Mandatory Minimum Sentences for Sexual Offences in Canadian Criminal Law

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Introduction

In the past decade, Canadian criminal law has been altered by the introduction of numerous mandatory minimum sentences in the *Criminal Code*. While prior to this time mandatory sentences were relatively rare, especially for first offences and for offences prosecuted by summary conviction, today the *Criminal Code* contains over 80 minimum sentences among its approximately 450 offences.[2]

Most of the attention from scholars and courts has focused on the mandatory sentences applicable to drug and gun crimes, or on the mandatory life sentence for murder and the distorting effects that may produce with respect to criminal defences. Scholars have considered whether mandatory minimums sentences are unconstitutional, with attention to their particular impact on aboriginal and racialized offenders.[3] In the case of murder, scholars have also considered whether the mandatory life sentence leverages guilty pleas to manslaughter in cases where battered women kill their abusers.[4]

Beginning in 2005, a number of mandatory minimum penalties have also been attached to the sexual offences in the *Criminal Code*, especially where the victims are children or youth.[5] Many additional mandatory minimums were added or increased in 2012.[6] These offences have received little attention in the debates about mandatory minimums. The purpose of this research is to consider the scope and the efficacy of mandatory minimum sentences for sexual offences and to evaluate whether the current use of mandatory minimums should be abandoned, retained, or expanded to other sexual offences. This draft

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[2] Debra Parkes identifies 84 mandatory minimums after the 2012 passage of the *Safe Streets and Communities Act,* SC 2012, c 1. Debra Parkes "From Smith to Smickle: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 SCLR (2d) 149 at note 2.
[3] These include Christoper Sewrattan, "Apples, Oranges, and Steel: The Effect of Mandatory Minimum Sentences for Drug Offences on the Equality Rights of Aboriginal Peoples" (2013) 46 UBC L Rev 121; Johnathan Rudin, "There Must Be Some Kind of Way Out of Here: Aboriginal Over-Representation, Bill C-10, and the Charter of Rights" (2013) 17 Can. Crim. L. Rev. 349; Ryan Newell "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration"(2013) 51 Osgoode Hall L J 199.
[4] Isabel Grant. "Rethinking the Sentencing Regime for Murder" (2001) 39 Osgoode Hall Law Journal 655; Elizabeth Sheehy "Battered women and mandatory minimum sentences." (2001) 39 Osgoode Hall LJ 529.
[5] *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act,* SC 2005, c 32.
[6] See the *Safe Streets and Communities Act*, supra note 2.

paper, which should be read as a work in progress, reflects some of my initial thoughts on these questions.

An analysis of mandatory minimum sentences for sexual offences requires more than merely applying the critiques of mandatory minimums developed in other contexts. Sexual assault is a gendered crime that reflects and reinforces sex inequality. The long history of sex discrimination in society has been reflected in the substantive law of sexual offences, as well as in the application of those laws in the criminal trial process, and in the sentencing of offenders. The overrepresentation of Aboriginal and racialized persons among those convicted of criminal offences also needs to account for the fact that in the context of sexual offences, most crimes are intra-racial, meaning that there are disproportionate numbers of victims from these communities as well. It is important to consider whether this context affects the critiques of mandatory minimums or, to turn the question on its head, whether mandatory minimum sentences in some way advance the project of combating the inequalities of sexual assault law.

Applying Mandatory Minimum Sentences to Sexual Offences

a. Legislative history

Mandatory sentences are not entirely new to the Canadian criminal law of sexual offences. At the most extreme end, rape was for many years a capital crime in Canada, although it appears that such sentences were rarely, if ever, carried out. However, with the major reforms to sexual offences in the 1980s, Canada adopted a scheme of escalating maximum penalties based on the perceived seriousness of the offence, without any prescribed minimum punishment.[7] Thus sexual assault, an offence created in 1983, was split into three gradations based on the amount of additional force, weapons or injury accompanying the non-consensual sexual contact. Sexual assault had a maximum penalty of 10 years' imprisonment when prosecuted by indictment, and six months (later raised to 18 months) when prosecuted by summary conviction. Sexual assault causing bodily harm is a straight indictable offence with a maximum of 14 years' imprisonment, and aggravated sexual assault has a maximum penalty of life imprisonment.[8]

