charged with driving while prohibited under section 86(1)(a)(ii) of the British Columbia *Motor Vehicle Act*, contrary to section 88(1)(a).¹² The offence carried a mandatory minimum sentence of seven days imprisonment. The Court concluded that the punishment was not grossly disproportionate.¹³

In *Morrissey*, the accused was charged with criminal negligence causing death. While he was drunk and carrying a loaded rifle, the accused tried to wake up his friend. The accused slipped and the gun went off, killing his friend.¹⁴ The Court upheld the four-year mandatory minimum.¹⁵

In *Latimer*, the accused was found guilty of second-degree murder for the death of his daughter who had a severe form of cerebral palsy.¹⁶ The accused challenged the mandatory minimum for second-degree murder — life with no chance of parole for 10 years. The Court held that the minimum was not grossly disproportionate.¹⁷

And finally, in *Ferguson*, a Royal Canadian Mounted Police (RCMP) officer shot and killed a detainee during an altercation and was convicted of manslaughter.¹⁸ Manslaughter with a firearm carried with it a four-year mandatory minimum sentence. The accused challenged this minimum

⁶ *Id.*, at para. 13.

⁷ *Id.*, at paras. 73, 75.

⁸ [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.), revg [1990] B.C.J. No. 11 (B.C.C.A.) [hereinafter “*Goltz*”].

⁹ [2000] S.C.J. No. 39, 2000 SCC 39, [2000] 2 S.C.R. 90 (S.C.C.), varg [1998] N.S.J. No. 116 (N.S.C.A.) [hereinafter “*Morrissey*”].

¹⁰ [2001] S.C.J. No. 1, 2001 SCC 1, [2001] 1 S.C.R. 3 (S.C.C.), affg [1998] S.J. No. 731 (Sask. C.A.) [hereinafter “*Latimer*”].

¹¹ [2008] S.C.J. No. 6, 2008 SCC 6, [2008] 1 S.C.R. 96 (S.C.C.), affg [2006] A.J. No. 1150 (Alta. C.A.) [hereinafter “*Ferguson*”].

¹² British Columbia *Motor Vehicle Act*, R.S.B.C. 1979, c. 288.

¹³ *Goltz*, *supra*, note 8, at paras. 82-85.

¹⁴ *Morrissey*, *supra*, note 9, at para. 5.

¹⁵ *Id.*, at paras. 53-54, 58.

¹⁶ *Latimer*, *supra*, note 10, at para. 1.

¹⁷ *Id.*, at para. 87.

¹⁸ *Ferguson*, *supra*, note 11, at para. 4.

but the Court upheld its constitutionality.¹⁹ In *Ferguson*, the Court also rejected the use of a constitutional exemption as a remedy for an exceptional case where a grossly disproportionate sentence would result from the imposition of a mandatory minimum. Rather, the Court underscored that the only remedy for an unconstitutional mandatory minimum was a declaration of invalidity.²⁰

Given this lack of success for those challenging mandatory minimums, it appears that the Supreme Court may have become more reluctant to declare mandatory minimums unconstitutional in the years following *Smith*. In response to this observation, some may argue that the decision to uphold the constitutionality of the four minimums had to do with the types of offences that were before the court rather than a change in the Court's approach to mandatory minimums. For instance, unlike the offence in *Smith*, which captured a wide range of conduct, the offences in *Goltz*, *Morrissey*, *Latimer* and *Ferguson* could arguably be committed in only a limited number of ways. Indeed, the offences in the latter three cases all required, at minimum, a death.

Though perhaps true, the "type of offence" argument, however, is not a complete answer. Following *Smith*, the Supreme Court did alter how one constructs an appropriate reasonable hypothetical. In *Smith*, the Court crafted a reasonable hypothetical offender who shared no characteristics with the actual offender before the court and fell on the least serious end of the spectrum of conduct captured by the offence. This changed in *Goltz*. In *Goltz*, the Court took a more restricted approach: it emphasized that a reasonable hypothetical could not be one that was "far-fetched" or "only marginally imaginable as a live possibility".²¹ *Goltz* also held that where there are several modes of committing an offence, courts could only consider reasonable hypotheticals that shared the accused's mode of commission (*e.g.*, in *Goltz*, the accused's driving prohibition was based on a registrar's order under section 86(1)(a)(ii) of the Act, and the Court limited reasonable hypotheticals to those who had been prohibited from driving under the same provision).²² And finally, *Goltz* made the actual facts of the case an important "benchmark" in shaping reasonable hypotheticals.²³ *Goltz*, accordingly, tightened the grip on the parameters of the reasonable hypothetical analysis.

¹⁹ *Id.*, at para. 29.

²⁰ *Id.*, at para. 57.

²¹ *Goltz*, *supra*, note 8, at para. 69.

²² *Id.*, at paras. 72-73.

²³ *Id.*, at para. 70.

