Justice Delayed and Justice Denied: Unconstitutional Legislation as Constitutional Harm

October 28, 2026

Author: Roberto J. De Luca
Contributors: Romina Hajizadeh, Tyler Lee

David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

Acknowledgements

The David Asper Centre for Constitutional Rights is a centre within the Henry N.R. Jackman Faculty of Law, University of Toronto, that is devoted to advocacy, research and education with respect to constitutional rights in Canada. The Asper Centre is a frequent intervener at the Supreme Court of Canada and other courts across the country on constitutional issues. The Asper Centre also regularly makes policy briefs to federal parliamentary committees on these same issues. In both its legal and policy interventions, the Asper Centre's submissions are informed by the academic expertise of the Jackman Law Faculty's world-class scholars.

The following report was designed to address systemic issues with respect to constitutional rights protection in Canada, including systemic issues that have been identified by these Faculty scholars and the prior work of the Asper Centre (often in collaboration with its many partners). While relevant scholarship is cited within the report, we write separately to acknowledge these significant contributions. Special thanks are owed to Cheryl Milne (Executive Director, Asper Centre) and Professors Kent Roach and Vincent Chiao, all of whom provided instructive comment on previous drafts of the report. Any remaining issues are our own.

The Asper Centre also specially thanks Romina Hajizadeh and Tyler Lee, the Centre's 2025 summer law students (University of Toronto Law, Class of 2027). Both students made numerous contributions to the report during their 2025 summer placements, including via legal and academic research that informed the final product. The report would not have been possible without their assistance.

Table of Contents

Executive Summary **1**

I. The Constitutional Problem **6**

a. The Case Study: The 39th to 41st Parliament's Tough on Crime Agenda 6

b. Why the Case Study Matters Today: The Problems of Delay and Imperfect Adherence to the Principle of Constitutional Supremacy 9

II. The Constitutional and Legislative Background **19**

a. Declarations of Constitutional Invalidity as Constitutional Imperative 19

b. This Report's Case Study: The Unconstitutional Tough on Crime Legislation of the 39th to 41st Parliaments 25

III. Case Law Findings **35**

a. The Volume and Geography of Provisions Found Unconstitutional 37

b. Delay in Resolving Unconstitutional Tough on Crime Provisions 39

c. Other Complications Arising from Unconstitutional Legislation on the Books 44

IV. Analysis **48**

a. The Constitutional Problem 48

b. The Court as Constitutional Arbiter and the Case of Mandatory Minimum Sentencing 51

c. Public Attitudes towards the Charter, the Courts, and Harper-era Criminal Justice Reforms 58

V. Conclusion & Recommendations **62**

Appendix A **A-1**

Appendix B **B-1**

Executive Summary

A cornerstone of the Canadian Constitution is the principle that the Constitution is supreme law and, for that reason, any laws that are inconsistent with it are to be of no force or effect. Behind this elegant and straightforward principle is an implied promise that Canadians and other individuals residing in Canada are to be safeguarded against the application of unconstitutional laws, and, relatedly, that unconstitutional legislation is not to remain "on the books" indefinitely. It is a principle that also contains the promise of providing just and appropriate remedies for any *Charter* harms suffered via the passage or application of such legislation.

In *Justice Delayed and Justice Denied: Unconstitutional Legislation as Constitutional Harm*, we bring together diverse strands of evidence to contend that the Canadian constitutional system is struggling to live up to these promises. In Canada's current constitutional reality, *Charter*-violating legislation often lives on the books for years before it is declared constitutionally invalid, and typically with little remedy for individuals who may have been harmed by the legislation while it was in force. The effective result is that governments currently enjoy the power to pass constitutionally suspect legislation with little fear that the state will bear the full cost of remedying rights violations that flow from its passage.

Our primary evidence is an empirical study of case law. Via a case study that focuses on the "tough on crime" legislative agenda of the 39th to 41st Parliaments (2008 – 2015), we found that when the Supreme Court of Canada declared legislation arising from these Parliaments unconstitutional on *Charter* grounds, the provision had typically already been in force for several years (seven to eight years). We also found thirteen provisions that had been declared unconstitutional by one or more appellate courts and that had not yet been resolved, or materially amended, on a national scale until July 18, 2026. Within this subset, there was only one case for which a Court of Appeal issued a countervailing decision upholding the provision. Notably, we also found that the Courts of Appeal to rule on these provisions, alone or in agreement with other Courts of Appeal, and without Supreme Court of Canada resolution, were distributed throughout Canada. The result has been that the *Charter*, as applied, has had meaningful variation in Canada's provinces and territories on the *Charter* issues in dispute, namely whether the sentencing provisions in question were in violation of the *Charter's* prohibition on cruel and unusual treatment or punishment. Since July 18, 2026, all of these remaining provisions have been amended in part, and arguably incompletely, on *Charter* grounds. The average time until conditional resolution for these thirteen provisions was 13.6 years. The range was 11 to 18.2 years.

Many of the issues animating the report have been the subject of national discussion and controversy in recent months, due in substantial part to the Supreme Court of Canada's decision in *R v Senneville*, 2025 SCC 33. In *Senneville*, the Court struck down one-year mandatory minimum penalties of imprisonment for possessing and accessing child pornography. By controversially declaring the mandatory minimum sentences unconstitutional based upon a

reasonable hypothetical situation (i.e., that the one-year punishment could be applied to a hypothetical accused 18-year-old in possession of material involving the hypothetical accused's friend's 17-year-old girlfriend), a narrow Court majority was reaffirming the principle that the *Charter* imposes obligations on constitutional actors to protect against laws being applied in a manner that would violate its guarantees, even if a "live" or non-hypothetical example of a constitutional violation was not yet before the courts. And it was doing so, in part, and in its view, to safeguard against the application of unconstitutional laws to unknown individuals, notwithstanding the severity of the offences in question (especially in their ordinary commission).

The question as to whether the majority in *Senneville* was right on the constitutional question has understandably attracted significant attention. While the Court has the legal authority to declare legislation unconstitutional, parliamentarians, Justices, and other legal observers can and did disagree with the Court's declaration and the interpretive findings it rested upon.

Yet, what has often been lost in the national discussion as to whether the Court got it right in *Senneville* has been an understanding of the full constitutional context for the Court's decision. Since at least 2016, the Supreme Court had provided Parliament, via its decision in *R v Lloyd*, 2016 SCC 13, with clear guidance as to how to safeguard mandatory minimum sentences against judicial declarations that the provisions are unconstitutional: either narrow the scope of criminal offences attracting a mandatory minimum punishment or build in a provision that would prevent a minimum punishment of imprisonment if the mandated punishment would violate the *Charter* rights of the specific offender before the sentencing judge. As noted by the Court in *Lloyd*, the use of "safety valves" is a common feature in other jurisdictions, a fact the government had observed in its own reporting since at least 2005 (*Lloyd*, para 36).

Lloyd was not an isolated decision. In the almost decade since the Court's guidance in *Lloyd*, and the Court's earlier landmark decision on mandatory minimum sentencing more generally (*R v Nur*, 2015 SCC 15), over two dozen of Canada's mandatory minimum sentencing provisions have been declared unconstitutional by appellate courts (see Appendices A and B). To its credit, Parliament, in both 2018 and 2022, removed several such provisions from the statute books, without waiting for a Supreme Court of Canada declaration on the matter. This historical and constitutional context is a reminder that while Parliament may have been of the view that the offences addressed in *Senneville* would ultimately survive constitutional review, it was on notice, for years, that the provisions were vulnerable to legal challenge. Parliament had the authority to amend the *Criminal Code* provisions in issue and repeatedly declined to do so. In fact, the provisions were left in place, despite the Courts of Appeal of Ontario (see *R v John*, 2018 ONCA 702) and British Columbia (see *R v Alexander*, 2019 BCCA 100) having found an earlier version of one of the provisions at issue in *Senneville* unconstitutional, when it carried a *less* severe mandatory minimum (six months as opposed to one year).

Parliament has since responded to the Court's judicial guidance in *Lloyd* via the *Protecting Victims Act* (Bill C-16), which was enacted on June 18, 2026 (with the relevant provisions coming into force, in relevant part, on July 18, 2026). The time between *Lloyd's* guidance and this legislative response was 10.2 years. Among other things, the legislation introduced a limited safety valve for mandatory minimum sentences in the *Criminal Code* and resurrected, with the addition of this same safety valve, several mandatory minimums that had been declared unconstitutional by the courts but had not yet been formally repealed by Parliament. As set out in this report, Parliament's proposal is imperfect and in ways that are insufficiently attentive to the *Charter* rights at stake or the Court's guidance in *Lloyd*. The government's reaffirmation of mandatory minimums also fails to address the many policy concerns that have been levelled against them, such as the concern that mandatory minimums facilitate false plea deals and otherwise unduly frustrate the role of judicial oversight and discretion in the sentencing process. Such constitutional and policy issues aside, the *Protecting Victims Act* is a reminder that Parliament has always had the power to avoid the controversial result in *Senneville*, including in ways that would preserve many of Parliament's stated policy aims in passing mandatory minimum sentencing laws.

This report aims to take a wider lesson from *Senneville* and similar constitutional disputes. It specifically aims to demonstrate how the passage of constitutionally suspect legislation, and the slow-moving constitutional resolution of this legislation, can have harmful consequences for our constitutional system, and for the many individuals who are invariably caught up in this system. In making this argument, the report relies upon the twin contentions that Parliament has frequently passed or preserved legislation despite being on notice that the judiciary was of the view, or at least of the likely view, that the legislation was unconstitutional and, further, that the judiciary has not, generally speaking, overstepped its constitutional role with respect to defining what the *Charter* requires. Based upon these twin contentions, we submit that legislation correctly declared unconstitutional has often imposed harms on individuals or our constitutional system, without adequate or timely constitutional remedy, notwithstanding eventual judicial interventions.

In making this argument, this report does not assume that appellate courts, including the Supreme Court, always get the constitutional question right. Nor does it assume that appellate courts speak with a single voice or have been without issue in providing prompt or consistent guidance to legislatures. For instance, and most recently, the Supreme Court of Canada, in *Quebec (Attorney General) v Denis*, 2026 SCC 25, set aside a Quebec Court of Appeal decision that had invalidated a mandatory minimum sentence for obtaining sexual services or communicating with anyone for the purpose of obtaining sexual services from a minor for consideration. The Quebec Court of Appeal decision that was reversed on appeal was not an isolated decision. Two other appellate courts, *R v Faroughi*, 2024 ONCA 178 and *R v JLM*, 2017 BCCA 258, had come to similar conclusions, the latter with respect to a precursor provision.

Such reversals complicate any claim that Parliament alone bears the blame for failing to resolve the constitutional issues addressed in *Nur* and *Lloyd*. Appellate courts can be wrong. They can be wrong in the sense of predicting the results of the highest court, i.e., as the Quebec Court of Appeal was in *Denis*. They can also be wrong in the sense of making binding constitutional decisions that may nevertheless be criticized for good reason, including by parliamentarians or by judicial institutions (e.g., dissenting Justices, subsequent courts, and courts in other jurisdictions). That said, and as addressed below, *Denis*' ultimate resolution is of a piece with the case law findings and concerns addressed in this report. The overwhelming pattern in our data is one of sustained judicial concern on the constitutional question, delayed resolution (judicial or parliamentary), and, in the ordinary but not exclusive result, judicial findings of constitutional invalidity.

The report also relies upon judicial reasons, additional case law evidence, government statistics, and academic literature to place the above findings in their wider context. Taken together, this evidence suggests that the passage of legislation later declared unconstitutional, coupled with parliamentary and judicial delays in its effective removal, has imposed constitutional harms on individuals and the constitutional system in myriad ways, including especially in ways that subvert the principle of access to justice.

Specifically, we contend that unconstitutional laws are remaining "on the books" for significant periods of time, and for want of a litigant able and willing to challenge the legislation; that legislation declared unconstitutional has been directly or indirectly applied to individuals, often without remedy for the rights holders harmed; and that unconstitutional laws have very likely imposed other systemic harms on the constitutional system in general, with little guarantee that the specific systemic harms imposed would be reversed simply by way of constitutional declarations of invalidity. Such systemic harms include facilitating adverse sentencing outcomes in general (e.g., facilitating false plea deals that were influenced by sentencing provisions later declared unconstitutional) and facilitating increases in adverse sentencing outcomes for certain vulnerable groups in particular (e.g., facilitating the documented increase in already overincarcerated groups, such as Indigenous women specifically and Indigenous individuals generally, via unconstitutional restrictions on judicial remedial discretion).

On this evidence, we conclude that both Parliament and our courts can be doing a better job of protecting and promoting the Charter's promise of constitutional rights protection. Further to this conclusion, the Asper Centre makes three broad recommendations:

Recommendation #1:

Parliament should investigate legislative process reforms that would help protect against the passage of unconstitutional legislation. It should also evaluate its prior reforms against the standard as to whether its prior reforms have militated against *Charter* violations.

Recommendation #2:

Governments, not *Charter* plaintiffs, should bear the onus of demonstrating why rights holders who suffer constitutional harms arising from the passage of unconstitutional legislation are not entitled to *Charter* damages.

Recommendation #3:

Courts should place greater weight on the problem of unconstitutional legislation remaining "on the books" before resorting to constitutional doctrines that avoid the question as to whether a provision before them is constitutional.

The report is organized into five sections: an introduction to the problem we are attempting to address; a backgrounder on the applicable constitutional framework and the case study in issue; our case law findings (with supporting appendices); analysis; and concluding remarks and recommendations.

I. The Constitutional Problem

What are the full constitutional harms that occur when Parliament passes *Charter*-violating legislation that is ultimately found to be unconstitutional by the courts? This report provides a descriptive account of this problem, through a case study: an accounting of the approach to public safety, crime, and criminal sentencing of the 39th to 41st Parliaments. For that reason, we first highlight some of the foundational facts underlying the selected case, and our reasons for selection.

a. The Case Study: The 39th to 41st Parliament's Tough on Crime Agenda

From February 13, 2006, through August 2, 2015, the Conservative Party, led by Prime Minister Stephen Harper, formed government (the "Harper government", the "Conservative government", or the "39th to 41st Parliaments"). A signature of the government platform during these years was ambitious "tough on crime" criminal law legislation.[1]

The tough on crime platform of the era reflected a broader policy movement that frequently cut across party lines. For instance, during the 39th and 40th Parliaments (2006 – 2011), the Conservatives formed minority governments, and legislation was passed with at least Liberal, and often multi-party, support. Further, several of the tough on crime reforms passed by the Conservative government from 2006 - 2015, such as mandatory minimum sentences, built upon measures passed by the Chrétien and Martin Liberal governments, with the Liberal governments evincing an increasingly "tough on crime" stance as time passed (1993 – 2006). Accordingly, the Martin Liberal government's 2006 platform contained measures, such as the stiffening of mandatory minimum sentences, that would go on to define the Conservative-led Parliaments that followed. That said, the Conservative party was typically at the forefront of these issues and ultimately passed stricter tough on crime legislation when it formed its first majority government in 2011 (the 41st Parliament), without these same levels of multi-party support.

Thus, while we sometimes adopt the convention of referring to the "Harper government" or "Conservative government" as shorthand for the government that defined the era, the convention is something of a misnomer for our purposes – the policy issue selected is not easily attributable to one party alone. In several respects, the tough on crime agenda passed by the 39th to 41st Parliaments marked the culmination of a broader, populist agenda that frequently had support from other major parties. Indeed, the use of a case study with broader "populist" support is an intentional feature of our research design. The selected case study has been chosen, in part, because it provides a window into Canada's ability (or inability) to confront a challenge always facing constitutional democracies: their capacity to enforce constitutional law and norms even when majoritarian sentiment is in tension with the country's larger constitutional commitments.

[1] A further accounting of these developments, their context, and relevant authorities is canvassed at Part II, Background and Appendix A (itemizing mandatory minimum sentences declared unconstitutional, with reference to the initial minimums imposed by Liberal governments).

Other related facts from the period also form part of the relevant context. First, in addition to often enjoying multi-party support in Parliament, there is evidence suggesting that the tough on crime agenda was largely popular with voters, albeit depending on how the issue was framed.[2] To at least some extent, then, parliamentarians could plausibly maintain that their tough on crime measures reflected policy measures with majority popular support. Conversely, courts reviewing these same legislative efforts often took on a "counter-majoritarian" role, i.e., as a constitution-enforcing institution that was less beholden to this public sentiment. Accordingly, several of the tough on crime reforms passed by the 39th to 41st Parliaments have now been undone by the courts on *Charter* grounds, including via several high-profile Supreme Court of Canada decisions.[3]

Second, the most significant and oppositional of the Supreme Court of Canada's decisions were issued after the Conservative government was no longer in power, save for the *Nur* decision that was decided only months before the Conservatives lost power (see Part IV, Analysis). In 2018 and 2022, some, but not all, of the tough on crime sentencing provisions were repealed or amended by Justin Trudeau-led Liberal governments.[4] Given this incomplete legislative repeal, the Supreme Court of Canada and Courts of Appeal across Canada have continued to be occupied with the constitutionality of provisions that were either measures passed by the Harper government, or

---

[2] For a review of the popularity of tough on crime sentencing in the period leading up to the Conservative's 2006 election, see J.V. Roberts, N. Crutcher, & P. Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings" (2007) 49:1 *Canadian Journal of Criminology and Criminal Justice*. The authors found both an attraction to tough sounding sentencing laws, due in part to an unhappiness with sentencing decisions, yet also a disapproval and awareness of the injustices that inevitably result from mandatory penalties that are not tailored to the offender.

[3] See especially *R v Nur*, 2015 SCC 15 [*Nur*] (finding mandatory minimum sentence provisions regarding firearm and repeat offences to be unconstitutional on s. 12 grounds); *R v Lloyd*, 2016 SCC 13 [*Lloyd*] (finding a mandatory minimum sentence provision regarding possession of a controlled substance to be unconstitutional on s. 12 grounds); *R v Safarzadeh-Markhali*, 2016 SCC 14 [*Safarzadeh-Markhali*] (finding an unconstitutional s. 7 violation with respect to the provision removing a sentencing court's discretion to provide offenders pre-sentence credit if bail was denied primarily on the basis of their criminal record); *R v Boudreault,* 2018 SCC 58 [*Boudreault*] (finding a mandatory victim surcharge provision unconstitutional on s. 12 grounds); *R v Bissonnette,* 2022 SCC 23 [*Bissonnette*] (finding a provision authorizing consecutive parole ineligibility periods in the context of multiple murders unconstitutional on s. 12 grounds); *R v Ndhlovu,* 2022 SCC 38 (finding mandatory lifetime registration provisions for designated sexual offences unconstitutional on s. 7 grounds); *R v Hills,* 2023 SCC 2 [*Hills*] (finding that a mandatory minimum sentence provision regarding the discharge of firearms, that had been repealed by the issuance of the decision, was an unjustifiable infringement under s. 12); and *R v Senneville*, 2025 SCC 33 [*Senneville*] (finding that two mandatory minimums concerning possessing and accessing child pornography unconstitutional on s. 12 grounds). That said, some Harper-era tough on crime legislation has survived Supreme Court appellate review. See especially, *R v Hilbach*, 2023 SCC 3, rev'g 2020 ABCA 332 [*Hilbach*], a companion decision to *Hills*, wherein Harper-era mandatory minimum sentence provisions regarding robbery offences, including with the use of a firearm, were upheld; *R v Sharma*, 2022 SCC 39, rev'g 2020 ONCA 478 [*Sharma*], wherein Harper-era limits regarding judicial discretion in the use of conditional sentences were upheld. Notably, both *Hilbach* and *Sharma* reversed the relevant Court of Appeal on the issue of constitutional validity (Alberta and Ontario, respectively) and included dissents that would have found the provisions invalid; and *Quebec (Attorney General) v Denis*, 2026 SCC 25 [*Denis*].

[4] Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, 1st Sess, 42nd Parl 2018 (received Royal Assent on 21 June 2018); Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2022 (received Royal Assent on 17 November 2022), SC 2022, c 15.

measures that were passed by a Liberal government and stiffened by the successor Conservatives, and that were then left in place by successor Liberal governments.[5]

Most recently, the bi- or multi- partisan nature of the tough on crime agenda has been amplified and illustrated by the Carney-era Liberal government's passage of Bill C-16, the *Protecting Victims Act*.[6] One of the chief purposes of the *Protecting Victims Act* was to restore *all* of the mandatory minimum penalties of imprisonment that were on the statute books but that were inoperative because they had been declared unconstitutional by the courts, including several provisions within our case study.[7] The Act also seeks to insulate all mandatory minimum penalties from future legal challenge. The enactment does so by granting courts the discretion to impose a lesser term of imprisonment than the mandated minimum sentence, but only if an imposition of the mandated minimum would violate the *Charter*, and only if the *Criminal Code's* minimum period of imprisonment is less than a life sentence.[8]

While the use of a discretionary "safety valve" appears to be roughly drawn from the Supreme Court of Canada's guidance in *R v Lloyd*, guidance that was itself made in reference to Department of Justice reporting with respect to the use of safety valves in other jurisdictions, it features significant and questionable departures from the Court's guidance. Contra *Lloyd's* guidance that safety valves must share one requirement, namely the "that the residual discretion allow for a lesser sentence,"[9] the *Protecting Victims Act* requires courts to always impose a period of *imprisonment*, without a carveout for periods of imprisonment that would result in a sentence that would constitute cruel and unusual punishment. The safety valve also does not apply at all to severe crimes with a minimum of life imprisonment (presumably on the theory that the seriousness and narrowness of the crimes involved may argue against the need for discretion). As set out in more detail in our brief to the House's Standing Committee on Justice and Human Rights, these departures from *Lloyd* will mandate new provision-by-provision judicial assessments of constitutionality for provisions declared unconstitutional, in no small part because the Supreme Court has sometimes found that a sentence less than imprisonment was appropriate for mandatory minimum sentence provisions declared unconstitutional.[10] The *Protecting Victims Act's* narrow

---

[5] See, e.g., *Hills*, *supra* note 3 (finding that a mandatory minimum sentence provision regarding the discharge of firearms, that had been repealed by the issuance of the decision, was an unjustifiable infringement under s. 12 of the *Charter*); and *Senneville, supra* note 3 (finding the mandatory minimums for possession of child pornography, *Criminal Code*, s. 163.1(4)(a), and accessing child pornography, s. 163.1(4.1)(a), that had been twice amended by the Harper government and left untouched by the Liberal's legislative reforms, unconstitutional). Additional cases are provided at Appendices A and B.

[6] Bill C-16, *Protecting Victims Act*, SC 2026, c 19 at ss 63, 87.

[7] *Ibid* at s 87.

[8] *Ibid* at s 63.

[9] *Lloyd*, *supra* note 3 at para 36 (emphasis added). *Lloyd's* use of the term "lesser sentence," instead of "lesser term of imprisonment," suggests that the majority reasons were advising that courts must retain discretion to apply sentences less than imprisonment, in the appropriate case.

[10] David Asper Centre for Constitutional Rights, *A Brief to the Standing Committee on Justice and Human Rights Regarding Bill C-16, An Act to amend certain Acts in relation to criminal and correctional matters (child protection, gender-based violence, delays and other measures)* (11 March 2026), pp 5 - 7.

approach to safety valves may therefore form a renewed source of tension between the judiciary and Parliament, including with respect to "tough on crime" initiatives that defined the 39th to 41st Parliaments.

Some partisan differences on these issues also persist. Conservative reactions to *Senneville* and Bill C-16 have been less deferential to the Court and to the Court's position as to what the *Charter* requires, arguing that the *Lloyd*-informed Liberal proposal would "empower[] judges to ignore literally every mandatory prison sentence in the *Criminal Code*, other than murder and treason."[11] Conservative representatives have thus suggested that they would take a more aggressive stance vis-à-vis the courts, including by invoking the notwithstanding clause to impose minimums notwithstanding court declarations they are unconstitutional (thereby effectively suspending the *Charter's* rights-based protection), at least in certain circumstances.[12] Be that as it may, both approaches share a commitment to carceral approaches to crime and a correlative strong-form approach to mandatory minimum sentencing – reflected by the passage of mandatory minimums by Liberals and Conservatives alike (see Appendix A) – despite the repeated negative judicial scrutiny strict mandatory minimum sentencing provisions have received in Canada's highest courts. For this reason, the conflict is best understood as chiefly an institutional one, pitting tough on crime Parliaments against courts enforcing the *Charter's* commitment to constitutional rights protection.

More broadly, this larger history illustrates both how the life cycle of unconstitutional legislation is a subject worthy of investigation in its own right – e.g., when was the legislation ultimately declared unconstitutional?; how was it imposed in the interim?; did it have collateral effects? – and how this history can shed light on larger questions of constitutional development, such as the roles that Parliament and the courts have actually played in confronting the general policy problem of unconstitutional legislation remaining, figuratively speaking, "on the books" (i.e., in the statute books *and* in force), over time. This retrospective accounting is also limited, of course, insofar as it fails to account for relevant developments since the case study, such as Parliament's introduction of Charter Statements and related reforms. That said, by assessing the constitutional performance of a preceding government, this report seeks to create a baseline by which to evaluate these more recent reforms in any further research.

b. Why the Case Study Matters Today: The Problems of Delay and Imperfect Adherence to the Principle of Constitutional Supremacy

As set out below (see Part III, Case Law Findings), our case law findings are that the above legislative agenda resulted in 38 appellate decisions declaring provisions constitutionally invalid, and an average period of seven to eight years between provisions coming into force and a

[11] Statement of Melissa Lantsman, Deputy Leader of the Conservative Party of Canada, "Mandatory isn't Optional," *Conservative Party* (11 December 2025), https://www.conservative.ca/mandatory-isnt-optional/.
[12] See, e.g., Catharine Tunney, "Poilievre says he'd invoke notwithstanding clause to overturn ruling on child porn sentences," CBC News (31 October 2025), https://www.cbc.ca/news/politics/supreme-court-child-pornography-9.6961728.

declaration of constitutional invalidity by the Supreme Court of Canada (an average that, among other things, excludes provisions declared unconstitutional by Courts of Appeal that have yet to be resolved by the Supreme Court). More specifically, the Supreme Court issued 12 of these 38 decisions and Courts of Appeal the remaining 26 (not including decisions which were superseded by later Supreme Court of Canada decisions). Of these 26 Courts of Appeal decisions, 20 were decisions wherein multiple Courts of Appeal had ruled on the provision(s) and declared the provision(s) unconstitutional, without an intervention by the Supreme Court of Canada. An important sub-finding was that a significant majority of the appellate decisions concerned mandatory minimum sentences, an emphasis that was less pronounced at the Supreme Court of Canada level.

Taken as a whole, this report argues for a broad conclusion with respect to the significance of these results: As it has snaked its way through Canada's constitutional system, the constitutionally suspect aspects of the tough on crime agenda have visited harms upon both individuals and the constitutional system as a whole. Further, these harms were far greater than should be tolerated, given Canada's express constitutional commitments, and given the potential for these harms to further erode our capacity to live up to these commitments. While it is of course true that appellate courts can err as to what the Constitution requires, the above judicial declarations of constitutional invalidity nevertheless reflect both binding statements as to what the Constitution means (by the constitutionally appointed referee) and, this report argues, at least roughly right conclusions with respect to the cases decided (see Part IV, Analysis). Before turning to this analysis and argument, it is useful to provide an overview of the kinds of harms that can, and likely did, arise via the legislation advancing a tough on crime agenda that has since been declared unconstitutional by appellate courts. The argument for why the Court was on solid footing in issuing its declarations of constitutional invalidity is discussed in Part IV.

