

Reconsidering *Luxton* in the Post-*Nur* Revolution: A Brief Qualitative and Quantitative Analysis of Recent Challenges to Mandatory Minimums and Other Sentencing Provisions

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ABSTRACT

In the 1990 decision of *R v Luxton*, the Supreme Court of Canada (SCC) upheld the mandatory minimum for first-degree murder as constitutional in large part because of the existence of the Faint Hope Clause Regime, which was abolished in 2011. Since then, Parliament has also codified proportionality as the fundamental principle of sentencing. Similarly, the SCC has rendered the *Gladue* line of cases. These changes suggest that the reasons for upholding *Luxton* may no longer be as valid now as they were back then. Recognizing that legal argument is as much a sociological phenomenon as it is about the law, the thesis of this article is that it is only recently that challenges to mandatory minimums have gained sufficient momentum to give a challenge to *Luxton* a fighting chance. *Nur* sent a strong signal to lower courts that unjustified constraints on their ability to impose proportionate sentences would no longer be tolerated. To quantitatively and qualitatively test this theory, the inventory of cases from

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MMS.watch will be analyzed to show that *Nur* sparked a revolution that has not only seen an increase in the number of challenges brought against mandatory minimums, but an increase in their success rate and reach. Then, using three key 2020 decisions from three different Appellate Courts, recent trends in judicial thinking that demonstrate both a boldness that is finally ready to take on *Luxton*, as well as support for some of the reasons for overturning *Luxton*, will be highlighted.

Keywords: Mandatory Minimum; First-Degree Murder; Faint Hope Clause; *Luxton*; *Nur*; *Hilbach*; *Sharma*; *Bissonnette*; MMS.watch; Statistics

I. INTRODUCTION

Since 2011, one of the key reasons for upholding the constitutionality of the mandatory minimum for first-degree murder in the 1990 decision of *R v Luxton*,¹ the Faint Hope Clause Regime,² has ceased to exist. Additionally, several other changes to the *Criminal Code of Canada*³ and developments in the common law have given rise to further compelling reasons to re-consider *Luxton*. Despite these changes suggesting that *Luxton* may no longer be good law, no such challenge to the Supreme Court of Canada's ruling has yet been launched.

Recognizing that legal argument is as much a sociological phenomenon as it is about the law, the thesis of this article is that it is only recently, in what the writer calls the post-*Nur*⁴ revolution, that challenges to mandatory minimums have gained sufficient momentum to actually give a challenge to *Luxton* a fighting chance. While on its face the decision in *Nur* appeared to be a small and incremental development of the common law (and it was), *Nur* sent a strong signal to lower court judges that unjustified constraints on their ability to impose proportionate sentences would no longer be tolerated. This judicial head nod from the Supreme Court has since sparked a revolution that has not only seen an increase in the number of challenges

¹ [1990] 2 SCR 711 [*Luxton*].

² In this paper, "Faint Hope Clause Regime" refers to ss. 745.6 through 745.64 of the *Criminal Code*, which allow for an offender to bring an application for a reduction in the period of parole ineligibility after serving 15 years of his or her sentence.

³ RSC 1985, c C46 [*Criminal Code*].

⁴ *R v Nur*, 2015 SCC 15 [*Nur*].

brought against mandatory minimums, but an increase in their success rate and reach. In addition to the first mandatory minimum for a serious violent offence being struck down, 2020 saw the demise of consecutive life sentences in Quebec⁵ and the prohibition on the availability of Conditional Sentence Orders for offences carrying a 14 year or greater maximum sentence in Ontario.⁶

This brief paper will quantitatively and qualitatively demonstrate the existence of a post-*Nur* revolution and argue that this revolution has now finally gained enough momentum to give a renewed challenge to *Luxton* a fighting chance. To do so, the inventory of cases from MMS.watch⁷ will be analyzed to show that *Nur* both inspired defence lawyers to bring challenges to mandatory minimum sentences and allowed judges to strike them down. Using three key 2020 decisions from three different Appellate Courts, recent trends in judicial thinking, that demonstrate both a boldness that is finally ready to take on *Luxton* as well as support for some of the reasons for overturning *Luxton*, will be highlighted.

II. THE DECISION IN *LUXTON*

In 1990, Mr. Luxton challenged the constitutionality of the mandatory minimum period of imprisonment of “Life-25”⁸ for constructive first-degree murder.⁹ Perhaps because it was one of many constitutional questions raised, or perhaps because the facts upon which Mr. Luxton was convicted

⁵ *Bissonnette c R*, 2020 QCCA 1585 [*Bissonnette*].

⁶ *R v Sharma*, 2020 ONCA 478 [*Sharma*].

⁷ MMS.watch is a free database, created by Matthew Oleynik and powered through rangefindr.ca, that monitors the constitutionality of mandatory minimum sentences found in both the *Criminal Code* and *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. In relation to each offence provision that carries a mandatory minimum, decisions from all court levels that either considers the constitutionality of the provision or entertain a request for a constitutional exemption are listed. Matthew Oleynik, *Rangefindr: MMS.watch*, online: <mms.watch> [perma.cc/7BKU-E5XL].

⁸ “Life-25” in this paper refers to the mandatory minimum for first-degree murder being life imprisonment without the possibility for parole for 25 years.

⁹ *Luxton* considered then paragraph 214(5)(e) of the *Criminal Code*, now paragraph 231(5)(e) of the *Criminal Code*, *supra* note 3, which notes that “Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections: (e) section 279 (kidnapping and forcible confinement).”

were hardly sympathetic,¹⁰ with little thought or legal analysis the Court upheld Life-25 as constitutional. In doing so, Chief Justice Lamer made the following observations:

In my view, the combination of [s. 231(5)(e)] and [s. 745(a)] does not constitute cruel and unusual punishment. These sections provide for punishment of the most serious crime in our criminal law, that of first degree murder. This is a crime that carries with it the most serious level of moral blameworthiness, namely subjective foresight of death. The penalty is severe and deservedly so. The minimum 25 years to be served before eligibility for parole reflects society's condemnation of a person who has exploited a position of power and dominance to the gravest extent possible by murdering the person that he or she is forcibly confining. The punishment is not excessive and clearly does not outrage our standards of decency. In my view, it is within the purview of Parliament, in order to meet the objectives of a rational system of sentencing, to treat our most serious crime with an appropriate degree of certainty and severity. I reiterate that even in the case of first degree murder, Parliament has been sensitive to the particular circumstances of each offender through various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole: see s. 672 (now s. 745), s. 674 (now s. 747) and s. 686 (now s. 751) of the Criminal Code...