Sexual offences against children were modernized in 1988. Parliament created the new offences of sexual interference and invitation to sexual touching. The basic age of consent to sexual activity with an adult was set at 14 years of age, and then raised to 16 in 2008. In addition, the general sexual assault offences continued to be applicable to child victims. None of these offences had minimum penalties. In

[7] See e.g. *Criminal Code*, RSC 1970, c C-46, 246.1 as amended by *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequences thereof*, SC 1982, C-25, s 19.
[8] *Criminal Code,* RSC 1985, c C-46, s 271 & s. 272.

the 1990s and 2000s additional offences were created to address other forms of child sexual exploitation and abuse. In particular Parliament added offences relating to child pornography, internet luring, and the prostitution of young people.[9]

Minimum penalties for sexual offences against children first appeared in 2005. At this time the Liberal minority government introduced Bill C-2, whose primary purposes were to respond to the Supreme Court's decision on the child pornography offence in *R. v. Sharpe* and to make amendments to better address the needs of vulnerable witnesses.[10] The original version of the Bill did not contain mandatory minimum penalties, but at the committee stage Conservative opposition members lobbied hard for the inclusion of such provisions, with the explicit goal of precluding the use of conditional sentence orders (CSOs), a sentence of imprisonment served in the community rather than in jail. A CSO is not available where the offence has a mandatory penalty of imprisonment. As a result of this pressure, mandatory minimum sentences of imprisonment were added to 10 child sexual abuse offences.[11]

Conservative MPs expressed concern that the minimum penalties were too low, and would lead to judges reducing periods of incarceration that would previously have had attracted conditional sentences down to the new minimums.[12] Nonetheless, they decided to support the amended bill. When the Conservatives formed a minority government later in 2005, they passed legislation eliminating conditional sentences for most sexual offences (including against adult victims) when prosecuted by indictment.[13] This was done by declaring them to be serious personal injury offences ineligible for a CSO, rather than through the use of minimum terms of imprisonment. Nonetheless, the earlier amendments to Bill C-2 were referred to as a prior victory toward the goal of eliminating the availability of CSOs for violent crimes.[14]

The most recent suite of amendments to the sentences for sexual offences were passed in 2012 as part of the *Safe Streets and Communities Act*.[15] This legislation raised many of the existing mandatory minimum penalties to one year on indictment or 90 days on summary conviction. The legislation also added mandatory minimums to the general sexual assault offence where the victim is under 16. This was

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[9] *Criminal Code*, *ibid*, s163.1, 172.1, 212(2).
[10] Bill C-2, *An Act Amend the Criminal Code (Protection of Children and Other Vulnerable Individuals) and the Canada Evidence Act*, 1st Session, 38th Parl, 2005; *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45.
[11] Bill C-2 added mandatory minimums to the following offences: s 151 Sexual interference, s 152 Invitation to sexual touching, s 153 Sexual exploitation, s 163.1(3) Distribution of child pornography, s 163.1(4) Possession of child pornography, s 163.1(4.1) Accessing child pornography, s 170 Parent or guardian procuring sexual activity, s 171 Householder permitting sexual activity, s 212(2) Living on the avails of prostitution of person under eighteen, s 212(4) Prostitution of person under eighteen.
[12] House of Commons*, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness Evidence*, 38th Parl, 1st Sess, No 042 (2 June 2005) at 1015 (Vic Toews).
[13] *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, SC 2007, c 12.
[14] *House of Commons Debates*, 39th Parl, 1st Sess, No 28 (29 May 2006) at 1100 (Rob Moore, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada).
[15] *Supra*, note 6.

done to ensure that this offence was not being used to circumvent the penalties in the child-specific offences. Witnesses at Committee who supported the legislation noted that the mandatory minimum penalties for many sexual offences in the United States were considerably higher than those in Canada and argued that the penalties here should be raised.[16]

It is therefore clear that the primary purpose of the low mandatory minimums put in place in 2005 was to end the availability of the conditional sentence for this group of sexual offences against children. A CSO remained an available disposition for sexual assault of a child when prosecuted on summary conviction until the 2012 amendments, when that possibility was eliminated. The shift to lengthier minimum terms of imprisonment in 2012 (one year minimums on indictment for sexual interference, invitation to sexual touching, sexual exploitation and internet luring) can be understood as an attempt not merely to preclude the conditional sentence but to shift the floor and therefore the range of sentences substantially higher. An increase in penalties for an offence, whether by raising the maximum or the minimum sentence, should be understood as shifting the entire range of proportionate sentences.[17] Thus the fact that an accused might have received a sentence of 6 months' imprisonment prior to the imposition of a one year minimum does not on its own make that minimum excessive. Instead, it signals that similar cases should receive a higher sentence in future.

