

Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences

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In the past fifteen years, mandatory minimum sentences have become significantly more prominent in Canadian criminal law. Most analyses of the constitutionality of mandatory minimums have focused on their application in drug and gun crimes, as well as murder. In contrast, relatively little attention has been paid to mandatory minimums attached to sexual offences committed against children and youth.

The author argues that the introduction of mandatory minimums for sexual offences committed against children and youth does not address the power, gender and race inequalities that characterize sexual offending. The author outlines the major legislative reforms that created specific sexual offences against children and youth, added short mandatory minimum sentences of imprisonment, and then further increased the length of these minimums. The author shows that introducing mandatory minimums for these offences was intended to block the availability of conditional sentence orders. This has caused a trend in post-mandatory minimum sentencing where longer conditional sentences have been replaced by very short custodial sentences at or near the mandatory minimum. The author overviews sentencing decisions in this area and concludes that the introduction of minimum sentences has short-circuited a deeper understanding of the harms of these crimes, and does nothing to prevent problematic judicial reasoning based on myths and stereotypes about child sexual abuse. These myths and stereotypes find their way into the sentencing process and lead to some aggravating factors being ignored or downplayed, while other factors are improperly identified as mitigating.

The author suggests that the criminal justice system needs a solution that roots out lingering stereotypes in order to properly acknowledge and remedy the harms to child and youth victims, the group most vulnerable to sexual violence.

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Introduction

In the past fifteen years, Parliament has significantly altered Canadian criminal law by introducing numerous mandatory minimum sentences for a range of *Criminal Code* offences. Prior to this time, mandatory sentences were relatively rare, especially for first offences and for offences prosecuted by summary conviction; more recently the *Criminal Code* grew to include more than 80 minimum sentences among its approximately 450 offences.¹

Until very recently, scholars and courts have focused their attention on the mandatory sentences applicable to drug and gun crimes (with Don Stuart offering one of the earliest examples of these critiques²), or on the mandatory life sentence for murder and the distorting effects it may produce with respect to criminal defences.³ Scholars have considered whether mandatory minimum sentences are unconstitutional, with attention to their particular impact on Indigenous and racialized offenders.⁴ In the case of murder, commentators

1. Debra Parkes identifies eighty-four mandatory minimums after the 2012 passage of the *Safe Streets and Communities Act*. See Debra Parkes, “From *Smith* to *Smickle*: The Charter’s Minimal Impact on Mandatory Minimum Sentences” (2012) 57 SCLR (2d) 149 at 149, n 4; *Safe Streets and Communities Act*, SC 2012, c 1 [SSCA].

2. Don Stuart was expressing alarm about mandatory minimums as early as 1977. See Donald R Stuart, “Criminal Law and Procedure” (1977) 9:3 Ottawa L Rev 568 at 673–74.

3. For other general critiques of mandatory minimums, see Allan Manson, “Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences” (2012) 57 SCLR (2d) 173; Sarah Chaster, “Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada” (2018) 23 Appeal 89; Lauren Witten, “Proportionality as a Moral Process: Reconceiving Judicial Discretion and Mandatory Minimum Penalties” (2016) 48:1 Ottawa L Rev 81.

4. See e.g. Christopher Sewrattan, “Apples, Oranges, and Steel: The Effect of Mandatory Minimum Sentences for Drug Offences on the Equality Rights of Aboriginal Peoples” (2013)

have also examined how the Crown could leverage mandatory life sentences to obtain guilty pleas to manslaughter in cases where battered women kill their abusers in self-defence.⁵

In 2005, Parliament attached a number of mandatory minimum penalties to the sexual offences in the *Criminal Code*, but only where the victims are children or youth.⁶ Additional mandatory minimums were added to these offences, and existing ones increased, in 2012.⁷ Sexual offences against children and youth have received comparatively little attention in the debates about mandatory minimums, although a number of recent judicial decisions have found some of these provisions to be unconstitutional.⁸

I argue in this article that analyzing mandatory minimum sentences for sexual offences requires more than merely applying the critiques of mandatory minimums developed in other contexts. This article accepts and proceeds from the premise that sexual assault is a gendered crime that reflects and reinforces sex inequality.⁹ This also applies to sexual offences against youth victims,

46:1 UBC L Rev 121; Jonathan Rudin, “There Must Be Some Kind of Way Out of Here: Aboriginal Over-Representation, Bill C-10, and the Charter of Rights” (2013) 17 Can Crim L Rev 349; Ryan Newell “Making Matters Worse: The *Safe Streets and Communities Act* and the Ongoing Crisis of Indigenous Over-Incarceration” (2013) 51:1 Osgoode Hall LJ 199.

5. See Isabel Grant, “Rethinking the Sentencing Regime for Murder” (2001) 39:2/3 Osgoode Hall LJ 655; Elizabeth Sheehy, “Battered Women and Mandatory Minimum Sentences” (2001) 39:2/3 Osgoode Hall LJ 529.

6. See *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32.

7. See *SSCA*, *supra* note 1.

8. For example, the one-year minimum for sexual interference when prosecuted on indictment has been found unconstitutional. See *R v Ford*, 2017 ABQB 322; *R v Scofield*, 2018 BCSC 91, *rev'd* on other grounds 2019 BCCA 3 [*R v Scofield* Initial Reasons]; *R v Scofield*, 2018 BCSC 419, *rev'd* on other grounds 2019 BCCA 3 [*R v Scofield* Additional Reasons]; *R v ML*, 2016 ONSC 7082. *R v ML* was followed in *R v Ali* and *R v Hussein*. See *R v Ali*, 2017 ONSC 4531; *R v Hussein*, 2017 ONSC 4202. But see *R v EMQ*, 2015 BCSC 201 (minimum upheld). The ninety-day minimum on summary conviction was found constitutional in *R v Gumban*. See 2017 BCPC 226. But see *R v Drumonde*, 2018 ONCJ 336 (minimum found unconstitutional). The one-year minimum for sexual exploitation was found unconstitutional in *R v Hood*. See 2016 NSPC 78, *aff'd* 2018 NSCA 18. But see *R v EJB*, 2018 ABCA 239 (minimum upheld).

9. See *R v Mills*, [1999] 3 SCR 668 at para 90, 180 DLR (4th) 1; Catharine A MacKinnon, “A Sex Equality Approach to Sexual Assault” (2003) 989:1 *Annals New York Academy Science* 265; Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22:2 *CJWL* 397; Emma Cunliffe, “Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?” (2012) 57 *SCLR* (2d) 295. For a description of historical approaches to sexual assault, see Janine Benedet, “Sexual Assault

where the gender gap narrows but is still substantial: girls under sixteen are four times as likely as boys to be victims of sexual abuse, and offenders are overwhelmingly male for youth victims of both sexes.¹⁰ The long history of sex discrimination in society has been reflected in the substantive law of sexual offences, as well as in the application of those laws in the criminal trial process, and in the sentencing of offenders.¹¹ The overrepresentation of Indigenous and racialized persons among those convicted of criminal offences needs to be analyzed in light of the fact that in the context of sexual offences, many crimes are intraracial, meaning that there are disproportionate numbers of Indigenous and racialized victims as well.¹² This disproportionality is more pronounced for

Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution” (2014) 52:1 Alta L Rev 127 [Benedet, “Sexual Assault”].

10. See Statistics Canada, *Police-Reported Sexual Offences Against Children and Youth in Canada, 2012*, by Adam Cotter & Pascale Beaupré, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 May 2014) at 3, 14–15 [Statistics Canada, *Sexual Offences*]. Similar findings are reported in adult populations. Statistics Canada reports that the majority of police-reported sexual assault victims are female (87%) and the majority of accused persons charged with sexual assault are male (98%). See Statistics Canada, *Police-Reported Sexual Assaults in Canada, 2009 to 2014: A Statistical Profile*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 3 October 2017) at 3.

11. See Benedet, “Sexual Assault”, *supra* note 9; Christine Boyle, “Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality” (2009) 13:4 Intl J Evidence & Proof 269.

12. Generally, violent crimes tend to be intraracial. See generally Sarah Becker, “Race and Violent Offender ‘Propensity’: Does the Intraracial Nature of Violent Crime Persist on the Local Level?” (2007) 9:2 Justice Research & Policy 53; Robert M O’Brien, “The Interracial Nature of Violent Crimes: A Reexamination” (1987) 92:4 Am J Sociology 817. In a 1991 study reviewing sexual assault cases involving Indigenous offenders and/or victims, the authors noted that “[o]f the 67 cases involving or related to a sexual offence, 46 involved Native intra-racial sexual assault”. See Margo L Nightingale, “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases” (1991) 23:1 Ottawa L Rev 71 at 81. The intraracial component of violent crime has also been widely noted in research from the United States. One study noted that “[w]hile the majority of rapes and sexual assaults against White and African American women were intraracial, victimisations against [American Indian and Alaska Native] women were more likely to be interracial”. See Ronet Bachman et al, “Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women” (2010) 43:2 Austl & NZ J Crim 199 at 212. The United States Department of Justice Bureau of Justice Statistics indicated that “[d]uring the 4-year aggregated period from 2012 to 2015, half (51%) of violent victimizations were intraracial”. See US, Department of Justice, *Race and Hispanic Origin of Victims and Offenders, 2012–15*, by Rachel E Morgan (NCJ 250747) (Washington, DC: DOJ, 2017) at 1. An Australian publication affirmed the predominantly intraracial

child victims, since a large number of these offences are committed by male family members. It is important to consider whether and how these facets of the social context in which sexual assaults are committed affect the critiques of mandatory minimums or, to turn the question on its head, whether mandatory minimum sentences in some way might actually advance the project of addressing the inequalities at the heart of sexual offences.