Similarly, in *Morrisey*, the Court insisted that any reasonable hypothetical must be “common”.²⁴ It also went on to exclude the facts of real, reported cases that were considered unusual and rare.²⁵ Moreover, the reasonable hypotheticals the Court constructed in *Morrisey* were ones devoid of any personal characteristics.²⁶

This narrowing of the reasonable hypothetical inquiry by the Supreme Court led academics like Kent Roach to conclude that, “The recent section 12 cases suggest that Parliament can create mandatory sentences without worrying very much that they may be invalidated on the basis of hypothetical best offenders.”²⁷

The Supreme Court jurisprudence between *Smith* and *Nur* also reveals another trend: deference to Parliament. In his article, “Searching for Smith”, Kent Roach characterized the post-*Smith* Supreme Court decisions upholding mandatory minimum sentences as moving from activism to minimalism in interpreting and applying section 12. As he observed, “The concern in *Smith* with whether a mandatory penalty is grossly disproportionate in light of what is necessary to deter or rehabilitate particular offenders, has been replaced by deference to Parliament’s decision to stress punitive purposes of sentencing over restorative ones.”²⁸ *Latimer* illustrates Roach’s point. In *Latimer*, the Court reiterated that it is not for the court to pass on the “wisdom of Parliament” with respect to the gravity of various offences and the range of penalties, which may be imposed upon those found guilty of committing the offences.²⁹ Rather, “Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment.”³⁰

The decision in *Ferguson* also prompted academic debate. In her article, “From *Smith* to *Smickle*: The Charter’s Minimal Impact on Mandatory Minimum Sentences”,³¹ Debra Parkes noted this split in academic opinion. On the one hand, *Ferguson* was seen as a retreat from substantive scrutiny of mandatory minimum sentences and a “lost opportunity” to provide a remedy for exceptional cases caught within the

²⁴ *Morrisey*, *supra*, note 9, at para. 33.

²⁵ *Id.*, at para. 50.

²⁶ *Id.*, at paras. 51-52.

²⁷ Kent Roach, “Searching for Smith: The Constitutionality of Mandatory Sentences” (2001) 39:2&3 *Osgoode Hall L.J.* 367 [hereinafter “Roach, ‘Searching for Smith’”], at 408.

²⁸ *Id.*, at 412.

²⁹ *Latimer*, *supra*, note 10, at para. 77.

³⁰ *Id.*

³¹ Debra Parkes, “From *Smith* to *Smickle*: The Charter’s Minimal Impact on Mandatory Minimum Sentences” (2012) 57 S.C.L.R. (2d).

wide net of mandatory minimum penalties.³² This was the view espoused by Lisa Dufraimont. On the other hand, Benjamin Berger supported the Court's rejection of a constitutional exemption. In his view, to "mop up" hard cases with constitutional exemptions would lend legitimacy to a legislative process that may not have paid sufficient attention to the substantive fairness of the laws it creates.³³ While Dufraimont expressed concern that judges would face substantial pressure to uphold laws by having to invalidate a mandatory minimum sentence for everyone based on an exceptional case, Berger appeared more confident that judges would make unpopular decisions when faced with compelling cases.³⁴

It was in this environment of uncertainty about what the Supreme Court would do in future challenges to mandatory minimums that the decision in *Nur* arose. Academics like Roach were longing for a decision like *Smith*, one with a strong judicial and constitutional voice in support of individualized justice.³⁵ Dufraimont perhaps shared this opinion, but appeared unconvinced that judges would actually take the plunge. Berger, however, appeared optimistic.

III. THE DECISION IN *NUR*

In *Nur*, the Supreme Court of Canada was asked to consider the constitutionality of the three-year mandatory minimum contained in section 95(1) of the *Criminal Code*.³⁶ Section 95(1) is a hybrid scheme. Where the Crown proceeds summarily, there is no mandatory minimum sentence. Where the Crown proceeds by indictment, a mandatory minimum of three years applies. In a split decision, the majority of the Supreme Court declared the three-year mandatory minimum unconstitutional.³⁷

Writing for the majority, Chief Justice McLachlin held that section 95(1) casts its net over a wide range of potential conduct. Though in most cases the mandatory minimum does not constitute cruel and unusual punishment, in some reasonably foreseeable cases it may.³⁸ The Court again employed the device of a reasonable hypothetical offender: a licensed and responsible gun owner who stores his unloaded firearm safely

³² *Id.*, at 161-62.

³³ *Id.*, at 162.

³⁴ *Id.*

³⁵ Roach, *supra*, note 27, at 412.

³⁶ R.S.C. 1985, c. C-46 [hereinafter "the Code"].

³⁷ *Nur*, *supra*, note 2, at para. 106.

³⁸ *Id.*, at para. 4.

with ammunition nearby, but makes a mistake as to where it can be stored.³⁹ According to the majority, given the minimal blameworthiness of this offender and the absence of any harm or real risk of harm flowing from the conduct, a three-year sentence would be grossly disproportionate.⁴⁰ By capturing licensing offences that involved little or no moral fault and little or no danger to the public, the minimum constituted cruel and unusual punishment.⁴¹

Justice Moldaver, writing for the dissent, disagreed. In his view, the reasonable hypothetical approach did not justify striking down the minimum. First, the hypothetical licensing-type cases relied on by the majority were not “grounded in experience” and in “common sense”.⁴² Moreover, the parties could not point to a single “real” case where an offender who committed a licensing-type offence was prosecuted by indictment and thereby attracted the mandatory minimum.⁴³ According to Justice Moldaver, an application of the reasonable hypothetical approach, which assumes that the Crown will elect to proceed by indictment when the fair, just, and appropriate election would be to proceed summarily does not accord with common sense.⁴⁴ After rejecting the majority’s approach, he went on to offer a different analytical approach to section 12 when dealing with hybrid schemes such as the one in section 95(1).

