Briefing Note,

Justice Delayed and Justice Denied:

Unconstitutional Legislation as Constitutional Harm

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Executive Summary

Since Canada's adoption of the *Charter of Rights and Freedoms*, the Canadian Constitution has offered the promise of protecting individuals against the application of *Charter*-violating legislation, and, relatedly, of preventing unconstitutional legislation from remaining "on the books" indefinitely. It has also offered 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 (2006 – 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 provision for which a Court of Appeal issued a countervailing decision upholding the provision.

Since July 18, 2026, all of these remaining provisions were amended by Parliament via the *Protecting Victims Act*. While we argue that the provisions as amended are still not straightforwardly compliant with the *Charter* or past judicial guidance, they may be reasonably considered "conditionally resolved", with the definitive legal status of each provision being left for another day. Measured from the date they came into force until the date they were materially amended via the relevant provisions of the *Protecting Victims Act*, the average time to conditional resolution for these thirteen provisions was 13.6 years (13.9 median). The range was 11 to 18.2 years. 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 across 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.

Justice Delayed and Justice Denied also relies on judicial reasons, additional case law evidence, government statistics, and academic literature to place these 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 (e.g., because of legal doctrines that expressly limit the possibility of remedy); 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, we make 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.

Unconstitutional Legislation as a Policy Failure: The Evidence

Justice Delayed and Justice Denied aims to take a wider lesson from the political and constitutional debates that often attend controversial declarations of constitutional invalidity in high profile cases. Within this debate, critics of Canadian courts, parliamentarians included, sometimes argue that courts have been too aggressive in thwarting the will of democratic majorities. Our review of judicial declarations of constitutional invalidity issued by appellate courts paints a different picture. The *Charter* is itself a democratic document, representing Canadians' most fundamental commitments with respect to constitutional rights protection. We contend that Parliament has, at times, been too cavalier in passing *Charter*-suspect legislation and, relatedly, too passive in amending or repealing legislation which it should know is in violation of these constitutional commitments. These constitutional failings are capable of, and have, created states of affairs wherein the judiciary has struggled to remove unconstitutional legislation from the books, in a timely fashion, even after the provision has received significant negative judicial attention. The constitutional system has also struggled to remedy the constitutional harms imposed on individuals before the law is repealed or declared invalid at a national scale. The overarching result is legislation that imposes harms on individuals and our constitutional system, without adequate remedy, during the several years before the offending legislation is repealed or declared unconstitutional by the Supreme Court.

Recent Canadian survey evidence suggests that the constitutional ideal undergirding this argument continues to have broad public resonance.[i] 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. Overwhelming majorities of Canadians identify judicial independence as essential to Canadian democracy. 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. The delay or denial of access to justice for affected litigants is viewed likewise. For these and related reasons, any judicial need to rely upon the exceptional remedy of declaring legislation unconstitutional is a legitimate cause for concern, notwithstanding the criticisms that are sometimes raised with respect to any particular declaration.

To examine the question of whether the Canadian constitutional system has been living up to its promise of protecting against the application of unconstitutional legislation, *Justice Delayed and Justice Denied* primarily focuses on the tough on crime legislative agenda that defined the 39th to 41st Parliaments, as a case study. The period was marked by the passage of a stream of "tough on crime" bills that resulted in several high-profile Supreme Court of Canada declarations of constitutional invalidity. Key bills included the *Tackling Violent Crime Act* (2008), *An Act to amend the Criminal Code* (2009), the *Safe Streets and Communities Act* (2012), the *Increasing Offenders' Accountability for Victims Act* (2013), the *Protection of Communities and Exploited Persons Act* (2014), and the *Tougher Penalties for Child Predators Act* (2015).