My conclusion is that mandatory minimum sentences have not contributed to addressing these inequalities. There is some evidence that mandatory minimum sentences have coincided with rising sentences, at least for the offence of sexual interference. However, there is also evidence that some judges are simply substituting a short minimum penalty of imprisonment, sometimes served intermittently, possibly followed by probation, for what would otherwise have been a longer conditional sentence of imprisonment that might have included terms akin to house arrest. I argue that this development offers no real benefit to victims of sexual violence and has cut off an important dialogue among judges and other criminal justice system actors about harm, proportionality and fairness in sentencing for sexual offences against this group of victims.

With that context in mind, I turn to a consideration of the constitutionality of mandatory minimums in the specific context of sexual offences against children and youth. I conclude that while many of the same concerns that have been raised about mandatory minimums for gun and drug crimes apply with equal force to sexual offences, especially where those minimums are relatively lengthy, sentencing for sexual offences is particularly vulnerable to stereotypical reasoning that falls back into discredited reasoning about lack of harm, risk and victim-blaming. Whether or not mandatory minimum sentences of imprisonment come to be seen as *per se* unconstitutional,¹³ in the sense that a non-custodial option must always be available, this discredited reasoning needs to be recognized and rejected.

This article should not be taken as suggesting that longer terms of incarceration are necessarily progressive or further the equality interests of women. It is important to pay attention to Don Stuart's caution that "the criminal law is a blunt instrument and should be used with restraint."¹⁴ He reminds us that while "[p]rison sentences for violent offences are easy to

aspect of sexual offences. See Peter Mals et al, "Adapting Violence Rehabilitation Programs for the Australian Aboriginal Offender" (2000) 30:1/2 *J Offender Rehabilitation* 121. Furthermore, our database of cases involving the sexual assault of adolescent girls reveals that the large majority of sexual offences against teenage girls were committed by male family members.

13. See Wayne K Gorman, "The Death of Mandatory Minimum Periods of Imprisonment in Canada?" (2016) 52:3 *Court Rev* 96.

14. Don Stuart, "Sexual Assault: Substantive Issues Before and After Bill C-49" (1993) 35:2 *Crim LQ* 241 at 245. There is, of course, a distinction between prosecution and sentencing. One

justify,” we should avoid “glibly urging ever longer prison sentences for sexual offenders”.¹⁵ The question of a truly feminist remedy for sexual assault is a larger project that has so far received much less attention than other aspects of the criminal justice system’s response to sexual violence.¹⁶ This article will not solve that problem. Rather, it aims to demonstrate a narrower point. Despite the introduction of minimum sentences, there continue to be sentencing decisions in which those who sexually abuse young people, and in particular teenage girls, are sentenced based on reasoning that minimizes the harm caused and the blameworthiness of offenders, even as appellate courts have called for such crimes to be taken seriously. Mandatory minimum sentences do not address this problem and in some cases make it worse. Mandatory minimum penalties do nothing to address the discriminatory reasoning at the heart of inadequate sexual assault sentences.

I. Applying Mandatory Minimum Sentences to Sexual Offences

A. Legislative History

Mandatory or presumptive sentences are not entirely new to the Canadian criminal law of sexual offences. At the most extreme end, rape was for many years a capital crime in Canada, although it appears that such sentences were rarely, if ever, carried out.¹⁷ However, with the major reforms to sexual offences in the 1980s, Canada adopted a scheme of escalating maximum penalties based on the perceived seriousness of the offence, without

might conclude that given the very small number of sexual assaults that are ever investigated and prosecuted, this is the one area in which the criminal law has so far been used with the greatest restraint.

15. *Ibid.*

16. See Constance Backhouse, “A Feminist Remedy for Sexual Assault: A Quest for Answers” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 725 [Sheehy, *Sexual Assault*]. The question of whether restorative justice practices could be useful in sexual offence cases is a controversial one and also beyond the scope of this paper. Certainly, their use in cases involving child and youth victims raises serious and age-specific concerns about power inequalities.

17. See *Criminal Code, 1892*, SC 1892, c 29, ss 266–67. See also Bruce A MacFarlane, “Historical Development of the Offence of Rape” in The Honourable Mr Justice Josiah Wood & Richard CC Peck, eds, *100 Years of the Criminal Code in Canada: Essays Commemorating the Centenary of the Canadian Criminal Code* (Ottawa: Canadian Bar Association, 1993) 111.

any prescribed minimum punishment.¹⁸ Thus sexual assault, an offence created in 1983, was split into three gradations based on the amount of additional force, use of weapons, or injury accompanying the non-consensual sexual contact. Sexual assault had a maximum penalty of ten years' imprisonment when prosecuted by indictment, and six months (later raised to eighteen months in 1994¹⁹) when prosecuted by summary conviction. Sexual assault causing bodily harm was a straight indictable offence with a maximum of fourteen years' imprisonment and aggravated sexual assault had a maximum penalty of life imprisonment.²⁰

Sexual offences against children were modernized in 1988.²¹ Parliament created the new offences of sexual interference and invitation to sexual touching.²² Neither of these offences had minimum penalties.²³ In addition, the general sexual assault offences continued to apply to child victims. The minimum age of consent to sexual activity with an adult was set at fourteen years of age, and then raised to sixteen in 2008.²⁴ In the 1990s and 2000s, additional offences were created to address other forms of child sexual exploitation and abuse. In particular, Parliament added offences relating to the prostitution of young people (1988),²⁵ child pornography (1993)²⁶ and internet luring (2002).²⁷

Minimum penalties for sexual offences against children first appeared in 2005. At this time, the Liberal minority government introduced Bill C-2, whose primary purposes were to respond to the Supreme Court of Canada's decision on the child pornography offence in *R v Sharpe*²⁸ and to make amendments

18. See *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, SC 1980-81-82-83, c 125, s 19, amending *Criminal Code*, RSC 1970, c C-34, s 246.

19. See *Criminal Law Amendment Act, 1994*, SC 1994, c 44, s 19.

20. See *Criminal Code*, RSC 1985, c C-46, ss 271-72.

21. See *An Act to amend the Criminal Code and the Canada Evidence Act*, RSC 1985, c 19 (3rd Supp) [*Act to amend CC and CEA*].

22. See *Criminal Code*, *supra* note 20, ss 151-52.

23. The first mandatory minimum for a sexual assault offence was added in 1995 for sexual assault with a firearm. See *ibid*, s 272(2)(a).

24. See *Tackling Violent Crime Act*, SC 2008, c 6, ss 13, 54.

25. See *Act to amend CC and CEA*, *supra* note 21, s 9 (amending the former subsection 212(4)).

26. See *An Act to amend the Criminal Code and the Customs Tariff (Child Pornography and Corrupting Morals)*, SC 1993, c 46, s 2.

27. See *Criminal Law Amendment Act, 2001*, SC 2002, c 13, s 8.

28. 2001 SCC 2.

to better address the needs of vulnerable witnesses.²⁹ The original version of the Bill did not contain mandatory minimum penalties, but at the committee stage Conservative opposition members lobbied hard for the inclusion of such provisions, with the explicit goal of precluding the use of conditional sentence orders (CSOs): a sentence of imprisonment served in the community rather than in jail. A CSO is not available where the offence has a mandatory penalty of imprisonment. As a result of this pressure, mandatory minimum sentences of imprisonment were added to ten child sexual abuse offences.³⁰

Some Conservative Members of Parliament expressed concern that the minimum penalties were too low and would lead to judges imposing the new minimum periods of incarceration in cases that would have previously attracted longer conditional sentences.³¹ Nonetheless, they decided to support the amended Bill. When the Conservatives formed a minority government later in 2005, they passed legislation eliminating conditional sentences for most sexual offences (including against adult victims) when prosecuted by indictment.³² This was done by declaring them to be serious personal injury offences ineligible for a CSO, rather than through the use of minimum terms of imprisonment. The earlier amendments in Bill C-2 were referred to as a prior victory toward the goal of eliminating the availability of CSOs for violent crimes.³³

The most recent suite of amendments to the minimum sentences for sexual offences was passed in 2012 as part of the *Safe Streets and Communities Act*.³⁴ This legislation raised many of the existing mandatory minimum penalties to one year on indictment or ninety days on summary conviction. The legislation

29. See Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess, 38th Parl, 2005 (assented to 20 July 2005), SC 2005, c 32.

30. See *ibid.* Bill C-2 added mandatory minimums to the following offences: sexual interference, invitation to sexual touching, and sexual exploitation (fourteen days on summary conviction or forty-five days on indictment); distribution of child pornography (ninety days on summary conviction or one year on indictment); possession of child pornography and accessing child pornography (fourteen days on summary conviction or forty-five days on indictment); parent or guardian procuring sexual activity and householder permitting sexual activity (forty-five days or six months, depending on the age of the victim); living on the avails of prostitution of person under eighteen (two years); and prostitution of person under eighteen (six months). See *Criminal Code*, *supra* note 20, ss 151–53, 163.1(3)–(4.1), 170–71, 212(2), 212(4).

