



UNIFORM LAW CONFERENCE OF CANADA

**WORKING GROUP ON STATUTORY EXEMPTION TO MANDATORY
MINIMUM PENALTIES OF IMPRISONMENT**

FINAL REPORT

**Presented by
Lina Theriault, Chair**

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1. INTRODUCTION

[1] In 2011, the Canadian Bar Association introduced a resolution which recommended the creation of a working group (WG) to examine the issue of statutory exemptions to mandatory minimum penalties (MMPs) of imprisonment. This resolution was passed by the Criminal Section of the Uniform Law Conference of Canada (ULCC) with broad support.

[2] A final report was published and presented at the 2013 ULCC in Victoria, British Columbia. This report did not result in any legislative amendments to incorporate an exemption mechanism into the *Criminal Code*.

[3] Ten years later, at the 2023 Annual Meeting of the ULCC in Charlottetown, Prince Edward Island, the following resolution (QC2023-03) was adopted:

We recommend the creation of a WG, chaired by a representative from Québec, with the mandate to update, in light of the coming into force of Bill C-5 [An Act to amend the Criminal Code and the Controlled Drugs and Substances Act]¹ and the various decisions that found mandatory minimum penalties unconstitutional for sexual offences committed against a person under 16 years of age, the 2013 final report “Statutory Exemptions to Mandatory Minimum Penalties”. The WG can also opine on whether or not the mechanism discussed in paragraph 36 of the Lloyd² decision should be implemented in the Criminal Code and if so, what should be the parameters of such a mechanism in Canada.

[4] As a result, this WG was formed. Two status reports were presented at the 2024 and 2025 Annual Meetings. Last year, the current chair of the WG was on sabbatical. Her replacement, however, was not able to hold meetings or advance the WG’s work during her absence due to other assignments. The present report is therefore the product of two years of work, namely during the 2023-2024 and 2025-2026 sessions. This is the final report of the WG, for presentation at the 2026 Annual Meeting.

[5] Members of the WG who contributed to this report included: chair: Lina Thériault (Directeur des poursuites criminelles et pénales, Québec), members: Leah Burt (Justice Canada), Amelia Jarvis (Justice Canada), Sylvain Leboeuf (Ministère de la Justice, Québec), Nicolas Le Grand Alary (Secrétariat de l’Ordre et Affaires juridiques, Barreau du Québec), Dayna Queau-Guzzi (Manitoba Prosecution Service), and Rebecca Sewell (Justice Canada), and ex-members who participated up until the release of the Status Report in August 2024: Emma Evans (Ministry of the Attorney General, Ontario), Sheldon Steeves (Public Prosecutions, Department of Justice and Public Safety,

¹ *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15.

² *R. v. Lloyd*, 2016 SCC 13 at para. 36. Cited in *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 108 and *Québec (Procureur général) v. Senneville*, 2025 SCC 33 at para. 113.

Newfoundland) and Matthias Villetorte (Justice Canada).³ The WG would also like to acknowledge the work of the former WG established in 2011,⁴ which fostered discussions and greatly contributed to the creation of this report. In fact, several sections of the 2011 report have been reproduced in whole or in part.

[6] As part of its mandate, this WG was tasked with considering the possibility of incorporating an exemption provision into the *Criminal Code*. More specifically, its focus was to update the 2013 report and consider the conclusions drawn therein, while also considering recent legislative, jurisprudential and contextual developments. Although there is some debate about the effectiveness of MMPs and their constitutional validity, the WG refrained from commenting on broader policy issues that were outside the scope of its mandate, such as the advisability of MMPs generally. Instead, the WG focused on assessing whether an exemption clause could be a beneficial option for Parliament to consider and, if implemented, what the exemption scheme could consist of. The WG also sought to determine whether statutory exemptions could function effectively within the existing constitutional and statutory dimensions of sentencing in Canada.

[7] This report deals *only* with the legislative exceptions that can be applied to MMPs of imprisonment, and not minimum fines or other mandatory *Criminal Code* orders. Also, despite the wording of Resolution QC2023-03, the WG did not focus solely on sexual offences against children, nor on former Bill C-5.⁵ Rather, it sought to comment on and make proposals of more general application, while always keeping in mind the concerns that gave rise to the 2023 resolution and the recent jurisprudential and legislative context.

2. CAUTIONARY NOTE: BILL C-16

[8] On December 9, 2025, the government introduced Bill C-16, the *Protecting Victims Act*,⁶ which seeks to establish an exemption mechanism under proposed section 718.4 of the *Criminal Code*. This provision would permit a sentence below an MMP to

³ The WG wishes to point out that, although much of the work had already been completed by the end of the 2023-2024 session, it issued a formal invitation at the 2024 ULCC meeting in Ottawa for new members (ideally from the defence bar) to broaden perspectives on the proposed exemption mechanism to MMPs. It appeared essential to take into account the viewpoint of the offenders who would be most affected by the implementation of such a mechanism. This invitation, however, did not yield the expected results, which explains the notable absence of defence counsel among the WG's members for the 2023 to 2026 sessions.

⁴ The 2011 WG was made up of the following members: Eric V. Gottardi, Anouk Desaulniers, Josh Hawkes, Q.C., Earl Fruchtman, Colleen McDuff, Lane Wiegers, Greg del Bigio, Nancy Irving, Samantha Hulme, Karen Beattie, Richard de Boer, Kusham Sharma, Matthias Villetorte, Juli Drolet, Kelly Morton-Bourgon, Greg DelBigio, Q.C.

⁵ *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15.

⁶ 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)*, 45th Parl. (Can.), 1st sess., December 9, 2025 (tabling).

be imposed when that MMP would constitute a cruel and unusual punishment for the offender before the court.

[9] Considering the tabling of this bill and the potential for its swift adoption, the WG's objective for the 2025-2026 session was to finalize the report so that it could potentially assist parliamentarians in considering the issues surrounding the introduction of an exemption clause to MMPs. Thus, the WG focused on the remaining issues that had yet to be resolved and had not been fully validated by the members. Although this report could have been even more comprehensive — particularly regarding the practical issues arising from the implementation of such a mechanism — the WG prioritized completing the report for the current session rather than extending its research and discussions into the following ULCC session.

3. BACKGROUND: INTERNATIONAL USE OF EXEMPTION CLAUSES

[10] The WG significantly benefited from the comprehensive report, *Exemptions from Mandatory Minimum Penalties*, prepared by Professor Yvon Dandurand, which was accepted by the Criminal Section of the ULCC in 2012.⁷ This report surveyed the structure and operation of statutory exemptions to MMPs in five other common law jurisdictions: the United States, England and Wales, South Africa, Australia, and New Zealand. It also presented a brief comparative analysis of legal provisions permitting relief from the imposition of certain MMPs. An updated report was subsequently published by Professor Dandurand in 2016,⁸ reviewing the experience of those five selected jurisdictions where exemptions have been instituted to determine how they have been applied, interpreted or amended since 2012. This updated report was also consulted by the members of the WG.

[11] Exemption provisions are a common feature of sentencing regimes where MMPs are used. Nine different types of exemption schemes were examined in the Dandurand Report ranging from very narrow provisions that applied to an offender charged with specified offences and only upon approval into designated treatment programs (e.g., as related to impaired driving), through to provisions that applied broadly to all offences that would otherwise be subject to an MMP. Two of the exemption schemes, the age-based exemption for juveniles and the treatment-based exemption, were not examined further.⁹

⁷ Yvon Dandurand, *Exemptions from Mandatory Minimum Penalties*, Report prepared for the Uniform Law Conference of Canada, 2012: <https://www.ulcc-chlc.ca/ULCC/media/Criminal-Section/Exemptions-from-mandatory-penalties-Dandurand-EN-2012.pdf>.