b. Application by courts

There is now a body of case law that has considered the sentencing of offenders for sexual offences governed by mandatory minimums. A review of some of the sentencing decisions for sexual interference and internet luring shows both the wide range of sentences considered appropriate by trial judges, and also the willingness of sentencing judges to impose very low sentences of actual incarceration for this offence in the face of mandatory minimums.

At the very low end of sentences, the 22 year old first offender in *R. v. Khan* was convicted of invitation to sexual touching in relation to a 13 year old victim. Khan was a skate guard who befriended the victim and her 11 year old friend during her visits to the rink. He began to exchange text messages with both girls, ultimately asking the 13 year old for a topless photo, sending her a picture of his penis, and telling her he wanted to have sex with her. Judge Bovard rejected the offender's s. 12 *Charter* challenge to the mandatory 14 day sentence of imprisonment for a summary conviction (since raised to 90 days).

[16] For e.g. House of Commons, *Standing Committee on Justice and Human Rights Evidence,* 40th Parl, 3rd Sess, No 044 (31 Jan 2011) at 1550 (Brian Rushfeldt, President, Canada Family Action Coalition).
[17] See *R v Ferguson*, 2006 ABCA 261 at paras 71-72, 397 AR 1, affirmed 2008 SCC 6, [2008] 1 SCR 96; *R v Rhyason,* 2007 ABCA 119 at para 17, (2007), 404 AR 191 (ABCA), affirmed, 2007 SCC 39, [2007] 3 SCR 108; *R v Hammond,* 2009 ABCA 415 at para 8, (2009), 469 AR 317; *R v Hall*, 2013 ABQB 418 at para 56, [2013] AWLD 5198.

Although the judge noted that the offender was in a position of trust, did not stop the conduct on his own, actually targeted both girls, was in denial and not truly remorseful, Khan was nonetheless sentenced to the statutory minimum penalty plus 12 months' probation.

A short sentence was also imposed in *R. v. Careen,* where the offender was a 52 year old high school teacher who sent a series of sexually charged text messages to a grade 12 student which culminated in requests for sexual contact with the student.[18] The student showed the messages to the offender's wife, who was also a teacher at the school. She deleted some of them but did not disclose the conversations to the school authorities. The complainant was the subject of gossip for several months around the school after a friend breached her confidence about the messages. She finally went to police to avoid being considered a liar. The offender was found guilty of sexual exploitation of a young person contrary to s. 153(1)(b). That offence now carries a minimum penalty of 90 days on summary conviction and one year on indictment. At the time the offence was committed in 2009, the minimum penalty was 45 days on indictment. Justice Schultes rejected the Crown's request for a sentence of 9 to 12 months, sentencing the accused instead to 60 days served intermittently. In his view, specific deterrence had been served by the conviction itself and the accused's current (non-teaching) employment should not be jeopardized.

Another case involving a teacher and student is *R. v. Hall*.[19] There the 62 year old teacher took a 14 year old girl with autism to a locked fitness room and on two occasions did sit ups with her sitting on his crotch. He denied any sexual intent and said that his actions fell into a "grey area." He was convicted of sexual exploitation of a person with a disability (an offence that carries no mandatory minimum penalty) and sexual interference (at a time when the minimum sentence was 45 days). Justice Acton sentenced the offender to 3 months' imprisonment and 2 years' probation.