31. See House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 38-1, No 042 (2 June 2005) at 0950 (Vic Toews).

32. See *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, SC 2007, c 12.

33. See *House of Commons Debates*, 39-1, vol 141, No 028 (29 May 2006) at 1100 (Rob Moore).

34. *Supra* note 1.

also added mandatory minimums to the general sexual assault offence where the victim is under sixteen. This appears to have been done to ensure that this general offence was not being used to circumvent the penalties in the child-specific offences.³⁵ Witnesses testifying at the Standing Committee on Justice and Human Rights who supported the legislation noted that the mandatory minimum penalties for many sexual offences in the United States were considerably higher than those in Canada and argued that the penalties here should be raised.³⁶

It is clear that the primary goal of the low mandatory minimum sentences enacted in 2005 was to end the availability of conditional sentences for indictable sexual offences against children. A CSO remained an available disposition for sexual assault of a child when prosecuted on summary conviction until the 2012 amendments, which then eliminated that possibility.³⁷ The shift to lengthier minimum terms of imprisonment in 2012 (one-year minimums on indictment for sexual interference, invitation to sexual touching, sexual exploitation and internet luring) can be understood as an attempt to shift the floor upwards and move the range of sentences substantially higher for all offenders committing such crimes. This was also reflected in additional amendments in 2015, which increased the maximum penalty on indictment for sexual offences committed against children and youth to fourteen years.³⁸ An increase in penalties for an offence, whether by raising the maximum or the minimum sentence, should be understood as shifting the entire range of proportionate sentences.³⁹ For this reason, the fact that an accused might have received a sentence of six months'

35. See Department of Justice Canada, "Safe Streets and Communities Act: Better Protection for Children and Youth from Sexual Predators" (Ottawa: DOJ Canada, 9 August 2012), online: *Government of Canada* <www.canada.ca/en/news/archive/2012/08/safe-streets-communities-act-better-protection-children-youth-sexual-predators.html>. The Department of Justice Canada states that: "The addition of mandatory minimum penalties to these offences will also have the effect of eliminating the use of conditional sentences, or house arrest, for any of these crimes" (*ibid*). This statement was in direct reference to an enumerated list of offences with mandatory minimum penalties, including sexual assault where the victim is under sixteen years of age. See *Criminal Code*, *supra* note 20, s 271 (the general sexual assault offence).

36. See e.g. House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 40-3, No 044 (31 January 2011) at 1550 (Brian Rushfeldt).

37. See *SSCA*, *supra* note 1, s 34.

38. See *Tougher Penalties for Child Predators Act*, SC 2015, c 23. This had the effect of making such offences ineligible for a conditional sentence order under the *Criminal Code* when prosecuted by indictment, independent of any minimum penalties. See *Criminal Code*, *supra* note 20, s 742.1(c).

39. See *R v Ferguson*, 2006 ABCA 261 at paras 71–72, *aff'd* 2008 SCC 6; *R v Rhyason*, 2007 ABCA 119 at para 17, *aff'd* 2007 SCC 39; *R v Hammond*, 2009 ABCA 415 at para 8; *R v Hall*, 2013 ABQB 418 at para 56.

imprisonment prior to the imposition of a one-year minimum does not on its own make that minimum excessive. Instead, it signals Parliament's intention that similar cases should receive a higher sentence in future.

B. Supreme Court of Canada Treatment of Mandatory Minimum Sentences

The Supreme Court of Canada case law on mandatory minimum sentences and the *Canadian Charter of Rights and Freedoms* is well-known and I will only briefly summarize it here.⁴⁰ In *R v Smith*, the Supreme Court of Canada struck down a mandatory seven-year prison sentence for importing narcotics as cruel and unusual punishment under section 12 of the *Charter*.⁴¹ Although the accused trafficker in *Smith* had received an actual sentence of eight years in light of the fact that he imported nearly a half pound of pure cocaine worth around \$150,000,⁴² the Court relied on the hypothetical case of a youthful first-time offender who crosses the border with a single joint of marijuana in his pocket to find the law unconstitutional, applying a test of "gross disproportionality". Notably, the Supreme Court of Canada remitted the case to the British Columbia Court of Appeal for re-sentencing, recognizing that the original sentence may have been influenced by the minimum penalty.

After *Smith*, challenges to mandatory minimums under section 12 faltered. In *R v Goltz*, the Supreme Court of Canada upheld a minimum sentence of seven days' imprisonment for driving while prohibited.⁴³ In *R v Morrissey*, the Supreme Court of Canada upheld a mandatory minimum sentence of four years for criminal negligence causing death with a firearm, emphasizing that hypotheticals had to be reasonable ones.⁴⁴

In *R v Latimer*, the Supreme Court of Canada upheld the mandatory life sentence and ten-year parole ineligibility period for second degree murder.⁴⁵ The Supreme Court of Canada rejected the possibility of a constitutional exemption from a minimum sentence in an individual case, which would have had the effect of making the minimum a presumptive sentence that could be departed from in exceptional cases. This conclusion was reaffirmed for the offence of manslaughter with a firearm in *R v Ferguson*.⁴⁶ Again, the Court emphasized

40. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

41. [1987] 1 SCR 1045, 40 DLR (4th) 435.

42. See *R v Smith* (1984), 8 DLR (4th) 565, 39 CR (3d) 305 (BCCA).

43. [1991] 3 SCR 485, 61 BCLR (2d) 145.

44. 2000 SCC 39.

45. 2001 SCC 1.

46. *Supra* note 39.

that hypotheticals could be used to invalidate minimum sentences only when they were reasonable scenarios, and that minimum sentences were not per se unconstitutional.

This posture of deference on mandatory minimums changed in the companion cases of *R v Nur* and *R v Charles*,⁴⁷ where a majority of the Supreme Court of Canada invalidated the three-year minimum prison term for possession of a loaded prohibited or restricted firearm.⁴⁸ The Court confirmed that in conducting a section 12 analysis, judges should consider reasonably foreseeable applications of the mandatory minimum. Chief Justice McLachlin emphasized that the focus must be on whether unconstitutional applications of the provision are reasonably foreseeable.⁴⁹ Judges are to consider what kind of conduct the law may reasonably be expected to catch, and whether the minimum penalty in such situations would be grossly disproportionate.⁵⁰ These are not limited to common instances or day-to-day applications of the law.⁵¹ Only remote or far-fetched examples are excluded. This means that personal characteristics of the offender can also be considered, if they do not produce far-fetched results. Relying on the hypothetical case of a person who has a valid licence for an unloaded restricted firearm at one residence and safely stores it with ammunition nearby at another residence, the majority found that a three-year term of imprisonment “for a person who has essentially committed a licensing infraction” would be grossly disproportionate and violate section 12.⁵²

Chief Justice McLachlin declined to consider the section 7 arguments, while noting that reliance on section 7 should not be precluded in a future case where section 12 did not resolve all of the issues before the court. She also found that the violations could not be saved under section 1 because the scheme was neither minimally impairing nor proportionate.

Writing in dissent, Moldaver J (Rothstein and Wagner JJ concurring) would have upheld the provision. Given that the offence was a hybrid one with no minimum penalty when prosecuted by summary conviction, he reasoned it was not reasonably foreseeable that minor violations would be subject to the mandatory sentence of imprisonment. Justice Moldaver noted that there had been a mandatory minimum attached to the offence since 1995, and yet there were no examples of actual cases in which licensing-type violations had been prosecuted by indictment.⁵³ This made the hypotheticals unreasonable and fanciful.

47. 2015 SCC 15.

48. See *ibid*; *Criminal Code*, *supra* note 20, s 95.

49. See *R v Nur*, *supra* note 47 at para 57.

50. See *ibid* at para 61.

51. See *ibid* at paras 67–68.

52. *Ibid* at para 83.

53. See *ibid* at para 126.

Nur was followed in 2016 by *R v Lloyd*, in which a majority of the Supreme Court of Canada struck down a one-year mandatory minimum for repeat offenders trafficking in drugs under subsection 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*.⁵⁴ The majority identified a number of reasonable hypotheticals that would render the minimum grossly disproportionate. More generally, the majority reasoned that

mandatory minimum sentences that . . . apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.⁵⁵

The three dissenting Justices would have found that the provision was constitutional, noting that the section 12 threshold of gross disproportionality was supposed to be a high one. The provision was limited to repeat offenders and made exceptions for those who had successfully completed an approved treatment program. They argued that the majority's approach left little room for Parliament's policy choices around sentencing, and appeared to contradict the holding that such sentences are not per se unconstitutional. This assessment has proven to be correct; there is no question that *Nur* and *Lloyd* have emboldened trial judges to find other mandatory minimums to be contrary to section 12.⁵⁶

Most recently, in *R v Boudreault*, the Supreme Court of Canada struck down section 737 of the *Criminal Code*, the provision setting out the mandatory victim surcharge to be imposed on any individual found guilty of an offence

54. *R v Lloyd*, 2016 SCC 13; *Controlled Drugs and Substances Act*, SC 1996, c 19, s 5(3)(a)(i)(D).

55. *R v Lloyd*, *supra* note 54 at paras 35–36.