⁸ Yvon Dandurand, Ruben Timmerman and Tracee Mathison-Midgley, *Exemptions from Mandatory Minimum Penalties: Recent Developments in Selected Countries*, Report prepared for the Department of Justice Canada, 2016: https://publications.gc.ca/collections/collection_2017/jus/J2-431-2016-eng.pdf.

⁹ These provisions were not examined further in light of the unique constitutional status of a separate justice system for youthful offenders as described by the Supreme Court of Canada in *R. v. D.(B.)*, 2008 SCC 25, and the unequal access and application of treatment-based exemptions (e.g., in impaired

[12] With the exception of the United States, Canada has the most extensive list of offences attracting an MMP of the jurisdictions examined in the Dandurand Report. Indeed, as of May 2026, 67 offences under the *Criminal Code* and one offence under the *Immigration and Refugee Protection Act*¹⁰ are subject to MMPs. Despite this, of the jurisdictions examined, Canada is the only one without a comprehensive statutory exemption provision. However, before importing such a mechanism into Canadian law, it is necessary to determine whether it is appropriate and viable to do so, given the particularities of the Canadian sentencing and constitutional regimes. Indeed, while the comparison with other legal systems is helpful, the distinctions drawn below in relation to other jurisdictions highlights the need to consider the possibility of incorporating an exemption provision into the *Criminal Code* in the unique Canadian context.

[13] First, it is important to recognize that some sentencing systems vary considerably from the Canadian system. This is the case for certain American states, where the ‘three strikes and you’re out’ approach is widely used in the application of MMPs for specific offences (e.g., sexual assault, kidnapping, aggravated robbery, etc.). As such, courts are to impose the maximum term of imprisonment prescribed for that offence, with some exceptions.

[14] It is also worth noting that in some jurisdictions, the MMPs are longer than what is typically seen in Canada. For example, in South Africa, very strict MMPs were enacted for serious offences, including minimum 10-, 20- and 30-year sentences for first, second and third sexual violence offences. The legislation nonetheless enables courts in South Africa to depart for the MMP if they are satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[15] It is also relevant to know that minimum sentencing regime extends to young offenders in some jurisdictions (see e.g., Western Australia), which is not the case in Canada due to the unique constitutional status of a separate justice system for youthful offenders.¹¹

[16] Finally, some jurisdictions appear to have life sentences with no possibility of parole. For example, New South Wales imposes presumptive standard non-parole periods for a number of serious offences (e.g., murder, wounding or grievous bodily harm with intent, sexual intercourse without consent, etc.). However, a court may deviate

driving cases, s. 320.23 of the *Criminal Code* allows the judge to depart from the MMP or order provided for in s. 320.19 or 320.24, if the accused successfully completes a treatment to resolve his substance abuse problem). Members of the WG consider that this type of mechanism poses difficulties and should not be extended to all offences, given that the availability of these programs is far from uniform across the country, is largely confined to major population centers, and is dependent on the political will of individual provinces to implement such programs.

¹⁰ Some of these penalties have been a feature of Canadian criminal law for a significant period of time (e.g., life imprisonment for first- and second-degree murder), while others are of comparatively recent origin. It should also be noted that some of these MMPs are only applicable to second or subsequent offences (e.g., incarceration for repeat impaired driving offences).

¹¹ *Youth Criminal Justice Act*, SC 2002, c. 1.

by imposing longer or shorter sentences if there are “good reasons” to do so. A similar criminal sentencing scheme is seen in Victoria, Australia. For example, adults who commit the offence of intentionally or recklessly causing serious harm to a person in circumstances of gross violence are subject to a minimum period of parole non-eligibility of four years. However, these provisions do not apply if a court is satisfied that a “special reason” exists.

4. LEGISLATIVE AND JURISPRUDENTIAL DEVELOPMENTS SINCE THE PUBLICATION OF THE 2013 REPORT

[17] The substantial legislative and jurisprudential developments in recent years, which have contributed to an increase in declarations of unconstitutionality, are the primary indicators of the need to update the 2013 report and revisit its recommendations.

4.1 Main Legislative Amendments Since 2013

[18] At the time of the 2013 report, the *Criminal Code* contained 57 offences with MMPs, most dating back to the 2005 and 2012 amendments, which predominantly focused on sexual offences against children.¹² Since then, Parliament has increased pre-existing MMPs targeting child predators.¹³

[19] As for firearm and drug offences, an opposing trend has been observed in recent years. In 2018, the federal government, in the wake of cannabis legalization,¹⁴ removed MMPs associated with cannabis possession, trafficking and production.¹⁵ In 2022, it undertook major sentencing reforms with Bill C-5.¹⁶ This Bill repealed MMPs for all drug offences in the *Controlled Drugs and Substances Act*¹⁷ and 14 offences in the *Criminal Code*, including for certain firearm offences. Bill C-5 also amended section 742.1 of the *Criminal Code* to increase the availability of conditional sentences of imprisonment.

¹² *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32; *Safe Streets and Communities Act*, S.C. 2012, c. 1.

¹³ *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23. In 2014, Parliament also added MMPs for trafficking and commodification of sexual activity: *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25.

¹⁴ *Cannabis Act*, S.C. 2018, c. 16.

¹⁵ *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, S.C. 2018, c. 16.

¹⁶ *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15.

¹⁷ This included the repeal of s. 10(5) of the *Controlled Drugs and Substances Act*, which provided for an exemption to MMPs when the offender successfully completed a program administered through a drug treatment court.

[20] More recently, on October 23 and December 9, 2025, Parliament introduced Bills C-14¹⁸ and C-16¹⁹. The former seeks to restrict the availability of conditional sentences for certain sexual offences by adding new exclusions to section 742.1. As for Bill C-16, it aims to create an exemption clause allowing judges to depart from an MMP where its application would constitute cruel and unusual punishment for the offender before the court. Sections 718.4(1) and (5) would still require the judge to impose a term of imprisonment and would preclude the imposition of a conditional sentence.

4.2 Clarification of the Framework for Analyzing the Constitutionality of MMPs

[21] When the initial WG drafted their report, the Supreme Court of Canada had not yet rendered two landmark decisions, which served as an impetus for a new wave of constitutional challenges associated with recent legislative amendments.

[22] Starting in 2015, the Supreme Court in *R. v. Nur*²⁰ breathed new life into the existing constitutional framework²¹ to assess the *Charter*-compliance of an MMP. It provided key clarifications on the two-stage inquiry which was first developed in *R. v. Smith*,²² by re-defining the application of reasonably foreseeable circumstances. For example, it endorsed the inclusion of uncommon or marginal examples of offenders and the way they committed their crimes in the consideration of hypothetical scenarios. It also clarified that the analysis could take into account personal characteristics relevant to these hypothetical offenders, so long as remote or farfetched examples were not being considered.

[23] One year later, these principles were re-affirmed in *R. v. Lloyd*.²³ Chief Justice McLachlin (as she then was) highlighted the vulnerability of certain MMPs targeting broad-spectrum offences and urged Parliament to find a solution to this problem:

As I have already said, in light of *Nur*, the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable

¹⁸ Bill C-14, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and the National Defence Act (bail and sentencing)*, 45th Parl. (Can.), 1st sess., October 23, 2025 (tabling).

¹⁹ 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)*, 45th Parl. (Can.), 1st sess., December 9, 2025 (tabling).

²⁰ *R. v. Nur*, 2015 SCC 15.

²¹ The first step is to determine whether the MMP would be grossly disproportionate in relation to the sentence deemed fit and proportionate for the offender before the court. If the answer is “no”, the second stages involves the analysis of whether reasonably foreseeable applications would inflict grossly disproportionate sentences on others: *R. v. Nur*, 2015 SCC 15 at para. 77.

²² *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045. From 1987 to 2015, the test was interpreted more restrictively in *R. v. Goltz*, [1991] 3 S.C.R. 485 and *R. v. Morrissey*, 2000 SCC 39.

²³ *R. v. Lloyd*, 2016 SCC 13.

reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.

Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries. It allows the legislature to impose severe sentences for offences deemed abhorrent, while avoiding unconstitutionally disproportionate sentences in exceptional cases.²⁴

[24] The solution of creating an exemption mechanism has since been reiterated by the Supreme Court in both *Bertrand Marchand*²⁵ and *Senneville*²⁶.

[25] The analysis required by section 12 of the *Charter* was recently clarified in *R. v. Hills*, where the Supreme Court specified that the outcome of the constitutional challenge will depend largely on three elements : (1) the scope and reach of the offence; (2) the effect of punishment on the offender; (3) and the penalty itself and its objectives (i.e., to what extent, if at all, the MMP goes beyond what is necessary to achieve Parliament's sentencing objectives relevant to the offence).²⁷

[26] The evolution in section 12 jurisprudence over the last decade, combined with the significant rise in the number and severity of MMPs since 2005, has led to an increasing number of successful challenges to the constitutionality of MMPs. Below is a list of some MMPs that have been found to be unconstitutional by the Supreme Court or provincial appeal courts in recent years:

- Firearm trafficking (s. 99(2)(a)): Québec.
- Importing firearm (s. 103(2)(a)): Québec.
- Child luring (s. 172.1(2)(a)(b)): Canada-wide (*R. v. Bertrand Marchand*, 2023 SCC 26).
- Sexual interference (s.151(a)): British Columbia, Alberta, Manitoba, Ontario, Québec and Nova Scotia.
- Sexual interference (s.151(b)): Yukon and Northwest Territories.
- Sexual exploitation (s. 153(1.1)(a)): Yukon and Nova Scotia.
- Sexual exploitation (s. 153(1.1)(b)): Yukon.

²⁴ *R. v. Lloyd*, 2016 SCC 13 at paras. 35-36 [citations removed; emphasis added].

²⁵ *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 108.

²⁶ *Québec (Procureur général) v. Senneville*, 2025 SCC 33 at para. 113.

²⁷ *R. v. Hills*, 2023 SCC 2 at para. 122.

- Making child sexual abuse and exploitation material (s. 163.1(2)): Ontario and Québec.
- Distribution of child sexual abuse and exploitation material (s. 163.1(3)): Ontario and Québec.
- Possessing and accessing of child sexual abuse and exploitation material (s. 163.4(a)(4.1)(a)): Canada-wide (*Québec (Procureur general) v. Senneville*, 2025 SCC 33).
- Sexual assault against a child under 16 (s. 271(a)): Ontario and Newfoundland and Labrador.
- Sexual assault with weapon, threats, or bodily harm (s. 272(2)(a.2)): Québec.
- Communicating for the purpose of obtaining, for consideration, the sexual services of a person under 18 (s. 286.1(2)(a)): British Columbia, Ontario and Québec.²⁸
- Obtaining material benefit from prostitution of a child under 18 (s. 286.2(2)): Ontario.
- Procuring a child under 18 for prostitution (s. 286.3(2)): Ontario.²⁹

[27] In light of these developments, it has become relevant to assess whether a mechanism structuring judicial discretion could allow for the imposition of substantial sentences for several categories of offenders, while simultaneously avoiding harsh punishment for certain vulnerable offenders through the systematic imposition of MMPs.³⁰

4.3 Growing Concern about the Effective Administration of Justice

[28] In 2016, the Supreme Court of Canada sent shock waves through the criminal justice system with its decision in *R. v. Jordan*.³¹ The Court made clear the absolute requirement to overhaul operating methods to ensure the timely administration of justice. This led all stakeholders (i.e., prosecutors, defence counsel, court administration, and trial judges) to question and adapt their practices.

[29] Problems relating to the administration of justice, which weigh heavily on the system, were overtly contemplated within this report. Indeed, the growing number of motions challenging MMPs can have the effect of contributing to delays by requiring considerable hearing time (sometimes a full day or more), as well as significant resources. In addition, where an accused is facing an MMP, there may be less incentive

²⁸ This MMP could also be ruled unconstitutional Canada-wide, depending on the outcome of the *Mario Denis, et al. v. His Majesty the King, et al.* case, which has been under consideration by the Supreme Court since January 13, 2026 (SCC File No 41401).

²⁹ For a real-time report, consult: mms.watch.

³⁰ *R. v. Lacasse*, 2015 SCC 64 at para. 12; *R. c. Ipeelee*, 2012 SCC 13 at para. 37.

³¹ *R. v. Jordan*, 2016 SCC 27. In concrete terms, *Jordan* resulted in a paradigm shift by constructing a new approach to pre-trial delay. It imposed time limits in the court system which, if exceeded, result in a presumption of unreasonable delay pursuant to s. 11(b) of the *Charter*. The ceilings are 18 months in the Provincial Court and 30 months in the Superior Court.

to resolve a matter with a guilty plea. This could potentially lead to more trials and more constitutional motions, all of which puts additional pressure on the justice system. It should also be noted that a more cumbersome judicial process leads to problems of its own, by placing more vulnerable offenders in an untenable position, as they do not always have the resources to invest in complex legal proceedings. For all these reasons, a more streamlined approach that would allow an accused to be exempted from the application of an MMP, without having to multiply proceedings to assert the violation of their rights, could contribute to improved judicial efficiency and greater fairness as between offenders.

[30] The WG nonetheless acknowledges that it is the role of the legislator to determine whether an exemption mechanism may strike a desirable balance between the principles of sentencing and the effective administration of justice. The purpose of this report is to highlight factors that Parliament may wish to consider if an exemption mechanism is under consideration.

5. KEY ISSUES RAISED BY THE WG

[31] This report does not comment on the policy or legal status of any current or proposed MMP. Rather, the WG has identified challenges and made recommendations relating to the following key issues surrounding an exemption mechanism for MMPs:

- 1) What are the main legal issues that arise in the consideration of an exemption provision?
- 2) What should be the key element(s) of an exemption provision?
- 3) Should some MMPs be excluded from the proposed exemption?
- 4) What are potential practical issues arising from the inclusion of an exemption mechanism in the *Criminal Code*?

6. DISCUSSION

6.1 Legal Issues in the Context of an Exemption Provision

(a) Individualized Sentencing

[32] Sentencing in Canada is an individualized process that requires courts to impose a sentence that is proportionate to the degree of responsibility of the offender and the seriousness of the offence committed. In crafting a fit sentence, courts have discretion to consider information relating to the commission of the offence and the offender, including: the objective seriousness of the offence, aggravating and mitigating factors and regional conditions and concerns, such as the prevalence of a particular offence in a given jurisdiction. Other sentencing principles, such as parity, restraint in the use of

imprisonment and totality also guide this individualized process.³² Provincial Courts of Appeal and ultimately the Supreme Court of Canada play an important role in ensuring consistency of approach and principle, and in correcting sentences that are demonstrably unfit or clearly unreasonable.³³

[33] MMPs limit this nuanced approach. One of the key challenges faced by the WG was to determine if a *general* exemption scheme could be created that would also operate to provide for flexibility in *individual* circumstances where the MMP would be clearly unjust.

