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Reforming Canada's Cruel and Unusual Approach to Mandatory Minimum Drug Sentencing

Shelby Hayes
The University of Western Ontario

Supervisor: Christopher Sherrin
University of Western Ontario

Abstract

Following the introduction of the *Safe Streets and Communities Act,* mandatory minimum penalties (MMPs) were greatly expanded in Canadian criminal law. This expansion has been controversial, particularly in the context of drug crime. Through the lens of proposed legislation, Bill C-5, this paper presents the arguments both for and against the use of MMPs in the *Controlled Drugs and Substances Act,* with a particular focus on their potential to produce cruel and unusual punishment. Ultimately, this paper argues that, on account of their many downfalls, MMPs should have no place in Canadian drug law.

In loving memory of my father, William Hayes.

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1: Introduction and Context

The proliferation of mandatory minimum penalties (MMPs) in Canadian criminal law is undoubtedly controversial. MMPs are a "tough on crime" sentencing tool enacted by Parliament to prescribe minimum sentences in law for various offences. They are used in both the *Criminal Code* and the *Controlled Drugs and Substances Act,* reflecting legislative intent to ensure harsh penalties for select crimes that are perceived to be most egregious.[1] This means that for some offences, all offenders must face the same minimum penalty regardless of the circumstances of the crime. While some argue that MMPs are effective in mandating harsh penalties to deter crime and ensuring consistency in sentencing outcomes, others point out significant concerns with MMPs. Namely, they undermine the fundamental purpose and principles of sentencing, displace judicial discretion, add further pressure to an already overburdened justice system, rely on a flawed drug treatment court program, do not deter crime, perpetuate systemic racism in the criminal justice system, and breach the *Charter* rights of Canadians. On various accounts, courts have found that MMPs, as applied in the context of drug crime, are unconstitutional, contrary to s.12 of the *Charter.*[2] Despite MMPs being found to produce cruel and unusual punishment,[3] MMPs remain in place and their proposed removal from various criminal offences is at the center of politically divisive debate in Parliament.

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[1] Kari Glynes Elliott & Kyle Coady, "Mandatory Minimum Penalties in Canada: Analysis and Annotated Bibliography" (2016) Research and Statistic Division, Department of Justice Canada at 5.
[2] Department of Justice Canada, "Mandatory Minimum Penalties and the Courts" (7 December 2021) online: Government of Canada <https://www.canada.ca/en/department-justice/news/2021/12/mandatory-minimum-penalties-and-the-courts.html>.
[3] *R v Lloyd,* 2016 SCC 13.; *R v Dickey,* 2016 BCCA 177.; *R v Bradley-Luscombe,* [2015] BCJ No, 1685.

While there is much to be explored in relation to MMPs generally, this project narrows on drug offences. The overwhelming majority of drug charges do not result in conviction.[4] Yet, according to a study by Canada's Department of Justice, "between 2007/08 and 2016/17, drug offences comprised 75% of all offences punishable by an MMP for which offenders were admitted to federal custody."[5] As this illustrates, MMPs in the drug context are pervasive.

Canada is in the midst of an opioid toxicity crisis,[6] despite total prohibition on narcotics. As is clear from this paradox, banning drugs is not keeping people safe. Opioid use has driven a significant increase in substance related deaths, hospitalizations, and emergency medical service responses.[7] Between January 2016 and December 2021, there were "29,052 apparent opioid toxicity deaths" in Canada.[8] In the first year of the COVID-19 pandemic, there was a dramatic increase in the number of opioid related deaths, averaging 21 deaths per day.[9] It is estimated that 96% of these deaths were accidental.[10] The Canadian Centre on Substance Use and Addiction suggests that several factors contribute to the opioid crisis, including a contaminated illegal drug supply, increased exposure to prescription opioids, and opioid

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[4] Statistics Canada, *Drug Related Offences in Canada, 2013,* by Adam Cotter, Jacob Greenland, & Maisie Karam, Catalogue no. 85-002-X (Ottawa: Statistics Canada, 25 June 2015).
[5] Department of Justice Canada, *The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities*, by Research and Statistics Division (Ottawa: Department of Justice Canada: October 2017) Research and Statistics Division, at 3.
[6] Government of Canada "Opioids," (last modified 1 December, 2021), online: Government of Canada <https://www.canada.ca/en/services/health/campaigns/drug-prevention.html>.
[7] Laura Hatt, "The Opioid Crisis in Canada" (2022) HillStudies, Library of Parliament, Publication No. 2021-23-E.
[8] Government of Canada, "Opioid- and Stimulant-related Harms in Canada" (23 June 2022) at 5-7 online: Government of Canada, Health: <https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants>.
[9] *Ibid;* "During the first year of the pandemic, there was a 96% increase in apparent opioid toxicity deaths (April 2020 – March 2021, 7,362 deaths), compared to the year before (April 2019 – March 2020, 3,747 deaths)."
[10] Canadian Centre on Substance Use and Addiction, "Canada's Opioid Crisis: What You Should Know" (2021) online: <https://www.ccsa.ca/sites/default/files/2021-06/CCSA-Canada-Opioid-Crisis-What-You-Should-Know-Poster-2021-en.pdf>.

tolerance and dependence.[11] Various other factors are also linked to drug use, addiction, and death, particularly in light of hardships stemming from the pandemic.[12] In June 2022, the co-chairs of the federal, provincial, and territorial Special Advisory Committee on the Epidemic of Opioid Overdoses released a joint statement which pointed to several recent studies on the opioid crisis, and emphasized "the critical need to expand access to high quality, evidence-based and innovative care to support people who use drugs."[13]

A conundrum emerges in approaching drug regulation, in light of addiction and Canada's drug crisis, while efforts continue to establish a better way forward. There have been years of calls for drug reform in Canada, with little traction. To a limited extent, harm reduction strategies have been introduced to address the problem.[14] However these often take a temporary approach relying on emergency exemptions and provincial health policies as opposed to fundamental changes to federal drug law.[15] Across Canada, drug courts have

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[11] *Ibid.*

[12] Canadian Centre on Substance Use and Addiction, "Mental Health and Substance Use During COVID-19: Spotlight on Canadian Households with Young Children" (2021) online: <https://www.ccsa.ca/sites/default/files/2021-05/CCSA-COVID-19-Mental-Health-Substance-Use-Canadian-Households-Children-Infographic-2021-en.pdf>;
Government of Canada, "Homelessness and substance-related acute toxicity deaths: a descriptive analysis of a national chart review study of coroner and medical examiner data, (23 June 2022) online: <https://www.canada.ca/en/health-canada/services/opioids/data-surveillance-research/homelessness-substance-related-acute-toxicity-deaths.html>.

[13] Government of Canada, "Joint Statement from the Co-Chairs of the Special Advisory Committee on the Epidemic of Opioid Overdoses – Latest National Data on Substance-Related Harms" (23 June 2022) Public Health Agency of Canada, online: <https://www.canada.ca/en/public-health/news/2022/06/joint-statement-from-the-co-chairs-of-the-special-advisory-committee-on-the-epidemic-of-opioid-overdoses--latest-national-data-on-substance-related0.html>.
While opioids are the central focus of many discussions around drugs in Canada, there is also evidence to suggest significant use, seizure, and harms associated with methamphetamine, particularly in the Prairie provinces. See: Public Safety Canada, "Fall 2019 Law Enforcement Roundtable on Illicit Drugs: Meeting Summary" (2021) at 4.

[14] Health Canada Expert Task Force on Substance Use, *Recommendations on Alternatives to Criminal Penalties for Simple Possession of Controlled Substances* (Ottawa: Health Canada: 6 May 2021) at 1.

[15] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

emerged in response to the number of criminally accused people who are involved with problematic substance use. While they can connect accused people with supports, they often require a plea of guilt and rarely take into account the interconnected nature of addiction and mental health, arguably criminalizing addiction. Compounding on these issues, is the notion that Canada has indeed waged its own "war on drugs," unjustly targeting Black and Indigenous Canadians in its drug policies.[16] In light of this complex web of problems, removing MMPs from the drug context may begin to reverse some of the harms associated with the law as it stands. That is, in part, what Bill C-5 proposes to do.

Thus, this major research project will discuss the effect of MMPs in sentencing drug crime in Canada and assess the potential outcomes of the proposed Bill C-5. Said exploration is to be framed around harm reduction, social justice, and access to justice while emphasizing the needs of particularly vulnerable Canadians. As such, this project will begin by providing an overview of the objectives and principles of sentencing. It will then explore MMPs, and their place in the *CDSA.* Next, the legislative aims and Parliamentary status of Bill C-5 will be discussed. Following that, the case to be made for and against the use of MMPs in the *CDSA* will be outlined. This will be illustrated by debates of and submissions to Parliament as well as academic explorations of MMPs. Finally, in assessing the potential effects of Bill C-5 on MMPs

[16] Akwasi Owusu-Bempah, "Race, Crime and Criminal Justice in Canada" (2014) Canada Oxford Handbooks Online, DOI: 10.1093/oxfordhb/9780199859016.013.020;
Faizal Mirza, "Mandatory Minimum Prison Sentencing and Systemic Racism" (2001) 39:2 Osgoode Hall Law Journal 491-512.

in the *CDSA* an argument will be made suggesting that repealing MMPs is a necessary step in achieving justice in Canadian drug laws.