Individual Harms, i.e., Unremedied Direct Harms Imposed on Individual Rights Holders

Most directly, individuals have been sentenced, or otherwise punished, under legislation later found to be unconstitutional in cases where they were not a party. While remedies may exist for affected individuals when a provision is found to be invalid after months or years of application, they are by no means automatic. Courts must navigate the legal question of whether or to what extent a finding of invalidity has retroactive application, while any affected individuals must often pursue remedies of their own accord.[13] Individuals seeking to overturn a sentence or punishment on the grounds of a later finding of invalidity, i.e., in a case other than their own, are limited by the principle that an individual may only have such recourse if they are still "in the judicial system," i.e., if they still have live rights of appeal. An individual who has exhausted their right to appeal

[13] See, e.g., *Boudreault*, *supra* note 3 at paras 103 – 109. While the rule of law creates a presumption that a declaration of invalidity is to apply retroactively, several judicial doctrines restrict and complicate the general rule. See *R v Albashir*, 2021 SCC 48 at paras 38 – 41 [*Albashir*]. This includes the prohibition against reopening settled matters (the *res judicata* doctrine) and principles limiting governmental financial liability for the application of legislation later found to be unconstitutional (the *de facto* and qualified immunity doctrines).

thus suffers the irreparable harm of being convicted under an invalid law, effectively as a sacrifice to the legal principle of *res judicata* (i.e., the principle of letting a "matter [already] judged" stand).[14]

For instance, in *Boudreault* (issued December 14, 2018), the Supreme Court of Canada invalidated amendments that removed judicial discretion with respect to victim surcharges imposed on individuals who were discharged, pled guilty, or were found guilty of a criminal or drug-related offence. The amendments had taken effect over five years earlier, on October 24, 2013. Under the far-reaching law as amended, offenders were mandated to pay, at minimum, a 30% surcharge on any fines or a charge for convictions when no fine was imposed ($100 for summary convictions and $200 for indictable offences).[15] By contrast, under the law prior to October 2013, offenders could avoid the otherwise applicable surcharge by proving "undue hardship."[16] While the unconstitutional amendments potentially affected a wide swath of individuals (those who would have escaped the charge if it was not mandatory), and those most disadvantaged in particular (i.e., specifically those who could make out the case for "undue hardship"), the Supreme Court did not reverse all or most of these surcharges. The Court's remedy was instead limited to the small number of individuals who were parties in the case before it.[17] Emphasizing the limits of judicial relief that is available for non-parties, the Court reasoned, in part, that it would be inappropriate to issue a wider remedy – including even to those non-parties who might escape the principle of *res judicata* insofar as the enforcement of the surcharge was ongoing.[18] The Court also reasoned that it was inappropriate to decide the issue of wider relief in

[14] See *Albashir*, *supra* note 13 at para 40 and citations therein ("Many fundamental principles that are essential to our constitutional system curtail the retroactive reach of judicial remedies. *Res judicata*, for example, prevents the reopening of settled matters due to later judicial pronouncements, even maintaining convictions for offences later declared unconstitutional if the accused has exhausted their appeals such that they are no longer 'in the judicial system'").

[15] See *Boudreault*, *supra* note 3 at para 7.

[16] See *ibid* at para 9.

[17] See *ibid* at paras 103 – 109. While the *Boudreault* majority notes the availability of s. 24(1) of the *Charter* to remedy the violation (para 109), there is little evidence that the individuals who would have been affected by the mandatory victim surcharge have had the capacity or incentive to bring such suits, or that individuals have since taken up the Court's suggestion. For instance, at present, zero of the three decisions citing to *Boudreault*, para 109 in the CanLII database involve a party attempting to remedy the enforcement of a mandatory victim surcharge, in reliance upon the Court's invitation. Suffice it to say, the cost of litigation alone would often be prohibitive, and it is unlikely that most individuals who would have been facing ongoing surcharges would have easy access to the courts on a self-represented basis. We are also unaware of individuals or groups availing themselves of other potential *Charter* remedies, such as via a class action suit, all of which would present hurdles of their own (e.g., in the class action suit context, legal and evidentiary issues would arise when defining the class and determining whether a class action suit is appropriate, given that any member of the class must have been unable to pay the charge due to "undue hardship").

[18] *Ibid.*

part because the parties before it did not provide robust submissions on what would constitute appropriate relief in the circumstances.[19]

A further complicating factor in cases such as *Boudreault* is that, notwithstanding the "fundamental principle of our constitutional order that courts have a duty to protect the rights guaranteed by the [*Charter*] from infringement by the state," governments enjoy qualified immunity with respect to *Charter* damages when passing unconstitutional legislation.[20] The state enjoys this qualified immunity on the theory that "other foundational constitutional principles require that the state be afforded the legislative autonomy to govern effectively."[21] In *Canada (Attorney General) v Power*, the Court recently revisited this doctrine for determining when or whether a government may be liable under the *Charter*, via the *Charter's* remedial provision, s. 24(1), for the passage of unconstitutional legislation.[22] Under *Power*, damages are only available if the legislation was either clearly unconstitutional, enacted in bad faith, or an abuse of power. In restating the standard thus, the majority was expressly setting a "high standard" for any damages claim, including a high standard of "clearly wrong" conduct that was over and above an act of negligence.[23]

The legal doctrine of qualified immunity has significant relevance for the harms at issue in this report. *Charter* damages are a potential avenue for making individuals whole when they suffer constitutional harms. The doctrine *intentionally* diminishes the availability of *Charter* damages to those harmed by unconstitutional legislation. While the doctrine may well be a necessary measure, in some form, to allow for effective government, the Court's current approach has, we submit, struck the wrong balance. For instance, as it stands, the Court's current test imposes significant practical difficulties on litigants seeking to meet the Court's test. That is, "[c]abinet and solicitor client privileges and Parliamentary privileges" often work to shield the evidence that is required to prove bad faith or to otherwise prove that governments were passing the unconstitutional legislation with the requisite, culpable mental state.[24] The result is that governments can avoid liability for passing unconstitutional legislation *even if* they engage in culpable conduct. Further, there are reasonable alternatives to the Court's current approach. For the above and related reasons, Kent Roach has argued, in his leading treatise on constitutional remedies, *Constitutional Remedies in Canada*, that the Court in *Power* would have done better to place the onus "on the government to justify why damages should not be awarded," in part as a way of avoiding "many of the difficulties of proving governmental fault" in the above context.[25] We endorse this approach, in

[19] *Ibid* at para 108. Notably, the Court also observed that both the *Tinker* appellants and an intervenor, the Criminal Lawyers Association, had in fact addressed the issue in their pleadings. The issue for the Court was the need for "more robust submissions from the parties on the issue," not the absence of submissions.
[20] *Canada (Attorney General) v. Power*, 2024 SCC 26 at para 1.
[21] *Ibid*.
[22] *Ibid.*
[23] *Ibid* at 102.
[24] K. Roach, *Constitutional Remedies in Canada*, 3rd Edition (Thomson Reuters, 2025) (updated December 2025, release 2) at s 11:15 [Roach, *Constitutional Remedies*].
[25] *Ibid.*

part because it would better serve the *Charter's* promise of providing a remedy for any constitutional harms suffered and, conversely, deterring constitutional harms that may arise via the legislative process.

The above doctrines of *res judicata* and qualified immunity are an important starting point because they underline our current constitutional reality: governments currently have the power to pass unconstitutional legislation with little fear that the state will bear the full cost of remedying any constitutional violations that flow from its passage. In the ordinary case, it is rights holders, and not the state, that ultimately bear the losses suffered. While some of this problem may reflect an unfortunate but necessary compromise between a commitment to constitutional rights protection and a commitment to effective government, this tension is not the full story. Courts can always strike a different balance between these commitments, and constitutional actors more generally must always play a role in mitigating the harms that can arise by way of unconstitutional statutes.

Indirect Harms to Rights Holders and Other Systemic Harms

It is also important to underline that unconstitutional legislation can result in indirect or systemic constitutional harms. For instance, delays in declaring legislation unconstitutional can serve to compound policy harms or dangers latent in criminal sentencing approaches, such as the "indirect effects" that can flow from mandatory minimum sentencing.[26] As addressed at length in this report, mandatory minimums have been a cornerstone of tough on crime legislation, and several mandatory minimums have since been declared unconstitutional by appellate courts. Courts have done so on the grounds that the mandated sentence would result in an unfit and grossly disproportionate sentence, either as applied to the offender or as applied to a reasonable hypothetical offender. Among other things, mandatory minimums have also been criticized on legal policy grounds for incentivizing improper charge stacking (i.e., the overcharging of a criminally accused, so as to facilitate plea deals on one or some of the many charges laid) and prohibited "pleas of convenience" by the accused (i.e., where an accused pleads out to a charge they insist they did not commit because it would be in their best interests).[27] The passage of *unconstitutional* mandatory minimums complicates navigating these already thorny problems by increasing the danger that at least some of the charges that inform plea deal negotiations, and resultant plea deals, are only later found to be unconstitutional.[28]

In short, the high rate at which mandatory minimums have been subject to successful challenge, coupled with the known danger of mandatory minimum sentences incentivizing false

---

[26] *Senneville*, *supra* note 3 at para 3.
[27] See, e.g., A. Woolley, "Mandatory Minimums and Lawyers' Ethics" (May 31, 2012) https://ablawg.ca/2012/05/31/mandatory-minimums-and-lawyers'-ethics/. Although both practices are formally prohibited in Canada, they are difficult to prevent in practice. With respect to charge stacking, the practice can constitute an unconstitutional exercise of prosecutorial discretion. See *R v Anderson*, 2014 SCC 41 at paras 44 and 48.
[28] See *Senneville*, *supra* note 3 at paras 3 and 49.

guilty pleas,[29] underlines the likely harms in issue – that is, innocent persons sentenced by way of unconstitutional legislation. Further, as recognized by Justice Martin in her *R v Bouvette* concurrence, there is increasing evidence that wrongful convictions are a serious problem in Canada's criminal justice system, that they disproportionately impact vulnerable groups, and that plea deals play an unfortunate role in exacerbating these twin problems.[30]

The problem was recently highlighted in 2025, when the Supreme Court of Canada entered an acquittal for Tammy Bouvette, who had invalidly pleaded guilty to the offence of criminal negligence causing death.[31] The acquittal principally arose because the Crown failed to provide Ms. Bouvette with critical disclosure regarding issues related to a key medical expert's findings.[32] Ms. Bouvette entered the deal, on the advice of counsel, to avoid the greater charge of second degree murder, a charge that would have carried an automatic life sentence if she had been convicted. As the Court of Appeal observed, because Ms. Bouvette was "unarmed with critical information that could assist her," it was "not difficult to imagine why" she would plead to the lesser offence. [33] The deal was also influenced by the fact that Ms. Bouvette was in an intensely vulnerable position – Ms. Bouvette was a mother of four, and a "marginalized, overwhelmed and intellectually challenged [person]" – when the Crown laid the severe charges and failed to disclose the facts necessary for a full and fair defence.[34] While Ms. Bouvette ultimately secured her acquittal, her case demonstrates how false pleas can be facilitated by mandatory minimum sentences, how false pleas are invariably a problem that disproportionately affects vulnerable persons, and, finally, how false pleas are not easily remedied when they occur. While not directly applicable to Ms. Bouvette's case, such incidents also illustrate how unconstitutional mandatory minimums that are "on the books" can lead to constitutional harms, i.e., as invalid laws that may nevertheless facilitate pleas to a lesser charge, and in ways that typically evade constitutional scrutiny.

---

[29] R. Pomerance, "The New Approach to Sentencing in Canada: Reflections of a Trial Judge" (2013) 17:3 *Canadian Criminal L Rev 305* at p 312. For an experimental psychology examination of the issue, see D. M. Zimmerman & S. Hunter, "Factors affecting false guilty pleas in a mock plea bargaining scenario" (2018) 23:1 *Legal and Criminological Psychology* 53. Generally, mandatory minimums risk soliciting false pleas by increasing the risks of going to trial and the perceived likelihood of conviction, even for those who are innocent with respect to the charges laid.

[30] See *R v Bouvette*, 2025 SCC 18 at paras 218 – 19 and citations therein.

[31] *Ibid* at paras 1 – 3. For an accounting of the relevant facts, including the key exculpatory evidence withheld from Ms. Bouvette, see Canadian Registry of Wrongful Convictions, "Tammy Bouvette," https://www.wrongfulconvictions.ca/cases/tammy-bouvette. In its inaugural report, the Canadian Registry of Wrongful Convictions found that 18% of its wrongful convictions (15 cases) were false plea deals. Canadian Registry of Wrongful Convictions, *Canada Has a Guilty Plea Wrongful Conviction Problem: The First Report from The Canadian Registry of Wrongful Convictions* (February 2023), https://www.datocms-assets.com/75199/1676311113-report-on-the-guilty-plea-wrongful-convictions-in-the-canadian-registry-of-wrongful-convictions-feb-13.pdf.

[32] *Bouvette*, supra note 30 at paras 1 - 3.

[33] *Ibid* at para 3 (citing to the Court of Appeal decision and noting that the BCCA's finding of a miscarriage of justice was expressed "in no uncertain terms").

[34] *Ibid*.

Unconstitutional legislation can also impose systemic harms on the constitutional system, over and above the direct or indirect harms they can impose on individuals. Again, the example of mandatory minimums is illustrative. A frequent policy criticism of mandatory minimum sentences is that individuals being charged with an offence that carries a mandatory minimum may elect to dig in at trial, despite weakness in their own legal case, because a plea deal cannot relieve the accused of the mandatory minimum imposed by legislation.[35] Indeed, the legal effect of mandatory minimums is to remove the discretion of Crowns to enter into plea deals that would impose less than the minimum sentence for the charge to which the accused pleads guilty, even if mitigating circumstances might argue for a lesser sentence than the minimum. Constitutionally suspect provisions exacerbate this policy problem by providing litigants with reason to raise complex constitutional challenges when, absent the constitutionally suspect provision, there might have been less complex litigation or no litigation at all.[36]

In some cases, such litigation may be little more than an expensive nuisance. In others, the consequences can be more wide-reaching. The Supreme Court of Canada and Canada's appellate courts have now found dozens of the tough on crime provisions unconstitutional (see Part III, Case Law Findings). Suffice it to say, every such appellate decision represents an allocation of significant public resources, from the initial enforcement of the provisions to the lengthy and complex judicial proceedings that are required before a provision is found unconstitutional. Members of the public, including victims of crimes or other witnesses, are often involved and burdened by these constitutional complications, such as by way of sentencing results that are delayed for years until the constitutional issue is resolved. Further, Canada's complex federal structure ensures that provincial findings of invalidity do not have nationwide effect, a constitutional reality that creates the collateral difficulty of having different *Criminal Code* provisions obtain depending on the province in which one resides (unless or until the Supreme Court of Canada issues an appellate decision on the issue nationwide).[37] The inevitable result of this constitutional reality is provincial variation in the application of laws later declared unconstitutional, a variation that sits, at best, in uneasy tension with a *Charter* of rights and freedoms that is intended to provide a national standard for constitutional rights protection.

An additional reason why the above issues are a cause for concern is that they potentially intersect with partisan differences as to how the Supreme Court and constitutional litigation is

---

[35] Pomerance*, supra* note 29 at 312.

[36] In its 2022 repeal of several mandatory minimum sentences, the Department of Justice Canada expressly observed that mandatory minimums had resulted in, among other things, "longer and more complex trials." Department of Justice, "Government of Canada announces measures to keep communities safe, fight systemic racism and make our criminal justice system more effective for all" (February 18, 2021), News Release, https://www.canada.ca/en/department-justice/news/2021/02/government-of-canada-announces-measures-to-keep-communities-safe-fight-systemic-racism-and-make-our-criminal-justice-system-more-effective-for-all.html (last accessed June 26, 2025).

[37] *R v Sullivan*, 2022 SCC 19 (finding that *stare decisis* is the appropriate framework to apply to the litigation of constitutional issues, and declarations of constitutional invalidity under s. 52(1), one consequence of which is that declarations of invalidity by lower courts are not binding on courts in other jurisdictions) [*Sullivan*].

viewed. Most recently, for instance, a 2024 poll by Angus Reid found that 49% of Canadians have confidence in the Supreme Court, while 42% stated they did not.[38] This is down from a 2015 poll, when the same pollster, Angus Reid, found that 61% of Canadians had confidence in the Supreme Court (either "a great deal" or "quite a lot"),[39] a relative high point over the last twenty years, particularly as compared to the lows experienced earlier during the Harper government's term.[40] More tellingly, recent Canadian Election Study data, and academic analysis of this and related data (see Part IV, Analysis), suggests that this decline may in part be attributed to a decline in trust by Conservative-voting individuals, a subgroup with a baseline level of trust in courts that has historically already been lower than other partisan subgroups.[41]

While there is room for debate as to the proper role of the courts in Canada's constitutional system, this partisan cleavage raises troubling issues as to whether partisan differences may overwhelm the institutional and constitutional constraints on unconstitutional government action. It also invites the question as to whether repeated and highly visible conflicts over the constitutionality of legislation contribute to divergent understandings of constitutional supremacy, and its proper locus. Take, for instance, the use and threatened use of the notwithstanding clause by provincial and federal conservative parties in English Canada. The notwithstanding clause is an important bellwether for public sentiment with respect to the *Charter* because it allows governments to render several *Charter* protections inoperative in certain circumstances, subject to a five-year expiry (when the legislation must be renewed or the judiciary's dictates once again become binding). Accordingly, its use or threatened use typically signals that the government invoking the clause is willing to take the exceptional step of opposing the judicial branch for *Charter* rights-violating reasons.[42]

There is currently a significant partisan split on the pivotal question as to whether or when *Charter* protections should be subject to the clause. For instance, in a 2022 poll, Liberal and NDP voters supported outright abolishment of the clause by significant margins (58% and 71%,

[38] Angus Reid Institute, "SCOC: Most say Canada's top court is impartial, but one-third say politics play into judicial appointments" (November 14, 2024) https://angusreid.org/supreme-court-appointment-impartial-bilingualism/ [Angus Reid, 2024].
[39] Angus Reid Institute, "Canadians have a more favourable view of their Supreme Court than Americans have of their own" (August 17, 2015) https://angusreid.org/wp-content/uploads/2015/08/2015.08.14-Supreme-Court-final.pdf [Angus Reid, 2015].
[40] Angus Reid Institute, *Half of Canadians say crime is rising in their communities, as confidence in police, courts wanes* (Angus Reid Institute, 2020) https://angusreid.org/justice-system-confidence-2020/ [Angus Reid, 2020].
[41] A. Lawlor & E. Crandall, "Public Support for Canadian Courts: Understanding the Roles of Institutional Trust and Partisanship" (2022) *Canadian Journal of Law and Society / Revue Canadienne Droit et Société*, 37:1 at pp 91–112 [Lawlor & Crandall, Institutional Trust].
[42] For a recent survey of the invocations of the clause and their rationales, see, e.g., T. Kahana, "The Notwithstanding Clause in Canada: The First Forty Years" (2023) 60:1 *Osgoode Hall Law Journal* (arguing, in part, that four invocations were for ameliorative purposes) [Kahana].

respectively), while CPC voters (49%) were under the national average of 55%, bested only by the unique case of Bloc Québécois voters (15%).[43]

This remarkable difference is more acute when one turns to political practice. At the provincial level, Conservative parties have been the sole parties to rely upon *Charter* exceptions via invocations of the notwithstanding clause,[44] again save for the case of Quebec (a province with a long and unique history of invoking the clause for reasons that are distinctive to the province[45]). Federally, Conservative leader Pierre Poilievre's decision to campaign on the use of the notwithstanding clause to undo court decisions on both bail and consecutive sentencing related to Harper-era reforms (pledges that were unsurprisingly opposed by other federal parties)[46] reflected the broader federal Conservative movement in direction of the clause, including especially on criminal justice issues. While the federal invocation of the notwithstanding clause would have been the first ever by any federal government, Liberal or Conservative, in the *Charter's* forty-plus years, it also would have reflected this broader movement. Despite this decades-long federal practice of not relying upon the clause, Conservative leadership debates post-Harper have featured leading candidates giving concrete examples of how they would use the clause, such as in 2022, when *all* of Pierre Poilievre, Jean Charest, and Patrick Brown promised to undo a Supreme Court decision (*Bissonette*) – issued by a unanimous Supreme Court – that had found Parliament's imposition of consecutive 25-year parole ineligibility periods in cases involving multiple first degree murders to be unconstitutional cruel and unusual punishment.[47] For all intents and purposes, the dominant federal Conservative policy position is that the clause should be invoked more often to undercut the Court's more expansive view of judicially-safeguarded constitutional rights protection.

Whatever else they may portend, such trends suggest there may now be a deepening partisan rift in Canada as to whether and when *Charter* protections, particularly as interpreted by courts, should invalidate legislation. Such a partisan rift substantially complicates a fundamental rule of law principle animating the *Charter* itself, namely the principle that the *Charter's* constitutional protections for rights and freedoms forms part of the supreme law for all of Canada, without exception.

---

[43] Angus Reid Institute, "Notwithstanding Clause: Majority see increased use problematic, would pursue abolition," (26 January 2023), https://angusreid.org/canada-constitution-notwithstanding-clause-bill-96-bill-28/ [Angus Reid, 2023].

[44] See, e.g., Kahana, *supra* note 42 at Appendix, available at <perma.cc/M6F6-KTSF >; see also A. Lawlor & E. Crandall, "The Canadian Charter's Notwithstanding Clause as an Institutionalized Mechanism of Court Curbing" (2023) 53:1 at 9 [Lawlor & Crandall, Notwithstanding Clause].

[45] See, e.g., F. Côté and G. Rousseau "From Ford v. Québec to the Act Respecting the Laicity of the State: A Distinctive Quebec Theory and Practice of the Notwithstanding Clause" (2020) 94:18 *The Supreme Court Law Review: Osgoode Constitutional Cases Conference*.

[46] P. Zimonjic, "Poilievre says he'll use notwithstanding clause to ensure multiple-murderers die in prison" *CBC News* (14 April 2025) https://www.cbc.ca/news/politics/poilievre-notwithstanding-clause-multiple-murders-1.7509497; D. Major, T. Parry, "Poilievre hints to police he would use notwithstanding clause to change laws" *CBC News* (24 April 2024) Poilievre hints to police he would use notwithstanding clause to change laws | CBC News.

[47] Lawlor & Crandall, Notwithstanding Clause, *supra* note 44 at 5 – 9; see *Bissonnette*, *supra* note 3.

The foregoing is intended to highlight what is generally accepted as true or even trite but not given much attention: the passage of legislation later declared unconstitutional by Canada's courts visits harm on both individuals and the Canadian constitutional system alike. This report is an attempt to bridge the gap between what is generally known and a fuller, evidence-based accounting of the harms that may result from the passage of such legislation. It does so through an exploration of the above case study, a case that has served as something of an outer marker of potential harms flowing from constitutional violations: the "tough on crime" agenda of the 39th to 41st Parliaments. It does so, in part, to illustrate the case for more robust pre-enactment *Charter* scrutiny of legislation and to call into question the current standard that serves to limit *Charter* liability for the passage of legislation found to be unconstitutional.

II. The Constitutional and Legislative Background

a. Declarations of Constitutional Invalidity as Constitutional Imperative

This report's animating premise is that declarations of constitutional invalidity are among the principal mechanisms through which constitutional supremacy is realized in practice and that declarations of constitutional invalidity otherwise have critical constitutional and normative force. For this reason, any documented need for courts to rely upon this exceptional remedy is itself a legitimate cause for concern, notwithstanding the policy or legal criticisms that are sometimes raised with respect to any particular declaration. Partisan complications aside, recent Canadian survey evidence suggests that this constitutional ideal continues to have broad public resonance. Overwhelming majorities of Canadians continue to view the addition of the *Charter* positively, with most also viewing the Supreme Court of Canada as an impartial arbiter of it.[48] Overwhelming majorities of Canadians also identify judicial independence as essential to Canadian democracy.[49] They similarly identify political interference in judicial decisions and the undermining of court rulings by public officials as serious threats to the rule of law.[50] The delay or denial of access to justice for affected litigants is viewed similarly.[51]

This public commitment to judicial institutions is neither naïve nor out of step with the reality of our political institutions. Unwittingly or not, this public commitment is directly grounded in Canada's constitutional framework, as written and interpreted, including especially as embodied in the *Constitution Act, 1982's* adoption of a *Charter of Rights and Freedoms* backed by robust remedial provisions. As the Supreme Court of Canada has frequently remarked, Canada's adoption of the *Charter* effectively transformed Canada's system of government from "a system of Parliamentary supremacy to one of constitutional supremacy."[52] While Canada's previous system had allowed for the finding of laws to be invalid if they were inconsistent with the separation of powers or Canada's federal structure (a structure imposed by colonial statute), i.e., if the level of government had no authority to pass the law in dispute, it nevertheless left the question of rights and freedoms almost entirely to parliamentary institutions. A central and animating principle of the *Charter*, by contrast, is that parliamentary institutions have no authority to pass legislation that is inconsistent with the *Charter's* guarantees.

Fittingly, then, the adoption of the *Charter* was simultaneous to the adoption of a constitutional supremacy clause within Canada's Constitution. S. 52 of the *Constitution Act, 1982*, is an express recognition that "[t]he Constitution of Canada is the supreme law of Canada, and any

---

[48] See especially, Angus Reid, 2015, *supra* note 39 and Angus Reid, 2024, *supra* note 38.
[49] Discover, *Perceptions of the Rule of Law Among Canadians: Research Findings* (4 November 2025) at 5, online (pdf): Ours to Protect https://cdn.prod.website-files.com/68cd815542859c129de37ba4/690e102b27d142dd4abd4a2d_OursToProtect.Research%20Report.pdf [Discover, 2025].
[50] *Ibid* at 9.
[51] *Ibid.*
[52] *Reference re Secession of Quebec*, 1998 CanLII 793 at para 72, [1998] 2 SCR 217 (SCC) [*Secession*].

law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[53] Under this unassailable principle of constitutionalism, the Constitution, including the *Charter*, both binds all governments and provides such governments with "their sole claim to exercise lawful authority."[54] While this shift has meant that it is the Constitution, and not the courts, that places limits on lawful authority, the courts play a central role in imposing these limits by virtue of their status as the "constitutionally mandated referee," i.e., the principal institution charged with interpreting what the Constitution means.[55]

As a matter of separation of powers, it is, of course, true that Parliament has an independent duty to abide by the *Charter* when passing legislation,[56] and it is otherwise charged with the time-sensitive custodial task of removing inoperative *Charter*-violating legislation from the statute books,[57] lest unwitting courts or other government actors (e.g., police and Crown prosecutors) mistakenly apply an invalid law with no legal force.[58] When Parliament fails in this latter duty, as it sometimes does, it has had significant consequences. For instance, in a 2010 article, Kent Roach found at least three instances wherein a trial judge allowed a jury to read s. 229(c) of the *Criminal Code* with the words that had been declared invalid by the Supreme Court – almost 20 years previous, in *R v Martineau* – still present.[59] The inoperative words, finally removed in 2019,[60] had provided for murder liability on the basis that the accused "ought to know" that the pursuit of an

---

[53] Constitution Act, 1982 at s. 52(1), being Schedule B to the Canada Act 1982, 1982, c 11 (UK).
[54] *Secession*, *supra* note 52 at para 72.
[55] *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 at para 105.
[56] See especially, *Department of Justice Act*, RSC 1985, c J-2, ss. 4.1-4.2 (providing for the Minister of Justice's duty to examine bills and regulations for consistency with the *Charter* and to issue Charter Statements to inform the House, Senate, and the public about any *Charter* effects of bills tabled by the government). While the Department of Justice has since issued an evaluation of the practice of Charter Statements, its findings and recommendations are largely peripheral to the issues raised in this report. See Department of Justice, *Evaluation of Charter Statements* (June 2024), https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2024/ecs-eecc/docs/evaluation-of-charter-statements_final-report_june-2024-eng.pdf [Canada, Charter Statements].
[57] Specifically, the Court has clarified that the Court's frequent language with respect to laws being "on" or "off" the books, or being "struck down" by the courts, is to be interpreted figuratively, given that courts are restricted to declaring the legislation in issue "inoperative", i.e., of no force or effect. Technically speaking, only Parliament, and not the courts, has the power to remove legislation from the statute books, inoperative or otherwise. See *Sullivan*, *supra* note 37 at para 48. This report relies upon Justice McLachlin's figurative language, here and elsewhere (see *Sullivan* at paras 46 and 50), which captures the salient point that a declaration of invalidity by the Supreme Court renders the provision of no force or effect "against all". It does so, in part, because the Court has continued to rely upon the figurative language, post-*Sullivan*. See *Senneville*, supra note 3 at paras 47 – 49.
[58] *In extremis*, failure to carry out this duty can result in inoperative or dead letter "off the books" legislation being applied. See *R v Vader*, 2016 ABQB 505, aff'd 2019 ABCA 191, leave to appeal refused *Travis Edward Vader v. Her Majesty the Queen*, 2019 CanLII 115287 (SCC) [*Vader*]. Although the case is infamous because of the trial judge's erroneous application of s. 230 of the *Criminal Code*, a murder offence the Supreme Court had declared invalid in 1990, the case history more broadly illustrates the trial delay and associated *Charter* issues that may arise when Parliament does not discharge this custodial duty. The accused was ultimately convicted of manslaughter.
[59] K. Roach, "The Problematic Revival of Murder Under Section 229(c) of the Criminal Code" (2010) 47:3 *Alberta Law Review* at p 685 [Roach, *The Problematic Revival*].
[60] See *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s. 77. The Act, at s. 78, also repealed *Criminal Code* s. 230, the provision in issue in the *Vader* case that received national attention, see *supra*, note 58.

unlawful object would cause death. In all three cases, the result was overturned murder convictions and new trials.[61]

Nevertheless, s. 52(1) ensures that it is courts that occupy a special role as guardians of the Constitution and the principle of constitutionalism more generally.[62] It is also a role that goes hand in hand with the courts' duty to act as guardian of the rule of law;[63] this is because, in the Court's words, the task of determining whether a law is inconsistent with the Constitution is, at base, "an ordinary judicial task."[64] Thus, with respect to the review of legislation, courts are always charged with, figuratively speaking, "striking down" any unconstitutional legislation that properly comes before them (unless the unconstitutional legislation can be saved by way of other judicial remedies).