(b) Constitutional Exemptions

[34] One of the key issues examined by the WG was the impact of an exemption provision on the respective roles of Parliament and the Courts as well as on the nature of sentencing itself. The Supreme Court of Canada considered these issues in *R. v. Ferguson*.³⁴ Ferguson had been granted a constitutional exemption from the four-year MMP applicable to manslaughter with a firearm. The Supreme Court concluded that individual exemptions were not available as a remedy for a violation of the *Charter*. This conclusion was based in part on a concern that a court-imposed exemption scheme would fundamentally change the legislation in question and represent an undue interference with the legislative role of Parliament.³⁵ The Court held that the remedy of striking down the legislation in its entirety was less intrusive than granting an individualized exemption for a *Charter* breach. This is because such an individualized remedy would reintroduce judicial discretion where Parliament had expressly excluded it.³⁶ The Court also noted that an individual exemption as a *Charter* remedy would be inconsistent with the remedial nature of the *Charter*, and undermine the accessibility, clarity, and predictability of the law. In particular, the Court noted that the divergence between the law as written, as opposed to its application, would give rise to uncertainty and unpredictability and would fundamentally alter the nature of constitutional litigation in this area. Ultimately, the Court found that this conceptualization would frustrate the ability of the courts to provide definitive guidance to Parliament regarding the constitutional boundaries of an MMP.³⁷

[35] However, the Supreme Court noted that the flexibility and precision of an individual exemption were attractive elements of that approach, as it preserved the law

³² The inter-relationship of these factors is discussed in several decisions of the Supreme Court of Canada, including: *R. v. Friesen*, 2020 SCC 9 at paras. 32-33; *R. v. Lacasse*, 2015 SCC 64 at para. 53; *R. v. Pham*, 2013 SCC 15 at paras. 6-10; *R. v. Knott*, 2012 SCC 42 at paras. 1, 47; *R. v. L.M.*, 2008 SCC 31 at paras. 17-23.

³³ *R. v. Lacasse*, 2015 SCC 64 at paras. 3, 11, 36-37; *R. v. Nasogaluak*, 2010 SCC 6 at paras. 43-46. These principles are also discussed at length in several decisions of provincial Courts of Appeal, including *R. v. Arcand*, 2010 ABCA 363.

³⁴ *R. v. Ferguson*, 2008 SCC 6.

³⁵ *Ibid* at paras. 50-51.

³⁶ *Ibid* at paras. 52-57.

³⁷ *Ibid* at paras. 60-65, 68-69, 72-73.

for the vast majority of cases to which it properly applied, while at the same time addressing exceptional cases.³⁸

[36] Thus, it is the opinion of the WG that a legislative exemption, properly crafted, could address these concerns. First, given that the exemption would originate from Parliament, and not within the courts, the concerns about respecting the proper role of Parliament do not arise. Second, if the exemption was crafted, not as a constitutional remedy, but as a component of the sentencing process, it would have no impact on the remedial nature of *Charter* and would not impair the ability of the court to give clear guidance regarding the constitutional boundaries of an MMP. However, as was quickly determined by the WG, properly crafting an exemption that would operate clearly and predictably, and in harmony with the balance of the sentencing provisions of the *Criminal Code*, is a more complex undertaking.

6.2 Key Elements of an Exemption Provision

[37] In *Lloyd*, the Supreme Court set out the fundamental characteristics of an exemption mechanism:

The residual judicial discretion is usually confined to exceptional cases and may require the judge to give reasons justifying departing from the mandatory minimum sentence prescribed by the law. It is for the legislature to determine the parameters of the residual judicial discretion. The laws of other countries reveal a variety of approaches. There is no precise formula and only one requirement — that the residual discretion allow for a lesser sentence where application of the mandatory minimum would result in a sentence that is grossly disproportionate to what is fit and appropriate and would constitute cruel and unusual punishment.³⁹

[38] In addition to the exceptional nature of the exemption mechanism, which left no room for ambiguity, the WG focused on five other elements pertaining to a possible exception to the application of MMPs. Each of these issues affects the nature and scope of the proposed exemption as well as the relationship of that exemption with existing sentencing and constitutional mechanisms.

(a) Threshold

[39] One of the key questions considered by the WG was the threshold at which the exemption could be triggered. The international experience with exemption schemes (ref. Dandurand Report) reveals a continuum ranging from exemption schemes that would operate “in the interests of justice,” or to alleviate what would otherwise be “an

³⁸ *Ibid* at paras. 38-40.

³⁹ *R. v. Lloyd*, 2016 SCC 13 at para. 36 [citations removed; emphasis added]. Cited in *Québec (Procureur général) v. Senneville*, 2025 SCC 33 at para. 113 and *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 108.

unjust sentence,” through to those which operate only where cooperation with the state, usually in the form of providing information to the prosecution or by way of an early guilty plea or both, were present in addition to other factors.

“In the interest of justice” or “Where there are good reasons”

[40] Exemptions that are triggered “in the interests of justice,” or “where there are good reasons” for reducing the MMP express a threshold very similar to that utilized within appellate review of a sentence. Namely, in the absence of an error of law or principle, appellate courts can only intervene where the sentence is “demonstrably unfit.”⁴⁰ The disadvantages of this threshold lie both in the difficulty of differentiating it from a sentence appeal, and from the fact that, by giving boundless discretion to judges, it would become “the exception that swallows the rule.” Indeed, the danger of setting the threshold too low is that it could transform the MMP into a mere suggestion.

“Exceptional circumstances”

[41] Other jurisdictions used language contemplating a higher threshold, such as “substantial and compelling circumstances” or “exceptional circumstances.” The WG prefers the latter formulation. The elevated standard contemplated by this choice of language highlights the exceptional nature of the exemption, whereas the notion of “substantial and compelling circumstances” could capture too wide a range of offenders and situations. In addition, the use of the term “exceptional” rather than “substantial and compelling” sends the guiding message that the courts should interpret the position in light of the fact that it is an *exceptional measure*, as intended by the legislator. Indeed, this language has been interpreted in foreign jurisdictions as to require circumstances that are truly exceptional, and where the specified MMP would not be departed from lightly or for reasons that could not withstand scrutiny.⁴¹ The advantage of this threshold is that it seems to preserve both the more traditional role of sentencing and appellate review, while retaining the conceptually separate notion of a constitutional remedy available to strike down the provision in all cases.

[42] The WG members nevertheless fear that this threshold could prompt parallel litigation — namely, under the exemption as an individual remedy and under section 12 of the *Charter* as a constitutional remedy. Adopting a standard that diverges from the well-established case law could create uncertainty in its application and lead to duplicative proceedings when exemptions are denied at first instance. The “exceptional circumstances” threshold could lead to a greater increase in litigation, given the

⁴⁰ *R. v. Friesen*, 2020 SCC 9 at paras. 25-29; *R. v. Lacasse*, 2015 SCC 64 at para. 11.

⁴¹ See how it has been interpreted in the UK: *R. v. Rehman*; *R. v. Wood*, [2005] EWCA Crim 2056 at paras. 10 et seq. This notion has also been interpreted in the Canadian jurisprudence, in the context of determining the exceptional circumstances justifying deviation from the range (pre-*R. v. Parranto*, 2021 SCC 46). As an example, the Manitoba Court of Appeal noted that exceptional circumstances will only be found in the clearest of cases involving multiple mitigating factors or a highly unusual motive for committing the offence (*R. v. Dalkeith-Mackie*, 2018 MBCA 118 at para. 23; *R. v. Burnett*, 2017 MBCA 122 at para. 29). The Manitoba Court of Appeal also cautioned “[s]entencing courts must take care not to conflate ‘sympathetic circumstances’ with ‘exceptional circumstances.’”

imprecision surrounding its scope and the likelihood that defence counsel would seek to ‘test its limits’. This, in turn, could offset some of the benefits anticipated with the creation of an exemption mechanism, such as the reduction of delay.

[43] The main difficulty with the “exceptional circumstances” threshold is the potential gap between what is considered “grossly disproportionate” and what qualifies as “exceptional circumstances,” which will depend on how broadly the latter is interpreted. A broad interpretation may create overlaps; a narrow one might increase the risk of constitutional challenges. As a result, this threshold could frequently lead to duplicative proceedings, as it would not necessarily avoid a constitutional debate under section 12.

[44] The WG also highlights that this threshold is unfamiliar to Canadian sentencing courts, unlike other thresholds that rely on language already well understood in our law (e.g., “in the interest of justice” or “grossly disproportionate”). Courts may face difficulties interpreting and applying a criterion that is not commonly used in case law, and a new body of jurisprudence would need to develop which could take considerable time. There is also a risk that courts may give the “exceptional circumstances” standard a broader scope than intended, making the exemption the norm. The WG is nonetheless of the view that framing the provision with a list of clearly defined factors (as discussed at pp. 18-20) could help mitigate these concerns.