2: Sentencing Objectives at Law

The *Controlled Drugs and Substances Act (CDSA)* sets out drug specific sentencing considerations which are to be weighed "without restricting the generality of the *Criminal Code."*[17] Accordingly, before turning to drug specific sentencing legislation it is important to outline the sentencing framework set out in the *Criminal Code.*

Part XXIII of the *Criminal Code* codifies the purpose, principles, and objectives of sentencing. These are central considerations in crafting a just and reasonable sentence. Sentencing is a fluid and individualized process, wherein sentencing judges consider the unique factors that surround the particular offender and offence at bar. The fundamental principle of sentencing is proportionality; a just sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility, taking into account their individual circumstance.[18] As stated at s.718 of the *Code* "the fundamental purpose of sentencing is to protect society and to contribute […] to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions," having regard to one or more of various enumerated objectives. These objectives are denunciation, deterrence, incapacitation, rehabilitation, reparations, and promotion of a sense of responsibility in the offender.[19] In meeting these aims, s.718.2 notes that relevant aggravating and mitigating factors should be taken into account in crafting an appropriate sentence.[20] Of equal importance are the principles

[17] *Controlled Drugs and Substances Act* (S.C. 1996, c. 19) [*CDSA]* s.10(1).
[18] *Criminal Code* (R.S.C., 1985, c. C-46) [*Criminal Code]* s.718.1.
[19] *Criminal Code,* s.718(a)-(f).
[20] *Ibid,* s.718.2.

of parity, totality, and restraint. This is to say that sentences are to be similar for similar offenders, should be crafted globally where possible, and as minimally invasive as possible while still meeting the aims of sentencing. In balancing these competing objectives, sentencing judges are afforded a large degree of discretion.[21] Sentencing judges are able to hear from the prosecution, the defense, and the victim(s) to ensure that whichever sentence they impose fits the crime committed, in those particular circumstances, by that particular offender.

With these guiding principles in mind, the fundamental purpose of sentencing for any offence in the *CDSA* "is to contribute to respect for the law and maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and the community."[22] Additionally, s.10(2) lists aggravating factors for the court to consider when imposing a drug related MMP. It is statutorily aggravating on sentence if the offence was carried out using a weapon or violence, or threat thereof, if the offence exposed someone under 18 years old to illegal drugs, or if the offender was previously convicted of a designated substance offence.[23]

Where the Crown intends to seek a MMP in relation to a drug offence, there is a requirement to give notice.[24] Thus, the court is not *required* to impose a MMP where the Crown has failed to give notice. Finally, in sentencing an offender under the *CDSA,* the court may delay

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[21] Allan Manson et al, *Sentencing and Penal Policy in Canada,* 3rd edn (Toronto: Emond Publishing: 2016) at 39.
[22] *CDSA,* s.10(2).
[23] *CDSA,* s.10(2)(a)-(c); As set out at s.2(1) *CDSA,* a designated substance offence means "**(a)** an offence under Part I, except subsection 4(1), or **(b)** a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a)."
[24] *CDSA,* s.8.

sentencing, such that the offender can participate in a drug treatment court or attend an approved treatment program.[25] Importantly, if an offender successfully completes one of these treatment programs the court is not required to impose a MMP.[26] As will be explored, this exception may not be as accommodating as it appears on its face. Troublingly, as will be argued, MMPs stand in direct contradiction to the guiding principles of sentencing as codified in both the *Criminal Code* and *CDSA*.

[25] *CDSA,* s.10(4).
[26] CDSA, s.10(5).

3: Mandatory Minimum Penalties

Mandatory minimum penalties (MMPs) are minimum sentences set out in law for particular offences. They are legislated predetermined minimum punishments for particular offences.[27] A MMP does not always entail incarceration, and may include various other sanctions.[28] Their recent proliferation has attracted much judicial, academic, and political critique.[29] This chapter will begin by outlining the history of MMPs in Canada before turning to a discussion of MMPs in the *CDSA.*

3.1: History of MMPs

MMPs are not a recent addition in Canadian criminal law. Rather, a small number of MMPs have been present since Canada's first *Criminal Code,* though they were intended to be an "exception to the rule."[30] MMPs were first expanded by the Liberal Party in the 1990s as a means of achieving stricter gun control, reaching a total of 9 MMPs in law.[31] Following that, "there was a further flourishing of [MMPs] in the 2000s and 2010s."[32] Currently, there are nearly 100 total MMPs in Canadian criminal law.[33] In 2012, as a part of the Conservative Party's "tough on crime" agenda, the *Safe Streets and Communities Act (SSCA),* an omnibus bill

[27] Elliott & Coady, *supra* note 1 at 4.
[28] *Ibid.*
[29] *Ibid.*
[30] Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 Appeal at 92.
[31] Debra Parkes, "From Smith to Smickle: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) SCLR 57 at 149.
[32] Chaster, *supra* note 30 at 92.
[33] *Ibid.*

encompassing nine previously failed bills, was passed.[34] It introduced MMPs in relation to various *Criminal Code* and *CDSA* offences, limited the availability of conditional sentence orders, modified Canada's youth criminal justice system, and shifted the law around record suspensions.[35] Where MMPs were introduced in the drug context, the *SSCA* was presented to Canadians as a means of harshly penalizing serious organized drug crime. However, as will be explored, these ends have not been achieved, and the *SSCA* intolerably targets "people with addictions and other low-income people involved in criminal activity as a means of survival."[36]

3.2: MMPs in the *CDSA*

Under the *CDSA* it is a crime to possess, obtain, traffic, import, export or produce any listed controlled substance.[37] Controlled substances are classified into six Schedules according to their chemical makeup, level of seriousness or potential for harm, and thus the sanctions associated with them.[38] For example, trafficking a Schedule I or II substance is an indictable offence which carries a punishment of up to life in prison,[39] as well as a potential MMP based on various criteria of the offence.[40] Possession of a Schedule I, II or III substance is a hybrid offence which can be sentenced much more leniently.[41]

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[34] *Safe Streets and Communities Act* (S.C. 2012, c. 1).
[35] Government of Canada, "Safe Streets & Communities Act: Backgrounder" (last modified 22 February 2012) online: *Government of Canada* < https://www.canada.ca/en/news/archive/2012/02/safe-streets-communities-act.html>.
[36] Darcie Bennett & Scott Bernstein, "Throwing Away the Keys: The human and social cost of mandatory minimum sentences." (2013) at 1, online (pdf) : Pivot Legal Society <http://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/395/attachments/original/1372448744/Final_Throwing Away_lo-res_-_v2.pdf?1372448744>.
[37] *CDSA,* ss.4-7.
[38] *Ibid,* Schedules I-IV.
[39] *CDSA,* s.5(3).
[40] *CDSA,* s.6(3)(a.1), s.6(3)(b).
[41] *CDSA,* s.4.

Drug crime is prosecuted federally by the Public Prosecution Service of Canada (PPSC).[42] Just as any other Crown prosecutor, PPSC prosecutors are entitled to prosecutorial discretion as delegated by the Director of Public Prosecutions. Deciding whether to prosecute a charge "is among the most important decisions that will be made by Crown counsel."[43] Prosecutions must be based on sufficient evidence and serve the interests of the public. In exercising this prosecutorial discretion, counsel must act ethically, and fairly as a "minister of justice."[44] In deciding whether to prosecute allegations, counsel must consider if there is a reasonable prospect of conviction based on the available evidence and if the public interest in being served in carrying out the prosecution.[45] In determining if there is a reasonable prospect of conviction, Crown counsel should consider the "availability, competence, and credibility of witnesses," admissibility of evidence to implicate the accused, any reasonable defences available to the accused, and any *Charter* violations. While a probability of conviction is not required, there must "be more than a bare *prima facie* case."[46] Where there is a reasonable prospect of conviction, a prosecution should only be carried out where it is in the public interest to do so. In weighing the public interest in a prosecution, Crown counsel should consider: "(1) the nature of the alleged offence"; "(2) the nature of the harm caused by or the consequences of the alleged offence"; "(3) the circumstances, consequences to and attitude of victims"; "(4) the level of

[42] Public Prosecution Service of Canada, "About the PPSC" (last modified 28 August 2021), Public Prosecution Service of Canada online: <https://www.ppsc-sppc.gc.ca/eng/bas/index.html>.
[43] Public Prosecution Service of Canada, "Public Prosecution Service of Canada: Deskbook" (2020) at 2.3 online (pdf): <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*

culpability and circumstances of the accused"; "(5) the need to protect sources of information"; and "(6) confidence in the administration of justice."[47] If there is not a reasonable prospect of conviction or public interest in prosecution, the charges are to be stayed or withdrawn.[48] While entitled to discretion, as a general rule, barring serious safety concerns, the PPSC is under direction not to prosecute low-level personal possession of controlled substances contrary to s.4 of the *CDSA.*[49]

Drug related MMPs are restricted to fact specific "serious drug offences including trafficking, possession for the purpose of trafficking, importing and exporting, and production" relating to Schedule I and II substances.[50] There are a total of seven carceral MMPs set out in the *CDSA,* as the following chart illustrates. There are two MMPs on the books relating to trafficking a substance contrary to s.5 of the *CDSA.* There is a minimum term of imprisonment for 1 year if the offence is committed to benefit a criminal organization, with the use or threat of violence or a weapon, or if the person was convicted or serving a term of imprisonment for a designated substance offence within the last 10 years.[51] The mandatory minimum term of imprisonment for trafficking a Schedule I or II substance increases to 2 years if committed near a school or anywhere else frequented by those under 18 years of age, if committed in a prison, or if the person used the services of a person under 18 to commit the offence.[52] Similarly,

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[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid,* at 5.13.
[50] *Ibid,* at 6.2.
[51] *CDSA,* s.5(3)(a)(i).
The definition of designated substance offence is found at s.462.48(1) of the *Criminal Code*, which says any offence other than simple possession.
[52] *CDSA,* s.5(3)(a)(ii).

importing or exporting contrary to s.6 of the CDSA is subject to two MMPs. Importing or exporting a Schedule I substance that is not more than one kilogram, or any Schedule II substance, carries a minimum term of one year imprisonment if committed for the purposes of trafficking, the commission of the offence involved an abuse of a position of trust or authority, or if the person had access to a restricted or authorized area in committing the offence.[53] If the offence involved more than one kilogram of a Schedule I substance, the minimum term of imprisonment increases to two years.[54] Finally, production of a substance contrary to s.7 of the *CDSA* also carries three potential MMPs.[55] Producing a Schedule I substance carries a minimum term of imprisonment of three years if any s.7(3) factors apply,[56] while producing a Schedule II substance has a MMP of one year if the production is for the purpose of trafficking,[57] and eighteen months if production is for the purpose of trafficking and any s.7(3) factors apply.[58] As outlined above, if an offender participates in a drug treatment court or successfully completes an approved treatment program under s.10(4) of the *CDSA,* the court is not statutorily required to impose a MMP.

