File Number: 31692

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

MICHAEL ESTY FERGUSON

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

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Interveners

FACTUM OF THE RESPONDENT ATTORNEY GENERAL OF ALBERTA

PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

Overview

1. This appeal concerns the validity of Parliament's attempt to control crimes committed with the use of a firearm. Does the mandatory minimum four-year prison sentence for manslaughter committed with a firearm, as provided in s. 236(a) of the *Criminal Code*, violate s. 12 of the *Charter* in the circumstances of this case? Specifically, when a person commits a criminal assault with a firearm resulting in the death of another human being, is a mandatory four-year prison sentence for manslaughter so grossly disproportionate to the crime that it outrages our society's sense of decency? Respondent's position is that on the facts of this or any reasonable hypothetical case, s. 236(a) of the *Criminal Code* does not amount to cruel and unusual punishment.

2. This Court has already upheld the constitutionality of the same minimum sentence in relation to criminal negligence with a firearm causing death in the context of an accidental shooting.[1] Appellant's moral culpability is greater in this case. He was not merely negligent. Rather, Appellant killed his victim by means of an unlawful act (assault or aggravated assault) with a firearm. As a police officer, he had extensive training in the use of firearms and was in a position of trust in relation to the victim.

3. Unlawful act manslaughter requires the commission of a predicate unlawful act that is dangerous.[2] At a minimum, Appellant had the necessary *mens rea* to commit the underlying assault, coupled with objective foresight of risk of bodily harm that is neither trivial nor transitory[3]. Indeed, where an assault is committed with a gun in close quarters as here, if Appellant did not actually foresee death, it was certainly objectively foreseeable. Applying all the factors relevant to the s. 12 analysis, the sentence imposed does not come close to being

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[1] ***R. v. Morrisey,*** [2000] 2 S.C.R. 90 in which a four-year minimum sentence was mandated by s. 220(a) [Appellant's Book of Authorities, "A.B.A." at Vol. II, Tab 27].

[2] ***R. v. Creighton,*** [1993] 3 S.C.R. 3 [A.B.A. at Vol. I, Tab 9] and ***R. v. DeSousa,*** [1992] 2 S.C.R. 944 [Respondent's Book of Authorities "R.B.A.." Vol. I, Tab 11].

[3] ***R. v. Creighton,*** *supra* at pp. 44-45 [R.B.A. at Vol. I, Tab 10]

grossly disproportionate. There is simply no trivial way to commit manslaughter with a firearm. A four year sentence is wholly proportionate to the crime and the offender.

4. Alternatively, if this Honourable Court finds that s. 236(a) does violate s. 12 of the *Charter* in the particular circumstances of this Appellant, or in a reasonable hypothetical case, Respondent submits that an "individual constitutional exemption" should not be available as a potential remedy, except during the limited period of a suspended declaration of invalidity. A broader individual constitutional exemption would drastically alter Parliament's express intent to create a mandatory minimum sentence in all cases of manslaughter committed with a firearm. Allowing the applicability of mandatory legislation to be decided on a case-by-case analysis creates great uncertainty and unpredictability in the law. Moreover, an individual exemption is not consonant with the analytical framework of the *Charter* and the constitutional dialogue between the courts and legislative branch. If the legislated minimum sentence violates s. 12, the appropriate remedy is to declare s. 236(a) to be of no force and effect and allow Parliament an opportunity to fix the constitutional deficiency.

5. Even if such remedy were theoretically possible, it should not be granted to Appellant. The particular facts on this appeal are not so unique or far-fetched or beyond the realm of reasonable contemplation that a constitutional exemption is appropriate.[4] If the facts of this case suggest that s. 236(a) casts too wide a net, then it should be struck down. To do otherwise allows constitutionally overbroad legislation to remain on the books, leaving courts to reign in the net each time a similar case arises. This is contrary to the intent of the *Charter* and s. 52 of the *Constitution Act, 1982.*

Background Facts

6. The Respondent does not accept Appellant's interpretation of the facts but rather, relies on the facts as set out by the majority of the Alberta Court of Appeal which are amply supported by the evidence at trial. The significant portions are summarized below.[5]

7. On October 3, 1999, Appellant, a police officer with the Royal Canadian Mounted Police, shot and killed Darren Varley, a person in his care and custody at the Pincher Creek RCMP

[4] In fact, in ***R. v. Morrisey,*** *supra* at para. 86, Arbour J. contemplated a somewhat analogous scenario, although in the context of a less morally blameworthy act of criminal negligence causing death. [A.B.A. at Vol. II, Tab 27].
[5] ***R. v. Ferguson,*** 2006 ABCA 261 at paras. 1, 4, 11, 14-38 [Appellant's Record "A.R." at Vol. I, Tab 2(D)].

Detachment. The victim was shot twice, once in the abdomen and once in the head. Appellant claimed he was acting in self-defence. He was charged with second-degree murder and at his third trial was ultimately convicted of manslaughter by means of an unlawful act pursuant to ss. 222(5)(a) and 234 of the *Criminal Code*.

8. At the time of his death, Darren Varley was 25-years old. Varley had an average to slight build. He had no martial arts training and had no interest in or knowledge of firearms. He had no criminal record.

9. Appellant was 6'1" tall and weighed between 210 and 220 pounds. He had been an RCMP constable for 19 years. Appellant had taken a number of firearms courses over and above his RCMP training and was an established marksman. He was one of eight individuals chosen from across Canada for a special tactical unit that was to have been stationed in Ottawa in order to deal with terrorist threats. This process required candidates to demonstrate extreme proficiency in the knowledge and use of firearms as well as superior physical strength and agility. Appellant had completed seven years of martial arts training.

10. On the evening of October 2, 1999, Darren Varley went to Leo's bar in Pincher Creek to socialize with friends. He met up with his fiancé, Chandelle Bachand and his sister, Alaine Varley. Later in the evening, Darren Varley was involved in separate scuffles with Wade Lunn and Andrew Pettigriew, his fiancé's ex-boyfriend. Both incidents were minor and broke up quickly.[6] Varley remained at the bar but was not aware that Chandelle had left.[7] After the bar closed, Varley and his friend Rod Tuckey became involved in a fight with a number of other individuals in the parking lot, because he believed Chandelle had gotten into a van with strangers and he was concerned about her.[8] As a result of the incident, Tuckey required medical attention.

11. Pat Bitango and Sarah Weatherill, mutual acquaintances, took Tuckey to the Pincher Creek Hospital while Varley stayed behind to search for his fiancé. Varley returned home around 3:00 a.m. He was still upset about the whereabouts of fiancé. He went to his sister Alaine's residence whereupon they both continued looking for Chandelle.[9] Varley appeared to

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[6] Evidence of Stacey Kettles [Respondent's Record "R.R." at p. 9/1-10]; Evidence of Chandelle Bachand [A.R. at Vol. II, Tab 4(A), pp. 146/24-148/34 ; 149/5-150/19].
[7] Evidence of Chandelle Bachand [A.R. at Vol. II, Tab 4(A), p. 151/6-46].
[8] Evidence of Alaine Varley [A.R. at Vol. III, Tab 4(F), p. 429/5-20].
[9] Evidence of Alayna Dyck [A.R. at Vol. II, Tab 4(D), pp. 276/5-283/31].

be shaking, injured and white/green in colour. Alaine later drove Varley to the hospital to check on the status of Rod Tuckey.[10]

The Hospital Incident

12. At 3:37 a.m., a hospital security guard, Earl Langille, contacted the RCMP to request that someone come to the hospital to investigate the whereabouts of Chandelle Bachand. Varley also spoke to the RCMP at that time.[11] RCMP Telecoms Operator, Veronica Roberts received the call. She advised Appellant that Varley definitely sounded intoxicated. When Roberts called a second time, Appellant asked her if Varley had "somewhere to sleep tonight."

13. Appellant arrived at the hospital and met with Darren Varley, Alaine Varley, Sarah Weatherill, Pat Bitango and Earl Langille. Other than Darren Varley, all of these individuals were sober.

14. When Appellant entered the hospital, he appeared impatient, irritated and annoyed. Alaine Varley tried to explain the circumstances to Appellant but as soon as she mentioned her brother's name, Appellant cut her off and went directly over to Darren Varley. Varley attempted to provide details of his missing fiancé and a description of the van. Witnesses described Varley as upset or agitated about what had occurred.[12] He was under the influence of alcohol, stuttering and speaking with his hands.[13] Appellant moved closer to Varley and asked if he was drunk. While Varley was attempting to explain the situation that happened earlier that morning, Appellant began yelling at him.

15. Other witnesses also heard Appellant ask Varley if he was drunk. When Varley replied that "had nothing to do with it", Appellant indicated "I don't like drunks", grabbed Varley by the shirt or jacket and punched him in the jaw area causing his mouth to bleed.[14] The witnesses were surprised at the sudden outburst as Varley had not been violent. Appellant's testimony at

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[10] Evidence of Stacey Kettles [R.R. at pp. 10/8–13/1]; Evidence of Alaine Varley [A.R. at Vol. III, Tab 4(F), pp. 427/38-428/6].
[11] Evidence of Earl Langille [A.R. at Vol. II, Tab 4(C), p. 217/2-12].
[12] Evidence of Earl Langille [A.R. at Vol. II, Tab 4(C), pp. 230/30-40; 255/10-256/18]; Evidence of Sarah Weatherill [A.R. at Vol. III, Tab 4(E), p. 323/1-6].
[13] Evidence of Stacey Kettles [R.R. at p. 11/8-15]; Evidence of Chandelhle Bachand [A.R. at Vol. II, Tab 4(A), p. 154/26-36]; Evidence of Alaine Varley [A.R. at Vol. III, Tab 4(F), pp. 421/20-35, 439/22-35]
[14] Evidence of Sarah Weatherill [A.R. at Vol. III, Tab 4(E), pp. 328/40-329/12; 330/46-331/10; 378/9-379/36]; Evidence of Patricia Mae Bell (née Bitango) [R.R. at p. 54/5-13].

trial was that he assaulted Varley by grabbing his shoulder in order to "calm him down." Varley was not placed under arrest at this time.[15]

16. After being hit, Varley immediately attempted to back away from Appellant. Appellant threw Varley to the floor and handcuffed him. He continued to punch Varley once Varley was down. Appellant was very angry at this point.[16]

17. Despite Alaine Varley's pleading, Appellant refused to release Darren Varley into his sister's custody. Appellant took Varley outside and placed him in the police cruiser without incident. Alaine Varley continued to plead with Appellant to release Varley into her custody.

18. At no time did Darren Varley attempt to leave the police car.[17] Alaine Varley opened the rear door of the police vehicle and spoke briefly with her brother in an effort to reassure him that everything was going to be okay. She shut the police vehicle door at the request of Appellant.

19. Appellant went back into the hospital. At this point, Varley kicked out the passenger side rear window of the police vehicle in an effort to get the attention of Tony Radvak and Danielle Bachand who by this time were in the hospital parking lot. Varley asked them if they had found Chandelle, to which they replied they had not. Varley was excited and concerned about Chandelle, but he was not angry.[18]

20. Sarah Weatherill and Pat Bitango witnessed the events and told Appellant when he returned to the hospital that they wanted to make a complaint over how he treated Varley.

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[15] Evidence of Earl Langille [A.R. at Vol. II, Tab 4(C), p. 242/1-15]; Evidence of Sarah Weatherill [A.R. at Vol. III, Tab 4(E), pp. 328/11-330/7; 378/16-381/12; 382/4-32]; Evidence of Patricia Mae Bell (née Bitango) [R.R. at pp. 54/5–55/32]; Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 744/28-745/22; 752/36-753/4].

[16] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 746/11-42, 753/3-28]; Evidence of Patricia Mae Bell (née Bitango) [R.R. at pp. 73/15-23, 61/33–72/25]. See also: Evidence of Earl Langille [A.R. at Vol. II, Tab 4(C), pp. 223/1-230/25; 238/24-38; 260/4-263/21]; Evidence of Alayna Dyck [A.R. at Vol. II, Tab 4(D), p. 285/17-42]; Evidence of Sarah Weatherill [A.R. at Vol. III, Tab 4(E), pp. 330/9-331/25; 332/17-333/35; 334/19-31; 335/8-47; 338/6-22; 352/5-20; 382/1-32]; Evidence of Patricia Mae Bell (née Bitango) [R.R. at pp. 56/36–57/18, 58/1–45, 59/13–41, 60/3–16].

[17] Evidence of Laura Weatherill [A.R. at Vol. II, Tab 4(B), pp. 172/18-173/35]; Evidence of Alaine Varley [A.R. at Vol. III, Tab 4(F), pp. 445/1-446/14; 446/27-447/43].

[18] Evidence of Anthony John Radvak [R.R. at pp. 4/35–7/14, 8/5-22].

Appellant spoke to them in a loud and angry tone.[19] Sarah Weatherill phoned Sergeant Gary Mills at home around 4:00 a.m. to complain about Appellant's conduct.[20]

The Shooting Death

21. Upon arrival at the police station, Appellant escorted Varley from the police car into the book-in area. At the book-in counter, the usual personal articles were removed from Varley. Appellant placed Varley face down on the floor and removed the handcuffs and kicked them to the side.[21] Varley then removed his own shoes without hesitation or assistance.[22] All of this occurred without incident. Appellant assisted Varley to his feet before guiding him directly towards the drunk tank which was the only available cell that morning. Tragically, Darren Varley was killed less than four minutes later.

22. According to Piet Schiebout, a guard at the detachment who was present at this time, Varley was "agitated", quite verbal and possibly intoxicated. Appellant was pushing Varley along into the book-in area as Varley seemed reluctant to go in himself.[23] Schiebout testified that Varley was resistant in that "he seemed to stop and not move on his own". Appellant pushed Varley "quite forcibly" toward the cell.[24] The distance from the book-in area to the cell where Varley was to be lodged was only six feet.[25]

23. Appellant did not formally arrest Varley, give him his right to counsel or afford him an opportunity to phone a lawyer. Varley had asked a number of times why he was being placed into the cells.[26]

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[19] Evidence of Laura Weatherill [A.R. at Vol. II, Tab 4(B), p. 202/38-44]; Evidence of Laura Weatherill [A.R. at Vol. II, Tab 4(B), pp. 174/1-175/3; 200/4-202/1]; Evidence of Alayna Dyck [A.R. at Vol. II, Tab 4(D), pp. 287/17-24; 290/45-291/3; 306/2-45]; Evidence of Sarah Weatherill [A.R. at Vol. III, Tab 4(E), p. 344/1-345/18]; Evidence of Patricia Mae Bell (née Bitango) [R.R. at pp. 68/18–35]; Evidence of Alaine Varley [A.R. at Vol. III, Tab 4(F), pp. 447/45-450/5].
[20] Evidence of Sarah Weatherill [A.R. at Vol. III, Tab 4(E), pp. 345/34-346/23].
[21] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 779/18-780/43].
[22] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), pp. 600/5-602/4].
[23] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), p. 580/1-17 and pp. 594/12-596/29].
[24] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), pp. 603/27-604/32].
[25] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), p. 605/3-10].
[26] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), pp. 602/8-603/22; 605/47-606/3; 606/31-33; 606/26-33].