Therefore, I conclude that in the case at bar the impugned provisions in combination do not represent cruel and unusual punishment within the meaning of s. 12 of the Charter.¹¹

In holding that Life-25 did not constitute “cruel and unusual punishment,” it appears that significant emphasis was placed on the existence of three “exceptions:” 1) the availability of the royal prerogative of mercy; 2) the availability of escorted temporary absences (ETAs); and 3) the existence of the Faint Hope Clause Regime. The significance of the existence of the Faint Hope Clause Regime (without reference to the royal prerogative or ETAs) was also emphasized by the then Chief Justice at the beginning of his reasons:

As a result of [s. 745(a)] the murderer is sentenced to life imprisonment without parole eligibility for 25 years. It is of some note that even in cases of first degree murder, [s. 745.6] of the Code provides that after serving 15 years the offender can apply to the Chief Justice in the province for a reduction in the number of years of imprisonment without eligibility for parole having regard for the character of

¹⁰ Mr. Luxton was convicted of stabbing a female cab driver, who was a 24-year-old mother of three, 15 times in the head and neck during the course of a robbery that included an unlawful confinement. Her body was found lying in a farmer's field. *Luxton*, *supra* note 1 at 715-16.

¹¹ *Ibid* at 724-25 [emphasis added].

the applicant, his conduct while serving the sentence, the nature of the offence for which he was convicted and any other matters that are relevant in the circumstances. This indicates that even in the cases of our most serious offenders, Parliament has provided for some sensitivity to the individual circumstances of each case when it comes to sentencing.¹²

In other words, from the few reasons that were given, Chief Justice Lamer appears to have heavily relied upon the existence of the Faint Hope Clause Regime to justify such a lengthy mandatory minimum. Since *Luxton* was decided, it has consistently been interpreted as upholding Life-25 sentences, generally.¹³

III. THE FAINT HOPE CLAUSE AND ITS ABOLITION

In its original format, the Faint Hope Clause Regime permitted offenders who had served at least 15 years of their sentence to bring an application before a jury, as of right, for a reduction in their period of parole ineligibility. These applications were essentially character applications, the purpose of which was “to call attention to changes which have occurred in the applicant’s situation and which might justify imposing a less harsh penalty.”¹⁴

Over time, these applications were circumscribed and eventually eliminated. In 1996, after controversial serial killer and child rapist Clifford Olson brought an application, Parliament introduced a judicial screening requirement that required offenders to show a “reasonable prospect” of success before a jury would be empanelled.¹⁵ In 2011, this judicial screening threshold was increased to require offenders to show a “substantial likelihood” of success before they would be permitted to appear before a jury.¹⁶ This increase in threshold applied to individuals who had committed the offence prior to the amendments coming into force on December 2,

¹² *Ibid* at 720 [emphasis added].

¹³ See e.g. *R v Hills*, 2020 ABCA 263; *R v Newborn*, 2020 ABCA 120; *Bissonnette*, *supra* note 5 at para 60.

¹⁴ *R v Swietlinski*, [1994] 3 SCR 481 at 493.

¹⁵ Bill C-45, *An Act to amend the Criminal Code (judicial review of parole ineligibility) and Another Act*, SC 1996, c 34, s 2.

¹⁶ Bill S-6, *An Act to amend the Criminal Code and another Act (Serious Time for the Most Serious Crime Act)*, SC 2011, c 2, s 4.

2011.¹⁷ For individuals who committed offences after December 2, 2011, the Faint Hope Clause Regime was abolished in its entirety.¹⁸

Since 2011, a number of individuals have challenged either the retrospective introduction of the judicial screening mechanism or the retrospective increase in the threshold to be established at the judicial screening phase.¹⁹ However, to date, no challenge to the abolition of the Faint Hope Clause Regime has been brought and can likely only be brought through a re-visitation of *Luxton*. The significance of this loss to those serving a life sentence cannot be understated. As noted in *R v Poitras*, “[a]ccording to the Library of Parliament Legislative Summary... juries granted relief in over 81% of the faint hope clause applications judges sent on to full hearings under the old threshold.”²⁰

IV. THE DECISION IN *NUR*

In the 2015 decision of *Nur*, the Supreme Court of Canada reiterated the test for finding a mandatory minimum sentence to be “cruel and unusual” pursuant to s. 12 of the *Charter*.²¹

To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.²²

The decision in *Nur* simply reiterated, in the context of s. 12 of the *Charter*, the longstanding principle that a challenge to the law “does not require that the impugned provision contravene the rights of the

¹⁷ *Ibid*, s 7(2).

¹⁸ *Ibid*, s 7(3).

¹⁹ See e.g. *R v Dell*, 2018 ONCA 674; *R v Simmonds*, 2018 BCCA 205.

²⁰ 2012 ONSC 5147 at para 21.