Our first step was to provide an accounting of the appellate declarations of constitutional invalidity that arose from this legislative agenda. While the clash between the judiciary and the 39th to 41st Parliaments on the issue of criminal justice is well recognized, significantly less attention has been paid to the specific life cycles of the provisions in question. Accordingly, to understand some of the longer-term impacts of the conflict, and its larger constitutional import, our accounting includes the ultimate where (i.e., which jurisdictions?) and when of provisions being declared unconstitutional (or failing to be so declared, i.e., when the Supreme Court did not grant leave on any appellate decision). Our results are summarized below.

a. National and Provincial/Territorial Declarations of Constitutional Invalidity

Within our case study, we found 40 provisions resulting in declarations of constitutional invalidity by appellate courts, including provisions that were later repealed.[ii] The relevant cases can be organized according to the relevant declarations and their legal status, prior to July 18, 2026:

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. Given the fundamental legal principle that provinces and territories are not bound by declarations of constitutional invalidity issued by other provinces and territories,[iii] these provisions remained "on the books", and were in danger of being applied – despite the appellate declarations of constitutional invalidity *and* despite a usual unanimity on the constitutional question by appellate courts who ruled on the provision. These findings inform our contention that legislation in our case study posed a threat of being applied to individuals, despite the weight of judicial authority finding that the legislation was unconstitutional.

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.[iv] The first column in Table 2 illustrates the number of Supreme Court of Canada and Courts of Appeal decisions wherein the Court was the highest court to rule on the issue, in its jurisdiction (including decisions involving provisions that were later repealed by Parliament). To account for a specific substantive issue that dominated our case law results, the second column specifies whether the decision concerned a mandatory minimum sentence provision. The third column illustrates the number of Court of Appeal decisions issued wherein the Court of Appeal's decision agreed with at least one other Court of Appeal decision, with respect to at least one declaration of constitutional invalidity.

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 Table 2 illustrates, we found a relatively broad geographic distribution with respect to Courts of Appeal decisions (7 provinces and 2 territories). Further, this broad distribution existed for the sub-category of cases wherein the Court of Appeal was not the sole Court of Appeal to decide on a provision in question.

Table 2 also illustrates our finding that a significant majority of the appellate decisions concerned 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).[v] As discussed further below, this difference largely reflects the Supreme Court of Canada's delay in resolving mandatory minimum decisions after its decision in *Lloyd* (2016-04-15), a landmark decision that had, relatively promptly (i.e., 3.4 years after the relevant provision had come into force), provided Parliament with guidance as to how to save mandatory minimum sentence provisions from declarations of invalidity.[vi]