24. There is no evidence that Appellant was required to carry a firearm when escorting Varley into the cell, although this was the practice at Pincher Creek at the time.[27] Appellant did not have his ASP (baton) with him and his "pepper" spray was not on his belt at the time.

25. Schiebout followed Appellant and Varley to the cell with the keys which he put in the cell door. Schiebout then returned to the book-in area and closed the door separating the two areas behind him. When he left the cell area, Varley was ahead of the toilet facing the back wall and Appellant was behind him at the doorway. Schiebout expected Appellant to come out of the cell area right behind him.[28]

26. According to Appellant's statements to Inspector Cantafio (see para. 37 below), once inside the cell, Varley came back at him. They grappled with each other. Varley managed to pull Appellant's protective vest over his head. Appellant worked his vest off and threw it down himself.[29] He immediately saw Varley's hand on his gun which was almost completely out of the holster. Appellant "went through the roof"[30] and at that point he made a decision that he was going to shoot Varley.[31] Appellant stated he feared for his life. He focused his total attention on the gun and with both hands wrestled it free from Varley's grip.[32]

27. At trial, Schiebout testified that just as he closed the door to the cell area and went toward the book-in desk, he heard two shots, a second or two apart. In his original statement, he indicated that the shots were fired two to three seconds apart.[33] Herman No Chief was in the cell next to the drunk tank at the time of the shooting. No Chief was in custody for intoxication. He was awakened by the sound of two loud bangs that he guessed were some three seconds apart.[34]

28. Upon hearing the second shot, Schiebout turned to reach for the door and saw Appellant opening the door on his own from the other side. He described in some detail how Appellant had his bullet-proof vest partially off, with his arms through the armholes and the vest up around his

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[27] ***R. v. Ferguson***, *supra* at para. 76 [A.R. at Vol. I, Tab 2(D)].
[28] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), pp. 606/42-610/30].
[29] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 756/27-757/12].
[30] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 755/6-18; 755/35-756/22].
[31] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 765/13-766/16].
[32] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 783/14-788/19].
[33] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), pp. 611/47-612/22; 613/1-17].
[34] Evidence of Herman No Chief from first trial read in by agreement [R.R. at p. 53/22-25].

facial area.[35] Appellant told Schiebout "…the prisoner fought me for my gun and I had to shoot him." He then said that he would get a hold of an ambulance and some of the "other guys."[36]

29. Appellant first phoned his friend, Constable Gord Pitt, at home and advised him what happened. It was only after that call that Appellant called for an ambulance.[37] And, this occurred only after Appellant took two photographs of Varley laying on the cell floor. At no time did Appellant check on the condition of Darren Varley after he shot him.[38]

30. Appellant met Pincher Creek ambulance personnel Lorne Dewart at the detachment cells. Appellant told Dewart that he wrestled his gun away from someone, got control of the gun and shot him twice. Appellant testified that Varley pulled his bullet-proof vest over his head and face. But shortly after the incident, Appellant told Dewart that during the struggle with Varley, Appellant had taken his own vest off to protect himself.[39]

31. After initial treatment at the Pincher Creek Hospital, Varley was transported to the Calgary Foothills Hospital via air ambulance where he died.

32. The autopsy and other forensic evidence confirmed two gunshot wounds: one to the head and one to the stomach. The cause of death was the second gunshot wound to the head.[40] The forensic evidence indicated that neither shot was fired at close range. Both shots would have been at a range of at least greater than nine inches from the muzzle of the gun.[41] Dr. Denmark, who performed the autopsy, testified that he would expect an individual to be bent over after being shot in the abdomen. Further, he stated that the evidence he gathered was consistent with Darren Varley being bent over when the second shot was fired through his head. Indeed, his head could have been as little as 13 inches from the floor.[42] The first bullet to the abdomen entered along the right side of the abdomen. Its path indicates that Varley would have been

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[35] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), pp. 615/4-616/32; 617/45-619/17]; Evidence of Earl Albert Lounsbury [R.R. at p. 3/20-24].
[36] Evidence of Piet Schiebout [A.R. at Vol. III, Tab 4(H), pp. 620/24-621/7].
[37] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 730/10-731/5; 733/20-27].
[38] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), p. 731/7-31].
[39] Evidence of Lorne Edward Dewart [R.R. at pp. 14/7–15/36, 16/10-22].
[40] Evidence of Dr. Lloyd Denmark [R.R. at pp. 18/10–17, 20/2–21/1].
[41] Evidence of Dr. Lloyd Denmark [R.R. at pp. 18/18–25, 19/22-25, 22/40-45]; Evidence of Alan John Voth [R.R. at pp. 30/43–32/13].
[42] Evidence of Dr. Lloyd Denmark [R.R. at pp. 23/24–25/27]; and see Evidence of Bruce Allan Maclean [R.R. at pp. 38/3–19, 39/45–40/10, 43/4–28, 44/6–2].

standing sideways to Appellant when he was shot. This wound was not fatal.[43] The second bullet entered the left side of the skull three inches above and slightly behind the ear, traveled through the brain at a "slight down and forward angle" and emerged on the right side of the skull just forward of and two inches above the right ear near the temple area.[44]

33. Staff Sergeant Bruce MacLean, blood spatter expert, gave the following evidence at trial:

- Darren Varley was bent over when shot in the head. His head could have been as low as 13 inches from the floor when this shot was fired.[45]
- Darren Varley did not move after he hit the floor.[46]
- Darren Varley would have been shot while his head was between 23 to 28 inches from the north wall (the wall furthest from the cell door).[47]

34. Expert evidence showed that Darren Varley's blood alcohol level at the time of his death was between 200 to 210 milligrams percent in 100 millilitres of blood.[48] A reading that high would be expected to affect an individual's fine and gross motor skills. Amongst other things vision, muscle coordination and strength would be significantly affected.[49] According to Appellant's own observations, Varley was at least "twice the legal limit."[50]

35. Appellant claims he shot "instinctively" and without aiming the gun. It should be noted that "Instinctive Shooting", more properly known as Instinctive Directive shooting (or sightless shooting) is in fact a controlled method of shooting at close range whereby the officer focuses his attention on the subject rather than the sights of the gun.[51]

36. Appellant suggests that the two shots were fired one almost immediately after the other. He also suggests that one aspect of his firearm training called for a police officer to fire two shots rapidly ("double tapping") when faced with an imminent and serious threat (see paras. 14 and 16 of his factum). Respondent disputes these facts.

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[43] Evidence of Dr. Lloyd Denmark [R.R. at p. 17/7-27].
[44] Evidence of Dr. Lloyd Denmark [R.R. at pp. 18/10–17, 20/2–71/1].
[45] Evidence of Bruce Allan Maclean [R.R. at pp. 38/3–19, 39/45–40/10, 43/4–28, 44/6–20].
[46] Evidence of Bruce Allan Maclean [R.R. at pp. 41/25-30, 42/35-39].
[47] Evidence of Bruce Allan Maclean [R.R. at p. 44/25–36].
[48] Evidence of Dr. Peter Philip Singer [R.R. at pp. 33/42–34/17].
[49] Evidence of Dr. Peter Philip Singer [R.R. at pp. 34/35–37/9].
[50] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), p. 696/11-42].
[51] Evidence of Herbert Hahn [R.R. at pp. 28/36–29/20]; Evidence of John Robert Ervin [R.R. at p. 52/31–39]; Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I) at p. 709/38-46].

Appellant's Inconsistent Evidence

37. After consulting his legal counsel, Appellant provided a *Charter*-cautioned statement and a video taped re-enactment of the events at the detachment cellblock, on October 3 and 4, 1999.[52] He provided another clarifying *Charter*-cautioned statement[53] and video taped re-enactment[54] on October 13, 1999. Inspector John Cantafio testified that each time he met with Appellant, he took deliberate steps to ensure that Appellant was in the proper state of mind to give an accurate cautioned statement.[55] No issue was taken with the admissibility of these statements at trial.

38. At trial, Appellant denied that he aimed the gun at Varley's head on the second shot. However, according to his own statements to Inspector Cantafio and the video taped re-enactment, after regaining control of his gun, he immediately pointed the gun at Varley and "instinctively" shot one round to his center of mass. Appellant then immediately raised the barrel and tracked it to Varley's head and while Varley was still on his feet, turning away and bent over from the first shot, he "instinctively" shot a second round.[56]

39. Appellant testified at trial and provided a version of events entirely different than those in his statements. Essentially, his position at trial was that both he and Varley were struggling for the gun at the time both shots were fired and that when the second shot was fired, Varley's head just happened to be in the way.[57] An objective view of the physical evidence, including the absence of gunshot residue on Varley's hands, or of his fingerprints or DNA on the weapon, together with the trajectory of the fatal shot, simply do not allow for Appellant's latest version of events.

Findings of the Trial Judge

40. Significantly, the Trial Judge found that Appellant was able to regain control of his firearm before firing at Varley, implicitly rejecting Appellant's version at trial that he and Varley

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[52] Interview between John Angelo Cantafio and Michael Esty Ferguson 1999 Oct. 3 and 4 [A.R. at Vol. IV, Tabs 5(J) and 5(k)].
[53] Interview between John Angelo Cantafio and Michael Esty Ferguson 1999 Oct. 13 [A.R. at Vol. IV, Tab 5(L)].
[54] Interview between John Angelo Cantafio and Michael Esty Ferguson 1999 Oct. 13 [A.R. at Vol. V, Tab 5(M)]; D.V.D. of October 13, 1999 Video Re-enactment by Michael Esty Ferguson (Exhibit #44) (reproduced from VHS) which was viewed by the Alberta Court of Appeal during oral arguments [R.R. at p. 74].
[55] Evidence of John Angelo Cantafio [A.R. at Vol. III, Tab 4(G), pp. 517/18-519/18 and 544/9-24].
[56] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 790/31-791/7; 791/40-792/10]; and see [A.R. at Vol. V, Tab 4(M)]; D.V.D. re-enactment (Exhibit #44) [R.R. at p. 74].

were struggling for the gun at the time both shots were fired[58]. This finding is consistent with Appellant's video re-enactment made on October 4, 1999 in which he demonstrated that after the first shot, while Varley was bent over and turning away from him, Appellant tracked Varley's head, aimed and fired the second shot.[59]

41. The Trial Judge held that, unlike the first shot to the abdomen, the second shot to the head could not have been in self defence. He also found that the second shot was not a deliberate shot to the head but rather a shot fired unnecessarily in close quarters. This latter finding is inconsistent with the video re-enactment evidence described above, which the Trial Judge implicitly preferred over Appellant's testimony in coming to the conclusion that he had regained control of his gun by the time of the second shot.

42. The Trial Judge found that the second shot was taken between less than a second and two to three seconds after the first. He also held that the second shot was fired as a result of firearms training with the RCMP. He suggested it was an instinctive and almost instantaneous reaction to what had been a life threatening situation moments before.[60]

43. With respect, the Court of Appeal was correct to reject the Trial Judge's characterization that the two shots were fired instinctively, in an almost instantaneous reaction and as a result of training. The Court of Appeal noted that describing the two shots as "instantaneous" or "instinctive" suggests that they were fired in rapid succession with no chance for reflection in between. If so, there would have been no basis for the jury to conclude that the first shot was fired in self defence but the second shot was not. Moreover, given the Trial Judge's finding that Appellant did not honestly believe he was in danger of death or grievous bodily harm at the time of the second shot, there must have been a sufficient temporal gap to allow him to reflect and change his view about his state of danger.[61] Thus, the Trial Judge's characterization is inconsistent with the jury's finding as well as his own.

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[57] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 684/12-44; 709/1-710/16].
[58] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 684/12-44; 709/1-710/16].
[59] Reasons for Judgment of Hawco J. at para. 3; [A.R. at Vol. I Tab 2(C) pp. 36-38]; ***R. v. Ferguson****, supra* at para. 27, 30; [A.R. at Vol. I, Tab 2(D)]; See also, Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), pp. 783/14-788/19] showing that Appellant wrestled the gun free from Varley; and see Evidence of Dr. Barbara Schmalz [A.R. at Vol. V, Tab 4(N), p. 973/33-42].
[60] Reasons for Judgment of Hawco J. at paras. 35, 40 [A.R. at Vol. I Tab 2(C) p 58].
[61] ***R. v. Ferguson***, *supra* at para. 34 [A.R. Vol. I, Tab 2(D)].

44. Further, rather than trying to follow the "logical process of the jury" to find what "the jury must have concluded", the Trial Judge ought to have come to his own determination of the relevant facts conducting his own independent assessment of the relevant facts.[62]

45. The Court of Appeal also correctly held that the Trial Judge erred in finding that Appellant's training required firing two quick shots in succession. The evidence does not support such a conclusion. The expert evidence regarding RCMP policy disclosed that officers must engage in a process of continuous risk assessment for the purpose of determining available options in any given situation and as situations change. This could include open hand techniques, use of weaponry, verbal commands, repositioning, among others.[63] The RCMP Firearm's Policy requires a fear of death or grievous bodily harm before the weapon may be discharged. Officers must consider less lethal options at each stage of assessment or reassessment such as "pepper spray", baton, physical force or retreat.[64] "Double Tap" drills in which two shots are quickly fired in a tight pattern, relate to situations where there is a fear that assailants are armed and wearing body armour.[65]

Judicial History

46. Appellant applied for an individual constitutional exemption from the mandatory minimum four-year prison sentence that would otherwise apply to any person who uses a firearm to commit manslaughter, pursuant to s. 236(a) of the *Criminal Code*. He did not challenge the constitutionality of s. 236(a) in general nor did he seek to read down the provision as it applies to an identifiable group of persons, such as police officers. Rather, he argued that the mandatory sentence amounted to cruel and unusual punishment in his particular case. The Trial Judge granted a constitutional exemption to Appellant and imposed a conditional sentence of two years less one day.