56. Across Canada, judges have declared various mandatory minimum penalties as unconstitutional under section 12 of the *Charter*, and therefore of no force or effect. See *R v Zhang*, 2018 ONCJ 646; *R v Badali*, 2016 ONSC 788; *R v Cardinal*, 2018 NWTSC 12; *R v Swaby*, 2017 BCSC 2020, aff'd 2018 BCCA 416; *R v Kakfwi*, 2018 NWTSC 13; *R v Dickey*, 2016 BCCA 177; *R v O'Neil Harriott*, 2017 ONSC 3393; *R v Friesen*, 2015 ABQB 717; *R v Hills*, 2018 ABQB 945; *R v Deyoung*, 2016 NSPC 67; *R v Hood*, 2016 NSPC 78. As of March 2018, courts have struck down mandatory minimum sentencing provisions on over twenty-five occasions. See Sean Fine, "Mandatory-Minimum Sentencing Rules Unravelling into Patchwork", *The Globe and Mail* (6 March 2018), online: <theglobeandmail.com/news/national/mandatory-minimum-sentencing-rules-unravelling-into-patchwork/article38205652/>.

under the *Criminal Code* or the *Controlled Drugs and Substances Act*.⁵⁷ The Court held that section 737 constituted cruel and unusual punishment under section 12 of the *Charter* because its “impact and effects create circumstances that are grossly disproportionate to what would otherwise be a fit sentence, outrage the standards of decency, and are both abhorrent and intolerable”.⁵⁸ The Court also stated that section 737 “undermines Parliament’s intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison”.⁵⁹ As such, the Court declared section 737 of the *Criminal Code* to be of no force and effect.⁶⁰

C. Pre-Mandatory Minimum Sentencing for Sexual Offences Against Children and Youth

The sexual assault trial has been the subject of lengthy and broad criticism for its reliance on rape myths and stereotypes as reflected in substantive law, rules of evidence and procedure, and judicial fact-finding and credibility assessments.⁶¹ Successive rounds of law reform have attempted to address some of these problems, along with an expanded program of judicial education.⁶² The sentencing process has received less attention, but is not immune from the same problems. Perhaps it is assumed that once the accused has been found guilty beyond a reasonable doubt these problems disappear, but in some sense the broad discretion of sentencing judges gives them ample scope to re-emerge.⁶³

57. *R v Boudreault*, 2018 SCC 58; *Criminal Code*, *supra* note 20, s 737.

58. *R v Boudreault*, *supra* note 57 at para 94.

59. *Ibid* at para 83.

60. See *ibid* at para 98.

61. The scholarship in this area is voluminous, and the activism of front-line women’s organizations extensive. For an important collection of this work, see Sheehy, *Sexual Assault*, *supra* note 16. For a more recent example, see Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen’s University Press, 2018). The scholarship of Christine Boyle, Melanie Randall, Jennifer Koshan, Lise Gotell, Karen Busby, Lucinda Vandervort, Isabel Grant, and others has been influential in shaping public debate, policy development, and my own work in this area.

62. For descriptions of some of these reforms, see Benedet, “Sexual Assault”, *supra* note 9 at 128–31, 135–38; Janine Benedet, “Judicial Misconduct in the Sexual Assault Trial” (2019) 52:1 UBC L Rev 1. See also Bill C-337, *Judicial Accountability through Sexual Assault Law Training Act*, 1st Sess, 42nd Parl, 2015 (as passed by the House of Commons 15 May 2017). The Bill is currently before the Senate and would formalize some educational requirements, including for applicants to the judiciary.

63. I have made a similar argument in relation to the exception provisions of the sex offender

It is worth noting that much of the scholarship in this area focuses on the crime of sexual assault. Comparatively little attention has been directed at the offences of sexual interference and invitation to sexual touching, which are specific to youth victims. It might be thought that these offences are qualitatively different and less susceptible to stereotypical reasoning since consent is not in issue. One might think that there is no risk of, for example, the use of sexual history evidence to humiliate the complainant, or of adverse inferences from dress or alcohol consumption.⁶⁴ Unfortunately, there are still ample occasions for stereotypical reasoning to re-emerge both at trial (for example, in the application of the mistake of age defence⁶⁵) and on sentencing (for example, the claim that there was “*de facto* consent”, which allegedly makes the offence less serious⁶⁶). In many of these situations sex and age intersect as the basis for the discriminatory reasoning, along with other factors such as race and class.

While these particular problems are most acute for teenage girl victims, there are other sex- and age-based stereotypes that have affected our understanding of these crimes as well, for both male and female child victims. DeMarni Cromer and Goldsmith identify five categories of child sexual abuse myths that have been repeated in the media, scholarly literature and judicial decisions. These myths (i) mischaracterize the harm to child victims; (ii) assert that child sexual abuse is extremely rare; (iii) blame the victim or adults other than the perpetrator; (iv) assert that only a small subset of people sexually abuse children (for example blaming “homosexual pedophiles”) and (v) assume features of the abuse itself, such that the child will be injured or complain immediately.⁶⁷ They demonstrate that these beliefs have influenced both public attitudes to child sexual abuse and the response of the criminal justice system.⁶⁸

The influence of these myths helps explain why there are relatively few available decisions that concern sentencing for sexual offences against children and youth prior to the early 1980s. Available cases prior to this time

registry, which were eliminated in 2011. See Janine Benedet, “A Victim-Centred Evaluation of the Federal Sex Offender Registry” (2012) 37:2 Queen’s LJ 437.

64. The same argument might even be made about sexual assault as applied to young victims, since where the complainant is under the age of sixteen its elements are functionally identical to sexual interference. Non-consent need not be proven by the Crown as an element of sexual assault where it is proven that the complainant is below the age of consent. Since the application of force requirement in sexual assault includes any touching of a sexual nature, its elements merge with sexual interference.

65. See Isabel Grant & Janine Benedet, “Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law” Can Bar Rev [forthcoming in 2019].

66. For a discussion rejecting this misconception, see *R v Hajar*, 2016 ABCA 222 at para 7.

67. See Lisa DeMarni Cromer & Rachel E Goldsmith “Child Sexual Abuse Myths: Attitudes, Beliefs, and Individual Differences” (2010) 19:6 J Child Sexual Abuse 618.

68. See *ibid*.

usually concerned attacks that amount to attempted rapes, often accompanied by forcible confinement and other acts of violence.⁶⁹ Given these facts, until the 1970s, convictions for indecent assaults and other sexual offences against children often attracted significant terms of imprisonment.⁷⁰

The small number of cases reflects an unwillingness on the part of the medical and legal communities to recognize the existence of the sexual abuse of children and to believe children when they reported abuse.⁷¹ Courts typically considered children to be incompetent witnesses and there was no organized provision of testimonial accommodations.⁷² Many adhered to the Freudian view that girls' reports of sexual abuse were mere fantasy, and in particular an expression of their desire for sex with their fathers.⁷³ The sexual abuse of boys by men was viewed through a homophobic lens, while teenage boys sexually abused by adult women, such as teachers, were seen as benefitting from the experience.⁷⁴ It was through the sustained efforts of the feminist movement in the 1970s, particularly on the subject of father-daughter incest, that the subject of child sexual abuse fully entered the public consciousness.⁷⁵

It was not until the 1980s that significant numbers of sexual assaults against younger children started to be prosecuted, including cases in which the offender

69. See *R v Peters*, [1969] OJ No 465 (QL) (Ont CA) (four years' imprisonment and ten lashes); *R v LCC*, [1973] OJ No 512 (QL) (Ont CA) (two years less a day's imprisonment).

70. See *R v Peters*, *supra* note 69; *R v LCC*, *supra* note 69; *R v Underhill* (1955), 114 CCC 320, [1955] NBJ No 4 (QL) (NBSC (AD)) (two years' imprisonment); *R v Drew (No 2)*, [1933] 4 DLR 592, 60 CCC 229 (Sask CA) (3.5 years' imprisonment and twenty-one lashes).

71. See Carol Smart, "Reconsidering the Recent History of Child Sexual Abuse, 1910–1960" (2000) 29:1 J Social Policy 55 at 56.

72. It was not until Bill C-2 in 2006 that courts began to make systematic provision for hearing the testimony of children without abstract inquiries into their understanding of concepts such as "truth". See Nicholas Bala et al, "A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000) 38:3 Osgoode Hall LJ 409.

73. For a detailed account of these beliefs and the indifference of the legal system, see Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Schuster, 1975) at 300–15.