Other courts have sentenced accused to short terms of actual imprisonment for repeated sexual abuse of minors, including unprotected sexual intercourse. In *R. v. Ivey*, the accused began having sex with the complainant when she was 14 and he was 19.[20] It was accepted that the accused was unaware of her age when the sexual activity began, but that he continued to have sex with her after learning of her age. The complainant became pregnant and terminated the pregnancy. The accused had a troubled past and a lengthy record. The Crown proceeded by indictment. Justice Burrage noted the applicable mandatory minimum of 45 days (since raised to one year), and sentenced the accused to 6 months' imprisonment in light of his youth, his record and the need to denounce and deter such conduct. A similar sentence was imposed in *R. v. M.(W.R.)*.[21] There the accused was 29 years old and the victim 14. The accused had an extensive criminal record. He was living with the victim's family when the sexual activity commenced

[18] *R v Careen,* 2012 BCC 918, 101 WCB (2d) 485.
[19] *R v Hall*, 2013 ABQB 418, 109 WCB (2d) 423.
[20] *R v Ivey*, 2013 NLTD(G) 79, 106 WCB (2d) 462.
[21] *R v M(WR)*, 2013 NSSC 392, 110 WCB (2d) 615.

and the girl's family approved of the relationship. At the time of sentencing she was 17, pregnant with his child and the two planned to continue their relationship. The Crown asked for 2 years' imprisonment. Justice McDougall sentenced the accused to five months' imprisonment, followed by probation.

In *R. v. B.(D.)*, the offender was 40 years of age and the victim 14.[22] The victim was a friend of the offender's daughter. The sexual activity included sexual intercourse on one occasion but also the use of objects including a ball gag. The offender pressured the complainant to continue the activities, at one point threatening suicide if she did not respond. The offender was Aboriginal, had no criminal record, and had a difficult childhood. Justice George sentenced the offender to 8 months' imprisonment, noting that the Aboriginal status of the accused should affect the quantum of the sentence in the accused's favour. Ironically, despite this recognition, the sentence imposed was actually longer than in *Ivey* and *M.(W.R.),* even though the offenders in those cases had long criminal records. Justice George did not indicate whether the victim was an Aboriginal girl.

These cases can be contrasted with *R. v. Craig*, where the victim was 13 and the offender 22.[23] They met online and later met in person. During their second meeting, they had sexual intercourse in some bushes. For the purpose of sentencing, the court proceeded on the footing that the offender believed the victim to be at least 16 but failed to take steps to ascertain her age. He was sentenced to 15 months' imprisonment in the face of a 45 day mandatory minimum, with the sentencing judge emphasizing the need for denunciation and deterrence and stating that a custodial sentence substantially longer than the minimum was warranted.

A Sex Equality Analysis of Mandatory Minimums

a. Criticisms of mandatory minimum sentences

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

Second, it is argued that where the application of the minimum depends to some extent on prosecutorial discretion, even a fair and thoughtful application of that discretion may be insufficient to prevent injustice. In the case of hybrid offences, this may occur where the prosecution decides to proceed by indictment

[22] *R v B(D)*, 2013 ONCJ 389, 108 WCB (2d) 167.
[23] *R v Craig*, 2013 BCSC 2098, [2013] BCJ No 2518.

because the limitation period for a summary conviction procedure has elapsed. In the alternative, the available evidence may suggest that the offence is sufficiently serious to be treated as an indictable offence but the facts ultimately proven at trial may result in a far less serious finding of culpability against the accused.

Third, it is argued that mandatory sentences of imprisonment may work particular injustices for Aboriginal accused who are disqualified from a non-custodial sentence. This is contrary to the direction in s. 718.2(e) of the *Criminal Code* that particular consideration be given to the circumstances of Aboriginal offenders when seeking alternatives to incarceration. In addition, it may result in a particularly harsh sentence where the accused has an intellectual disability, but does not meet the criteria for being considered not criminally responsible by reason of mental disorder. This may arise where the accused has a brain injury or a diagnosis of fetal alcohol spectrum disorder, for example.

These criticisms have a constitutional dimension. The first criticism essentially triggers a s. 12 analysis based either on the facts before the court, or on reasonable hypothetical cases. In the either case, it is argued that it would lead to grossly disproportionate punishment if the minimum penalty were to be imposed, thus violating the right to be free from cruel and unusual punishment. The second criticism can be framed as a s.9 arbitrariness claim, based on the argument that there is nothing to prevent two offences of identical gravity being subject to different sentences if one is prosecuted by indictment and the other on summary conviction. The final criticism amounts to an allegation that the equality rights guaranteed by s. 15(1) have been violated and that the unavailability of non-custodial dispositions, or sentences less than the minimum, has the effect of discriminating on the basis of race or mental disability.