[45] **In summary, the members are unanimously of the view that having two co-existing thresholds is not an appropriate solution, as it would create confusion and potential overlaps, as well as leading to increased litigation.**

“Cruel and unusual punishment”

[46] The WG members also examined the standard that mirrors the threshold for a *Charter* remedy under section 12. Such a scheme could be seen as a simple legislative response to the Supreme Court of Canada in *R. v. Ferguson*. In *R. v. Lloyd*,⁴² the Supreme Court explicitly referred to the “cruel and unusual punishment” standard as a potential threshold for an exemption. It suggested that Parliament could build in a safety valve to allow judges to impose a lesser sentence where the application of the MMP would be grossly disproportionate to what is fit and appropriate.

[47] As noted above, members consider it inadvisable to create two parallel regimes with different standards, given the risks of confusion and duplicative proceedings. **The WG therefore favourably views the adoption of the same criterion as that in section 12 of the *Charter* which seemed to be suggested by the Supreme Court in *Lloyd*, *Bertrand Marchand* and *Senneville*.**⁴³ As this standard is already well known to Canadian courts, it is likely to be applied more consistently, and judges can rely on the

⁴² *R. v. Lloyd*, 2016 SCC 13 at para. 36.

⁴³ *R. v. Lloyd*, 2016 SCC 13 at para. 36; *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 108; *Québec (Procureur général) v. Senneville*, 2025 SCC 33 at para. 113.

extensive section 12 jurisprudence when applying the exemption clause. Moreover, if a court were to disregard the strict and demanding standard underlying the determination of whether a sentence is “cruel and unusual,” it would then commit an error of law reviewable on appeal.

[48] Unlike the “exceptional circumstances” threshold, the section 12 standard is unlikely to generate duplicative proceedings — subject of course to any limits or features that might be built into the exemption provision.⁴⁴ Focusing on the threshold alone, an example illustrates why duplication is improbable under the section 12 standard:

An offender challenges the MMP under both regimes: first through the exemption mechanism and, if unsuccessful, through a reasonable-hypothetical challenge under section 12.

In such a case, the constitutional debate would be largely theoretical. The answer at the first stage would mirror the exemption analysis (i.e., the sentence is not cruel and unusual as applied to the offender), and at the hypothetical stage, the court, in principle, must consider the existence of the mechanism to avoid striking down the provision as a whole.

A hypothetical offender for whom the MMP would be cruel and unusual would have access to an exemption and therefore have a ‘way out,’ which means that a declaration of unconstitutionality would be unnecessary. In short, because the exemption clause would rest on the same constitutional standard available to every offender, a reasonable-hypothetical debate would no longer be needed.

[49] If the “cruel and unusual punishment” threshold is built into the exemption mechanism, the WG is of the view that the section 12 constitutional framework will likely evolve. It would therefore be expected to garner less frequent use as related to MMPs, since the mechanism would make a *Charter*-based constitutional challenge unnecessary. That said, section 12 would *not* become moot. The significant expansion of MMPs over the past two decades has required courts to develop practical tools to assess their constitutionality, shaping the evolution of the section 12 framework. Nonetheless, this provision remains a safeguard against all forms of cruel and unusual treatment or punishment, not only MMPs (it has already been applied, for example, in cases involving solitary confinement and corporal punishment).

[50] Integrating the constitutional criterion directly into the exemption clause could carry the disadvantage of placing the entire burden on a single offender — who remains subject to judicial discretion rather than benefiting from a declaration of unconstitutionality applying to all. Several members note, however, that this is already the practical reality: constitutional challenges to MMPs are most often heard in provincial courts, which cannot issue declarations of general application. As a result, an

⁴⁴ In this regard, see paragraphs 69 and 70 of this Final Report, which discuss certain potentially problematic limitations that could be introduced into the exemption mechanism.

individualized determination must be made in every case. Ultimately, if an MMP provision is consistently addressed through the exemption mechanism, this may signal to the legislator that it is neither viable nor effective, in which case Parliament could always intervene to repeal it, if deemed appropriate.

[51] In summary, the WG members are of the view that, should the legislator create an exemption mechanism to MMPs, it should adopt the “cruel and unusual punishment” constitutional standard, which is already well known and well understood by Canadian courts.

Presumptive guidelines or sentences

[52] It is necessary to comment on the growing trend of utilizing “presumptive guidelines or sentences,” as is the case in the United States. As mentioned in the 2016 Dandurand Report: “sentencing guidelines in many jurisdictions are slowly turning into de facto ‘presumptive’ guidelines that allow deviations from the prescribed [MMP] in some circumstances.”⁴⁵ In the WG’s view, this approach, which relies on a much lower threshold than that recommended in this report, should be avoided for two predominant reasons.

[53] First, the American experience informs us that there are several issues surrounding the use of presumptive sentences. After the Supreme Court’s decisions in *Blakely* and *Booker*,⁴⁶ which converted the mandatory sentencing regime that had been in place since 1984 to an advisory scheme, many observers became concerned about the emergence of three problematic trends: (1) an increase in “judge-made” sentences imposed outside the ranges established by the Sentencing Guidelines; (2) shorter sentences for certain types of offences; and (3) increased geographic and racial disparity in sentencing.

[54] Second, the use of presumptive sentences appears inconsistent with the structure of the sentencing process and statutory principles within the *Criminal Code*. It would require reframing how the sentencing process functions in Canada — a policy question that falls outside the scope of the WG’s mandate.

Recommendation 1: Adopt “cruel and unusual punishment” as the threshold to give rise to a statutory exemption for MMPs.

(b) Relationship to Principles of Sentencing

[55] In addition to the nature of the language used to identify the threshold, the WG paid careful consideration to the nature of the requirement itself. Thresholds that focus

⁴⁵ Dandurand Report, 2016, p. 45.

⁴⁶ *United States v. Blakely*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

on the circumstance of the offence and the offender fit more comfortably within Canada's well-established sentencing principles, including proportionality. Proportionality, codified as a fundamental principle, is grounded in an assessment of the gravity of the offence and the degree of responsibility of the offender.⁴⁷ The Supreme Court has described the significance of this principle as follows:

Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.⁴⁸

[56] The addition of other requirements, such as an early guilty plea, or aiding the prosecution quickly gives rise to concern. First, although arguably an indication of remorse, these requirements bring other considerations to bear that have little to do with the offence and the offender, and more to do with conduct that benefits the state or the administration of justice. These requirements that “compel a benefit to the justice system” also give rise to serious concern regarding wrongful convictions and improperly motivated pleas and/or plea-bargaining.⁴⁹ Creating what would effectively be another category of “in-custody” or “soon to be in custody” informant would significantly broaden the availability and use of this kind of evidence. Such an outcome would be contrary to the recommendations of many inquiries in relation to wrongful convictions, and contrary to many prosecutorial policies, which seek to restrict the use of such evidence. In addition, examination of the use of such criteria in the United States reveals inconsistent application, with potentially troubling impacts on disadvantaged or vulnerable defendants. Thus, the WG was not comfortable with the inclusion of such criteria in an exemption model.

[57] The integration of any proposed exemption provision with existing sentencing principles was an important consideration. Not only does this maintain, to the extent possible, a consistent approach with respect to sentencing principles, it also minimizes the risk of unintended or unforeseen consequences. It also reduces the likelihood of a logical disconnect that may occur if the criteria for the exemption are unrelated to the general criteria relevant within sentencing. For example, it is not inconsistent to recognize the validity of an MMP, while concluding that in the particular circumstances

⁴⁷ S. 718.1 of the *Criminal Code*.

⁴⁸ *R. v. Ipeelee*, 2012 SCC 13 at para. 37.