²¹ *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

²² *Nur*, *supra* note 4 at para 46.

claimant.”²³ It then built on the two-stage analysis from *R v Goltz*²⁴ and made several other minor but helpful changes to the s. 12 test. As Sarah Chaster points out in her article, “Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada:”

Nur injected some much-needed flexibility into the section 12 analysis. After dissenting in both *Goltz* and *Morrisey*, Chief Justice McLachlin wrote for the majority in *Nur* and made four important alterations (or clarifications) to the reasonable hypothetical analysis:

- (i) The requirement of common or day-to-day generality from *Goltz* is displaced by a broader test based on “reasonable foreseeability”;
- (ii) A ruling that a particular provision is not in violation of section 12 does not preclude future challenges to that provision;
- (iii) Reported cases should be considered in the reasonable hypothetical analysis; and
- (iv) Personal characteristics may be considered when constructing a reasonable hypothetical, as long as they are not tailored to create remote or far-fetched examples.²⁵

What was most significant about *Nur*, however, was its strong denouncement of mandatory minimum sentences. Specifically, the Court stated that “it is the duty of the courts to scrutinize the constitutionality of [mandatory minimums].”²⁶ While Justice Lamer in *Smith*²⁷ had attempted to remind judges of their constitutional obligation to review mandatory minimums for compliance with the *Charter*, few lawyers and judges alike appear to have heard that direction as few mandatory minimums were declared unconstitutional prior to 2015.²⁸

Returning to *Nur*, after finding that the provision in question violated s. 12 of the *Charter*, the Court then went on to consider whether it was saved by s. 1 and made the following comments:

The government has not established that mandatory minimum terms of imprisonment act as a deterrent against gun-related crimes. Doubts concerning the effectiveness of incarceration as a deterrent have been longstanding...

²³ *Ibid* at para 51.

²⁴ [1991] 3 SCR 485.

²⁵ Sarah Chaster, “Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada” (2018) 23 Appeal 89 at 98.

²⁶ *Nur*, *supra* note 4 at para 87.

²⁷ *R v Smith*, [1987] 1 SCR 1045 [*Smith*].

²⁸ This will be demonstrated in Section VI below.

Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes: see, e.g., A. N. Doob and C. M. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003), 30 *Crime & Just.* 143; M. Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009), 38 *Crime & Just.* 65. The empirical evidence "is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences" (A. N. Doob and C. Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001), 39 *Osgoode Hall L.J.* 287, at p. 291).²⁹

While the Supreme Court of Canada had rendered at least one decision prior to *Nur* striking down a mandatory minimum,³⁰ they had never denounced mandatory minimums in such a strong fashion. Instead, they had previously maintained that it was "within the purview of Parliament ... to treat our most serious crime with an appropriate degree of certainty and severity."³¹

The following year, in *R v Lloyd*,³² the Supreme Court again struck down a mandatory minimum under the *Controlled Drugs and Substances Act*,³³ as being grossly disproportionate to the reasonably foreseeable future offender. The Court was split between a minority, arguing that mandatory minimums should only be struck down in rare cases,³⁴ and a majority, who took a wider view. Chief Justice McLachlin (as she then was), again for the majority,³⁵ made some very strong comments that because many mandatory minimum sentences apply to offences that "can be committed in many ways and under many different circumstances by a wide range of people"³⁶ they will "almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional."³⁷

²⁹ *Nur*, *supra* note 4 at paras 113-14.

³⁰ *Smith*, *supra* note 27.

³¹ *Luxton*, *supra* note 1 at 724-25.

³² *R v Lloyd*, 2016 SCC 13 [*Lloyd*].

³³ *CDSA*, *supra* note 7, s 5(3)(a)(i)(D).

³⁴ *Lloyd*, *supra* note 32 at paras 57-72.

³⁵ Recall Chief Justice McLachlin (as she then was) also wrote for the majority in *Nur*.

³⁶ *Lloyd*, *supra* note 32 at para 3.

³⁷ *Ibid* at para 35 [emphasis added].

V. METCALFE'S 2015 ARTICLE

Following the release of *Nur*, in her 2015 paper,³⁸ Laura Metcalfe³⁹ considered the constitutionality of s. 231(5)(e) of the *Criminal Code*, which was challenged in *Luxton*. This “constructive” first-degree murder provision elevates second-degree murder to first-degree murder “when the death is caused... while committing or attempting to commit...” either kidnapping or forcible confinement.⁴⁰ Metcalfe made three main arguments to suggest that changes to both statute and the common law provide lower courts with the authority to depart from the decision in *Luxton*.

First, she argued that, because the Faint Hope Clause Regime had now been abolished, one of the conditions precedent to affirming the mandatory minimum in *Luxton* no longer existed.⁴¹ As explained above, the removal of the Faint Hope Clause Regime, which was successful far more often than not, constitutes a significant loss for prospective offenders and hardens the sentence to a true 25 years without parole.

Second, she pointed out that, since *Luxton*, Parliament has enacted s. 718.2(e) of the *Criminal Code* and the Supreme Court of Canada has released the seminal decisions of *R v Gladue*,⁴² and *R v Ipeelee*.⁴³ Both the principle of restraint and the *Gladue/Ipeelee* line of cases require sentencing judges to consider the systemic factors that bring Aboriginal Offenders before the Courts before imposing the least restrictive sanction that meets the principles of sentencing. Mandatory minimums, including the mandatory minimum for first-degree murder, do not permit Courts to give effect to *Gladue* factors by reducing or otherwise tailoring a sentence.⁴⁴ Indeed, the Supreme Court of Canada noted that under step one in the two-step *Nur* analysis, which requires judges to consider what constitutes a proportionate sentence in relation to the offender before them, regard must

³⁸ It appears the paper was released in 2015 but officially published in 2016 (see citation below).

³⁹ Laura Metcalfe, "Reconsidering the Constitutionality of Mandatory Minimum Sentences Under Section 231(5)(e) Post-Luxton" (2016) 6:2 UWO J Leg Stud 1, online (pdf): *Western Libraries* <ojs.lib.uwo.ca/index.php/uwojls/article/view/5658/4752> [perma.cc/ETU2-D3TU].

⁴⁰ *Criminal Code*, *supra* note 3, s 231(5)(e).

⁴¹ Metcalfe, *supra* note 39 at 4.

⁴² [1999] 1 SCR 688 [*Gladue*].

⁴³ 2012 SCC 13 [*Ipeelee*].

⁴⁴ Metcalfe, *supra* note 39 at 10–11.

be had to the sentencing principles outlined in ss. 718, 718.1 and 718.2 of the *Criminal Code*, including s. 718.2(e).⁴⁵

Lastly, Metcalfe argued that the s. 12 *Charter* jurisprudence, through *Nur*, changed (or at least clarified) the legal test for determining whether a mandatory minimum constitutes cruel and unusual punishment.⁴⁶ That is, prior to *Nur*, it was unclear whether Courts hearing a challenge to the constitutionality of a mandatory minimum were restricted to considering its application to the offender before them or whether recourse to the “reasonable hypothetical” was permissible. As we now know, recourse to the “reasonable hypothetical” is permitted, if not mandated, for the sake of judicial economy. As only Mr. Luxton’s circumstances were considered, the constitutionality of the mandatory minimum for first-degree murder has not been considered against the reasonable hypothetical offender.

