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Mandatory Minimums and Lawyers' Ethics

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Statute commented on:

Safe Streets and Communities Act, Bill C-10, 60-61 Elizabeth II, Assented to March 13, 2012

Introduction

This week the New York Times had an article highlighting two recent federal court decisions criticizing the effect of mandatory minimums on criminal justice. One, a sentencing memorandum by a District Court judge in *U.S.A. v Gurley*, USDC, Mass., May 17, 2012, criticized the diminution of the role of the jury in the criminal trial that results from plea bargaining . The judge held that jury leniency must be taken into account in determining the range of minimum sentences to be applied, but noted that the increased place of plea bargaining in the American system had rendered the role of the jury functionally irrelevant, and the judge largely so. "Prosecutors run our federal criminal justice system today. Judges play a subordinate role - necessary yes, but subordinate nonetheless. Defense counsel take what they can get" (p. 50). The other, also a sentencing memorandum but this time from the District Court of New York, *USA v Dossie*, USDC, NY, March 30, 2012, was even harsher in its indictment. The accused in that case was a drug user who engaged in a minor way in the sale of drugs. As summarized by Judge Gleeson, "His sole function was to ferry money to the supplier and crack to the informant on four occasions for a total gain to himself of $140" (p. 8). Unfortunately, however, Dossie's four transactions involved quantities of crack cocaine in excess of 28 grams. As a consequence, he fell within the mandatory minimum sentence for such offences of 5 years. The prosecutor sought that sentence, and Judge Gleeson had no choice but to impose it, even though in his view "It was not a just sentence" (p. 19). Judge Gleeson noted that this result was a product of a misapplication of the original intention of the mandatory minimum sentencing laws – in which quantities of drugs sold was intended to be a proxy for individuals who were managers or leaders in the drug trade – and of excessive prosecutor zeal.

What do these two American judgments have to do with Alberta or Canadian law in general, or with the ethics of Canadian lawyers in particular? Because under the newly enacted Bill C-10, the *Safe Streets and Communities Act*, numerous offences under the *Criminal Code*, RSC 1985, c C-46 and under the *Controlled Drug and Substances Act*, RSC 1995, c 19, are now subject to mandatory minimums when they weren't before. This raises the question of whether Canadian prosecutors and defence lawyers will be subject to the sort of ethical dangers that have arguably plagued their American counterparts to a greater extent than when relatively fewer Criminal Code offences attracted mandatory minimums.

In this blog I will start out by reviewing in general terms the ethical dangers posed by mandatory minimum sentences. I will then review some of the changes to sentencing brought in by Bill C-

10 and consider whether those changes create the likelihood of similar problems arising in Canada.

The Ethical Risks of Mandatory Minimum Sentences

Mandatory minimum sentences create ethical challenges for both prosecutors and defence lawyers. For prosecutors the issue is primarily with respect to the exercise of prosecutorial discretion, which includes the power of the prosecutor to decide whether to prosecute a charge, to enter a stay of proceedings, to accept a guilty plea to a lesser charge, to withdraw from proceedings, to take control of a private prosecution, or to resile from a plea agreement (*Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at 394; *R v Nixon*, 2011 SCC 34). The exercise of prosecutorial discretion is largely unreviewable by the courts (unless the prosecutor has acted in a way that constitutes an abuse of process or the tort of malicious prosecution) or by the law societies (unless the prosecutor has egregiously violated their ethical obligations). (See, in general, Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Toronto: LexisNexis, 2011) at 291-301). The prosecutor does have clear duties with respect to the exercise of that prosecutorial discretion, however: the prosecutor should only proceed with a charge where there is a reasonable chance of conviction and the public interest supports doing so.

The ethical danger of mandatory minimums for the exercise of prosecutorial discretion rests largely with the power (and temptation) it creates for prosecutors to proceed with charges that will result in the imposition of a minimum sentence, even where those charges may not be all that well founded, in order to pressure an accused to accept a plea to a lesser offence. An accused whose offence is best described as manslaughter, for example, could nonetheless be charged with first degree murder in order to encourage that accused to accept a plea, thereby allowing the prosecutor to avoid the work, expense and risk associated with a criminal trial. The accused might even be 'encouraged,' through the existence of the threat of the first degree murder trial, to accept a plea to second degree murder, an offence of which the accused is likely not guilty.

This power would of course be meaningless in a perfect world, in which a criminal trial could never result in a wrongful conviction. But as long as an accused knows that there is a risk of conviction of the more significant offence, and therefore a risk of suffering the mandatory minimum sentence, there will be a strong incentive for the accused to accept an offered plea, even if the accused is not factually guilty of the higher offence, and may not even be factually guilty of the lesser offence on which the plea offer is based. The rationally risk-adverse accused creates a power in the prosecutor to take advantage of that risk-aversion by using charges carrying a mandatory minimum sentence to force a plea.