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[53] *CDSA,* s.6(3)(a).
[54] *CDSA,* s.6(3)(a.1).
[55] *CDSA,* s.7.
[56] *CDSA,* s.7(2)(a).
[57] *CDSA,* s.7(2)(a.1)(i).
[58] *CDSA,* s.7(2)(a.1)(ii).
s.7(3) factors are: "**(a)** the person used real property that belongs to a third party in committing the offence; **(b)** the production constituted a potential security, health or safety hazard to persons under the age of 18 years who were in the location where the offence was committed or in the immediate area; **(c)** the production constituted a potential public safety hazard in a residential area; or **(d)** the person set or placed a trap, device or other thing that is likely to cause death or bodily harm to another person in the location where the offence was committed or in the immediate area, or permitted such a trap, device or other thing to remain or be placed in that location or area."

Offence	Circumstances of Offence which trigger MMP	MMP	Maximum Penalty
s.5(3)(a)(i) trafficking a Schedule I or II substance	(A) committed to benefit a criminal organization; (B) use or threat of violence; (C) carried, used, or threatened to use a weapon; (D) if convicted of a designated substance offence within the last 10 years	1 year imprisonment	Life imprisonment
s.5(3)(a)(ii) trafficking a Schedule I or II substance	(A) committed in or near a school or anywhere else frequented by those under 18 years of age; (B) committed in a prison; (C) used the services of a person under 18 to commit the offence	2 years imprisonment	Life imprisonment
s.6(3)(a) importing / exporting a Schedule I substance not more than 1kg or Schedule II substance	(i) committed for the purposes of trafficking; (ii) commission of the offence involved an abuse of a position of trust; (iii) authority or if the person used access to a restricted or authorized	1 year imprisonment	Life imprisonment
s.6(3)(a.1) importing / exporting	involved more than one kilogram of a Schedule I substance	2 years imprisonment	Life imprisonment
s.7(2)(a) production of a Schedule I substance	If any of the following s.7(3) factors apply: (a) used real property that belongs to a third party; (b) production constituted a potential security, health or safety hazard to persons under 18 who were in the immediate area of the offence; (c) production constituted a public safety hazard in a residential area; (d) placed or permitted a trap that could cause death or bodily harm in the area of the offence	3 years imprisonment	Life imprisonment
s.7(2)(a.1)(i) production of a Schedule II substance	for the purpose of trafficking	1 year imprisonment	Life imprisonment
s.7(2)(a.1)(ii) production of a Schedule I substance	Any s.7(3) factors apply (as listed above)	18 months' imprisonment	Life imprisonment

As a result of recent constitutional challenges, which will be touched on below, the PPSC is under direction not to seek a MMP for offences of trafficking or possession for the purpose of trafficking of Schedule I or II drugs where; the offender carried a weapon contrary to s.5(3)(a)(i)(C); the offender was previously convicted of a designated substances offence contrary to s. 5(3)(a)(i)(D); the offence was committed in or near a school or other place frequented by persons under 18 contrary to s. 5(3)(a)(ii)(A); and the offender involves a person under 18 in the offence contrary to s. 5(3)(a)(ii)(C).[59] In relation to these offences, prosecutors are directed to seek an appropriate sentence based on principles of sentencing, aggravating factors listed in s.10 of the *CDSA,* and the case law. Importantly, "in some instances the appropriate sentence may exceed the MMP."[60]

[59] Public Prosecution Service of Canada, *supra* note 43, at 6.2.1
[60] *Ibid* at 6.2.

4: Bill C-5

Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act,* was introduced by Minister of Justice David Lametti on December 7, 2021. In the context of this project, Bill C-5 repeals all MMPs included in the *CDSA.* The Bill was introduced as a part of a Liberal campaign promise to reintroduce the former Bill C-22, in response to the Supreme Court of Canada striking down MMPs. Bill C-5 "amends the *Criminal Code* and the *Controlled Drugs and Substances Act* to, among other things, repeal certain mandatory minimum penalties, allow for a greater use of conditional sentences and establish diversion measures for simple drug possession offences."[61] The Department of Justice Canada expressed that addressing racial inequities in the criminal justice system, frequent *Charter* challenges, and the failure to deter crime are the most pressing reason to take action to repeal MMPs.[62]

As of June 2022, Bill C-5 has passed all three readings in the House of Commons, two readings in the Senate, and is currently at committee consideration.[63] This chapter will begin by briefly outlining all of the amendments to the *CDSA* proposed in Bill C-5 before touching on the Bill's progression through Parliament. In so doing, it will begin to provide context for the case to be made for and against MMPs in the *CDSA.*

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[61] Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2021 (first reading 7 December 2021).
[62] Department of Justice Canada, "Bill C-5: Mandatory Minimum Penalties to be repealed: Backgrounder" (last modified 07 December 2021) online: *Government of Canada* < https://www.canada.ca/en/department-justice/news/2021/12/mandatory-minimum-penalties-to-be-repealed.html>.
[63] LEGISinfo, "C-5, An Act to amend the Criminal Code and Controlled Drugs and Substances Act: 44th Parliament, 1st Session November 22, 2021 to present," (2022) online: https://www.parl.ca/LegisInfo/en/bill/44-1/C-5.

4.1: Purpose

As the Bill stands following third reading in the House of Commons, Bill C-5 proposes four central changes to the criminal law. First, it removes MMPs for fourteen *Criminal Code* offences, including some firearms, weapons, and unauthorized sale of tobacco offences, though retains MMPs for murder and serious gun trafficking offences. Second, it removes all MMPs from the *CDSA.* Third, it reinstates the availability of Conditional Sentence Orders (CSO) for various offences, including drug offences which were precluded from CSOs. Finally, it codifies a diversion program for simple drug possession under s.4 of the *CDSA.* These "evidence-based diversion measures" require law enforcement to consider "referring people to treatment programs or other support services, rather than charging or prosecuting them for simple drug-possession offences."[64] Importantly, this provision provides for the following principles to be taken into consideration:

> "(a) problematic substance use should be addressed primarily as a health and social issue;
> (b) interventions should be founded on evidence-based best practices and should aim to protect the health, dignity and human rights of individuals who use drugs and to reduce harm to those individuals, their families and their communities;
> (c) criminal sanctions imposed in respect of the possession of drugs for personal use can increase the stigma associated with drug use and are not consistent with established public health evidence;
> (d) interventions should address the root causes of problematic substance use, including by encouraging measures such as education, treatment, aftercare, rehabilitation and social reintegration; and
> (e) judicial resources are more appropriately used in relation to offences that pose a risk to public safety."[65]

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[64] Julia Nicol et al, "Legislative Summary: Bill C-5: An Act to amend the Criminal Code and the Controlled Drugs and Substances Act" (2022) Library of Parliament, Publication No. 44-1-C5-E.
[65] Parliament of Canada, "Bill C-5" (last modified 15 June 2022) online: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-5/third-reading>.

4.2: Progression Through Parliament

The First Reading of Bill C-5 was completed on December 7, 2021 and major speeches were delivered on December 13, 2021.[66] In Parliamentary debates and votes, Bill C-5 divided the Conservative Party from the rest of the House of Commons.[67] Following speeches and debates, Second Reading was completed on March 31, 2022 before the legislation was referred to be considered by the Standing Committee on Justice and Human Rights in May of 2022.

In reviewing Bill C-5, the Committee had the benefit of thirty-two briefs submitted by diverse special interest organizations. Five organizations who submitted briefs acknowledged that some parts of Bill C-5 were beyond the scope of their submission and did not comment on drug policy. As such, their briefs have not been considered here. Generally speaking, of the twenty-seven briefs that touched on drug crime and MMPs, twenty-six were expressly supportive of Bill C-5 to the extent that it repeals MMPs from the *CDSA*. This is not to say that supporters were uncritical of Bill C-5. Rather, there was a general consensus of the need to repeal MMPs from the *CDSA,* while also advocating for amendments that would go much further in addressing various other health, social, and economic harms of the criminalization of drugs. Further, several groups convincingly recommended a model of decriminalization, endorsing the Canadian Drug Policy Coalition's proposal entitled "Decriminalization Done Right: A Rights-Based Path for Drug Policy."[68] Their central critiques of Bill C-5 were in its failure to

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[66] LEGISinfo, *supra* note 63.
[67] Parliament of Canada, House of Commons, "Vote No. 155" 44th Parliament, 1st Session, Sitting No.89 (15 June 22) online: <https://www.ourcommons.ca/Members/en/votes/44/1/155?view=party>.
[68] Canadian Drug Policy Coalition, "Decriminalization Done Right: A Rights-Based Path for Drug Policy" (2022) at 8, online (pdf): https://www.drugpolicy.ca/wp-content/uploads/2021/12/EN-PTL-Decrim.pdf.

take a decriminalized approach to drug policy, emphasizing further need for rehabilitative and preventative strategies. Of the twenty-seven briefs that directly touched on MMPs in the *CDSA,* one does not explicitly support the removal of MMPs from the drug context and suggests that removing MMPs may be a concern to public safety.[69]

Ultimately, following the Report Stage and amendments to the language around the principles of evidenced based diversion measures, the Third Reading of Bill C-5 was completed on June 15, 2022. It was agreed to in a vote of 206 Yea's to 117 Nay's.[70] Unsurprisingly, all of those opposed are members of the Conservative Party – the same Party that initially expanded MMPs into drug law. First and Second Reading in the Senate were completed on June 16, 2022 and June 22, 2022 respectively before the Bill was referred for committee consideration. Thus far, there have been two briefs submitted to the Senate Standing Committee on Legal and Constitutional Affairs for consideration. The only one relevant to these purposes was submitted by the Canadian Criminal Justice Association and is strongly in support of Bill C-5. However, much like supporters at the House of Commons stage, they are critical of what the Bill fails to accomplish and suggest that much more must be done in addressing the harms of MMPs and the criminalization of drugs. At the time of writing, the Bill remains at the committee consideration stage in the Senate.