b. Declarations of Constitutional Invalidity: The Problem of Delayed Resolution

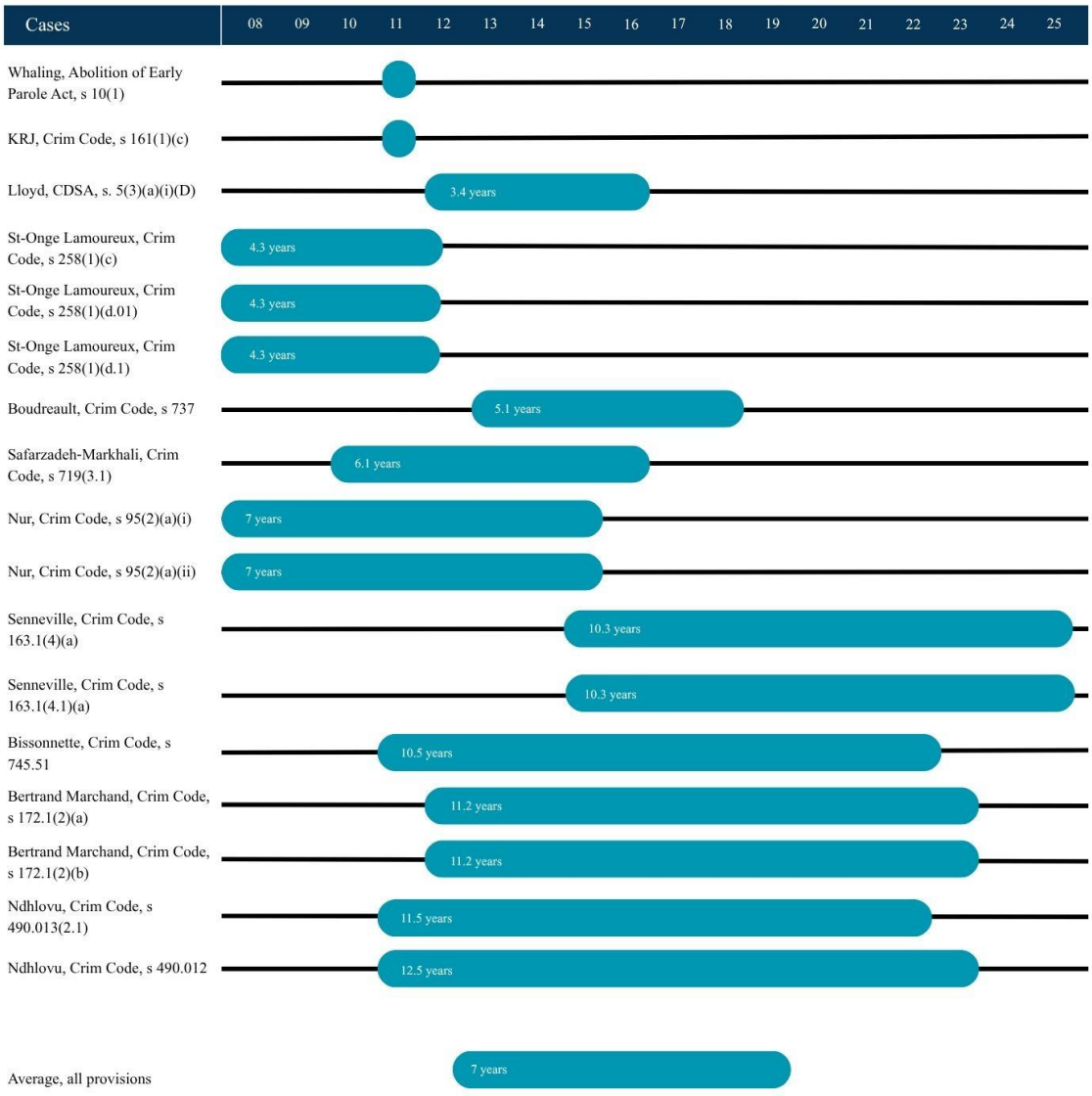
Provisions found to be unconstitutional can also be applied, or otherwise shape legal outcomes, in the time between their coming into force and the date they are declared unconstitutional. To illustrate the delay in resolution that has attended statutory provisions ultimately struck down by the Supreme Court of Canada, we isolated the first category from Table 1 (SCC declarations, and no Parliamentary intervention prior to its decision) and then calculated the relevant time between the provision coming into force and it no longer being in force or effect.[vii] The relevant decisions and provisions are illustrated in Table 3.

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)
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
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

If all 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, was 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. Time to resolution is illustrated below (Graphic 1), sorted from shortest to longest time to resolution.