This divided judgment comes as little surprise when one looks back at how the mandatory minimum jurisprudence had developed since *Smith*. Justice Moldaver’s comments reflect the narrowing of the reasonable hypothetical approach that took place following *Goltz*. Post-*Goltz*, a reasonable hypothetical had to be “common” and not “far-fetched”, and devoid of personal characteristics. By contrast, the reasonable hypothetical offender constructed by Chief Justice McLachlin was nothing like the offender before the court and fell on the least serious end of the spectrum of conduct captured by section 95(1). Viewed in this way, the decision in *Nur* represents a sharp turn back to the approach adopted in *Smith*. It represents a loosening of the grip on reasonable hypotheticals that *Goltz* and its progeny had imposed.

Furthermore, whereas *Goltz* and *Morrisey* were decisions seen as being deferential to Parliament, *Nur* is not. Indeed, in his dissent, Justice

³⁹ *Id.*, at para. 82.

⁴⁰ *Id.*

⁴¹ *Id.*, at para. 83.

⁴² *Id.*, at para. 125.

⁴³ *Id.*, at para. 126.

⁴⁴ *Id.*, at para. 129.

Moldaver appears to directly accuse the majority of not respecting the role of Parliament. According to Justice Moldaver, it was Parliament's choice to raise the mandatory minimums in section 95, and that choice reflects valid and pressing objectives.⁴⁵ In his words, "it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture."⁴⁶

The majority's comments in the Section 1 analysis also embody a push back against Parliament. Shortly after *Nur* was released, then Justice Minister Peter MacKay wrote an editorial in the *National Post* where he announced that despite striking down the law, all nine justices "actually agreed that mandatory prison sentences are legitimate criminal justice tools."⁴⁷ The Court said no such thing. To the contrary, following decades of empirical research, the Supreme Court finally agreed and declared that mandatory minimum sentences do not, in fact, deter crime.⁴⁸ In so doing, the Court has effectively told Parliament that it could no longer justify an unconstitutional mandatory minimum sentence on the basis that it was rationally connected to deterrence. This is a far cry from the deferential standard the Court emphasized in *Goltz*.

IV. THE AFTERMATH OF *NUR*

The decision in *Nur* is undeniably a positive step for those committed to eliminating mandatory minimum sentences. At a time when mandatory minimum sentences were steadily rising, the Supreme Court endorsed a framework for challenging these minimums. Offenders who wish to embark on a constitutional challenge now have a clear template: they can either challenge the minimum on their own particular circumstances or on the basis of a reasonable hypothetical. The Court also armed offenders with guidance on how to craft an appropriate "reasonable hypothetical" in their quest to strike these minimums down.

In the wake of *Nur*, in Ontario alone, at least three more mandatory minimum sentences had been struck down. In *R. v. Vu*,⁴⁹ for instance, the Ontario Superior Court of Justice found that the six and nine month

⁴⁵ *Id.*, at para. 132.

⁴⁶ *Id.*, at para. 132.

⁴⁷ Peter MacKay, *National Post*, "What the Court got right — and wrong — on mandatory sentences for gun crimes" (April 21, 2015). See online: <<http://news.nationalpost.com/full-comment/peter-mackay-what-the-court-got-right-and-wrong-on-mandatory-sentences-for-gun-crimes>>.

⁴⁸ *Nur*, *supra*, note 2, at para. 114.

⁴⁹ [2015] O.J. No. 5278, 2015 ONSC 5834 (Ont. S.C.J.) [hereinafter "*Vu*"].

mandatory minimum sentences contained in sections 7(2)(b)(i) and (ii) of the *Controlled Drugs and Substances Act* for the production of marijuana violated section 12 of the Charter. The Court found the provisions unconstitutional on the basis of a reasonable hypothetical offender: a licensed marijuana producer who made a mistake and did not know he or she was over their licence limit.⁵⁰ The Court also found that the violation was neither minimally impairing nor proportional and could not be saved by section 1.⁵¹

Shifting from drugs back to firearms, in *R. v. Hussain*⁵² the Ontario Superior Court declared the three-year mandatory minimum sentence for trafficking a firearm unconstitutional. Again, the Court employed a reasonable hypothetical. This time it was a licensed hunter who lent his rifle to his brother, knowing that his brother does not have a possession and acquisition licence. While hunting together, the brothers have the misfortune of running into a former acquaintance, now a police officer, who charges the accused.⁵³ For this hypothetical offender, a sentence of three years was found to constitute cruel and unusual punishment and could not be saved by section 1.⁵⁴

Although not exhaustive, these cases illustrate that the concerns that existed in the decades following *Smith* — that Parliament could create mandatory sentences without having to worry that they may be invalidated on the basis of a reasonable hypothetical offender — may no longer be as compelling as they once were. Viewed through this lens, the decision in *Nur* is groundbreaking. Borrowing Roach’s words, those who were left “searching for *Smith*” triumphed in *Nur*.

V. THE LOST OPPORTUNITY IN *LLOYD*

Following *Nur*, the Supreme Court was confronted with yet another challenge to a mandatory minimum sentence in *Lloyd*. In *Lloyd*, the Court dealt with the one-year mandatory minimum contained in section 5(3)(a)(i)(d) of the *Controlled Drugs and Substances Act*.⁵⁵ The provincial court judge in *Lloyd* declared the provision contrary to

⁵⁰ *Id.*, at para. 175.

