MANDATORY MINIMUM SENTENCES:
HANDCUFFING THE PRISONER OR THE JUDGE?

....THE CANADIAN EXPERIENCE SO FAR...

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Learning Objectives

- What is the sentencing framework in Canada?
- What is the status of Mandatory Minimum Sentences (“MMS”) in Canada?
- What is the rationale for recent MMS amendments?
- What are the mandatory minimums?
- What is the impact of mandatory minimums on sentencing?
- Can the Charter offer relief from MMS?
- Other legislative amendments akin to MMS
- What is in store for the future?
First....

- Meet Leroy Smickle......
- Charged with possession of a loaded firearm
- What is a fit and appropriate sentence for him?
Canadian Sentencing Framework

- **Criminal Code**
- Applies to sentencing of all adult offenders
- Current framework enacted 1995
- Fundamental purpose and objectives of sentencing:

  S. 718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

  (a) to denounce unlawful conduct;
  (b) to deter the offender and other persons from committing offences;
  (c) to separate offenders from society, where necessary;
  (d) to assist in rehabilitating offenders;
  (e) to provide reparations for harm done to victims or to the community; and
  (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (principle of proportionality).

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (principle of parity);
(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (principle of totality);
(d) an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and
(e) 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.
Sentencing under s. 718 requires:

- Individualized decision making
- All sentences to be based on evidence about the offence, the offender and his/her community
- Judicial discretion
- A resulting sentence that is proportionate and satisfies the purpose, principles and objectives of sentencing
MMS prior to 2012

- MMS in *Criminal Code* since 1892
- In 1892, six offences with MMS
- Since then, MMS added to address serious societal issues
The “new” MMS regime – 2012

- Safe Streets and Communities Act
- Part of omnibus Bill
- Enacted 2012
- Introduced many new MMS by amendments to the Criminal Code and the Controlled Drugs and Substances Act
- Now well over 50 offences for which there are MMS
What did the Safe Streets and Communities Act do?

- Made at least five significant changes to sentencing:
  1. Established many new MMS
  2. Increased certain existing MMS
  3. Increased some maximum sentences
  4. Created some new offences
  5. Restricted availability of Conditional Sentence Orders
Why were these changes made?

- Response to the Federal Government’s June 2011 Speech from the Throne promising to “move quickly to re-introduce comprehensive laws and order legislation to combat crime and terrorism”.

- Followed public outrage over rashes of gun violence, high profile cases of sexual offences against children, and proliferation of drug offences.
Which types of offences have mandatory minimums?

The main types of offences that have mandatory minimums are:

- sexual offences
- child pornography offences
- firearms/weapons offences
- serious property offences
- impaired driving
- the most serious bodily harm offences
- certain drug offences – trafficking; possession for the purpose of trafficking; production
Application of MMS

Dependent on:

- Type of offence committed
- Whether offence is prosecuted by indictment or summarily
- Whether it is a first, second or subsequent conviction for a particular offence
- For sexual offences, age of the victim
- For drug offences, type of drug, amount of drug, aggravating factors
Arguments in favour of MMS

- Act as specific deterrent
- Prevent crime by separating offenders from society
- Act as general deterrent by showing societal disapproval
- Reduce disparity in sentences given to offenders for the same offences across Canada
- Meet the public’s expectation and desire that offenders be held accountable by being imprisoned
Arguments against MMS

- Do not really deter
- Limit judicial discretion
- Lead to sentences that are not proportionate
- Give significant discretion to the prosecution
- May result in wrongful convictions
- Increase prison populations
- Increase use of court resources and costs
Impact of MMS on sentencing

- Judiciary must respect Parliament’s authority to enact legislation dealing with crime prevention

- BUT......

- MMS arguably inconsistent with other legislative requirements
How are MMS inconsistent with other legislative sentencing requirements?

Arguably inconsistent with the fundamental principle of sentencing in s. 718.1 CC (proportionality):

- No exceptions to MMS
- Lack of judicial discretion
- Evidence may suggest sentence less than MMS
How are MMS inconsistent with other legislative sentencing requirements?

Imprisonment will become the primary sentencing option for offenders:

- Seems contrary to *Criminal Code* provisions that require consideration of non-custodial alternatives if appropriate
- Contrary to jurisprudence favouring rehabilitation and restorative sentencing
How are MMS inconsistent with other legislative sentencing requirements?

- MMS permits no differential sentencing on the basis of offender’s aboriginal status, as required by:
  - s. 718.2(e) *Criminal Code*;
  - *R. v Gladue*, [1999] 1 SCR 688; and

- Note: *R. v. Johnson*, 2013 ONCA held MMS applies to all cases, including those where s. 718.2(e) CC applies.
So...what is a judge to do?

- Judge must use MMS as starting point, and then impose sentence consistent with purpose, principles and objectives of sentencing

- …unless the judge finds the MMS unconstitutional
Can the *Charter* provide relief?