Graphic 1: Time until SCC Resolution



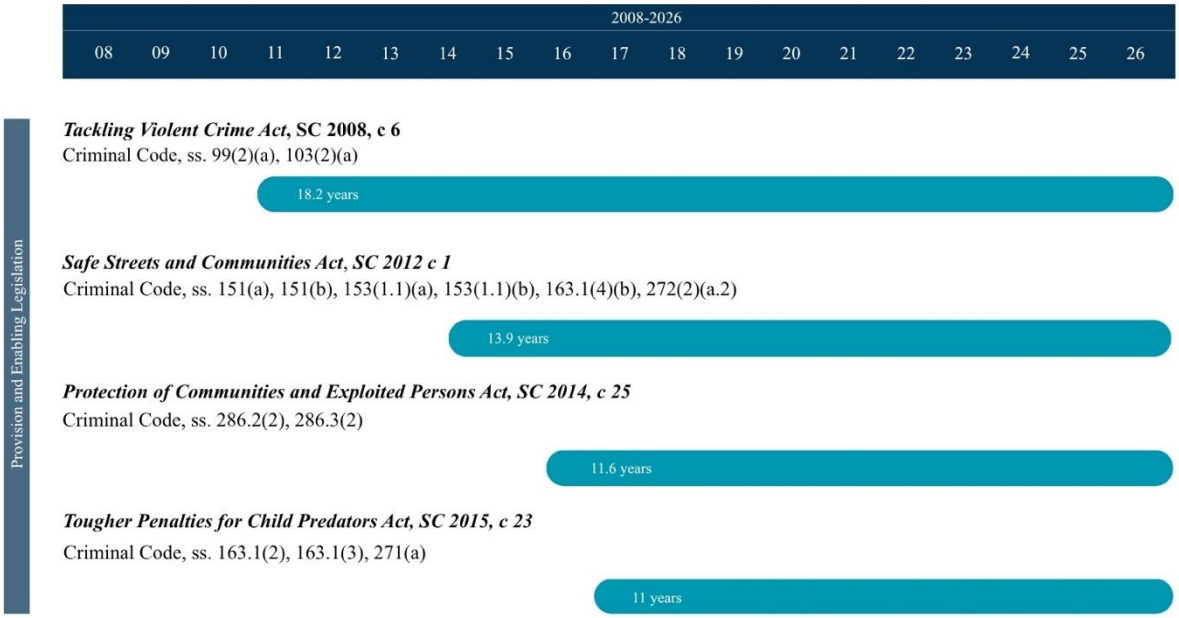
As Graphic 1 illustrates, the average time to resolution does not tell the full story, in part because there was significant variation in our results. Several provisions crossed the ten-year threshold, whereas others were promptly resolved. Notably, two of the lengthiest delays (*Bertrand Marchand* and *Senneville*) involved decisions that declared mandatory minimum sentences unconstitutional well after the Supreme Court of Canada's aforementioned decision in *Lloyd*. This guidance has now informed Parliament's amendment of the *Criminal Code's* mandatory minimum sentencing provisions, including its resuscitation of the provisions at issue in both *Senneville* and *Bertrand Marchand*, with amendments.

The Supreme Court of Canada's above seventeen declarations of constitutional invalidity also represent the average *best case* for judicial resolution of an unconstitutional provision, within our case study. As indicated, while the 41st Parliament was dissolved over a decade ago (August 2, 2015), we located thirteen provisions that continued to live on the books, that received at least one declaration of invalidity by a Court of Appeal, and that did not result in either legislative repeal or leave to appeal to the Supreme Court of Canada. All thirteen provisions were mandatory minimum sentence provisions that were eventually amended in part, with the relevant amendments taking force on July 18, 2026. The provisions, their enabling legislation, the relevant Court of Appeal decisions, and their dates in force are set out at Table 4 and Graphic 2:

Table 4: Provisions subject to Courts of Appeal declarations were in force from 11.0 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 precedent: *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

Graphic 2: Time until Parliamentary Amendment



Graphic 2 and Table 4 illustrate how a focus on Supreme Court of Canada decisions alone substantially underestimates the extent to which provisions that have been declared unconstitutional by appellate courts have nevertheless remained "on the books" for substantial periods of time. Table 4 documents how they have done so almost exclusively in jurisdictions yet to rule on the provision, with little to no appellate legal precedent suggesting that the provision would be upheld if decided upon by the Courts of Appeal in these jurisdictions.