⁴⁹ See for example: “*Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*” for an examination of the experience in the United States, 2005 50 *Criminal Law Quarterly*, 67, “*Thumb on the Scale: How Mandatory Minimum Sentences Distort Plea Bargaining*”, *The Economist*, January 26, 2013.

of the offence and offender there were exceptional circumstances so as not to impose that sentence. However, if the sentence is reduced for other reasons, such as cooperation with the Crown, or an early guilty plea, the court and ultimately the public are left to consider the balance between justice and expedience. Reducing what would otherwise be an appropriate sentence based on mere expediency does little to enhance public confidence in the criminal justice system.

[58] The consensus of the WG was that any exemption scheme should be consistent with existing sentencing principles (s. 718.1 et seq. of the *Criminal Code*), but that mirroring or codifying all of those principles within the exemption mechanism would be both redundant and undesirable. The WG was also of the view that an exemption scheme should focus on the circumstances of the offence and the offender. Such a focus would fit comfortably with the principle of proportionality codified in section 718.1 of the *Criminal Code*.

[59] **The WG is of the view that *if* the “cruel and unusual punishment” threshold is adopted, it is unnecessary to set out a list of factors to guide the court in applying the exemption mechanism.** As noted above, the extensive section 12 jurisprudence already provides trial courts with sufficient guidance in exercising their discretion. Certain factors (e.g., youth, Indigenous status, mental health challenges) have been recognized in the section 12 reasonable-hypothetical case law as capable of rendering an MMP cruel and unusual. That recognition, however, will not automatically extend to other offenders — the analysis always depends on a constellation of circumstances specific to the individual and the offence.

[60] **If the “exceptional circumstances” threshold is adopted, WG members consider it *essential* that the exemption mechanism include a non-exhaustive list of factors the court may take into account.** Such guidance would help ensure a more consistent application of the exemption and limit its use to circumstances that are truly exceptional. Some members note that without such a list to frame the interpretation and application of the “exceptional circumstances” threshold, courts may effectively have ‘free rein’ to depart from an MMP.

[61] The WG agreed that factors already delineated within the statutorily codified sentencing regime (s. 718.1 et seq. of the *Criminal Code*) should not be included in the list as to avoid duplication. It was also agreed amongst the members that no one factor would act as an exclusionary or disqualifying factor. In addition, this list should be limited to elements that could be deemed “exceptional” in certain cases. For example, the absence of a criminal record is already taken into consideration by the court to craft a fit and proper sentence. Therefore, it should not be regarded as an exceptional circumstance. In a similar vein, the exemption should not be granted based on the *absence* of certain aggravating factors, such as the *absence* of weapons, violence, threats or bodily harm/death. This is particularly true in the case of sexual offences. Indeed, as highlighted by the Supreme Court in *Friesen*, it is important not to underemphasize the

significant psychological harm of sexual violence, as well as consequences that can materialize over the long term (even in the absence of *additional* physical violence).⁵⁰

[62] Another factor the WG unanimously rejected as a potentially “relevant factor” was an offender’s cooperation and information sharing with the Crown. While this factor has taken on some significance in certain jurisdictions, like the United States, it was the strong view of the WG that such a factor should not be encouraged and did not sit easily beside the Canadian experience with jailhouse informants and wrongful convictions.

[63] The following is a non-exhaustive list of factors that the WG recommends be considered when granting an exemption to an MMP, if the “exceptional circumstances” threshold is adopted:

- 1) The offender’s advanced age or medically confirmed disease or illness, if the court is satisfied that as a result of this disease or illness, he or she would suffer unreasonable hardship by serving the MMP;
- 2) The offender’s mental condition, if the court is satisfied that:
 - (a) at the time of the commission of the offence, he or she had impaired mental functioning that is *connected* to the commission of the offence and substantially reduces the offender’s culpability, or
 - (b) he or she has demonstrated impaired mental functioning that would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment⁵¹
- 3) Any other factor or constellation of factors that may give rise to “exceptional circumstances” to justify a departure from an MMP.

[64] The provision could also specify that in determining whether to grant the exemption, the sentencing judge *must* examine the circumstances of the case holistically. That said, the provision could provide greater flexibility by specifying that there may be a single determining factor related to either the offence or the offender which qualifies to meet the threshold, while in other cases it would be a constellation of relevant circumstances.

⁵⁰ *R. v. Friesen*, 2020 SCC 9 at paras. 56, 79-84.

⁵¹ There must be a nexus between the mental illness and the commission of the offence. In other words, the mental illness must have played a role in the criminal conduct. See *R. v. Mrozik*, 2026 MBCA 46 at paras. 28-31, 32-40, 48-51; *R. v. Schofield*, 2025 MBCA 43 at paras. 35, 46-47, 52; *R. v. Cerezo-Brennan*, 2023 MBCA 17 at paras. 21, 24, 25; *Ricard-Perras c. R.*, 2023 QCCA 1333 at paras. 13, 16, 21, 23; *R. v. Fabbro*, 2021 ONCA 494 at paras. 25-26; *R. v. Pond*, 2020 NBCA 54 at paras. 34-40, 44; *R. v. Bahesa*, 2019 BCCA 70 at para. 22; *R. v. Scofield*, 2019 BCCA 3 at paras. 64, 104; *R. v. JED*, 2018 MBCA 123 at para. 132; *R. v. Okemow*, 2017 MBCA 59 at paras. 72-73.

Recommendation 2: If the “exceptional circumstances” threshold is adopted, a non-exhaustive list of factors must be added to the provision to ensure a consistent application of this new criterion. If the “grossly disproportionate” standard is chosen, such a list does not appear necessary.

(c) Need for Notice and Obligation to Provide Reasons

[65] Considering that some of the factors listed above, or personal circumstances that could be invoked by offenders, should be supported by external evidence (e.g., psychiatric/psychological assessments for mental health conditions), **the WG suggests imposing an obligation on the offender to notify the Crown of his or her intention to seek the exemption within a reasonable time before the sentencing hearing.** Given the court’s truth-seeking function, the notice would allow both parties to review the evidence in advance and make informed submissions on the application of the exemption clause. For instance, the parties may need to cross-examine an expert or present rebuttal evidence, which requires adequate preparation. Notice requirements would help avoid adjournments that could unduly prolong proceedings.

[66] Moreover, the exemption mechanism will require submissions and argument comparable to current section 12 litigation. Without prior notice, the prosecutor may be unable to adequately address all elements of the section 12 analytical framework, which extends beyond proportionality and engages broader jurisprudence on cruel and unusual punishment. Such notice could also prove useful in provinces where prosecution services are distinct from constitutional law branches (e.g., Manitoba and Québec), as some coordination is required. The absence of notice in these cases could result in additional delays. Finally, notice would help track exemption requests. Normally, the federal government is informed of litigation through notices of constitutional questions. Since this would no longer be the norm, the notice requirement would allow the federal government to monitor patterns of use and consider legislative amendments if a provision is consistently addressed through the exemption mechanism.

[67] The WG members are also of the view that it is not necessary to impose a specific number of days for providing notice. The notion of a “reasonable time,” which is used elsewhere in the *Criminal Code*, is sufficient. Moreover, the members were of the view that the failure to provide such notice should not preclude the offender from invoking the exemption. The judge could simply order an adjournment as a remedy, which is consistent with section 657.3(4) of the *Criminal Code* in the case of expert evidence.

[68] The WG also noted that some jurisdictions require a sentencing judge to provide detailed reasons for their reliance on an exemption provision.⁵² The members take note of the fact that proposed section 718.4(4) of Bill C-16 provides for this obligation. Such an approach is consistent with the obligation set out in section 726.2 of the *Criminal*

⁵² See Dandurand Report 2012, e.g., South Africa specifically.

Code, which may justify formulating it more precisely in the context of the exemption provision. For example, the judge may be required to articulate what circumstance(s) he or she considered and why it is/they are exceptional in the case. **The WG is of the opinion that the requirement for overt reasons will serve as a tool to prevent judges from interpreting the provision too broadly and can safeguard against the concern of “the exception becoming the rule.”**

Recommendation 3: The new mechanism should require an offender to give notice of their intention to invoke the exemption within a “reasonable time” before the hearing.

