An End to Mandatory Minimum Sentences?

Imagine a college student returning from a spring-break trip to Seattle with one joint (cannabis) who is arrested for importing a controlled substance, convicted, and sentenced to 7 years in prison. The Supreme Court of Canada considered these hypothetical facts in *R v Smith*, a 1987 case where the mandatory minimum sentence of 7 years for importing a controlled substance was found to be unconstitutional because it violated the right to be free from cruel and unusual punishment by the government.[1] Mandatory minimum sentences continue to plague the criminal justice system because they are often found to be unfair. Those accused of crimes with mandatory minimum sentences have no recourse other than to challenge the Criminal Code sections as unconstitutional – this in spite of the current government's promise to review them.

Senator Kim Pate said in April 2018 that she would introduce a bill into the Senate that would allow judges to decide whether or not to apply a mandatory minimum when sentencing an offender.[2] The Senator's move comes in response to the criticisms against mandatory minimum sentences and the current government's lack of action to review them, despite the topic being on the federal agenda since 2016.[3]

When an accused person is found guilty, a sentencing judge cannot change mandatory minimum time that the offender must serve in jail if that mandatory minimum is included in the Criminal Code section. The judge must comply with the sentence, regardless of the offender's circumstances. Mandatory minimum sentences have always been used for some offences, such as murder. However, the number of offences for which they were required was significantly increased under the Harper government on the basis that they would decrease crime and deter repeat offence.[4] There is little evidence to support these assumptions.[5] Their increased use has been criticized for adding to the backlog of cases in the courts and for reducing the discretion of judges to consider the individual circumstances of an accused person. This restriction of discretion is contrary to sentencing principles.[6]

Many mandatory minimum sentences are being challenged in the courts using section 12 of the *Charter of Rights and Freedoms*, which states that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment"[7] because some mandatory minimum sentences are not proportional to the offences for which an accused is sentenced. In other words, sending a college student to jail for 7 years for crossing the border with a single joint (perhaps their first) has been challenged as being more than excessive and a cruel and unusual punishment.

Background

Most mandatory minimum sentences are for drug offences, impaired driving, firearms offences, and sexual offences involving children. Some mandatory minimum sentences

depend on the circumstances of the offence: the age of victims, use of firearms, repeat offending, type of drug (for drug offences), or location of incident (e.g. school). For example, in the case of impaired driving, the mandatory minimum sentence increases with repeat offences. For a first offence, the mandatory minimum punishment is a fine of not less than $1,000; for a second offence, imprisonment for not less than 30 days; and, for each subsequent offence, imprisonment for not less than 120 days.[8] Other mandatory minimum sentences apply in all circumstances, such as those related to child pornography and sexual violations against children.[9]

According to a Statistics Canada report, supporters of mandatory minimum sentences believe they deter potential offenders: simply having the mandatory minimum in place emphasizes the seriousness of the offence and thus provides a deterrent. The view is that potential offenders will think twice about committing the offence because they know the government takes that offence seriously and because there are severe penalties attached to it. Supporters also suggest mandatory minimum sentences prevent re-offending because they keep the offender in prison longer.[10] They have suggested that mandatory minimum sentences result in more predictable sentences and more consistency because they reduce differences in sentencing that result from race, gender, or economic status.[11]

There is little evidence, however, that mandatory minimum sentences are successful in deterring potential offenders or reducing re-offence (save for some evidence of a deterrence effect for impaired driving[12]).[13] And while sentences might be more consistent, there is some evidence that mandatory minimum sentences can result in overly harsh penalties and that longer stays in incarceration can increase rather than deter recidivism."[14]

Critics of mandatory minimum sentences say that they clog the courts. Offenders have no incentive to plead guilty for offences where they cannot be offered a reduced sentence in exchange for their plea.[15] Instead, many offenders opt to go to trial in the hope that they will be found not guilty. The trial takes up court time, and may include a time-consuming and complex *Charter* challenge against the mandatory minimum sentence for breaching section 12 of the *Charter*. The time these challenges take up has become increasingly important in light of a Supreme Court of Canada ruling last year that put strict maximums on the time a case could take to go through the courts.