⁵¹ *Id.*

⁵² [2015] O.J. No. 6159, 2015 ONSC 7115 (Ont. S.C.J.) [hereinafter “*Hussain*”].

⁵³ *Id.*, at para. 101.

⁵⁴ *Id.*, at para. 105.

⁵⁵ S.C. 1996, C. 19 [hereinafter “CDSA”].

section 12 and not justified under section 1.⁵⁶ The British Columbia Court of Appeal allowed the Crown's appeal, finding that the provincial court judge had no power to declare the provision invalid, and set aside the declaration.⁵⁷ The majority of the Supreme Court held that while the minimum was not grossly disproportionate for the offender before the court, it could be in other reasonably foreseeable cases and declared the minimum invalid.⁵⁸

Like *Nur*, the decision in *Lloyd* is positive for those in favour of eliminating mandatory minimums. The Court declared yet another mandatory minimum unconstitutional and sent a strong signal to Parliament that mandatory minimums that apply to offences that cast a wide net are vulnerable to constitutional challenge. However, the Court was also confronted with two key issues that impact mandatory minimums more broadly: (i) whether provincial court judges have the power to invalidate legislation and (ii) whether a judge is obligated to consider the constitutionality of a mandatory minimum where it can have no impact on the sentence in the case at issue.⁵⁹ The Court answered "no" to both questions. In so doing, the decision may also represent a "lost opportunity".

First, the Court dealt with the issue of declaratory relief only briefly: "The law on this matter is clear. Provincial court judges are not empowered to make formal declarations that a law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*; only superior court judges of inherent jurisdiction and courts with statutory authority possess this power."⁶⁰ According to the Court, provincial court judges only have the power to decide the constitutional validity of a mandatory minimum provision in the case before them.⁶¹ The Court did not explain why provincial court judges lack this power, nor engage with any of the practical reasons why provincial court judges should be granted this power.

For instance, preventing provincial courts from making constitutional declarations creates a needless duplication of proceedings. While provincial court judgments are never binding, forbidding provincial court judges from issuing declarations makes it impossible for judges to follow

⁵⁶ *Lloyd, supra*, note 4, at para. 10.

⁵⁷ *Id.*, at para. 11.

⁵⁸ *Id.*, at paras. 25, 37.

⁵⁹ *Id.*, at para. 13.

⁶⁰ *Id.*, at para. 15.

⁶¹ *Id.*, at para. 16.

past provincial court decisions that have found mandatory minimums unconstitutional absent a constitutional challenge. Though a past judgment is persuasive, a provincial court judge cannot rely on it to avoid imposing a mandatory minimum. The law remains presumptively valid, and accused persons must bring the same challenge and seek the same remedy over and over again in every case. This pointlessly wastes judicial resources in an overburdened court system and it thwarts access to justice.⁶²

Furthermore, denying declaratory power to provincial court judges creates the risk that unconstitutional laws will continue to be applied to those who do not have the wherewithal to bring constitutional challenges. If a provincial court judge finds a mandatory minimum unconstitutional but has no declaratory power, the minimum remains in place. If an accused in a future case does not bring a constitutional challenge, the law is presumed valid and must be applied.⁶³

The lack of declaratory relief also makes it difficult to access effective remedies for unconstitutional mandatory minimums that attach to summary conviction offences. Exclusive jurisdiction over summary conviction offences lies with the provincial courts. Amendments to the *Safe Streets and Communities Act*⁶⁴ alone created six new mandatory minimum sentences for offences where the Crown proceeds summarily. Constitutional challenges to those minimums begin in the provincial court.

Indecent exposure, criminalized by section 173(2) of the *Criminal Code*, provides an example. The offence now carries a mandatory minimum sentence of 90 days on summary conviction. If a constitutional challenge were launched against this minimum, a provincial court judge

⁶² The controversial victim fine surcharge perfectly illustrates the absurdity this causes. The *Criminal Code* now requires a surcharge of 30 per cent on top of any fine imposed by a court or, in cases where no fine is imposed, a mandatory charge of \$100 per summary conviction offence and \$200 per indictable offence. In *R. v. Michael*, [2014] O.J. No. 3609, 2014 ONCJ 360 (Ont. C.J.), Justice Paciocco of the Ontario Court of Justice found that the victim fine surcharge violated s. 12 of the Charter on the facts of the offender before him (at para. 99). Assuming *arguendo* that this decision is correct, a provincial court judge's inability to issue declaratory relief would mean that Justice Paciocco's decision can have no application beyond the accused in that case. Another judge of the provincial court would be *unable* to follow the decision to avoid applying the victim fine surcharge unless the accused had brought another constitutional challenge to the surcharge. Given how many accused persons pass through the "plea courts" in Canada's provincial courts each and every day, requiring a fresh challenge in every case is simply unworkable.

⁶³ This is precisely what Justice Paciocco was told he was required to do with the victim fine surcharge in the subsequent decision of *R. v. Sharkey*, [2015] O.J. No. 1275, 2015 ONSC 1657 (Ont. S.C.J.), revg [2014] O.J. No. 4153 (Ont. C.J.). Absent another challenge to the law, Justice Paciocco had to apply the victim fine surcharge he struck down in *Michael* (*Sharkey* at para. 26).