Despite the seemingly clear statement in *Nur* that all of the principles outlined in both ss. 718 and 718.1 of the *Criminal Code* are to be considered in the s. 12 analysis,⁴⁷ some academics have read *Lloyd* as precluding the use of *Gladue* factors within the reasonable hypothetical analysis. For example, Professor Kiyani has argued that “*Lloyd* may make it harder for courts to find a section 12 violation given the Chief Justice’s explicit connection of *Lloyd* to *R. v. Lacasse*, which confirms that section 718.2(e) and *Gladue* principles are not part of the analysis under section 12.”⁴⁸ While the writer respectfully disagrees with this reading of *Lloyd*, the writer would argue that successfully challenging the mandatory minimum for first-degree murder does not necessarily require that the “reasonable hypothetical” offender be Aboriginal with significantly mitigating *Gladue* factors.⁴⁹ That is, once Metcalfe’s arguments have been used to successfully open the door to a reconsideration of *Luxton*, any reasonable hypothetical may then be put forth (e.g., a battered-wife convicted of first-degree murder).

The point in challenging *Luxton* is that because the mandatory minimum for first-degree murder is at once both the minimum and the

⁴⁵ *Nur*, *supra* note 4 at paras 40–42.

⁴⁶ Metcalfe, *supra* note 39 at 11–12.

⁴⁷ *Nur*, *supra* note 4 at paras 40–42.

⁴⁸ Asad G Kiyani, “R v Lloyd and the Unpredictable Stability of Mandatory Minimum Litigation” (2017) 81 SCLR (2d) 117 at 118.

⁴⁹ For example, the mandatory minimum of Life-25 may be grossly disproportionate when applied to a battered woman who kills her husband after years of abuse with no way out.

maximum sentence allowed in law,⁵⁰ it does not allow the sentence to be tailored to account for any aggravating or mitigating factors for any offender. Thus, it overrides the fundamental principle of sentencing, “the *sine qua non*,”⁵¹ that a sentence be proportional to the seriousness of the offence and the degree of responsibility of the offender in lieu of a “one size fits all” sentence. As noted in *Nur*:

Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.⁵²

In addition to the arguments made by Metcalfe, which were confined to s. 231(5)(e) of the *Criminal Code*, each of these arguments could and ought to be applied to each of the enumerated ways in which one can ground a conviction for first-degree murder, including where planning and deliberation is found.⁵³ In other words, where the mandatory minimum is Life-25, each of the aforementioned arguments applies as to why it may be constitutionally infirm.

VI. CHALLENGES TO MANDATORY MINIMUMS PRE- AND POST-*NUR*

A. The Methodology

To test the theory that *Nur* sparked a revolution overthrowing mandatory minimums, the writer analyzed the MMS.watch⁵⁴ database to assess whether the hypothesis that there has been an increase in the volume

⁵⁰ This statement assumes that only one count of first-degree murder is being sentenced.

⁵¹ *Ipeelee*, *supra* note 43 at para 37.

⁵² *Nur*, *supra* note 4 at para 44.

⁵³ In other words, all of ss. 231(2) through to and including 231(6.2) of the *Criminal Code* should be re-examined.

⁵⁴ Oleynik, *supra* note 7.

and success of challenges since 2015 was correct.⁵⁵ To do so, first, the total number of challenges between 2011 and 2019 (i.e., the four years before and after *Nur* was decided) were tallied to assess whether an increase in the number of challenges had occurred. Next, these decisions were categorized as being “successful” or “unsuccessful,” with success being defined as the mandatory minimum either having been struck down or not applied in the case before the Court. Because the challenges to mandatory minimums listed in MMS.watch include both formal challenges to the legislation brought in Superior Courts as well as individual *Charter* challenges (i.e. requests not to apply the minimum in a particular case) brought in lower courts, a large number of cases were able to be analyzed (N= 248).⁵⁶ The year 2020 was not used in this quantitative analysis as the data would undoubtedly be impacted by court closures due to the COVID-19 pandemic and, in the view of the writer, assessing four years before and after *Nur* was enough to determine the presence or absence of a trend. To assess any trends over a longer period of time, cases up to and including 2014 were amalgamated (due to low numbers) and assessed against the years 2015 through 2019, inclusive. Again, 2020 was not used as the data would invariably be problematic due to widespread court closures across the country.

B. Results

In relation to the number of challenges between 2011 and 2019, as shown below, there was a slight increase in the number of challenges to mandatory minimums between 2012 and 2015. This rise is likely attributable to the significant increase in the number of mandatory minimums that were introduced under the Harper government.⁵⁷ As Sarah Chaster notes, “By the end of 2012, between the *Criminal Code* and

⁵⁵ Mr. Oleynik advises that the database is kept by programmatically monitoring CanLII’s new cases using a collection of search strings and citation patterns that are used to generate a list of new judgments that likely deal with MMSs. A researcher then reviews the cases on this list to see whether they should be included on MMS.watch. As such, while it can be expected to be reasonably accurate, it may not be perfect.

⁵⁶ There are more than 286 cases on MMS.watch. However, as 2020 cases were not included, this sample size is slightly smaller.

⁵⁷ Isabel Grant, “Cleaning up the mandatory minimums mess” (8 May 2018), online: *Policy Options* <policyoptions.irpp.org/magazines/may-2018/cleaning-up-the-mandatory-minimums-mess> [perma.cc/6EEA-SJKU].

Controlled Drugs and Substances Act (CDSA), there were nearly one hundred MMS.”⁵⁸ After 2015, however, there is an undeniable spike in the number of challenges, with about three times as many challenges in 2016, four times in 2017, five times in 2018 and about six times in 2019, when compared to 2015; this consistent linear increase supports the existence of a post-*Nur* revolution. In theory, this chart will eventually peak and begin to fall again as once each mandatory minimum has been struck down in each province or territory (or by the Supreme Court) there will be no need to bring future challenges. However, it appears that as of 2019 we had not yet reached that peak.