47. The majority of the Court of Appeal overturned this ruling, finding there was no violation of s. 12 of the Charter. Aside from the factual errors identified above, the majority held that the Trial Judge committed several legal errors in his s. 12 analysis. In particular, he used the wrong

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[62] *Ibid.* at para. 12 [A.R. at Vol. I, Tab 2(D)].
[63] Evidence of John Robert Ervin [R.R. at pp. 45/14-38, 46/1–47/5]; Evidence of Herbert Hahn [R.R. at pp. 26/41-27/12].
[64] Evidence of John Robert Ervin [R.R. at pp. 48/33–44, 49/40–50/4].
[65] Evidence of John Robert Ervin [R.R. at pp. 51/14-38].

criteria to assess the gravity of the offence, including the moral blameworthiness of Appellant; failed to take into consideration provision of the *Corrections and Conditional Release Act* when assessing the effect of the minimum sentence on Appellant; erred in concluding that Parliament did not intend the tough sentencing measures to apply to police officers; misapplied this Court's decision in ***Morrisey***; purported to exempt Appellant from the minimum sentence on the basis of his status as a police officer despite finding that his extensive firearms training and position of trust were aggravating factors. The majority also found that even had there been a s. 12 violation, an individual constitutional exemption of the type fashioned by the Trial Judge is not a remedy available in Canadian law.

48. Respondent submits that regardless of whether the Court of Appeal was correct to interfere with the facts as found by the Trial Judge, even characterizing the facts in their most favourable light for Appellant, a four-year mandatory sentence does not amount to cruel and unusual punishment.

PART II – QUESTIONS IN ISSUE

Question in Issue 1 Does the mandatory minimum sentence prescribed by s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, constitute cruel and unusual punishment in the appellant's case, in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*?

Respondent's Position with regard to Question in Issue 1 **The answer is no. In fact, Appellant's sentence is fit and appropriate in the circumstances.**

Question in Issue 2 If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Respondent's Position with regard to Question in Issue 2 **This question does not arise. In the alternative, the answer is yes. While a breach of s. 12 may only be justified under s. 1 in exceptional cases, this is such a case. Parliament's intent is to denounce and provide a certain deterrent for the use of guns in crime. A four year minimum sentence for manslaughter committed with a firearm is proportionate in virtually all imaginable cases.**

Question in Issue 3 If the answer to Question 2 is "no", does Canadian law recognize the availability of a constitutional exemption on a case-by-case basis from the statutory mandatory minimum sentence set out in s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46?

Respondent's Position with regard to Question in Issue 3 **This question does not arise. However, Canadian law does not recognize a constitutional exemption on a case-by-case basis from a statutory mandatory minimum sentence. If s. 236(a) violates s. 12 of the *Charter*, the proper remedy is to declare s. 236(a) to be of no force and effect and allow Parliament an opportunity to rectify any constitutional deficiency. An individual constitutional exemption is contrary to the analytical framework of the *Charter* and the constitutional dialogue, undermines the legislative scheme and imports an unacceptable degree of uncertainty into the law. Such remedy should only be available for the period during which a declaration of invalidity is suspended.**

PART III – ARGUMENT

A. Introduction

49. The central issue is whether a four-year minimum prison sentence for committing unlawful act manslaughter with a firearm is so grossly disproportionate to the crime as to outrage society's sense of decency. Would Canadians find it abhorrent or intolerable to sentence an offender to four years in prison for killing his victim by means of a criminal assault with a firearm? Based on authority and common sense, the answer must be no. There is no circumstance where a four-year prison term is grossly disproportionate to the offence of manslaughter committed with a firearm. Appellant's case is no exception.

50. The mandatory minimum sentence in s. 236(a) of the *Criminal Code* is legitimately aimed at deterring and denunciating the criminal misuse of firearms to protect the public.[66] Parliament has recognized that guns are inherently dangerous and pose a risk to public safety. As such, their criminal misuse must be deterred as part of an overall regime of gun control.

51. As this Court held in ***R. v. Felawka***,[67] "no matter what the intention may be of the person carrying a gun, the firearm itself presents the ultimate threat of death to those in its presence". The fact that the offender was a police officer carrying a firearm in the course of his duty is not a mitigating factor as Appellant contends. In this context, it does not matter whether Appellant was lawfully in possession of a firearm in the course of duty or while on a hunting trip. It is not mere possession or opportunity that is being punished, rather it is the use of the firearm in the commission of a criminal offence. In fact, a police officer is trained in the use of firearms and is acutely aware of their inherent danger. Appellant was in a position of trust with the public, including the suspect in his charge. It is particularly egregious when a police officer violates this trust by committing a crime with a firearm, especially when the consequence is death.

52. In the alternative, if this Court finds that s. 236(a) resulted in a grossly excessive sentence in the circumstances of Appellant, then the appropriate remedy is to strike down the provision

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[66] ***Reference re Firearms Act (Can.)***, [2000] 1 S.C.R. 783 at paras. 20-21, 33 [R.B.A. Vol. III, Tab 24]; ***R. v. Morrisey***, *supra*, at para. 70 [A.B.A. at Vol. II, Tab 27]

[67] ***R. v. Felawka***, [1993] 4 S.C.R. 199 at 211 [R.B.A. Vol. I, Tab 13].

and allow Parliament an opportunity to craft a solution. A constitutional exemption should not be available except during the period of a suspended declaration of invalidity.

B. Section 12 of the *Charter*

53. The test for cruel and unusual punishment is well settled. Punishment which is merely disproportionate or excessive does not violate s. 12. Nor is a mandatory minimum sentence cruel and unusual *per se*.[68] Rather, the sentence must be so excessive or grossly disproportionate that it outrages standards of decency and Canadians would find it abhorrent or intolerable. This Court has stressed the importance of deferring to Parliament's choice of sentence. It is only in rare and unique circumstances that a court will find a sentence constitutes cruel and unusual punishment.[69]

54. The first step is to determine whether the punishment is grossly disproportionate for the individual offender having regard to the gravity of the offence, the personal characteristics of the offender, the particular circumstances of the case, the actual effect of the punishment on the individual, relevant penological goals and sentencing principles, the existence of valid alternatives to the punishment imposed and a comparison of punishments imposed for other crimes in the same jurisdiction.[70]

55. If the sentence is not grossly disproportionate for the individual offender, the court must then test the constitutionality of the sentence against reasonable hypotheticals. Reasonable hypotheticals cannot be extreme or far-fetched or marginally imaginable cases but must commonly arise in day-to-day life or be common examples of the crime in question.[71] As in ***Latimer,*** the constitutional questions stated by this Court restrict this appeal to the particularized inquiry under s. 12. Nonetheless, Appellant has also argued in the alternative, that s. 236(a) violates s. 12 of the *Charter* when applied to reasonable hypothetical situations. As such, Respondent will address both aspects of the s. 12 test beginning with the particularized inquiry.

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[68] ***R. v. Smith***, [1987] 1 S.C.R. 1045 at para. 65 [A.B.A. at Vol. II Tab 37]

[69] ***R. v. Smith,*** *supra*; ***Steele v. Mountain Institution*****,** [1990] 2 S.C.R. 1385 at 1417 [A.B.A. at Vol. II, Tab 41]; ***R. v. Goltz*****,** [1991] 3 S.C.R. 485 [A.B.A. at Vol. I, Tab 13]; ***R. v. Morrisey,*** *supra* [A.B.A. at Vol. II, Tab 27]; ***R. v. Latimer***, [2001] 1 S.C.R. 3 at paras. 73-78 [A.B.A. at Vol. I Tab 19].

[70] ***R. v. Morrisey,*** *supra* at paras. 26-29 [A.B.A. at Vol. II Tab 27].

[71] ***R. v. Morrisey,*** *supra* at paras. 30-33 [A.B.A. at Vol. II Tab 27].

56. The Alberta Court of Appeal was correct that the four-year mandatory minimum sentence for manslaughter with a firearm does not amount to cruel and unusual punishment in Appellant's case.

Gravity of the Offence

57. The gravity of the offence turns on both the character and consequences of the offender's actions.[72] There can be no more serious consequence than killing another person.[73] This factor alone makes the crime particularly grave. Moreover, the use of a firearm inherently increases the risk of death occurring.

58. Manslaughter may be committed either by committing an unlawful act or by criminal negligence. To be convicted of unlawful act manslaughter, in addition to the *mens rea* for the underlying act (here, an assault), at a minimum, Appellant must have had objective foresight of a risk of bodily harm that was neither trivial nor transitory. The unlawful act must be objectively dangerous.[74]

59. In ***Morrisey***, this Court upheld the minimum mandatory sentence for criminal negligence causing death with a firearm. In commenting on the gravity of the offence, Gonthier J. observed that we do not convict people who merely cause death unintentionally. Rather, in addition to the use of a firearm, the Crown must prove wanton or reckless conduct that was a marked departure from a reasonable person. This merits criminal sanction. In the present case, Appellant was not merely criminally negligent, he had the subjective intent to shoot Varley with a gun – an inherently dangerous weapon.

60. This Court has noted that an unintentional killing while committing a minor offence properly attracts a lighter sentence than an unintentional killing where the circumstances indicate an awareness of the risk of death, albeit short of the intention to murder.[75] Although the minimum *mens rea* required for unlawful act manslaughter is objective foreseeability of bodily harm, when a firearm is used in the commission of the crime, the risk of death is reasonably foreseeable. As a police officer, Appellant was trained in the use of firearms and well aware of

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[72] ***R. v. Morrisey,*** *supra* at para. 35 [A.B.A. at Vol. II, Tab 27].
[73] ***R. v. Creighton,*** *supra* at p. 19, per Lamer C.J [R.B.A. Vol. I, Tab 10].; ***R. v. Goltz,*** *supra* at para. 35 [A.B.A. at Vol I Tab 13].
[74] ***R. v. Creighton,*** *supra* at p. 42-43 [R.B.A. Vol. I, Tab 10]; ***R. v. DeSousa***, *supra* [R.B.A. Vol. I, Tab 11].
[75] ***R. v. Creighton,*** *supra* at p. 48. [R.B.A. Vol. I, Tab 10]

their deadly nature. He more than anyone would be subjectively aware of the risk of death created by unlawfully shooting a person.

61. Causing the death of another through negligence or a dangerous unlawful act requires a special sanction to reflect the gravity of the offence, even though death may not have been objectively foreseeable.[76] Surely the use of a firearm "ups the ante". This Court described criminal negligence causing death with a firearm as a "particularly grave offence".[77] No less can be said of unlawful act manslaughter under s. 236(a). The Court of Appeal correctly observed that in many cases, the predicate offence for unlawful act manslaughter will have a higher subjective *mens rea* than negligence making the conduct more morally culpable than manslaughter by criminal negligence. Here, Appellant had the subjective intent to commit an assault or indeed an aggravated assault while on duty. His moral culpability was surely no lower than the wanton and reckless disregard for safety displayed in ***Morrisey.***[78]

62. In assessing the gravity of the offence, Fruman J.A., for the majority of the Court of Appeal, correctly noted that the overall moral blameworthiness for the crime contemplates more than the minimum *mens rea* required, given the wide range of circumstances covered by unlawful act manslaughter. She applied the criteria set out in ***R. v. Laberge*** including the nature and quality of the act, the method used, the degree of planning and deliberation, and the offender's awareness of risk**.**[79] The more Appellant subjectively knew or was reckless to the fact his unlawful act would not only create a risk of death but actually cause death, the higher the culpability. Similarly, the more his conduct suggests he ought to have known that life-threatening injuries would result, the greater the culpability. In this regard, Fruman J.A. concluded:

> *The judge made a critical finding that Ferguson had regained control of the gun before firing…At that point, Varley was unarmed and intoxicated, in his t-shirt and socks. The shots were fired in very close quarters. Ferguson admitted he knew that if he pulled the trigger he would hit Varley and that he was aiming to hit him – to stop him – because he believed if Varley got his gun, Varley would shoot him…Both objective foresight and subjective intent were clearly present: Ferguson formed the intention to shoot Varley at close range and knew this was*

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[76] ***R. v. Creighton,*** *supra* at p. 56 [R.B.A. Vol. I, Tab 10].
[77] ***R. v. Morrisey,*** *supra* at para. 37 [A.B.A. at Vol. II Tab 27].
[78] ***R. v. Ferguson,*** *supra* at para. 56-57 [A.R. at Vol. I, Tab 2(D)].
[79] ***R. v. Laberge*** (1995), 165 A.R. 375 (C.A.) at paras. 7-8, 17-21 [R.B.A. Vol. II, Tab 16]. In ***R. v. Stone***, [1999] 2 S.C.R. 290 at para. 247, this Court cited the factors considered in ***Laberge*** to determine an appropriate sentence for manslaughter [R.B.A. Vol. II, Tab 22].

> *likely to put Varley at risk of, or cause, life-threatening injuries. The trial judge also made a specific finding that at the time he fired the second shot, Ferguson did not honestly believe he was in danger of death or grievous bodily harm…Having wounded Varley and stopped any threat with the first shot, the second fatal shot was "unnecessary" or "negligent" (as the judge characterized it in paras. 3.9 and 36). On the basis of this preliminary assessment, Ferguson would have a high level of moral culpability.*[80]

Notwithstanding these finding of a high level of moral culpability, the Court of Appeal only sentenced Appellant to the minimum mandatory sentence of four years.

63. There are no trivial acts of manslaughter, particularly with a firearm.[81] When Appellant's subjective and objective intent are examined, it is apparent his moral culpability is at the high end. Coupled with the most drastic consequence of death, the offence can only be described as very grave.

Particular Circumstances of the Offender and the Case

64. This stage focuses on mitigating and aggravating factors that would affect the appropriateness of the sentence.[82] There are a number of aggravating factors in this case relative to Appellant:

- He was in a position of trust towards his victim. Mr. Varley was in his custody and control.
- He had extensive training in the use of firearms, over and above standard R.C.M.P. courses.
- He was not required to bring his gun with him into the cell. He chose to do so when there were alternatives available (e.g. pepper spray or baton). At that time, Mr. Varley was highly intoxicated, unarmed and dressed in a t-shirt and socks.
- The fact that police officers carry guns in the course of duty does not make it less of a crime to commit manslaughter. It is precisely because police officers routinely carry guns and receive special training that we expect a higher standard of care handling their firearms than for a normal citizen.[83]
- In the video re-enactment, Appellant demonstrated that after the first shot to the abdomen, Varley was bent over somewhat and turning away from him. Appellant then tracked

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[80] ***R. v. Ferguson,*** *supra* at para. 67 [A.R. at Vol. I, Tab 2(D)].