Among other things, this wide-ranging judicial obligation flows from the text of s. 52(1) itself, which reflects the framers' intent to ensure that "unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies".[65] Were this judicial mandate and its consequent judicial remedy not universal, the Supreme Court has reasoned, "[t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — [would] exact[] a price paid in the coin of injustice", such as by impairing the rights of citizens to know and act in accord with the law and by facilitating the "over-application" of the law to cases where it would be unconstitutional.[66] While the *Charter* gives Parliament the power to *temporarily* shield legislation from the effects of such declarations in certain cases, notwithstanding the judiciary's determination of the meaning of rights and freedoms (section 33), and the power to justify limitations of *Charter* rights and freedoms as reasonable (section 1), there is no textual ambiguity as to who wields the declaratory power under s. 52.

This temporary and bounded role for section 33 illustrates two distinct and important conceptions of "unconstitutional legislation." Substantively or normatively, invocations of the notwithstanding clause, and judicial practices of dissent and disagreement, often trade on a shared understanding of the principle that what the Constitution means, or should mean, is a matter on which we might disagree. Formally, however, this substantive or normative disagreement as to what the Constitution should mean does not displace the legal reality that legislation is, under s. 52, unconstitutional and of no force or effect if the courts declare it to be so. *In extremis*, for instance, a formally valid section 33 invocation is a recognition that the courts wield the power to declare that legislation without the clause would be of no force or effect. This trite distinction is belaboured here because it undergirds an essential premise of this report. While institutions and

[61] Roach, *The Problematic Revival*, *supra* note 59 at 685.
[62] Power, *supra* 20 at paras 55-56 (and citations therein).
[63] On this general duty, see, e.g., *Democracy Watch v Canada (Attorney General)*, 2026 SCC 28.
[64] *Sullivan*, *supra* note 37 at para 43.
[65] *R v Ferguson*, 2008 SCC 6 at para 65 [*Ferguson*].
[66] *Ibid* at para 72.

reasonable people may disagree as to what is constitutional, the Canadian constitutional system has, since 1982, provided courts alone with the power to make binding and permanent determinations on the matter. As set out further below (Part IV, Analysis), a corollary of this fact is that the "whether, when, and why" of declarations of constitutional invalidity answers fundamental questions with respect to the health of Canada's constitutional democracy – such as whether Parliament is heeding this binding guidance (to the extent it is required), whether it is dissenting or objecting in an appropriate way, and whether or when individuals harmed by constitutional violations (legally understood) are adequately remedied, if at all.

The practical import of these constitutional facts is demonstrated by how the judicial branch has exercised its special role of policing the principle that all lawful authority flows from the Constitution. Shortly after the *Charter's* passage, for instance, the Supreme Court of Canada recognized, in *R v Big M Drug Mart Ltd.,* that the corporation before it had the right to challenge legislation prohibiting the sale of goods on the "Lord's day" on freedom of religion and conscience grounds, whether or not the corporation could itself enjoy these *Charter* freedoms.[67] The Court reasoned that because "no one can be convicted of an offence under an unconstitutional law," the question of whether a corporation could enjoy freedom of religion was irrelevant to the constitutional issue before it.[68]

In this and similar ways, s. 52(1) of the *Constitution Act, 1982* has been interpreted to provide courts with the judicial power to invalidate unconstitutional laws even if the findings of invalidity are not based upon "the precise facts before the court," lest "bad laws remain on the books indefinitely."[69] In the Court's reasoning, "[n]o one should be subjected to an unconstitutional law . . . . This reflects the principle that the Constitution belongs to all citizens, who share a right to the constitutional application of the laws of Canada."[70] Further, and as recently expressed in *Senneville*, the purposes of "avoid[ing] invalid laws remaining in force indefinitely" include avoiding the "indirect effects" that can flow from invalid laws (such as via a pernicious influence

---

[67] *R v Big M Drug Mart Ltd.,* 1985 CanLII 69, [1985] 1 SCR 295 (CanLII) (SCC) [*Big M*]. This is not to say that *Big M* has done away with limits imposed on corporate entities in pleading *Charter* protections when they are not themselves capable of enjoying the rights or freedoms. As a general rule, corporations may plead *Charter* protections even if they are not themselves capable of exercising the *Charter* right or freedom if the challenge concerns the potential application of a criminal sanction (as noted, "no one can be convicted of an offence under an unconstitutional law") or if the corporation has been compelled as a defendant in a proceeding by the state. Otherwise, corporations are subject to the general rule of standing that they cannot plead rights or freedoms that they do not possess. See, e.g., *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 (holding that corporations do not enjoy the s. 12 protection against cruel and unusual treatment or punishment). Relevant to our purposes, the trajectory of the case law has been to expand, rather than restrict, the exception to rules of standing articulated in *Big M*. See, e.g., *Canadian Egg Marketing Agency v Richardson*, 1997 CanLII 17020) at paras 33 – 44 and citations therein, [1998] 3 SCR 157 (SCC) (expressly expanding the exception in *Big M* to corporations compelled in a civil proceeding, while further taking notice of the exceptions provided by public interest standing and the Court's residuary discretion to hear *Charter* issues when the case has been fully argued on the merits and the case is of sufficient public importance).

[68] *Big M* at p 313.

[69] *Nur*, *supra* note 3 para 51.

[70] *Ibid* at para 51; see also *Hills*, *supra* note 3 at paras 71 – 73.

on the plea bargaining process) and the overarching need to "promote legal certainty and real access to justice" for all citizens, *including* those without the ability to initiate legal proceedings.[71] Thus, by providing constitutional certainty on *Charter* issues that speak to litigants and the public alike, the Court has viewed itself as furthering the *Charter* promise of ensuring an access to justice that is secured "independent of one's ability to bring a legal proceeding."[72]

Accordingly, the Court's approach in *Big M* is only one of many ways that the judiciary has sought to guard against the problem of unconstitutional legislation remaining in force and on the books for lack of an affected litigant willing and able to challenge the legislation in issue. Most notably, courts have, in the appropriate case, expressly permitted litigants to challenge legislation or government action on behalf of the public interest. Public interest litigants are, by definition, not directly affected by the constitutional protections in issue, and thus must seek standing on other grounds. Under the relevant multi-factor test, courts must consider both the purposes underlying limits to standing (preserving scarce resources, ensuring those most directly affected by issues are heard by the courts, and ensuring that courts restrict themselves to their proper role) *and* the purposes underlying the need to relax these rules in the case of *bona fide* public interest litigants, namely the need to give effect to the principle of legality and to ensure access to the courts or access to justice.[73] The overarching purpose of the last two considerations, and the development of public interest standing more generally, has been to protect the public's right "to government in accordance with the law" and "to prevent the immunization of legislation or public acts from any challenge."[74]

Somewhat more controversially, Canadian courts have also permitted consideration of the constitutionality of legislation by reference to the hypothetical circumstances that are reasonably likely to arise. In the case of mandatory minimum sentences, reasonable hypothetical offenders have routinely been used to invalidate legislation on the grounds that the sentence would be cruel and unusual if applied to a hypothetical offender other than the individual being sentenced (see Part IV, Analysis). Indeed, some courts have held, in the appropriate case, that it is an error of law not to consider a constitutional challenge before the court even if the sentencing judge concludes that the constitutional issue would have no impact on the offender before it.[75] More recently, reasonable hypotheticals have also been accepted as a legitimate mechanism for challenging the

[71] *Senneville*, *supra* note 3, at para 3.
[72] *Ibid* at para 48 (citing to P. Daly et al., "The Effect of Declarations of Unconstitutionality in Canada" (2022), 42 *NJCL* 25 at p 44).
[73] See *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at paras 29 – 30.
[74] *Ibid* at para 40 (citing to *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116, [1992] 1 SCR 236 (SCC) at pp 250 and 252).
[75] See *Griffith v R*, 2023 QCCA 301 at paras 53 – 85, leave to appeal refused *Procureur général du Québec c. Darrell Griffith*, 2023 CanLII 92318 [*Griffith*] (finding that judicial restraint cannot abrogate the Court's duty to examine the constitutionality of provisions in dispute via reasonable hypotheticals, if the constitutional issues have been properly raised).

constitutionality of offences based on their application to a reasonable hypothetical *accused* more broadly.[76]

The *Charter's* remedial provisions further buttress the Constitution's animating concern with protecting all citizens against unconstitutional state action. The Supreme Court of Canada has observed that granting just and appropriate remedies is the courts' "most meaningful function under the Charter."[77] It has also observed that the Court's purposive approach to constitutional remedies is intended to give life to the ancient maxim, reflected in s. 24(1), that "where there is a right, there must be a remedy."[78] While a court's power to issue such remedies under s. 24(1) is discretionary, the Court has noted that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion."[79] Implicit in these lofty judicial pronouncements is the premise that a violation of *Charter* rights and freedoms is a constitutional harm in search of a just and appropriate remedy (to be fashioned by courts). This remains true notwithstanding the judiciary's concerns that discretion under s. 24 must also respect the framework of our constitutional democracy, including the limited roles of courts within this system, and the need to ensure that any remedies ensure fairness for parties against whom an order is made.[80]

The status of the *Charter* as a constitutional document that necessarily implicates the good of the public at large, as well as the societal need to prevent future breaches, is perhaps best highlighted by the Supreme Court of Canada's guidance when first recognizing the availability of *Charter* damages under s. 24(1). In *Vancouver (City) v Ward*, a case in which the Asper Centre intervened, the Court explained the need for their availability to extend beyond the goal of compensation:

> [28] Vindication, in the sense of affirming constitutional values, has also been recognized as a valid object of damages in many jurisdictions…. Vindication focuses on the harm the infringement causes society. As Didcott J. observed in *Fose*, violations of constitutionally protected rights harm not only their particular victims, but society as a whole. This is because they "impair public confidence and diminish public faith in the efficacy of the [constitutional] protection": *Fose*, at para. 82. While one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society.

---

[76] See especially *R v Appulonappa*, 2015 SCC 59 at para 28 (noting, in a case wherein the appellants relied solely upon reasonable hypotheticals to challenge the constitutionality of a human smuggling offence, that "It is indeed established that a court may consider 'reasonable hypotheticals' to determine whether a law is consistent with the *Charter*").
[77] *Nelles v Ontario* 1989 CanLII 77 at para 50, [1989] 2 SCR 170 (SCC).
[78] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 25 [*Doucet-Boudreau*].
[79] *Mills v The Queen*, 1986 CanLII 17 at para 278, [1986] 1 SCR 863 (SCC).
[80] *Doucet-Boudreau*, *supra* note 78 at paras 54 – 59.

> [29] Finally, deterrence of future breaches of the right has also been widely recognized as a valid object of public law damages…. Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. … [D]eterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.[81]

For these and similar reasons, the principles of constitutionalism and the rule of law inform the rule that the state itself may be liable for *Charter* damages when it passes unconstitutional legislation, albeit only if, under the Court's current doctrine (as noted in Part I, Introduction), the legislation was clearly unconstitutional or in bad faith or an abuse of power.[82]

The foregoing is intended to highlight how Canada's constitutional democracy is committed, at least in principle, to the notion that government must always act in accord with the Constitution, as supreme law. From the vantage point of Canada's constitutional design, including as embedded in s. 52 of the *Constitution Act, 1982*, the mere presence of unconstitutional legislation on the books has and must be viewed as a *per se* injustice. While Canada's constitutional structure also contemplates and even facilitates reasonable disagreement as to whether the judiciary has come to the right conclusions on constitutional matters, the supremacy clause also stands for the proposition that the passage of laws declared unconstitutional by our appellate courts should both be the exception and heavily guarded against. Conversely, to the extent the Canadian system allows for the frequent passage of constitutionally suspect laws or fails to remedy constitutionally suspect legislation on the books once it is on notice of declared constitutional flaws, it is evidence of constitutional failings, including with respect to the principles of vindication and deterrence.

b. This Report's Case Study: The Unconstitutional Tough on Crime Legislation of the 39th to 41st Parliaments

This report examines the Harper government's approach to crime and sentencing to document the legal system's vulnerability to the passage of laws later declared unconstitutional and to begin to illustrate the constitutional harms that can arise from the repeated passage of these same laws. While our own review of the case law and findings are presented in Part III of this report, these findings and our analysis build upon or respond to the significant commentary,

---

[81] *Vancouver (City) v Ward*, 2010 SCC 27 at paras 25 – 29 [Ward]. The Asper Centre intervened in the case, with its joint Intervener British Columbia Civil Liberties Association, to argue that s.24(1) of the Charter authorizes courts to award *Charter* damages for the infringement of a right in the absence of bad faith, an abuse of power or tortious conduct committed by the infringer. See Factum of the Joint Interveners David Asper Centre for Constitutional Rights and British Columbia Civil Liberties Association (4 January 2010), https://aspercentre.ca/wp-content/uploads/2017/04/Ward-Factum.pdf.

[82] *Power*, *supra* note 20; *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13.

academic and otherwise, that has been produced with respect to this period of Canadian constitutional history. The remainder of this section sets out some of this context.

i. The Tough on Crime Approach in Context

In an oft-cited article on sentencing policy, Anthony Doob and Cheryl Webster describe Canada's once longstanding tradition of treating incarceration as a "necessary evil."[83] Canada's comprehensive 1996 sentencing reforms largely reflected this tradition. In 1996, the Liberal government specifically introduced a comprehensive sentencing protocol to the *Criminal Code*, which articulated paradigmatic principles of sentencing such as denunciation, individual and general deterrence, rehabilitation, and incapacitation.[84] Further, the additions incorporated a strong statement of proportionality and maintained the tradition of leaving sentencing largely to judges.[85] Over the next decade, however, this consensus began to erode. The Liberal government restricted access to the faint hope clause – a provision allowing for early parole for offenders serving life sentences – and introduced mandatory minimum sentences relating to firearms and driving offences.[86] As Doob elsewhere argued (with Carla Cesaroni), for many politicians, mandatory minimum sentences "represent a convenient, expeditious, and popular response to a specific crime problem."[87]

Perhaps unsurprisingly, then, the policy had wide appeal. All three major national political parties supported mandatory minimum sentences during this time period, broadly speaking, with the Liberals and Conservatives including mandatory minimum sentences in their 2006 platform.[88] Federal parties, including especially the Liberal Party, also supported the legislation arising from the Conservative's 2006 tough on crime platform as it unfolded.[89] Indeed, the Conservative's mandatory minimums built upon lesser minimums introduced by a minority Liberal government in 2004 and enacted in 2005. These mandatory minimums had the further effect of restricting some of the Liberal's passage of anti-carceral reforms in 1996, such as the introduction of conditional sentencing (i.e., sentences served in the community under certain conditions, providing a halfway home between probationary sentences and incarceration) and the passage of s. 718.2(*e*), a *Criminal Code* provision having "the remedial purpose of restricting the use of prison for all offenders, and … having a particular remedial role with respect to aboriginal peoples."[90]

---

[83] A. N. Doob & C.M. Webster, "Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century" (2016) 45:1 *Crime and Justice* 359 at 367 [Doob & Webster].
[84] *Ibid* at 374. See also *Criminal Code*, RSC 1985, c C-46, s 718.
[85] *Criminal Code*, s 718.1.
[86] Doob & Webster, *supra* note 83 at 375-377.
[87] A. N. Doob & C. Cesaroni, "The political attractiveness of mandatory minimum sentences" (2001) 39:1 Osgoode L J 287.
[88] J.V. Roberts, N. Crutcher, & P. Verbrugge, *supra* note 2 at 78.
[89] M.J. Stobbe, *Was Stephen Harper Really Tough on Crime? A Systems and Symbolic Action Analysis* (PhD, University of Saskatchewan, 2018) at Table 8.1, p 188 [Stobbe].
[90] *R v Gladue*, 1999 CanLII 679 at para 45, [1999] 1 SCR 688 (SCC) [*Gladue*] (commenting on the legislative purpose of the provision and finding it remedial, i.e., finding it went beyond a codification of pre-existing principles). For a discussion of these 1996 anti-carceral reforms, their later restriction, and Parliament's burgeoning

Even with these post-1996 trends, however, Doob and Webster maintain that the Harper era constituted a "dramatic break" with Canada's historic traditions in sentencing.[91] Conservative rhetoric coupled with a lack of serious opposition from other parties reflected a "tough on crime" approach.[92] In their 2006 election campaign, the Harper government promised many changes to the criminal justice system in Canada, including an increase in the imposition of mandatory minimum sentences, the restriction of conditional sentences, the elimination of the faint hope clause, the tightening of parole release, the reduction of pre-sentence custody credit (i.e., the credit provided to offenders for time spent in custody prior to trial or sentence), the requirement for some sentences to be served consecutively as opposed to concurrently, and the restriction of prisoners in federal institutions from voting in elections.[93] The Harper government delivered some of their promises quickly, such as by enacting – with Liberal and NDP support – *An Act to amend the Criminal Code (conditional sentence of imprisonment)* which made conditional sentences unavailable for any offence punishable by 10 or more years in prison, and – with Liberal, NDP, and BQ support – *An Act to amend the Criminal Code (minimum penalties for offences involving firearms)* which raised mandatory minimum sentences for certain firearms-related offences.[94]

For the next decade, the Harper government produced what Doob and Webster describe as an "unrelenting rain" of changes in sentencing laws.[95] This observation reflects a general academic consensus that a substantial portion of the government's legislative efforts were directed "to criminal justice policy in general and sentencing policy in particular,"[96] thereby forming a distinct legislative agenda that merits retrospective evaluation.

ii. The Harper Government, the Courts, and Unconstitutional Legislation

The expressly constitutional issues that beset the Harper government have also routinely received critical attention during and after the government's significant stay in power.[97]

For instance, media coverage often contended that the constitutional litigation of legislation passed during this era negatively impacted the relationship between Parliament and the Supreme Court of Canada.[98] Some academic commentators have argued similarly or have otherwise

---

conflict with Court precedent during this time period, see, e.g., J. Rudin, "There Must Be Some Kind of Way Out of Here: Aboriginal Over-Representation, Bill C-10, and the Charter of Rights" (2013) 17:3 at 350 – 352 [Rudin].

[91] A. N. Doob & C.M. Webster, *supra* note 83 at 380.

[92] *Ibid*.

[93] *Ibid*.

[94] *Ibid* at 382.

[95] *Ibid* at 385.

[96] K. Puddister, "How the Canadian sentencing system impacts policy reform: An examination of the Harper era" (2021) 43:2 *Law & Policy* at 149.

[97] See, e.g., R. Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing* (Vancouver: British Civil Liberties Association, 2014); J.B. Kelly & K. Puddister, "Criminal Justice Policy During the Harper Era: Private Member's Bills, Penal Populism, and the Criminal Code of Canada" (2017) 32:3 *Canadian Journal of Law & Society / La Revue Canadienne Droit et Société*; and C. Manfredi, "Conservatives, the Supreme Court of Canada, and the Constitution: Judicial-Government Relations, 2006–2015" (2015) 52:3 *Osgoode Hall L* J 951.

[98] C. Manfredi, *supra* note 97 at 952-953. See for example "The Supreme Court is Harper's real Opposition," The Globe and Mail (1 July 2014), online: <www.theglobeandmail.com/globe-debate/the-supreme-court-is-harpers-real-

maintained that the Court was a consistent roadblock to the government's policy agenda.[99] As Emmett Macfarlane has maintained, evidence for this view can be found in that fact that the Harper government had the unique distinction of losing every constitutional reference opinion heard by the Supreme Court of Canada during the Harper government's tenure (i.e., cases that typically have significant policy implications, such as Senate reform), the only government to have done so since Confederation.[100]

Be that as it may, this popular understanding must be reconciled with the fact that the government's actual losses while governing only amounted to a handful of cases.[101] Most notably, in a 2016 piece, Christopher Manfredi relied on this evidence, in part, to argue that the relationship between the Harper government and the Supreme Court was not as fractious as it had appeared.[102] In addition to detailing how the legislation at issue was often enacted by previous governments, Manfredi observed that the rate at which the government lost *Charter* cases as the "defending government" was almost the lowest of the most recent three governments (from 2015) to date (1.33 compared to 2.56 and 1.31).[103] Contentious cases such as *Bedford* and *PHS*, which Manfredi conceded were examples of cases which demonstrated a fractious relationship, were thus more the exception than the rule.[104] Further to this argument, Manfredi observed that many of the several other cases during the Harper era in which legislation was struck down did not align with the adversarial narrative, such as the Court's message in the first *Securities Reference* as "one of cooperation rather than confrontation."[105] Manfredi concluded that "[b]oth the overall picture and the specific circumstances of judicial invalidations under the Charter during the CPC government indicate a much more complex relationship between the Court and the government than can be captured through a simple 'scorecard' of outcomes."[106]

Somewhat auspiciously, Manfredi observed that perhaps the closest fit with the typical narrative was the case of *Nur*, where the Supreme Court majority firmly rejected the Harper government's specific use of mandatory minimums.[107] In retrospect, Manfredi's approach and argument – which defined the relation between the government and the courts by way of cases litigated while the Conservative government remained in power – has had limited import for answering the broader question as to the government's relationship to the courts as a matter of Canadian constitutional development more generally. Constitutional litigation of tough on crime

---

opposition/article19395285>, "Harper vs the Supreme Court of Canada," Global News (12 May 2014), online:<globalnews.ca/news/1325937/harper-vs-the-supreme-court-of-canada>.

[99] E. Macfarlane, "You Can't Always Get What You Want" (2018) *Canadian Journal of Political Science / Revue canadienne de science politique*, 51:1 [Macfarlane].

[100] *Ibid* at 13 - 14.

[101] Manfredi, *supra* note 97 at 958 – 959.

[102] *Ibid.*

[103] *Ibid* at 957 – 959.

[104] *Ibid* at 965.

[105] *Ibid* at 971.

[106] *Ibid*.

[107] *Nur*, *supra* note 3.

legislation has occupied the courts for years after its passage, with several of the Supreme Court of Canada's hallmark criminal law decisions over the last decade undoing signature legislation (see Part III, Case Law Findings). Among other things, this case law demonstrates, perhaps unsurprisingly, that unconstitutional legislation may spend several years on the books before appellate courts issue a declaration of invalidity, i.e., well after the government responsible has left power, and any full accounting of a government's ultimate relation with the judicial branch must address these longer-term developments.

Relatedly, recent literature commenting on the Harper era's tough on crime period has also turned its mind to its most constitutionally contested contribution: the passage of mandatory minimum sentences. Most notably for our purposes, in a relatively recent survey of provincial appellate and Supreme Court of Canada decisions, Brendan Dell found that 39 of 51 Harper-era mandatory minimum sentences provisions introduced into either the *Criminal Code* or the *Controlled Drugs and Substances Act* had been found to violate the *Charter*.[108] All 39 of the mandatory minimum sentence provisions were declared of no force or effect.[109] On Dell's accounting (ending in March 2023), the first appellate challenge arose in 2013 and then generally increased until a peak in 2018, with a total of 11 cases before appellate courts challenging 15 separate mandatory minimum provisions.[110] The provisions also arose from a broad and sustained legislative agenda. Again on Dell's accounting, the government passed eleven bills that created or increased 51 different mandatory minimum sentences between 2006 and 2015.[111] 42 of the 51 mandatory minimum sentences that were introduced or increased came from four bills, two of which were introduced in the government's final session in power, as a majority government,[112] with the bulk of the 51 sentences concerning sexual offences (32), firearms (7), and drug-related offences (5).[113]

iii. The Effects of Legislation Declared Unconstitutional?

Both the academic literature and our case law findings generally support the conclusion that the government's criminal justice reforms from 2006 – 2015 were found to violate the *Charter* at a relatively meaningful rate, at least in retrospect, and at least as assessed by appellate courts. The present report attempts to extend this observation by examining some of the consequences of declared unconstitutional legislation remaining in force before, during, and sometimes after relevant declarations. However, at least three significant issues complicate any attempt to draw a causal story between the declared unconstitutional tough on crime provisions arising from the 39th to 41st Parliaments and their impact, on offenders or otherwise.

---

[108] B. Dell, "Return to *Smith*? Harper-Era Mandatory Minimum Sentences in Canadian Courts (2008-2023)" (2023) 55:2 *Ottawa L Rev* 327 at 344 [Dell].
[109] *Ibid* at 346.
[110] *Ibid* at 343.
[111] *Ibid* at 339.
[112] *Ibid* at 340.
[113] *Ibid* at 341.

First and foremost, we are unaware of any secondary literature that has attempted to measure the effects of the government's unconstitutional provisions, as such. Instead, and as reflected by the above-referenced work, the literature assessing the government's tough on crime policy has generally either tallied the constitutional losses suffered by the Harper government or asked whether the tough on crime policy did, in fact, lead to the harsher results with respect to sentencing one might expect given the rhetoric and retributive justice underpinnings of the policy. While both kinds of studies may be suggestive, they do not attempt to answer the more granular question as to whether the known *unconstitutional* legislation from the time period exacerbated or mitigated findings with respect to sentence severity or related measures for "tough on crime" sentencing. Put another way, the unanswered question can be posed thus: If the government had restricted itself to *Charter*-compliant legislation, would the effects of its sentencing reforms have been materially different?

A second complicating issue is that at least some of the effects of the government's later-declared unconstitutional legislation may be unmeasurable. The theoretical difficulty is that it is often difficult, and sometimes impossible, to disentangle what would have happened but for legislation later declared unconstitutional, particularly when that legislation is on the books for a number of years. An example helps illustrate the difficulty. In the case of plea bargaining, an accused may face several charges, only one of which may carry an unconstitutional mandatory minimum sentence. The accused may then plead guilty, in exchange for the dropping or reducing of some of the charges laid (such as often happens in a global resolution). In these cases, measuring the effect of the constitutionally flawed provision on the final resolution is very likely to be speculative at best. Indeed, in many cases, the accused may themselves not know how their behaviour would have changed but for the flawed provision.

