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Wade Riordan Raaflaub  
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## Mandatory Minimum Sentences

### CURRENT LAWS IN CANADA

There are about 40 offences under the *Criminal Code* for which a mandatory minimum sentence of imprisonment (MMS) must be imposed. Apart from life imprisonment for murder and some miscellaneous MMS,<sup>(1)</sup> they fall under three categories and may be summarized as follows (with year of original enactment in parentheses):

#### A. Offences Involving Firearms and Other Weapons

- Four years when a firearm is used in the commission of manslaughter, attempted murder, bodily harm with intent, sexual assault, aggravated sexual assault, kidnapping, hostage-taking, robbery, extortion and criminal negligence causing death (1995)
- One year (first conviction) and three years (second or subsequent conviction) for using a firearm in the commission of an indictable offence, in an attempt, or during flight afterwards (1977)
- One year for importing or exporting a firearm knowing it is unauthorized, and weapons trafficking (1995)
- One year (if the Crown proceeds by indictment) for possessing a prohibited or restricted firearm with ammunition, possessing a weapon obtained through an offence, or making an automatic firearm (1995)
- One year (second conviction) and two years less a day (third or subsequent conviction) for possessing a firearm, weapon, device or ammunition knowing it is unauthorized (1995)

#### B. Sexual Offences Involving Children

- Two years for living off the avails of prostitution of someone under 18 (2005); five years if violence, intimidation or coercion is used (1997)

- Six months for soliciting the sexual services of someone under 18 (2005)
- Six months if a parent, guardian or householder procures or permits prohibited sexual activity of a child under 14; 45 days if the child is 14 to 18 (2005)
- 45 days if a person in a position of trust or authority sexually exploits a child under 14; 14 days if the child is 14 to 18 (2005)
- One year (conviction by indictment) or 90 days (summary conviction) for producing, distributing, importing or exporting child pornography (2005)
- 45 days (conviction by indictment) or 14 days (summary conviction) for possessing or accessing child pornography, and sexually touching a person under 14 (2005)

#### C. Impaired Driving

- 14 days (second conviction) and 90 days (third or subsequent conviction) for impaired driving (1921), a blood alcohol level over .08 (1976) and refusing to provide a breath sample (1976)

### CONSTITUTIONALITY OF MMS

MMS are generally inconsistent with the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender,<sup>(2)</sup> as they do not allow a judge to make any exception in an appropriate case. However, this does not necessarily mean that an MMS is unconstitutional. An MMS constitutes cruel and unusual punishment, in violation of the *Canadian Charter of Rights and Freedoms*, if it is possible for the MMS, in a specific matter or reasonable hypothetical case, to be “grossly disproportionate.”

given the gravity of the offence or the personal circumstances of the offender.

By way of example, the Supreme Court of Canada concluded in 1987 that an MMS of seven years for importing or exporting a narcotic constituted cruel and unusual punishment because it failed to take into account the nature and quantity of the substance, the reason for the offence, or the absence of any previous convictions.<sup>(3)</sup> The applicable provision was accordingly struck down. Conversely, the current MMS of four years for criminal negligence causing death, where a firearm is used, was upheld by the Supreme Court in 2000 on the basis that such an offence necessarily involves wanton and reckless disregard for life and safety.<sup>(4)</sup>

### **EFFECT OF CANADIAN MMS ON CRIME**

A study in 1983 found that robberies and homicides with firearms decreased after MMS came into force in 1977, but there may have been a compensating increase in offences not involving firearms, and MMS were only one aspect of the legislation evaluated.<sup>(5)</sup> The study concluded that a direct cause and effect relationship between the MMS and declines in crime rates could not be drawn, as screening provisions to determine who may possess or acquire a firearm may have contributed. There has not been a comprehensive study of 1995 legislation attaching further MMS to firearm offences.

With respect to MMS for impaired driving, the deterrent effect is difficult to assess because legislative initiatives are often accompanied by education campaigns, and there do not appear to have been any direct assessments of Canadian laws. However, MMS in other jurisdictions have generally not been found to reduce recidivism rates or alcohol-related accidents.<sup>(6)</sup>

One way in which MMS might prevent crime is through incapacitation, or rendering a convicted person unable to commit further offences while incarcerated. However, the strategy involves the difficult task of predicting which individuals are likely to recommit serious or numerous offences. Current sentencing practice may already capture most of them, and overuse of MMS may unnecessarily lead to overcrowded prisons.<sup>(7)</sup>

Given the inherent difficulty in measuring the correlation between tougher sentences and the incidence of crime, studies on the effects of MMS are often difficult to interpret. For instance, uncontrolled variables or alternate explanations for a trend may play a role. At all times, the quality, methodology and limitations of a particular study or statistical analysis must be borne in mind when assessing the validity and relevance of its conclusions.