74. See e.g. DeMarni Cromer & Goldsmith, *supra* note 67 at 624.

75. See Diana EH Russell, "The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children" (1983) 7 Child Abuse & Neglect 133 at 137 (28% of adult respondents reported sexual abuse before the age of fourteen; for 12%, the abuse was intrafamilial). For Canadian research documenting the absence of police and policy response to the issue prior to the 1980s, see Ontario, Cornwall Public Inquiry, *A Historical Review of the Evolution of Police Practices, Policies and Training Regarding Child Sexual Abuse* (Submission), by Joseph P Hornick & Chelsey Morrice (Calgary: Canadian Research Institute for Law and the Family, 2007) at xi, online (pdf): <www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/report/research_papers/Phase_1_RP/1_Hornick_Report_en.pdf>.

was in a position of trust and secured sexual access by abusing that position, and cases in which the assaults took the form of sexual touching rather than intercourse or attempted intercourse. That increased caseload brought with it a number of problematic conclusions on the part of some courts, reflecting many of the same child sexual abuse myths: that the sentence might be mitigated if the young person was in fact the sexual aggressor;⁷⁶ that young children are not seriously harmed by sexual contact with adults in the absence of additional physical violence;⁷⁷ and that what was problematically labelled fondling is much less serious than other forms of abuse.⁷⁸ In some of these cases, suspended sentences were imposed, especially if the accused was classified as a pedophile in need of treatment for his illness.⁷⁹ If the offender was not considered to be a pedophile, and was otherwise of good character, he was generally thought to be at low risk to reoffend.⁸⁰

With the introduction of CSOs in the mid-1990s, some of this same reasoning was deployed to justify allowing the offender to serve his sentence in the community. This disposition was especially popular in historic sexual abuse cases, where the victim did not complain to police until many years after the abuse ended, often after they had reached adulthood, based on the conclusion that the offender was no longer engaged in such behaviour.⁸¹ However, it was not limited to historic prosecutions. One of the particular concerns about the CSOs imposed in some of these cases is that the restrictions placed on the offender's liberty seem minimal. If the offender is not given house arrest, or is allowed to leave his home to go to work, to church, for medical appointments and to run errands, it is hard to see how this is a significant restriction on liberty.⁸² Where the offender minimizes the offence, and family and friends of the offender support this mischaracterization, such cognitive distortions are reinforced by a sentence that makes the crime appear to be a technical one, rather than a real sexual assault which is stereotypically understood to require overt force or violence.⁸³ CSOs may also return the offender to the same

76. See *R v Allen* (1989), 77 Nfld & PEIR 138, [1989] NJ No 229 (QL) (Nfld SC (CA)).

77. See *R v Pilgrim* (1981), 35 Nfld & PEIR 30, 64 CCC (2d) 523 (Nfld SC (CA)).

78. See *ibid.* See also *R v Wismayer* (1997), 33 OR (3d) 225, 115 CCC (3d) 18 (CA); *R v Bone*, [1998] MJ No 620 (QL), 1998 CanLII 14184 (Man Prov Ct); *R v Willis*, [1975] 1 All ER 620 at 624, [1975] Crim LR 177 (CA).

79. See e.g. *R v Robertson* (1979), 10 CR (3d) S-46, 46 CCC (2d) 573 (Ont CA). But see *R v Henein* (1980), 53 CCC (2d) 257, 1980 CanLII 2980 (Ont CA).

80. See *R v Adams* (1981), 13 Man R (2d) 386, [1981] MJ No 108 (QL) (CA); *R v Upshall*, [1969] OJ No 153 (QL) (Ont CA).

81. See e.g. *R v LFW*, 2000 SCC 6.

82. See *R v AG* (1998), 114 OAC 336, [1998] OJ No 4031 (QL) (CA).

83. See *R v RAR*, 2000 SCC 8 at para 29.

community or even the same household as the victim. Research on sentence length for sexual crimes against children conducted by Carol-Ann Bauman in the 1990s revealed that average sentences dropped significantly from a peak of 3.5 years in 1995 to a low of 1.8 years in 1998, a decline she attributed to the introduction of conditional sentences, which are only available if the sentence is less than 2 years.⁸⁴

Yet it is also evident that courts in the 1980s and 1990s were engaged in considerable debate as to how to understand and sentence for these offences. Perhaps the highest profile of these cases was *R v Stuckless*, in which the offender was sentenced for dozens of sexual assaults against boys whom he lured through his position as an equipment manager at Maple Leaf Gardens.⁸⁵ Justice Watt sentenced Stuckless to a term of two years less a day followed by probation, on the condition that he take medication to reduce his sex drive once released. He cited the fact that pedophilia was an illness requiring treatment, and the absence of penetration or additional violence as relevant factors influencing the sentence.⁸⁶ The Court of Appeal for Ontario increased the sentence to a global sentence of six years, finding that these were not mitigating circumstances and that the sentence was unfit.⁸⁷ In 2002, Moldaver JA, for the same Court, underscored the emphasis on denunciation and general deterrence in *R v D(D)*, noting that the six-year sentence in *Stuckless* should be considered at the low end of acceptable sentences for that type of conduct.⁸⁸ In dismissing an appeal from a nine-year sentence for an offender who sexually abused four young boys over periods of several years, he noted:

The overall message . . . is meant to be clear. Adult sexual predators who would put the lives of innocent children at risk to satisfy their deviant sexual needs must know that they will pay a heavy price. In cases such as this, absent exceptional circumstances, the objectives of sentencing proclaimed by Parliament in s. 718(a), (b) and (c) of the *Criminal Code*, commonly referred to as denunciation, general and specific deterrence, and the need to separate offenders from society, must take precedence over the other recognized objectives of sentencing.⁸⁹

84. See Carol-Ann Bauman, "The Sentencing of Sexual Offences Against Children" (1998) 17 CR (5th) 352 at 352–53, 361–62.

85. [1997] OJ No 6367 (QL), 1997 CarswellOnt 6078 (WL Can) (Ont Ct J (Gen Div)).

86. See *ibid* at para 81.

87. See *R v Stuckless* (1998), 41 OR (3d) 103, 17 CR (5th) 330 (CA).

88. *R v D(D)* (2002), 58 OR (3d) 788, 163 CCC (3d) 471 (CA) [cited to OR].

89. *Ibid* at para 34.

None of this historical review shows that mandatory minimum sentences of imprisonment are a good idea. It does demonstrate, however, that there was a genuine concern animating some of those who supported them that judges were not taking these cases sufficiently seriously nor recognizing their violent nature and the harms they caused to victims. Mandatory minimums seemed like a quick fix to the deeper problem of judicial reasoning based on problematic assumptions about harm, risk and severity. However, appellate courts were already working to address these concerns independently by signaling to sentencing judges that societal understanding of these offences had shifted, much like they had for impaired driving, to one in which such offences were seen as both far too common and deeply harmful to child victims. What needed to follow was a deeper engagement with the question of whether this recognition required ever-longer sentences of incarceration, and the particular impacts of in-custody sentences on Indigenous offenders, among other issues. As the next section of this article explains, mandatory minimums in some sense short-circuited these important dialogues in favour of inflexible sentencing floors.

D. Sentencing for Sexual Offences After Mandatory Minimum Sentencing

As noted above, when Parliament introduced mandatory minimum sentences for sexual offences against children and youth in 2005, it was responding to a very specific concern: the imposition of conditional sentence orders in some of these cases. As a result, minimum penalties of imprisonment were set very low (fourteen days on summary conviction and forty-five days on indictment) to give judges the maximum possible discretion in custodial sentencing while still eliminating the possibility of conditional sentences.

The subsequent enhancement of these minimums in 2012 to as much as one year for some offences prosecuted by indictment had a different goal. These amendments sought to raise the floor and thus shift the range of sentences for these offences. Was this simply a punitive response that aimed to incarcerate more people for longer periods of time? Or was there also reason for continuing concern about the approach to sentencing sexual offences against children and youth?

What has happened to sentences in these cases since the introduction of mandatory minimums? Overall, the data I reviewed suggests that sentences have increased. To document this, I looked at all decisions in British Columbia, Ontario and Alberta⁹⁰ decided between 2001 and 2003, before the minimum sentence was introduced, where the accused was sentenced for

90. These provinces were chosen because collectively they comprise more than half the Canadian population and provide some east-west balance.

at least one count of sexual interference contrary to section 151 of the *Criminal Code* (forty-two cases).⁹¹ I then looked at cases with the same parameters decided between 2008 and 2010, after the first minimums (of fourteen or forty-five days) were added but before they were raised in 2012 to ninety days and one year (seventy-nine cases).⁹²

In the pre-mandatory minimum sentencing (MMS) period, the average length of custodial sentence (excluding conditional sentences and indeterminate sentences for dangerous offenders) was thirty-two months. In the post-MMS period, it was fifty-six months. Many of these cases involved other charges, so the comparison is not exact by any means. Fourteen per cent of the post-MMS cases involved very long sentences of more than eight years' imprisonment; these cases are unlikely to be seriously affected by the introduction of low minimum penalties since factors such as the large number of victims, the extent of the abuse, or the amount of additional violence meant that they were always going to attract a very serious sentence.⁹³

A clearer difference, however, emerges at the lower end: 37% of offenders were given sentences of less than one year in the pre-MMS period and only 13% in the post-MMS period. A conditional sentence was imposed in 12% of the pre-MMS cases (five cases) and a conditional discharge in one case, meaning that 50% of the section 151 offenders in the sample prior to the enactment of the MMS received no custodial jail time or a sentence of under one year. Post MMS, that number dropped to 14%.⁹⁴

This does not mean that mandatory minimums caused these increases. It is equally possible that the introduction of the minimum and the overall inflation in sentences stem from the concerns discussed above that these cases were not historically seen as serious crimes of violence.

Despite this overall inflationary trend, a review of some of the sentencing decisions after the introduction of mandatory minimums shows the wide range of sentences considered appropriate by trial judges, and also the willingness of some sentencing judges to impose very low sentences of ninety days or less in the face of mandatory minimums. This is most evident not with cases involving young children, but in cases where the victim is an adolescent girl.

91. I chose sexual interference because all of the victims would be children and youth.

92. Almost all of the cases for which information was available were prosecuted on indictment (97% of the pre-MMS cases and 93% of the post-MMS cases). Given that information was not available for some cases, there is insufficient evidence to show that the introduction of mandatory minimums led to more cases being prosecuted by summary conviction.