The final complication is that, even leaving the above difficulties aside, the literature itself provides a somewhat contested portrait as to whether or to what extent the government's "tough on crime" policies had their ostensibly intended effects on criminal sentencing, in general. This literature is relevant to the issue at hand, notwithstanding the above qualifications, because if the actual effects of the tough on crime agenda were muted or severe in the aggregate, the effects may also have been muted or severe in the case of the unconstitutional legislation that made up a substantial part of this agenda.

Some of the evidence may support the view that little changed in Canadian corrections despite the government's ostensibly significant legal reforms. In 2022, Jean-Denis David et al. identified relatively stable levels of severity in sentencing during and beyond the era, as defined by a sentencing severity index created for the study.[114] The sentencing severity index takes into

[114]J.D. David, C. Leclerc, & Johnson B. Johnson, "Reconsidering Penal Stability in Canada Through a New Sentencing Severity Index" (2022) 3:1 *International Criminology* 26 at 34 [J.D. David, C. Leclerc, & Johnson B. Johnson]. David et al also note that data from 2015/16 is problematic since sentence length data was missing for the province of Ontario during that year. Further, the study only considers two sentences among several within the arsenal of sentences available to courts (did not consider conditional sentences).

account "both the frequency of custody and probation sentences, and sentence length to assess changes in sentencing practices," an overarching purpose of which is to move beyond studies that have focused almost exclusively on incarceration rates to examine the effects of sentencing policy.[115]

These aggregate findings are of a piece with the arguments and conclusions of certain authors relying upon aggregate incarceration-based data. In a 2021 article, the political scientist Kate Puddister argued that "available data do not indicate that there have been seismic shifts in Canadian corrections since the Harper government left office in 2015," outside of a downloading of costs onto provincial governments.[116] Puddister's conclusion largely rests on aggregate incarceration rates and prior literature demonstrating Canada's history with stable rates of incarceration, including work by Doob and Webster.[117] While Puddister acknowledges that it may have been premature to draw conclusions upon her last year of data (2016/2017), we note that the relevant rates upon which she relied fell further in subsequent years at both the federal and provincial/territorial levels (well before mandatory minimum sentencing provisions were repealed via legislation), which may be interpreted as being consistent with her thesis.[118] Notably, authors employing comparable approaches to Puddister have similarly maintained that Canada's incarceration rate has been stable, despite the widescale introduction of mandatory minimums.[119]

That said, David et al.'s above findings with respect to sentencing severity in the aggregate also come with the authors' caution that their aggregate findings do not provide the full story. First, they maintain that "it is undeniable that the rates in the use of prison and probation as well as their average length have changed...even if the overall severity changed little."[120] Generally, David et al. found that between 2005/2006 through 2016/2017, custodial sentences became more frequent, but shorter, while probationary sentences were fewer, but longer.[121] Specifically, David et al. found

---

[115] *Ibid* at 27.
[116] Puddister, *supra* note 96 at 159.
[117] *Ibid*.
[118] Puddister relies upon Canada's combined adult incarceration rate of 136 per 100,000 in 2016/17, i.e., adults in both provincial/territorial (86.96) and federal (49.29) corrections programs. *Ibid*. The data published after her study show a general decline in incarceration rates in Canada. While these trends raise complicated questions with respect to causation, they may be interpreted as lending support to Puddister's argument that any effect of the Harper government's "tough on crime" approach was muted. Specifically, at the provincial/territorial level, the incarceration rate of 86.96 per 100,000 was a high-water mark as compared to each of the six years subsequent for which data is published (83.88, 79.57, 78.66, 61.56, 66.84, 71.59). Statistics Canada. Table 35-10-0154-01 Average counts of adults in provincial and territorial correctional programs, available at https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401. At the federal level, the same holds true for the rate of 49.29 per 100,000 as compared to the six years subsequent for which data is published (48.02, 47.08, 46.16, 41.71, 39.96, 40.07). Statistics Canada. Table 35-10-0155-01 Average counts of offenders in federal programs, Canada and regions, available at https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015501.
[119] See Stobbe, *supra* note 89, at ch 2 and ch 5. This general theme articulated by both Puddister and Stobbe builds upon the earlier, leading work of Webster and Doob. See especially Doob & Webster, *supra* note 83 and A.N. Doob & C.M. Webster "Maintaining Our Balance: Trends in Imprisonment Policies in Canada" in K. Ismaili, J.B. Sprott, & Kim Varma, eds, *Canadian Criminal Justice Policy: Contemporary Perspectives* (Oxford, 2012).
[120] J.D. David, C. Leclerc, & Johnson B. Johnson, *supra* note 114.
[121] *Ibid*.

that the number of custody sentences increased from 347 to 390 sentences issued for every 1000 guilty cases between 2005 and 2017.[122] Probation sentences decreased from 303 to 270 probation sentences for every 1000 guilty cases.[123] However, the average number of days for custody sentences declined from 126 to 107 days between 2005/2006 and 2016/2017.[124] David et al. note that this decrease is mainly attributable to a small group of cases with long sentences which have diminished over time: custody sentences at the 95th percentile decreased 10% from 600 to 540 days between 2005/2006 and 2016/2017.[125] Reciprocally, the length of probation sentences increased. From 2010/2011 onward, the average probation sentence length increased almost continuously from 412 to 435 days translating into a 5.6% increase.[126]

Second, David et al. found that the effects of reforms were substantially greater with respect to offences targeted by government legislation, namely sexual offences against children and drug offences.[127] Finally, David et al. caution that their aggregate index, can, and did, obscure variations between the provinces that cancel out in the aggregate.[128]

In possible contrast to both sets of findings, Jeffrey Penney et al. found, in a 2023 study looking at Liberal-era mandatory minimums, that the introduction of mandatory minimums increases the average sentence length for a given offence, sometimes far exceeding the imposed minimums.[129] They also found that the increases occur immediately following the policy change, suggesting that judges and prosecutors quickly change their sentencing behaviour after the implementation of mandatory minimum sentences.[130] These conclusions were consistent with evidence from the U.S. suggesting that the introduction of mandatory minimum sentences for specific crimes accounted for much of the growth in incarceration rates in the United States.[131]

Further complications arise given the significant literature finding that incarceration for certain groups, including especially Indigenous peoples, rose dramatically during our relevant period. For instance, a 2019 review of the literature commissioned by the Department of Justice observed that from 2008 – 2009 to 2017 – 2018, i.e., from about the beginnings of tough on crime legislation taking force until larger efforts of repeal began to materialize (such as the first legislative repeal of mandatory minimums), Indigenous individuals went from roughly 20 percent to 28 percent of the total population in federal institutions, whereas Indigenous women went from

[122] *Ibid* at 30.
[123] *Ibid*.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid* at 35.
[128] *Ibid* at 35-36.
[129] J. Penney, S. Lehrer, & E. Galan, "Mandatory minimum sentencing and its effect on sentencing distributions: Evidence from Canada" (2023) 57:1 *Canadian Journal of Economics* 55 [J. Penney, S. Lehrer, & E. Galan].
[130] *Ibid*.
[131] *Ibid* at 57.

constituting 32 percent to 40 percent.[132] More recent reporting suggests these trends slowed for Indigenous offenders as a whole, but not for women. For instance, by 2022/2023, the figures stood at 29 percent and 50%, respectively.[133]

In provincial and territorial institutions, the results were similar, with a documented rise in the population of incarcerated Indigenous individuals from 21% to 28% around the same time period (2006 – 2007 to 2016 – 2017).[134] Similar increases can be observed in admissions data, including in years in which legislative efforts to pass tough on crime legislation culminated. For instance, in the three years between 2013-2014 and 2016-2017, total adult Indigenous admissions to custody rose from 25 percent of total admissions to 30 percent, sentenced admissions rose from 26 percent to 30 percent, and remands rose from 23 percent to 29 percent.[135] While rates of custody admission at the provincial level have since appeared to stabilize in the aggregate, women face substantially higher rates of admission (42%) than men (30%).[136]

Suffice it to say, these are breathtaking figures, both absolutely and with respect to rates of increase – during these time periods, the Indigenous population of Canada was approximately 4.1% of Canada's adult population (and 8% of its youth population), i.e., substantially lower than their rates of incarceration.[137] In short, the well-documented problem of overrepresentation of Indigenous people in carceral institutions consistently and dramatically increased during the relevant time periods, both for Indigenous individuals generally, and for certain subgroups in particular (including especially women, and young women in particular), despite an apparently stable incarceration rate in the aggregate,[138] and despite the problem of overrepresentation being well beyond acute at the start of the period in issue. While the causes for such trends may be several, the data strongly support a certain level of skepticism for the "same old, same old" thesis.

With these complications in mind, what conclusions might be drawn from the extant literature? The seemingly competing views offered by the literature are not necessarily in conflict. Penney et al. appear to offer outlying results by finding an "inflationary floor" with respect to certain mandatory minimum offences. Critically, Penney et al. consider a narrow scope of offences: namely, sexual crimes against children and child pornography offences.[139] While Penney et al. consider the Liberal's introduction of mandatory minimums for these offences, the offence

---

[132] Canada, Department of Justice, Research and Statistics Division, S. Clark, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (2019) at 8, and citations therein, archived at https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf [*DOJ, Overrepresentation of Indigenous People, 2019*].
[133] Canada, Office of the Correctional Investigator, Office of the Correctional investigator Annual Report 2021-2022 (2022), archived at https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2021-2022.
[134] *DOJ, Overrepresentation of Indigenous People*, *2019*, *supra* note 132 at 9.
[135] *Ibid* at 10.
[136] See, e.g., Canada, Department of Justice, JustFacts: Research and Statistics Division, *The Overrepresentation of Indigenous People in the Criminal Justice System* (2024) at 4, and citations therein, archived at https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2024/pdf/rsd_jf2024_indigenous-overrepresentation_eng.pdf.
[137] *DOJ, Overrepresentation of Indigenous People*, *2019*, supra note 132 at 8 - 10.
[138] *Ibid* at 10.
[139] J. Penney, S. Lehrer, & E. Galan, *supra* note 129 at 61.

types were subsequently targeted by the Conservative government's mandatory minimum initiatives, on repeated occasions (see Appendix A). The scope of offences surveyed by Penney et al are considered within the category "other sexual offences" in the study by David et al.[140] As noted, David et al similarly found that, despite their findings of aggregate stability, targeted reforms such as "other sexual offences" saw an increase in sentencing severity. Accordingly, the findings associated with these sentences may be consistent.

Taken as a whole, the extant literature suggests that aggregate incarceration rates very likely do not tell the full story. Mandatory minimum reforms passed during the 39th to 41st Parliaments likely increased the sentencing severity for *targeted* offences, even if the broader justice system likely acted to counterbalance the overall sentencing severity and incarceration rate throughout the examined periods in the aggregate. While not the subject of the above studies, these findings compound the potential policy problem raised by unconstitutional tough on crime legislation. That is, courts have since declared the sentencing provisions for several "targeted" offences unconstitutional, due in part to their overzealous removal of judicial discretion where it was required by the *Charter* (see Part III, Case Law Findings). For that reason, it is at least likely that provisions ultimately declared unconstitutional have contributed to some of the larger policy effects arising from tough on crime sentencing generally – i.e., increased sentencing severity, the creation of "inflationary floors", and the increased overincarceration of Indigenous individuals.

This overarching problem is perhaps clearest in the case of Indigenous overincarceration. For instance, shortly after *The Safe Streets Act* was passed – the most wide-ranging of the tough on crime bills passed during our case study – Jonathan Rudin observed that Parliament and the Supreme Court were moving in separate directions with respect to criminal sentencing generally and with respect to the sentencing of Indigenous offenders in particular.[141] This was reflected, in part, in the Court's decision in *R v Ipeelee*, wherein the Court recognized that the facts of overincarceration of Indigenous individuals is a result of contemporary systemic discrimination.[142] Accordingly, the Court reasoned, it is partly up to sentencing judges, as front-line workers, to exercise their discretionary-decision making powers in sentencing to take such facts into account, and to ensure that they were not contributing further to the problem.[143] By contrast, discretionary judicial decision-making was a primary target of the tough on crime agenda, via the passage of mandatory minimums (in *The Safe Streets Act* and elsewhere). No issue contributed more to the constant clash between Parliament and the courts on tough on crime legislation. The Court's reasons in *Ipeelee* are a reminder as to why the removal of remedial discretion was, at the same time, a removal of the Court's ability to mitigate known constitutional issues, such as the known problem of contemporary systemic discrimination and its contribution to Indigenous incarceration.

[140] See J.D. David, C. Leclerc, & Johnson B. Johnson, *supra* note 114 at 34.
[141] Rudin, *supra* note 90.
[142] *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*] at 67; Rudin, *supra* note 90 at 355 – 356.
[143] *Ipeelee*, *supra* note 142 at 67.

III. Case Law Findings

For the reasons set out in Parts I and II, an underlying premise of this report is that the frequent passage of legislation that is later declared unconstitutional by appellate courts is cause for constitutional concern. A secondary premise is that frequent delays or other complications in arriving at declarations of constitutional invalidity is a further, independent cause for constitutional concern. Finally, while we have not systematically addressed the issue, a final animating premise is that the constitutional harms arising from the above enactments or delays may be exacerbated when the provisions in issue work in tandem to undermine the *Charter's* ameliorative purposes and to strengthen already-known failings with respect to *Charter* protections.

To answer whether the volume of unconstitutional legislation passed by the 39th to 41st Parliaments, or delay in its resolution, was a matter of constitutional concern, we first undertook a review of the relevant amending statutes and the resultant case law. Our methods for documenting the provisions declared unconstitutional, and the relevant amending legislation, are set out at Appendix A. Our method for documenting relevant case law is set out at Appendix B.

Briefly, we set out to document appellate decisions with respect to tough on crime statutory provisions that were created or substantially amended by the 39th to 41st Parliaments. Appellate decisions were restricted to decisions by the Supreme Court of Canada or a provincial or territorial Court of Appeal, wherein a provision or provisions were declared invalid on *Charter* grounds, and wherein the decision was the highest known appellate ruling on the provision. In cases where multiple Courts of Appeal issued declarations of invalidity, without a SCC resolution, all decisions were included. In cases where the provision was repealed by a later government without SCC resolution, or with SCC resolution after repeal (see *Hills*), the decisions were included (unless noted otherwise in our sub-findings). The issue of "live" but suspect provisions, i.e., provisions that were declared unconstitutional by a Court of Appeal but that were not declared unconstitutional by the SCC or repealed, were addressed as an important subset, as below and as catalogued in Appendix A.

The above method is underinclusive in certain important ways. We have not, for instance, included the many relevant declarations of invalidity that have been issued at lower courts throughout Canada, without intervening appellate decisions.[144] We have also not included Courts of Appeal declarations when those declarations were superseded by Supreme Court of Canada declarations coming to the same conclusion. We have not included declarations when the Harper-era amending legislation simply moved and re-introduced an unconstitutional provision in identical or almost identical form, even if the effects of the provision may have potentially been

[144] For an ongoing survey of the many such decisions that are continuing to arise in the mandatory minimum context, see especially M. Oleynik, "MMS.Watch" (last accessed 15 December 2025) [Oleynik] (tracking mandatory minimum decisions in the *Criminal Code*).

altered by the larger amended scheme.[145] The overarching purpose of our narrower examination was to focus the inquiry more clearly on statutory provisions that, first, could be attributed to the legislative agenda of the 39th to 41st Parliaments and, second, that had attracted significant, and legally authoritative, negative constitutional scrutiny.

Finally, and consistent with this focus on binding declarations, we have also omitted an accounting of declarations that were legally binding in their relevant jurisdiction, oftentimes for years, until the Supreme Court ruled otherwise.[146] This subset of cases[147] may be interpreted as evidence for the proposition that the judiciary has occasionally failed to provide prompt or consistent guidance to legislatures or lower courts.

For instance, and as noted, the Supreme Court of Canada, in *Quebec (Attorney General) v Denis*, 2026 SCC 25, reversed a Quebec Court of Appeal decision that had invalidated a mandatory minimum sentence for obtaining sexual services or communicating with anyone for the purpose of obtaining sexual services from a minor for consideration. The Court of Appeal decision, and two others coming to the same conclusion as the Quebec Court of Appeal on the same and a precursor provision, are not addressed in our results because the judiciary's ultimate national resolution was to uphold the provision as constitutional. That said, and as addressed below, cases such as *Denis* do not substantially undermine the overwhelming pattern in our data, which was that of a pattern of sustained constitutional concern, delayed resolution (judicial or parliamentary), and, in the ordinary result, numerous findings of constitutional invalidity.

[145] See especially *R v Morrison*, 2019 SCC 15 [*Morrison*], which concerned s. 172.1(3) of the *Criminal Code*, a statutory presumption that shifted the burden to the accused to prove they believed they were not communicating with a child if certain representations were in evidence. The provision was present in similar form prior to Harper-era amendments, including in similar form for other related offences that have also resulted in appellate declarations of constitutional invalidity. Notably, Justice Karakatsanis, in concurrence, would have also ruled on s. 172.1(2)(a), a mandatory minimum which was later declared unconstitutional in *Bertrand Marchand*, *supra* note 3 (a case included within our results). *Morrison* (and related Courts of Appeal decisions with respect to analogous statutory presumptions) is not included in our results as there was no material change to the statutory presumption, despite it operating within a stiffer child luring sentencing scheme, as described in *Bertrand Marchand* (see para 26).

[146] See, e.g., *Sharma*, *supra* note 3 (upholding a limit on conditional sentences substantially amended by the *Safe Streets and Communities Act*, SC 2012, c 1, with four Justices in dissent).

[147] While our findings did not include a systematic accounting of cases wherein the Supreme Court of Canada upheld tough on crime provisions from the 39th to 41st Parliaments, via a reversal of a Court of Appeal decision, three cases worthy of note are *Hilbach*, *Sharma*, and *Denis*, *supra* note 3. *Morrison*, *supra* note 145 was excluded from our accounting and considerations, either way, for the reasons set out at fn 145.

a. The Volume and Geography of Provisions Found Unconstitutional

If organized by section, subsection, or other relevant text (collectively, "provisions"), 40 provisions have been subject to at least one declaration of constitutional invalidity, on *Charter* grounds, by a Court of Appeal or the Supreme Court. With respect to provisions that were unresolved by either Parliament or the Supreme Court, save for partial amendment on July 18, 2026, we found only one instance of a Court of Appeal expressly disagreeing on the constitutional issue: *Criminal Code*, s. 153(1.1)(a); see Appendix A. The provisions may be organized according to their legal status as follows:

Table 1: One third of provisions declared unconstitutional by at least one Court of Appeal were not repealed or otherwise resolved on a national scale until July 18, 2026

Current Status, Legislative Provisions Declared Unconstitutional	**Total: 40**
National Resolution	
SCC Declaration of Invalidity (either subsequently repealed or not repealed and then resuscitated on July 18, 2026, with amendment)	**17 (42.5%)**
Repealed or amended in 2018, prior to SCC intervention	**8 (20.0%)**
Repealed or amended in 2022, including one provision receiving later SCC "resolution" in *R v Hills*, 2023 SCC 2	**2 (5.0%)**
	Subtotal: 27
No National Resolution	
On the books: Declared invalid by one or more Courts of Appeal, with no known express dissenting COAs and no SCC leave; amended as of July 18, 2026	**12 (30.0%)**
On the books: Declared invalid by one or more Courts of Appeal, with a known dissenting COA and no SCC leave; amended as of July 18, 2026	**1 (2.5%)**
	Subtotal: 13

As Table 1 illustrates, the constitutionality of several statutory provisions was only ever addressed by one or more Courts of Appeal. A secondary question related to the above findings was the when and where of Courts of Appeal issuing decisions on the provisions in issue, without Supreme Court of Canada resolution. This question asks, in part, whether the phenomenon of provincial and/or territorial declarations of constitutional invalidity that were unresolved by the Supreme Court was a nation-wide issue or whether it was instead restricted to a small number of Courts of Appeal. Table 2 provides a bird's-eye view of our case law findings on this sub-issue.

Table 2: Decisions across Canada often did not receive SCC Resolution			
Jurisdiction	**Total # of Decisions as Highest Court**	**# of MMS Decisions**	**# of Decisions in Agreement with Peer COAs**
SCC	**12**	**6**	**N/A**
Alberta	**1**	**1**	**1**
British Columbia	**7**	**6**	**4**
Manitoba	**2**	**1**	**2**
Newfoundland and Labrador	**1**	**1**	**1**
Northwest Territories	**1**	**1**	**1**
Nova Scotia	**1**	**1**	**1**
Ontario	**7**	**6**	**6**
Quebec	**4**	**4**	**2**
Yukon	**2**	**2**	**2**
Totals	**38**	**29**	**20**

As referenced above in summary, we found 38 decisions by the Supreme Court of Canada or a Court of Appeal issuing a declaration of constitutional invalidity with respect to one or more provisions, on *Charter* grounds, based upon the above criteria. 12 of these decisions were issued by the Supreme Court (including *Hills*) and the remaining 26 by Courts of Appeal. Of these 26 Courts of Appeal decisions, 20 were decisions wherein multiple Courts of Appeal had come to the same ruling on at least one of the provision(s) in issue and declared the provision(s) unconstitutional (see Appendix B).

A significant majority of the appellate decisions as a whole concern mandatory minimum sentences (29/38, or 76.3%), an emphasis that was less pronounced at the Supreme Court of Canada level (6/12, 50% versus 23/26, or 88%, at the Court of Appeal level). As set out further above and below, this difference likely reflects the Supreme Court of Canada's delay in resolving mandatory minimum decisions after its decision in *Lloyd*, i.e., the landmark 2016 decision that had provided Parliament with guidance as to how to save mandatory minimum sentence provisions from declarations of invalidity.

Relatedly, the provisions that resulted in multiple declarations of invalidity by Courts of Appeal, without Supreme Court of Canada or Parliamentary intervention until 2026, are *all Criminal Code* provisions that impose mandatory minimum sentences for sexual offences harming minors, namely: s. 151(a) (six Courts); s. 151(b) (two Courts); 153(1.1)(a) (two Courts, plus one conflicting Court upholding the provision); ss. 163.1(2) and (3) (two Courts); and 271(a) (two Courts). See Appendix A.

The most recent Supreme Court of Canada declaration in our findings, *Senneville* (October 31, 2025), also concerned two provisions concerning sexual offences harming minors, namely concerning the possession of child pornography, *Criminal Code*, s. 163.1(4)(a), and accessing child pornography, s. 163.1(4.1)(a). As noted, an earlier version of the possession provision, s. 163.1(4)(a), had been the subject of prior appellate authority, with two Courts of Appeal coming to the same conclusion as the Quebec Court of Appeal and the Supreme Court with respect to the precursor provision: see *Procureur général du Québec c. Terroux*, 2023 QCCA 731, *R v Alexander*, 2019 BCCA 100, and *R v John*, 2018 ONCA 702.

The provisions attracting multiple Courts of Appeal decisions without Supreme Court of Canada resolution, that have since been repealed, are: *Criminal Code*, s. 719(3.1) (specifically, the text therein denying enhanced pre-trial detention credit in certain bail related circumstances, which was an issue not ruled upon by the SCC in *Safarzadeh-Markhali* when it had declared unconstitutional the provision's other restriction concerning offenders denied bail primarily because of a criminal conviction); CDSA, s. 7(2)(b)(iii) (two Courts); CDSA, s. 7(2)(b)(v) (two Courts); and CDSA, s. 7(2)(b)(vi) (two Courts). Notably, all of the repealed CDSA provisions were mandatory minimum sentence provisions relating to marijuana production.

An important consequence of these above case law findings is that they demonstrate how Canadian provinces, absent Supreme Court intervention, have had substantial variation in sentencing laws in their jurisdictions. Further, this variation almost invariably owed to the absence of Court of Appeal decisions in certain provinces (i.e., *not* to conflicting Court of Appeal decisions), coupled with the legal principle that provinces are not bound by extra-provincial findings that the provision in question is in violation of the *Charter*.

b. Delay in Resolving Unconstitutional Tough on Crime Provisions

Provisions found to be unconstitutional can also be applied, or otherwise shape legal outcomes, in the time between their coming into force and the date they are declared unconstitutional.

To illustrate the delay in resolution that has attended statutory provisions ultimately struck down by the Supreme Court of Canada, we isolated the first category from Table 1 (SCC declarations, and no Parliamentary intervention prior to the SCC declaration) and then calculated the relevant time between the provision coming into force and the declaration taking effect. The relevant decisions and provisions are as follows:

Table 3: Eleven SCC decisions resulted in seventeen provisions being declared unconstitutional (excluding an SCC decision addressing a repealed provision)

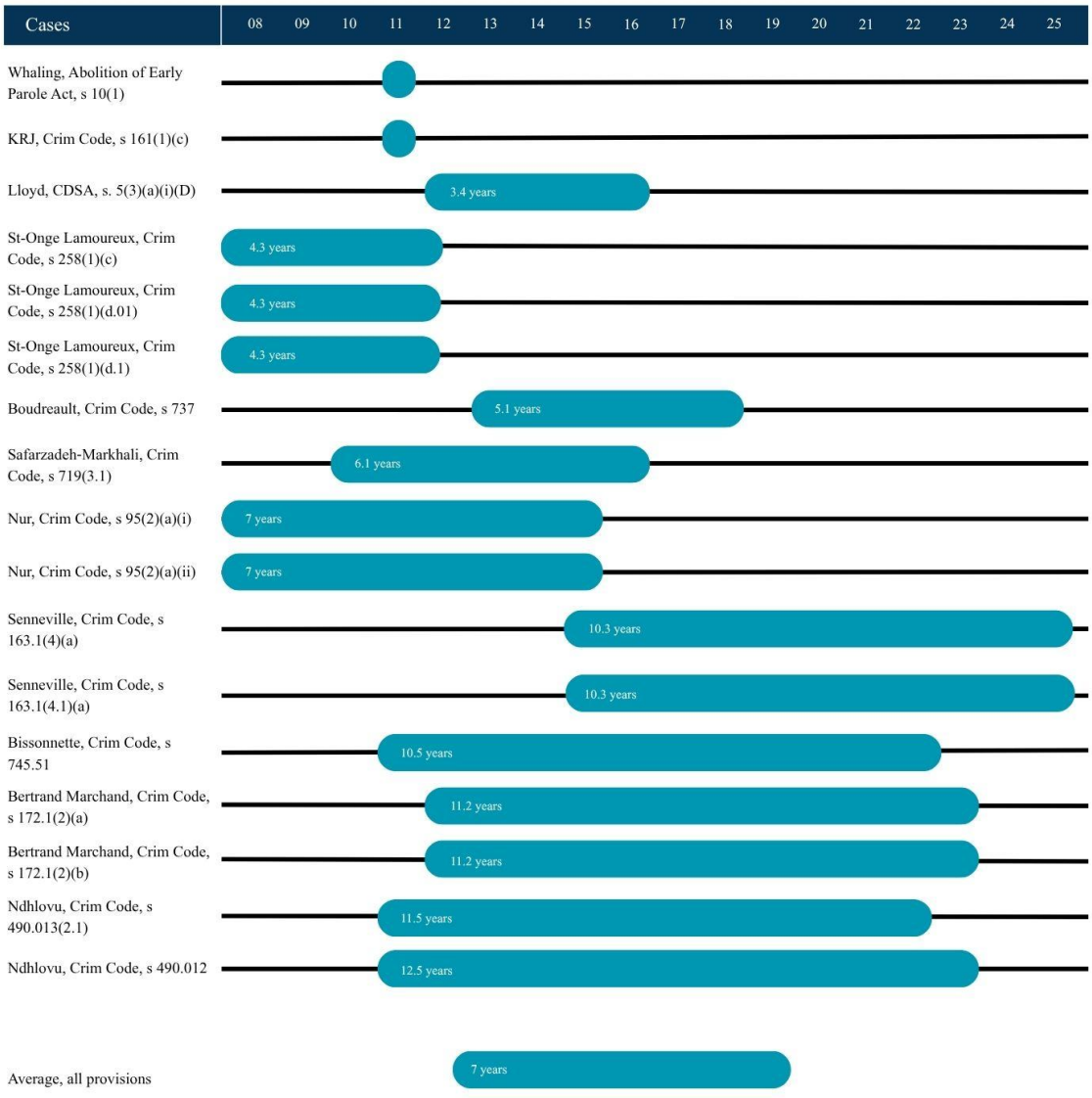
Case	Relevant Enabling or Amending Enactment & Date of Royal Assent	Provision(s) declared invalid	Date provision(s) came into force	Date provision(s) no longer of force and effect
R. v. St-Onge Lamoureux, 2012 SCC 57	Tackling Violent Crime Act, SC 2008, c 6 (2008-02-28)	Criminal Code, ss. 258(1)(*c*), (*d.01*) and (*d.1*)	2008-07-02	2012-11-02
Canada (Attorney General) v. Whaling, 2014 SCC 20	Abolition of Early Parole Act, SC 2011, c 11 (2011-03-23)	Abolition of Early Parole Act, s. 10(1)	2011-03-28	Retroactive (coded as zero)
R. v. Nur, 2015 SCC 15	Tackling Violent Crime Act, SC 2008, c 6 (2008-02-28)	*Criminal Code*, s. 95(2)(a)(i)-(ii)	2008-05-01	2015-04-14
R. v. Lloyd, 2016 SCC 13	Safe Streets and Communities Act, SC 2012, c 1 (2012-03-13)	Controlled Drugs and Substances Act, s. 5(3)(a)(i)(D)	2012-11-06	2016-04-15
R. v. Safarzadeh-Markhali, 2016 SCC 14	Truth in Sentencing Act, SC 2009, c 29 (2009-10-22)	Criminal Code, s. 719(3.1) (only part of subsection)	2010-02-22	2016-04-15
R. v. K.R.J., 2016 SCC 31	Safe Streets and Communities Act, SC 2012, c 1 (2012-03-13)	Criminal Code, s. 161(1)(c)	2012-08-09	Retroactive (coded as zero)[148]
R. v. Boudreault, 2018 SCC 58	Increasing Offenders' Accountability for Victims Act, SC 2013, c 11 (2013-06-19)	Criminal Code, s. 737	2013-10-24	2018-12-14
R. v. Bissonnette, 2022 SCC 23	Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, SC 2011, c 5 (2011-03-23)	Criminal Code. s. 745.51	2011-12-02	2022-05-27
R. v. Ndhlovu, 2022 SCC 38	Protecting Victims from Sex Offenders Act, SC 2010, c 17 (2010-12-15)	Criminal Code, ss. 490.012, 490.013(2.1)	2011-04-15	2022-10-28: 490.013(2.1) 2023-10-28: 490.012[149]
R v Bertrand Marchand, 2023 SCC 26	Safe Streets and Communities Act, SC 2012, c 1 (2012-03-13)	Criminal Code, ss. 172.1(2)(a) and 172.1(2)(b)	2012-08-09	2023-11-03
R v Senneville, 2025 SCC 33	Tougher Penalties for Child Predators Act, SC 2015, c 23 (2015-06-18)	Criminal Code, ss. 163.1(4)(a) and 163.1(4.1)(a)	2015-07-17	2025-10-31

[148] The effect of the Court's order in *KRJ* was to "read down" the statutory language (without expressly stating it was using the "reading down" remedy). It is included within the results because the effect of the remedy was to declare the legislation of no force or effect to the extent specified by the Court (under the authority of s. 52). While a case may be made for also including *R v Boutilier*, 2017 SCC 64, in our results, on similar grounds, it is omitted given the Court's decision to describe its holding as a matter of statutory interpretation.