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[69] National Police Federation, "Submission on Bill C-5 An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act" (2021) online (pdf) *House of Commons Standing Committee on Justice and Human Rights* https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11750873/br-external/NationalPoliceFederation-e.pdf.

[70] Parliament of Canada, House of Commons, "Vote No. 155" 44th Parliament, 1st Session, Sitting No.89 (15 June 22) online: <https://www.ourcommons.ca/Members/en/votes/44/1/155?view=party>.

5: The Case for MMPs in the *CDSA*

As evidenced by recent division in Parliament, there is contention around the role of MMPs in Canadian criminal law. Politicians, actors in the criminal justice system, academics, and advocates take various stances on the use of MMPs. Those in support of MMPs typically suggest they reduce disparity in sentencing through limiting judicial discretion and respond to public perception of the need to harshly punish serious crime.[71] The following section will address these arguments in further detail.

a) Harsh Sentences

It has been suggested that the popularity of MMPs is rooted in a general distrust of the judiciary and public opinions of sentencing as ineffective and lenient.[72] For example, in his response speech in the House of Commons, Conservative MP Michael Barret suggested that removing MMPs via Bill C-5 "would do nothing more than reduce punishments, and truly reduce accountability, for… drug dealers."[73] MMPs address this public concern by statutorily ensuring a strict sentence particularly for crimes which are deemed "especially egregious or irredeemable."[74] Thus, some contend that "it is difficult to argue that the penalties imposed are unfit since they apply only to very serious conduct."[75] By ensuring harsh sentences, MMPs are

[71] Elliott & Coady, *supra* note 1, at 7.
[72] Parkes, *supra* note 31 at 151.
[73] "Bill C-5, An Act to amend the *Criminal Code and Controlled Drugs and Substances Act,*" 2nd reading, *House of Commons Debates,* 44-1, No 016 (13 December 2021) at 1125 (Hon Michael Barrett).
[74] Elliott & Coady, *supra* note 1, at 5.
[75] Chaster, *supra* note 30 at 92.

thought to achieve both general and specific deterrence.[76] Proponents suggest MMPs further achieve sentencing goals by incapacitating offenders and sending a clear message of society's condemnation of particular acts.[77] Further, it has been suggested that the hybrid nature of some offences which are subject to MMPs operates as a "safety valve" wherein the Crown can exercise their discretion and choose to proceed summarily if a MMP would be unduly harsh or beyond the conscience of the public.[78] MMPs are thought to be an expression of public will in Canada's democracy. They are a political tool often used to reflect public opinion of those who believe in the efficacy of a tough on crime approach.[79]

b) Decreased Sentencing Disparity

In restricting sentencing discretion, MMPs address concerns around so called "judge-shopping" wherein advocates aim to have cases heard by particular judges who have reputations for their general attitude towards sentencing.[80] This concern reflects the position that there is vast sentencing disparity in judicial outcomes in Canada. Supporters of MMPs suggest that legislated uniformity in sentencing reduces said sentencing disparity. As such, anyone who commits an offence that is subject to a MMP, regardless of "intersectional factors" which have been seen to contribute to vast sentencing disparity, will be subject to the same minimum sentence.[81] In this way, relying on MMPs as a "bastion against the idiosyncrasies of

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[76] Thomas Gabor & Nicole Crutcher, "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures, (2002) Research and Statistic Division, Department of Justice Canada, online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr02_1/rr02_1.pdf> at 1.
[77] *Ibid.*
[78] Chaster, *supra* note 30 at 96.
[79] Elliott & Coady, *supra* note 1, at 8.
[80] Elliott & Coady, *supra* note 1, at 7.
[81] *Ibid.*

the sentencing judge" can establish consistency and predictability in sentencing, thus contributing to the rule of law.[82]

In their submission to the House of Commons, The National Police Federation suggests that "Bill C-5 cannot achieve its objectives."[83] They reason that removing MMPs in the *CDSA* will have little impact on Canada's drug crisis because of the discretion already afforded to police officers and the PPSC in charging and prosecuting those who use drugs.[84] While supportive of expanded investment in "programs such as addiction treatment, rehabilitation and diversion," particularly in underfunded rural communities, they are critical of the Bill's ability to do so.[85] The same position was advanced by MP Michael Barret who highlighted the Bill's limitations in substantively connecting those in need with supports; removing MMPs is not the same as implementing harm reduction and rehabilitative strategies – which are essential moving forward.[86]

Emphasizing how deadly the drug crisis has been and continues to be, the National Police Federation asserts that "reducing penalties related to trafficking and importing controlled

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[82] Chaster, *supra* note 30 at 93; Sarah Chaster, "Mandatory Minimum Sentencing in Canada: *Nur*-sing the Wounds" (2016) at 8, online (pdf) *University of Victoria* <https://www.uvic.ca/law/assets/docs/crimlawpapers/Chaster,%20Sarah%20-%20Manditory%20Minimum%20Sentencing%20in%20Canada%20%20Nur-sing%20the%20Wounds%20.pdf>.

[83] National Police Federation, "Submission on Bill C-5 An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act" (2021) at 3 online (pdf) *House of Commons Standing Committee on Justice and Human Rights* https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11750873/br-external/NationalPoliceFederation-e.pdf.

[84] *Ibid.*

[85] *Ibid,* at 6.

[86] "Bill C-5, An Act to amend the *Criminal Code and Controlled Drugs and Substances Act,*" 2nd reading, *House of Commons Debates,* 44-1, No 016 (13 December 2021) at 1125 (Hon Michael Barrett).

substances may undermine efforts to control the opioid epidemic."[87] They suggest that through incapacitation, MMPs ensure public safety. As such, a softening of this approach without coinciding increased deterrence measures, border control measures, and police and community resources would be dangerous for victims of drug trafficking. However, as will be further explored, advocating for the repeal of MMPs, via the passage of Bill C-5, is not a suggestion that duly strict sentences should not or would not be consistently imposed. Rather, in removing MMPs from the *CDSA,* judges will have the necessary discretion to adequately apply the foundational principles of sentencing in light of the total circumstances of the offence. The outcome of *R v Nur* is illustrative of this point. While the particular MMP was struck down, the court, properly able to exercise discretion, imposed lengthy sentences for each offender as necessitated by the circumstances of their crime.[88]

[87] *Ibid.*
[88] *R v Nur,* 2015 SCC 15. .

6: The Case Against MMPs in the *CDSA*

While the above rationales have contributed to the conditions under which MMPs have flourished, there is a significant opposition to the use of MMPs. Those who oppose MMPs suggest that their effects are detrimental on various fronts.[89] In 1987, the Canadian Sentencing Commission (CSC) published their *Report on Sentencing Reform* which recommended the total abolition of MMPs, save for murder and high treason.[90] This report pointed to various flaws associated with MMPs including constitutional concerns, their failure to deter crime, and their propensity to lead to arbitrary detention.[91] This section will explore criticisms of MMPs in greater detail.

a) The Loss of Proportionality

At their core, MMPs interfere with the fundamental principle of sentencing – proportionality – by painting all offenders with the same brush. As opined by the CSC, MMPs "do not reflect the reality of the wide range of circumstances in which offences are committed and in which offenders find themselves."[92] MMPs "represent a *priori* political judgement about what is a just punishment in all circumstances,"[93] directly offending the principle of proportionality. The Supreme Court of Canada has been critical of MMPs to that end because "they emphasize denunciation, general deterrence and retribution at the expense of what is a

[89] *Ibid.*
[90] Chaster, *supra* note 30 at 93.
[91] Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: The Canadian Sentencing Commission, 1987) (Chairman J.R. Omer Archambault) at 182-186.
[92] *Ibid,* at 65.
[93] Benjamin L Berger, "A More Lasting Comfort?: The Politics of Minimum Sentences, the Rule of Law and R. v. Ferguson" (2009) 47 SCLR: Osgoode's Annual Constitutional Cases Conference at 112.

fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime."[94] Depriving sentencing judges of the discretion to impose proportionate sentences is an affront to the aims of sentencing and perpetuates significant harms associated with MMPs.

Troublingly, the erosion of proportionality sees high-level 'ring leaders' face the same starting point in sentencing ranges as those who become involved with drug crime in order to meet their own addiction needs, despite a clear difference in moral culpability.[95] In light of that, MMPs have been referred to as "inflationary floors"[96] because they set the minimum sentence for the best offender, while offenders with less sympathetic circumstances may face sentences much harsher than the minimum, inexorably leading to longer sentences overall.[97] This has significant economic impacts which will be further explored and does not adequately achieve rehabilitative aims. Further, despite dated arguments to suggest that MMPs are an expression of democratic will of Canadians, a 2017 National Justice Survey revealed that 91% of Canadians indicated that judges should be granted the flexibility to impose less restrictive sentences outside of MMPs.[98]

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[94] *R v Nur*, at para 44.
[95] Gabor & Crutcher, *supra* note 76 at 18.
[96] Chaster, *supra* note 30 at 94.
[97] Tim Quigley, "Reducing Expectations While Maintaining the Function of Canadian Criminal Law" (2015) 62 CLQ at 289.
[98] "Bill C-5, An Act to amend the *Criminal Code and Controlled Drugs and Substances Act,*" 2nd reading, *House of Commons Debates,* 44-1, No 016 (13 December 2021) at 1110 (Hon Gary Anandasangaree).