[81] Indeed, in the context of the mandatory sentence in s. 85 of the *Criminal Code*, there is no trivial way to use a firearm in the commission of an indictable offence no matter how comparatively insignificant the offence may be: ***R. v. Born With A Tooth*** (1994), 159 A.R. 86 (Q.B.) at para. 28 [R.B.A. Vol. I, Tab 6].

[82] ***R. v. Morrisey,*** *supra* at para. 38 [A.B.A. at Vol. II, Tab 27].

[83] ***R. v. Ferguson,*** *supra* at para. 74 [A.R. at Vol. I, Tab 2(D)]; and see ***R. v. Morrisey,*** *supra* at para. 86, per Arbour J. [A.B.A. at Vol. II, Tab 27]

Varley's head, aimed and fired the second shot. The medical and blood spatter evidence were consistent with Varley being bent over, at least slightly, when the second shot to the head was fired. (See ***R. v. Ferguson****, supra* at paras. 27-28)

- At no time did he check on the condition of Darren Varley after he shot him.[84] There is no indication of any remorse.

65. There are also mitigating factors to consider respecting Appellant. He served on the R.C.M.P. for 19 years. He had no criminal record and there is no reason to suspect he will re-offend. Finally, he acted in a compressed time frame to what had initially been a perceived threat from Varley, who initiated the altercation in the cell.

66. The last mitigating factor merits further comment. The Trial Judge found that the shots were fired between less than a second and three seconds apart (para. 40). Given that the jury did not find the second shot was fired in self defence, there must have been sufficient time for Appellant to reassess his personal danger and the need to fire again. As such, the second shot could not have been "instinctive" or an "instantaneous reaction" otherwise there would have been no basis to distinguish the two shots in terms of self defence. Appellant's training was a factor but the evidence does not support a finding that R.C.M.P. officers are trained to fire two shots regardless of whether the life threatening situation remained.[85]

67. The mitigating factors do not offset the aggravating factors in this case. Nor do they displace the gravity of the offence.

68. It is difficult to conceive how the circumstances of this case are any less morally blameworthy than in ***Morrisey***. In that case, the offender was highly intoxicated and in a state of extreme emotional distress when he recklessly slipped off a bunk bed causing his loaded gun to discharge and kill the victim. He did not intend to shoot his gun let alone wound the victim. The act was purely inadvertent, albeit criminally negligent. Morrisey was sincerely remorseful from the outset and assumed responsibility for his actions. He had no criminal record. This Court concluded that the minimum four-year sentence pursuant to s. 220(a) of the *Criminal Code* did not amount to cruel and unusual punishment in those circumstances nor in any reasonable hypothetical case.

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[84] Evidence of Michael Esty Ferguson [A.R. at Vol. IV, Tab 4(I), p. 731/7-31].
[85] ***R. v. Ferguson,*** *supra* at para. 34, 37-38; See evidence cited above at para. 45 of this Factum.

69. In contrast, Appellant was not merely criminally negligent, he intended to shoot Varley in close quarters. There is no evidence of any remorse. If a four-year mandatory sentence is not a cruel and unusual punishment in the case of a drunken mishap with a firearm or a "hunting trip gone awry" or "playing around with a gun" (the reasonable hypotheticals posited by Gonthier J. in ***Morrisey***), how could it be so for a manslaughter in which the offender intended to assault the victim by shooting him with a gun? Respondent submits that ***Morrisey*** is dispositive of this appeal.[86]

Actual Effect of the Punishment on the Individual

70. The nature, conditions and duration of the punishment must be considered to assess its actual effect on the offender. In this case, the Trial Judge awarded Appellant three-for-one credit for 70 days of pre-trial custody, thereby shortening the actual time served in custody to about three years and five months. However, the Trial Judge erred in failing to consider the availability of parole. Appellant would have been eligible for day parole after less than eight months and full parole after less than 14 months. This mitigates the harshness of the mandatory sentence imposed.[87]

71. Appellant argued that as an ex-RCMP officer, his time in custody would be more difficult than for other offenders. The Trial Judge suggested that he would need to be placed in protective custody for the full period of imprisonment as his safety would always be in danger. However, he failed to consider the provisions of the *Corrections and Conditional Release Act* which are designed to ensure sentences are carried out in a safe and humane manner, using the least restrictive measures consistent with protection of the public, staff members and offenders.[88] In particular, s. 121 of the *Act* provides discretion to grant parole at any time to an offender whose physical or mental health would likely suffer serious damage from continued confinement or for whom it would constitute an excessive hardship.

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[86] See also the majority judgment in ***R. v. Birchall***, 2001 BCCA 356 [A.B.A. at Vol. I, Tab 6]; In ***R. v. Colville,*** (2005), 201 C.C.C. (3d) 353 (Alta. C.A.) at paras. 11, 13, the Court held that s. 236(a) did not violate s. 12 of the *Charter* in circumstances where the offender smashed a window with the barrel of his rifle which discharged. At the time, he did not believe the gun was loaded and did not intend to hurt the victim. He was trying to effect a citizen's arrest. [R.B.A. Vol. I, Tab 9]

[87] ***R. v. Morrisey,*** *supra* at paras. 41-42 citing this Court's decision in ***R. v. Wust,*** [2000] 1 S.C.R. 455 [A.B.A. Vol. II, Tab 27]; ***R. v. Ferguson,*** *supra* at paras. 80-82 [A.R. at Vol. I, Tab 2(D)**;** *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 119(1)(c)(i) and 120(1) [pp. 45-58 of these materials].

[88] *Corrections and Conditional Release Act,* S.C. 1992, c. 20, ss. 3(a), 4(d), 68-71, 87, 121[pp. 45-58 of these materials].

72. The mere fact an offender must serve time in protective custody cannot alone render a sentence cruel and unusual. Otherwise, mandatory minimum sentences would always be constitutionally suspect whenever a particular offender is likely to experience a hard time in prison, whether due to the status of the offender (eg. a police officer), his conduct (e.g. an informant) or his particular frailty. There is a system in place to protect the health and safety of prisoners.

Comparison of Punishments for other Crimes in the same Jurisdiction

73. Appellant cites several cases (paras. 38-42 of his factum) where sentences imposed for manslaughter were less than four years. He argues this demonstrates that the mere use of a firearm will not always, in and of itself, justify the mandatory minimum four-year sentence. Even if this is correct, it does not follow that the mandatory minimum is grossly disproportionate in violation of s. 12 of the *Charter*. Moreover, the cases cited were all decided prior to the introduction of s. 236(a) of the *Criminal Code* and before the decision of this Court in ***Morrisey***.

74. These cases must be viewed with caution in assessing the constitutionality of s. 236(a). In her concurring opinion in ***Morrisey***, Arbour J. held that the mandatory minimum sentence for firearms-related offences must act as an "inflationary floor", applicable to the so-called best offender. Over time, sentences come to reflect the inflationary consequences of the new minimum.[89] It is unwise to simply measure gross proportionality against an existing range of sentences because, subject to constitutional limits, Parliament is entitled to create aggravated forms of existing offences with enhanced punishments.[90]

75. When considering the harm caused by manslaughter, it is at least arguable that this crime is more serious than others that receive the same sentence such as robbery with a firearm.[91]

The Penological Goals and Sentencing Principles

76. In ***Morrisey***, Gonthier J. held that "unquestionably, Parliament is entitled to take appropriate measures to address the pressing problem of firearm-related deaths, especially given

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[89] ***R. v. Morrisey,*** *supra* at paras. 75-76 [A.B.A. at Vol. II, Tab 27].
[90] ***R. v. McDonald*** (1998), 127 C.C.C. (3d) 57 (Ont. C.A.) at para. 68 [R.A.B. Vol. II, Tab 18].
[91] ***R. v. Morrisey,*** *supra* at para. 49 [A.B.A. at Vol. II, Tab 27]; See also ***R. v. McDonald,*** *supra* in which the Ontario Court of Appeal rejected a s. 12 challenge to the minimum four-year sentence imposed in s. 344(a) of the *Criminal Code* for robbery with a firearm [R.A.B. Vol. II, Tab 18].

that it has been consistently a serious problem for over 20 years".[92] Further, Parliament is entitled to pursue the "sentencing principles of general deterrence, denunciation, and retributive justice more than the principles of rehabilitation and specific deterrence".[93]

77. It is equally critical to deter and denunciate the use of firearms in the commission of manslaughter by offenders who engage in dangerous unlawful acts.

78. The minimum sentence serves as a collective condemnation of the offender's conduct for encroaching on society's basic code of values.[94] It is a statement that dangerous unlawful acts involving a firearm which result in death are unacceptable.[95] The minimum sentence forces the offender to acknowledge the harm and imposes a punishment that is commensurate with that harm.[96]

79. Appellant argues that Parliament failed to take into account the fact he is a police officer who is required to carry a firearm. However, this Court noted in ***Latimer***:

> *It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has a broad discretion in proscribing conduct as criminal and in determining appropriate punishment.*[97]

80. There is no basis for the conclusion that Parliament did not intend the mandatory minimum sentences imposed in the *Firearms Act*, S.C. 1995, c. 39, to apply to police officers who carry guns as part of their duty. As Fruman J.A. observes, Parliament specifically addressed its mind to the position of peace officers in s. 139 of the *Firearms Act* and created particular exemptions where appropriate.[98] It chose not to exempt peace officers from the application of s. 236(a) of the *Criminal Code.* This is hardly surprising. The fact police officers must carry firearms does not in any way minimize the moral blameworthiness or the harm caused by criminal acts committed with guns. Given that police officers are in a position of trust and are

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[92] ***R. v. Morrisey*****,** supra at para. 43 [A.B.A. at Vol. II Tab 27].
[93] ***R. v. Morrisey,*** *supra***,** at para. 46 [A.B.A. at Vol. II Tab 27].
[94] ***R. v. Latimer,*** *supra* at para. 86 [A.B.A. at Vol. I, Tab 19].
[95] ***R. v. Morrisey,*** *supra* at para. 47-48 [A.B.A. at Vol. II Tab 27].
[96] ***R. v. Morrisey,*** *supra* at para 48 [A.B.A. at Vol. II Tab 27]; See also ***R. v. M.(C.A.)***, [1996] 1 S.C.R. 500 at paras. 79-81 [R.B.A. Vol. II, Tab 17].
[97] ***R. v. Latimer,*** *supra* at para. 77 [A.B.A. at Vol. I Tab 19].
[98] ***R. v. Ferguson,*** *supra* at para. 88 [A.R. at Vol. I Tab 2(D)]; e.g. see the exemption now found in s. 117.07 of the *Criminal Code* [pp. 60-63 of these materials].

specially trained in the use of firearms, the commission of a crime such as manslaughter with a firearm is even more reprehensible.[99]

81. Section 12 does not hold Parliament to so exacting a standard as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender.[100] As Fruman J.A. noted, police officers are not immune from the problem of firearms-related deaths Parliament sought to address.

Conclusion – There is no s. 12 Violation in the Particular Circumstances of this Case

82. Appellant's crime was grave. He committed a criminal assault or aggravated assault with a firearm, and killed Mr. Varley. Appellant was in a position of power and trust: Varley was intoxicated and in his custody. Not only was the unlawful act dangerous, serious bodily harm or death was at least objectively foreseeable and in all likelihood, subjectively foreseeable. Parliament is entitled to pass a sentence that emphasizes the principles of deterrence and denunciation. In these circumstances, a four-year jail term can hardly be seen as grossly disproportionate so as to outrage society's sense of decency. Far from abhorrent or intolerable, such a sentence is proportionate to the crime.

Consideration of the Reasonable Hypothetical

83. While not raised by Appellant in the courts below, nor in the constitutional questions posed by this Court, Appellant argues an alternative position that s. 236(a) violates s. 12 of the *Charter* based on a consideration of reasonable hypothetical cases. He posits cases of unlawful act manslaughter in which the predicate offence is "careless use of a firearm" or "pointing a firearm".

84. The *mens rea* for careless use of a firearm under s. 86(1) of the *Criminal Code* requires a marked departure from the standard of care of a reasonable person in the circumstances.[101] In this regard, if s. 86(1) is the predicate offence for unlawful act manslaughter, it becomes virtually indistinguishable from criminal negligence causing death and the reasons in ***Morrisey*** apply.

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[99] ***R. v. Ferguson,*** *supra* at para. 90 [A.R. at Vol. I Tab 2(D)].
[100] ***R. v. Goltz,*** *supra* at p. 501 [A.B.A. at Vol. I Tab 13].
[101] ***R. v. Gosset,*** [1993] 3 S.C.R. 76 at pp. 101-102 [R.B.A. Vol. I, Tab 14]; ***R. v. Creighton,*** *supra* at p. 59 [R.B.A. Vol. I, Tab 10].

Similarly, if pointing a firearm at someone ultimately leads to an act of manslaughter, it is hard to differentiate from criminal negligence causing death. It is submitted that ***R. v. Bill*** cited by Appellant [Tab 4] was wrongly decided or would have been decided differently with the benefit of this Court's guidance in ***Morrisey***.

85. In any case, neither example constitutes a reasonable hypothetical in the case at bar. The proper approach is to develop imaginable circumstances which could commonly arise in day-to-day life with a degree of generality appropriate to the particular offence.[102]

86. Respondent submits that a reasonable hypothetical should be restricted to cases where the underlying offence is an assault. This is consistent this Court's approach in ***R. v. Goltz*** and ***R. v. Brown*** in which consideration of a reasonable hypothetical was limited to the particular underlying offence which gave rise to the mandatory sentence, despite the fact that the minimum also applied to other predicate offences.[103] Where the predicate act is an assault with a firearm, there is little doubt that a four-year prison sentence is appropriate. This is so regardless of whether the offender was provoked and even if the circumstances approach "near self-defence".

87. The facts of the present case may also be used to develop a reasonable hypothetical. Police officers come into conduct with difficult individuals every day. It is not hard to imagine a scuffle with a suspect in which a gun is fired either negligently or intentionally. Arbour J. posited just such a hypothetical in her concurring reasons in ***Morrisey***.

88. In ***Morrisey***, Arbour J. expressly declined to prejudge the constitutionality of the minimum sentence in her example.[104] Nonetheless, as already noted, Appellant was not merely negligent. It was not an accidental death.