[149] Constitutional exemptions during the suspended period were nevertheless available in the appropriate case, under authority of s. 24(1) of the *Charter* and any appropriate legislation. See, e.g., *Ontario (AG) v G*, 2020 SCC 38 at para 147 (noting the general legal principle) and *R v Lepki*, 2024 ABCA 257 (holding the sentencing judge erred by finding the court lacked jurisdiction to grant a constitutional exemption during the period of suspended declaration of invalidity flowing from *Ndhlovu*).

If all of the above Supreme Court of Canada declarations are considered, with each provision being weighted as one result (17 provisions, arising from 11 decisions), the average length of time from an unconstitutional statutory provision coming into force until it was no longer of force or effect, in whole or in part, is 7.02 years. If the two provisions whose retroactive unconstitutional effect is coded as zero are omitted, the time for resolution is 7.96 years. The medians were 6.55 and 6.96 years, respectively. The provision repealed before the resultant Court decision (*Hills*) is not included in the above averages. The results are illustrated in Graphic 1, below.

Graphic 1: Time until SCC Resolution



As Graphic 1 illustrates, the average time to resolution does not tell the full story, in part because there was significant variation in our results. Several provisions crossed the ten-year threshold, whereas others were promptly resolved. Notably, two of the lengthiest delays (*Bertrand Marchand* and *Senneville*) involved decisions that declared mandatory minimum sentences unconstitutional well after the Supreme Court of Canada's decision in *Lloyd* (2016-04-15). *Lloyd*'s guidance on the relevant point has now informed Parliament's resuscitation of the provisions at issue in both *Senneville* and *Bertrand Marchand*, with a narrow version of *Lloyd's* recommendation of a "safety valve" as a potential saving amendment.

Critically, the above figures represent the average *best case* for judicial resolution of a provision declared unconstitutional, within our case study. As indicated, while the 41st Parliament was dissolved over a decade ago (August 2, 2015), we located thirteen provisions that had continued to live on the books (in at least some jurisdictions), that had received at least one declaration of invalidity by a Court of Appeal, and that had not yet resulted in either legislative repeal or leave to appeal to the Supreme Court of Canada. *All* thirteen provisions were mandatory minimum sentence provisions that were addressed by amendments taking force on July 18, 2026. Because the scheme is unlike past repeals and amendments in that it preserves the bulk of the provision while raising novel constitutional issues, the provisions resolved by the bill are worth consideration as a distinct subset. The provisions, their enabling legislation, the relevant Court of Appeal decisions, and their dates in force are set out below at Graphic 2 and Table 4:

Graphic 2: Time until Parliamentary Amendment

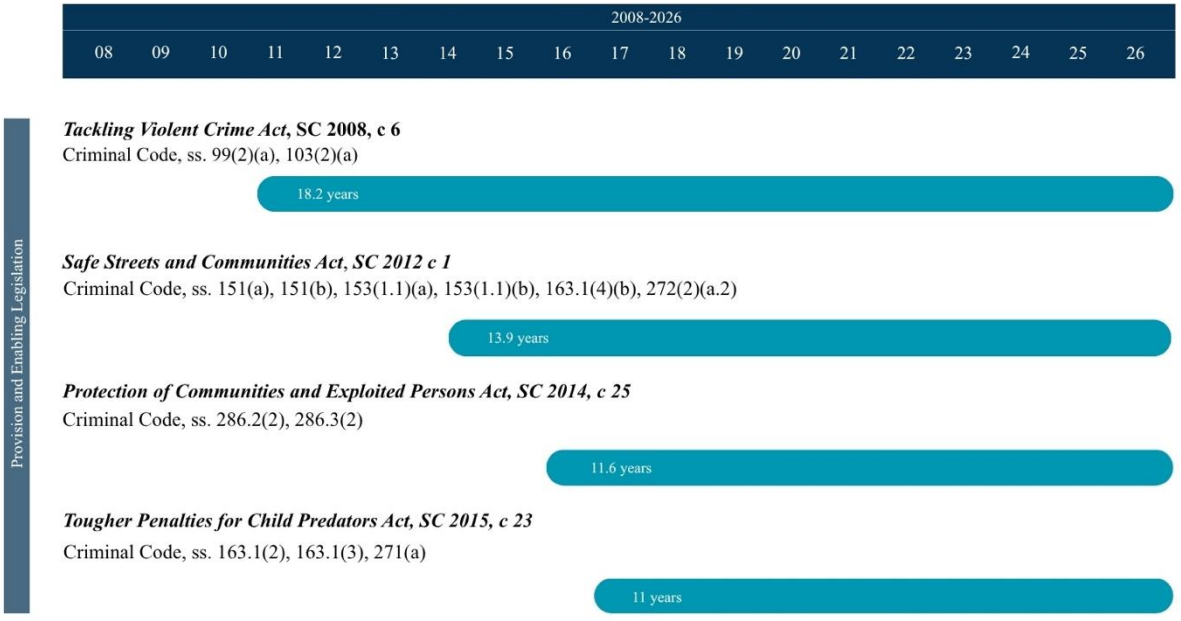


Table 4: Provisions subject to Courts of Appeal declarations were in force from 11 to 18.2 years before amendment			
Provision & Enabling Legislation	**Courts of Appeal Decisions (Declarations of Invalidity)**	**Date in force**	**Years in force until amended**
***Tackling Violent Crime Act*, SC 2008, c 6**			
Criminal Code, s. 99(2)(a)	R. c. Lefrançois, 2018 QCCA 1793	2008-05-01	18.2
Criminal Code, s. 103(2)(a)	R. c. Lefrançois, 2018 QCCA 1793	2008-05-01	18.2
***Safe Streets and Communities Act*, SC 2012, c 1**			
Criminal Code, s. 151(a)	*Caron Barrette c R*, 2018 QCCA 516 *R v Hood*, 2018 NSCA 18 *R v JED*, 2018 MBCA 123 *R v Scofield*, 2019 BCCA 3 *R v Ford*, 2019 ABCA 87 *R v BJT*, 2019 ONCA 694	2012-08-09	13.9
Criminal Code, s. 151(b)	R v Gargan, 2023 NWTCA 5 R. v. D.A.D., 2024 YKCA 9	2012-08-09	13.9
Criminal Code, s. 153(1.1)(a)	*R v EO*, 2019 YKCA 9 *R. v. Hood*, 2018 NSCA 18 Countervailing: *R v EJB*, 2018 ABCA 239	2012-08-09	13.9
Criminal Code, s. 153(1.1)(b)	R v D.A.D., 2024 YKCA 9	2012-08-09	13.9
Criminal Code, s. 163.1(4)(b)	*R v Swaby*, 2018 BCCA 416	2012-08-09	13.9
Criminal Code, s. 272(2)(a.2)	*R. v. Trottier, 2020 QCCA 703*	2012-08-09	13.9
***Protection of Communities and Exploited Persons Act*, SC 2014, c 25**			
Criminal Code, s. 286.2(2)	*R. v. Joseph*, 2020 ONCA 733	2014-12-06	11.6
Criminal Code, s. 286.3(2)	*R v Safieh*, 2021 ONCA 643	2014-12-06	11.6
Tougher Penalties for Child Predators Act, SC 2015, c 23			
Criminal Code, s. 163.1(2)	*R. v. Joseph*, 2020 ONCA 733 *R v Gagnon,* 2026 QCCA 583	2015-07-17	11.0
Criminal Code, s. 163.1(3)	*R v Pike*, 2024 ONCA 608 *R v Gagnon,* 2026 QCCA 583	2015-07-17	11.0
Criminal Code, s. 271(a)	*R v MacLean*, 2021 NLCA 24 *R v Basso*, 2024 ONCA 168	2015-07-17	11.0

As illustrated by Graphic 2, the delay between passage and parliamentary amendment was substantial. Measured from the date they came into force until the date the relevant provisions of the *Protecting Victims Act* came into force, the average time to "conditional resolution" was 13.6 years (13.9 median). The minimum was 11 years and the maximum 18.2. The time between *Lloyd's* guidance to Parliament on mandatory minimums, generally, and the passage of legislation amending these specific provisions, in partial response to this guidance, was 10.2 years.

A further effect of the legislation that is not captured in our data is that the *Protecting Victims Act* also resuscitated provisions declared unconstitutional by the Supreme Court of Canada, while incorporating the new safety valve as an attempted saving provision. Given

Parliament's narrow approach to the safety valve mechanism, whether the provisions as amended will survive judicial scrutiny is also an open question.

More generally, the above results very likely constitute best case timelines for constitutional litigation as such, given that our timeline data concerns criminal law provisions. Criminal law provisions are more likely to be litigated and resolved in a relatively timely manner, as compared to non-criminal cases, for several reasons. First, criminal law litigation has long been the most voluminous subject matter area in Canadian courts. Second, and relatedly, the wider availability of criminal legal aid, as compared to non-criminal legal aid, ensures that the criminal law defendants are more able to raise legal challenges to criminal law provisions, including via constitutional law challenges that raise special concerns with respect to costs because of their complexity. These two effects are further pronounced by the fact that criminal defence practitioners are typically also, by necessity, well versed in constitutional law litigation. Finally, the severity of adverse consequences that can flow from criminal convictions ensures that criminal defendants are specially incentivized to pursue any legal means by which to contest criminal charges and convictions. It is therefore likely that a more global accounting of the time between laws coming into force and their being declared unconstitutional would be greater than the above averages for criminal law provisions.

c. Other Complications Arising from Unconstitutional Legislation on the Books

Two additional issues of concern are worth comment: the proliferation of litigation on the constitutionality of provisions despite apparent legal consensus by appellate authorities; and the application, or potential application, of unconstitutional provisions prior to their being declared of no force or effect.

Our above results underline how governments have not been keen to remove or reduce mandatory minimums with respect to child-related sexual offences, even when the provisions have attracted several appellate declarations of invalidity and have otherwise substantially increased sentences as compared to their earlier variants. The Supreme Court of Canada has also been unable or reluctant to decide all the outstanding cases. While the Court's recent decision in *Senneville* brought the matter to a head, this demonstrated dual hesitancy underlines the general problem of delayed national resolution of constitutional questions. This delay often resulted in a proliferation of constitutional litigation in the lower courts.

For instance, subsection 151(a) of the *Criminal Code* imposes a mandatory minimum of one year for the indictable offence of sexual interference with minors under 16. Subsection 151(b) imposes a 90-day mandatory minimum if the offence is prosecuted on a summary basis. Pre-amendment, s. 151(a) was subject to six declarations of invalidity by Courts of Appeal in 2018 and 2019, and s. 151(b) was, more recently, also subject to two such declarations (2023 and 2024): see Appendix A. With respect to s. 151(a), and according to the survey by Oleynik, there were *sixteen* additional declarations of invalidity by lower courts that were not subject to appellate intervention,

from 2016 through 2024.[150] Despite this flood of cases, and the apparent unanimity in recent case law addressing the constitutional issue, the Courts of Appeal of four provinces (New Brunswick, Newfoundland and Labrador, Prince Edward Island, and Saskatchewan) and the three territories had yet to declare s. 151(a) unconstitutional in their home jurisdictions by the time of amendment. This left the provision "on the books" in a very material way.

While the litigation surrounding s. 151(a) is admittedly an outlier with respect to the number of declarations of invalidity it attracted, the general pattern of Courts of Appeal and lower courts typically reaching the same or similar constitutional results is often repeated throughout the mandatory minimum case law.[151] This case law underlines how delayed or unresolved constitutional issues can occupy litigants and courts for years on end, even if the vast majority of courts deciding the issue are arriving at the same legal conclusion.

The second problem is that the combination of delay and frequent litigation has resulted in provisions that are ultimately declared invalid being applied to offenders, typically because the sentencing judge is satisfied that the offender before it merits at least the minimum sentence imposed or because the constitutional issue is uncontested.

For instance, on the former point, and with respect to s. 151(a), at least two lower courts upheld and applied the provision, but in jurisdictions wherein the relevant Courts of Appeal – British Columbia and Quebec – later declared the pre-amendment provision invalid: *R v EMQ*, 2015 BCSC 201, *R c Desmarais*, 2017 QCCQ 7882. In a third case, *R c d'Anjou*, 2016 QCCQ 5101, the court decided the issue solely as applied to the offender before it, without speaking to the provision's constitutionality more generally. This pattern is not unique or exclusive to s. 151(a).[152] Although the sentencing results in these cases would not have changed for the offenders in issue, they are nevertheless instances of constitutionally invalid provisions being "applied", albeit in a way that avoids directly applying the aspect of the provision that is later found unconstitutional (i.e., by a finding that the sentence would be imposed whether or not it was mandatory). Among other things, these applications, minimal as they may appear, contribute to delay in resolution and the potential direct application of the invalid legislation in other cases.

On the latter point of litigants not contesting invalid legislation, which raises a more troubling concern with respect to the "over-application" of laws ultimately found to be invalid, a straightforward case illustrates the problem: *R v Peterkin*, 2013 ONSC 2116. This case concerned

---

[150] Oleynik, *supra* note 144 (as accessed on October 15, 2025). The cases are: *R v Alobaid*, 2024 NBKB 52, *R v Oatway*, 2024 PESC 50, *R v Esliger*, 2023 NBKB 94, *R v WG*, 2019 ONSC 1146, *R v BS*, 2018 BCSC 2044, *R v Gordon*, 2018 ONSC 6217, *R v HL*, 2018 ONSC 1026, *R v Sarmales*, 2017 ONSC 1869, *R v ML*, 2016 ONSC 7082, *R v Nayneecassum*, 2022 SKPC 10, *R v Brown*, 2021 YKTC 19, *R v Semple*, 2021 NWTTC 6, *R v Turple*, 2019 NSPC 52, *R v AW*, 2018 CanLII 94529 (NLPC), *R v SJP*, 2016 NSPC 50, *R c Jomphe*, 2016 QCCQ 1127.
[151] *See, e.g., ibid*.
[152] See, e.g., *R v Charles*, 2010 ONSC 5437 (rejecting the offender's constitutional challenge of *Criminal Code* s. 95(2)(a)(ii), a provision that would eventually be declared invalid in *Nur*; and *R v Ditoro*, 2021 ONCJ 540 (rejecting the offender's constitutional challenge of *Criminal Code* s. 172.1(2)(b), a provision eventually declared invalid in *Bertrand Marchand*).

a 3-year mandatory minimum sentence for a first offence of possession of a prohibited or restricted firearm with ammunition. The mandatory minimum in issue, s. 95(2)(a)(i) of the *Criminal Code*, was ultimately declared unconstitutional in *Nur*. In *Peterkin*, the sentencing judge took notice of the youth of the offender, his lack of a criminal record, his capacity for rehabilitation, and the offender's decision not to contest the constitutionality of the mandatory minimum sentence. Before finding the mandatory minimum sentence appropriate, the sentencing judge concluded that the offender's decision not to contest the minimum sentence meant three years was "the minimum sentence which the accused *must* receive" (para 21, emphasis added).

This reasoning illustrates both how unconstitutional minimums may work to decide the sentencing result in liminal cases – i.e., based on the reasons themselves, it is, at minimum, unclear what the sentencing result would have been if the relatively sympathetic offender had challenged the validity of the unconstitutional 3-year minimum – and how they can otherwise be considered "applied," even if the result would have been the same (i.e., in *Peterkin*, the specific sentence issued at least in part because it was mandatory, and not wholly as the product of the sentencing judge's discretionary judgment).

A further problem is that unconstitutional provisions can be directly applied to offenders even if the offender before the court would straightforwardly not merit the sentence under a constitutional variant of the legislation in question. As noted above, in *Boudreault*, the Supreme Court turned its mind to the problem of individuals who had been compelled to pay a mandatory victim surcharge, who would not have paid the surcharge if it were cured of its constitutional defects, and who were not parties in the case before it. This included a subset of individuals who were still subject to ongoing enforcement of the surcharge, thus potentially relieving them of application of the principle of *res judicata*.[153] The Court ultimately declined to issue a remedy that would provide direct relief for these apparent unconstitutional violations, ongoing or otherwise, even if it did recognize the harms imposed by the unconstitutional provision on these third parties.

Boudreault speaks to the larger issue of unconstitutional legislation being directly applied to individuals, with prejudice. To begin to investigate this larger problem, we began to conduct select reviews of case law arising under provisions ultimately declared unconstitutional. While our research was limited in scope and did not uncover significant evidence of this problem, outside of the mandatory victim surcharge context, we caution that this is not to say such additional violations do not exist. Among other things, our case law review was restricted to a small sample of reported decisions (relative to the known universe of cases citing to the provision during the relevant time period), which omits both the many sentences that are entered without being reported upon and the full universe of reported cases arising under provisions declared invalid. The larger practical difficulty we faced was the volume of case law arising while an unconstitutional provision is in force. For instance, Westlaw searches of cases citing to certain unconstitutional provisions (*Criminal Code* ss. 490.012 (*Ndhlovu*), 490.013(2.1) (*Ndhlovu*), 719(3.1) (*Safarzadeh Markhali*),

[153] *Boudreault*, *supra* note 3 at paras 107 – 108.

and 737 (*Boudreault*), after the provision in issue came into force but before it was declared invalid by the Supreme Court of Canada, yielded hundreds to over 1300 citing cases for each provision.

At the high end, s. 490.012 yielded 1381 cases nationwide in the Westlaw database, with only a date filter applied (from date of force through the date of the *Ndhlovu* decision, notwithstanding the Court's one-year suspended declaration of invalidity for the provision). Because s. 490.012, as it was when addressed in *Ndhlovu*, concerned mandatory *SOIRA* orders for offenders convicted of designated offences such as sexual assault and other sexual offences, it was routine for courts to cite the applicable provision when issuing an order, without addressing any constitutional issue as to whether the order would have issued if the SOIRA was not mandatory. Many of the 1381 decisions thus contain bare language citing to the provision as authority for the order issued. Unfortunately, and for reasons set out above, it is often difficult or impossible to know whether the orders in question violated the *Charter*, based upon the *Ndhlovu* analysis, especially given that sentencing judges would have no reason – outside of constitutional challenges – to probe whether the order would be just and appropriate if the court had discretion to vary it or not issue it altogether. The result is decisions akin to *Peterkin*, but at considerable scale.

This volume of citation helps illustrate the extent to which unconstitutional provisions can be embedded in the legal system, with heavy and routine citation and reliance (in one way or another), well before the provision is declared invalid. It also helps illustrate a further indirect harm that often results from unconstitutional mandates – an unfortunate direction to institutions, including courts, to abstain from investigating and then issuing reasons with respect to issues that turn out to be pivotal to the necessary *Charter* analysis for individuals affected by the law before it is struck down.

IV. Analysis

a. The Constitutional Problem

Since 1982, Canada's Constitution has entrenched an express command that any law that is inconsistent with the provisions of the Constitution is to have no force or effect. The Supreme Court of Canada has also held that all citizens "share a right to the constitutional application of the laws of Canada," and has more generally concerned itself with remedying the problem of unconstitutional legislation potentially remaining on the books indefinitely.[154] Our results suggest that the Canadian constitutional system is failing to live up to these constitutional standards and commitments.

We note the following constitutional concerns raised by our above findings and reviews:

1) Courts have struggled to provide access to justice to individuals who are unable to bring forward a legal case

The problem of unconstitutional legislation remaining on the books is a real one.

While the full extent to which unknown individuals are being harmed by unconstitutional laws is an open question, our case law findings suggest that constitutionally suspect legislation is not being timely challenged and/or not being timely challenged on a national scale. This is true even in the criminal law context, where legal aid is more available to litigants seeking to protect their or others' constitutional rights. In this important sense, our constitutional system is failing to provide access to justice to individuals independent of their personal ability to bring forward a legal case.

Specifically, we found that: (1) provisions successfully challenged in one or multiple provincial jurisdictions are not always timely appealed to the Supreme Court of Canada (meaning that provincial variation continues to exist on constitutional issues affecting the *Charter* rights of individuals facing sentencing decisions); (2) within the thirteen provisions that remained without national resolution until 2026, almost all Courts of Appeal decisions were of the same or similar opinion on the constitutional invalidity of the provisions in issue, when one or more Courts of Appeal spoke to the issue (i.e., lending persuasive authority to the Courts of Appeal decisions, and to the implication that jurisdictions without appellate authority are not in dissent, but are instead in a situation wherein they have an unconstitutional law "on the books" for lack of a capable litigant); (3) the Supreme Court of Canada has denied leave or otherwise delayed resolution with respect to provisions later found to be unconstitutional (i.e., increasing the risk that unconstitutional legislation might affect individuals who are unable to bring forward a legal

[154] *Nur*, *supra* note 3 at para 51.

case); and, finally, (4) Supreme Court of Canada decisions often issued only several years after a provision was first declared unconstitutional by a lower court of appeal and after seven to eight years since the provision came into force.

Taken together, this delay in arriving at national resolutions on *Charter* issues suggests that laws are remaining "on the books" for lack of a litigant with the time and resources to litigate the issue. In our case study, the potential constitutional harms of applying unconstitutional mandatory minimums were often mitigated by courts finding that the offender before it would merit the sentence regardless of the constitutionally suspect provision. Yet, such holdings would not cure the potential "inflationary" effect of the sentencing provisions at issue in our case study (see Part II), the general problem of courts routinely needing to administer provisions that are constitutionally suspect in their current form, or the risk that the provisions will be used against individuals caught up in the criminal justice system in other ways (such as, in the mandatory minimum context, having the indirect effect of influencing the plea bargaining process, including to the point of facilitating false pleas).

2) Rights holders are being asked to bear too great a share of the harms flowing from the passage of unconstitutional legislation

A related issue arising from the above access to justice concerns is that individuals who are harmed by legislation later declared unconstitutional often have little legal recourse, due especially to judicial doctrines such as *res judicata* and qualified immunity. The result is that legislation that is declared unconstitutional only after significant time "on the books" often results in harms to rights holders that go unremedied.

This fact is not an inevitable consequence of our constitutional system. As set out further below, our case study suggests that the problem of inadequate constitutional remedies, understood in its full context, is in an important sense a failing at the front end. Parliament can reduce preventable constitutional harms by ensuring that legislation is better vetted, on *Charter* grounds, before it is enacted. The 39th to 41st Parliaments were, by contrast, defined by a legislative agenda that oftentimes appeared to actively resist the Court's mandate to interpret and apply the *Charter*.

Parliament can also reduce such harms by performing its duty of reviewing and, where appropriate, removing or amending provisions after it is known they are constitutionally suspect. While Parliament has sometimes taken on this custodial role with respect to the provisions in our case study (2018, 2022), its partial approach to such legislative repeals, and its exceedingly narrow approach to following the Court's guidance in *Lloyd* in its passage of the *Protecting Victims Act* (2026), are broadly suggestive of a Parliament

without incentive or interest in taking Supreme Court declarations and guidance too seriously.

This is not to say that courts cannot play a role in mitigating the harms that flow from the passage of unconstitutional legislation. Above (Part II), we argued for judicial reforms with respect to the doctrine of qualified immunity, which would better remedy rights holders who are harmed by legislation declared unconstitutional. Below (Part V), we suggest other potential avenues for judicial reforms, such as revisiting the Court's current cautious approach towards interventions and relaxing the principle of judicial restraint. That said, our findings suggest that judicial reforms are not a panacea for the problem of harms arising from the passage of legislation later declared unconstitutional.

3) Robust judicial oversight with respect to a government's legislative agenda typically occurs after the governing party leaves power

Our findings suggest that it is a mistake to view the Supreme Court of Canada as a concurrent check on the unconstitutional exercise of legislative power, at least with respect to the circumstances and specific constitutional problem (unconstitutional legislation) canvassed in our report.

Perhaps unsurprisingly, our case law results suggest that Parliaments can, at least in certain circumstances, largely escape Supreme Court of Canada-level rebukes – i.e., judicial decisions which can, in the appropriate case, bring national attention to a parliamentary transgression – with respect to constitutionally-flawed legislation while they are still in power.[155] The result can be multiple pieces of legislation exhibiting the same or similar constitutional deficiencies (according to subsequent appellate courts), without an intervening Supreme Court decision.