⁶⁴ S.C. 2012, c. 1.

could find that the minimum is cruel and unusual punishment on the basis of a real or hypothetical offender (*e.g.*, an 18-year old accused with no criminal record suffering from mental health issues that do not render him not criminally responsible). If the challenge was successful but the provincial court cannot make a declaration, the unconstitutional minimum could survive on the books indefinitely. A broad declaration could only be obtained on appeal to the Superior Court. The Crown could immunize the minimum from a broad declaration of invalidity by simply refusing to appeal any judgment where the law is not applied.

Despite being urged by the parties the Supreme Court did not speak about any of these concerns in *Lloyd*. Even if a strict application of past cases compels the conclusion that provincial court judges lack the power to declare legislation invalid, the Court has the power to depart from its own decisions but it chose not to on this issue. Perhaps more disappointing is that the Court remained completely silent on all the problems caused by the failure to grant provincial court judges declaratory power. Had the Court engaged with these issues, it could have offered guidance to Parliament to show them why the court system may not be an effective forum for dealing with mandatory minimum sentences.

The Court similarly fell short when addressing the mootness issue. The Court left the discretion to consider the constitutionality of mandatory minimums in “moot” cases — where the minimum has no impact on the offender before the court — with judges. In the Court’s words, “judicial economy dictates that judges should not squander time and resources on matters they need not decide.”⁶⁵ To their credit, the Court did go on to say that a formalistic approach should be avoided and that the doctrine of mootness should be applied flexibly: “to compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender’s sentence, as a condition precedent to considering the law’s constitutional validity, would place artificial constraints on the trial and decision-making process.”⁶⁶ That being said, the Court paused short of encouraging judges to decide constitutional challenges to mandatory minimums even if the minimum has no effect on the offender before the court.

Judges should be encouraged to decide such challenges. Constitutional litigation is not only lengthy it is also expensive. However, there are some accused — like the accused in *Lloyd* — who meet the requirements

⁶⁵ *Lloyd*, *supra*, note 4, at para. 18.

⁶⁶ *Id.*

of standing and are willing to undertake the cost and effort of challenging a mandatory minimum sentence knowing full well that they may prevail on the merits but receive no tangible benefit in the end. It makes little common sense to discourage these accused from undertaking such important challenges.

Moreover, a requirement insisting that an offender personally benefit before adjudicating a constitutional challenge appears to be rooted in the concern that a better future claimant — one who is directly affected by the law — may exist. This was precisely the concern which animated the British Columbia Court of Appeal’s decision in *Lloyd*: “If this court [the BCCA] were to find for the Crown on the s. 12 issue, it would mean that people who are potentially much more directly affected by the issue than is Mr. Lloyd would be effectively precluded from raising challenges to the legislation short of an appeal to the Supreme Court of Canada.”⁶⁷

While this may be true for other types of constitutional challenges, the reasonable hypothetical prong of the section 12 test eliminates this concern. Under section 12, a court is not confined to the circumstances of the immediate offender before it. Rather, a court is obliged to go on to consider the circumstances of other offenders. The circumstances of a “much more directly affected” accused can be considered as a reasonable hypothetical. This branch of the section 12 inquiry therefore eliminates any advantage that may be gained by waiting for a “better future claimant”.

But as with the declaratory relief issue, the Court did not engage with these concerns when it held that courts were not obligated to consider constitutional challenges in moot cases. The concern this raises is that post-*Lloyd* judges may decline to consider challenges to mandatory minimums even after accused persons have invested time, effort and money into bringing the challenge. While this concern does not appear to have materialized yet, in cases following *Lloyd* some judges appear to be pausing to ask whether they need to decide the constitutional challenge at all.

For example, in *R. v. Hofer*,⁶⁸ a challenge to the two-year mandatory minimum for the production of marijuana arising out of British Columbia, the judge commented that before proceeding to the section 12 analysis, “I note that reasons may exist for not hearing Mr. Hofer’s

⁶⁷ *R. v. Lloyd*, [2014] B.C.J. No. 1212, 2014 BCCA 224, at para. 47 (B.C.C.A.), revd [2016] S.C.J. No. 13 (S.C.C.) [hereinafter “*Lloyd BCCA*”].

⁶⁸ [2016] B.C.J. No. 1656, 2016 BCSC 1442 (B.C.S.C.) [hereinafter “*Hofer*”].

application.”⁶⁹ In the judge’s words, “if I were to conclude that I would impose the same sentence on Mr. Hofer irrespective of the existence of the mandatory minimum, it would not be necessary to resolve the constitutional question.”⁷⁰ However, because the parties agreed that but for the minimum, the accused would likely receive a sentence of less than two years, the judge proceeded with the challenge.⁷¹

While not a challenge to a mandatory minimum, similar comments are seen in *R. v. Antwi*.⁷² In *Antwi*, the accused challenged the constitutionality of section 85(4) of the Code, which requires consecutive sentences for using a firearm in the course of committing an indictable offence. After submissions had already been made on the challenge, the Supreme Court released its decision in *Lloyd*. The judge in *Antwi* invited counsel to return and make submissions on whether it was “necessary” to decide the challenge.⁷³ The judge ultimately concluded it was necessary as it would affect the ultimate sentence and went on to decide the challenge.⁷⁴

Although in both *Hofer* and *Antwi* the judges ultimately went on to decide the constitutional challenges, this was because both judges deemed it was “necessary”. But what if the challenges were not necessary? Would the judges have seen value in deciding the challenges and proceeded, or would they have declined, leaving the potentially unconstitutional provisions remaining on the books? The post-*Lloyd* environment is thus reminiscent of the uncertainty we had following *Ferguson*: Dufraimont’s skepticism of what judges will do on the one hand versus Berger’s optimism on the other.