Each of these criticisms has potential application in the context of sexual offences. The first general criticism of constrained discretion is significant because many sexual offences have been drafted to cover a wide range of conduct and circumstances. Thus sexual assault of a child under 16, which carries a 1 year minimum when prosecuted by indictment, can encompass conduct ranging from penetration of various orifices with a penis or with objects, to oral sexual contact, to sexual touching of the genitals, to hugging, kissing, or rubbing parts of a child's body over clothing. If the reasonable observer would conclude that the conduct violated the sexual integrity of the child, this is sufficient to make out the *actus reus* of the offence.

This variety may be combined with the limitation problem discussed above. If a 15 year old girl waits 8 months before reporting that her teacher sent her text messages inviting her to engage in a sexual act with him, as in *Careen*, the Crown must either prosecute by indictment, triggering a mandatory 12 month sentence for internet luring, or decline to prosecute at all.

In addition, the wider definitional ambit of sexual assault may also lead to cases where the facts proven are quite different than those alleged, but nonetheless prove the elements of the offence. For example, in *R. v. Duke*,[24] the complainant was a 16 year old girl who was camping with some family friends. They encountered the accused, a prior acquaintance, at a neighbouring campsite. The accused, who was 42 years old, took the victim for a ride on his all-terrain vehicle. She alleged that he repeatedly kissed her and touched her sexually. The trial judge was prepared to find only that a single brief kiss took place, which the accused admitted. He considered the complainant to be an unreliable witness. If this case had taken place today, and the complainant had been a year younger, the accused would have been subject to a mandatory minimum sentence of 90 days on summary conviction, or a year on indictment.

There have been a few cases in which constitutional arguments have been considered in relation to mandatory sentences for sexual offences. A s. 12 claim was recently considered in the context of internet luring in *R. v. Stapley*.[25] There the accused pled guilty to child luring. The Crown proceeded summarily and the accused was thus subject to a minimum sentence of 90 days' imprisonment, which he argued was grossly disproportionate. The defence asked for a term of probation. The conviction arose from facebook messages sent by the 20 year old offender to a 16 year old boy. These messages encouraged the teenaged victim to send him sexual photographs and engage in sexual acts. He was promised various rewards for doing so, and was told that another man, Craig Lajoie, would also pay him for sex. The victim repeatedly rejected the invitations and made clear they were unwanted, but Stapley persisted. The two had met through an informal road hockey league organized by the offender. As part of his statement to police, Stapley disclosed that he had been sexually abused by Lajoie as a youth. Stapley was described as having low intelligence. He had never been employed and lived with his parents.

Justice Griffin considered both whether the minimum penalty was grossly disproportionate as applied to Stapley and also to reasonable hypothetical cases. He noted that the offence was serious but did not involve actual physical harm. The offender was himself a victim of sexual assault, was of below average intelligence, and had good family support. He entered a guilty plea. The offender and the victim were close in age and it might well have come to nothing if Stapley had not persisted when told his messages were unwanted. However, the actual minimum would require serving only 60 days when earned remission was credited. The sentence could be served intermittently. Even if it had been available, a conditional sentence was not sufficient to denounce this kind of conduct where the offender "essentially lives his life as if he is serving a conditional sentence."[26] Without the minimum penalty, Justice Griffin would have imposed a sentence of 14 to 21 days. Ninety days was excessive, but not so excessive as to outrage standards of decency.

[24] 2012 SKPC 138 (CanLII).
[25] *R v Stapley,* 2014 ONCJ 184, [2014] OJ No 1887.
[26] *Ibid* at para 45.

Neither the Crown nor the defence posited a reasonable hypothetical, but Justice Griffin suggested the following: "A 19 year old male, by way of a smartphone, communicates with a female he knows to be 16 and a half years of age at his high school. He requests her to send a picture of her breasts to him. […] The 16 and a half year old female, rather than send the picture of her breasts, unlike some of her friends who have done that, goes to her mother who in turn attends at the police station."[27] He noted that there was a growing concern over the inappropriate use of smartphones by young people, and that schools were trying to deal with how to encourage "digital citizenship" and discourage bad choices, in the face of the willingness of some teenagers to share such photos. He noted that a similar request made face to face on the facts he described would not be a criminal offence. Justice Griffin described himself as "struggling" with this example, especially as it was of his own making and counsel had not made submissions on it. As such, he declined to find a s. 12 violation but hoped that "this halting decision could and should be reviewed by a higher court."[28]