For instance, within our sample time period, the *Tackling Violent Crime Act* (2008), *An Act to amend the Criminal Code* (2009), the *Safe Streets and Communities Act* (2012), and the *Increasing Offenders' Accountability for Victims Act* (2013), *all* resulted in Supreme Court of Canada declarations of constitutional invalidity, with respect to mandatory minimum sentences, only *after* the last of these bills was already passed: Appendix B. Only the final piece of legislation in our sample, the *Tougher Penalties for Child Predators Act*, post-dated the Supreme Court of Canada's decision in *Nur* (April 2015), but it too was introduced (February 2014) and passed in the House (March 2015) before the *Nur* decision.

[155] This finding is consistent with Macfarlane, *supra* note 99 at 7 (finding, via his own survey of Supreme Court of Canada decisions, that 44 of 51 SCC decisions invalidating legislation from one of Canada's three longest serving governments, since 1982, invalidated legislation passed by a previous government).

As intimated, one result of this built-in institutional delay is that Parliament can undertake repeated legislative efforts, on similar issues, and parliamentary or public debate may not be fully informed or fully aware of the constitutional dimensions of the legislation in issue. This dynamic effectively provides Parliament with the capacity to pass constitutionally suspect legislation on like issues, over several years, without Supreme Court of Canada intervention until after, or near the close, of these legislative efforts. This danger further underlines the need for robust *Charter* review of legislation before it is passed.

b. The Court as Constitutional Arbiter and the Case of Mandatory Minimum Sentencing

This report relies, in part, upon the contention that because the *legal* import of declarations of invalidity is unassailable – such declarations render the legislation null and void in the relevant jurisdiction, whatever observers or political institutions may think of the merits of the Court's declaration(s) – the issuance of such declarations at any notable scale is an independent cause for constitutional concern. At minimum, such declarations are an indication that the institution primarily if not exclusively charged with policing disagreement on matters of constitutional interpretation is of the opinion that legislation has breached the Constitution.

This report also relies, in part, upon the contention that the courts' declarations of constitutional invalidity have been roughly right in their interpretation of the *Charter*, including with respect to what it requires in the mandatory minimum context. As applied to mandatory minimums, the use of reasonable hypotheticals as an appropriate vehicle to assess the constitutional *bona fides* of legislation has been reaffirmed (post-*Smith*) by a relatively unbroken chain of Supreme Court majorities since *Nur*, as well as academic and legal commentators, such as Lisa Kerr, Michael Perlin, Deborah Parkes, and Kent Roach, among others, who have advanced arguments that broadly support the Court's contemporary and more interventionist approach.[156] For these and like reasons, we contend that the declarations issued by the Court are strong evidence of failings with respect to Canada's substantive commitments to rights and freedoms, including as expressed in the *Charter*. On this view, declarations of constitutional invalidity, their delay in issuance, and imperfect remedies for those harmed by the legislation in issue, pose a more fundamental challenge to constitutional rights protection in Canada.

This second contention is sometimes resisted, including especially in the mandatory minimums context. Before turning to this counterargument, it is worth first underlining the prominence of mandatory minimums in our findings and in the recent jurisprudence, as the volume of such declarations is often a source of contention.

---

[156] See, e.g., L. Kerr & M. Perlin, "A New Justification for Section 12 Hypotheticals and Two Rules for Constructing Them" (2025) 5 *SCLR* (3d) 179; D. Parkes, "From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 SCLR 149 at 150–51; and K. Roach, "Searching for *Smith*: The Constitutionality of Mandatory Sentences" (2001) 39:2&3 *Osgoode Hall LJ* 367 [Roach, *Searching for Smith*].

Mandatory Minimums as the Primary Locus of Interbranch Conflict

As noted, the bulk of the mandatory minimum subset and its distribution has been recently catalogued by the political scientist Brendan Dell. By Dell's accounting, mandatory minimum sentences were found to violate section 12 of the *Charter* 39 of the 51 times a provision was challenged under this *Charter* protection.[157] However, the majority of these decisions relied upon a reasonable hypothetical offender to ground its declaration of invalidity. First, the court found a constitutional violation, as applied to the specific offender before it, 11 of the 47 times it was considered on this basis (23%).[158] By contrast, the court found an unconstitutional violation 33 of the 41 times the provision was applied to reasonable hypothetical offender, that is, where it considered whether the mandatory minimum sentences provision would be grossly disproportionate when applied to a reasonable hypothetical scenario (80%).[159] While we have undertaken a broader look at the Harper-era tough on crime agenda, and have organized the relevant categories different than Dell, our findings were likewise dominated by mandatory minimum sentence declarations, with declarations involving reasonable hypothetical offenders similarly taking on an outsized role.

Because the concept of "reasonable hypotheticals" permits courts to issue binding declarations that need not be directly applicable to the offender or accused before it, the concept can be a site of conflict with respect to larger views regarding the problem of unconstitutional legislation and the role courts should play in remedying it. Under the Court's self-imposed test, the first stage of the s. 12 inquiry mandates an individualized process to determine what a fit and proportionate sentence is for the offender before the court (and whether the impugned provision requires the imposition of a sentence that is grossly disproportionate), including by using the general sentencing principles set out by Parliament in the *Criminal Code*. The second stage repeats this process but for an offender in a reasonably foreseeable case or hypothetical scenario. This second stage has been the site of controversy because it invites and may even obligate[160] courts to perform constitutional reviews of legislation without an actual offender before it to guide the inquiry.

Specifically, the reasonable hypothetical scenario must underscore the reasonableness of the hypothetical scenario, and may include at least five characteristics: it must be reasonably foreseeable based on judicial experience and common sense, i.e., it should not be a remote or extreme possibility; courts may rely on reported cases to define the scope of the hypothetical scenario, including with modified facts; the hypothetical must be reasonable with an eye to the conduct that falls within the impugned provision (e.g., how and by whom), but without straining every constituent element by reliance on fanciful facts; factors such as age, poverty, race, Indigeneity, mental health issues and addiction may be considered in crafting reasonable

[157] Dell, *supra* note 108 at 345.
[158] *Ibid* at 347.
[159] *Ibid.*
[160] *Griffith*, *supra* note 75.

hypotheticals, but any scenario must present a reasonably foreseeable offender, as opposed to the most sympathetic offender (i.e., it must avoid hypotheticals that are remote or utterly unrealistic); and finally, while reasonable hypotheticals are best tested through the adversarial process, and it is generally up to the offender/claimant to articulate and advance the reasonably foreseeable hypotheticals which might sustain the constitutional argument, this is not mandatory, such that a court raising the issue on its own motion is not a reviewable error.[161] Beginning with *Nur*, the Court has departed from the requirement that reasonable hypothetical scenarios be "common" or "likely", in favour of an approach that simply focuses on what is reasonably foreseeable based on judicial experience and common sense,[162] and has otherwise expanded the range as to what might be considered a reasonable hypothetical scenario that is properly before the court.[163]

Judicial Overreach?

The Court's reasonable hypotheticals framework has received no shortage of scholarly and judicial attention. Critics of the Court's above approach principally view it as an inchoate standard that has allowed the Court to usurp a role reserved to Parliament. Peter Hogg has characterized the approach, in both its section 12 and section 7 forms, as one that relies upon the "most innocent possible defender" to strike down laws even when the accused or the offender before the Court did not raise the same constitutional difficulties.[164] On Hogg's view, "[i]t is very hard for any law to withstand an attack of this kind."[165] In the mandatory minimum sentence context, Hogg has maintained that this approach relies upon an "idealized view of individualized sentencing" that is "not widely shared outside the small community of judges and advocates who operate the present system."[166]

In his above study, Dell somewhat similarly – albeit less pointedly – argues that Canadian courts' alleged lack of clarity and consistency in the application of the reasonable hypothetical test has made it difficult for Parliament to know how it can adequately respond to court invalidations of mandatory minimums, particularly given that a finding of proscribed "cruel and unusual punishment" leaves little room for a government justification for the practice that might save the Charter infringement as a "reasonable limit" under Section 1.[167] On this reading, the increase in declarations of invalidity is the result of an inconsistent, court-initiated change in application of the reasonable hypothetical test, and/or a change in court doctrine, from *Nur* forward. For this

---

[161] *Hills*, *supra* note 3 at paras 76 – 93; see also *Senneville*, *supra* note 3 at paras 55 – 60.
[162] *Ibid* at para 79, citing to *Nur*, *supra* note 3 at paras 62 and 68.
[163] See especially, *Nur*, *supra* note 3 at para 70 (departing from *R v Morrisey*'s restriction on prior cases that were deemed "marginal" on the grounds that any such case is both reasonably foreseeable and the case has actually happened).
[164] See P. H. Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58:7 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* at fn 28.
[165] *Ibid* at 202 and fn 28 (addressing *R v Heywood* but also the Court's approach in *Smith* as an approach rightly departed from in the section 12 case law prior to *Nur*).
[166] P. Hogg & W. Wright, *Constitutional Law of Canada*, 5th ed. (Thomson Reuters, 2025) (Updated July 2025, Release No 1) at s. 53:4 [Hogg & Wright].
[167] *Dell, supra* note 108 at 353.

conclusion, Dell relies, in substantial part, upon the Court's earlier caution in striking down mandatory minimums based on the impact on reasonably hypothetical offenders in the era subsequent to *R v Smith* (1987), as exemplified by the Court's observation in *R v Morrisey* (2000) "that the reasonable hypothetical must be common, … going so far as to exclude the facts of real, reported cases that were considered unusual or rare."[168]

Additional support for this position can be drawn from the practice and statements of certain justices themselves, many of whom have routinely either disagreed about the application of the test or who have refused to apply the test altogether.[169] In *Nur* itself, for instance, Justice Moldaver's dissent (joined by Rothstein and Wagner JJ.) argued that the majority's decision was not grounded in experience or common sense. Justice Moldaver argued, in part, that the parties had failed to identify a case wherein the hybrid offence in issue was prosecuted by indictment, and, further, that an application of the test which assumes that the Crown would proceed by indictment, when the fair, just, and appropriate decision would be to proceed summarily, did not accord with common sense.[170] In *Hills*, the eight-member majority expressly noted and then dismissed the more sweeping concerns of Justices O'Ferrall and Wakeling of the Alberta Court of Appeal – who were themselves relying, in part, upon judicial dissents to the Court's established approach – which culminated in their proposal "that this Court abandon the use of reasonably foreseeable scenarios" altogether.[171] In the words of the majority, the Justices' objection was, effectively, that the framework was "difficult to apply and lacks cohesion."[172] More recently, in *Senneville*, a four-member dissent accepted *Nur* as good law but argued that the majority's broad endorsement of reasonable hypotheticals provided too much of a departure from the facts of the case. The appropriate approach, the dissent argued, requires courts to narrow their ambition and ensure "a sufficient factual and legal connection" between the actual case before the court and the hypothetical scenario.[173] In the case before it, adequate heed of the *Criminal Code's* objectives of denunciation and deterrence, and of Parliament's decision to enact mandatory minimums in the child pornography context, were also required.[174]

From these vantage points, it may be argued that the significant increase in declarations of invalidity from *Nur* forward should be attributed to an overly interventionist Court applying an unclear framework that was, furthermore, inconsistent with its own past pronouncements.

The Court as Discretionary Decision-Maker: In Defense of the Contemporary Court's Approach

[168] *Ibid* at 357.
[169] For an overview of this problem, see D. M. Haak, "The Case of the Reasonable Hypothetical Sex Worker," 2022 60-1 *Alberta Law Review* 205 at pp 215 – 16.
[170] *Nur*, *supra* note 3 at paras 126 and 129.
[171] *Hills*, *supra* note 3 at paras 43, 49, 67, and 75.
[172] *Ibid* at para 43.
[173] *Senneville*, supra note 3 at para 126.
[174] *Ibid* at paras 236 – 238 and 258 – 261.

Be all that as it may, we reject the above criticisms of the Court's approach, including especially in their stronger variants. We do so for three principal reasons.

First and foremost, the vulnerability of mandatory minimums to declarations of invalidity has always flowed from the nature of mandatory minimums themselves. Because mandatory minimums represent a significant restriction on judicial discretion, they reduce the likelihood that sentences can, within the mandated range, always be crafted fairly and in accordance with the fundamental and *Charter*-informed principle of proportionality set out in the *Criminal Code*.[175] In 1987, the Canadian Sentencing Commission described the problem thus:

> ...each criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined.[176]

While advocates for mandatory minimums, such as Hogg, have viewed such discretion with skepticism, due in part to the significant variance that attends discretionary sentencing decisions,[177] the exclusion of any mechanism for accommodating exceptional circumstances will almost invariably require the imposition of a rule in violation of certain offenders' *Charter* protections, given that "[i]t is inevitable that circumstances will arise that sometimes justify the imposition of a lesser sentence."[178]

Further, Hogg's above observation that judges and those most involved with the carceral system are the most vocal supporters of judicial discretion is not necessarily a mark against it. Judicial expertise matters, here as elsewhere. Judges are in a unique position to craft appropriate sentences, given their involvement in trial proceedings and knowledge of offenders' mitigating and aggravating circumstances, community needs, and pragmatics on the frontlines of the justice system.[179] Courts' perspectives are unique since they are exposed to a wide variety of offenders who commit offences with varying degrees of culpability and levels of seriousness.[180] By contrast, and as illustrated by our case law findings, there is little to suggest that mandatory minimums have, in practice, been wisely- or expertly-tailored to the realities of the criminal justice system. As critics of mandatory minimums have observed, some politicians appear to respond to a narrow category or categories of offending, such as serious gun crime, "and have no experience with the wide diversity of offences and offenders that appear for sentencing in criminal courts across the country."[181] Instead, when Parliament considers offenders, they appear to consider the "drug cartels, the Clifford Olsons, and the Paul Bernardos" or other broadly conceived tropes of crime

---

[175] *Criminal Code* s 718.1.
[176] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, 1987) 186.
[177] *See* Hogg & Wright, *supra* note 166.
[178] J.V. Roberts, N. Crutcher, & P. Verbrugge, *supra* note 2 at 80.
[179] Mangat, *supra* note 97 at 17. See also *R v Wu*, 2003 SCC 73 at para 19.
[180] Dell, *supra* note 108 at 356.
[181] J.V. Roberts, N. Crutcher, & P. Verbrugge, *supra* note 2 at 80.

and criminals,[182] as opposed to the much messier reality known to sentencing judges as "front-line workers in the criminal justice system."[183]

The need to account for the wide diversity of offenders, including the uncommon, and its intersection with the requirements imposed on Parliaments and courts by the *Charter*, was expressly brought to the fore in the majority reasons in *Nur*. In *Nur*, the majority rejected the Attorney General of Ontario's argument that courts must confine themselves to *likely* applications of the offence, and that a presumption of constitutionality should attach to a provision if the law was not unconstitutional as applied to the specific offender before the Court. McLachlin C.J. reasoned:

> [68] … [A]doption of the likelihood standard would constitute a new and radically narrower approach to constitutional review of legislation than that consistently adhered to since *Big M*. The Court has never asked itself whether a projected application of an impugned law is common or "likely" in deciding whether a law violates a provision of the *Charter*. To set the threshold for constitutional review at common or likely instances would be to allow bad laws to stay on the books.
>
> [69] The Attorney General of Ontario urges that the approach she proposes is necessary to prevent uncertainty in the law. […]
>
> [70] I am not persuaded by this argument. In essence, it would make the sentencing range for common occurrences of the offence the constitutional norm. This is problematic for two reasons. Appropriate sentencing ranges are themselves subject to debate and, more importantly, any gain in clarity would come at the price of appropriate constitutional review and unconstitutional applications of the law. The question is, certainty for whom? The Attorney General of Ontario's test provides a degree of certainty for offenders in situations that commonly occur. But it provides no certainty for offenders outside that category. They — and their prosecutors and judges — are left to wonder whether the mandatory minimum will be unconstitutional in their situation. Finally, as discussed below, the reasonably foreseeable test, applied in accordance with the principle of *stare decisis*, will provide sufficient certainty in the law.

The majority reasons are worth emphasizing in the present context as they offer a reminder that complaints of a lack of clarity and consistency with respect to the judiciary's application of the reasonable hypothetical framework are, at base, a disagreement as to what we are seeking clarity

[182] Roach, *Searching for Smith*, *supra* note 156 at 411. See also J.V. Roberts, N. Crutcher, & P. Verbrugge, *supra* note 2 at 91 - 92.
[183] *Ipeelee*, *supra* note 142 at para 47.

and consistency about – the resolution of discrete cases or the constitutional *bona fides* of laws on the books, judged against the protections provided for in the *Charter*.

To the extent the Court's self-declared concern, post-*Charter*, has relatively consistently been the latter of these two purposes, a concern that is rooted in the entrenchment of the *Charter* itself, it can hardly have come as a surprise to parliamentarians (or advocates of parliamentary power) that sweeping "tough on crime" reforms might elicit an equally powerful reaction from the courts. This is particularly so given that many of these same reforms sought to weaken the judiciary's power in fashioning fair and appropriate criminal sentences, a dictate that flows, in part, from the *Charter's* remedial provisions and its universal guarantee against cruel and unusual treatment or punishment.

Second, and relatedly, the Court's apparent change in judicial approach from *Nur* forward did not come from nowhere. We have already observed that the Court had clearly marked out the constitutional importance of judicial discretion in an analogous context, the sentencing of Indigenous offenders. *Gladue* (1999) and *Ipeelee* (2012) were an unbroken line of precedent that indicated a Court trajectory that was only further affirmed in *Nur*.[184] The consistency of this line of precedent has included, but has not been limited to, the consideration of Indigeneity and cases involving Indigenous peoples when applying the reasonable hypothetical test.[185] As noted (Part II), the Court has been similarly forceful in describing the importance and breadth of its remedial grant of discretion at s. 24 of the *Charter*.

Further to this point, the Court's section 12 jurisprudence was also not a neatly decided point of contrast during the 39th to 41st Parliaments. Prior to *Nur*, several prominent commentators had criticized the Court for failing to live up to its section 12 obligations post-*Smith*.[186] *Nur* and its progeny may thus be viewed as courts rightly adopting the *Charter*-based criticism of the court's practice that had arisen, despite the *Smith* precedent. That this adoption was not *ad hoc* or particularly contentious as a legal matter was then reflected in the relatively strong judicial majorities that have decided the bulk of mandatory minimum cases from *Nur* forward.[187] While Parliament may not have been on specific notice of the change in approach or emphasis until the last months of the Harper government, the change was always premised on the need to live up to the *Charter* obligations imposed upon Parliament and the courts via section 12, including as had largely been communicated in *Smith* and had been canvassed by commentators prior to the *Nur* decision.

---

[184] See especially Rudin, *supra* note 90.
[185] See *Senneville*, supra note 3 at para 59 (reaffirming the relevance of Indigeneity for the proportionality analysis, in reliance on *Nur*, *Lloyd*, *Boudreault*, and *Hills*).
[186] See Parkes, *supra* note 156; and Roach, *Searching for Smith*, *supra* note 156.
[187] Most notably, *Bertrand Marchand* and *Hills* were 6-1 and 8-1 decisions. *Boudreault*, *Nur*, and *Lloyd* were 7-2, 6-3 and 6-3, respectively. The Court split narrowly (5-4) in *Senneville*. Analogy may also be made between the issues raised in the mandatory minimum context and the consecutive sentencing context, wherein *Bissonnette* – a frequent target of political criticism of the Court – was a unanimous decision.

Third, and finally, the narrative of a runaway Court that departed from longstanding guidance, or that ran roughshod over parliamentary powers, is in significant tension with the behavior of the relevant Parliaments themselves.

With respect to the passage of the provisions in question, the Harper government's legislative practices themselves intimated that it was aware of the constitutional vulnerability of its criminal justice legislation. Indeed, the evidence suggests that the government was not particularly shy about provoking disputes with the Court on these and related issues. For instance, in a leading piece on the issue, James Kelly and Kate Puddister found that the Harper government passed legislation via private members' bills at a higher rate than the Liberal Chrétien and Martin governments, with an unprecedented focus on criminal justice matters (as opposed to the parochial concerns that have historically characterized private members' bills).[188] These data are noteworthy as private members bills do not invite the same Department of Justice legal scrutiny as government bills, i.e., they allow "a government to pursue constitutionally suspect amendments such as mandatory minimum sentences to the *Criminal Code* with minimal, or non-existent, constitutional scrutiny."[189]

Similar may be said with respect to the several procedural moves the government made to limit meaningful review of its most controversial tough on crime initiatives. As argued and documented by Hiebert, Macfarlane, and Drake, the government engaged in several notable failures to explain or justify the government's alleged conclusion that several of its most significant legislative initiatives complied with the *Charter*, notwithstanding the concerns raised by legal scholars and parliamentarians "that key aspects of the government's legislative agenda were vulnerable to judicial invalidation."[190] As they further argue, the Harper government's departure from the judiciary's positions at the time was also reflected in the Harper government's unsuccessful attempt "to revamp the judicial appointment process to ensure that its legislative efforts to 'crack down on crime and make our streets and communities safer' would have a better chance of surviving Charter litigation."[191]

c. Public Attitudes towards the Charter, the Courts, and Harper-era Criminal Justice Reforms

[188] Kelly & Puddister, *supra* note 97 at 392 – 393.
[189] *Ibid* at 394.
[190] Emmett Macfarlane, Janet Hiebert & Anna Drake, "The Legislative Process and Charter Rights: Criminal Justice Policy and the Harper Government" in Emmett Macfarlane, Janet Hiebert & Anna Drake, eds, *Legislating under the Charter* (Toronto: University of Toronto Press, 2023) 68 at 69 [*Legislating under the Charter*]. The several procedural and related moves set out by Macfarlane, Hiebert, and Drake are too many to name, but include the use of sweeping omnibus legislation that frustrated meaningful review (i.e., the *Safe Streets and Communities Act*), the use of irregular committee referrals (i.e., ensuring the *Tackling Violent Crime Act* avoided the rights-centric Justice Committee), and the imposition of strict time constraints on parliamentary debate and witness testimony. *Ibid* at 71 – 82.
[191] *Ibid* at 70.

The volume and scope of the constitutional violations that arose via Harper-era tough on crime legislation naturally raise the question as to whether such disputes have affected public attitudes towards the courts. In his public appearances, Chief Justice Wagner has routinely lamented the decline in trust of judicial institutions, and has further cautioned against systemic issues, such as the rise of misinformation and the lack of traditional press coverage of the Court, as fueling polarization, political cynicism, and distorting public debate.[192] This apparent decline is of constitutional significance due, in part, to the *Charter's* and Court's role in affirming constitutional values. As noted, according to the Court, its role in enforcing the *Charter* must extend to addressing the harms that constitutional violations visit upon the state and society as a whole, including their erosion of public confidence and public faith in the efficacy of constitutional protection.[193]

While the Chief Justice's concerns find support in the empirical literature, the survey evidence paints something of a complex portrait. From a bird's eye view, broad based polling has found sizeable fluctuations in public trust or confidence in courts among Canadians, with a recent downward trend over the last decade. Data from Angus Reid indicates that public support for the Supreme Court appears to have fluctuated over the past decade and a half, from a low of 31% support in 2012 (a low possibly explained by a series of scandals around the time period) to a high of 57% in 2016, dropping again to 48% by 2020.[194] As noted, in 2024, the figure was at 49%.[195]

The survey evidence with respect to partisanship and polarization is, in important respects, more revealing. For instance, Angus Reid data from 2015 showed that Conservative supporters in the 2011 federal election had significantly weaker levels of support for the SCC (56%) than Liberal (79%), NDP (63%), or Bloc supporters (73%).[196] These data suggest a partisan division in support for the Supreme Court, with Conservatives being the most likely to express a lack of support.[197] This trend continued in 2019, when 68% of Conservative voters expressed either a "complete lack" or "not a lot" of confidence in the Supreme Court, as compared to only 20% of Liberal voters.[198]

---

[192] A. Macnab, "Chief Justice of Canada Richard Wagner notes decline in press coverage of courts at CBA forum" Canadian Lawyer (22 June 2023) https://www.canadianlawyermag.com/news/general/chief-justice-of-canada-richard-wagner-notes-decline-in-press-coverage-of-courts-at-cba-forum/377008; D. LeBlanc, "Chief justice warns against political attacks on judicial independence" CBC News (05 June 2022) https://www.cbc.ca/news/politics/judicial-independence-supreme-court-richard-wagner-1.6473754.

[193] See *Ward*, *supra* note 81 at para 28.

[194] Angus Reid, 2020, *supra* note 40. The explanation given by Angus Reid for the 2012 low is as follows: "Near the start of the last decade, most Canadians expressed a lack of confidence in the Royal Canadian Mounted Police, their local police forces, and the courts system – including the Supreme Court of Canada. These findings came on the heels of a number of scandals and investigations, including allegations that RCMP leadership had covered up pension fraud, as well as inquiries into police mismanagement of the case of serial killer Robert Pickton and abuse of power in other B.C. cases."

[195] Angus Reid, 2024, *supra* note 38.

[196] *Ibid*.

[197] Lawlor & Crandall, Institutional Trust, *supra* note 41 at 98.

[198] Angus Reid, 2020, *supra* note 40.

Unsurprisingly, perhaps, these partisan differences are also evident in attitudes towards specific court decisions. In a 2022 study, Lawlor and Crandall found a meaningful difference in support between Conservative and other voters in high-profile Supreme Court cases (*Bedford*, *Carter*, *Tsilhqot'in*, and *Nur*), with Conservatives registering statistically significant lower levels of support for all four decisions.[199] In this same study, Lawlor and Crandall further found, via Canadian Election Study data, that court support generally correlated with confidence in institutions, with court support levels being tied to education levels, perspectives with respect to equality, support for government institutions, and satisfaction with democracy generally.[200] The authors then summarized their findings with respect to partisan effects as follows:

> We also find evidence of a partisan effect during the tenure of the Conservative government of Stephen Harper, with Conservative supporters being less likely to support the courts. This type of partisan division is especially notable given that it stands apart from earlier research on public support of Canadian courts and suggests that the perceived ideological neutrality of the courts, particularly the SCC given its high political salience during this period, may have decreased during the Harper era. The lessening of this partisan effect after the Conservative Party left office in 2015 suggests that it may not have lasting effects, though a decrease in overall court support identified in the 2019 CES data suggests that courts may nonetheless be facing an emerging legitimacy deficit. Certainly, further study will be warranted as new data become available in the next Canadian election cycle.

According to Lawlor and Crandall, these general findings may reflect, in part, a general relationship that arose during the Harper era, wherein the Prime Minister was willing to engage in provocative criticism of Court, with little reprimand from Conservative voters inclined to distrust the courts generally.[201] The further result of this dynamic and the attacks on the Court, however, may well have been, as Lawlor and Crandall contend, "reverberating effects for levels of trust in Canadian political institutions."[202]

Writing more recently and using a mix of CES and their own survey data, Lawlor and Crandall have continued to express worry with respect to the above trends. In addition to finding that Conservatives continued to show lower levels of confidence than other groups, Lawlor and Crandall found that "the overall number of Canadians who report 'a great deal of trust' in the courts has declined from 26 per cent in 2008 to 11 per cent in 2023, while those who report having no

[199] Lawlor & Crandall, Institutional Trust, *supra* note 41 at 97-98.
[200] *Ibid* at 108.
[201] *Ibid* at 109.
[202] *Ibid*.

trust has risen from four per cent to slightly more than 10 per cent over the same period."[203] They also found that interaction with the court system was associated with lower confidence in the institution, with 53% of those with contact expressing confidence and 62% of those with no contact expressing confidence.[204] That said, Lawlor and Crandall also found that confidence in the courts was higher among those more informed about the courts, that a majority (60 percent) continued to believe courts should have the final say on *Charter* issues, and that a clear majority (more than 60 percent) stated that they trusted the court to make decisions in the best interests of the Canadian people.[205]

The causes of declines in institutional trust generally, and trust in courts specifically, are, of course, a multifaceted problem. While issues arising from frequent constitutional litigation (complexity, cost, and delay, to name a few), often on matters where the Court is compelled to play a highly politicized, counter-majoritarian role in enforcing *Charter* protections *may* contribute to the problem, further evidence would be required to establish a causal link. That said, the above survey evidence is consistent with the possibility that reducing the volume of constitutionally suspect legislation passed by Parliament or providing ways to resolve unconstitutional legislation more efficiently and effectively, would facilitate trust in courts by reducing the number of partisan-charged conflicts between Parliament and the courts.