93. There was only one such case in the pre-MMS cases. See *R v Leblanc*, [2002] OJ No 4611 (QL) (Ont Sup Ct).

94. There was one CSO in the post-MMS cases.

For example, the twenty-two-year-old first-offender in *R v Khan* was convicted of invitation to sexual touching in relation to a thirteen-year-old victim.⁹⁵ Khan was a skate guard who befriended the victim and her eleven-year-old friend during their visits to the rink. He began to exchange text messages with both girls, ultimately asking the thirteen-year-old for a topless photo, sending her a picture of his penis, and telling her he wanted to have sex with her. Justice Bovard rejected the offender's section 12 *Charter* challenge to the mandatory fourteen-day sentence of imprisonment on summary conviction (since raised to ninety days). Although the judge noted that the offender was in a position of trust, did not stop the conduct on his own, initially targeted both girls, was in denial and was not truly remorseful, Khan was nonetheless sentenced to the statutory minimum penalty plus twelve months' probation.⁹⁶

Another case involving a short sentence where there was physical contact is *R v Hall*.⁹⁷ There the sixty-two-year-old teacher took a fourteen-year-old autistic girl to a locked fitness room and on two occasions did sit ups with her sitting on his crotch. He denied any sexual intent and contended that his actions fell into a "grey area". He was convicted of sexual exploitation of a person with a disability (an offence that carries no mandatory minimum penalty) and sexual interference (at a time when the minimum sentence was forty-five days). Justice Acton sentenced the offender to three months' imprisonment and two years' probation.

A ninety-day minimum sentence was also imposed in *R v RRGs*, where the accused was convicted of touching for a sexual purpose his girlfriend's fourteen-year-old niece.⁹⁸ Both the accused and the victim were Indigenous and the assault happened in a reserve community. The accused had lived with the victim's family for a number of years in her childhood and had assisted in caring for her and her twin sister. He entered the residence uninvited in the middle of the night and went to the victim's bedroom. He climbed into bed with her

95. 2013 ONCJ 267.

96. In *R v Careen*, a short sentence was also imposed where the offender was a fifty-two-year-old high school teacher who sent a series of sexually charged text messages to a grade 12 student that culminated in requests for sexual contact. The student showed the messages to the offender's wife, who was also a teacher at the school. She deleted some of them but did not disclose the conversations to the school authorities. See 2012 BCSC 918. Careen was found guilty of sexual exploitation of a young person contrary to subsection 153(1)(b). See *Criminal Code*, *supra* note 20, s 153(1)(b). At the time the offence was committed in 2009, the minimum penalty was forty-five days on indictment. Justice Schultes rejected the Crown's request for a sentence of nine to twelve months, sentencing the accused instead to sixty days served intermittently. In his view, specific deterrence had been served by the conviction itself and the accused's current (non-teaching) employment should not be jeopardized. See *R v Careen*, *supra* note 96 at para 42.

97. *Supra* note 39.

98. 2014 BCPC 170.

and began to touch her and lift her shirt. When she awoke and objected, he left the home. He had also sent sexual text messages to the victim's sister in the month prior to the assault. The victim's mother described the victim as distant and no longer liking to go out or show affection with family members. Justice Birnie held that an appropriate penalty would have been an eight-month conditional sentence, but since such a disposition was not permitted, he imposed the minimum penalty of ninety days' imprisonment followed by three years' probation, relying on *R v Gladue*⁹⁹ and the need to preserve the offender's employment.

It is important to keep in mind that the highest rates of reported sexual assault are perpetrated on adolescent girls. Girls are the victims in approximately eighty per cent of these reported cases.¹⁰⁰ While the rate of offending against boys is relatively constant throughout childhood and adolescence, rates for girls are not only higher across all ages but rise sharply between the ages of thirteen and fifteen.¹⁰¹ This is a time of extreme vulnerability for girls, who are beginning to assert their independence and trying to develop a healthy sexuality in a culture that continues to eroticize them, in ways that intersect with race, class and other factors.¹⁰²

99. [1999] 1 SCR 688, 171 DLR (4th) 385.

100. See Statistics Canada, *Sexual Offences*, *supra* note 10 at 3.

101. See *ibid* at 11.

102. For further consideration of the portrayal of adolescent girls as sexual temptresses, see Grant & Benedet, *supra* note 65. For a discussion concerning the intersection of race, see e.g. Robyn Bourgeois, "Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada" (2015) 62:6 UCLA L Rev 1426. "Indigenous women and girls also experience extremely high rates of sexual violence, with 75 percent of indigenous females experiencing some form of sexual abuse before age eighteen, with 50 percent experiencing this violence before age fourteen, and 25 percent experiencing this violence before age seven" (*ibid* at 1428). Bourgeois notes that the disturbing number of Indigenous children in the child welfare system who have experienced dislocation and family disruption also heightens the risk of sexual violence (*ibid* at 1462–63). Sandrina de Finney has written:

Indigenous girls in the West live the intergenerational effects of systemic racialized/gendered/sexualized/classed colonialism that excludes them from normative notions of Western girlhood. Their positioning as perpetual 'others' to white Canadian citizenship directly contradicts neoliberal demands on girls to self-actualize. They are disproportionately represented in indicators of social exclusion and are most at risk of poverty, racialized violence and sexual exploitation – due in part to persistent colonial images of Indigenous girls and women as drunk, passive, mysterious – romanticized versions of colonial property.

Many of the offenders in these cases are exploiting not only privilege and power rooted in sex and age, but also trading on positions of trust as teachers, coaches or family friends. Many of the girls are vulnerable for reasons beyond their age, including Indigeneity and disability. While sentencing is a highly individualized process, it can be difficult to discern any organizing principle that explains the wide range of sentences handed out for these offences. In some cases it appears that judges who would otherwise have agreed with a longer conditional sentence are simply imposing a sentence at or near the minimum. Neither sentencing option precludes stereotypical reasoning that reflects myths about child sexual abuse. This context needs to inform our assessment of the impact and utility of mandatory minimum sentences.

II. Constitutionality of Mandatory Minimum Sentences for Sexual Offences Against Children and Youth

A. Criticisms of Mandatory Minimum Sentences

The conventional criticisms of mandatory minimum penalties need only be briefly stated. First, it is argued that judges must not be constrained by an artificial sentencing floor that may not permit the crafting of a fit sentence when the full range of mitigating factors is taken into account.¹⁰³ In other words, there will inevitably be cases in which the minimum penalty is excessive and contrary to the principles of sentencing in light of the particular facts.

Second, where the application of the minimum depends to some extent on prosecutorial discretion, even a fair and thoughtful application of that discretion may be insufficient to prevent injustice.¹⁰⁴ In the case of hybrid offences, this may occur where the prosecution decides to proceed by indictment because the six-month limitation period for a summary conviction procedure has elapsed. In the alternative, the available evidence may suggest that the offence is sufficiently serious to be treated as an indictable offence but the facts ultimately proven at trial may result in a far less serious version of the offence.¹⁰⁵ In *Nur*, the Supreme Court of Canada rejected the argument that the Crown's ability to elect to proceed summarily prevented the minimum sentence from being

See Sandrina de Finney, "Playing Indian and Other Settler Stories: Disrupting Western Narratives of Indigenous Girlhood" (2015) 29:2 *Continuum* 169 at 170.

103. See Parkes, *supra* note 1 at 151, 155; Chaster, *supra* note 3 at 94.

104. See Chaster, *supra* note 3 at 94.

105. See *R v Smickle*, 2014 ONCA 49.

grossly disproportionate for less serious offences.¹⁰⁶ Chief Justice McLachlin, for the majority, noted that the Crown prosecutor is in an adversarial position to the accused,¹⁰⁷ “the exercise of discretion typically occurs before the facts are fully known”,¹⁰⁸ and “the constitutionality of a statutory provision [cannot] rest on an expectation that the Crown will act properly”.¹⁰⁹

Third, it is argued that mandatory sentences of imprisonment may work particular injustices for Indigenous accused by disqualifying them from a non-custodial sentence. This is contrary to the direction in subsection 718.2(e) of the *Criminal Code* that particular consideration be given to the circumstances of Aboriginal offenders when evaluating alternatives to incarceration, and the general direction in subsection 718.2(d) which requires, for all offenders, that incarceration not be imposed where other less restrictive options are appropriate.¹¹⁰ In addition, statutory minimums may result in a particularly harsh sentence where the accused has a mental disability, but does not meet the criteria for being considered not criminally responsible by reason of mental disorder (NCR). This may arise where the accused has a brain injury or a diagnosis of fetal alcohol spectrum disorder, for example.¹¹¹

Each of these criticisms has potential specific application in the context of sexual offences. The first general criticism of constrained discretion is significant because many sexual offences have been drafted to cover a wide range of conduct and circumstances. Thus, the sexual assault of a child under sixteen, which carries a one-year minimum when prosecuted by indictment, can encompass conduct ranging from penetration of various orifices with a penis or with objects, to oral sexual contact, to sexual touching of the genitals, to hugging, kissing, or touching parts of a child’s body over clothing. If the reasonable observer would conclude that the conduct violated the sexual integrity of the child, this is sufficient to make out the *actus reus* of the offence.¹¹²

Moreover, if a fifteen-year-old girl waits eight months before reporting that her teacher sent her text messages inviting her to engage in a sexual act with him, the Crown can only prosecute by indictment, triggering a mandatory

106. See *supra* note 47.

107. See *ibid* at para 86.

108. *Ibid* at para 97.