Mandatory minimum sentences have also been criticized because they are contrary to the principles of sentencing.[16] The *Criminal Code* states that the fundamental principle of sentencing is proportionality which means a sentence should reflect both the "gravity of the offence and the degree of responsibility of the offender."[17] A trial judge should be able to weigh the evidence, the facts and the circumstance of the accused - they are in the best position to appreciate all the circumstances of the case. Mandatory minimum sentences reduce the judge's discretion to consider individual circumstances as a prescribed amount of jail time is pre-determined. This results in longer sentences for more people, which can financially strain the justice system. More discretion in sentencing would allow judges to more effectively tailor sentences and for example, assign "community-based sentences" (like community service, or probation), which are currently unavailable if an offence carries a

mandatory minimum sentence of imprisonment, even when the accused person presents no danger to the community."[18]

The *Charter* Challenge – Cruel and Unusual Punishment

Shortly after the *Charter* was passed in 1982, the Supreme Court of Canada (SCC) found a mandatory minimum sentence of 7 years unconstitutional in the case of *R v Smith*.[19] The offence was for importing any quantity and any type of illegal narcotic. The Court decided that the punishment appropriate for Mr. Smith, given the circumstances of his offence - he was caught importing seven and a half ounces of cocaine and had prior drug convictions. However, the Court decided, that the sentence would be too severe for a hypothetical first-time offender who was a college student returning from a winter break trip to the USA with a single joint.[20] Therefore, the Court struck down that part of the Criminal Code because it was a breach of section 12 of the *Charter*.

After *Smith,* and several unsuccessful challenges to mandatory minimums at the Supreme Court of Canada,[21] the Court struck down two more mandatory minimum sentences using section 12 of the *Charter*.[22] In *R v Nur* in 2015, the Supreme Court struck down a sentence of 3 years (5 years for a second offence) for possessing a prohibited or restricted firearm because it would be grossly disproportionate for people committing the offence through a licence infraction - for example, they forgot to renew their firearms licence for a few days.[23] A mandatory minimum sentence would not allow the judge to take that fact into consideration in sentencing the offender. In *R v Lloyd* in 2016, the Supreme Court struck down a sentence of 1 year for possession of a controlled substance with intent to traffic. The Court said that the sentence would be too severe for an addicted person who is only sharing the substance with their similarly-addicted spouse. Further, the mandatory minimum sentence would not allow judges to lower the sentence when the offender had completed an addiction program and become sober before trial.[24]

Since 2016, there have been more than 25 cases where a lower court (a provincial court) has struck down a mandatory minimum sentence because it is considered "cruel and unusual punishment."[25]

For a mandatory minimum sentence to violate section12 it must be grossly disproportionate to the offence – grossly disproportionate means "more than merely excessive."[26].[27] In the *Smith* case, the sentence was found to be grossly disproportionate for a hypothetical college student in possession of a single, perhaps even a first, joint.[28] Therefore, it was a breach of section 12 of the *Charter.*

Once a breach of the *Charter* is established, the government must provide a rationale for its legislation *Charter and* the Court then uses section 1, the justification section of the *Charter* to determine whether the *Charter* breach is reasonable. In the case of mandatory minimum sentences, it has been difficult for the government to show that the imposition of a mandatory minimum sentence for the purpose of deterring other potential offenders is a minimal impairment of the right not to be subjected to cruel and unusual punishment.[29] There are other ways to deter the public from committing crimes than those which impose

long, often unnecessary sentences on all offenders who commit the crime regardless of circumstances.[30]

Conclusions

Mandatory minimum sentences are criticized for clogging the courts, for being contrary to principles of sentencing, and for breaching section12 *Charter* rights. There is little by way of evidence to justify using them. They appear to be on the way out either through continued rulings by courts who find they violate section 12 of the *Charter* or by legislation such as that being proposed by Senator Pate to give judges discretion as to whether or not to use them.

Not all mandatory minimum sentences will be ruled unconstitutional, because not all of them result in grossly disproportionate sentences. Mandatory minimum sentences such as those used to deter drunk driving, do serve some purposes when used appropriately and in the right circumstances.. The increase in the use of mandatory minimum sentences for the unverified purpose of deterring crime however, appears to have created greater problems than it has solved.

Given the backlog of cases in the courts, and the need for trial within a reasonable time as well as the unreasonable nature of some mandatory minimum sentences, it appears to be high time something was done about them. Senator Pate's proposal to introduce a bill giving sentencing judges discretion regarding mandatory minimums will hopefully serve to address some of these issues.

[1] *R v Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435 .

[2] The Canadian Press, "Sen. Kim Pate to introduce bill aimed at mandatory minimum penalties", *CBC News* (10 April 2018), online: < http://www.cbc.ca/news/politics/kim-pate-mandatory-minimum-penalties-1.4613214>.