89. Manslaughter with a gun never involves a "small offender" being subjected to a harsh minimum penalty for a "trivial offence." This case is nothing like sentencing an individual to a minimum of seven years for importing a single "joint" (***Smith***). While manslaughter can be committed in a wide variety of ways, the consequence is always death. Along with the *mens rea*

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[102] ***R. v. Morrisey,*** *supra* at para. 30-33, 50 [A.B.A. at Vol. II Tab 27].

[103] ***R. v. Goltz,*** *supra* at 515-502 [A.B.A. at Vol. I Tab 13]**;** ***R. v. Brown***, [1994] 3 S.C.R. 749 in which this Court limited the consideration of a reasonable hypothetical to cases where the underlying offence was robbery in the context of s. 85(1) of the *Criminal Code*. As such, a hypothetical relating to mischief was not considered reasonable. [R.B.A. Vol. I, Tab 7]. See also ***R. v. Morrisey,*** *supra.*[A.B.A. at Vol. II Tab 27].

[104] ***R. v. Morrisey,*** *supra* at paras. 86-88 [A.B.A. at Vol. II Tab 27].

for the predicate offence, the minimum *mens rea* required is objective foresight of bodily harm in the context of a dangerous act. When a firearm is used, whether carelessly or intentionally, it is hard to imagine a scenario where the risk of death is not objectively foreseeable, let alone serious harm. In any reasonably imaginable circumstance, a four-year minimum sentence (with the possibility of full parole after 16 months) is not grossly disproportionate for this offence. Simply put, manslaughter with a firearm warrants a lengthy prison term.

C. Section 1 of the *Charter*

90. In the alternative, if the mandatory minimum sentence imposed by s. 236(a) of the *Criminal Code* violates s. 12 of the *Charter*, it is justified under s. 1. Respondent acknowledges it will generally be difficult to justify a grossly disproportionate minimum sentence under s. 1. However, general deterrence or some other important societal objective may be sufficient to justify a breach of s. 12 of the *Charter* in an appropriate case.[105]

91. Appellant suggests that the Crown chose not to advance a s. 1 argument at trial due to the impossibility of justifying a grossly disproportionate sentence. In fact, s. 1 was not argued because Appellant did not challenge the constitutionality of s. 236(a) but rather only sought a constitutional exemption. As will be discussed in more detail below, this highlights one of the many flaws with such a remedy: it obviates the need to conduct a proper s. 1 analysis because the general constitutionality of the provision is not impugned.

92. A four-year mandatory minimum sentence for manslaughter is demonstrably justified in a free and democratic society that is understandably concerned about the scourge of gun crime. Section 236(a) was introduced in 1995 as part of a series of amendments intended to deter the abuse of firearms.[106] During second reading, the Minister of Justice highlighted Parliament's pressing and substantial objective to severely deter and denunciate the horrific problem of firearm-related crime and death:

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[105] ***R. v. Smith,*** *supra* at 1073 [A.B.A. at Vol. II Tab 37], ***R. v. Goltz,*** *supra* [A.B.A. at Vol. I Tab 13]*;* ***R. v. Morrisey,*** *supra* at para. 45 [A.B .A. at Vol. II Tab 27]; See also the comments of the Chief Justice in ***R. v. Sharpe***, [2001] 1 S.C.R. 45 at para. 80 rejecting the argument that any *Charter* right is so absolute that it can never be justified under s. 1 [R.B.A. Vol. II, Tab 21].

[106] In addition to s. 236(a), the mandatory minimum four-year sentence also applies to other serious *Criminal Code* offences committed with a firearm including s. 220 (criminal negligence causing death); s. 239 (attempted murder); s. 244 (cause bodily harm with intent); s. 272 (sexual assault with a weapon); s. 273 (aggravated sexual assault); s. 279 (kidnapping); s. 279.1 (hostage taking); s. 344 (robbery) and s. 346 (extortion). Other indictable offences committed with a firearm are dealt with under s. 85.

> *The government suggests that the object of the regulation of firearms should be the preservation of the safe, civilized and peaceful nature of Canada. ...*
>
> *...if we are to retain our safe and peaceful character as a country we should signal in every possible way that we will not tolerate and we will severely punish the use of firearms in the commission of crime. Those who take up a firearm to threaten others, to rob or to assault must know that by choosing to use a firearm they are making an important decision about a large part of the rest of their lives. The punishment must be certain and must be significant.*[107] [Emphasis Added]

93. Section 236(a) is clearly rationally connected to this critical social objective. This is equally true whether the offender is a police officer carrying a firearm in the course of duty, a hunter or someone simply playing around with a gun. In all cases, the risk of death – to the victim, to witnesses or bystanders and to the perpetrator of the crime – is manifest.

94. When considering minimal impairment and the overall proportionality between the effect of the measure and its objective, we must bear in mind that "it is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences".[108] Courts must take a deferential stance to Parliament's choice of punishment.[109] By enacting s. 236(a), Parliament has signalled that society regards the use of guns in the commission of criminal offences as a very serious matter.

95. Parliament need not choose the least restrictive means possible as long as it falls within a range of reasonable solutions. A minimum sentence does not fail the proportionality test under s. 1 merely because it has been found to be grossly disproportionate. Such reasoning is circular. Rather, the extent and scope of the s. 12 *Charter* breach should be examined in relation to the importance of the objectives sought, the strength of the rational connection of the means chosen and the likelihood that a breach would occur in other circumstances.

96. The objective is nothing short of preventing death by guns. A stern and certain sentence is needed to deter and denunciate such a serious crime. A lesser sentence would not have the same impact. Section 236(a) is reasonably tailored to its objective keeping in mind the practical

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[107] *House of Commons Debates*, Vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at p. 9706-9707 [R.B.A. Vol. III, Tab 32]; also cited in ***Reference re Firearms Act (Can.)***, *supra* at paras. 20-21 [R.B.A. Vol. III, Tab 24].

[108] ***R. v. Smith,*** *supra* at 725 [A.B.A. at Vol. II Tab 37].

[109] ***R. v. Latimer,*** *supra* at paras. 76-77 [A.B.A. at Vol. I Tab 19].

difficulty of accounting for every possible fact scenario that may arise.[110] In the vast majority of cases, a four-year sentence for taking a life, even if excessive, could not be considered abhorrent or intolerable, given the gravity of the offence.

97. Finally, it should be noted the Trial Judge would have substituted a sentence of two years less a day in this case. Arguably, this was merely tinkering with the legislated minimum. If four years (with the possibility of parole after only 16 months) is truly considered grossly excessive for manslaughter, it is only marginally so.

D. Remedy – an individual constitutional exemption is not available under the *Charter*

Introduction

98. If s. 236(a) violates s. 12 of the *Charter*, either in the particular circumstances of this case or based on a reasonable hypothetical case, the proper remedy is to strike down the provision and send it back to Parliament for consideration. To date, this Court has not recognized the existence of an individual constitutional exemption in the form sought by Appellant and it should decline to do so.[111]

99. At first blush, granting a constitutional exemption to an individual appears attractive. It enables a court to uphold a law that appears valid in most of its applications but creates an exemption only for those applications which would violate the *Charter*. However, on closer examination the analytical underpinning of such a remedy is fundamentally flawed. It is not consonant with the twin guiding principles of constitutional remedies: respect for the legislative role and respect for the purposes of the *Charter.*

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[110] ***R. v. Sharpe***, *supra* at paras. 96 and 103 [R.B.A. Vol. II, Tab 21].

[111] Appellate courts in Ontario, Quebec, New Brunswick and now Alberta have rejected the availability of an individual exemption from a mandatory minimum sentence: ***R. v. Kelly*** (1990), 59 C.C.C. (3d) 497 (Ont. C.A.); ***R. v. McDonald,*** *supra* (Ont. C.A.); ***R. v. Madeley***, [2002] O.J. No. 2410 (Ont. C.A.); ***R. v. Chabot*** (1992), 77 C.C.C. (3d) 371 (Que.C.A.); ***R. v. Roberts*** (1998), 125 C.C.C. (3d) 471 (N.B.C.A.) following the decision of Bastarache J.A. (as he then was) in ***R. c. Desjardins*** (1996), 182 N.B.R. (2d) 321 (N.B.C.A.) at para. 34 [R.B.A. Vol. I, Tab 4]. The British Columbia Court of Appeal has recognized the remedy in *obiter* (***R. v. Kumar,*** (1993), 85 C.C.C. (3d) 417 (B.C.C.A.) or dissenting opinions (***Birchall,*** *supra* and ***R. v. Walcott*** (2001), 154 C.C.C. (3d) 385 (B.C.C.A.). While appellate courts in Saskatchewan, Northwest Territories and the Yukon granted constitutional exemptions from the mandatory firearms prohibition (***McGillivary, Nester*** and ***Chief,*** *infra*), it is submitted these cases were wrongly decided (see ***Kelly,*** *supra*).

100. After 25 years of *Charter* jurisprudence, this Court has not rendered a majority decision adopting the remedy of an individual constitutional exemption in the form sought.[112] While *obiter* comments have alluded to the possibility, this Court's reticence to adopt this form of remedy is justified by the many problems inherent with it:

- It is incompatible with the proper institutional role of the courts and legislature. It is capable of fundamentally altering the law created by the legislature and negating the express intent of the statutory scheme.
- It creates significant uncertainty and unpredictability in the law which is particularly problematic in the criminal sphere. Case-by-case justice inherent in the constitutional exemption may leave largely intact an unconstitutional law that is overbroad;
- It does not fit with the analytical framework of the *Charter* and, in particular, this Court's jurisprudence on s. 24(1) and s. 52 of the *Constitution Act, 1982*.

Undue Interference with the Role of Parliament

101. Courts should choose a remedy that will best vindicate *Charter* values while refraining from intruding into the legislative sphere beyond what is necessary.[113] Appellant argues that striking down a minimum mandatory sentence which is constitutional in the majority of cases is an overly blunt remedy. To the contrary, granting an individual constitutional exemption is a far greater intrusion into the legislative sphere.

102. First, it effectively imports a judicial discretion into the sentencing regime which Parliament expressly chose to exclude. While overriding the mandatory minimum sentence saves the law in one sense, it dramatically alters the unequivocal intent of Parliament that there be a certain and lengthy period of incarceration: ***Seaboyer***.[114] Where Parliament's choice of means is unequivocal, attempting to further the objective of the legislative scheme through different means constitutes an unwarranted intrusion into the legislative domain.[115]

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[112] The Appellant cites this Court's decisions in ***R. v. Sawyer***, [1992] 3 S.C.R. 809 and ***R. v. Latimer,*** *supra* as authority at least implying the availability of "stand-alone" constitutional exemptions. However, in both cases there was no violation of s. 12 and this Court did not decide the issue. In ***R. v. Morrisey,*** *supra,* Arbour J. for the minority acknowledged that the present state of the law is that a mandatory minimum penalty which violates s. 12 on the particularized inquiry must be struck down (para. 66). In ***R. v. Rose***, [1998] 3 S.C.R 262, L'Heureux-Dubé J., writing alone, contemplated the existence of a constitutional exemption, but acknowledged that the issue had not been argued and was not necessary to decide in that case.

[113] ***Osborne v. Canada (Treasury Board)***, [1991] 2 S.C.R. 69 at 104 [R.B.A. Vol. I, Tab 3].

[114] ***R. v. Seaboyer***, [1991] 2 S.C.R. 577 at p. 628, where McLachlin J. (as she then was) recognized the same problem in the context of the rape shield provision [R.B.A. Vol. II, Tab 20]. ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at p. 705-708 [R.B.A. Vol. III, Tab 27].

[115] ***Schachter v. Canada,*** *supra* at pp. 708-709 [R.B.A. Vol. III, Tab 27].

103. Secondly, individual exemptions are incompatible with the "constitutional dialogue" between the legislative and judicial branches endorsed by this Court in its *Charter* jurisprudence.[116] It deprives the legislative branch of the opportunity to remedy any constitutional defect through appropriate amendments. In our constitutional democracy, it is inappropriate to adopt a remedy that contemplates a case-by-case review of the validity of a mandatory law of general application. This ignores the proper role of the legislature.

104. Another difficulty is the assumption that violations will only be rare and so it is somehow less intrusive to uphold the law generally and exempt the particular offender. This assumption is not necessarily true as illustrated by the line of cases granting exemptions from the mandatory prohibition against the possession of firearms.[117] Without commenting on the correctness of the conclusions under s. 12 of the *Charter,* the fact that three appellate courts saw fit to grant constitutional exemptions from the mandatory prohibition demonstrates that once the door to constitutional exemption is opened, the remedy may be applied much more routinely than anticipated. It may be far more palatable to a trial judge to grant an exemption in an individual case than be forced to strike down a mandatory minimum altogether.[118] This could result in a patchwork application of a mandatory law.

105. Similarly, while Appellant's circumstances may be uncommon, it is not beyond the realm of possibility that other police officers could be convicted of manslaughter with a firearm in the course of duty.[119]

106. It is precisely this concern that led Wilson J. to conclude that it is not "open to the Court to cure over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books." Once a court finds that legislation is over-inclusive

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[116] ***Vriend v. Alberta,*** [1998] 1 S.C.R. 493 at paras. 137-139 [R.A.B. Vol. III, Tab 28]; ***R. v. Mills***, [1999] 3 S.C.R. 668 at paras. 20, 55-59 [R.B.A. Vol. II, Tab 19].

[117] See ***R. v. Chief*** (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.) [A.B.A. at Vol. I Tab 8]; ***R. v. McGillivary*** (1991), 62 C.C.C. (3d) 407 (Sask. C.A.) [A.B.A. at Vol. I Tab 26]; ***R. v. Nester*** (1992), 70 C.C.C. (3d) 477 (N.W.T.C.A.) [A.B.A. at Vol. II Tab 28]; See also ***R. v. Iyerak***, [1991] N.W.T.R. 40 (S.C.) [R.A.B. Vol. II, Tab 15]; ***R. v. E.(P.)***, [1990] N.W.T.R. 246 (S.C.) [R.A.B. Vol. I, Tab 12]; cf. ***R. v. Kelly,*** *supra* (Ont. C.A.) at paras. 46-55 [A.B.A. at Vol. I Tab 16].

[118] Sankoff P., "Constitutional Exemptions: An Ongoing Problem Requiring a Swift Resolution", (2003) 36 U.B.C.L. Rev. 231 at 239-240 [A.B.A. Vol. II, Tab 42].