Problematically, and disproportionately, MMPs target and incarcerate "the wrong people" in the drug trade.[99] For example, MMPs catch low level offenders who are struggling with problematic substance use themselves, and are "easily replaced in the illicit market,"[100] while high-level organizers are often better positioned to use their inside knowledge as leverage to avoid MMPs in plea bargaining.[101] A 2012 study by the Pivot Legal Society on the life stories of those initially impacted by the *SSCA* in Vancouver, illustrates this point. The study found that the provisions of the *SSCA,* including MMPs in the drug context, were intended to target organized drug crime, but in reality they predominately affect and do not deter those living in deep poverty and with addiction.[102]

As outlined above, an offender may face a MMP where they have been convicted of a designated substance offence in the last ten years. A designated substance offence is any drug offence, save for simple possession, under Part 1 of the *CDSA.* Given the chronic nature of addiction, as corroborated by the Pivot Legal Society study, many people living with drug dependency have previously been convicted of a designated substance offence.[103] As such, the designated substance offence provision targets those who are drug dependant and had the

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[99] Gabor & Crutcher, *supra* note 76 at 17.
[100] *Ibid.*
[101] *Ibid.*
[102] Darcie Bennett & Scott Bernstein, "Throwing Away the Keys: The human and social cost of mandatory minimum sentences." (2013) at vi , online (pdf) : Pivot Legal Society <http://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/395/attachments/original/1372448744/Final_Throwing Away_lo-res_-_v2.pdf?1372448744>.
[103] *Ibid,* at 4.

potential to "put hundreds of people in jail who would be better off in treatment or being supported in accessing harm reduction services."[104]

Additionally , an offender can be subject to a MMP where an offence is committed to the benefit of a criminal organization. However, the meaning of 'organized crime' is quite broad. Under s.467.1(1), a criminal organization is any group of three or more people that has the commission of a crime as their main purpose.[105] This means that if three "drug users involved in street-level sales for survival purposes" were to be working together to facilitate a drug deal, they could be subject to a minimum level of incarceration.[106] While hypothetical, that kind of incidental shared effort is caught by MMP legislation, despite it not being the work of a highly organized drug operation. The participants in the Pivot Legal Society study felt that, contrary to the intention of Parliament, because of the insulated nature of those who organize drug crime and the exposed nature of those on the street who distribute drugs, the organized crime provision would "allow higher-level drug traffickers to continue escaping arrest and prosecution while leaving easily replaceable street-level dealers to potentially face longer sentences."[107]

Further, an offender could face a MMP where they commit a drug crime in proximity to a school or any place that minors frequent. The breadth and vagueness of this statement means that many feel that this could describe "just about any place in their community."[108] Thus, by

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[104] *Ibid,* at 34.
[105] *Criminal Code*, s.467.1(1).
[106] Bennett & Bernstein, *supra* note 101, at 10.
[107] *Ibid.*
[108] *Ibid.*

inflating the minimum sentence, proportionality is threatened and low level offenders are more likely to take the brunt of a disproportionate heavy handed sentencing scheme. These significant harms associated with MMP legislation in the *CDSA* have been judicially recognized. PPSC Crowns are now under direction not to seek MMPs in these circumstances, as a result of constitutional challenges. Entirely removing MMPs from the *CDSA* would codify this approach and ensure that judges are consistently able to apply the principle of proportionality at sentencing.

b) Displaced Discretion

Proponents suggest that MMPs remove judicial discretion to ensure consistency in sentencing outcomes, while opponents point out that judicial discretion is questionably misplaced. Rather, discretion is transferred from the judiciary to prosecutors. Where MMPs are concerned, prosecutors' decisions carry significant weight on sentence; "prosecutors can trigger mandatory minimums by charging crimes that carry those sentences; by proving certain aggravating factors at sentencing; by refusing to accept guilty pleas to lesser offences that do not carry mandatory minimums; or by electing to proceed summarily or by indictment where that election entails a particular mandatory minimum."[109] As Ministers of Justice, prosecutors are to act dispassionately in ensuring that justice is done. To that end, prosecutors are afforded a large degree of discretion in their decision making; "prosecutorial discretion is 'expansive' and must be insulated from most types of review."[110] While sentencing judges give reasons for their

[109] Palma Paciocco. "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing." (2014) 81:3 Can Crim L Rev, at 242.
[110] *Ibid,* at 249.

decisions, which are subject to public scrutiny and appeal, prosecutors' reasons for seeking an MMP are neither made public, nor subject to challenge or review.[111] In that sense, prosecutors, as opposed to judges, have a large degree of control over sentencing outcomes where MMPs are concerned. Supporters of MMPs suggest that removing judicial discretion for certain crimes achieves greater certainty and consistency in sentencing outcomes. However, in that discretion is merely transferred, MMPs do not *remove* discretion. This transfer of discretion and insulation of decision making threatens transparency and accountability in the criminal justice system.[112]

Further, as a result of the transfer of discretion to prosecutors, the proliferation of MMPs has been linked to an increase in "charge bargaining."[113] As a result of the charge bargaining process, offenders may face pressures to plead guilty to a lesser offence so as to avoid being sentenced to a MMP. Met with the decision to risk facing a conviction that carries a certain MMP or to plead guilty to a lesser offence which does not, "the incentives for an innocent accused to plead guilty become particularly powerful and clear."[114] Thus, increased pressure to plead guilty can increase the risk of wrongful conviction.[115] This is not to say that all guilty pleas as a result of charge bargaining are pressured or could result in a wrongful conviction, but rather that the risk certainly exists where MMPs are concerned.[116] Thus, the transfer of judicial

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[111] Parkes, *supra* note 31, at 166.
[112] Elliott & Coady, *supra* note 1, at 7.
[113] Parkes, *supra* note 31, at 166.
[114] Berger, *supra* note 93, at 111.
[115] Chaster, *supra* note 30 at 94.
[116] Dianne L Martin. "Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions." Osgoode Hall Law Journal 39.2/3 (2001) : 513-527 http://digitalcommons.osgoode.yorku.ca/ohlj/vol39/iss2/12.

discretion to prosecutors through MMPs does not ensure consistency in sentencing and endangers the rule of law via risk of wrongful conviction.

c) Further Burdening the Criminal Justice System

MMPs carry significant implications on the efficiency of the criminal justice system. MMPs lead to increased court, correctional and "hard-to-calculate" social costs.[117] In his speech in the House of Commons, MP Gary Anandasangaree noted that "so-called tough-on-crime measures have actually made our criminal justice system less effective by discouraging the early resolution of cases."[118] While on one hand, it has been suggested that the risk of facing an MMP could incentivize guilty pleas, on the other hand it has been suggested that MMPs can increase trial frequency. Because of the high stakes, people facing a MMP are sometimes more likely to take their case to trial, rather than to resolve it outside of the courtroom,[119] "in fear of the significant penalty that awaits them should they be found guilty."[120] As suggested by the Canadian Criminal Justice Association in their submission to the House of Commons, "not only does this increase time for *specific case* resolution in an already overburdened criminal justice system, but increased litigation because of MMPs increases court delay, *generally*, which negatively impacts victims."[121] The Canadian Bar Association's submission echoes this point,

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[117] Elliottt & Coady, *supra* note 1, at 10.
[118] "Bill C-5, An Act to amend the *Criminal Code and Controlled Drugs and Substances Act,*" 2nd reading, *House of Commons Debates,* 44-1, No 016 (13 December 2021) at 1105 (Hon Gary Anandasangaree).
[119] *Ibid.*
[120] Canadian Criminal Justice Association, "Legislative Brief Bill C-5 An Act to amend the Criminal Code and the Controlled Drugs and Substances Act 44th Parliament, 1st Session" (2022) at 3 online (pdf) *Senate Standing Committee on Legal and Constitutional Affairs:* <https://sencanada.ca/Content/Sen/Committee/441/LCJC/briefs/2022-05-05_LCJC_C-5_Brief_CCJA_e.pdf>.
[121] *Ibid.*

and further noted that as a result of MMPs, offenders who choose to go to trial to attempt to avoid an MMP "languish in pre-trial custody, unable to meaningfully begin or complete the process of rehabilitation."[122] It is difficult to quantify the precise cost of these pressures on the criminal justice system. However, given the criminal justice system's dependence on pre-trial resolutions, increased trial frequency is not ideal. Through increased litigation, MMPs can significantly delay court processes, further burdening an already overwhelmed system.

Further, MMPs "increase costs on an overburdened justice system by leading to higher rates of incarceration."[123] Mandatory incarceration can increase prison populations despite the fact that they are already unsustainably high. This has in some jails lead to "triple-bunking," and means that limited education and rehabilitation programs are increasingly less available to inmates.[124] Where budgets are invested in lengthy litigation and incarceration, but not matched in treatment and social policies, it is hard to see how the *CDSA*'s rehabilitative and treatment aims are being met.[125] Thus, it is clear that, in relying on MMPs, with little regard to their effect on the criminal justice system, policy makers are not concerned with addressing the root causes of addiction and crime but rather with removing those who use drugs from society.[126]

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[122] The Canadian Bar Association, Criminal Justice Section, "Bill C-5 – Criminal Code and Controlled Drugs and Substances Act Amendments" (2021) at 5 online (pdf): *House of Commons Standing Committee on Justice and Human Rights* https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11705741/br-external/TheCanadianBarAssociationCriminalJusticeSection-e.pdf
[123] Chaster, *supra* note 82 at 9.
[124] Berger, *supra* note 93 at 109.
[125] Bennett & Bernstein, *supra* note 101 at VI.
[126] Berger, *supra* note 93 at 108.

d) Drug Treatment Court Flaws

Rehabilitation is central to the fundamental purpose of sentencing as codified in the *CDSA.* As such, s.10(5) provides that an offender can evade facing a MMP where they participate in drug treatment court or complete an approved drug treatment program. These options may present as a means of mitigating the risk that MMPs target those who are dealing with addiction.[127]

However, the inaccessibility of drug treatment courts means that rehabilitative aims of the s.10(5) drug treatment provision often cannot be met.[128] Drug treatment courts are often inaccessible and often built on a flawed philosophical understanding of addiction.[129] Across Canada, there are a total of twenty-five drug treatment courts.[130] Given the size of this country, there are significant geographical barriers to entry.[131] Those living in remote communities, without access to reliable transportation may be barred from participating in drug treatment courts, and thus prevented from benefiting from s.10(5).