[203] A. Lawlor and E. Crandall, "Longstanding Canadian confidence in the judicial system may be on shaky ground" (August 24, 2023), *Policy Options*, https://policyoptions.irpp.org/2023/08/judicial-system-confidence/ [Lawlor & Crandall, Policy Options].
[204] *Ibid*.
[205] *Ibid*.

V. Conclusion & Recommendations

Our selected case study assesses *Charter*-performance from a particular vantage point: whether, or how well, the Canadian constitutional system is living up to its promise to protect against the passage and application of *Charter*-violating legislation, and to otherwise provide just and appropriate remedies when such violations do occur.

While our findings should be interpreted with caution given that they were restricted to a particular policy area and to particular Parliaments, they generally support two overarching observations that merit comment: first, federal Parliament appears to be capable of, and at least occasionally susceptible to, passing a significant amount of constitutionally deficient provisions in a relatively short period of time; and, second, while Canada's judicial system has developed judicial doctrines that allow it to address constitutionally suspect legislation without "live" cases or controversies before it, the judicial system still appears to be imperfectly equipped to resolve such legislation, when the volume and/or type of legislation in issue is passed in ways that can frustrate timely review or remedy at the national level. The cumulative result is a constitutional system that allows for the too frequent passage of unconstitutional legislation while being unable to remedy the several *Charter* harms that flow from such passage.

Taken together, these observations ground our three overarching recommendations:

Recommendation #1:

Parliament should investigate legislative process reforms that would help protect against the passage of unconstitutional legislation. It should also evaluate its prior reforms against the standard as to whether its prior reforms have militated against *Charter* violations.

Recommendation #2:

Governments, not *Charter* plaintiffs, should bear the onus of demonstrating why rights holders who suffer constitutional harms arising from the passage of unconstitutional legislation are not entitled to *Charter* damages.

Recommendation #3:

Courts should place greater weight on the problem of unconstitutional legislation remaining "on the books" before resorting to constitutional doctrines that avoid the question as to whether a provision before them is constitutional.

Recommendation #1

First and foremost, Parliament can very likely do a better job of protecting against the passage of unconstitutional legislation and, relatedly, of removing or amending suspect unconstitutional legislation once Parliament is on notice the legislation is constitutionally suspect. In our case study, we found a significant number of provisions that were declared unconstitutional by appellate courts. The scholarly literature, including as discussed in judicial reasons, also makes clear that the constitutional violations were not trivial or innocuous. The *Charter*-violating legislation had the effect or likely effect of imposing cruel and unusual punishment on offenders, facilitating false plea deals, and contributing to the overincarceration of certain marginalized groups, including especially Indigenous peoples.

While Parliament has enacted *Charter*-relevant measures in the last few years (e.g., the Minister of Justice's increased role in informing Parliament on *Charter* issues arising via bills, through Charter Statements), these measures have not been overtly aimed at preventing the passage of unconstitutional legislation. This has been evidenced, for instance, by the Government of Canada's own evaluation of Charter Statements, which appropriately focused on the statements as educative measures to be assessed on that basis, i.e., not as measures designed to provide risk analyses or to prevent the passage of unconstitutional legislation.[206]

This report does not attempt to canvass every possible reform. Instead, we recommend Parliament investigate legislative process reforms that would help protect against the passage of unconstitutional legislation and, as necessary, evaluate its prior reforms against the specific standard as to whether the prior reforms have militated against *Charter* violations. Comparative examples, such as the Joint Committee on Human Rights of the Parliament of the United Kingdom, offer both instruction and precedent as to the possibility of such rights-protecting institutions. We expect future work of the Asper Centre to develop this inquiry further.

Recommendation #2

Our second and third recommendations reflect the need to complement any inquiry with respect to parliamentary reform with an assessment of the Canadian judicial system, including practices and procedures that may be frustrating adequate resolution of, and constitutional remedies for, the constitutional problems at hand.

Based in part on our findings with respect to the volume and nature of declarations of constitutional invalidity, we have argued that Canadian law has struck the wrong balance when determining whether *Charter* damages are an appropriate remedy to the passage of unconstitutional legislation. Requiring governments, as opposed to *Charter* plaintiffs, to bear the onus of demonstrating why rights holders who suffer constitutional harms arising from the passage of unconstitutional legislation are not entitled to *Charter* damages would, we submit, better reflect

[206] Canada, Charter Statements *supra* note 56.

the need to deter the too common passage of unconstitutional legislation and the special evidentiary challenges facing *Charter* plaintiffs attempting to advance legitimate *Charter* claims for constitutional damages. While Parliament would ideally take on this *Charter*-informed duty voluntarily, the legal question of whether and when this duty flows from the *Charter* and its remedial provisions is a question of constitutional interpretation that may be revisited by the courts.

Accordingly, we recommend courts, in the appropriate case, to revisit the test set out in *Power* and to revise it in a manner that gives greater weight to the *Charter's* remedial promise, including, ideally, by placing the onus on governments to demonstrate that their passage of unconstitutional legislation should not give rise to *Charter* damages in the appropriate case.

Recommendation #3

Finally, we recommend that courts continue to place weight, and indeed a greater weight, on ensuring that legislation does not remain "on the books" for lack of a litigant with the resources to pursue a legal case. Two examples illustrate the difficulty courts currently face and why this final potential avenue for reform is advisable.

First, in our above discussion of *Boudreault*, we observed that the Supreme Court majority declined to issue a remedy that might assist individuals who were being affected by the unconstitutional mandatory victim surcharge, in part for the reason of insufficient submissions on the issue in the case before it. Yet, the intervener Criminal Lawyers Association *had* elected to use their scant time and factum space to make submissions on the very issue (alongside one of the parties).[207] Unfortunately, since *Boudreault*, courts across Canada, including the Supreme Court, have appeared to take an even stricter view towards interveners and the allowable scope of their submissions, an issue the Asper Centre has since documented and reported on. Given our above findings, an important avenue for reform would be revisiting and even reversing this modern trend, including by way of the recommendations provided in our recent report, *More than Busybodies*, *Report of a Workshop on the Status of Public Interest Interveners in Canadian Courts*.[208]

Second, in our review of Supreme Court of Canada declarations of constitutional invalidity, we observed that a key portion of the Court's declaration in *Bertrand Marchand* would have issued over four years earlier, in *R v Morrison*, had the views of the concurring Justice in that case (J. Karakatsanis) decided the issue as to which issues were proper for the Court to decide. As Justice

[207] While the bar to remedies in *Boudreault* was primarily discussed in reference to the principle of *res judicata*, the judicial caution on display may also be witnessed in the related qualified immunity context, where the Court has placed the burden on *Charter* plaintiffs to make out the case as to why the passage of unconstitutional legislation should result in damages. This burden contrasts with an approach that would require the government to demonstrate why remedies should not issue given the demonstrated constitutional harm of the passage of unconstitutional legislation. See Roach, *Constitutional Remedies*, *supra* note 24 at s. 11.15. Taking a less cautious approach, and amending the standard in a way that better remedies the harms imposed on rights holders, would be of a piece with our second broad judicial recommendation, discussed below.

[208] David Asper Centre for Constitutional Rights, *More than Busybodies*, *Report of a Workshop on the Status of Public Interest Interveners in Canadian Courts* (September 2025), https://aspercentre.ca/asper-centre-calls-for-stronger-role-for-public-interest-interveners-in-canadian-courts/.

Karakatsanis underlined, the accused Douglas Morrison had successfully challenged the mandatory minimum throughout the proceedings, and any decision not to decide the matter on final appeal would mean that Mr. Morrison and others similarly situated may, by virtue of the Court majority's decision, "find themselves subject to a mandatory minimum sentence that is constitutionally unsound."[209] While the Court has often relied upon, and defended, such judicial restraint on the grounds that unnecessary constitutional declarations may unforeseeably prejudice future cases,[210] our findings suggest that this calculus must increasingly come to terms with the problem of delay in arriving at declarations of constitutional invalidity. For this and like reasons,[211] judicial restraint should not constrain courts from resolving *Charter* issues that are properly before the court, including, in the appropriate case, via the assistance of public interest interveners.

The central lesson of *Justice Delayed and Justice Denied* is that constitutional violations can persist for years after they are first identified. Every year of delay increases the risk of harms being imposed and decreases the possibility of remedying the *Charter* harms suffered. This is also to say that it is a mistake to view the problem of unconstitutional legislation as primarily or exclusively a question of constitutional interpretation. The problem of unconstitutional legislation and its just and appropriate remedy is also a question of access to justice for individuals harmed; of appropriate institutional design for preventing and remedying such harms; and a wider question of whether or to what extent our constitutional system is living up to its constitutional commitments. The above recommendations are set out as a potential first step towards addressing these larger problems.

[209] *Morrison*, *supra* note 145.
[210] *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 181 [*Canadian Council for Refugees*].
[211] For a canvassing of the harms imposed by the Federal Court's reliance on the doctrine of judicial restraint in *Canadian Council for Refugees*, *supra* note 210, see C. Milne & C. Salvino, "Analyzing the Treatment of Multiple Charter Claims: Judicial Restraint and the Case for Section 15" (2024) 114:2 *Supreme Court Law Review*; and Factum of the Joint Interveners David Asper Centre for Constitutional Rights, West Coast Legal Education and Action Fund Association and Women's Legal Education and Fund Inc. (15 June 2022), https://aspercentre.ca/wp-content/uploads/2022/06/39749-Factum-of-DAC-LEAF-and-WCLEAFSUBMITTED.pdf.

APPENDIX A
PROVISIONS DECLARED INVALID & RELATED ENACTMENTS UNDER THE 39th to 41st PARLIAMENTS

Overview

Section A provides an accounting of constitutional declarations of invalidity with respect to certain statutes identified in Section B and further accounted for in Appendix B.

Section B provides a list of tough on crime and related bills passed by the 39th to 41st Parliaments.

Appendix A, Section A

The below table provides an accounting of the number of times a unique Harper-era tough on crime provision was found to violate the Charter by at least one appellate court. The below provisions arose or were substantially amended by one or more of the amending enactments in this Appendix, Section B. The below accounting includes provisions that were repealed by legislation, with annotation where applicable. The raw case law data for the below accounting, with reference to relevant amending enactments, is provided in Appendix B.

When the Supreme Court of Canada issued a decision, we have omitted any Courts of Appeal declarations from the accounting (i.e., declarations that were superseded by SCC intervention).

For Courts of Appeal decisions, we have provided brief citations of the relevant cases declaring the provision invalid. While some annotation is provided, the table does not systematically canvass decisions by Courts of Appeal on the same provision. These and additional data are provided in Appendix B.

In several cases, the provisions declared invalid and included below are mandatory minimum sentence provisions that were in place prior to the 39th to 41st Parliaments but were then significantly stiffened via Harper-era reforms. Where appropriate, brief annotations are provided in the description of the provision to describe the minimums in place prior to the reforms. See Appendix B for additional information, including relevant enabling enactments, sorted by jurisdiction and case.

Criminal Code		
Provision	***Case(s) declaring invalid***	***Brief Description of Provision in Issue***
Criminal Code, s. 95(2)(a)(i)	*R v Nur*, 2015 SCC 15	3-year MMS, Possession of prohibited or restricted firearm with ammunition (indictable, first offence) Note: The MMS was increased from 1 Year (first *or* subsequent offences) to 3 Years (first offences only) in the relevant period (2008)
Criminal Code, s. 95(2)(a)(ii)	*R v Nur,* 2015 SCC 15	5-year MMS, Possession of prohibited or restricted firearm with ammunition (indictable, second or subsequent offence) Note: The MMS was increased from 1 year (first *or* subsequent offences) to 5 years (second or subsequent offence) in the relevant period (2008)
Criminal Code, s. 99(2)(a)	*R c Lefrançois*, 2018 QCCA 1793	3-Year MMS, Firearms trafficking (indictable, first offence) Note: The MMS was increased from 1 Year (first *or* subsequent offences) to 3 Years (first offences only) in the relevant period (2008)
Criminal Code, s. 103(2)(a)	*R c Lefrançois*, 2018 QCCA 1793	3-Year MMS, Importing or exporting unauthorized weapons, knowing they are unauthorized (indictable, first offence) Note: The MMS was increased from 1 Year (first *or* subsequent offences) to 3 Years (first offences only) and 5 years (second or subsequent offences, at 103(2)(b)) in the relevant period (2008), but only for a subset of offences involving firearms or prohibited ammunition. All other offences retained the prior 1-year MMS, per s. 103(2.1).
Criminal Code, s. 151(a)	*Caron Barrette c R*, 2018 QCCA 516; *R v Hood*, 2018 NSCA 18, *R v JED*, 2018 MBCA 123, *R v Scofield*, 2019 BCCA 3, *R v Ford*, 2019 ABCA 87, *R v BJT*, 2019 ONCA 694	1-Year MMS, Sexual Interference with a minor under 16 (indictable) Note: The MMS was increased from 45 days to 1 year in the relevant period (2012)
Criminal Code, s. 151(b)	R v Gargan, 2023 NWTCA 5, R v D.A.D., 2024 YKCA 9	90-day MMS, Sexual Interference with a minor under 16 (summary) Note: The MMS was increased from 14 days to 90 days in the relevant period (2012)

Criminal Code, s. 153(1.1)(a)	R v Hood, 2018 NSCA 18 R v EO, 2019 YKCA 9 Conflicting COA decision: R v EJB, 2018 ABCA 239 leave to appeal refused	1-Year MMS, Sexual Exploitation with a Young Person, i.e., 16 - 18 (indictable) Note: The MMS was increased from 45 days to 1 year in the relevant period (2012)
Criminal Code, s. 153(1.1)(b)	R v D.A.D., 2024 YKCA 9	90-day MMS, Sexual Exploitation with a Young Person, i.e., 16 - 18 (summary) Note: The MMS was increased from 14 days to 90 in the relevant period (2012)
Criminal Code, s.161(1)(c)	R v KRJ, 2016 SCC 31	Discretion provided to sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age, including retroactively (retroactive power invalid)
Criminal Code, s. 163.1(2)	R v Joseph, 2020 ONCA 733 R v Gagnon, 2026 QCCA 583	1-Year MMS, Making child pornography offence (indictable) Note: The MMS was increased in 2015 by amending a hybrid offence with a 1 year (indictable) or six-month (summary, an increase from 90 days created in 2012) MMS and turning it into a non-hybrid indictable offence with a 1 Year MMS.

Criminal Code, s. 163.1(3)	R v Pike, 2024 ONCA 608 R v Gagnon, 2026 QCCA 583 Several Courts of Appeal have applied the provision but elected not to decide its constitutionality: *Ibrahim c R*, 2018 QCCA 1205 *R c Daudelin*, 2021 QCCA 784 *R v Gerbrandt*, 2021 ABCA 346 *R v Trimm*, 2024 NLCA 18 As above, the QCCA cases have been superseded by *Gagnon*, which considered the constitutional question and issued a declaration. See also, *Claing* c. R., 2026 QCCA 926, finding the Court was bound by *Gagnon*, including as applied to the offender before it.	1-Year MMS, Distribution, etc. of child pornography offence (indictable) Note: The MMS was increased in 2015 by amending a hybrid offence with a 1 year (indictable) or six month (summary) MMS and turning it into a non-hybrid indictable offence with a 1 Year MMS. The provision was also amended in 2012 to increase the summary minimum from 90 days to six months.
Criminal Code, s. 163.1(4)(a), as amended in 2015	Quebec (Attorney General) v. Senneville, 2025 SCC 33	1-Year MMS, Possession of child pornography offence (indictable) Note: The MMS was increased from 14 days to six months in the relevant period (2012) and then from 6 months to 1 year (2015) during the relevant period The MMS as amended in 2012 was the subject of two declarations of invalidity: R v Alexander, 2019 BCCA 100; R v John, 2018 ONCA 702
Criminal Code, s. 163.1(4.1)(a), as amended in 2015	Quebec (Attorney General) v Senneville, 2025 SCC 33	1-Year MMS, Accessing child pornography offence (indictable) Note: The MMS was first increased from 45 days to 6 months (2012) and then from 6 months to 1 year (2015) during the relevant period

Criminal Code, s. 163.1(4)(b)	R v Swaby, 2018 BCCA 416	Six-month MMS, Possession of child pornography offence (summary) Note: The MMS was increased from 14 days to 90 days (2012) and then to six months (2015) in the relevant period Note: *Swaby* was a holding with respect to the prior 90-day MMS (in force 2012 – 2015), but thereby also applies to the greater sentence.
Criminal Code, s. 172.1(2)(a)	R v Bertrand Marchand, 2023 SCC 26	1-Year MMS, Luring a child, by means of telecommunication (indictable)
Criminal Code, s. 172.1(2)(b)	R v Bertrand Marchand, 2023 SCC 26	6-month MMS, Luring a child, by means of telecommunication (summary)
Criminal Code, s. 244.2(3)(b)	R v Hills, 2023 SCC 2	4-Year MMS, Discharging firearm (place), recklessness; indictable Repealed, 2022 (prior to SCC decision). *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15
Criminal Code, s. 258(1)(c)	R. v. St-Onge Lamoureux, 2012 SCC 57	Requirements to rebut presumption of accuracy re: breathalyzer notes Note: While included in our results, the decision is a borderline case, as the SCC upheld the bulk of Parliament's relevant legislation, including by finding that 258(1)(c), 258(1)(d.01), and 258(1)(d.1) were constitutional *only* after certain requirements were severed.
Criminal Code, s. 258(1)(d.01)	R. v. St-Onge Lamoureux, 2012 SCC 57	Restricting the types of evidence that an accused may rely on to rebut the presumption under 258(1)(c) above (i.e., removing the evidence used in the *Carter* defence)
Criminal Code, s. 258(1)(d.1)	R. v. St-Onge Lamoureux, 2012 SCC 57	Requiring an accused to show that alcohol consumption was consumption with not exceeding BAC limit at the time of offence and at with results of breathalyzer test (presumption of identity)
Criminal Code, s. 271(a)	R v MacLean, 2021 NLCA 24, R v Basso, 2024 ONCA 168	1-Year MMS if victim under 16, Sexual Assault (indictable)
Criminal Code, s. 272(2)(a.2)	R. v. Trottier, 2020 QCCA 703	5-Year MMS, Sexual assault with a weapon, threats to a third party or causing bodily harm, complainant under 16 years

Criminal Code, s. 286.2(2)	R. v. Joseph, 2020 ONCA 733	2-Year MMS, Material benefit from sexual services provided by person under 18 years, indictable Note: An analogous offence, with a 2-Year MMS, was located at 212(2). 2014 reforms expanded the scope of the offence.
Criminal Code, s. 286.3(2)	R v Safieh, 2021 ONCA 643	5-Year MMS, Procuring (a person to offer or provide sexual services for consideration), person under 18 years, indictable Note: An analogous offence, with a 5-Year MMS, was located at 212(2.1). 2014 reforms expanded the scope of the offence.
Criminal Code, s. 490.012	R v Ndhlovu, 2022 SCC 38	Requiring mandatory registration on the national sex offender registry of offenders found guilty of designated sexual offences
Criminal Code, s. 490.013(2.1)	R v Ndhlovu, 2022 SCC 38	Requiring lifetime registration for offenders convicted of more than one designated offence
Criminal Code, s. 719(3.1) (criminal record exclusion)	R. v. Safarzadeh Markhali, 2016 SCC 14	Denial of enhanced credit for pre-sentence custody to offenders who are denied bail primarily because of a prior conviction
Criminal Code, s. 719(3.1) (bail breach exclusion)	R. v. Romanchych, 2018 BCCA 26, R v Kovich (GW), 2016 MBCA 19, R. v. Meads, 2018 ONCA 146	Denial of enhanced credit for pre-sentence custody to offenders who are denied bail primarily because of a breach of bail terms N.B. Per the cited authorities, the bail breach exclusion found at the former s. 719(3.1) was not covered by the holding in *R. v. Safarzadeh Markhali.* The restriction on enhanced credit in issue was repealed in 2018 in favour of a discretionary standard. *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29, s. 66.
Criminal Code, s. 737	R v Boudreault, 2018 SCC 58	Mandatory victim surcharge (replacing the former discretionary victim surcharge)
Criminal Code, s. 745.51	R v Bissonnette, 2022 SCC 23	Multiple first degree murders; Permitting imposition of consecutive 25-year parole ineligibility periods
Controlled Drugs and Substances Act (CDSA)		
Provision	***Case(s) declaring invalid***	***Brief Description of Provision in Issue***
CDSA, s. 5(3)(a)(i)(D)	R v Lloyd, 2016 SCC 13	1-Year MMS, Possessing controlled substances for purpose of trafficking

CDSA, s. 5(3)(a)(ii)(A)	R v Dickey, 2016 BCCA 177	2-Year MMS, Possessing controlled substances for purpose of trafficking, in or near a school or school grounds. Provisions at A and C (infra) were repealed in 2018. *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29, s. 196.
CDSA, s. 5(3)(a)(ii)(C)	R v Dickey, 2016 BCCA 177	2-Year MMS, Possessing controlled substances for purpose of trafficking, in or near any public place frequented by those under 18 (other than those already addressed). Repealed. See above note.
CDSA, s. 7(2)(b)(i)	R v Elliott, 2017 BCCA 214	6-Month MMS, Producing marijuana plants (more than 5 but less than 201). Repealed, 2018. *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29, s. 197.
CDSA, s. 7(2)(b)(iii)	R v Serov, 2017 BCCA 456, R v Vu, 2018 ONCA 436	1-Year MMS, Producing marijuana plants (more than 200 but less than 501). Repealed, 2018 (see above).
CDSA, s. 7(2)(b)(iv)	R v Serov, 2017 BCCA 456	18-Month MMS, Producing marijuana plants (more than 200 but less than 501), including aggravating factor of use of real property of third party. Repealed, 2018 (see above).
CDSA, s. 7(2)(b)(v)	R v McGee, 2017 BCCA 457, R v Vu, 2018 ONCA 436	2-Year MMS, Producing marijuana plants more than 500, indictable Repealed, 2018 (see above).
CDSA, s. 7(2)(b)(vi)	R v McGee, 2017 BCCA 457, R v Vu, 2018 ONCA 436	3-Year MMS, Producing marijuana plants more than 500, indictable, aggravating factor of using property belonging to a third party in committing the offence. Repealed, 2018 (see above).

CDSA, s. 7(3)(c)	R v Vu, 2018 ONCA 436	Statutory aggravating factor involving production of marijuana that constitutes a potential public safety hazard in a residential area Repealed, 2022. *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15, s. 17.
Abolition of Early Parole Act		
Provision	***Case(s) declaring invalid***	***Brief Description of Provision in Issue***
Abolition of Early Parole Act, s. 10(1)	Canada (AG) v Whaling, 2014 SCC 20	Removing accelerated parole review for non-violent, first-time offenders, including retrospectively to offenders already serving sentences (retrospective aspect of provision in issue)

Appendix A, Section B

All acts we categorized as relevant are provided below.

The acts classified as tough on crime (or related) legislation include, but are not limited to, any acts that amended the *Criminal Code* and/or the *Controlled Drugs and Substances Act*. In cases where amendments to either statute were minor, the act was included below, with a parenthetical note provided.

The survey is chronological and organized by Parliamentary sessions. For legislation classified as relevant or non-relevant, the survey is restricted to statutes that were published in the Annual Statutes and made accessible on Canada's Justice Laws Website. Accordingly, the category of "total enactments" for any time period is comprised of, and only of, relevant and non-relevant statutes (i.e., bills passed) published in the Annual Statutes and made accessible on Canada's Justice Laws Website. Omnibus bills are treated as one enactment and bills that received Royal Assent that did not form part of the Annual Statutes (i.e., bills that did not come into force during the selected time period) are omitted.

The purposes of the review were to inform the project's case law research (with relevant statutes being researched for relevant case law arising) and to evidence, in broad terms, the 39th to 41st Parliaments' focus on criminal justice policy and sentencing reform during the relevant period. While the above method was, in some respects, overinclusive for this second purpose, the inclusion of relatively trivial enactments was often mirrored by trivial non-relevant enactments passed during this same period.

In the result, we documented 71 relevant enactments, broadly interpreted, out of a total of 277 annual statutes.