[119] See ***R. v. Deane*** [1997] O.J. No. 3578 [A.B.A. at Vol. I Tab 11]; ***R. v. Gosset,*** *supra* [R.B.A. Vol. I, Tab 14].

and cannot be justified under s. 1, it must be struck down. The court should not create exemptions (which presuppose its constitutional validity).[120]

107. The very limited form of constitutional exemption recognized in ***Corbiere*** (for the period during which there is a suspension of a declaration of invalidity) does not present these problems.[121] The limited exemption does not impede the constitutional dialogue between Parliament and the judiciary but rather fosters it. While providing a remedy to the individual, it also ensures that Parliament has an opportunity to define the solution to the constitutional problem.[122]

108. If s. 236(a) violates s. 12 of the *Charter,* Parliament may wish to consider many options to remedy the constitutional defect. Parliament could respond by reducing the length of the mandatory minimum sentence; it might leave the sentence length but import a limited discretion to alleviate the harshness of s. 236(a) in circumstances where the trial judge deemed it to be grossly disproportionate (analogous to what was done in s. 113 of the *Criminal Code* to alleviate the harshness of the mandatory firearms prohibition); Parliament might choose to remove the mandatory minimum from unlawful act manslaughter with a firearm altogether; alternatively, it could limit the application of s. 236(a) to specific predicate offences or where the offender has a certain level of *mens rea*. There may be other ways of approaching the problem after further study. The point is, it is not for the court to choose among the various options. It is patently a legislative function. It is no answer to say that it is always open to Parliament to fix the problem after a constitutional exemption is granted.

Constitutional Exemptions create Significant Uncertainty and Unpredictability

109. The Court of Appeal correctly observed that individual exemptions would compromise certainty and predictability in the law. Despite finding a law generally constitutional, sentencing judges could refuse to apply the minimum sentence on a case-by-case basis. Not only does this

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[120] ***Osborne v. Canada (Treasury Board),*** *supra* at p. 76-77 [R.B.A. Vol. I, Tab 3]; ***Rodriguez v. B.C. (A.G.)***, [1993] 3 S.C.R. 519 per Lamer C.J. (dissenting) at pp. 576-578 [R.B.A. Vol. III, Tab 26]. See also ***R. v. LaPierre*** (1998), 123 C.C.C. (3d) 332 (Que. C.A.) at 348 [A.B.A. at Vol. I, Tab 18].

[121] ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203 at paras. 22-23 citing ***Schachter v. Canada,*** *supra* at pp. 715-717 and ***Rodriguez v. B.C. (A.G.)***, *supra* at p. 577. The Court refused to grant an individual constitutional exemption rather than strike down the legislation at issue [R.B.A. Vol. I Tab 1].

[122] This is the form of remedy that Lamer C.J. (in dissent) would have granted in ***Rodriguez,*** *supra.* Lamer C.J. expressly limited the remedy to the period during the suspended declaration of invalidity, agreeing with many of the concerns expressed by Wilson J. in ***Osborne,*** *supra* and McLachlin J. in ***Seaboyer,*** *supra*.

dramatically alter the mandatory nature of the scheme contemplated by Parliament (as noted in ***Seaboyer***), one could never know whether the minimum sentence will be applied in a given case.

110. In ***Smith***, Le Dain J. (concurring) was initially attracted by the flexibility that constitutional exemptions offered, but he ultimately concluded that:

> *…it would not be a sound approach to the validity and application of a mandatory minimum sentence provision which applies to a wide range of conduct, if only because of the uncertainty it would create and the prejudicial effects which the assumed validity or application of the provision might have in particular cases.*[123]

111. Constitutional exemptions delegate to trial judges the task of determining when the minimum sentence should not be applied which amounts to saying "it should not be applied when it should not be applied". As this Court persuasively observed, there would never be a reason to strike down a mandatory sentence under s. 52 since the sentencing judge could simply decline to apply the minimum if it would violate s. 12. It also puts the burden on the accused to prove the mandatory minimum is unconstitutional in each case subsequent case. One could not know in advance whether they are subject to the mandatory provision or not.[124]

112. In ***Seaboyer,*** this Court noted the possibility that criterion external to the *Charter* could be used to base exemptions. However, even if it were possible to do so in the context of a mandatory minimum sentence for manslaughter, that task should be left for Parliament. For example, it cannot be assumed that "all police officers required to carry firearms in the course of employment" merit an exemption from the application of s. 236(a), regardless of moral fault.

113. One of the basic premises of the rule of law is that everyone is subject to the same law.[125] It is contrary to this fundamental principle to exempt certain individuals on a case-by-case basis from a mandatory statutory enactment (that is assumed to be valid). This not only undermines

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[123] ***R. v. Smith*****,** *supra* at p. 111.2 [A.B.A. at Vol. II Tab 37].

[124] ***R. v. Seaboyer,*** *supra* at pp. 628-629 [R.B.A. Vol. II, Tab 20]; ***R. v. Goltz,*** *supra* per McLachlin J. (dissenting), at pp. 525-527 [A.B.A. at Vol. I Tab 13].

[125] ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217 at 258 [R.B.A. Vol. III, Tab 25]; ***R. v. Campbell***, [1999] 1 S.C.R. 565 at paras. 18-19 [R.B.A. Vol. I, Tab 8]; Mitchell, G., "Constitutional Exemptions: Is There Any Longer a Principled Case for Them?" (The *Canadian Charter of Rights and Freedoms*: Twenty Years Later, CBA conference, Ottawa, 2001) [unpublished] [R.B.A. Vol. III, Tab 30].

the predictability of consequences and the deterrent effect of mandatory minimum sentences, it compromises the public's trust in the administration of justice.[126]

Constitutional Exemptions do not fit with the Reasonable Hypothetical Analysis

114. Constitutional exemptions cannot logically co-exist with the current analytical framework repeatedly adopted for s. 12 of the *Charter*.[127] As the law stands, if a minimum penalty is grossly disproportionate under the first stage of the s. 12 analysis, the provision is struck down.

115. The reasons of Fruman J.A. demonstrate why this must be so. If Appellant succeeds in obtaining a constitutional exemption in his particular case, the next offender may argue that s. 236(a) is cruel and unusual, based on a reasonable hypothetical, citing Appellant's case. The purpose of the constitutional exemption is thwarted because it would only have the effect of deferring a declaration of invalidity until the next case.[128] Nor can it be assumed that this case is so rare or unique that only Appellant would require an exemption.

116. Even if a rare or unique case arises, falling outside the realm of any reasonable hypothetical, if the minimum sentence violates s. 12 and cannot be justified by s. 1, Parliament will simply have to remedy the constitutional defect. The *Charter* demands no less.

The *Charter* does not Permit the Remedy Sought

117. The type of constitutional exemption sought here is fundamentally inconsistent with the analytical framework of the *Charter*. First, it ignores the proper role of s. 1 of the *Charter*. If a law *prima facie* breaches a *Charter* right, the government must have the fullest opportunity to justify its impugned legislation under s. 1. The case at bar illustrates how seeking a stand-alone constitutional exemption skirts this critical stage of *Charter* analysis. Since Appellant did not

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[126] In ***Miron v. Trudel,*** [1995] 2 S.C.R. 418 at para. 179-180, this Court recognized the inherent unfairness of granting an individual constitutional exemption because it would deprive everyone else in similar circumstances of a remedy [R.B.A. Vol. I, Tab 2].

[127] In ***R. v. Wiles***, [2005] 3 S.C.R. 895, this Court unanimously applied the s. 12 test set out in ***Smith*** and ***Goltz*** [R.B.A. Vol. III, Tab 23].

[128] ***R. v. Ferguson,*** *supra* at para. 106 [A.R. at Vol. I Tab 2(D)]; See also ***R. v. Kelly ,*** *supra* at para. 51-55 [A.B.A. at Vol. I Tab 16]; ***R. v. McDonald,*** *supra* at para. 86 [R.B.A. Vol. II, Tab 18]; Sankoff, P., "Constitutional Exemptions: Myth or Reality?", (1999-2000), 11 N.J.C.L. 411 at 432-434 [R.B.A. Vol. III, Tab 31].

directly attack the constitutional validity of s. 236(a), an exemption was given in his particular case, without considering s. 1.[129]

118. Section 1 focuses on the broader social context of the impugned provision in terms of its objectives and proportionality of means and effects. The impugned provision is analyzed in a systemic sense. If the legislation is upheld under s. 1, then no remedy is granted. On the other hand, if the provision cannot be justified in a free and democratic society, it defies logic to uphold the legislation generally, without any amendment, and simply exempt the individual from its application. Section 1 was never intended to be a limited justification of a single application of a law. It requires a broad contextual analysis.

119. In contrast, where government action violates the *Charter*, the aggrieved person is entitled to an individual remedy under s. 24(1). The underlying legislation is presumed valid and no s. 1 analysis is required.

120. Secondly, constitutional exemptions are contrary to this Court's jurisprudence regarding the interplay of remedies under s. 24(1) and s. 52. Section 52 is engaged when the constitutionality of a law itself is at issue as opposed to particular state action. Thus, if the mandatory sentence imposed by s. 236(a) is cruel and unusual, s. 52 mandates that it be declared of no force and effect. Section 52 provides a systemic remedy to the law. On the other hand, individual remedies may be granted under s. 24(1) in cases where the provision in question is not in and of itself unconstitutional, but government action taken under it infringes one's *Charter* rights. An individual remedy under s. 24(1) will rarely be available in conjunction with s. 52. If the provision is struck down, that will usually be the only remedy needed.[130]

121. Respondent submits that if a mandatory statutory provision such as s. 236(a) cannot be remedied through the tools of severance, reading down or reading in, then it should simply be

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[129] In ***Wakeford v. Canada*** (2002), 162 C.C.C. (3d) 51 (Ont. C.A.) at paras. 55-56, the Ontario Court of Appeal noted that one cannot simply seek a constitutional exemption from the *Controlled Drugs and Substances Act*. There must be a direct attack on the allegedly overbroad legislation with proper notice to the Attorneys General [R.B.A. Vol. III, Tab 29].

[130] ***Schachter,*** *supra* at pp. 717, 719-720 [R.B.A. Vol. III, Tab 27]; ***R. v. 974649 Ontario Inc.***, [2001] 3 S.C.R. 575 at para. 14 [R.B.A. Vol. I, Tab 5].

struck down. There is no room for an individual constitutional exemption (other than during the period of a suspended declaration of invalidity) under either s. 52 or s. 24(1).[131]

122. Nor is there any practical need for an individual constitutional exemption. If s. 236(a) is struck down, Appellant will have his remedy. As noted in ***Schachter***, if a court reads in or reads down, a remedy under s. 24 would likely only duplicate the relief flowing from the s. 52 remedy anyway. On the other hand, if the court is unwilling to read in a general exception to s. 236(a) (because to do so would unduly interfere with the role of Parliament), it is difficult to justify providing such an exception to only one person.

123. In this regard, there is an important difference between constitutional exemptions and the other "traditional" s. 52 remedies. Severance, reading in or reading down effectively changes the legislation as it applies to <u>everyone</u>, thereby vindicating the values of the *Charter* and upholding the rule of law. If the law is overbroad, s. 52 provides a <u>systemic</u> remedy that limits application of the legislation for an identifiable group or circumstance.[132] In contrast, an individual constitutional exemption leaves the overbroad provision <u>on the books as is</u> and only grants a remedy to one individual, presumably under s. 24. An individual remedy makes no sense when a <u>mandatory</u> legislative provision is at issue as opposed to specific government action.

124. Finally, if courts can grant an individual remedy to rectify the constitutional deficiency of a mandatory minimum sentence on a case by case basis, no law would ever need to be struck down under s. 52. The trial judge would simply not apply the law on the particular facts.[133] This turns past jurisprudence on its head. Despite finding that a <u>mandatory legislative provision</u> violates the *Charter*, only the individual receives a remedy. The systemic remedy under s. 52 is ignored. Over-inclusive legislation should not be remedied on a case by case basis.[134]

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[131] In "Constitutional Exemptions: Myth or Reality?" (1999-2000), 11 N.J.C.L. 411 at 434-441, Peter Sankoff illustrates the problem of using either s. 24(1) or s. 52 as authority for an individual constitutional exemption [R.B.A. Vol. III, Tab 31].

[132] For example, see ***R. v. Sharpe,*** *supra* at paras. 111-127 where McLachlin C.J. read in two limited exceptions to s. 163.1 of the *Criminal Code* to remedy a law that peripherally problematic in those situations but otherwise substantially constitutional in most applications [R.B.A. Vol. II, Tab 21].

[133] ***Seaboyer,*** *supra* at pp. 628-629 [R.B.A. Vol. II, Tab 20].

[134] ***Osborne,*** *supra* per Wilson J. at pp. 76-77 [R.B.A. Vol. I, Tab 3].

Even if such Remedy were possible, a Constitutional Exemption is not Appropriate

125. In the alternative, even if this Court recognizes the possibility of individual constitutional exemptions, it should be a remedy of last resort after all other options are canvassed. Specifically, it should only be granted where the mandatory minimum sentence violates s. 12 in the most unusual and rare circumstance, unlikely ever to repeat. Otherwise, the court risks leaving an overbroad law intact, subject to a series of case by case exemptions.

126. In the case at bar, it can hardly be asserted that the circumstances are so rare as to warrant a constitutional exemption. Police come into contact with suspects every day. The potential for confrontation and violence is ever present. If s. 236(a) imposes a grossly disproportionate sentence on Appellant, it is conceivable the same could be true of future cases. This is certainly not the first time a police officer has been convicted of unintentionally killing someone with a firearm in the course of duty.[135]

127. Even if this Court were inclined to grant an exemption to an identifiable group as opposed to an individual, it is not at all clear why "peace officers in the line of duty" would constitute a group for whom it is appropriate to read an exception into the legislation. For example, if a police officer commits manslaughter with a firearm in circumstances amounting to "near murder", surely the moral culpability would justify a mandatory four-year sentence, at minimum. Why should that particular offender be exempt from s. 236(a) merely because the egregious crime was committed by a police officer?

The Appropriate Remedy is to Strike out s. 236(a) and Suspend the Declaration

128. This Court's jurisprudence dictates that a mandatory minimum sentence which violates s. 12 should be struck down, even if only grossly disproportionate on the specific facts.[136]

129. A similar remedial problem arose in ***R. v. Sharpe***[137] McLachlin C.J. noted that the *Criminal Code* prohibition against possession of child pornography violated s. 2(b) of the *Charter* but was justified under s. 1, in the vast majority of the law's applications, given the risk

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[135] ***R. v. Deane,*** *supra* (criminal negligence causing death) [A.B.A. at Vol. I Tab 10]; see also ***R. v. Gosset,*** *supra* [R.B.A. Vol. I, Tab 14].