Even where an accused person is able to access a drug treatment court, the courts are premised on "the position that drug dependence is a matter of free will rather than a complex medical condition."[132] Further, many consider drug treatment courts to be coercive measures

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[127] *Ibid.*
[128] *CDSA,* s.10(5)
[129] Bennett & Bernstein, *supra* note 101, at 24.
[130] Canadian Association of Drug Treatment Court Professionals, "DTCs in Canada" online: <https://cadtc.org/dtcs-canada/>.
[131] Bennett & Bernstein, *supra* note 101, at 24.
[132] *Ibid.*

that can do more harm than good.[133] As suggested in the brief submitted to the House of Commons by the Canadian Drug Policy Coalition, there are human rights concerns raised by drug treatment courts: "coercion, intrusive judicial supervision, and the potential for sanctions (including jail time) for drug use, breach of conditions, or missed treatment sessions, urine tests, or court appearances."[134] As such, most participants do not successfully complete drug treatment court programs. A 2015 report by the Department of Justice Canada found that at that time, drug treatment courts had "a retention rate of 36% and a graduation rate of 27%."[135] The study further found that the primary reason for failure to complete the program was most often because participants breached program guidelines or re-offended.[136] It should be noted that not all of those involved in this particular study were participating in a drug treatment court as a result of a drug crime carrying a MMP. Drug treatment courts are available to a variety of offenders. Nevertheless, the study indicates that the success of those who participate in drug treatment courts is limited.[137] Compounding on this is the fact that in order to participate in a drug treatment court the accused must plead guilty. Those who plead guilty to participate in and do not complete drug treatment court are then forced to return to the

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[133] Canadian Drug Policy Coalition, "Decriminalization Done Right: A Rights-Based Path for Drug Policy" (2022) at 8, online (pdf): https://www.drugpolicy.ca/wp-content/uploads/2021/12/EN-PTL-Decrim.pdf.
[134] Canadian Drug Policy Coalition, Letter to Jean-François Pagé, Clerk of the Standing Committee on Justice and Human Rights on 20 April 2022, at 3 online (pdf): *House of Commons Standing Committee on Justice and Human Rights* < https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11713944/br-external/CanadianDrugPolicyCoalition-e.pdf>.
[135] Department of Justice Canada, *Drug Treatment Court Funding Program Evaluation: Final Report,* by Evaluation Division Corporate Services Branch (Ottawa: Department of Justice Canada: April 2015) Evaluation Division Corporate Services Branch, at 55.
[136] *Ibid,* at 56.
[137] *Ibid.*

traditional justice system having plead guilty, raising concerns for the legal rights of those struggling with addiction.[138]

e) No Evidence of Deterrent Effect

General deterrence, or the idea that harsh penalties consequently reduce crime, is a central justification for the use of MMPs. The "deterrence through sentencing hypothesis," as described by Anthony Doob, Cheryl Webster and Rosemary Gartner, rests on the assumption that the perception of the certainty of harsh sanctions will weigh in the mind of those deciding whether, or not, to commit a crime.[139] Practically speaking, there is difficulty in evaluating the precise deterrent effect of particular legislation, whether it be positive or negative.[140] However, available evidence does not support the suggestion that harsh penalties deter crime. Rather, in reviewing a breadth of materials on the deterrent effect of harsh sentences and MMPs, Doob, Webster and Gartner concluded that they "know of no reputable criminologist who has looked carefully at the overall body of research literature on 'deterrence through sentencing' who believes that crime rates will be reduced, through deterrence, by raising the severity of sentences handed down in criminal courts."[141] Indeed, the perceived link between harsher

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[138] Bennett & Bernstein, *supra* note 101, at 24.
[139] Anthony N. Doob, Cheryl Marie Webster, & Rosemary Gartner, "Issues Related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation" (2014) at A-2 to A-4, online (pdf): *Criminological Highlights,* University of Toronto Centre for Criminology & Sociolegal Studies < https://www.crimsl.utoronto.ca/sites/crimsl.utoronto.ca/files/Issues%20related%20to%20Harsh%20Sentences%20and%20Mandatory%20Minimum%20Sentences%20General%20Deterrence%20and%20Incapacitation.pdf>.
[140] Kent Roach, "Searching for Smith: The Constitutionality of Mandatory Sentences." Osgoode Hall Law Journal 39.2/3 (2001): http://digitalcommons.osgoode.yorku.ca/ohlj/vol39/iss2/6 at 389.
[141] Doob, Webster & Ganter, *supra* note 139, at A-3.

penalties and deterrence has been described as a "null hypothesis" because there is in fact no real link between harsh sentences and general deterrence.[142]

The limited deterrent effect of harsh sentences is also evident in the case of MMPs; "there is little evidence to support the hope that mandatory penalties of imprisonment, which may not even be known to the general public, will serve as effective deterrents of [crime]."[143] Because there is no evidence to suggest that MMPs have reduced drug use or crime "in any measurable way,"[144] it can be said that MMPs "are not effective as a crime-control strategy."[145] Data published by Statistics Canada on trends in police-reported rates of drug offences in Canada between 1986 and 2020 illustrates this point.[146] Police-reported drug offences included possession, trafficking, production, importation and exportation. Offences were further categorized by type of drug; cannabis, cocaine, or other drugs (including heroin, methamphetamines, and opioids). Following decriminalization in 2018, there was a sharp decline in police reported cannabis offences.[147] However, between 2012 and 2020, following the 2012 proliferation of MMPs in the *CDSA,* there was only a minimal, but not significant, decrease in offences involving cocaine and there was a notable increase in offences involving other drugs.[148] In 2012, police reported crime for other drugs at a rate of 52 per 100,000

[142] Anthony N. Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime & Justice at 143.
[143] Roach, *supra* note 140.
[144] Gabor & Crutcher, *supra* note 76 at 18.
[145] Berger, *supra* note 93 at 106.
[146] Statistics Canada, *Police Reported Crime Statistics in Canada, 2020,* by Greg Moreau, Catalogue no. 85-002-X (Ottawa: Statistics Canada: 27 July 2021) at Chart 6.
[147] *Ibid.*
[148] *Ibid.*

population. By 2020, police reported crime for other drugs at a rate of 102 per 100,000, almost doubling in that time period.[149] As for the decrease in cocaine related crime, the study notes that this may not be indicative of a general decrease in drug use, because "the polysubstance nature of the opioid crisis may impact how particular drug offences, namely those related to methamphetamine and cocaine, are reported, given that only one drug type will be indicated as the most serious violation for a particular criminal incident."

It is important to note that the usefulness of this data in this context is somewhat limited. This data represents trends in *all* drug crime, not just that which is subject to MMPs. Further, other phenomena, such as the COVID-19 pandemic, may be responsible for upward trends in drug crime during this period. With these caveats in mind, this data certainly cannot be taken as a suggestion that MMPs have effected a reduction in drug crime overall. Rather, this data generally supports the assertion that proliferating MMPs in drug law does not have a notable deterrent effect on drug crime.

While there is difficulty in quantifying the deterrent effect, or lack thereof, of MMPs, the general consensus is clear. The sentiment of McIntyre J in *R v Smith* continues to ring true; "it is apparent, and here no evidence is needed for we 'should not be ignorant as judges of what we know as men' […] that the minimum sentence provided in s. 5(2) of the *Narcotic Control Act* has not reduced the illicit importation of narcotics to the extent desired by Parliament and probably

[149] *Ibid.*

no punishment, however severe, would entirely stem the flow into this country."[150] Several years later, rates of drug related crime and incarceration remain high, so MMPs cannot be said to have effectively deterred drug crime.

Thus, MMPs justified through deterrence are something of a false promise; "as long as the public believes that crime can be deterred by legislatures or judges through harsh sentences, there is no need to consider other approaches to crime reduction."[151] This is to say that as long as Canadians are satisfied that drug crime is punished harshly, there is little motivation to consider the social and economic underpinnings of Canada's drug economy which drive drug crime.

f) Racial Bias

Perhaps the most problematic, and yet least surprising, aspect of MMPs is their unequal application to Black and Indigenous offenders. It is well established that harsh drug policies intolerably disproportionately affect Black and Indigenous Canadians. Systemic racism is evident at all stages of the criminal justice system, and it is theorized that this is no different where MMPs are concerned; "scholars have pointed to minimum sentences as having particularly troublesome consequences for Aboriginal peoples, with serious concerns also

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[150] *R v Smith,* [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) at 64.
The *CDSA* replaced the *Narcotics Control Act.*
[151] Doob & Webster, *supra* note 130, at 191.

raised about disparate racial impacts and the manner in which mandatory minimums have contributed to gender inequities in the criminal law."[152]

There are limited statistics available on incarceration rates for drug related convictions carrying MMPs, however, data from the Correctional Service of Canada collected between 2007/08 and 2016/17 indicates that, as opposed to White offenders, "Black and other visible minority offenders were much more likely to be admitted [to federal custody] with a conviction for an offence punishable by a MMP.[153] The same study reveals that over that time period drug offences accounted for 75% of convictions for which offenders entered federal custody.[154] Of those offences, 89% were for trafficking.[155] When further broken down by race and offence type, while Black offenders were more likely to be incarcerated for importation or exportation offences, "White offenders were more likely to be admitted with a trafficking (s. 5 of the *CDSA)* or production (s. 7 of the *CDSA)* offence – they comprised 63% and 72% of these two groups, respectively, over the ten year period."[156]

A report by Statistics Canada, indicates that "[of] the total Canadian population, 2.9% of people self-identify as Black, 4.3% as Indigenous and 16.2% as 'other' visible minorities."[157] However, again between 2007/08 and 2016/17, of offenders incarcerated for an offence under s.6 of the *CDSA,* 42% were Black and 12% were Indigenous. Thus, Black and Indigenous

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[152] Berger, *supra* note 93, at 111.
[153] Department of Justice Canada, *supra* note 5 at 1.
[154] *Ibid,* at 3.
[155] *Ibid.*
[156] *Ibid*.
[157] *Ibid*.

offenders are statistically overrepresented in incarceration related to importation and exportation of substances. The most significant increase in overrepresentation of Indigenous offenders' conviction rates for s.6 offences occurred following the introduction of the *SSCA*, which proliferated MMPs in drug law.[158] These figures do not suggest that Black and Indigenous Canadians are overrepresented in incarceration for *all* drug related crime carrying MMPs, however they do indicate significant overrepresentation for *some* offences, which alone cannot be tolerated.