I. 39TH Parliament, 1st Session, April 3, 2006 – September 14, 2007 (113 House sitting days)

April 3, 2006 – End of Year: **4/11 Enactments**

January 1, 2007 – September 14, 2007: **7/27 Enactments**

Total: **11/38 Enactments**

2006

1. SC 2006, c 9 – Federal Accountability Act (Bill C-2, assented to 2006-12-12)
2. SC 2006, c 11 - An Act to amend the Judges Act and certain other Acts in relation to courts (Bill C-17, assented to 2006-12-14)
3. SC 2006, c 12 - An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act (Bill C-25, assented to 2006-12-14)
4. SC 2006, c 14 – An Act to amend the Criminal Code (street racing) and to make a consequential amendment to the Corrections and Conditional Release Act (Bill C-19, assented to 2006-12-14)

2007

5. SC 2007, c 5 – An Act to amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act (Bill S-3, assented to 2007-03-29)
6. SC 2007, c 9 – An Act to amend the Criminal Code (criminal interest rate) (Bill C-26, assented to 2007-05-03)
7. SC 2007, c 12 – An Act to amend the Criminal Code (conditional sentence of imprisonment) (Bill C-9, assented to 2007-05-03)
8. SC 2007, c 13 – An Act to amend the Criminal Code in order to Implement the United Nations Convention against Corruption (Bill C-48, assented to 2007-05-31)
9. SC 2007, c 20 – An Act to amend the Criminal Code (luring a child) (Bill C-277, assented to 2007-06-22)
10. SC 2007, c 22 – An Act to amend certain Acts in relation to DNA identification (Bill C-18, assented to 2007-06-22)
11. SC 2007, c 28 – An Act to amend the Criminal Code (unauthorized recording of a movie) (Bill C-59, assented to 2007-06-22)

II. 39TH Parliament, 2nd Session, October 16, 2007 – September 7, 2008 (73 House sitting days)

October 16, 2007 to End of Year: **0/6 Enactments**

January 1, 2008 – September 7, 2008: **4/29 Enactments**

Total: **4/35 Enactments**

2007: None

2008

1. SC 2008, c 3, An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act (Bill C-3, assented to 2008-02-14)
2. SC 2008, c 6 – Tackling Violent Crime Act (Bill C-2, assented to 2008-02-28)
3. SC 2008, c 12 - An Act to amend the Criminal Code (cruelty to animals) (Bill S-203, assented to 2008-04-17)
4. SC 2008, c 18 – An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments) (Bill C-13, assented to 2008-05-29)

III. 40TH Parliament, 1st Session, November 8, 2008 – December 4, 2008 (8 House sitting days)

No enactments

IV. 40TH Parliament, 2nd Session, January 26, 2009 – December 30, 2009 (83 House sitting days)

January 26, 2009 – December 30, 2009: **4/28 Enactments**

Total: **4/28 Enactments**

2009

1. SC 2009, c 2 – Budget Implementation Act, 2009 (Bill C-10, assented to 2009-03-12) (*N.B.: Minor relevant amendment*)
2. SC 2009, c 22 – An Act to amend the Criminal Code (organized crime and protection of justice system participants) (Bill C-14, assented to 2009-06-23)
3. SC 2009, c 28 – An Act to amend the Criminal Code (identity theft and related misconduct) (Bill S-4, assented to 2009-10-22)
4. SC 2009, c 29 – Truth in Sentencing Act (Bill C-25, assented to 2009-10-22)

V. 40TH Parliament, 3rd Session, March 3, 2010 – March 26, 2011 (99 House sitting days)

March 3, 2010 – End of Year: **7/20 Enactments**

January 1, 2011 – March 26, 2011: **6/14 Enactments**

Total: **13/34 Enactments**

2010

1. SC 2010, c 3 – An Act to amend the Criminal Code (minimum sentence for offenders involving the trafficking of persons under the age of eighteen years) (Bill C-268, assented to 2010-06-29)
2. SC 2010, c 5 - Limiting Pardons for Serious Crimes Act (Bill C-23A, assented to 2010-06-29)
3. SC 2010, c 14 – An Act to amend the Criminal Code (auto theft and trafficking in property obtained by crime) (Bill S-9, assented to 2010-11-18)
4. SC 2010, c 17 – Protecting Victims from Sex Offenders Act (Bill S-2, assented to 2010-12-15)
5. SC 2010, c 19 – An Act to amend the Criminal Code (suicide bombings) (Bill S-215, assented to 2010-12-15)
6. SC 2010, c 20 – An Act to amend the Criminal Code (justification for detention in custody) (Bill C-464, assented to 2010-12-15)
7. SC 2010, c 22 - Eliminating Entitlements for Prisoners Act (Bill C-31, assented to 2010-12-15)

2011

1. SC 2011, c 2 – An Act to amend the Criminal Code and another Act (Bill S-6, assented to 2011-03-23)
2. SC 2011, c 5 – Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act (Bill C-48, assented to 2011-03-23)
3. SC 2011, c 6 – Standing up for Victims of White Collar Crime Act (Bill C-21, assented to 2011-03-23)
4. SC 2011, c 7 – Response to the Supreme Court of Canada Decision in R. v. Shoker Act (Bill C-30, assented to 2011-03-23)
5. SC 2011, c 11 – Abolition of Early Parole Act (Bill C-59, assented to 2011-03-23) (only repealed s. 89 of code)
6. SC 2011, c 14 – An Act to amend the Controlled Drugs and Substances Act (methamphetamine and ecstasy) (Bill C-475, assented to 2011-03-25)

VI. 41st Parliament, 1st Session, June 2, 2011 – September 13, 2013 (272 House sitting days)

June 2, 2011 – End of Year: **1/9 Enactments**

2012 (Full Year): **6/26 Enactments**

January 1, 2013 – September 13, 2013: **9/33 Enactments**

Total: **16/68 Enactments**

2011

1. SC 2011, c 16 – Fair and Efficient Criminal Trials Act (Bill C-2, assented to 2011-06-26)

2012

2. SC 2012, c 1 – Safe Streets and Communities Act (Bill C-10, assented to 2012-03-13)
3. SC 2012, c 6 – An Act to amend the Criminal Code and the Firearms Act (Bill C-19, assented to 2012-04-05)
4. SC 2012, c 9 – Citizen's Arrest and Self-defence Act (Bill C-26, assented to 2012-06-28)

5. SC 2012, c 15 – An Act to amend the Criminal Code (trafficking in persons) (Bill C-310, assented to 2012-06-28)
6. Jobs, Growth and Long-term Prosperity Act, SC 2012, c 19 (N.B. minor amendment to *Criminal Code* regarding peace officers)
7. SC 2012, c 29 – Protecting Canada's Seniors Act (Bill C-26, assented to 2012-12-14) (N.B. amending *Criminal Code* to add vulnerability due to age as an aggravating circumstance for sentencing purposes)

2013

8. SC 2013, c 8 – Response to the Supreme Court of Canada Decision in R. v. Tse Act (Bill C-55, assented to 2013-03-27)
9. SC 2013, c 9 – Combating Terrorism Act (Bill S-7, assented to 2013-04-25)
10. SC 2013, c 11 – Increasing Offenders' Accountability for Victims Act (Bill C-37, assented to 2013-06-19)
11. SC 2013, c 13 - Nuclear Terrorism Act (Bill S-9, assented to 2013-06-19)
12. SC 2013, c 15 - Preventing Persons from Concealing Their Identity during Riots and Unlawful Assemblies Act (Bill C-309, assented to 2013-06-19)
13. SC 2013, c 16 - Faster Removal of Foreign Criminals Act (Bill C-43, assented to 2013-06-19)
14. SC 2013, c 19 - An Act to amend the Criminal Code (prize fights) (Bill S-209, assented to 2013-06-19)
15. SC 2013, c 24 - Strengthening Military Justice in the Defence of Canada Act (Bill C-15, assented to 2013-06-19)
16. SC 2013, c 32 - An Act to amend the Criminal Code (kidnapping of young person) (Bill C-299, assented to 2013-06-26)

VII. 41st Parliament, 2nd Session, October 16, 2013 – August 2, 2015 (235 House sitting days)

October 16, 2013 – **End of Year: 1/2 Enactments**

2014 (Full Year): **11/36 Enactments**

January 1, 2015 – August 2, 2015: **11/36 Enactments**

Total: **23/74 Enactments**

2013

1. SC 2013, c 40 Economic Action Plan 2013 Act, No. 2 (N.B. minor amendment to the *Criminal Code* relating to the definition of passport and another minor amendment)

2014

2. SC 2014, c 6 – Not Criminally Responsible Reform Act (Bill C-14, assented to 2014-04-11)
3. SC 2014, c 9 – An Act to amend the Criminal Code (mischief relating to war memorials) (Bill C-217, assented to 2014-06-19)

4. SC 2014, c 10 – An Act to amend the Criminal Code (personating peace officer or public officer) (Bill C-444, assented to 2014-06-19)
5. SC 2014, c 17 – An Act to amend the Criminal Code and the National Defence Act (criminal organization recruitment) (Bill C-394, assented to 2014-06-19)
6. SC 2014, c 21 – An Act to amend the Criminal Code and the Corrections and Conditional Release Act (restrictions on offenders) (Bill C-489, assented to 2014-06-19)
7. SC 2014, c 22 - An Act to amend the Citizenship Act and to make consequential amendments to other Acts (Bill C-24, assented to 2014-06-19)
8. SC 2014, c 23 – Tackling Contraband Tobacco Act. (Bill C-10, assented to 2014-11-06)
9. SC 2014, c 25 – Protection of Communities and Exploited Persons Act (bill C-36, assented to 2014-11-06)
10. SC 2014, c 31 – Protecting Canadians from Online Crime Act (Bill C-13, assented to 2014-12-09)
11. Combating Counterfeit Products Act, SC 2014, c 32 (N.B. minor amendment to *Criminal Code*)
12. Economic Action Plan 2014 Act, No. 2, SC 2014, c 39 (N.B. minor amendment to *Criminal Code*)

2015

1. SC 2015, c 1 – An Act to amend the Criminal Code (assaults against public transit operators) (Bill S-221, assented to 2015-02-25)
2. SC 2015, c 3 - Miscellaneous Statute Law Amendment Act, 2014 (Bill C-47, assented to 2015-02-26) (N.B. Minor amendments to the *Criminal Code*)
3. SC 2015, c 9 - Protection of Canada from Terrorists Act (Bill C-44, assented to 2015-04-23) (N.B. Primarily concerns extraterritorial policing powers)
4. SC 2015, c 13 – Victims Bill of Rights Act (Bill C-32, assented to 2015-04-23)
5. SC 2015, c 16 – An Act to amend the Criminal Code (exploitation and trafficking in persons) (Bill C-452, assented to 2015-06-18)
6. SC 2015, c 20 – Anti-terrorism Act, 2015 (Bill C-51, assented to 2015-06-18)
7. SC 2015, c 22 – Respect for Communities Act (Bill C-2, assented to 2015-6-18) (CDSA)
8. SC 2015, c 23 – Tougher Penalties for Child Predators Act (Bill C-26, assented to 2015-06-18)
9. SC 2015, c 27 – Common Sense Firearms Licensing Act (Bill C-42, assented to 2015-06-18)
10. SC 2015, c 29 – Zero Tolerance for Barbaric Cultural Practices Act (Bill S-7, assented to 2015-06-18)
11. SC 2015, c 34 – Justice for Animals in Service Act (Quanto's Law) (Bill C-35, assented to 2015-06-23)

APPENDIX B
DECLARATIONS OF INVALIDITY: DECISIONS BY LEVEL OF COURT AND JURISDICTION

Overview

The below tables set out decisions resulting in declarations of invalidity with respect to tough on crime legislation passed during the 39th to 41st Parliaments. To be included in a relevant table, a decision:

(1) issued from the Supreme Court of Canada or a provincial or territorial Court of Appeal;
(2) declared a legislative provision or provisions invalid on *Charter* grounds (N.B.: declarations re: regulations are excluded);
(3) the provision(s) declared invalid was created or substantially amended during the 39th to 41st Parliaments, without any substantial intervening amendment; and
(4) the decision is the highest known appellate ruling on the provision, with declarations of invalidity of equal standing (i.e., Courts of Appeal) all being documented under the relevant table.

The significance, if any, of Bill C-16, the *Protecting Victims Act* (June 18, 2026), and its widescale reform of mandatory minimum sentence provisions, is not addressed in the below tables. In cases where a Supreme Court of Canada decision has superseded Court of Appeal decisions with respect to a provision, the Court of Appeal decisions are omitted, even if the decisions were not the case on appeal. In cases where legislation has been passed that has apparently resolved the issues resulting in Court of Appeal declarations of constitutional invalidity, *without* a Supreme Court of Canada decision on the matter, all of the Court of Appeal cases are included. Efforts have been made to note any relevant legislative changes.

The above criteria have been used, in part, to focus on the appellate litigation that has resulted from Harper-era tough on crime legislation and the timing of this litigation. This is to be contrasted to an approach that focuses on an accounting of the provisions that have been found unconstitutional by at least one appellate court, without reversal: see Appendix A. Suffice it to say, within this classification scheme, declarations are not created equal. Among other things, a Supreme Court of Canada declaration represents the top court's holding as well as the substantial litigation that preceded it, including often multiple Courts of Appeal decisions on the issue in dispute.

Following a summary table, tables are organized first by level of court, and then alphabetically, with cases within each jurisdiction then being organized chronologically. While substantial

efforts were made to document relevant decisions,[212] it is possible that not all relevant cases have been included. Accordingly, the tables should not be considered comprehensive.

The tables are provided as follows:

SUMMARY TABLE B-3

SUPREME COURT OF CANADA B-4

COURTS OF APPEAL B-6

ALBERTA B-6

BRITISH COLUMBIA B-7

MANITOBA B-9

NEWFOUNDLAND AND LABRADOR B-10

NORTHWEST TERRITORIES B-11

NOVA SCOTIA B-12

ONTARIO B-13

QUEBEC B-16

YUKON B-17

[212] Our research included significant independent research via the main legal databases (CanLII, Westlaw, and Quicklaw). That said, two secondary sources were also substantially relied upon to source and/or verify MMS-specific findings and deserve special mention: the MMS tracker by Matthew Oleynik, available at https://mms.watch/; and Brendan Dell, "Return to *Smith*? Harper-Era Mandatory Minimum Sentences in Canadian Courts (2008-2023)" (2023) 55:2 Ottawa L Rev 327.

SUMMARY TABLE			
Jurisdiction	**Total # of Decisions as Highest Court**	**# of MMS Decisions**	**# of Decisions in Agreement with Peer COAs**
Supreme Court of Canada	**12**	**6**	**N/A**
Alberta	**1**	**1**	**1**
British Columbia	**7**	**6**	**4**
Manitoba	**2**	**1**	**2**
Newfoundland and Labrador	**1**	**1**	**1**
Northwest Territories	**1**	**1**	**1**
Nova Scotia	**1**	**1**	**1**
Ontario	**7**	**6**	**6**
Quebec	**4**	**4**	**2**
Yukon	**2**	**2**	**2**
Totals	**38**	**29**	**20**

In our results, and as detailed in Appendix A, we have located six *Criminal Code* provisions that have resulted in declarations of invalidity by two or more Courts of Appeal, with respect to provisions that were "on the books" when the *Protecting Victims Act* came into force on July 18, 2026: s. 151(a) (six Courts); s. 151(b) (two Courts); s. 153(1.1)(a) (two Courts, plus one conflicting Court); s. 163.1(2) (two Courts); s. 163.1(3) (two Courts); and s. 271(a) (two Courts). All are MMS-related decisions.

We have also located one *Criminal Code* and three *Controlled Drugs and Substances Act* provisions that were declared invalid by two Courts of Appeal, but that were repealed without SCC resolution: s. 719(3.1) (re: the denial of credit for breaches of bail conditions, not ruled upon by the SCC in Safarzadeh Markhali); CDSA, s. 7(2)(b)(iii) (two Courts); CDSA, s. 7(2)(b)(v) (two Courts); and CDSA, s. 7(2)(b)(vi) (two Courts). The decisions are included in the above results.

SUPREME COURT OF CANADA					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Date provision(s) no longer of force and effect**
R. v. St-Onge Lamoureux, 2012 SCC 57	Tackling Violent Crime Act, SC 2008, c 6, 2008-02-28	Criminal Code, ss. 258(1)(*d.01*), 258(1)(*d.1*), and 258(1)(*c*)	s. 11(d)	Statutory presumptions of accuracy and identity (breathalyzers)	2012-11-02 See Appendix A for note on inclusion (as provisions requiring severance for constitutionality).
Canada (Attorney General) v. Whaling, 2014 SCC 20	Abolition of Early Parole Act, S.C. 2011, c. 11, 2011-03-23	Abolition of Early Parole Act, s. 10(1)	s. 11(h)	Double jeopardy	Retroactive (invalidating retroactive effect of provision that came into force 2011-03-28)
R. v. Nur, 2015 SCC 15	Tackling Violent Crime Act, SC 2008, c 6, 2008-02-28	*Criminal Code*, s. 95(2)(a)(i)-(ii)	s. 12	MMS	2015-04-14
R. v. Lloyd, 2016 SCC 13	Safe Streets and Communities Act, SC 2012, c 1, 2012-03-13	Controlled Drugs and Substances Act, s. 5(3)(a)(i)(D)	s. 12	MMS	2016-04-15
R. v. Safarzadeh - Markhali, 2016 SCC 14	Truth in Sentencing Act, SC 2009, c 29, 2009-10-22	Criminal Code, s. 719(3.1) (portion re: criminal record exclusion for pre-trial detention credit)	s. 7	Sentencing: pre-trial detention and credit	2016-04-15
R. v. K.R.J., 2016 SCC 31	Safe Streets and Communities Act, SC 2012, c 1, 2012-03-13	Criminal Code, s. 161(1)(c)	s. 11(i)	Benefit of lesser punishment if offence varied after commission	Retroactive (invalidating retroactive effect of provision that came into force 2012-08-09)
R. v. Boudreault, 2018 SCC 58	Increasing Offenders' Accountability for Victims Act, SC 2013, c 11, 2013-06-19	Criminal Code, s. 737	s. 12	Mandatory victim surcharge (N.B. Coded as MMS)	2018-12-14
R. v. Bissonnette, 2022 SCC 23	Protecting Canadians by Ending Sentence Discounts for Multiple	Criminal Code. s. 745.51	s. 12	Sentencing: Consecutive sentencing and	2022-05-27

	Murders Act, SC 2011, c 5, 2011-03-23			parole ineligibility	
R. v. Ndhlovu, 2022 SCC 38	Protecting Victims from Sex Offenders Act, SC 2010, c 17, 2010-12-15	Criminal Code, ss. 490.012, 490.013(2.1)	s. 7	Offender registration, sexual offences	2022-10-28: 490.013(2.1) 2023-10-28: 490.012 (suspended declaration of invalidity[213])
R. v. Hills, 2023 SCC 2	An Act to amend the Criminal Code (organized crime and protection of justice system participants), SC 2009, c 22, 2009-06-23	Criminal Code, ss. 244.2(3)(b)	s. 12	MMS	Date of SCC decision: 2023-01-27 Date of legislation repealing provision (Royal Assent): 2022-11-17. *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act* SC 2022, c 15
R v Bertrand Marchand, 2023 SCC 26	Safe Streets and Communities Act, SC 2012, c 1, 2012-03-13	Criminal Code, ss. 172.1(2)(a) and 172.1(2)(b)	s. 12	MMS	2023-11-03
R v Senneville, 2025 SCC 33	Tougher Penalties for Child Predators Act, SC 2015, c 23, 2015-06-18	Criminal Code, ss. 163.1(4)(a) and (4.1)(a)	s. 12	MMS	2025-10-31

[213] Constitutional exemptions during the suspended period were nevertheless available in the appropriate case, under authority of s. 24(1) of the *Charter* and any appropriate legislation. See, e.g., *Ontario (AG) v G*, 2020 SCC 38 at para 147 (noting the general legal principle) and *R. v. Lepki*, 2024 ABCA 257 (holding the sentencing judge erred by finding the court lacked jurisdiction to grant a constitutional exemption during the period of suspended declaration of invalidity flowing from *Ndhlovu*).

COURTS OF APPEAL

ALBERTA					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
R. v. Ford, 2019 ABCA 87	Safe Streets and Communities Act, SC 2012, c 1, 2012-03-13	Criminal Code, s. 151(a)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *Caron Barrette c R*, 2018 QCCA 516 *R v Hood*, 2018 NSCA 18 *R v JED*, 2018 MBCA 123 *R v Scofield*, 2019 BCCA 3 *R v BJT*, 2019 ONCA 694

BRITISH COLUMBIA					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
R. v. Dickey, 2016 BCCA 177	Safe Streets and Communities Act, S.C. 2012, c. 1 2012-03-13	Controlled Drugs and Substances Act, s. 5(3)(a)(ii)(A) and (C)	s. 12	MMS	No known appeal to SCC Provisions repealed in 2018 (see Appendix A).
R. v. Elliott, 2017 BCCA 214	Safe Streets and Communities Act, S.C. 2012, c. 1 2012-03-13	Controlled Drugs and Substances Act, s. 7(2)(b)(i)	s. 12	MMS	No known appeal to SCC Provisions repealed in 2018 (see Appendix A).
R. v. Serov, 2017 BCCA 456	Safe Streets and Communities Act, SC 2012, c 1 2012-03-13	Controlled Drugs and Substances Act, s. 7(2)(b)(iii) and (iv)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal, s. 7(2)(b)(iii) (see table entries): R v Vu, 2018 ONCA 436 Provisions repealed in 2018 (see Appendix A).
R. v. McGee, 2017 BCCA 457	Safe Streets and Communities Act, SC 2012, c 1 2012-03-13	Controlled Drugs and Substances Act, s. 7(2)(b)(v) and (vi)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal, s. 7(2)(b)(v) and (vi) (see table entries): R v Vu, 2018 ONCA 436 Provisions repealed in 2018 (see Appendix A).
R. v. Romanchych, 2018 BCCA 26	Truth in Sentencing Act, SC 2009, c 29 2009-10-22	Criminal Code, s. 719(3.1) (bail breaches exclusion for pre-trial detention credit) N.B. Criminal record exclusion for pre-trial detention, located at same sub-section, also declared invalid; superseded by SCC	s. 7	Sentencing: pre-trial detention and credit	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *R v Kovich (GW)*, 2016 MBCA 19 *R. v. Meads*, 2018 ONCA 146 Conflicting decisions:

		in *Safarzadeh-Markhali*			*R. v. Chambers*, 2014 YKCA 13, leave to appeal refused (issued prior to SCC decision, *Safarzadeh-Markhali*) Provisions repealed in 2018 (see Appendix A).
R. v. Swaby, 2018 BCCA 416	Safe Streets and Communities Act, S.C. 2012, c. 1 2012-03-13	Criminal Code, s. 163.1(4)(b)	s. 12	MMS	No known appeal to SCC
R. v. Scofield, 2019 BCCA 3	Safe Streets and Communities Act, S.C. 2012, c. 1 2012-03-13	Criminal Code, s. 151(a)	s. 12	MMS	*Caron Barrette c R*, 2018 QCCA 516 *R v Hood*, 2018 NSCA 18 *R v JED*, 2018 MBCA 123 *R v Ford*, 2019 ABCA 87 *R v BJT*, 2019 ONCA 694

MANITOBA					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
R v Kovich (GW), 2016 MBCA 19	Truth in Sentencing Act, SC 2009, c 29 2009-10-22	Criminal Code, s. 719(3.1) (bail breaches exclusion for pre-trial detention credit) N.B. Criminal record exclusion for pre-trial detention, located at same sub-section, also declared invalid; on this issue, superseded by SCC in *Safarzadeh-Markhali*	s. 7	Sentencing: pre-trial detention and credit	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *R. v. Meads*, 2018 ONCA 146 *R. v. Romanchych*, 2018 BCCA 26 Conflicting decisions: *R. v. Chambers*, 2014 YKCA 13, leave to appeal refused (issued prior to SCC decision, *Safarzadeh-Markhali*) Provisions repealed in 2018 (see Appendix A).
R v JED, 2018 MBCA 123	Safe Streets and Communities Act, SC 2012 c 1 2012-03-13	Criminal Code, s. 151(a)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *Caron Barrette c R*, 2018 QCCA 516 *R v Hood*, 2018 NSCA 18 *R v Scofield*, 2019 BCCA 3 *R v Ford*, 2019 ABCA 87 *R v BJT*, 2019 ONCA 694

NEWFOUNDLAND AND LABRADOR					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
R v MacLean, 2021 NLCA 24	Tougher Penalties for Child Predators Act, SC 2015, c 23 2015-06-18	Criminal Code, s. 271(a)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *R v Basso*, 2024 ONCA 168

NORTHWEST TERRITORIES					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
R v Gargan, 2023 NWTCA 5	Safe Streets and Communities Act, SC 2012, c 1 2012-03-13	s. 151(b)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal (see table entries): R. v. D.A.D., 2024 YKCA 9

NOVA SCOTIA					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
R. v. Hood, 2018 NSCA 18	Safe Streets and Communities Act, SC 2012, c 1 2012-03-13	Criminal Code, ss. 151(a) and 153(1.1)(a)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal (see table entries) re s. 151(a): *Caron Barrette c R*, 2018 QCCA 516 *R v JED*, 2018 MBCA 123 *R v Scofield*, 2019 BCCA 3 *R v Ford*, 2019 ABCA 87 *R v BJT*, 2019 ONCA 694 Conflicting Courts of Appeal decisions exist re: s. 153(1.1)(a), with one additional finding of invalidity and one decision upholding the provision: *R v EO*, 2019 YKCA 9, leave to appeal refused (finding provision invalid) *R v EJB*, 2018 ABCA 239, leave to appeal refused (upholding provision)

ONTARIO					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
R. v. Vu, 2018 ONCA 436	Safe Streets and Communities Act, SC 2012, c 1 2012-03-13	Controlled Drugs and Substances Act, ss. 7(2)(b)(iii), (v), (vi) and 7(3)(c)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal, s. 7(2)(b)(iii), (see table entries): *R v Serov*, 2017 BCCA 456 Same result in other Courts of Appeal, s. 7(2)(b)(v)-(vi)(see table entries): *R v McGee*, 2017 BCCA 457 Subsections 7(2)(b)(iii), (v), and (vi) were all repealed in 2018. S. 7(3)(c) repealed in 2022. See Appendix A.
R. v. Meads, 2018 ONCA 146	Truth in Sentencing Act, SC 2009, c 29 2009-10-22	Criminal Code, 719(3.1) (bail breaches exclusion for pre-trial detention credit)	s. 7	Sentencing: pre-trial detention and credit	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *R v Kovich (GW)*, 2016 MBCA 19 *R. v. Romanchych*, 2018 BCCA 26 Conflicting decisions: *R. v. Chambers*, 2014 YKCA 13, leave to appeal refused (issued prior to SCC decision, *Safarzadeh-Markhali*) Provision amended in 2018 (see Appendix A).
R. v. BJT, 2019 ONCA 694	Safe Streets and Communities Act, SC 2012, c 1 2012-03-13	Criminal Code, s. 151(a)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *Caron Barrette c R*, 2018 QCCA 516 *R v Hood*, 2018 NSCA 18 *R v JED*, 2018 MBCA 123 *R v Scofield*, 2019 BCCA 3 *R v Ford*, 2019 ABCA 87

R. v. Joseph, 2020 ONCA 733	163.1(2): Tougher Penalties for Child Predators Act, SC 2015, c 23 2015-06-18 286.2(2): Protection of Communities and Exploited Persons Act, SC 2014, c 25 2014-11-06	Criminal Code, ss. 163.1(2) and 286.2(2)	s. 12	MMS	Same result in other Courts of Appeal, s. 163.1(2) (see table entries): R v Gagnon, 2026 QCCA 583
R v Safieh, 2021 ONCA 643	Protection of Communities and Exploited Persons Act, SC 2014, c 25 2014-11-06	Criminal Code, s. 286.3(2)	s. 12	MMS	No known appeal to SCC
R v Basso, 2024 ONCA 168	Tougher Penalties for Child Predators Act, SC 2015, c 23 2015-06-18	Criminal Code, s. 271(a)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *R v MacLean*, 2021 NLCA 24

R v Pike, 2024 ONCA 608	Tougher Penalties for Child Predators Act, SC 2015, c 23, 2015-06-18	Criminal Code, s. 163.1(3)	s. 12	MMS		No known appeal to SCC Same result in other Courts of Appeal (see table entries): R v Gagnon, 2026 QCCA 583 Several Courts of Appeal have applied the provision but elected not to decide its constitutionality: *Ibrahim c R*, 2018 QCCA 1205 *R c Daudelin*, 2021 QCCA 784 *R v Gerbrandt*, 2021 ABCA 346 *R v Trimm*, 2024 NLCA 18 As above, the QCCA cases have been superseded by *Gagnon*.

QUEBEC					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
Caron Barrette v R, 2018 QCCA 516	Safe Streets and Communities Act, S.C. 2012, c. 1 2012-03-13	Criminal Code, s. 151(a)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal (see table entries): *R v Hood*, 2018 NSCA 18 *R v Scofield*, 2019 BCCA 3 *R v Ford*, 2019 ABCA 87 *R v JED*, 2018 MBCA 123 *R v BJT*, 2019 ONCA 694
R. c. Lefrançois, 2018 QCCA 1793	Tackling Violent Crime Act, SC 2008, c 6 2008-02-28	Criminal Code, s. 99(2)(a) and s. 103(2)(a)	s. 12	MMS	Leave to appeal to SCC refused. 99(2)(a) was applied in *R v Chief*, 2024 MBCA 67 without deciding its constitutionality.
R. v. Trottier, 2020 QCCA 703	Safe Streets and Communities Act, S.C. 2012, c. 1 2012-03-13	Criminal Code, s. 272(2)(a.2)	s. 12	MMS	No known appeal to SCC
R. v. Gagnon, 2026 QCCA 583	Tougher Penalties for Child Predators Act, SC 2015, c 23 2015-06-18	Criminal Code, ss. 163.1(2) and (3)	s. 12	MMS	Same result in other Courts of Appeal, s. 163.1(2) (see table entries): *R v Joseph*, 2020 ONCA 733 Same result in other Courts of Appeal, s. 163.1(3) (see table entries): *R v Pike*, 2024 ONCA 608 See also, *Claing c. R.*, 2026 QCCA 926, finding the Court was bound by *Gagnon*, including as applied to the offender before it.

YUKON					
Case	**Enactment & Royal Assent**	**Provision(s) declared invalid**	**Charter section(s) violated**	**Subject**	**Disposition Notes**
R. v. EO, 2019 YKCA 9	Safe Streets and Communities Act, SC 2012, c 1 2012-03-13	Criminal Code, s. 153(1.1)(a)	s. 12	MMS	Leave to appeal to SCC refused Conflicting Courts of Appeal decisions exist re: s. 153(1.1)(a), with one additional finding of invalidity and one decision upholding the provision: *R v Hood*, 2018 NSCA 18 (finding provision invalid) *R v EJB*, 2018 ABCA 239 leave to appeal refused (upholding provision)
R. v. D.A.D., 2024 YKCA 9	Safe Streets and Communities Act, SC 2012 c 1 2012-03-13	Criminal Code, s. 151(b) and 153(1.1)(b)	s. 12	MMS	No known appeal to SCC Same result in other Courts of Appeal on s. 151(b) (see table entries): R v Gargan, 2023 NWTCA 5