The ethical danger of mandatory minimums for defence lawyers is the flip-side of the power that rests with prosecutors. In Canada an accused cannot enter a plea of convenience, and a lawyer may not assist a client who maintains his innocence to enter a plea – to do otherwise involves the lawyer in misleading the court, which is ethically prohibited (in Alberta see, Code of Professional Conduct Rules 4.01(8) and 4.01(2)(m)). But where a defence lawyer knows that pleading guilty is in the client's best interests, rationally assessed, the lawyer faces a choice with no satisfactory moral outcome: sacrifice the client's best interests or sacrifice the lawyer's professional obligations. In the imperfect world in which wrongful convictions are possible, and may even be probable in some circumstances, there is often no way to avoid sacrificing one of those moral goods.

Mandatory minimums enhance this existing ethical problem for defence lawyers simply because they increase the likelihood that it will be in the rational self-interest of an accused to accept a plea bargain for an offence that he did not commit. That is, they increase the frequency and intensity of the dilemma that defence lawyers face when advising a client about whether to accept a plea.

Bill C-10

One of the main features of the *Safe Streets and Communities Act* is its introduction or enhancing of mandatory minimums for offences under the *Criminal Code* and the *Controlled Drugs and Substances Act*. Under Bill C-10 mandatory minimum sentences of 1 year (for indictable offences) and 90 days (for summary convictions) are imposed for offences such as touching for sexual purposes (s 151), invitation to sexual touching (s 152), luring a child by means of a computer system (s 172.1(2)) and sexual assault where the victim is under the age of 16 (s 271). Where the victim is under the age of 16, sexual assault with a weapon or with threats of violence, or aggravated sexual assault, will attract a mandatory minimum of 5 years (s 272(2) and s 273(2)). Mandatory minimum sentences of 1 and 2 years are also imposed for some offences under the *Controlled Drugs and Substances Act*. The minimum sentences are imposed for crimes involving trafficking, importation or production of certain substances where certain criteria are met, such as trafficking at a school, in a prison or with the involvement of a person under the age of 18. In addition, if a person imports a substance listed in Schedule 1 of the Act in an amount in excess of 1kg, that person is subject to a minimum of two years in prison (Bill C-10, s 40(a.1), amending *Controlled Drugs and Substances Act*, s 6(3)(a)).

In imposing these minimum sentences Bill C-10 is significantly less harsh than its American counterparts. No offence dealt with in the Act would impose the type of 5 or 10 year sentences at issue in the American cases noted above. Minimum sentences for trafficking are not triggered by the possession of a certain level of drugs, and for importation the amount of drugs in a person's possession would have to be 1 kilogram to trigger the minimum. By contrast, Dossie was sent to jail for five years because he possessed 28 grams of crack cocaine in circumstances that constituted trafficking.

Having said that, mandatory minimums of any kind give increased power to prosecutors in exercising their discretion. They enhance the stakes for a criminal accused determining the merits of a plea versus going to trial on a charge with an associated mandatory minimum. This is particularly so if, as appears to be the case, the time served by the accused is increasingly "hard" time (see: Doug Saunders, "Hurt the Criminal or Hurt the Crime," Globe and Mail, May 26, 2012). This means that, even in its relatively less harsh form, the ethical pressures for prosecutors and defence lawyers created by Bill C-10 are real, and must be taken into account.

One way for that to occur is, of course, through the reticence and independence of individual prosecutors. The difficulty with that, though, is that ethical decisions in any context will be highly influenced by circumstantial realities and pressures; ethical outcomes are far more determined by circumstances and culture than they are by the moral reasoning of individual decision-makers (see: Jonathan Haidt, "The New Synthesis in Moral Psychology" (2007) *Science* 316 and Alice Woolley and Jocelyn Stacey, "The Psychology of Good Character," here).

That means that to address the ethical dangers of mandatory minimums properly requires systemic approaches and institutional responses, in particular from the provincial attorney generals, the federal Department of Justice and from higher level administrators within those

bodies. It is unfair, and unrealistic, to ask individual Crowns to bear the sole responsibility of ensuring that Canada avoids the ethical problems that have arisen in the United States, particularly where those Crowns may be under pressure to achieve a high number of convictions with the minimum amount of time and expense.

For defence lawyers, has the time come to relax the ethical prohibition on recommending that a client accept a plea of convenience? In my view it has not. While the existence of that prohibition creates a dilemma for defence lawyers, and one which will grow with the increased use of mandatory minimum sentences, the alternative, which would effectively encourage lax or incompetent lawyering in which clients are improperly pressured by counsel unprepared for trial, is far worse (see: e.g., *Law Society of Alberta v Syed*, [1994] LSDD No 211).

The irony of mandatory minimum sentencing is that it is intended to reduce the discretion of trial judges that, in the mind of critics, leads to criminals being granted unduly light sentences. Yet what mandatory minimum sentences do is simply replace the discretion of trial judges with the discretion of prosecutors and, to a lesser extent, of a defence lawyer. That discretion is unreviewable and, as often as not, invisible. It may generally trend towards increased punishment, rather than to increased laxity, but that does not render it any less discretionary, or any more just.