109. *Ibid* at para 95.

110. See *supra* note 20, ss 718.2(d)–(e). See also *R v Gladue*, *supra* note 99; *R v Ipeelee*, 2012 SCC 13.

111. See *R v Adamo*, 2013 MBQB 225. See also Kent Roach & Andrea Bailey, “The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing” (2009) 42:1 UBC L Rev 1.

112. See *R v Chase*, [1987] 2 SCR 293 at 302, 82 NBR (2d) 229. If the accused knows the child is under sixteen, and the touching is not accidental, the *mens rea* is also proven. See *R v George*, 2017 SCC 38 at para 7.

twelve-month sentence for internet luring. Leaving aside the fitness of such a sentence on the facts of a given case, this does show that the Crown, acting in good faith, may find its own discretion limited by circumstances beyond its control. This is particularly likely in cases involving sexual abuse of minors, where delayed reporting is common.

In addition, the wider definitional ambit of sexual assault may also lead to cases where the facts proven are quite different than those alleged, but nonetheless establish the elements of the offence.¹¹³ The decision to proceed on indictment might well have been reasonable on the facts alleged but not on the facts as found.

A number of constitutional challenges to mandatory minimum sentences in the sexual offence context have relied on precisely these arguments. In the first wave of challenges, courts upheld the sentencing provisions.¹¹⁴ A section 15(1) *Charter* challenge to the minimum sentence for sexual interference was rejected in *R v TMB*.¹¹⁵ In that case, the accused was convicted summarily of sexually touching his five-year-old granddaughter. He argued that the inability to impose a non-custodial sentence discriminated against him as an Aboriginal offender. On appeal, Code J noted that it was now well-accepted both that Aboriginal people are overrepresented in the prison system and also that child sexual abuse is a serious problem that causes great harms. The expert evidence on the efficacy of incarceration for child sex offenders, including those of Aboriginal heritage, was divided and the accused had not proven that the effects of the minimum penalty were discriminatory. Despite dismissing the constitutional challenge, Code J allowed the accused's appeal from the eight-month sentence imposed at trial and substituted the minimum sentence of ninety days.¹¹⁶

More recent cases have invalidated the mandatory minimums for sexual interference and sexual exploitation of a young person.¹¹⁷ A number of the successful challenges rely on the diminished capacity of the accused, but proceed under section 12 rather than section 15(1). For example, in *R v Ford*, the Court invalidated the one-year minimum for sexual interference when prosecuted on indictment.¹¹⁸ The accused, aged twenty, had intercourse with a thirteen-year-old Aboriginal girl in a public restroom. He was described as far below the

113. See *R v Duke*, 2012 SKPC 138.

114. See *R v Lonergan*, 2009 BCSC 1678; *R v Stapley*, 2014 ONCJ 184.

115. 2013 ONSC 4019.

116. A section 15(1) challenge to the three-year mandatory minimum sentence for a firearms offence was successful on the ground of mental disability. See *R v Adamo*, *supra* note 111.

117. See e.g. *R v ML*, *supra* note 8. There are also several cases dealing with the constitutionality of minimum sentences for child pornography and child prostitution offences, but those are beyond the scope of this paper.

118. *Supra* note 8.

intelligence of an average adult offender, having suffered a brain injury as a child after the removal of a tumour.¹¹⁹

In *R v Scofield*, the twenty-two-year-old accused engaged in several acts of unprotected intercourse with two fifteen-year-old girls he had met online.¹²⁰ The girls were described as “willing participants”,¹²¹ a problematic term that suggests the victims were partly responsible and experienced less harm. The offender had a mental disability and was described by the judge as similar to someone who would fall intellectually within the close in age exception for adolescents, an infantilizing approach that is not used in other contexts, for example in considering whether a complainant has the capacity to consent. She found that he was not able to understand that what he did was wrong or harmful and sentenced him to a conditional sentence of six months. The British Columbia Court of Appeal upheld the finding of unconstitutionality, with a majority substituting a CSO of twelve months.¹²²

In *R v JED*, the Manitoba Court of Appeal also upheld a determination that the minimum one-year sentence was unconstitutional.¹²³ The twenty-three-year-old accused had developmental disabilities, but was often left to babysit his two young nieces. He sexually abused one girl over a period of two years and the other over a period of six months. The trial judge, after invalidating the minimum punishment, imposed a sentence of ninety days to be served intermittently followed by probation.¹²⁴ The Manitoba Court of Appeal conducted an extensive review of other cases involving the sexual touching of children before raising this to twenty-two months of imprisonment.¹²⁵

Cases involving offenders with intellectual impairments or mental health problems are challenging for the criminal justice system. The NCR verdict and disposition system is designed only for those with the most severe psychiatric illnesses and other disabilities rather than people with mild to moderate developmental or intellectual disabilities. Most people with mental disabilities are left to rely on the sentencing phase to seek some concessions. This issue deserves much more attention and it is important to remember that striking down minimums does not solve all of the problems associated with applying the criminal law to people with diminished capacity whose actions have caused serious harms to others.

119. See *ibid.* For additional reasons, see *R v Ford*, 2017 ABQB 527.

120. *R v Scofield* Initial Reasons, *supra* note 8.

121. *Ibid* at paras 7, 80. See also *R v Scofield* Additional Reasons, *supra* note 8.

122. See *R v Scofield*, 2019 BCCA 3. The dissenting justice would have imposed an even longer CSO of sixteen months (*ibid* at para 90).

123. 2018 MBCA 123.

124. See *ibid* at para 22.

125. See *ibid* at para 128. For the Court’s extensive review of the case law, see *ibid* at paras 53–66.

Other cases for which the minimum would not violate section 12 when applied to the particular circumstances of the offender have relied on reasonable hypotheticals from other cases to invalidate minimum sentences. In *R v ML*, the offender was in his fifties and employed as a nurse.¹²⁶ He shared marijuana with his daughter's teenage half-sister in his bed when she was sleeping over and in his care. He then touched her bare breasts. The sentencing judge found that an appropriate sentence for sexual interference was nine months' imprisonment, such that the one-year minimum was not grossly disproportionate.¹²⁷ However, he relied on the facts of other reported cases to conclude that there were circumstances in which a sentence of only sixty to ninety days would be appropriate for this offence, and found the minimum contrary to section 12, even though he accepted that sentences for sexual crimes against children had been increasing overall in recent years.¹²⁸ The reasoning in this decision was applied as binding and followed in a number of other Ontario cases.¹²⁹

B. Ongoing Problems with Sentencing for Child Sex Offences

The concerns about the use of mandatory sentences of imprisonment must be placed in the broader context of sentencing for sexual offences. Regardless of the sentencing range available to courts, myths and stereotypes about sexual assault can find their way into the sentencing process and lead to some aggravating factors being ignored or downplayed, while other factors are improperly identified as mitigating. Some of these concerns are evident in the cases summarized above. There continue to be cases in which courts fail to recognize grooming behaviour, place weight on the fact that child victims "consent" or are "willing", or overemphasize loss of class status by offenders who hold professional positions of trust that enabled their abuse in the first place.¹³⁰

In *Khan*, the offender was given a very low sentence despite his position of trust, his grooming behaviour, the very young age of the victim, and his lack

126. *Supra* note 8.

127. See *ibid* at para 82.

128. See *ibid* at para 85.

129. See *R v Hussein*, *supra* note 8 at paras 26–29; *R v Drumonde*, *supra* note 8 at para 50; *R v S*, 2017 ONSC 1869 at para 22; *R v McCaw*, 2018 ONSC 3464 at para 74. See also *R v Ali*, *supra* note 8. Justice Sheard states: "I had decided that the declaration of Justice M. Linhares de Sousa in *R. v. M.L.*, 2016 ONSC 7082 that the mandatory minimum punishment of imprisonment for a term of one year as found in s. 151(a) is of no force or effect is *binding upon the Crown*" [emphasis added]. See *R v Ali*, *supra* note 8 at para 2.

130. *R v Hajar*, *supra* note 66.

of insight or remorse.¹³¹ His admission that he targeted the victim because she seemed “loose”, and that he was really more interested in her eleven-year-old friend, should have raised serious concerns for the Court about his risk to other girls.

In *Hall*, the victim was taken to a locked room by the abuser, who targeted her because of her disability and tried to cover up what he was doing under the guise of normal activities.¹³² His attempt to spin what happened as being in a “grey area”, claiming the appropriateness of his conduct was unclear, should raise real concerns about the potential for recidivism.¹³³ While the courts in these cases were prepared to label the offences as “serious” in the abstract, they did not identify the full harm nor the broader context for such behaviours on the facts before them.

We continue to see cases that rely on mistaken assumptions about harm and responsibility, even where the sexual activity includes repeated acts of unprotected sexual intercourse with a minor. For example, in *R v WRM*,¹³⁴ the accused was twenty-nine years old and the victim fourteen. The accused had an extensive criminal record and was living with the victim’s family when the sexual activity commenced. The girl’s family approved of the relationship. At the time of sentencing she was seventeen, pregnant with his child and the two planned to continue their relationship. The Crown asked for two years’ imprisonment. Justice McDougall sentenced the accused to five months’ imprisonment, followed by probation.