VI. THE COURTS ARE AN INEFFECTIVE FORUM

In both *Nur* and *Lloyd*, the Supreme Court declared a mandatory minimum unconstitutional and, in their wake, other successful challenges to mandatory minimums have sprouted up across the country. Despite these positive results, the courts are ultimately an ineffective forum to deal with the problem of mandatory minimum sentences in Canada: the problem is simply too big for the courts to cure on their own.

⁶⁹ *Id.*, at para. 19.

⁷⁰ *Id.*, at para. 20.

⁷¹ *Id.*, at para. 20.

⁷² [2016] O.J. No. 3588, 2016 ONSC 4325 (Ont. S.C.J.) [hereinafter “*Antwi*”].

⁷³ *Id.*, at para. 27.

⁷⁴ *Id.*, at para. 38.

First, the Supreme Court held that mandatory minimums are not *per se* unconstitutional, rather, only those minimums that result in grossly disproportionate sentences are constitutionally invalid. As such, each mandatory minimum must be individually attacked and each of these challenges is long, protracted and costly. *Nur* itself was six years in the making: the offence took place in 2009, was decided at the trial level in 2011, at the Court of Appeal in 2013 and finally, by the Supreme Court in 2015. If one mandatory minimum sentence took six years to completely defeat, the task of defeating the 50 or so minimums at large is daunting, if not impossible.

Second, even if a court strikes down a mandatory minimum sentence, nothing prevents the Crown from appealing. For instance, the Crown is appealing *Vu* to the Ontario Court of Appeal in an effort to overturn the challenge. Similarly, nothing prevents Parliament from introducing a new minimum to replace one that was invalidated. That is precisely what happened after *Nur*. After the Supreme Court struck down the three-year mandatory minimum, Parliament sought almost immediately to re-introduce the minimum through an Act aptly named, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in R. v. Nur*.⁷⁵ While the Bill ultimately did not pass, this does not detract from the fact that even where a court strikes down a mandatory minimum, the threat of a new one lingers. The effect of this is that the evil that the challenge seeks to remedy might not be expunged.

Third, the Court in *Nur* reiterated that a challenge to a mandatory minimum must get over a “high bar” for what constitutes cruel and unusual punishment under section 12 of the Charter.⁷⁶ What is required is a finding on a balance of probabilities that the sentence is grossly disproportionate to the appropriate punishment having regard to the nature of the offence and the circumstances of the offender.⁷⁷ The gross disproportionality test is aimed at punishments that are more than merely excessive, and not every disproportionate or excessive sentence results in a constitutional violation.

This is a high standard to meet. Some mandatory minimum sentences simply cannot get there. For example, as previously noted, the *Safe Streets and Communities Act* created a slew of mandatory minimum sentences for the sexual exploitation of children. On summary conviction, the penalties

⁷⁵ Bill C-69 (introduction and first reading June 10, 2015).

⁷⁶ *Nur* SCC, *supra*, note 2, at para. 39.

⁷⁷ *Id.*

range from 30 to 90 days.⁷⁸ Given their short length, as was the case in *Goltz*, while the sentences may be disproportionate for some offenders, they may not be grossly so. As such, these minimums would remain on the books. However, a disproportionate sentence invites the same destructive consequences as grossly disproportionate ones: through their effect on plea-bargaining, they raise the specter of wrongful convictions and, at the end of the day, they do not work to deter crime.⁷⁹ The standard of gross disproportionality therefore acts as a bar for the courts to fix the problem of mandatory minimum sentences. It leaves some minimums beyond the courts' reach to invalidate.

And finally, post-*Lloyd*, it is now clear that provincial court judges lack the power to invalidate unconstitutional mandatory minimums. This creates a further impediment to eliminating mandatory minimum sentences.

VII. MANDATORY MINIMUMS ARE PARLIAMENT'S PROBLEM

Today, our courts are involved in constitutional litigation on everything from assisted suicide to prostitution and polygamy. The problem of mandatory minimums is just one more difficult issue thrown to the judiciary by Parliament. The courts have dealt with the problem as best they can. However, striking down unconstitutional mandatory minimums in a piecemeal manner is a painstakingly slow process. Furthermore, the high bar for finding a section 12 breach means mandatory minimums will still be hard to successfully challenge. To truly redress the problem of mandatory minimums, widespread change is needed. The solution lies with Parliament, not the courts.

A look at what other countries have done offers some possible solutions for our problem. The obvious solution is to simply repeal mandatory minimums. Some states in the United States have taken this step, which has produced positive results. For example, Rhode Island repealed all mandatory minimums for drug offences in 2009.⁸⁰ Offences involving less than one kilogram of heroin or cocaine, or less than five kilograms of marijuana, for instance, previously carried a mandatory minimum sentence of 10 years and a maximum of 50 years.⁸¹ Now, there is no mandatory minimum and a judge may assign a sentence anywhere

⁷⁸ *Id.*

⁷⁹ *Nur, supra*, note 2, at paras. 96, 114.