[136] ***R. v. Smith,*** *supra* [A.B.A. at Vol. II Tab 37]; ***R. v. Morrisey,*** *supra*, per Arbour J. at para. 66 [A.B.A. at Vol. II Tab 27].

[137] ***R. v. Sharpe,*** *supra* at paras. 103-114 [R.B.A. Vol. II, Tab 21].

of harm to children (paras. 103-110). In its main impact, the law was proportionate and constitutional. However, she found two problematic exceptions: self-created private works of the imagination and visual recordings of oneself alone. Confronted with a law that generally complies with the *Charter* but is unconstitutional on the periphery, the Court considered three remedial options: (1) strike out the law; (2) find the law valid in that case and decline to find it unconstitutional on the basis of a hypothetical that has not arisen yet; or (3) grant a constitutional exemption if and when the unconstitutional applications arise.

130. McLachlin C.J. observed that the second option – declining to find the law unconstitutional based on a hypothetical scenario not before the court – is inconsistent with Canadian jurisprudence. This, of course, is true of the well-established test for s. 12.

131. The problem with striking out is that it would nullify a law that is valid in most of its applications other than in far removed hypothetical scenarios. Further, the evil targeted would go unremedied until Parliament responded with another law. Ultimately, the Court found that reading in an exclusion of the problematic applications of the child pornography provision was the most appropriate remedy. As a result, McLachlin C.J. did not canvass the constitutional exemption option in any detail.

132. In the case at bar, striking down the mandatory minimum sentence in s. 236(a) would not eliminate the substantive offence of unlawful act manslaughter. An accused would still face up to life in prison. At the same time, suspending the declaration of invalidity would provide Parliament a chance to respond.

133. Moreover, reading in is inappropriate because there is no obvious way to remedy the constitutional defect that would preserve the intent of Parliament. Unlike in ***Sharpe,*** there are simply too many options. As noted above, Parliament could reduce the mandatory minimum sentence; it might import a limited discretion to alleviate the harshness of s. 236(a) in circumstances where the trial judge deemed it to be grossly disproportionate; alternatively, it might limit the application of s. 236(a) to specific predicate offences or where the offender has a certain level of *mens rea*. There may be other ways of approaching the problem. The point is, it is not for the court to choose among the various options.

134. Appellant suggests that if a unique case arises, striking down s. 236(a) is too blunt, particularly if it has already survived the reasonable hypothetical analysis. However, this result is dictated by this Court's s. 12 jurisprudence and s. 52. It is not illogical or overly blunt, but a necessary consequence in a constitutional democracy where Parliamentary sovereignty is restrained by the *Charter*.

135. If s. 236(a) is found to violate s. 12 of the *Charter* because it casts the net too wide, then it must be struck down. However, given that the mandatory minimum sentence for manslaughter would likely survive scrutiny in the majority of cases, Respondent submits that the declaration of invalidity should be suspended to allow Parliament sufficient time to devise a solution.

E. Conclusion

136. A court will only find that a minimum sentence violates s. 12 of the *Charter* on rare and unique occasions. The test is properly stringent, mindful of the fact that Parliament has a broad discretion in determining proper punishment. A mandatory minimum sentence of four years for unlawful act manslaughter committed with a firearm is not grossly disproportionate so as to outrage society's sense of decency. To find otherwise would trivialize s. 12 of the *Charter*. Far from being abhorrent or intolerable, s. 236(a) imposes precisely the sentence a reasonable person would expect for such a grave offence.

137. The fact Appellant was a police officer carrying a gun in the course of duty does not undermine the gravity of the offence or his moral culpability. It should not be forgotten that Appellant committed a criminal assault with a firearm and killed someone in his custody. Appellant was in a position of power and trust. Admittedly there are mitigating circumstances but they do not overwhelm the seriousness of the crime or the need for deterrence, denunciation and retribution. Nor do they render the sentence unconstitutional. No reasonable hypothetical has been advanced for which the mandatory four-year sentence (with eligibility for full parole in 16 months) would result in cruel and unusual punishment.

138. However, if this Court finds that the mandatory minimum sentence violates s. 12 of the *Charter* and is not saved by s. 1, s. 236(a) must be struck down. There is no principled basis for an individual constitutional exemption from a mandatory sentence. Far from being a lesser intrusion into the legislative sphere, it deprives Parliament of the chance to respond thereby undermining the constitutional dialogue between the courts and legislative branch. It results in a

case by case application of a manifestly mandatory provision creating uncertainty in the law. Finally, an individual constitutional exemption is not consonant with general analytical framework of the *Charter* and this Court's jurisprudence on *Charter* remedies.

PART IV – SUBMISSIONS ON COSTS

139. The Respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

140. The Crown respectfully submits that the appeal be dismissed. In the alternative, if this Court finds that the mandatory minimum sentence prescribed by s. 236(a) of the *Criminal Code* violates s. 12 in the appellant's case, the proper remedy is to declare s. 236(a) to be of no force or effect pursuant to s. 52 of the *Constitution Act, 1982* and suspend the declaration of invalidity for an appropriate period of time to allow Parliament a chance to respond.

141. The first constitutional question should be answered "no". If it is necessary to decide, the second question should be answered "yes" and the third question should answered "no".

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 2nd day of August, 2007.

JOSHUA B. HAWKES
for RICHARD A. SAULL
COUNSEL FOR THE RESPONDENT
ATTORNEY GENERAL OF ALBERTA

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PART VII – STATUTE, REGULATION, RULE, ORDINANCE OR BY-LAW

Canadian Charter of Rights and Freedoms, ss. 1, 12 and 24(1)

1. Rights and freedoms in Canada

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. Droits et libertés au Canada

La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

12. Treatment or punishment

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

12. Cruauté

Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

24(1) Enforcement of guaranteed rights and freedoms

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

24(1) Recours en cas d'atteinte aux droits et libertés

Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

***Constitution Act*, 1982, s. 52**

52(1) Primacy of Constitution of Canada

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52(1) Primauté de la Constitution du Canada

La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

***Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 3(a), 4(d), 68-71, 87, 119(1)(c)(i), 120(1) and 121**

3. Purpose of correctional system

The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

3. But du système correctionnel

Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

4. Principles that guide the Service

The principles that shall guide the Service in achieving the purpose referred to in section 3 are

(a) that the protection of society be the paramount consideration in the corrections process;

(b) that the sentence be carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, other information

from the trial or sentencing process, the release policies of, and any comments from, the National Parole Board, and information obtained from victims and offenders;

(c) that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public;

(d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

(e) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

(f) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service;

(g) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(h) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;

(i) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration; and

(j) that staff members be properly selected and trained, and be given

(i) appropriate career development opportunities,

(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and

(iii) opportunities to participate in the development of correctional policies and programs.

4. Principes de fonctionnement

Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent :

a) la protection de la société est le critère prépondérant lors de l'application du processus correctionnel;

b) l'exécution de la peine tient compte de toute information pertinente dont le Service

dispose, notamment des motifs et recommandations donnés par le juge qui l'a prononcée, des renseignements obtenus au cours du procès ou dans la détermination de la peine ou fournis par les victimes et les délinquants, ainsi que des directives ou observations de la Commission nationale des libérations conditionnelles en ce qui touche la libération;

c) il accroît son efficacité et sa transparence par l'échange, au moment opportun, de renseignements utiles avec les autres éléments du système de justice pénale ainsi que par la communication de ses directives d'orientation générale et programmes correctionnels tant aux délinquants et aux victimes qu'au grand public;

d) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible;

e) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée;

f) il facilite la participation du public aux questions relatives à ses activités;

g) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;

h) ses directives d'orientation générale, programmes et méthodes respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones et à d'autres groupes particuliers;

i) il est attendu que les délinquants observent les règlements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur et des libérations conditionnelles ou d'office et qu'ils participent aux programmes favorisant leur réadaptation et leur réinsertion sociale;

j) il veille au bon recrutement et à la bonne formation de ses agents, leur offre de bonnes conditions de travail dans un milieu exempt de pratiques portant atteinte à la dignité humaine, un plan de carrière avec la possibilité de se perfectionner ainsi que l'occasion de participer à l'élaboration des directives d'orientation générale et programmes correctionnels.

68. Instruments of restraint

No person shall apply an instrument of restraint to an offender as punishment.

68. Moyens de contrainte

Il est interdit d'user de moyens de contrainte à titre de sanction contre un délinquant.

69. Cruel treatment, etc.

No person shall administer, instigate, consent to or acquiesce in any cruel, inhumane or degrading treatment or punishment of an offender.

69. Cruauté

Il est interdit de faire subir un traitement inhumain, cruel ou dégradant à un délinquant, d'y consentir ou d'encourager un tel traitement.

70. Living conditions, etc.

The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

70. Conditions de vie

Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.

71(1) Contacts and visits

In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.

71(2) Visitors' permitted items

At each penitentiary, a conspicuous notice shall be posted at the visitor control point, listing the items that a visitor may have in possession beyond the visitor control point.

71(3) Where visitor has non-permitted item

Where a visitor has in possession, beyond the visitor control point, an item not listed on the notice mentioned in subsection (2) without having previously obtained the permission of a staff member, a staff member may terminate or restrict the visit.

71(1) Rapports avec l'extérieur

Dans les limites raisonnables fixées par règlement pour assurer la sécurité de quiconque ou du

pénitencier, le Service reconnaît à chaque détenu le droit, afin de favoriser ses rapports avec la collectivité, d'entretenir, dans la mesure du possible, des relations, notamment par des visites ou de la correspondance, avec sa famille, ses amis ou d'autres personnes de l'extérieur du pénitencier.

71(2) Objets permis lors de visites

Dans chaque pénitencier, un avis donnant la liste des objets que les visiteurs peuvent garder avec eux au-delà du poste de vérification doit être placé bien en vue à ce poste.

71(3) Possession d'objets non énumérés

L'agent peut mettre fin à une visite ou la restreindre lorsque le visiteur est en possession, sans son autorisation ou celle d'un autre agent, d'un objet ne figurant pas dans la liste.

87. Service to consider health factors

The Service shall take into consideration an offender's state of health and health care needs

(a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters; and

(b) in the preparation of the offender for release and the supervision of the offender.

87. État de santé du délinquant

Les décisions concernant un délinquant, notamment en ce qui touche son placement, son transfèrement, son isolement préventif ou toute question disciplinaire, ainsi que les mesures préparatoires à sa mise en liberté et sa surveillance durant celle-ci, doivent tenir compte de son état de santé et des soins qu'il requiert.

119.1 When eligible for day parole -- offenders eligible for accelerated parole review

The portion of the sentence of an offender who is eligible for accelerated parole review under sections 125 and 126 that must be served before the offender may be released on day parole is six months, or one sixth of the sentence, whichever is longer.

119.1 Temps d'épreuve pour la semi-liberté -- délinquants admissibles à la procédure d'examen expéditif

Le temps d'épreuve pour l'admissibilité à la semi-liberté est, dans le cas d'un délinquant admissible à la procédure d'examen expéditif en vertu des articles 125 et 126, six mois ou, si elle est supérieure, la période qui équivaut au sixième de la peine.

119(1) Time when eligible for day parole

Subject to section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, the portion of a sentence that must be served before an offender may be released on day parole is

(a) one year, where the offender was, before October 15, 1977, sentenced to preventive detention;

(b) where the offender is an offender, other than an offender referred to in paragraph (b.1), who was sentenced to detention in a penitentiary for an indeterminate period, the longer of

(i) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with section 761 of the Criminal Code, less three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

(b.1) where the offender was sentenced to detention in a penitentiary for an indeterminate period as of the date on which this paragraph comes into force, the longer of

(i) three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

(c) where the offender is serving a sentence of two years or more, other than a sentence referred to in paragraph (a) or (b), the greater of

(i) the portion ending six months before the date on which full parole may be granted, and

(ii) six months; or

(d) one half of the portion of the sentence that must be served before full parole may be granted, where the offender is serving a sentence of less than two years.

119(1.1) Time when eligible for day parole

Notwithstanding section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act*and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, an offender described in subsection 746.1(1) or (2) of the *Criminal Code* or to whom those subsections apply pursuant to subsection 140.3(2) of the *National Defence Act* or subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, shall not, in the circumstances

described in subsection 120.2(2) or (3), be released on day parole until three years before the day that is determined in accordance with subsection 120.2(2) or (3).

119(1.2) When eligible for day parole -- young offender sentenced to life imprisonment

Notwithstanding section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, in the circumstances described in subsection 120.2(2), the portion of the sentence of an offender described in subsection 746.1(3) of the *Criminal Code* or to whom that subsection applies pursuant to subsection 140.3(2) of the *National Defence Act*or subsection 15(2) of the *Crimes Against Humanity and War Crimes Act* that must be served before the offender may be released on day parole is the longer of

(a) the period that expires when all but one fifth of the period of imprisonment the offender is to serve without eligibility for parole has been served, and

(b) the portion of the sentence that must be served before full parole may be granted to the offender, determined in accordance with subsection 120.2(2), less three years.

119(2) Short sentences

The Board is not required to review the case of an offender who applies for day parole if the offender is serving a sentence of less than six months.

119(1) Temps d'épreuve pour la semi-liberté

Sous réserve de l'article 746.1 du *Code criminel*, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le temps d'épreuve pour l'admissibilité; à la semi-liberté est :

a) un an, en cas de condamnation à la détention préventive avant le 15 octobre 1977;

b) dans le cas d'un délinquant -- autre que celui visé à l'alinéa b.1) -- condamné à une peine de détention dans un pénitencier pour une période indéterminée, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément à l'article 761 du *Code criminel* ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);

b.1) dans le cas d'un délinquant condamné, avant la date d'entrée en vigueur du présent alinéa, à une peine de détention dans un pénitencier pour une période indéterminée, trois ans ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);

c) dans le cas du délinquant qui purge une peine d'emprisonnement égale ou supérieure à deux ans, à l'exclusion des peines visées aux alinéas a) et b), six mois ou, si elle est plus

longue, la période qui se termine six mois avant la date d'admissibilité à la libération conditionnelle totale;

d) dans le cas du délinquant qui purge une peine inférieure à deux ans, la moitié de la peine à purger avant cette même date.

