Mandatory Minimum Sentences (R. v. Nur; R. v. Lloyd; R. v. Sharma; R. v. Hills; R. v. Hilbach)

BACKGROUND

- The CBA opposes the use of mandatory minimum sentences (MMS). International social science research shows that MMS do not advance key sentencing goals. They do not deter people from committing crime, while they do subvert important aspects of Canada's sentencing regime, including principles of proportionality and individualization.

- The CBA supports judicial independence, and reliance on judges to impose a just sentence after hearing all facts in the individual case and about the individual offender.

- MMS do not target the most egregious or dangerous offenders, who are already subject to stiff sentences precisely because of the nature of their crimes. More often, less culpable offenders are caught by MMS and subjected to disproportionate terms of imprisonment.

- The impact of MMS on vulnerable and marginalized groups, who already suffer from poverty and deprivation, is particularly harsh. In Canada, this most notably affects Aboriginal communities, a population already grossly over-represented in custody.

- In 2011, CBA Council passed a resolution on *Justice in Sentencing*. While the CBA opposes MMS (except for murder), if MMS remain part of Canadian law, the federal government should legislate a sentencing "safety valve" to allow judges to avoid MMSs when injustice would result. CBA Council has also passed resolutions addressing the disproportionate impact that MMS have on mentally ill and marginalized communities.

- *R. v. Nur* involved a man found guilty of one count of possession of a firearm under section 95(2)(a)(i) of the *Criminal Code*, which carries a mandatory minimum three-year sentence. The CBA intervened at the Supreme Court of Canada. Criminal Justice Section Chair Eric Gottardi acted as pro bono counsel. The CBA focused on the constitutionality of s. 95(2)(a)(i), arguing that the MMS violates *Charter* ss. 7 or 12, and cannot be justified under s. 1. Reasonable alternatives such as a legislative "safety valve" are available in other countries with MMS, and must be available under Canadian law to be *Charter* complaint. In addition, the particular circumstances of marginalized offenders should be factored into any *Charter* analysis.

- In April 2015, the SCC held that the sections violate section 12 of the *Charter*, and cannot be saved by section 1, as the minimal impairment and proportionality requirements are not met. (2015 SCC 15).

- The CBA intervened in *R. v. Lloyd*, which dealt with similar issues in the context of drug trafficking. Eric Gottardi and Mila Shah acted as pro bono counsel. In April 2016, a majority of the SCC again held that the relevant sections violated section 12 of the *Charter* and was not saved by section 1.

- The 2015 mandate letter from the Prime Minister to the Justice Minister directed her to limit MMS. Given that undertaking, the Section now emphasizes the CBA's support for judicial independence in sentencing, rather than advocating for a "safety valve" in special cases of injustice. Inaction on the direction in the mandate letter was explained by Justice Canada officials as pending a more comprehensive review of sentencing generally, which has not been pursued.

CURRENT STATUS

- The Criminal Justice Section sponsored a resolution adopted at the 2021 AGM, urging the federal government to eliminate MMSs for offences other than murder and, for offences other than murder, where mandatory minimums remain, to add a "safety valve" in section 718 of the *Criminal Code*.

- In February 2021, the Justice Minister introduced Bill C-22, amendments to the *Criminal Code* and the *Controlled Drugs and Substances Act*, to repeal mandatory minimum sentences for 14 offences in the *Criminal Code* and all six sentences in the *Controlled Drugs and Substances Act.*

- The CBA Board approved three interventions on mandatory minimum sentences in 2021. Applications for leave to intervene granted in July 2021 and the appeals heard by the SCC in March 2022. Eric Gottardi and Charlotte van Wiltenburg of Peck and Company Barristers in Vancouver act as pro bono counsel*:*

  - *R. v. Sharma:* appeal re constitutionality of *Criminal Code* ss. 742.1(c) and (e)(ii), which limit the availability of a conditional sentence order (more commonly known as house arrest). Key issue is whether these restrictions violate ss. 7 and/or 15 of the *Charter*. Court granted a Crown motion to put appeal on hold pending outcome of related bill before Parliament. CBA application for leave to intervene in SCC to be filed in accordance with new filing deadlines to be set by the Court.

  - *R. v. Hills*; *R. v. Hilbach:* Appeals revisit constitutionality of MMSs for some gun related offences under s. 12 of the *Charter*. Applications for leave to intervene granted in July 2021.

- In December 2021, Justice Minister Lametti reintroduced Bill C-5, amendments to repeal mandatory minimum sentences for 14 offences in the *Criminal Code* and all six sentences in the *Controlled Drugs and Substances Act*. Jody Berkes, past Chair of the Criminal Justice Section, appeared before the House Committee in May 2022. He noted Bill's progress but urged the Committee to extend the repeal of MMSs to further offences. The Bill received Royal Assent in November 2022 (S.C. 2022, c. 15).

- The *Sharma* decision, released in November 2022, ruled that banning conditional sentences for certain offences was constitutional. The 5-4 split decision left many disappointed with its interpretation of s. 15 *Charter* rights and in addressing the impact of MMSs on Indigenous people, women in particular. The ruling is somewhat blunted by the passage of Bill C-5 which repeals many MMSs from the *Criminal Code.*

- *Hills* and *Hilbach* judgments, released in January 2023, clarify a two-stage enquiry to assess whether an MMS violates s. 12: (1) what constitutes a fit and proportionate sentence within the objectives and principles of sentencing; and (2) is the sentence grossly disproportionate, not merely excessive, to the fit and proportionate sentence. This assessment may consider either the actual offender before the court, or another offender in a reasonably foreseeable case or hypothetical scenario.

- In October, 2025, MMS for possessing or accessing child sexual abuse material (CSAM) were struck down as unconstitutional by the Supreme Court (*Senneville),* removing those specific MMS. It struck down one-year MMS for possessing or accessing child sexual abuse material as unconstitutional under the *Charter*, citing disproportionate impacts in reasonably foreseeable scenarios. This 5-4 ruling continued a trend of invalidating MMS, prompting government responses to balance victim protection with proportional.

- In response, the federal government introduced Bill C-16, the *Protecting Victims Act* in December 2025 in response to the *Senneville* decision. The Bill aims to strengthen MMS for certain crimes, particularly those involving gender-based violence, intimate partner violence, and child sexual offenses, by allowing judicial discretion only in rare cases where the MMS would be "cruel and unusual" against the *Charter* or "grossly disproportionate," effectively making many previously

struck-down MMS operative again. According to the Justice Department, 17 mandatory minimum penalties would become operative again, including penalties for weapons trafficking, sexual interference, child pornography, and child prostitution. I

- See also, Firearms-related Initiatives, Impaired Driving, Organized Crime, Protection of Children and Vulnerable People, Sentencing and Parole Initiatives.

NEXT STEPS

- CBA Advocacy staff will monitor the impact of the Supreme Court decisions, and the Criminal Justice Section continues to highlight the reasons for its opposition of MMSs, despite partial movement on reforms.