Recommendation 4: The sentencing judge should be required to record the reasons for their decision.

(d) The Nature and Extent of the Exemption

[69] There is range of options to consider in relation to the extent or nature of the exemption. For example, the provision could simply provide that the stipulated MMP no longer applies. This is how the exemption is formulated in several jurisdictions. Also, there could be an obligation on judges to impose a custodial sentence, even if that sentence is of a short or nominal duration, or even a bar on imposing certain dispositions (e.g., ss. 730, 731, 732, 742.1 of the *Criminal Code*). This is precisely what proposed section 718.4(5) of Bill C-16 provides — namely, that the sentence imposed in lieu of the MMP must be a custodial one.

[70] The members of the WG were not unanimous about whether such a limitation is appropriate. On the one hand, some members were in favour of restricting the judge’s ability to impose conditional sentences (considering that these sentences are often ill-suited in the context of sexual offences, particularly those involving children). On the other hand, several members expressed reservations about such a limitation. **First**, a key concern is that limiting judicial discretion in this manner may re-ignite debates under sections 7 and 12 of the *Charter* and give rise to novel arguments regarding the scope of the proposed section 718.4(5). Indeed, most of the reasonable hypotheticals that have led to findings of invalidity in recent years involved offenders whose proportionate sentence was not a term of imprisonment (e.g., discharge, conditional sentence and probation order).⁵³ Requiring courts to impose custodial sentences could bring us ‘back to square one’ and renew constitutional challenges. However, it was noted that it would be open to courts to order a sentence as low as one day of imprisonment. In such cases, it may be challenging for an accused to establish that the sentence reaches the high threshold of gross disproportionality. **Second**, lengthy conditional sentences with stringent conditions can, in certain cases, be more deterrent than nominal periods of incarceration (e.g. a one-day jail sentence), and could therefore better align with Parliament’s intent to impose harsher sanctions. **Third**, if judges begin imposing

⁵³ This was the case in the recent *Senneville* and *Bertrand Marchand* decisions.

symbolic custodial sentences of only a few days to comply with this requirement, sentencing ranges could be adversely affected. **Finally**, some members question the need to include such a limitation directly in the exemption provision, particularly if the proposed amendments to section 742.1 of the *Criminal Code* in Bill C-14 come into force.

[71] Another methodology that was examined was the idea of converting the MMP to a starting point — with the sentence varying downward, depending on the degree of “exceptional circumstances” in the case. It is conceivable that a numerical or percentage variation could be specified. The notion of “starting point” is a concept that is used in the United Kingdom in conjunction with their exemption provisions. Under this conceptualization, once an exemption is granted, the mandatory penalty is converted into a starting point from which variation is then calculated. The attractive aspect of this approach is that it emphasizes the normative character of the specified penalty even where the exemption applies. However, the permissible scope of departure from the starting point would need to be significant in order for the proposed remedy to be consistent with the threshold.

[72] However, this formulation of the exemption is closely related to the issue of the threshold. For example, it would be logically inconsistent to select the “exceptional circumstances” threshold but stipulate that only a minor or modest variation in the statutory penalty should be applied. As a result, the strong view of the WG was that the extent and nature of the permitted variation should be up to the trial judge. The higher the threshold, the greater the degree of flexibility that should be permitted in exempting the offender from the MMP that would otherwise apply.

(e) The Role of Appellate Courts

[73] Another key factor in ensuring consistency in the interpretation and application of an exemption provision was the contemplation of the role of appellate review. Recognizing that the decision to grant an exemption should be exceptional, and that there is significant public interest in the uniformity of approach with respect to these provisions, the WG concluded that the interpretation and application of the threshold would likely be considered a question of law, reviewed on a standard of correctness.⁵⁴

[74] As for the decision whether to grant the exemption, the WG was of the view that this falls within the discretionary power of the judge, as they will have to assess various factual elements relating to the commission of the offence and the offender’s personal circumstances. As such, the standard of review for sentence appeals would continue to apply.⁵⁵ In other words, a court of appeal would not intervene unless: (1) the sentence

⁵⁴ As noted by the Court of Appeal of New Brunswick, “fair warning to sentencing judges, it is a reversible error of principle to ‘categorize the ordinary as exceptional’”: *R. v. Murdoch*, 2015 NBCA 38 at para 47 citing *R. v. Zenari*, 2012 ABCA 279 at para 8.

⁵⁵ *R. v. Burnett*, 2017 MBCA 122 at para. 31, which dealt with the departure from an established

imposed was demonstrably unfit; or (2) the sentencing judge made an error in principle that had an impact on the sentence (i.e., an error of law, a failure to consider a relevant factor, or an erroneous consideration of an aggravating or mitigating factor).⁵⁶ In summary, the appellate court would have to consider the language used for the exemption (and eventually the case law interpreting it), but deference would be afforded to the sentencing judge's factual determinations (akin to any sentence appeal).

6.3 Exclusion of Certain MMPs

[75] The WG carefully considered whether any offences should be excluded from the proposed exemption provision. A consensus quickly emerged around one category of offence that has long been the subject of MMPs: murder. The MMP of life imprisonment for murder has a well-settled provenance related to the abolition of the death penalty. The MMP itself was seen by some as an exemption from the death penalty. The members note that this exclusion is set out in proposed section 718.4(2) of Bill C-16.

[76] There was some discussion about a second subset of offences, namely those relating to impaired driving. They too have long been the subject of MMPs. In fact, custodial sentences for these offences are the earliest examples of MMPs in the *Criminal Code*. In light of this history, it was felt by some that it was unnecessary to provide for an exemption scheme in relation to these penalties, since they have so far survived judicial scrutiny. Several members also believed that the distinctiveness of the impaired driving regime justifies excluding these offences from the application of an exemption provision. One of the distinctive features is that the imposition of the MMP is gradual (i.e., the offender receives a fine for a first offence, whereas incarceration is reserved for second [30 days] and subsequent offences [120 days]). Another distinctive feature is the availability of the mechanism provided for in section 320.23(2) of the *Criminal Code*, which allows a judge to waive the imposition of an MMP if the offender has successfully completed a treatment program approved by the province in which he or she resides.⁵⁷ The WG members note that proposed section 718.4(3) of Bill C-16 explicitly states that the exemption does not affect the operation of section 320.23 of the *Criminal Code*.

[77] Some members of the WG felt that if the rationale for exempting some crimes was simply that some offences somehow do not warrant exemption eligibility, then reasonable people can disagree over what these offences might be. This disagreement would inevitably invite the creation of a carve-out list that is larger than what the WG might have intended. Accordingly, it was decided that the issue of whether some offences should be excluded from any exemption regime was a question better left for policy experts to consider.

sentencing range based on the offender's exceptional circumstances. See UK: *R. v. Rehman*; *R. v. Wood*, [2005] EWCA Crim 2056 at para. 14: "Unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist, or clearly wrong in not identifying exceptional circumstances when they do exist, this court will not readily interfere."

⁵⁶ *R. v. Friesen*, 2020 SCC 9 at paras. 25-29; *R. v. Lacasse*, 2015 SCC 64 at para. 11.

⁵⁷ This mechanism is not, however, applied uniformly across Canada, see footnote 9.

6.4 Potential Practical Issues Arising from the Inclusion of an Exemption Mechanism in the *Criminal Code*

[78] While many members of the WG were of the opinion that it would be appropriate to legislate an exemption mechanism in the *Criminal Code*, a number of potential difficulties were identified. The WG felt that it was important to highlight these concerns for further contemplation by Parliament.