[3] Sean Fine, "Mandatory-minimum sentencing rules unravelling into patchwork", *The Globe and Mail* (4 march 2018), online: < https://www.theglobeandmail.com/news/national/mandatory-minimum-sentencing-rules-unravelling-into-patchwork/article38205652/>.

[4] *Ibid*.

[5] See Canada, Solicitor General Canada, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, by Paula Smith, Paul Gendreau & Claire Goggin, catalogue No JS42-103/2002 (Ottawa: Public Works and Government Services Canada 2002); Canada, Department of Justice Canada, Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures, by Thomas Gabor & Nicole Crutcher, rr2002-1e (Research and Statistics Division, Department of Justice Canada, 2002); Canada, Statistics Canada, *Mandatory minimum penalties: An analysis of criminal justice system outcomes for selected offences*, by Mary Allen, Catalogue no. 85-002-X (Ottawa: Statistics Canada, 29 August 2017) at 3.

[6] *R v Nur*, 2015 SCC 15 at para 44, [2015] 1 SCR 773 .

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

[8] *Criminal Code*, RC C 1985, c C-46, s 255(1) .

[9] Canada, Statistics Canada, *Mandatory minimum penalties: An analysis of criminal justice system outcomes for selected offence*s, by Mary Allen, Catalogue no. 85-002-X (Ottawa: Statistics Canada, 29 August 2017) at 3.

[10] *Ibid*.

[11]*Ibid*.

[12] See Lawrence W Sherman, "Police Crackdowns: Initial and Residual Deterrence" (1990) 12 *Crime and Justice* 1; Faye E Taxman & Alex Piquero, "On preventing Drunk Driving Recidivism: An Explanation of Rehabilitation and Punishment Approaches" (1998) 26:2 *Journal of Criminal Justice* 129; Daniel S Nagin, "Deterrence and Incapacitation" in Michael Tonry, ed, *The Handbook of Crime and Punishment* (New York: Oxford University Press, 1998) 345.

[13] See Canada, Solicitor General Canada, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, by Paula Smith, Paul Gendreau & Claire Goggin, catalogue No JS42-103/2002 (Ottawa: Public Works and Government Services Canada 2002); Canada, Department of Justice Canada, Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures, by Thomas Gabor & Nicole Crutcher, rr2002-1e (Research and Statistics Division, Department of Justice Canada, 2002); Canada, Statistics Canada, *Mandatory minimum penalties: An analysis of criminal justice system outcomes for selected offences*, by Mary Allen, Catalogue no. 85-002-X (Ottawa: Statistics Canada, 29 August 2017) at 3.

[14] Canada, Statistics Canada, *Mandatory minimum penalties: An analysis of criminal justice system outcomes for selected offences*, by Mary Allen, Catalogue no. 85-002-X (Ottawa: Statistics Canada, 29 August 2017) at 3.

[15] Sean Fine, "Mandatory-minimum sentencing rules unravelling into patchwork", *The Globe and Mail* (4 march 2018), online: < https://www.theglobeandmail.com/news/national/mandatory-minimum-sentencing-rules-unravelling-into-patchwork/article38205652/>.

[16] *R v Nur*, *supra* note 6 para 44.

[17] *Criminal Code*, *supra* note 7, s 718.1.

[18] Elizabeth Sheehy & Isabel Grant, "Senator Kim Pate's bill freeing judges from the constraints of mandatory minimum sentences will help address over incarceration and court

delays," *Policy Options* (8 May 2018), online: <http://policyoptions.irpp.org/magazines/may-2018/cleaning-up-the-mandatory-minimums-mess/>.

[19] *Smith*, *supra* note 1.

[20] *Ibid* at 1053

[21] *R v Luxton*, [1990] 2 S.C.R. 711, 58 CCC (3d) 449; *R v Goltz*, [1991] 3 SCR 485, 67 CCC (3d) 481; *R v Morrisey*, 2000 SCC 39, [2000] 2 SCR 90; *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3; *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96.

[22] *Nur*, *supra* note 6; *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 .

[23] *Nur*, *supra* note 6.

[24] *Lloyd*, *supra* note 22.

[26] *Smith*, *supra* note 1 at 1073; *Nur*, *supra* note 6 at para 39.

[27] *Nur supra* note 6 at para 56.

[28] *Smith*, *supra* note 1.

[29] See *Smith*, supra note 1; *Nur* supra note 6; *Lloyd*, supra note 22.

[30] *Smith*, *supra* note 1 at 1080