Overrepresentation is not indicative of Black and Indigenous groups committing drug crime or using drugs at an elevated rate.[159] Rather, overrepresentation is borne from racial bias permeating all levels of the criminal justice system.[160] There is significant data to suggest an over-policing of Black communities in Canada, which means that Black Canadians are inherently subject to an increased risk of being affected by a MMP,[161] despite the fact that "the best criminological evidence suggests that the vast majority of drug users and sellers are white."[162] Indeed, it has been suggested that "the impact of racial profiling and the poor use of prosecutorial discretion are even more severe under mandatory prison sentencing laws: Black people who are unfairly and disproportionately targeted for criminal investigations will likely succumb to more guilty pleas, stiffer penalties, and higher incarceration rates."[163] As previously outlined, MMPs shift judicial discretion into the hands of prosecutors, and it has further been

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[158] *Ibid*.
[159] Mirza, *supra* note 16 at 503.
[160] Owusu-Bempah, *supra* note 16 at 13.
[161] Mirza, *supra* note 16 at 496.
[162] Owusu-Bempah, *supra* note 16 at 14.
[163] Mirza, *supra* note 16 at 494.

suggested that Black and Indigenous Canadians are "less likely to benefit from exercises of prosecutorial discretion," reflecting systemic biases.[164] This is to say that where MMPs are flawed in many regards, their ramifications disproportionately affect Black offenders as a result of systemic bias.

The well-established overrepresentation of Indigenous Canadians in incarceration led to judicial recognition of the lasting impacts of colonialism in *R v Gladue*[165] and the codification of s. 718.2(e) of the *Criminal Code* which says that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[166] It is "exceedingly difficult to reconcile" these principles with the use of MMPs.[167] Thus, the Native Women's Association of Canada expressed support of Bill C-5 to the House of Commons because repealing MMPs "allows judges to meaningfully engage *Gladue* principles at sentencing," which is essential in advancing reconciliation.[168] To illustrate, the "vast majority" of Indigenous offenders encounter the criminal justice system as a result of intergenerational trauma, stemming from state inflicted colonialism.[169] Further, compounding on issues associated with

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[164] Raji Mangat, More Than We Can Afford: The Costs of Mandatory Minimum Sentencing, British Columbia Civil Liberties Association, 2014 CanLIIDocs 12, <https://canlii.ca/t/7d9>, at 31.
[165] *R v Gladue,* [1999] 1 S.C.R. 688; *R v Ipeelee,* 2012 SCC 13.
[166] *Criminal Code,* s.718.2(3).
[167] Parkes, *supra* note 31 at 168.
[168] Native Women's Association of Canada, "Brief on Bill C-5 *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act:* Prepared for House Standing Committee on Justice and Human Rights" (2021) at 1 online (pdf): *House of Commons Standing Committee on Justice and Human Rights* https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11713974/br-external/NativeWomensAssociationOfCanada-e.pdf.
[169] Sarah Runyon, "Correctional Afterthought: Offences Against the Administration of Justice and Canada's Persistent Savage Anxieties," (2020) 43:5 Man LJ at 27.

drug treatment courts as outlined above, even where an Indigenous offender may evade a MMP by completing an approved treatment program, "the irony in coercing the offender to revisit and cope with that trauma in the way the state deems acceptable is palpable."[170] As such, it is concerning to limit judicial discretion via MMPs such that judges are prevented from applying *Gladue* principles at sentencing. Thus, the Truth and Reconciliation Committee called upon Parliament "to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences."[171] In removing MMPs from the *CDSA,* via passage of Bill C-5, Parliament can begin to meet that call to action.

The criminogenic social conditions in which Black and Indigenous Canadians often exist are unjustly erased from sentencing considerations when judges are bound by MMPs, perpetuating intolerable systemic race-based inequity in the criminal justice system.[172] As suggested in a brief by the South Asian Legal Clinic of Ontario, over-policing, overrepresentation, and overincarceration of Black and Indigenous Canadians "proceeds to negatively influence every portion of their lives" including issues securing housing, employment and adequate health and social services.[173] MP Randall Garrison's speech to the House of Commons on Bill C-5, suggested that Bill C-5 could be strengthened by including automatic expungement for criminal

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[170] *Ibid.*
[171] *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, 2015) at 3.
[172] Mirza, *supra* note 16, at 500.
[173] South Asian Legal Clinic of Ontario, "SUBMISSIONS TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS: Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substance Act*" (2022) at 2 online (pdf): *House of Commons Standing Committee on Justice and Human Rights* < https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11766596/br-external/SouthAsianLegalClinicOfOntario-e.pdf>.

records around drug possession, as a means of further addressing racial inequity.[174] Removing MMPs will not in and of itself erase systemic bias from the criminal justice system, however it can "reduce the harm [Black and Indigenous offenders] face by allowing judges to consider a sentence that balances the impact of the crime with their personal circumstance."[175]

g) Constitutional Concerns

MMPs are not in and of themselves unconstitutional. However, one of the most significant criticisms of MMPs is their potential to produce unjust sentences, infringing on the *Canadian Charter of Rights and Freedoms*[176]. As of December 2021, the Department of Justice Canada was tracking 217 *Charter* challenges to MMPs.[177] Section 12 of the *Charter* is most commonly invoked in challenging the constitutionality of MMPs.[178] Section 12 reads "everyone has the right not to be subjected to any cruel and unusual punishment or treatment."[179] As briefly touched on above, there have been several constitutional challenges to MMPs on these grounds. The following section will outline some of these, highlighting their relevance to the debate around MMPs in the drug context.

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[174] "Bill C-5, An Act to amend the *Criminal Code and Controlled Drugs and Substances Act,*" 2nd reading, *House of Commons Debates,* 44-1, No 016 (13 December 2021) at 1230 (Hon Randall Garrison).
[175] South Asian Legal Clinic of Ontario, *supra* note 153 at 5.
[176] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[177] Department of Justice Canada, *supra* note 2.
[178] Chaster, *supra* note 30 at 95.
[179] *Canadian Charter of Rights and Freedoms*, s.12.

The Canadian Sentencing Commission's 1987 Report on Sentencing Reform noted that constitutional challenges to MMPs are not new.[180] In 1976, the potential cruel and unusual effects of a 7 year MMP for importation of a narcotic were discussed by the court in *R v Shand*.[181] While the Court of Appeal overturned the trial court's decision to set aside the mandatory minimum, it also acknowledged that the MMP could in some cases be unduly harsh for some offenders.[182] However, the court reasoned that this undue harshness could be justified as a means to achieving the end of containing the drug trade.[183]

In 1987, in the seminal case of *R v Smith,*[184] the Supreme Court of Canada struck down a MMP of seven years imprisonment for importing a narcotic on s.12 grounds.[185] The court set a high threshold for punishment that is "cruel and unusual" contrary to s.12. To amount to a *Charter* breach a punishment must be grossly disproportionate, meaning that it is "more than merely excessive."[186] Such a sentence would be "so excessive as to outrage the standards of decency."[187] The court set out a two-part test to be used in determining if a punishment is grossly disproportionate. First, the court considers the circumstances of the offence and offender at bar. If a MMP is so harsh in the circumstances that it could offend society's sense of decency, the court then considers if the infringement of s.12 is justifiable under s.1. If imposing the MMP would not be grossly disproportionate on those grounds, then second, the court may

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[180] Report of the Canadian Sentencing Commission, *supra* note 91 at 182.
[181] *R v Shand* (1976), 29 C.C.C. (2d) 199 (Ont. Co. Ct.)
[182] Report of the Canadian Sentencing Commission, *supra* note 91 at 182.
[183] *Ibid.*
[184] *R v Smith,* [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).
[185] Chaster, *supra* note 30 at 95.
[186] *R v Smith*, at para 55.
[187] *Ibid,* at para 54.

consider any reasonable hypothetical scenario in which the MMP could subject an offender to cruel and unusual punishment. Relying on the reasonable hypothetical analysis, the court in *Smith* found that it would be grossly disproportionate to sentence a first time offender who imported a single "joint of grass" to a mandatory minimum of seven years in prison.[188] The infringement on s.12 could not be saved under s.1 and thus the MMP was struck down.

In the years following, despite initial constitutional infirmity and persistent academic criticism, the judiciary consistently deferred to Parliament on the issue of MMPs.[189] Post *Smith,* there was judicial reluctance in finding that MMPs can produce cruel and unusual punishment. On four occasions, the Supreme Court of Canada grappled with the constitutionality of MMPs, though not in the drug context. In each instance, MMPs were upheld. First, in *R v Goltz* a MMP on a driving offence was upheld as it did not amount to cruel and usual punishment. There, the court constrained the reasonable hypothetical analysis, finding that hypotheticals outside of the imaginable circumstances of daily life could not be considered.[190] To this end, some considered the reasonable hypothetical analysis to be merely a "faint hope clause."[191] In *R v Morrisey* the court followed the ruling that a reasonable hypothetical must be something that could commonly arise in upholding a MMP.[192] This position was mirrored in *R v Latimer,* where a constitutional exemption was overturned and a MMP was upheld.[193] Fourth in *R v Ferguson,* the court upheld a MMP and confirmed that constitutional exemptions should not be used in a

[188] *Ibid,* at para 13.
[189] Chaster, *supra* note 30 at 90.
[190] *R v Goltz*, [1991] 3 SCR 485 at 73.
[191] Chaster, *supra* note 30 at 97.
[192] *R v Morrisey,* 2000 SCC 39.
[193] *R v Latimer,* 2001 SCC 1.

haphazard fashion to avoid the imposition of a MMP.[194] Rather, the court held that a declaration of invalidity under s.52 of the *Charter* is the only suitable remedy where a provision is unconstitutional.[195] The *Ferguson* decision split academic opinion. Some saw it as a retreat from the scrutiny enunciated by the court in *Smith,* while others suggested that it sent a clear message that the court should not continue to "mop up" messes as a result of flawed legislation.[196] This deferential line of jurisprudence represented a move from judicial "activism to minimalism."[197] Though it should be noted that the reluctance to depart from MMPs in these four decisions may well be rooted in the "types of offences that were before the court rather than a change in the Court's approach to mandatory minimums."[198]