A s. 9 claim was advanced in the older case of *R. v. Lonegren.*[29] There the 51 year old accused was convicted of sexual interference for touching the back and buttocks of a nine year old girl while she slept over at his girlfriend's home. The Crown proceeded by indictment. The minimum sentence at that time was 45 days, while on summary conviction it would have been 14 days. Lonegren argued that the section violated s. 12 as applied to his particular circumstances, an argument that Justice Barrow rejected. On the question of s. 9, Crown discretion with respect to hybrid offences was a core Crown function not in and of itself unconstitutional or contrary to the principles of fundamental justice. Nonetheless, the some of the reasons that might affect the decision to proceed by indictment revealed the arbitrariness of the scheme. Justice Barrow gave the example of a case where the sole reasons for proceeding by indictment was that the limitation period had been passed, or where the facts proven were substantially less serious than those alleged. Thus the minimum sentence accompanying an indictable proceeding could be applied for reasons unrelated to any sentencing regime and was therefore a violation of s. 9.

However, in a later set of reasons, Justice Barrow found the s. 9 violation to be saved by s. 1.[30] The fact of imprisonment was not itself arbitrary. Imposing greater sentences for offences that are generally more serious was rationally connected to the objective of deterring child sexual abuse. The group of offenders affected by the violation would be small, and the additional jail time was only 30 days. The minimal impairment test required that the means chosen fall within a range of reasonable alternatives, not perfection.

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[27] *Ibid* at para 58.
[28] *Ibid* at para 72.
[29] *R v Lonegren*, 2009 BCSC 1678, 250 CCC (3d) 377.
[30] *R v Lonegren*, 2010 BCSC 960, 225 CRR (2d) 102.

Finally, a s. 15(1) challenge was brought to the minimum sentence for sexual interference in *R. v. T.M.B.*[31] In that case the accused was convicted summarily of sexually touching his five year old granddaughter. He argued that the inability to impose a non-custodial sentence discriminated against him as an Aboriginal offender. On appeal, Justice Code rejected this challenge. It was now well accepted both that Aboriginal people are overrepresented in the prison system and also that child sexual abuse is a serious problem that causes great harms. The evidence on the efficacy of incarceration for child sex offenders, including those of Aboriginal heritage was divided. Despite dismissing the constitutional challenge, he allowed the accused's appeal from the 8 month sentence imposed at trial and substituted the minimum sentence of 90 days.

A s. 15(1) challenge to the three-year mandatory minimum sentence for a firearms offence was successful on the ground of mental disability in *R. v. Adamo*.[32] The accused was suffering from the effects of a brain injury and had received no ongoing treatment or support. Justice Suche held that removing the inability to adequately factor mental disability into the sentencing decision was a violation of s. 15(1) that was not saved by s. 1, as well as a violation of sections 7 and 12 of the *Charter.* One could expect similar arguments to be advanced on behalf of an accused person with an intellectual disability in the context of sexual offences, especially with the increase in the mandatory minimum on indictment to 1 year.

However, in *R. v. Anderson*, an impaired driving case, the Supreme Court of Canada recently rejected an argument that consideration of the Aboriginal status of the accused was a principal of fundamental justice such that the Crown was required to do so before giving notice of its intention to seek an enhanced minimum sentence on the basis of prior convictions.[33] This makes clear that s. 15(1) and not s. 7 is the proper forum for such challenges, but may also suggest that the problem of Aboriginal over-incarceration will not on its own be sufficient to prevent the use of mandatory sentences of imprisonment.

b. *Criticisms of sentencing trends in child sex offences*

The concerns about the use of mandatory sentences of imprisonment must be placed in the broader context of sentencing for sexual offences. Regardless of the sentencing range available to the court, myths and stereotypes about sexual assault can find their way into the sentencing process and lead to some aggravating factors being ignored or downplayed, while other factors improperly identified as mitigating. Many of these concerns are evident in the cases surveyed above. We continue to see cases where courts fail to recognize grooming behaviour, place weight on the fact that child victims "consent"

[31] *R v TMB*, 2013 ONSC 4019, 108 WCB (2d) 205.
[32] *R v Adamo*, 2013 MBQB 225, [2013] MJ No 302.
[33] *R v Anderson*, 2014 SCC 41, [2014] SCJ No 41.

and assume that the harm is lessened, as well as decisions that place too much weight on loss of class status by offenders who are teachers or who hold other professional positions of trust.