Table 1: Number of Challenges to Mandatory Minimums across Canada by Year

Year	N
2011	0
2012	2
2013	8
2014	8
2015	12
2016	37
2017	48
2018	59
2019	74

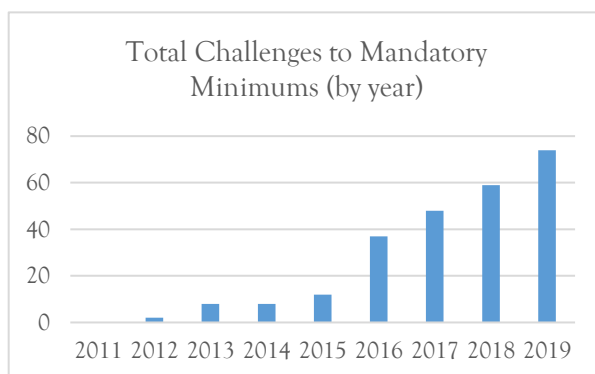


Figure A: Number of Challenges to Mandatory Minimums across Canada by Year

For the 2011-to-2019-time frame, the success rate of these challenges was also tracked by year, as shown below. As you can see, these figures also increased slightly prior to 2015 and then continued to substantially increase thereafter. While the table and chart below show a slight spike in 2015, this can be attributed to the relatively low number of challenges that year (compared to subsequent years) combined with the fact that both *Nur* and *R v Vu*,⁵⁹ are “double counted” for having struck down two different

⁵⁸ Chaster, *supra* note 25 at 92.

⁵⁹ 2015 ONSC 5834.

provisions in the same decision thereby accounting for four of the 12 successful challenges that year.

Table 2: Percent Success Rate of Challenges to Mandatory Minimums across Canada by Year

Year	%
2011	0
2012	0
2013	37.5
2014	37.5
2015	75.0
2016	56.76
2017	56.25
2018	72.88
2019	85.14

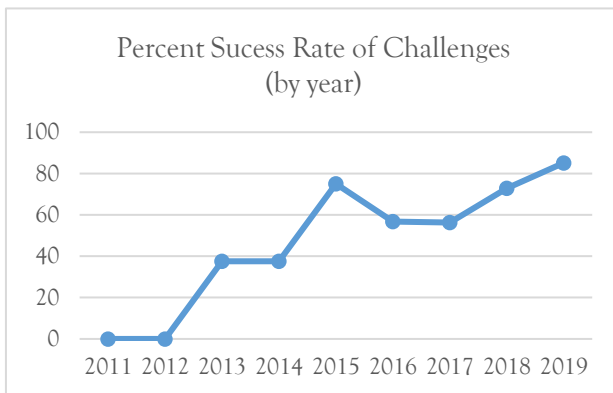


Figure B: Percent Success Rate of Challenges to Mandatory Minimums across Canada by Year

When we look at the total number of challenges brought to mandatory minimums between 1985⁶⁰ and 2019, with the years 1985-2014 being grouped together due to the relatively low numbers, we can see that relatively few challenges were brought prior to 2015. Over the 29 years between 1985 and 2014, only 56 challenges were brought for an average of fewer than two challenges per year.⁶¹ In contrast, in the years 2015 through 2019, inclusive, a total of 12, 37, 48, 59 and 74 challenges were brought.

⁶⁰ The year 1985 was chosen as that is the first challenge identified by MMS.watch, being *R v Laviolette*, 55 Nfld & PEIR 10, 1985 CanLII 175, which upheld the mandatory minimum for second-degree murder.

⁶¹ 56 challenges divided by 29 years equals an average of 1.93 challenges per year between 1985 and 2014.

Table 3: Number Challenges to Mandatory Minimums across Canada by Year (with 1985-2014 amalgamated)

Year	N
1985-2014	56
2015	12
2016	37
2017	48
2018	59
2019	74

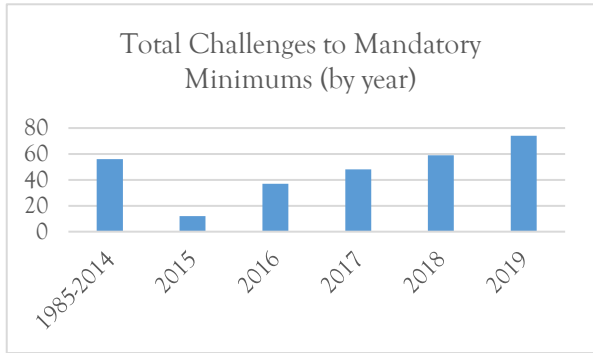


Figure C: Number of Challenges to various Mandatory Minimums across Canada by Year (with 2014 and prior amalgamated)

Similarly, when we look at the success rates for each year, only 3.57% of challenges brought between 1985 and 2014 were successful. By 2019, 85% of challenges were successful. The writer would suggest that this trend is even stronger evidence of a post-Nur revolution.

Table 4: Percent Success Rate of Challenges to Mandatory Minimums across Canada by Year (with 1985-2014 amalgamated)

Year	%
1985-2014	3.57
2015	75.00
2016	56.76
2017	56.25
2018	72.88
2019	85.14

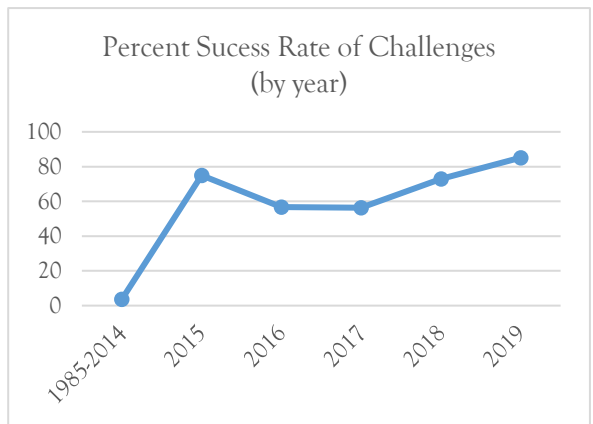


Figure D: Percent Success Rate of Challenges to various Mandatory Minimums across Canada by Year (with 2015 and prior amalgamated)

In conclusion, the above figures show a marked departure from the observation made by Professor Debra Parkes in 2014 (pre-*Nur*) that “the Supreme Court’s approach has been decidedly deferential to Parliament”⁶² and has given s. 12 “little substantive content or application.”⁶³ Given the figures above, it would appear that neither the Supreme Court nor lower courts following *Nur* and *Lloyd* feel the need to be as deferential to Parliament as compared to years past.