⁸⁰ Ram Subramanian, "Playbook for Change? States Reconsider Mandatory Sentences" (February, 2014) Vera Institute of Justice, at 11 [hereinafter "Subramanium"].

⁸¹ *Id.*

from zero to 50 years.⁸² After the repeal, the state's prison population decreased (by 9.2 per cent) and the state saw a decline in violent crime between 2009 and 2011.⁸³ Whether or not this was a causal link, at the very least, the statistics suggest that crime rates can drop even with such repeals.

Rhode Island is not alone in this endeavour. In 2002, Michigan completely abolished mandatory minimums for drug offences, eliminated the stacking of consecutive sentences and restored the power of judges to consider factors other than weight in determining penalties.⁸⁴ Similarly, in 2001, Louisiana repealed mandatory minimums for many non-violent and simple drug possession offences and cut minimums in half for drug trafficking. These changes, along with accompanying administrative reforms and the expansion of treatment programs, have stabilized prison population growth in Louisiana.⁸⁵ Maine also passed legislation reducing certain mandatory minimums and granting judges the authority to suspend others.⁸⁶ All told, at least 29 states have taken steps to roll back mandatory sentences since 2000.⁸⁷

At first blush, the repeal of mandatory minimum sentences may appear too drastic of a move for Parliament to make. After all, we are still on the heels of the former Conservative government's tough on crime agenda and mandatory minimums are purportedly politically attractive.⁸⁸ However, public opinion research reveals only limited support for mandatory minimums.⁸⁹ The current debate in Massachusetts

⁸² *Id.*

⁸³ *Boston Globe*, "Repeal mandatory minimum sentences" (June 7, 2015) online: <<https://www.bostonglobe.com/opinion/editorials/2015/06/06/repeal-mandatory-minimum-drug-sentences/2XSeZQz8GDpYaMqbZH2vqL/story.html>>.

⁸⁴ "Restoring Judicial Discretion by Repealing Rhode Island's Mandatory Minimum Drug Sentences" Family Life Centre citing Judith A. Green, *Positive Trends in State-Level Sentencing and Corrections Policy* (Washington DC: Families Against Mandatory Minimums, Nov., 2003), at 11-2 online: <http://www.famm.org/pdfs/82751_Positive%20Trends.pdf>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Subramaniam, *supra*, note 80, at 8.

⁸⁸ Anthony N. Doob and Carla Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001) 39 *Osgoode Hall L.J.* 288, at 288-89.

⁸⁹ Research reveals that the public appears to value sentences based on proportionality over the principles of deterrence and denunciation that underlie mandatory minimums. Canadians favour mandatory minimums in the abstract, but back away from that support when they are presented with real-life examples. For example, almost all Canadians support a mandatory sentence of life imprisonment for offenders convicted of murder. However, when a case about a man sentenced to life imprisonment for the murder of his severely disabled daughter is described to Canadians, three-quarters of those polled opposed the imposition of the mandatory minimum. See: Julian V. Roberts,

is telling. Lawmakers held a hearing last year on a proposal to abolish mandatory minimum sentences for drug offences. A statewide poll conducted by MassINC found that only 11 per cent of those polled are in favour of requiring judges to impose mandatory minimums.⁹⁰

Maryland is considering the same proposal and public opinion there is also in favour of repeal. For instance, 70 percent of Maryland voters support the repeal of mandatory minimums for nonviolent drug offenders, and 78 percent of Maryland voters agree that the state spends too much money locking up nonviolent drug offenders.⁹¹ With respect to the latter, the repeal of mandatory minimums does result in cost-savings. For example, Michigan's repeal of mandatory minimums was passed with broad bipartisan support and saved the state \$41 million in 2003.⁹²

Canada would be no exception. The economic cost of mandatory minimum sentencing is prohibitively high. For instance, according to the Parliamentary Budget Officer (PBO), the new mandatory minimums for sexual offences in the *Safe Streets and Communities Act* were estimated to cost \$10.9 million over two years because of higher prison populations.⁹³ There is also the social cost. Not only is money wasted on a policy that does not even reduce crime, but according to the Canadian Centre for Policy Alternatives (CCPA), money is also diverted away from policies that do efficiently diminish crime.⁹⁴ Not surprisingly, these funds would be more effective if they were spent on investment in employment, education, public housing, addictions treatment, and mental health support services — all social services that have been proven to reduce crime.⁹⁵

“Public Opinion and Mandatory Sentencing: A Review of International Findings” (2003) 30 *Crime & Just.* 483, at 489-90.

⁹⁰ *Supra*, note 83.

⁹¹ Marc Schindler and Ronald Weich, *Washington Post*, “Strengthen the Justice Reinvestment Act by repealing Maryland’s mandatory sentencing laws” (March 16, 2016) online: <<https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/03/16/strengthen-the-justice-reinvestment-act-by-repealing-marylands-mandatory-sentencing-laws/>>.

⁹² *Supra*, note 84.

⁹³ Office of the Parliamentary Budget Officer, *The Fiscal Impact of Changes to Eligibility for Conditional Sentences of Imprisonment in Canada* by Tolga R. Yalkin & Michael Kirk (Ottawa: Office of the Parliamentary Budget Officer, 2012), at 17.