The Court seems to treat the victim’s parents’ approval of the offender’s conduct, the resulting pregnancy, and the continued sexual activity as mitigating factors.¹³⁵ That the victim’s parents would invite a violent man into their home, and do nothing to stop the abuse of a fourteen-year-old girl at the hands of a twenty-nine-year-old man, is not a mitigating factor. It simply underscores the victim’s vulnerability in that she has no one to protect her from the abuse, which will continue now that she has to mother his child as a teenager.

The effects of substituting short sentences of imprisonment for conditional sentences also deserve scrutiny. The standard method for considering whether to impose a conditional sentence is first to consider whether the appropriate sentence could be of such a length that a CSO would be available, and then to consider whether the accused should serve his sentence in the community,

131. See *supra* note 95.

132. See *supra* note 39 at paras 2–3.

133. Similarly, in *R v Careen*, the fact that the offender lost his teaching position should not have been used to significantly discount his sentence since it was the position of trust that the teaching position afforded him that allowed him to commit the offence in the first place. See *supra* note 96.

134. 2013 NSSC 392.

135. See *ibid.*

typically under some form of curfew or house arrest.¹³⁶ While the CSO may be longer than the in-custody sentence, they are not completely disconnected from one another. However, it appears that instead, there is a trend to substitute very short in-custody sentences at or near the mandatory minimum as a substitute for longer conditional sentences that could have formerly been imposed. Put another way, there appear to be almost no cases in which persons committing sexual offences against children were sentenced to ninety days' imprisonment or less prior to the imposition of mandatory minimums. These cases are much easier to find since 2012.¹³⁷ What seems to have happened in some cases is a switch from longer conditional sentences for shorter in-custody sentences, often served intermittently.

For another example, one can contrast the decisions in *R v Dick*¹³⁸ and *R v Merkuratsuk*,¹³⁹ each of which involved an intoxicated Indigenous first-time offender who sexually assaulted a teenage victim. In *Dick*, the offender was twenty-seven and the complainant sixteen. They had been drinking with others and later went to sleep on separate sofas. She awoke to find Dick having sexual intercourse with her. There was no mandatory minimum sentence since the victim was sixteen, and a conditional sentence order was available because the Crown proceeded summarily. Dick was sentenced to a sixteen-month conditional sentence followed by probation. The CSO included a curfew, a no-contact order, community service and counselling among its conditions. In *Merkuratsuk*, the offender was a forty-year-old woman who had sexual intercourse with a fourteen-year-old boy. She pled guilty to sexual interference. The offence took place in 2009, at a time when the minimum penalty on indictment was forty-five days. In sentencing the offender to the minimum sentence, followed by thirty months of probation, Stack J stated:

The circumstances of the offender and the needs of the community in which the offense occurred require consideration as well. This offense arises directly from Ms. Merkuratsuk's abuse of alcohol and a lifetime of despair and hopelessness. Ms. Merkuratsuk, as an Inuk woman, should be subject only to the minimum period of incarceration that is sufficient to deter her specifically and the public generally. Thus, recognizing that the statutory minimum is at the very low end of the range of sentencing for an offense such

136. See *R v Proulx*, 2000 SCC 5 at paras 28, 36.

137. See *R v Angel*, 2018 BCSC 1751; *R v Randall*, 2018 ONCJ 470; *R v TAS*, 2018 SKQB 183; *R v CC*, 2017 ONSC 5604; *R v Boriskewich*, 2017 ABPC 202.

138. 2013 YKTC 107.

139. 2012 NLTD(G) 11.

as this, it is more than is required for the former and is at least sufficient for the latter. Had a longer period of house arrest been available as a sentencing alternative, I would have considered it. Both the needs of the community and [the offender] would likely have been appropriately dealt with by a period of incarceration served by the offender in her own home. This would have allowed her to avail of treatments and programs that may address the underlying causes of her crime. Similar goals can be achieved through a short period of incarceration followed by supervised probation.¹⁴⁰

It is worth asking whether this shift from conditional sentences to short, possibly intermittent, jail terms benefits those who are victimized by sexual assault. This is not a simple question. The overuse of conditional sentences for sexual offences can be justly criticized, especially if they impose only minimal restrictions. Conditional sentences are supposed to be sentences of imprisonment served in the community, with conditions that are significantly restrictive of the offender's liberty.¹⁴¹ The blurring of conditional sentences with terms of probation undermined public confidence in the conditional sentence and fueled opposition to their use.¹⁴²

Supporters of conditional sentences note that even if their terms are not different, the consequences for breach are. Breaching probation is a separate summary conviction offence, while breaching a CSO means that the offender will be sent to jail to serve the balance of the sentence.¹⁴³ However, in some jurisdictions the lack of monitoring and enforcement of CSOs made this difference more theoretical than real.¹⁴⁴ When trial judges say that similar

140. *Ibid* at para 28.

141. See *R v Proulx*, *supra* note 136.

142. For a discussion of judicial and public attitudes toward conditional sentences, see Department of Justice, *Conditional Sentencing in Canada: An Overview of Research Findings*, by Julian V Roberts & Carol LaPrairie, Catalogue No RR2000-6c (Ottawa: DOJ, 2000) at 7–8, 25–28.

143. See *Criminal Code*, *supra* note 20, s 742.6 (governing conditional sentence breaches). But see *Criminal Code*, *supra* note 20, s 733.1 (governing breach of probation).

144. See Dawn North, "An Empirical Analysis of Conditional Sentencing in British Columbia" in Department of Justice, Research and Statistics Division, ed, *The Changing Face of Conditional Sentencing* (Ottawa: DOJ, 2000) 73 (stating that there is "poor or incomplete data — conditional sentence breaches in BC are not reliably tracked in either the court or corrections databases" at 82); Department of Justice, *supra* note 142 (finding that electronic monitoring, for example, "has not been widely used as a way of monitoring offenders sentenced to a conditional term of imprisonment" at 35).

goals can be achieved by a short period of incarceration and lengthy terms of probation, they reinforce this similarity. A meaningful term of actual imprisonment or, in some limited circumstances, a CSO with serious restrictions on liberty that are enforced, seem like preferable alternatives from the perspective of victims. This is especially true when intermittent sentences are imposed, since many correctional facilities do not have the capacity to properly house weekend inmates and the offender receives credit for a full day's time regardless of when he signs in or out.¹⁴⁵

The question of Indigenous over-incarceration must also be considered. In many cases where an Indigenous accused faces a mandatory jail sentence for a child sexual offence, the victim of that offence will have been an Indigenous child. Yet the sentencing judges in the cases reviewed for this paper almost never identified whether the victim was also Indigenous. There was no opportunity to consider the serious problem of the sexual victimization of Indigenous children and the ways in which their potential and ability to overcome the legacies of colonialism in their communities are being impeded by abuse. This engagement, which is necessarily complex and cannot be addressed by the traditional criminal justice system on its own, cannot fairly begin unless the Indigenous identities of sexual assault victims are also made visible.¹⁴⁶

Conclusion

A critique of mandatory minimum sentences in the context of sexual offences needs to fairly account for where these sentences came from—frustration at the overuse of conditional sentences, and the belief that their terms were watered down until they became indistinguishable from probation. My conclusion, however, is that mandatory minimum sentences of imprisonment are not helpful for addressing the very real harms done to child and youth victims of sexual assault. Very short mandatory minimums may be more likely to

145. See Bethany Lindsay, "Weekends in Jail: Why Some Convicts Serve Only Intermittent Sentences", *CBC News* (12 May 2018), online: <www.cbc.ca/news/canada/british-columbia/weekends-in-jail-why-some-convicts-serve-only-intermittent-sentences-1.4657956>; Keith Doucette, "How Weekend-Only Jail Sentences Can Cause Security Risks, Overcrowding", *The Globe and Mail* (21 June 2018), online: <theglobeandmail.com/canada/article-how-weekend-only-jail-sentences-can-cause-security-risks-overcrowding-2/>; Luis Millan, "Growing Use of Intermittent Sentences Worsens Overcrowding, Says Quebec Ombudsperson", *The Lawyer's Daily* (5 April 2018), online: <www.thelawyersdaily.ca/articles/6199/growing-use-of-intermittent-sentences-worsens-overcrowding-says-quebec-ombudsperson>.

146. See Tracey Lindberg, Priscilla Campeau & Maria Campbell, "Indigenous Women and Sexual Assault in Canada" in Sheehy, *Sexual Assault*, *supra* note 16, 87.

resist constitutional scrutiny, but as a practical matter they can result in the substitution of largely meaningless, short, intermittent jail terms for longer terms of house arrest. Such sentences inevitably lead to pressure to raise the minimum penalties, which is exactly what happened in 2012. Yet the very wide range of circumstances captured by the sexual offences currently in the *Criminal Code*, and the range of offenders who come before the courts, make higher minimum penalties highly vulnerable to constitutional challenges.

Rather than focusing on mandatory minimums, we need to root out lingering stereotypes that minimize the harms of these offences where the victims do not actively resist, where grooming is not required, and where the sexual activity takes forms other than actual intercourse.¹⁴⁷ All of these facts are reflective of the vulnerability of young victims and should not be treated as mitigating factors. The recognition that these crimes cause grave harms to their victims needs to be extended from children to younger adolescents, who are the group most vulnerable to sexual assault. Reliance on minimum penalties to send a message ineffectively short-circuits a deeper understanding of the harms of these crimes.

147. Some of these recurring myths were rejected more recently by the Court of Appeal of Alberta. See *R v Hajar*, *supra* note 66.