(a) An Increase in Conditional Sentence Orders

[79] Bill C-5 amended section 742.1 of the *Criminal Code* to increase the availability of conditional sentences of imprisonment by amending the pre-condition set out in section 742.1(c) and by repealing those set out in sections 742.1(e) and (f).⁵⁸ The remaining pre-conditions that pose an obstacle to the imposition of a conditional sentence are the requirement that conditional sentences be consistent with public safety (s. 742.1(a)) and the existence of a minimum term of imprisonment (s. 742.1(b)). An offender who would be exempt from the application of an MMP could therefore be sentenced to imprisonment in the community if the court is satisfied that this sentence would not endanger the public. Although this risk could materialize if an exemption mechanism is created, some members of the WG believe that it should be addressed by amendments to section 742.1, if deemed appropriate or necessary (as is currently contemplated under Bill C-14⁵⁹). WG members are indeed concerned that introducing limitations to conditional sentences within the exemption mechanism, as set out in proposed section 718.4(5) of Bill C-16, could have the unintended effect of generating new constitutional challenges (see the detailed concerns expressed on this issue at paragraphs 69 and 70).

⁵⁸ Before 2022, s. 742.1 provided that a conditional sentence could not be imposed if the offence, prosecuted by way of indictment, was punishable by a maximum term of imprisonment of 14 years or life. Section 742.1(e), now repealed, excluded certain offences punishable by a maximum term of imprisonment of 10 years which resulted in bodily harm, involved the import/export/trafficking/production of drugs or involved the use of a weapon. Section 742.1(f) provided for a list of 11 offences for which a conditional sentence could not be imposed (ss. 144, 264, 271, 279, 279.02, 281, 333.1, 334(a), 348(1)(e), 349 and 435). The amendment to s. 742.1(c) removed these former requirements and limited the list of exclusions to three offences, namely attempted murder (s. 239), torture (s. 269.1) and advocating genocide (s. 318). A terrorism or criminal organization offence prosecuted by way of indictment where the maximum term of imprisonment is 10 years or more is also not eligible for a conditional sentence, in accordance with article 742.1(d), which remained unchanged.

⁵⁹ Bill C-14, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and the National Defence Act (bail and sentencing)*, 45th Parl. (Can.), 1st sess., October 23, 2025 (tabling).

(b) The Problem with Hybrid Offences

[80] The use of a statutory exemption mechanism for MMPs could raise equity and parity issues in the case of hybrid offences.⁶⁰ Consider the following example:

An individual is convicted of committing a sexual assault on a victim under the age of 16. Since the crime is being prosecuted by way of indictment, the offender will be subject to an MMP of one year (pursuant to s. 271(a) of the *Criminal Code*). The offender applies for the exemption, which is granted by the court. Instead, the court imposes a sentence of four months, as the one-year MMP was cruel and unusual in their circumstances.

If the offender had been prosecuted summarily, the MMP of six months would apply. Considering that four months was the proportionate sentence, it is unclear whether the offender would have received the legislative exemption — as an MMP of six months may not have been viewed as grossly disproportionate in relation to a proportionate sentence of four months.

[81] Circumstances such as these could lead to incongruous and potentially unjust results where an offender prosecuted by indictment receives a lower sentence than they would have had they been prosecuted summarily (even though an indictable offence is generally considered more serious). This outcome may arise because establishing that the MMP for a summary conviction offence constitutes cruel and unusual punishment is generally more difficult. In that context, an offender could be placed in a more favourable position than another solely by virtue of prosecutorial discretion. The Supreme Court recognized this difficulty, by way of analogy, in *R. v. Bertrand Marchand*:

Simply striking the one-year mandatory minimum and leaving the six-month punishment intact presents its own set of related issues — including an issue of parity. If the summary conviction punishment remains, an individual may be charged summarily for ostensibly less serious conduct than would be charged by indictment and potentially face a more serious punishment by virtue of the mandatory minimum. This potential outcome further highlights the difference between the role of a sentencing judge and the role of a Crown prosecutor. It is the judge's role to craft a fit and proportionate sentence in light of the circumstances of the offender and the gravity of the offence after being presented with evidence of the offender's background and individual circumstances. In

⁶⁰ Parliament has provided that many *Criminal Code* offences can be prosecuted by “indictable offence” or by “summary conviction.” These are known as hybrid offences. It is not uncommon for the accused to be subject to an MMP, regardless of the mode of prosecution. However, the length of the MMP varies according to the election of prosecution (e.g., one year for an indictable offence and six months for a summary conviction).

contrast, the Crown prosecutor is tasked with using their discretion to choose a path to conviction with little information about the offender's individual circumstances and while balancing other priorities.⁶¹

[82] The WG members note, however, that the underlying issue here is not the exemption mechanism itself, but rather the fact that MMPs are prescribed for hybrid offences. Regardless of the threshold chosen for an exemption, issues of fairness and parity are likely to arise in the case of hybrid offences.

(c) The “Lowering” of Sentencing Ranges

[83] Given the implicit recognition that sentences below MMPs can be proportionate and meet sentencing objectives, the introduction of an exemption mechanism would likely have the effect of lowering sentencing ranges for the relevant offences. Indeed, as soon as it is possible for an offender to benefit from the exemption mechanism, the sentencing range will have to account for the fact that a lower sentence may be imposed. Furthermore, a potential “lowering” of the range of sentences could have an impact on the application of the exemption mechanism itself. Stated alternatively, the lower the range, the more likely a judge is to grant an exemption. This issue is intrinsically linked and dependent upon the interpretation (i.e., broad or restrictive) that the courts will make of the exemption.

[84] Some WG members also fear that an exemption mechanism could result in a significant departure from the principles and direction provided in *R. v. Friesen*⁶² as related to sexual offences committed against children. Specifically, the concern is that the exemption would permit markedly reduced or symbolic sentences for these crimes, thereby weakening the coherent national framework *Friesen* sought to reinforce. Other members point out, however, that this concern already exists given the numerous declarations of unconstitutionality of MMPs across Canada.

(d) Incentivizing the Increased Use of Mandatory Minimum Penalties

[85] With the creation of an exemption mechanism that may (to some degree) insulate MMPs from constitutional challenge, this could lead to the enactment of new MMPs or the re-enactment of MMPs previously found to violate section 12 of the *Charter*. While it is within the purview of Parliament to do so, this may result in more offenders being subject to MMPs, and periods of incarceration. It is beyond the scope of this paper to comment on the policy considerations that may arise in expanding MMPs to a greater range of offences.

⁶¹ *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 164.

⁶² The Supreme Court in *Friesen* emphasized that proportionate sentences for sexual offences against children will often require substantial penitentiary terms, with mid-single-digit sentences as the norm and higher ranges neither exceptional nor reserved for rare cases: *R. v. Friesen*, 2020 SCC 9 at para. 114.

7. CONCLUSION

[86] This report, along with the research summarized in the Dandurand Report, provides an overview and analysis of some of the fundamental issues to be resolved if an exemption provision was enacted in Canada. Such a mechanism, while attenuating the relationship between Parliament and the courts, respects the unique constitutional status and function of both institutions.

[87] The ultimate determination of whether such a mechanism should be enacted in Canada is a policy choice to be made by Parliament. With this report, the WG members endeavoured to make a useful contribution to those policy deliberations, illustrating that statutory exemptions to MMPs can function effectively within the existing constitutional and statutory dimensions of sentencing in Canada.

[88] By way of conclusion, the WG presents a summary of its recommendations concerning the essential components of a potential exemption regime, should the legislator decide that introducing such a mechanism into the *Criminal Code* is warranted:

SUMMARY OF RECOMMENDATIONS

Recommendation 1: Adopt “cruel and unusual punishment” as the threshold to give rise to a statutory exemption for MMPs.

Recommendation 2: If the “exceptional circumstances” threshold is adopted, a non-exhaustive list of factors must be added to the provision to ensure a consistent application of this new criterion. If the “grossly disproportionate” standard is chosen, such a list does not appear necessary.

Recommendation 3: The new mechanism should require the offender to give notice of their intention to invoke the exemption within a “reasonable time” before the hearing.

Recommendation 4: The sentencing judge should be required to record the reasons for their decision.