Measured from the date they came into force until the date the relevant provisions were materially amended by the *Protecting Victims Act*, the average time to "conditional resolution" was 13.6 years (13.9 median). The mandatory minimum sentence provisions were also all indirectly addressed by *Lloyd's* guidance to Parliament as to how to save mandatory minimum sentences from a declaration of invalidity. The time between this guidance and amendment was 10.2 years.

The Harms Imposed

Justice Delayed and Justice Denied argues for the simple proposition that unconstitutional elements of the tough on crime agenda visited harms upon individuals and the constitutional system before they were declared unconstitutional, often without remedy.

For instance, individuals can be, and were, sentenced, punished, or otherwise harmed via legislation that was later declared unconstitutional by the courts. A leading example of this kind of direct harm is *R v Boudreault*, 2018 SCC 58, wherein the Supreme Court found that offenders were required to pay an unconstitutional mandatory victim surcharge as part of their sentence. While the Court acknowledged the likely application of the unconstitutional surcharge on individuals not before the Court, it nevertheless held that it could not directly provide relief for the many individuals affected.[viii]

The harms imposed can also be indirect. For instance, the Supreme Court has recognized that wrongful convictions are a serious problem in Canada's criminal justice system and that mandatory minimum sentences incentivize false guilty pleas.[ix] Given that several mandatory minimum sentences from our case study were on the books for years before being amended, repealed, or declared unconstitutional, it is likely that such sentences were among the provisions that have induced false pleas. Similarly, there is empirical evidence that mandatory minimum sentences lead to increased sentencing severity, i.e., increases in the frequency of custody and probation sentences, and sentence length, for the broader kinds of offences targeted by the mandatory minimums.[x] Over the past decade, courts have declared certain mandatory minimums for several such offences unconstitutional. It is again likely that the offences in question had larger effects on our criminal justice system, in the direction of increased sentencing severity, notwithstanding the judiciary's conclusion that the provisions were of no force or effect.

Harms that are directly or indirectly imposed by way of legislation later declared unconstitutional require special attention because such harms often cannot be remedied, frequently by intentional design. For instance, governments enjoy qualified immunity with respect to *Charter* damages that arise from the passage of unconstitutional legislation. Under the modern doctrine, remedies with respect to the passage of unconstitutional legislation are only available in very narrow circumstances, i.e., with respect to legislation that is clearly unconstitutional, enacted in bad faith, or as an abuse of power.[xi] Because the latter two circumstances are ones in which legal and parliamentary privileges typically operate to shield the relevant evidence from potential litigants, the practical reality is that damages are likely to be only available in the rare case of "clearly unconstitutional" legislation. The state enjoys this qualified immunity on the theory that foundational constitutional principles other than constitutional rights protection require that the state be afforded the legislative autonomy necessary to govern effectively. Nor does the problem end there. Similar restrictions are imposed on individuals who are directly harmed by the application of legislation that is later declared unconstitutional. For instance, the principle of *res judicata* expressly prohibits individuals from reopening settled matters. Thus, an individual harmed by legislation later declared unconstitutional will be barred from seeking a remedy for the constitutional harm if they are no longer in the judicial system.

The cumulative result of these and related doctrines is that the – sometimes impossible to meet – burden for relief primarily falls to the individuals harmed by the passage or application of legislation declared unconstitutional, as opposed to the government that passed or applied the legislation in the first place.

The Institutional Dynamics

Our specific case study was selected, in part, to examine how Canada's constitutional system addressed a populist legislative agenda that was, at least at times, resistant to judicial oversight. 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 specific problem of unconstitutional legislation. Perhaps unsurprisingly, our case law results suggest that Parliaments can, at least in certain circumstances, escape Supreme Court of Canada-level rebukes with respect to constitutionally-flawed legislation while they are still in power. 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, only after the last of these bills was already passed. 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.