⁹⁴ Canadian Centre for Policy Alternatives, “Bill C-10 Fact Sheet” (November 7, 2011) online: <<https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2011/11/bill%20C-10%20nov%202011.pdf>>.

⁹⁵ *Id.*

If an outright repeal is too drastic for Parliament, a second solution to the problem of mandatory minimums is to build in an exemption or escape clause. The Supreme Court in *Lloyd* made this same suggestion.⁹⁶ These clauses can take different forms. In some jurisdictions, the clauses apply to specific groups of offenders. For instance, in the United States, some states that have adopted mandatory minimums for specific offences have also created exceptions to the application of these minimums in the case of juvenile offenders. This is the case, for example, in Montana where there is an exception to mandatory minimum sentences for offenders who were less than 18 years of age at the time of the commission of the offence.⁹⁷

Clauses may also take the form of relief in light of mitigating factors (“the safety valve” approach). For instance, in South Australia, for some offences, the courts have the power to reduce a penalty below the minimum where “good reason” exists to do so. These reasons include the character, antecedents, age or physical or mental condition of the offender; the fact that the offence was trifling; or any other extenuating circumstances where the court is “of the opinion that good reason exists for reducing the penalty below the minimum, the court may so reduce the penalty.”⁹⁸

The introduction of such exemption or escape clauses is not a new concept in Canada. The Supreme Court has found that well-crafted exemption clauses can cure issues of unconstitutionality. For example, in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*,⁹⁹ the Court held that British Columbia’s court hearing fee regime violated section 96 of the *Constitution Act, 1867* because it was not coupled with an adequate exemption for people who could not afford the fees.¹⁰⁰ By contrast, in *Canada (Attorney General) v. PHS Community Services Society*,¹⁰¹ the Court held that the prohibition on the possession of controlled substances in section 4(1) of the CDSA was constitutional because the exemption in section 56 of the CDSA

⁹⁶ *Lloyd*, *supra*, note 4, at para. 36.

⁹⁷ See: Yvon Dandurand, “Exemptions from Mandatory Minimum Penalties” (August 2012) Uniform Conference of Canada Working Group on Exemptions from Mandatory Minimum Penalties, at 11-12 [hereinafter “Dandurand”].

⁹⁸ *Id.*, at 19.

⁹⁹ [2014] S.C.J. No. 59, 2014 SCC 59, [2014] 3 S.C.R. 31 (S.C.C.) [hereinafter “*Trial Lawyers Association of British Columbia*”].

¹⁰⁰ *Id.*, at para. 46.

¹⁰¹ [2011] S.C.J. No. 44, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), affg [2010] B.C.J. No. 57 (B.C.C.A.) [hereinafter “*PHS Community Services Society*”].

acted as a “safety valve”. The exemption prevented the application of section 4(1) to the staff and clients of Vancouver’s safe injection site. Without it, the section would be unconstitutional.

Though an attractive alternative to repealing mandatory minimums, exemption or escape clauses should be adopted with caution. They possess the potential to create the same destructive consequences that mandatory minimums create. For example, some states in the United States allow for departures from mandatory minimums where an offender pleads guilty or cooperates with the prosecution. In Florida, for instance, the state attorney can request the court to reduce or suspend a sentence of any person who is convicted of drug trafficking when the person provides substantial assistance in the identification, arrest, or conviction of any other person engaged in trafficking.¹⁰² The obvious concern is that these clauses may be used to encourage or compel offenders to plead guilty and cooperate with the state, raising the specter of wrongful convictions.

VIII. CONCLUSION

Just prior to his election as Prime Minister of Canada, Justin Trudeau stated that he would consider repealing some mandatory minimum sentences introduced by the Conservative government. In his words:

Where we have concerns is in the overuse and quite frankly abuse of mandatory minimums... It’s the kind of political ploy that makes everyone feel good, saying, ‘We’re going to be tough on these people,’ but by removing judicial discretion, and by emphasizing mandatory minimums, you’re actually clogging up our jails for longer periods of time and not necessarily making our communities any safer.¹⁰³

True to his word, upon being elected, our new Prime Minister has made the review of mandatory minimums part of the Justice Minister’s agenda.¹⁰⁴ Since then, however, there has been radio silence. The concern

¹⁰² Dandurand, *supra*, note 97, at 18.

¹⁰³ *Global News*, “Justin Trudeau might repeal some mandatory minimums if elected” (September 15, 2015) online: <<http://globalnews.ca/news/2242259/justin-trudeau-might-repeal-mandatory-minimums-if-elected/>>.

¹⁰⁴ *CTV News*, “Liberals will review controversial mandatory minimums: justice minister” (November 8, 2015) online: <<http://www.ctvnews.ca/politics/liberals-will-review-controversial-mandatory-minimums-justice-minister-1.2648279>>.

is that Parliament may leave the problem of mandatory minimum sentences in Canada to the courts.

Despite their best efforts, the courts are ill suited to tackle the problem of mandatory minimums. The solution therefore lies with Parliament, not the courts. Parliament created the problem of mandatory minimums in this country. Our previous government exacerbated the problem in its march down the path of being tough on crime. But our new government is in a position to cure the problem. Whether the solution is through the repeal of some mandatory minimums or through the introduction of exemption or escape clauses, something needs to be done.