### **MMS IN THE UNITED STATES**

In the late 1980s, the United States enacted MMS for certain federal drug offences. Traffickers became subject to MMS of five or ten years, depending on the quantity and nature of the prohibited substance. However, drug-related crime in the United States has generally been unaffected. This is because MMS tend to be given to first-time, low-level drug dealers, who are easily replaced in the illicit market. High-level dealers are less likely to be caught and are more likely to avoid the MMS by providing information to police and prosecutors in order to convict others.<sup>(8)</sup>

There has been some evidence that MMS have been effective in the context of gun-related crime in the United States, although the results are mixed overall. For example, an evaluation published in 1992 found that mandatory additional imprisonment where particular offences are committed with a firearm deterred homicide, but not other violent crimes.<sup>(9)</sup>

### **INCIDENTAL EFFECTS OF MMS**

An MMS may not actually result in firm and consistent sentencing as intended, and may have incidental implications. The possibility of an MMS sometimes results in charges being stayed or withdrawn, or a plea negotiation for a different charge, because prosecutors consider the MMS to be too harsh. Accordingly, decisions regarding appropriate punishment are transferred from the judiciary to the prosecution.<sup>(10)</sup>

When there is an MMS, the accused has no incentive to plead guilty, more likely leading to a costly trial. Trials may also result in jury nullification, which is a jury's refusal to convict when the MMS is perceived to be unfair. Alternatively, to compensate for the MMS for a particular offence, a judge may impose a less severe sentence for accompanying charges.

A survey of Canadian judges found that slightly over half felt that MMS hindered their ability to impose a just sentence.<sup>(11)</sup>

Lengthier incarcerations due to MMS result in increased prison costs not necessarily offset by any reduction in crime rates and recidivism. There is also an opportunity cost, because fewer public funds are available for law enforcement and crime prevention initiatives. Finally, MMS might have an adverse effect on minority accused, who may be more likely to be charged with offences carrying MMS.<sup>(12)</sup>

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- (1) MMS exist for high treason (life imprisonment) and illegal betting (14 days for a second conviction; three months for a third or subsequent conviction).
  - (2) *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.1.
  - (3) *R. v. Smith*, [1987] 1 S.C.R. 1045.
  - (4) *R. v. Morrisey*, [2000] 2 S.C.R. 90.
  - (5) E. Scarff, *Evaluation of the Canadian Gun Control Legislation*, Solicitor General Canada, Ottawa, 1983.
  - (6) T. Gabor and N. Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures*, Department of Justice Canada, Ottawa, 2002, pp. 16-17, <http://canada.justice.gc.ca/en/ps/rs/rep/2002/rr2002-1a.pdf>.

- (7) *Ibid.*, pp. 9-10.
- (8) *Ibid.*, p. 17.
- (9) D. Parent *et al.*, *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*, U.S. Department of Justice, Washington, D.C., 1997, <http://www.ncjrs.gov/txtfiles/161839.txt>, citing D. McDowall *et al.*, "A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes," *Journal of Criminal Law and Criminology*, Vol. 83, No. 2, 1992, pp. 378-394.
- (10) C. Meredith *et al.*, *Research on the Application of Section 85 of the Criminal Code of Canada*, Department of Justice Canada, Ottawa, 1994, section 2.7, [http://www.cfc-ccaf.gc.ca/pol-leg/res-eval/publications/reports/1990-95/reports/sec85\\_rpt\\_e.asp](http://www.cfc-ccaf.gc.ca/pol-leg/res-eval/publications/reports/1990-95/reports/sec85_rpt_e.asp); United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Washington, D.C., 1991, pp. ii-iv.
- (11) J. Roberts, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*, Department of Justice Canada, Ottawa, 2005, p. 10, <http://canada.justice.gc.ca/en/ps/rs/rep/2005/rr05-10/rr05-10.pdf>, citing Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Ottawa, 1987.
- (12) American Bar Association, Justice Kennedy Commission, *Report to the House of Delegates*, Washington, D.C., 2004, pp. 24-26.