VII. 2020 HIGHLIGHTS AND TRENDS IN CONSTITUTIONAL CHALLENGES

While just over 200 challenges to various mandatory minimums have been launched since *Nur*,⁶⁴ the writer would argue that not only have they been increasing in number and success rate, but the decisions appear to be getting bolder. As indicated above, not only did 2020 see an Appellate Court uphold the unconstitutionality of a mandatory minimum for a serious violent offence for the first time in *Hilbach* (i.e., robbery with a firearm), but also the striking down of consecutive life sentences in Quebec in *Bissonnette* and the prohibition on the availability of Conditional Sentence Orders for offences carrying a 14 year or greater maximum sentence in Ontario in *Sharma*. Note that while the year 2020 was not used for the quantitative analysis, for the reasons cited above, as there is no reason to suggest that the pandemic had any effect on the quality of the decisions rendered 2020 cases were used in the qualitative analysis. The existence of a global pandemic was not used (or even mentioned) in any of the examined cases to justify striking down the mandatory minimums at issue.

Hilbach is significant because it represents the only case in Canada that has struck down a mandatory minimum for a serious violent offence.⁶⁵ At issue were the mandatory minimums for robbery with a restricted/prohibited firearm, being five years for a first offence and seven years for a second offence pursuant to s. 344(1)(a) of the *Criminal Code*, as

⁶² Debra Parkes, “The Punishment Agenda in the Courts” (2014) 67 SCLR (2d) 489 at 598.

⁶³ *Ibid* at 599.

⁶⁴ See Table 1. The total number of challenges between 2016 and 2019, inclusive, is 218.

⁶⁵ See Oleynik, *supra* note 7 under “other offences” for a list of all the challenges to violent offences.

well as robbery with a firearm, being four years pursuant to s. 344(1)(a.1) of the *Criminal Code*. Technically, *Hilbach* represents two cases of mandatory minimums for serious violent offences being struck down as, by consent, the crown appeals of *Hilbach* and *R v Zwozdesky*,⁶⁶ were heard together.

Mr. Hilbach pleaded guilty to robbery with a prohibited firearm, contrary to s. 344(1)(a)(i) of the *Criminal Code*, while the possession of the firearm was prohibited, contrary to s. 117.01(1) of the *Criminal Code*.⁶⁷ The facts were summarized by the Court of Appeal as follows:

[O]n June 9, 2017, Mr Hilbach, age 19, and a 13-year-old accomplice robbed a convenience store in Edmonton with an unloaded sawed-off rifle. Mr Hilbach covered his face with his shirt and pointed the gun at two employees demanding cash. His accomplice punched one of the employees and kicked the other. They fled with \$290 in lottery tickets and were apprehended a short time later.⁶⁸

Mr. Zwozdesky pleaded guilty as a party to the offence of using a firearm during the course of a robbery, contrary to s. 344(1)(a.1) of the *Criminal Code*. He also plead guilty to a second offence of being a party to a second robbery, contrary to s. 344(1)(b) of the *Criminal Code*, committed just one week after the first offence.⁶⁹ The facts were summarized by the Court of Appeal as:

On September 13, 2016, Mr Zwozdesky and two others robbed a convenience store in Caslan, Alberta. Mr Zwozdesky was the driver of the 'getaway vehicle.' He went into the store immediately before the robbery and purchased a lighter. He was not in the store during the robbery. The other two individuals were masked, and one of them carried a sawed-off shotgun, pushed the store clerk and pointed the gun at her. A shot was fired into a shelf but no one was injured. One week later, on September 20, 2016, Mr Zwozdesky and two others robbed another rural convenience store at Beaver Lake, Alberta. Once again, Mr Zwozdesky was the driver and he did not at any time enter the store. During this robbery the two others were masked, one of the other persons brandished a shotgun and the clerk was sprayed with pepper spray.⁷⁰

In both *Hilbach* and *Zwozdesky*, the sentencing judges found that the applicable mandatory minimums were grossly disproportionate to reasonably foreseeable cases; in the case of *Hilbach*, the sentencing judge found that the mandatory minimum would be grossly disproportionate as

⁶⁶ 2019 ABQB 322.

⁶⁷ *R v Hilbach*, 2020 ABCA 332 at para 2 [*Hilbach*].

⁶⁸ *Ibid* at para 8.

⁶⁹ *Ibid* at para 3.

⁷⁰ *Ibid* at para 19.

applied to him personally. As such, the mandatory minimums in s. 344(1)(a)(i) and s. 344(1)(a.1) of the *Criminal Code* were each struck down.⁷¹

In upholding the declaration of invalidity in *Hilbach*, the Alberta Court of Appeal noted the significant *Gladue* factors in the offender's personal circumstances. They further observed that the mandatory minimum of five (5) years imprisonment was so high as to over-emphasize denunciation and deterrence, to the detriment of other sentencing principles, such that sentencing judges would not be able to give any meaningful effect to mitigating factors:

As to Mr Hilbach's particular characteristics, he is Indigenous, a member of the Ermineskin Cree Nation, and there are significant *Gladue* factors (See also *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, paras 72, 75, 87). Both of his parents were alcoholics and substance abusers, and they abandoned him when he was between six and eight months old. He was raised by paternal grandparents, both of whom had attended residential schools. He suffered from personal addiction, violence and poverty, and had gang affiliations in the past. He committed the robbery in question for the purpose of obtaining money to make his way home to Maskwacis.⁷²

[...]