While the underlying causes of harms caused by unconstitutional legislation are multi-faceted, our case study review suggests that certain basic sets of facts and principles informed the problem as it arose in the 39th to 41st Parliaments. The first is the straightforward institutional reality that Parliament can typically act faster than courts, by design, even when its legislative agenda is constitutionally suspect at the time of enactment. The second, conversely, is that appellate review is a lengthy and time-consuming process, and that national resolution in particular takes years to accomplish. An obvious consequence of these built-in institutional differences 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.[xii] 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.

While this institutional trade-off is part and parcel of Canada's constitutional democracy, two additional factors very likely exacerbated the problem within our case study. The first is an access to justice problem. The spread of uncontested Court of Appeal decisions, coupled with the absence of decisions in other jurisdictions (i.e., other provinces or territories where the provision(s) in issue remain good law) or Supreme Court of Canada resolution, suggests that laws later declared unconstitutional were very likely remaining "on the books" for lack of a litigant with the time and resources to litigate the issue. Second, and relatedly, the limited availability of post-declaration remedies for the passage of unconstitutional legislation has provided little incentive to litigants to pursue damages-based constitutional litigation against governments guilty of passing *Charter*-violating legislation. The practical result of this remedial reality is that it has been rights holders, and not the state, that have ultimately been expected to bear the losses suffered in the ordinary case. The overarching consequence is that our existing remedial options are not well-designed to cure the harms suffered or to deter future failures to safeguard the *Charter* during the passage of legislation.

Conclusion and Recommendations

Justice Delayed and Justice Denied is intended to lay the foundations for a conversation with respect to the need for *Charter*-based legislative and judicial reforms. Our findings, as above, suggest that federal Parliament appears to be capable of, and at least occasionally susceptible to, passing a significant number of constitutionally deficient provisions in a relatively short period of time; and, second, that the judicial system still appears to be imperfectly equipped at resolving unconstitutional legislation, when Parliament is unwilling to undertake systemic reforms, and when the volume and/or type of legislation in issue is passed in ways that can frustrate timely review 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.

Given these overarching concerns, *Justice Delayed and Justice Denied* makes the following 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 the prior reforms have militated against *Charter* violations.

The principal conclusion of our report is that Parliament has, in its recent history, passed unconstitutional legislation at an unacceptable rate and that unconstitutional legislation and its attendant harms are not easily remedied once enacted. Accordingly, we broadly recommend that Parliament should identify and institute legislative process reforms that would militate against the passage of unconstitutional legislation. While we recognize that Parliament has enacted *Charter*-relevant measures in the last few years (e.g., the Minister of Justice's increased role in informing Parliament on the *Charter* impacts of bills as tabled, through Charter Statements), these measures have not been directly aimed at preventing the passage of unconstitutional legislation. This has been evidenced, for instance, by the Government of Canada's recognition of the limited purpose of Charter Statements in its evaluation of the practice, i.e., it has recognized the statements as measures intended to inform parliamentary and public debate on the possible *Charter* effects of bills, *not* as legal opinions or risk assessments that address the bill's constitutionality.[xiii]

We do not attempt to canvass possible reforms in *Justice Delayed and Justice Denied*. 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: In the context of qualified immunity disputes, 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.

The state currently enjoys qualified immunity with respect to *Charter* damages that have been caused by the passage of unconstitutional legislation. Under the Court's current legal test, *Charter* damages are only available if the legislation was either clearly unconstitutional, enacted in bad faith, or as an abuse of power. Further, it is *Charter* plaintiffs that bear the onus of demonstrating why damages are appropriate

with respect to the passage of legislation declared unconstitutional. We adopt Professor Kent Roach's recommendation of reversing this onus, including as set out in his leading treatise, *Constitutional Remedies in Canada*.[xiv] The onus can be meaningfully reversed either by necessary government interventions (e.g., through appropriate legislation and/or through a change in government positions when litigating the issue) or by a court-initiated change in the relevant legal test.