Some twenty-eight years following the Supreme Court's initial striking down of a MMP in *Smith,* two MMPs have again been struck down in recent Supreme Court decisions. In *R v Nur,* the court's earlier position in *Smith* was affirmed and clarified. The court found that a three-year mandatory minimum for a firearms offence was inconsistent with s.12 of the *Charter* and it was therefore declared of no force and effect. In *Nur,* there was a retreat from the overly constrained reasonable hypothetical analysis, to a more broad test of reasonable foreseeability.[199] In considering reasonable foreseeability, the court "may take into account personal characteristics relevant to people who may be caught by the mandatory minimum, but

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[194] *R v Ferguson,* 2008 SCC 6.
[195] *Ibid,* at para 57.
[196] Janani Shanmuganathan, "R. v. Nur: A Positive Step but not the Solution to the Problem of Mandatory Minimum Sentences in Canada" (2016) 76 SCLR: Osgoode's Annual Constitutional Cases at 334.
[197] *Ibid,* at 333.
[198] *Ibid,* at 332.
[199] *R v Nur,* 2015 SCC 15, at para 65.

must avoid characteristics that would produce remote or far-fetched examples."[200] *Nur* represented a positive step forward, though not a concrete solution to the issue of MMPs because "the problem of mandatory minimum sentences is one that is too big for the courts to cure on their own."[201]

However, *Nur* laid the groundwork for further judicial scrutiny of MMPs in *R v Lloyd,* a drug trafficking case which is most important for current purposes. Chief Justice McLachlin writing for the majority reasoned that "the reality is that mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence."[202] *Lloyd* confirmed the court's stance in *Nur* that a sentence infringes on s.12 where it is a "grossly disproportionate sentence on the individual before the court, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others."[203] In finding the MMP of no force and effect, the court offered guidance to Parliament if they wished to retain MMPs in such a way that does not amount to cruel and unusual punishment either by narrowing the scope of MMPs or implementing an escape clause such that judges are able to avoiding using MMPs in exceptional circumstances.[204]

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[200] *Ibid* at para 76.
[201] Shanmuganathan, *surpa* note 196 at 330.
[202] *R v Lloyd,* 2016 SCC 13, at para 3.
[203] *Ibid,* at para 22.
[204] *Ibid,* at paras 35-36.

While unable to provide declaratory relief such that their decisions may be relied upon in future cases outside of that province, provincial court judges frequently find drug related MMPs to be unconstitutional in the cases before them.[205] According to a 2021 study by the Department of Justice Canada, in the last decade "69% of the constitutional challenges to MMPs for drug offences were successful."[206] The recent decision in *R v Sharma* illustrates the cruel and unusual effects of MMPs and the provincial court's willingness to acknowledge them.[207] The case involved a 20-year old Indigenous woman, with no prior criminal record, who is an intergenerational survivor of Canada's colonial residential school system. The Ontario Court of Appeal described some of Ms. Sharma's personal circumstances including being raped by two men at age 13, running away from home and being involved in sex work by age 15, being forced to drop out of high school at age 16 because she could not afford a $400 uniform, giving birth to her daughter at age 17, and dealing with serious mental health struggles throughout.[208] As a result of financial pressures and the threat of eviction for her and her two-year old child, Ms. Sharma agreed to be a drug courier for a man she was dating and imported cocaine from Surinam into Canada in exchange for $20,000. Upon being apprehended, she admitted what she had done and plead guilty at the earliest opportunity. At sentencing in the Ontario Court of Justice, the two-year mandatory minimum for importing a controlled substance contrary to s.6(3)(a.1) was struck down because "it would have constituted cruel and

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[205] Shanmuganathan, *surpa* note 196 at 339.
[206] Department of Justice Canada, *supra* note 2.
[207] *R v Sharma,* 2018 ONSC 1141 (CanLII).
While settled on the s.12 MMP matter, the case has made its way to the Supreme Court in relation to address "whether Parliament has the constitutional authority to restrict the general availability of conditional sentences for serious crimes without offending ss. 7 or 15 of the *Charter."*
[208] *R v Sharma*, at para 10.

unusual punishment when applied to Ms. Sharma and a number of reasonable hypothetical offenders."[209] Ms. Sharma's case is a powerful, yet not exceedingly uncommon, example of the MMPs in practice. Because the law remains on the books, if someone in similar circumstances to Ms. Sharma lacks the means to mount a constitutional challenge to a MMP, they may find themselves subject to a MMP, perpetuating cycles of crime and trauma.[210]

Despite these perils, MMPs flourished "because they are seen as politically popular, appealing to large segments of the electorate who have little information about the principles and operation of the criminal justice system."[211] Much of the public's attention is focused on harshly punishing drug crime, while failing to recognize the nuance of the issue. In a time of fear around serious crime, it is politically charged with popularity, though practically unwise, to take a 'tough on crime' approach.[212] Pursuing a solution to Canada's drug crisis through ineffective legal measures does a disservice to all Canadians.

As has been evidenced by the case against MMPs, they are an ineffective tool. They erode the legitimacy of fundamental sentencing principles, displace judicial discretion, are extremely costly, do not rehabilitate offenders nor deter crime, serve to perpetuate unacceptable racial bias in the criminal justice system, and are particularly vulnerable to constitutional challenge. While there has been a recent resurgence in judicial action against MMPs at the Supreme Court, "striking down unconstitutional mandatory minimums through

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[209] *Ibid*, para 21.
[210] Shanmuganathan, *surpa* note 196 at 340.
[211] Parkes, *supra* note 31 at 151.
[212] Berger, *supra* note 93 at 108.

the courts is to attack the problem in a piecemeal manner."[213] Indeed, it is the role of Parliament to take action to avert the perils of MMPs. Over the last 40 years of constitutional uncertainty around MMPs, there has been advocacy for narrowing the scope of MMPs as they stand, adding an escape clause similar to that of international counterparts, and for total repeal of MMPs. Bill C-5's proposal to entirely remove MMPs from the drug context is an essential step forward in reversing the harms associated with MMPs and addressing Canada's drug crisis.

[213] *Ibid,* at 330.

7: Bill C-5: Repealing MMPs in the *CDSA*

As the above discussions have outlined, Bill C-5 is broad in its proposed effect. While falling outside of the scope of this project, it would be remiss to fail to acknowledge that Bill C-5 could shape the law around firearms and tobacco related crimes. These are complex issues that deserve study in their own right.

Within the scope of this project, Bill C-5 is promising because removing MMPs from the *CDSA* is a vital *first* step in addressing Canada's drug crisis. As noted by Senator Marc Gold, Bill C-5 will not fix all issues with the current drug situaiton, "like the social determinants of crime and inequities in policing," however he did reason that it will grant judges the discretion to proportionately sentence offenders "with regard to public safety, rehabilitation and the realities of colonialism, racism and intergenerational trauma."[214] Still, while removing MMPs alone will not reverse all of the harms associated with Canada's war on drugs, it is an important measure in signalling, if not creating, a major shift in the tide. Removing MMPs will address immediate concerns associated with MMPs. By repealing MMPs, Parliament will empower the judiciary with the necessary discretion to sentence offenders proportionately taking into account all circumstances of the offence and offender. There will be relief from the pressures of increased litigation and incarceration associated with MMPs such that resources can be redistributed in supporting Canadians in need. Those struggling with addiction will not be coerced into participating in inaccessible and ineffective drug treatment courts. Repealing

[214] Debates of the Senate (Hansard), 1st Session 44th Parliament, Volume 153: Number 56 (20 June 22) at 1950 (Hon Marc Gold).

MMPs from the *CDSA* will contribute to efforts to ensure that they are not misconstrued as effective deterrent measures. While it will not entirely address systemic racial bias in the criminal justice system, repealing MMPs from the *CDSA* will ensure that certain racial groups are not disproportionately affected by the provisions. Finally, repealing MMPs will bring the law into compliance with recent SCC rulings on constitutionality and put an end to the constitutional vulnerability of MMPs in the *CDSA.*

As Parliamentary speeches and debates, along with intervener's policy briefs have illustrated, Bill C-5 is imperfect. Indubitably, the most serious dilemma with Bill C-5 is what it does not include. It does not provide additional mental health, rehabilitative, and socio-economic supports for those who have been caught up in cycles of drug crime. For these reasons, Parliament must go further than removing MMPs from the *CDSA* in addressing the drug crisis. However, in diverting focus and resources from harshly penalizing those who are involved in the drug trade as a means to support addiction, the government may begin to adequately address problematic substance use as a health and social concern, by enacting evidence-based practices and interventions to address the root causes of addiction. Thus, in the immediate, repealing cruel and unusual drug related MMPs is essential.

8: Conclusion

This project began by highlighting the lethal effects of the drug crisis in Canada, indicating that Canada's war on drugs has failed. Drugs are killing Canadians at an increasingly alarming rate. It went on to outline drug sentencing objectives at law, highlighting the centrality of the principle of proportionality. It provided context on MMPs and their application in, and proposed removal from, the *CDSA.* Ultimately, the study explored the cases both for and against the use of MMPs in the *CDSA.* While proponents suggest that harsh sentences and decreased sentencing disparity are adequate justifications for the use of MMPs, it is clear from this review that an overly punitive drug sentencing framework is not working to end the drug crisis and keep Canadians safe.

The last decade has evidenced that MMPs in the *CDSA* interfere with the principle of proportionality, misplace judicial discretion, increase the burden of incarceration and litigation, rely on a flawed drug treatment court system, do not deter crime, and perpetuate systemic racial bias in the criminal justice system. These fundamental flaws with MMPs mean that such sentencing provisions are constitutionally vulnerable, because they can produce cruel and unusual punishment, contrary to s.12 of the *Charter*. As such, MMPs have no place in Canada's drug policies. It is high time that Parliament permanently removes all MMPs from the *CDSA,* through Bill C-5, and further commits to taking meaningful steps to reduce the harm suffered by criminalizing drugs.

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