The constitutionality of MMS has been challenged under s. 12 of the *Canadian Charter of Rights and Freedoms* (right not to be subjected to cruel and unusual treatment or punishment).

- Test is gross disproportionality – as to offender or in reasonable hypothetical
- In the view of a community fully informed about philosophy, principles and purposes of sentencing in the *Code*, the *Charter* rights and the circumstances of the particular case before the court
- Test is stringent
- Grossly disproportionate means more than excessive
Challenges mainly to firearms MMS:

- 2008 – Supreme Court of Canada upheld MMS for manslaughter with firearm (R v. Ferguson, 2008 SCC 6) - no violation of s. 12 in the particular case or as to the hypotheticals put forward.
- 2010 – BCCA upheld constitutionality of one year consecutive sentence for use of firearm during commission of an offence (R v Stewart, 2010 BCCA 153)
- 2013 – Ont. CA upheld one year MMS for use of firearm (R. v. Meszaros, 2013 ONCA 682)
What happened to Leroy Smickle?

- Heard in the Ontario Court of Appeal with 5 other firearms cases
- Decision released on November 12, 2013
- 3 year MMS for possession of a loaded, prohibited/restricted firearm as first offence under s. 95(2)(a)(i) *Criminal Code* struck down as being contrary to s. 12 *Charter*. 
What happened to Leroy Smickle?

- The MMS were not grossly disproportionate when applied to the particular cases but met that test when applied to a reasonable hypothetical.

- Application for leave to SCC has been filed in two of the cases – one the same as *Smickle (R v Nur)* and *R v. Charles* (where 5 year MMS struck down for a second and subsequent offender).
What about multiple MMS?

- How is the court to apply multiple MMS when taking into the principle of totality?
- A good question!
What about multiple MMS?

- **R. v. C.G.J.L, 2013 ABCA 140**
  - At trial, concurrent sentences imposed for offences related to child pornography and sexual touching
  - On appeal, sentence increased on basis total sentence was significantly lower than the accumulation of minimum sentences Parliament contemplated.

- **R. v. Borecky, 2013 BCCA 163**
  - At trial, concurrent MMS for drug and firearm offences
  - BCCA said s. 85(4) does not require consecutive sentences for all offences involving drugs and firearms.
Conflicts between MMS and sentencing principles often arise in drug cases

- Non-custodial sentences were often deemed appropriate for certain offences, based on circumstances of offenders.
- Now, MMS precludes non-custodial sentences in most cases.
- Example:
  - 25 year old university student, no record, in university, aboriginal.
  - Pleads guilty to production of marijuana for the purpose of trafficking; committed offence to pay for school; grow operation in basement of friend’s house where she is house sitting; 11 plants found.
  - What would you do?
Defence position: a conditional discharge or, at most, a suspended sentence with probation.

Crown position: MMS is 9 months imprisonment (6 months based on the number of plants s. 7(2)(b) CDSA; plus 3 months for the use of real property of another –which is an aggravating factor s. 7(3)(a) CDSA).
Other legislative changes limiting judicial discretion on sentencing ("MMS-like")

- Reducing the availability of Conditional Sentence Orders (part of Safe Streets and Communities Act)
- Restricting credit for pre-sentence custody (Truth in Sentencing Act)
- Removing discretion to excuse offender from paying victim surcharge (Increasing Offenders’ Accountability for Victims Act)
Limiting use of conditional sentence orders

- CSO introduced in 2000 as alternative to imprisonment
- “House arrest” with conditions
- Used to be available for virtually any offence as long as no minimum sentence, fit sentence was less than 2 years, offender posed no risk, and sentencing objectives could be met
- Availability substantially eroded by various amendments
- Charter challenges to eliminating CSO scheme not successful to date (R. v. Perry, 2013 QCCA 212; leave to appeal to SCC refused)
- CSOs for drug offences now limited (by adding MMS, many offences no longer eligible for CSO)
Restricting credit for pre-sentence custody

- Ss. 719 and 524 *Criminal Code*
- No more 2:1
- Limited to 1:1; unless “circumstances justify it” in which case limited to 1.5:1 (*R. v. Summers*, 2014 SCC 26)
- No eligibility for enhanced credit if denied bail based on criminal record or bail revoked and denied (much litigation on interpretation, and *Charter* challenges; cases go both ways; appeals pending but no appellate authority yet)
Mandatory payment of victim surcharge

- No discretion to waive where payment would cause offender undue hardship
- Sentencing judge must impose surcharge “in addition to any other punishment imposed on the offender”
- Amount is 30% of fine or, if no fine, $100 for summary conviction offence and $200 for indictable offence
- Some judges using creative ways, including Charter, to avoid impact (R. v. Cloud 2014 QCCQ – on appeal)
What is in store for the future?

- Different opinions
- Likely both prisoner and judge will be “handcuffed” by MMS legislation
What can Canadian judges learn from the U.S. experience with MMS?

- We are about to find out!