The need for such a reversal is easy to understand. Governments that pass unconstitutional legislation should be required to demonstrate why rights holders who suffer constitutional harms are not entitled to *Charter* damages, particularly when it is governments who typically hold the evidence required to prove bad conduct. This recommended change would: better allocate responsibility to the entity actually responsible for the passage of unconstitutional legislation; help remedy the unfortunate and preventable ease with which unconstitutional legislation is currently passed in Canada's constitutional system; and help mitigate the special evidentiary challenges (e.g., claims of legal or parliamentary privilege) facing *Charter* plaintiffs attempting to advance legitimate *Charter* claims in the above context.

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.**

Canadian courts have developed doctrines to assist them in ensuring that unconstitutional legislation is removed from the statute books, even if an individual directly affected by the law in dispute is not currently before them. They also deploy competing judicial doctrines, such as the doctrine of judicial restraint, which broadly advises courts to defer to Parliament on questions of constitutional interpretation in borderline cases or in cases where a "live" case is not currently before the Court. Our above findings are evidence that unconstitutional and constitutionally suspect legislation has remained on the books for significant periods of time, and in ways that have or may have affected significant numbers of people (and, typically, the most marginalized among them). Given this constitutional reality, we recommend that Canadian courts be more willing to deploy measures protecting against unconstitutional legislation living "on the books," notwithstanding the controversy that often attends such judicial interventions. Simply put, we view it as a mistake to counsel deference to Parliament when the issue before the court is whether the Constitution, i.e., the supreme law, is being violated by allowing a suspect provision to continue to have full legal force and effect.

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.

Endnotes

[i] See especially Roberto J. De Luca, *Justice Delayed and Justice Denied: Unconstitutional Legislation as Constitutional Harm* (Toronto: David Asper Centre for Constitutional Rights, 28 October 2026), at Parts I(b) and II(a) and citations therein [*Justice Delayed and Justice Denied*]. Throughout this briefing note, citation to the authorities relied upon in the report are generally omitted.
[ii] See *Justice Delayed and Justice Denied*, Appendix A and Part III(a).
[iii] See especially, *R v Sullivan*, 2022 SCC 19.
[iv] See *Justice Delayed and Justice Denied*, Appendix B and Part III(a). As set out at Part III(a) and Appendix B, this secondary focus on decisions was used, in part, to focus on the appellate litigation that resulted from the tough on crime legislation of the 39th to 41st Parliaments and the timing of this litigation.
[v] Our study included 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. The significance of this prominence of mandatory minimum sentences is addressed at *Justice Delayed and Justice Denied*, Part IV(b).
[vi] See *R v Lloyd*, 2016 SCC 13 at para 36.
[vii] See *Justice Delayed and Justice Denied*, Appendix B and Part III(b).
[viii] See *Justice Delayed and Justice Denied*, Parts I(b) and V, for a fuller discussion of the case and its significance on the issue of constitutional remedies and their limits.
[ix] See especially *R v Bouvette*, 2025 SCC 18 at paras 218 – 19, and citations therein, and *R v Senneville*, 2025 SCC 33 at paras 3 and 49.
[x] See, e.g., 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; and J.D. David, C. Leclerc, & B. Johnson, "Reconsidering Penal Stability in Canada Through a New Sentencing Severity Index" (2022) 3:1 *International Criminology* 26.
[xi] *Canada (Attorney General) v Power*, 2024 SCC 26.
[xii] With respect to our specific case study, we also address pre-enactment conduct that suggests that the 39th to 41st Parliaments were aware that significant elements of their tough on crime legislative agenda were at significant risk of being struck down once passed. See *Justice Delayed and Justice Denied*, Part IV(b).
[xiii] See Department of Justice, *Evaluation of Charter Statements* (June 2024) at 9, 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.
[xiv] K. Roach, *Constitutional Remedies in Canada*, 3rd Edition (Thomson Reuters, 2025) (updated December 2025, release 2) at s 11:15.