In this case, the five-year mandatory minimum is so high that many cases will attract the minimum sentence and even aggravated cases may frequently not result in a sentence higher than the minimum, such that mitigating factors are lost. The mandatory minimum also elevates the sentencing principles of denunciation and deterrence to such an extent as to minimize objectives of rehabilitation, the imposition of a just sanction, and special considerations for Indigenous offenders: *Boudreault*, paras 80-83.⁷³

Similarly, in upholding the declaration of invalidity in *Zwozdesky*, recourse to the reasonable hypothetical was used. Ultimately, the Court found that the mandatory minimum of four years for robbery with a firearm would be grossly disproportionate to the many other real-life cases they compared it to.⁷⁴ In other words, the imposition of the mandatory minimum would be disproportionately greater than properly individualized sentences, after all the aggravating and mitigating circumstances were accounted for.

⁷¹ *Ibid* at paras 80-82.

⁷² *Ibid* at para 43.

⁷³ *Ibid* at para 53.

⁷⁴ *Ibid* at paras 58-71.

Hilbach is significant because it emphasizes the need for individualization and to give meaningful effect to *Gladue* factors, even with respect to serious violent offences. It also shows a willingness on the part of the Court to strike down mandatory minimums beyond those that might affect “licensing type” offenders (as in *Nur*) or “drug sharing spouse” offenders (as in *Lloyd*), to include violent offenders as well. Many of the same arguments that would have to be accepted to overturn *Luxton* were accepted in *Hilbach*.

Next, *Bissonnette* did not deal with a mandatory minimum but, rather, dealt with the constitutionality of s. 745.51 of the *Criminal Code* that was introduced in 2011 (i.e., the same year the Faint Hope Clause Regime was abolished) through Bill C-48: *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*.⁷⁵ S. 745.51, in short, permits judges to impose consecutive periods of parole ineligibility for those convicted of “multiple murders.”

Alexandre Bissonnette pleaded guilty to six counts of first-degree murder and six counts of attempted murder in relation to the shooting at the Quebec City Mosque on January 29, 2017. After eating dinner with his parents, he began searching the internet for information on suicide and mass killings. He left his parents’ house, with firearms and ammunition in hand, at approximately 7:00 pm. Between 7:54 pm and 7:56 pm, he opened fire on worshippers present at the Mosque. He then proceeded to the Parc national des Grands-Jardins, with the intention of committing suicide. However, instead, he dialed 911, admitted what he had done, and was arrested by 9:00 pm that evening. He was 27 years old at the time of the shooting, had been on leave from work and school because of an anxiety disorder, and was under the influence of alcohol at the time the offence occurred.⁷⁶

In sentencing Mr. Bissonnette, the sentencing judge read s. 745.51 of the *Criminal Code* as requiring consecutive life sentences to be imposed in 25-year increments of parole ineligibility (i.e., 25, 50, 75 or 100 years, etc.) and examined the provision in light of ss. 7 and 12 of the *Charter*. In consideration of the first step of the *Nur* test, he held that an appropriate sentence for Mr. Bissonnette would be life imprisonment without the

⁷⁵ SC 2011, c 5.

⁷⁶ *Bissonnette*, *supra* note 5 at paras 2, 8–11.

possibility of parole for 35 to 42 years.⁷⁷ As such, the application of s. 745.51, as read, would result in a grossly disproportionate sentence that was “cruel and unusual,”⁷⁸ contrary to s. 12 of the *Charter*. Under s. 7 of the *Charter*, he also found that it infringed the right to life, liberty, and security of the person in a manner contrary to three principles of fundamental justice by its “overbreadth, grossly disproportionate negative impact and the protection of human dignity.”⁷⁹ None of the infringements were saved by s. 1 of the *Charter*. However, instead of declaring the entire provision unconstitutional, the sentencing judge felt that where the infringement could be remedied through other means, such as reading in or reading down, those alternatives must be considered.⁸⁰ Ultimately, he read in new wording that would allow periods of parole ineligibility to be set between 25 and 50 years instead of 25 or 50 years.⁸¹

In finding that the approach used by the sentencing judge was wrong in law, the Quebec Court of Appeal ultimately agreed that the provision violated the *Charter* in a manner that was not saved by s. 1 of the *Charter*. However, rather than reading in or reading down the provision, they went a step further and declared it unconstitutional.⁸²

Bissonnette is significant for a number of reasons. First, it highlights both the need to be able to individualize sentences and the need to show restraint, even in the most horrific of circumstances. Second, it strongly rejects the draconian sentences⁸³ often seen in our neighbours to the south and highlights the need for reviewability of the sentence at reasonable intervals.⁸⁴ As the Quebec Court of Appeal astutely pointed out, the reviewability of indeterminate sentences for dangerous offences was also a major factor in upholding the constitutionality of those provisions.⁸⁵ Again,

⁷⁷ *Ibid* at paras 28–30.

⁷⁸ *Ibid* at para 31.

⁷⁹ *Ibid* at para 34.

⁸⁰ *Ibid* at para 36.

⁸¹ *Ibid* at para 38.

⁸² *Ibid* at para 187.

⁸³ *Ibid* at paras 19–20. At the original sentencing, the Crown sought a sentence of 150 years, to which the sentencing judge suggested that if that were correct, another offender would have to be sentenced to 800 years, a grossly disproportionate sentence on any yardstick. The Court of Appeal agreed with the sentencing judge.

⁸⁴ *Ibid* at para 110.

⁸⁵ See *Steele v Mountain Institution*, [1990] 2 SCR 1385 at paras 58–60; *R v Lyons*, [1998] 3 SCR 45 at para 20.

the ability to review the offender's rehabilitative progress through the Faint Hope Clause Regime was one of the main reasons for upholding Life-25 in *Luxton*. This reviewability no longer exists for those who commit offences after December 2, 2011.

Finally, *Sharma* dealt with the constitutionality of s. 742.1(c) of the *Criminal Code*, among others,⁸⁶ which prohibits the imposition of a Conditional Sentence Order (CSO) for offences prosecuted by indictment for which the maximum period of imprisonment is 14 years or more. Ms. Sharma was a young Aboriginal mother who was caught importing almost two kilograms of cocaine into Canada. In short, she committed the offence because she was facing eviction and did not want to let herself and her daughter become homeless.⁸⁷ Ms. Sharma pleaded guilty and challenged the constitutionality of s. 742.1(c) of the *Criminal Code* under ss. 7 and 15 of the *Charter*.