The internet luring/invitation to sexual touching cases fail to recognize behaviours that amount to attempts at grooming. In *Khan*, the offender was given a very low sentence despite his position of trust, his grooming behaviour, the very young age of the victim, and his lack of insight or remorse.[34] His admission that he targeted the victim because she seemed loose, and that he was really more interested in her 11-year-old friend, should have raised serious concerns. Similarly, in *Careen*, the fact that the student had the courage to complain to the teacher's wife, herself another teacher, and she covered up her husband's misconduct for an extended period of time with his knowledge, turning the school community against the victim, should be considered highly aggravating.[35] The fact that the offender lost his teaching position should not significantly discount his sentence since it was the position of trust that the teaching position afforded him that allowed him to commit the offence in the first place. In *Stapley*, the offender was certainly a young man who faced challenges and some leniency was called for.[36] But the court failed to recognize the way in which Stapley was procuring the victim for prostitution and seemed to be recruiting teenage boys through the ball hockey league for himself and for his own abuser. While the courts in each of these cases were prepared to label the offences as "serious" in the abstract, they did not identify the full harm or the broader context for such behaviours on the facts before them.

Perhaps most disturbing are the reasons for sentence in *M.(W.R.)*[37] and *Hall*.[38] In *M.(W.R.)* the court seems to treat the victim's parents' approval of the offender's conduct, the resulting pregnancy, and the continued sexual activity as mitigating factors. That the victim's parents would invite a violent man into their home to "date" both of their daughters in sequence, and do nothing to stop the abuse of a 14 year old girl at the hands of a 29 year old man, is not a mitigating factor. It simply underscores the victim's vulnerability in that she has no one to protect her from the abuse, which will continue now that she has to mother his child as a teenager. The sentence in this case should have been significantly higher. In *Hall*, the victim was taken to a locked room by the abuser, who targeted her because of her disability and tried to cover up what he was doing under the guise of normal activities. His attempt to spin what happened as being in a "grey area" should raise real concerns about the potential for recidivism. It is not part of a student's learning day to help their teachers "exercise".

The effects of substituting short sentences of imprisonment for conditional sentences also deserve scrutiny. The appropriate method for considering whether to impose a conditional sentence is first to fix

[34] *R v Khan*, 2013 ONCJ 267, 106 WCB (2d) 560.
[35] *Supra*, note 19.
[36] *Supra*, note 25.
[37] *Supra*, note 22.
[38] *Supra*, note 20.

the appropriate period of imprisonment for the accused, and then to consider whether the accused should serve that sentence in the community, typically under curfew or house arrest. The removal of the conditional sentence through notional minimums of 15 or 45 days' imprisonment should mean that the accused serves the same sentence as when CSOs were available, only now in actual jail. However, it appears that instead, there is a trend to substitute very short sentences of imprisonment at or near the mandatory minimum for longer conditional sentences. Put another way, it is almost impossible to find offenders sentenced to 45 days of imprisonment (in jail or in the community) prior to the imposition of mandatory minimums. [39] What seems to have happened in at least some cases is a switch of longer conditional sentences for shorter sentences of imprisonment, often served intermittently.

This seems to have been the case in *Stapley*, where the offender was sentenced to the minimum term plus probation for internet luring. The sentencing judge noted that the offender had disclosed that he had also been the victim of abuse when he was younger. As a result of this disclosure, Stapley's abuser, Lajoie, was arrested and convicted. Despite the fact that Lajoie had actually touched Stapley, and seemed to be using him to procure future victims, he received a CSO because the offence took place before the mandatory minimums.[40]

For another example, one can contrast the decisions in *R. v. Dick*[41] and *R. v. Merkuratsuk*,[42] each of which involved an intoxicated Aboriginal first offender who sexually assaulted a teenage victim. In *Dick*, the offender was 27 and the complainant 16. They had been drinking with others and later went to sleep on separate sofas. She awoke to find Dick having sexual intercourse with her. There was no mandatory minimum sentence since the victim was 16, and a conditional sentence order was available because the Crown proceeded summarily. Dick was sentenced to a 16 month conditional sentence followed by probation. The CSO included a curfew, a no-contact order, community service and counselling among its conditions. In *Merkuratsuk*, the offender was a 40 year old woman who had sexual intercourse with a 14 year old boy. She pled guilty to sexual interference. The offence took place in 2009, at a time when the minimum penalty on indictment was 45 days. In sentencing the offender to the minimum sentence, followed by 30 months of probation, Justice Stack stated:

> The circumstances of the offender and the needs of the community in which the offence occurred require consideration as well. This offence arises directly from Ms. Merkuratsuk's abuse of alcohol and a lifetime of despair and hopelessness. Ms. Merkuratsuk, as an Inuk woman, should be subject only to the minimum period of incarceration that is sufficient to deter her specifically

[39] For an exception, see *R v L(C)*, 2013 ONSC 277, [2013] No 114 where the accused successfully appealed his six-month sentence for sexual interference against his teenaged neighbor. The appeal court substituted a sentence of 90 days (which would have been the minimum penalty after the 2012 amendments.)
[40] *Supra*, note 25 at para 8.
[41] *R v Dick*, 2013 YKTC 107, 111 WCB (2d) 881.
[42] *R v Merkuratsuk*, 2012 NLTD(G) 11, 99 WCB (2d) 648.

> and the public generally. Thus, recognizing that the statutory minimum is at the very low end of the range of sentencing for an offence such as this, it is more than is required for the former and is at least sufficient for the latter. Had a longer period of house arrest been available as a sentencing alternative, I would have considered it. Both the needs of the community and [the offender] would likely have been appropriately dealt with by a period of incarceration served by the offender in her own home. This would have allowed her to avail of treatments and programs that may address the underlying causes of her crime. Similar goals can be achieved through a short period of incarceration followed by supervised probation.[43]

It is worth asking whether this is a trend that benefits those who are victimized by sexual assault. This is not a simple question. The overuse of conditional sentences for sexual offences can be justly criticized. So can the practice of imposing only minimal conditions that allow the accused to do almost anything short of going out for a night on the town or a week's vacation in Cuba. Conditional sentences are supposed to be sentences of imprisonment, with conditions that are significantly restrictive of the offender's liberty.[44] The blurring of conditional sentences with terms of probation undermined public confidence in the conditional sentence and fueled opposition to their use.

Supporters of conditional sentences argue that even if their terms are not different, the consequences for breach are. Breaching probation is a separate summary conviction offence, while breaching a CSO means that the offender will be sent to jail to serve the balance of the sentence. However, the lack of monitoring and enforcement of CSOs made this difference more theoretical than real. When trial judges say that similar goals can be achieved by short incarceration and lengthy terms of probation, they reinforce this similarity. A CSO with serious restrictions on liberty that are enforced, or a meaningful term of actual imprisonment, depending on the facts, seem like preferable alternatives from the perspective of victims. This is especially true when intermittent sentences are imposed, since many correctional facilities do not have the capacity to house weekend inmates and the offender may do nothing more than sign in and sign out again, having served 24 hours or less of the three-day weekend.

The question of Aboriginal over-incarceration should also be viewed somewhat differently in the context of sexual offences. In most cases where an Aboriginal accused faces a mandatory jail sentence for a child sexual offence, the victim of that offence will have been an Aboriginal child. Yet the sentencing judges in the cases reviewed for this paper never identified whether the victim was also Aboriginal. There was no opportunity to consider the serious problem of the sexual victimization of Aboriginal children and the ways in which their potential and ability to overcome the legacies of colonialism in their communities are being impeded by this abuse.

Thus any critique of mandatory minimum sentences in the context of sexual offences needs to account for where these sentences came from – frustration at the overuse of conditional sentences, and the

[43] *Ibid* at para 28.
[44] See R v Proulx, 2005 SCC 5 at paras 28, 36,182 DLR (4th).

watering down of their terms until they became indistinguishable from probation. Supporters and opponents of mandatory minimums need to acknowledge that very short mandatory minimums result in the substitution of CSOs for largely meaningless short intermittent jail terms. This inevitably leads to pressure to raise the minimum penalties, which is exactly what happened in 2012. Yet the wide range of circumstances captured by these offences, and their hybrid nature, make higher minimum penalties particularly vulnerable to constitutional challenges. None of this will be resolved without confronting the ongoing failure to see the full harms of sexual crimes.