While the s. 7 argument was abandoned at the final argument before the sentencing judge and the s. 15 argument was dismissed, on appeal, the Ontario Court of Appeal (ONCA) permitted the s. 7 argument to be revived as all of the necessary evidence to decide the issue had been called. Ultimately, the ONCA held that the provision violated both ss. 7 and 15 of the *Charter*. In coming to this conclusion, Feldman, JA, writing for the majority, noted the strong link between s. 742.1 (i.e., the CSO provisions) and s. 718.2(e) of the *Criminal Code*, which directs sentencing judges to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances ... with particular attention to the circumstances of Aboriginal offenders."⁸⁸ The status of s. 742.1 of the *Criminal Code* as a remedial provision, introduced specifically for the purpose of addressing the problem of systemic racism and the overrepresentation of Aboriginal peoples in Canada, was noted by the

⁸⁶ The Court in *Sharma* also looked at the constitutionality of s. 742.1(e)(ii) of the *Criminal Code*, which precludes the availability of Conditional Sentence Orders for individuals convicted of an offence that is prosecuted by way of indictment, for which the maximum term of imprisonment is ten years that involved the import, export, trafficking or production of drugs. For the sake of convenience, only s. 742.1(c) will be referred to as the same reasoning and the same remedy was applied to each section of the *Criminal Code*.

⁸⁷ *Sharma*, *supra* note 6 at para 6.

⁸⁸ *Criminal Code*, *supra* note 3, s 718.2(e).

Court to have been repeatedly recognized in the seminal cases of *Gladue*⁸⁹ and *R v Proulx*.⁹⁰

In 2012, the amendments brought by Parliament through the *Safe Streets and Communities Act*⁹¹ significantly reduced the availability of CSOs, including by eliminating their availability for all offences prosecuted by way of indictment for which the maximum period of imprisonment is 14 years or more.⁹² In finding that s. 742.1(c) of the *Criminal Code* violated s. 15 of the *Charter*, the majority of the Court of Appeal concluded that “[b]y removing that remedial sentencing option, the impact of the impugned provisions is to create a distinction between Aboriginal and non-Aboriginal offenders based on race.”⁹³ They further went on to find that the effect of this provision was to “reinforc[e], perpetuat[e], or exacerbate[e] the disadvantage that Ms. Sharma face[d] as an Indigenous person.”⁹⁴

This decision is significant in that it suggests that a consideration of s. 718.2(e) of the *Criminal Code*, as a remedial provision, is mandatory and that Parliament cannot simply override its consideration for certain offences. The writer would argue that implicit in s. 718.2(e) of the *Criminal Code* is the notion that the shortest period of imprisonment that can be imposed to meet the purpose and principles of sentencing should be imposed. As such, where a mandatory minimum calls for a sentence that is greater than required to meet the purpose and principles of sentencing, the mandatory minimum will violate the *Charter*.⁹⁵ Like *Bissonnette*, this decision also signals a boldness that is willing to take on more than just mandatory minimums.

VIII. CONCLUSION

With the abolition of the Faint Hope Clause regime, the foundation for upholding *Luxton* begins to collapse. When further statutory and

⁸⁹ *Gladue*, *supra* note 42 at para 93.

⁹⁰ 2000 SCC 5 at para 92.

⁹¹ SC 2012, c 1.

⁹² *Ibid*, s 34; *Criminal Code*, *supra* note 3, s 742.1(c).

⁹³ *Sharma*, *supra* note 6 at para 70.

⁹⁴ *Ibid* at para 89.

⁹⁵ One could argue that it would violate s. 15 of the *Charter* or s. 12 of the *Charter* if “grossly disproportionate.” However, given the deference given to sentencing judges, practically speaking, a finding of gross disproportionality would likely be required to find a s. 15 violation when it is the length of sentence that is at issue and not the manner in which it is being served, as in *Sharma*.

common law changes are considered, such as the introduction of s. 718.2(e) of the *Criminal Code* and the decisions in *Gladue*, *Ipeelee*, *Nur*, and *Lloyd*, the need to reconsider the ruling in *Luxton* becomes even more apparent. However, just because legal arguments can be made in favor of a certain outcome does not mean they will be accepted by a Court. As noted by Steve Coughlan, “it is important to be alert to the ‘trends’ in law, and to recognize that legal argument is as much a sociological phenomenon as anything else.”⁹⁶

Since the Supreme Court of Canada’s seminal decision in *Nur*, challenges to mandatory minimums have increased significantly, with their success rate also climbing at an undeniable rate. This suggests that lower courts have taken note of former Chief Justice McLaughlin’s strong comments in both *Nur* and *Lloyd* denouncing mandatory minimums and are less willing than they once were to accept Parliamentary constraints on their ability to impose proportionate sentences.

In order to overturn *Luxton*, a Court would have to accept that “Life-25” is grossly disproportionate to the reasonable hypothetical offender, after a proper consideration of the objectives and principles of sentencing. These principles include those found in the *Gladue* line of cases and as codified in s. 718.2(e) of the *Criminal Code*. *Hilbach* suggests that at least some Courts may now be willing to interfere with mandatory minimums for serious violent offences. *Bissonnette* similarly demonstrates a willingness to interfere with mandatory minimum type provisions, even for the most heinous of crimes, and highlights the need for the reviewability of sentences at reasonable intervals. Finally, *Sharma* emphasizes that s. 718.2(e) of the *Criminal Code* is not simply a principle of sentencing but a remedial provision aimed at addressing the over-incarceration of Aboriginals. As such, it cannot be ignored or have its consideration statutorily eliminated by Parliament. In the end, both the statistical trends and trends in judicial thinking suggest that the sociological climate has finally reached a place where striking down the mandatory minimum for first-degree murder may actually be possible, if not necessary.

⁹⁶ Steve Coughlan, “Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big” (2015) 71 SCLR (2d) 415 at 416.