119(1.1) Temps d'épreuve pour la semi-liberté

Par dérogation à l'article 746.1 du *Code criminel*, au paragraphe 140.3(2) de la *Loi sur la défense nationale* et au paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, dans les cas visés aux paragraphes 120.2(2) ou (3), le temps d'épreuve pour l'admissibilité à la semi-liberté est, dans le cas du délinquant visé aux paragraphes 746.1(1) ou (2) du *Code criminel* ou auquel l'une ou l'autre de ces dispositions s'appliquent aux termes du paragraphe 140.3(2) de la *Loi sur la défense nationale* ou du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, la période qui se termine trois ans avant la date déterminée conformément aux paragraphes 120.2(2) ou (3).

119(1.2) Temps d'épreuve pour la semi-liberté -- personne âgée de moins de dix-huit ans

Par dérogation à l'article 746.1 du *Code criminel*, au paragraphe 140.3(2) de la *Loi sur la défense nationale* et au paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, dans les cas visés au paragraphe 120.2(2), le temps d'épreuve pour l'admissibilité à la semi-liberté est la période qui se termine, dans le cas d'un délinquant visé au paragraphe 746.1(3) du *Code criminel* ou auquel ce paragraphe s'applique aux termes du paragraphe 140.3(2) de la *Loi sur la défense nationale* ou du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, au dernier cinquième du délai préalable à l'admissibilité à la libération conditionnelle ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2).

119(2) Courtes peines d'emprisonnement

La Commission n'est pas tenue d'examiner les demandes de semi-liberté émanant des délinquants condamnés à une peine d'emprisonnement inférieure à six mois.

120.1(1) Additional consecutive sentence

Where an offender who is serving a sentence receives an additional sentence that is to be served consecutively to the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

(a) any remaining period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed; and

(b) the period of ineligibility in relation to the additional sentence.

120.1(2) Additional sentence to be served consecutively to a portion of the sentence

Notwithstanding subsection (1), where an offender who is serving a sentence receives an additional sentence that is to be served consecutively to a portion of the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day that is the latest of

(a) the day on which the offender has served the period of ineligibility of full parole in relation to the sentence the offender was serving when the additional sentence was imposed,

(b) the day on which the offender has served, commencing on the date on which the additional sentence was imposed, the period of ineligibility for full parole in relation to the additional sentence, and

(c) the day on which the offender has served the period of ineligibility for full parole in relation to the sentence that includes the additional sentence as provided by subsection 139(1).

120.2(1) Additional concurrent sentence

Subject to subsection (2), where an offender who is serving a sentence receives an additional sentence that is to be served concurrently with any portion of the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day that is the later of

(a) the day on which the offender has served the period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed, and

(b) the day on which the offender has served

(i) the period of ineligibility in relation to any portion of the sentence that includes the additional sentence as provided by subsection 139(1) and that is subject to an order under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, and

(ii) the period of ineligibility in relation to any other portion of that sentence.

120.2(2) Where sentence in addition to life sentence

Where an offender who is sentenced to life imprisonment or for an indeterminate period receives an additional sentence for a determinate period, the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

(a) any remaining period of ineligibility to which the offender is subject; and

(b) the period of ineligibility in relation to the additional sentence.

120.2(3) Where reduction of period of ineligibility for parole

Where, pursuant to section 745.6 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* or subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, there has been a reduction in the number of years of imprisonment without eligibility for parole of an offender referred to in subsection (2), the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

(a) the remaining period of ineligibility to which the offender would have been subject, after taking into account the reduction; and

(b) the period of ineligibility in relation to the additional sentence.

120.3 Maximum period

Subject to section 745 of the *Criminal Code*, subsection 140.3(1) of the *National Defence Act* and subsection 15(1) of the *Crimes Against Humanity and War Crimes Act*, where an offender who is serving a sentence receives an additional sentence, the day on which the offender is eligible for full parole shall not be later than the day on which the offender has served fifteen years from the day on which the last of the sentences was imposed.

120.3 Maximum

Sous réserve de l'article 745 du *Code criminel*, du paragraphe 140.3(1) de la *Loi sur la défense nationale* et du paragraphe 15(1) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, lorsqu'un délinquant qui purge une peine d'emprisonnement est condamné à une peine supplémentaire, la limite maximale du temps d'épreuve requis pour la libération conditionnelle totale est de quinze ans à compter de la condamnation à la dernière peine.

120.1(1) Peine supplémentaire consécutive

Le délinquant dont la peine d'emprisonnement n'est pas expirée et qui est condamné à une peine d'emprisonnement supplémentaire à purger à la suite de l'autre n'est pas admissible à la libération conditionnelle totale avant d'avoir purgé, à la fois, depuis le jour où il s'est vu infliger cette peine supplémentaire :

a) le reste du temps d'épreuve relatif à la peine que le délinquant purgeait déjà lorsqu'il s'est vu imposer la peine supplémentaire;

b) le temps d'épreuve relatif à cette peine supplémentaire.

120.1(2) Peine supplémentaire à purger après une partie de la peine

Par dérogation au paragraphe (1), le délinquant dont la peine d'emprisonnement n'est pas expirée et qui est condamné à une peine supplémentaire à purger après une partie de la peine en cours n'est admissible à la libération conditionnelle totale qu'à la plus éloignée des dates suivantes :

a) la date à laquelle il a accompli le temps d'épreuve sur la peine qu'il purge au moment de la condamnation à la peine supplémentaire;

b) la date à laquelle il a accompli le temps d'épreuve sur la peine supplémentaire, déterminé à compter de la date de la condamnation à celle-ci;

c) la date à laquelle il a accompli le temps d'épreuve requis par rapport à la peine d'emprisonnement déterminée conformément au paragraphe 139(1).

120.2(1) Peine supplémentaire concurrente

Sous réserve du paragraphe (2), le délinquant dont la peine d'emprisonnement n'est pas expirée et qui est condamné à une peine d'emprisonnement supplémentaire à purger en même temps qu'une partie de l'autre n'est admissible à la libération conditionnelle totale qu'à la plus éloignée des dates suivantes :

a) la date à laquelle il a accompli le temps d'épreuve sur la peine qu'il purge au moment de la condamnation à la peine supplémentaire;

b) la date à laquelle il a accompli, d'une part, le temps d'épreuve requis par rapport à la partie de la période globale d'emprisonnement, déterminée conformément au paragraphe 139(1), qui est visée par une ordonnance rendue en vertu de l'article 743.6 du *Code criminel* ou de l'article 140.4 de la *Loi sur la défense nationale* et, d'autre part, le temps d'épreuve requis par rapport à toute autre partie de cette période globale d'emprisonnement.

120.2(2) Peine d'emprisonnement à perpétuité

Le délinquant qui est condamné à une peine d'emprisonnement supplémentaire pour une période déterminée alors qu'il purge une peine d'emprisonnement à perpétuité ou pour une période indéterminée n'est admissible à la libération conditionnelle totale qu'à la date à laquelle il a accompli le temps d'épreuve auquel il est assujetti au moment de la condamnation ainsi que le temps d'épreuve sur la peine supplémentaire.

120.2(3) Nouveau calcul en cas de réduction du temps d'épreuve

En cas de réduction du temps d'épreuve sur la peine d'emprisonnement à perpétuité en vertu de l'article 745.6 du *Code criminel*, du paragraphe 140.3(2) de la *Loi sur la défense nationale* on du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le délinquant visé au paragraphe (2) n'est admissible à la libération conditionnelle totale qu'à la date à laquelle il a accompli le temps d'épreuve auquel il aurait été assujetti, compte tenu de la réduction, à la date de la condamnation à la peine supplémentaire ainsi que le temps d'épreuve sur la peine supplémentaire.

120(1) Time when eligible for full parole

Subject to sections 746.1 and 761 of the *Criminal Code* and to any order made under section 743.6 of that Act, to subsection 140.3(2) of the *National Defence Act* and to any order made under section 140.4 of that Act, and to subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, an offender is not eligible for full parole until the day on which the offender has served a period of ineligibility of the lesser of one third of the sentence and seven years.

120(2) Life Sentence

Subject to any order made under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, an offender who is serving a life sentence, imposed otherwise than as a minimum punishment, is not eligible for full parole until the day on which the offender has served a period of ineligibility of seven years less any time spent in custody between the day on which the offender was arrested and taken into custody, in respect of the offence for which the sentence was imposed, and the day on which the sentence was imposed.

120(1) Temps d'épreuve pour la libération conditionnelle totale

Sous réserve des articles 746.1 et 761 du *Code criminel* et de toute ordonnance rendue en vertu de l'article 743.6 de cette loi, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et de toute ordonnance rendue en vertu de l'article 140.4 de cette loi, et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est d'un tiers de la peine à concurrence de sept ans.

120(2) Cas particulier : perpétuité

Dans le cas d'une condamnation à l'emprisonnement à perpétuité et à condition que cette peine n'ait pas constitué un minimum en l'occurrence, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est, sous réserve de toute ordonnance rendue en vertu de l'article 743.6 du *Code criminel* ou en vertu de l'article 140.4 de la *Loi sur la défense nationale*, de sept ans moins le temps de détention compris entre le jour de l'arrestation et celui de la condamnation à cette peine.

120(3)

[Abrogé, 1995, ch. 42, art. 34.]

120(4)

[Abrogé, 1995, ch. 42, art. 34.]

120(5)

[Abrogé, 1995, ch. 42, art. 34.]

121(1) Exceptional cases

Subject to section 102 and notwithstanding sections 119 to 120.3 or any order made under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, parole may be granted at any time to an offender

(a) who is terminally ill;

(b) whose physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement;

(c) for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced; or

(d) who is the subject of an order of surrender under the *Extradition Act* and who is to be detained until surrendered.

121(2) Exceptions

Subsection (1) does not apply to an offender who is

(a) serving a life sentence imposed as a minimum punishment or commuted from a sentence of death; or

(b) serving, in a penitentiary, a sentence for an indeterminate period.

121(1) Cas exceptionnels

Sous réserve de l'article 102 mais par dérogation aux articles 119 à 120.3 et même si le temps d'épreuve a été fixé par le tribunal en application de l'article 743.6 du *Code criminel* ou de l'article 140.4 de la *Loi sur la défense nationale*, le délinquant peut bénéficier de la libération conditionnelle dans les cas suivants :

a) il est malade en phase terminale;

b) sa santé physique ou mentale risque d'être gravement compromise si la détention se poursuit;

c) l'incarcération constitue pour lui une contrainte excessive difficilement prévisible au moment de sa condamnation;

d) il fait l'objet d'un arrêté d'extradition pris aux termes de la *Loi sur l'extradition* et est incarcéré jusqu'à son extradition.

121(2) Exceptions

Le présent article ne s'applique pas aux délinquants qui purgent:

a) une peine d'emprisonnement à perpétuité infligée comme peine minimale;

b) une peine de mort commuée en emprisonnement à perpétuité;

c) une peine de détention dans un pénitencier pour une période indéterminée.

***Criminal Code*, R.S.C. 1985, c. C-46, ss. 113, 117.07, 220, 236(a), 239, 244, 272, 273, 279, 279.1, 344 and 346**

113(1) Lifting of prohibition order for sustenance or employment

Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that

(a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or

(b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,
the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or employment purposes.

113(2) Factors

A competent authority may make an order under subsection (1) only after taking the following factors into account;

(a) the criminal record, if any, of the person;

(b) the nature and circumstances of the offence, if any, in respect of which the prohibition order was or will be made; and

(c) the safety of the person and of other persons.

113(3) Effect of order

Where an order is made under subsection (1),

(a) an authorization, a licence or a registration certificate may not be denied to the person in respect of whom the order was made solely on the basis of a prohibition order against the person or the commission of an offence in respect of which a prohibition order was made against the person; and

(b) an authorization and a licence may, for the duration of the order, be issued to the person in respect of whom the order was made only for sustenance or employment purposes and, where the order sets out terms and conditions, only in accordance with those terms and conditions, but, for greater certainty, the authorization or licence may also be subject to terms and conditions set by the chief firearms officer that are not inconsistent with the purpose for which it is issued and any terms and conditions set out in the order.

113(4) When order can be made

For greater certainty, an order under subsection (1) may be made during proceedings for an order under subsection 109(1), 110(1), 111(5), 117.05(4) or 515(2), paragraph 732.1(3)(d) or subsection 810(3).

113(5) Meaning of "competent authority"

In this section, "competent authority" means the competent authority that made or has jurisdiction to make the prohibition order.

113(1) Levée de l'interdiction

La juridiction compétente peut rendre une ordonnance autorisant le contrôleur des armes à feu ou le directeur à délivrer à une personne qui est ou sera visée par une ordonnance d'interdiction, une autorisation, un permis ou un certificat d'enregistrement, selon le cas, aux conditions qu'elle estime indiquées, si cette personne la convainc:

a) soit de la nécessité pour elle de posséder une arme à feu ou une arme à autorisation restreinte pour chasser, notamment à la trappe, afin d'assurer sa subsistance ou celle de sa famille;

b) soit du fait que l'ordonnance d'interdiction équivaudrait à une interdiction de travailler dans son seul domaine possible d'emploi.

113(2) Critères

La juridiction compétente peut rendre l'ordonnance après avoir tenu compte:

a) du casier judiciaire de cette personne, s'il y a lieu;

b) le cas échéant, de la nature de l'infraction à l'origine de l'ordonnance d'interdiction et des

circonstances dans lesquelles elle a été commise;

c) de la sécurité de toute personne.

113(3) Conséquences de l'ordonnance

Une fois l'ordonnance rendue:

a) la personne visée par celle-ci ne peut se voir refuser la délivrance d'une autorisation, d'un permis ou d'un certificat d'enregistrement du seul fait qu'elle est sous le coup d'une ordonnance d'interdiction ou a perpétré une infraction à l'origine d'une telle ordonnance;

b) l'autorisation ou le permis ne peut être délivré, pour la durée de l'ordonnance, qu'aux seules fins de subsistance ou d'emploi et, s'il y a lieu, qu'en conformité avec les conditions de l'ordonnance, étant entendu qu'il peut être assorti de toute autre condition fixée par le contrôleur des armes à feu, qui n'est pas incompatible avec ces fins et conditions.

113(4) Quand l'ordonnance peut être rendue

Il demeure entendu que l'ordonnance peut être rendue lorsque les procédures sont engagées en application des paragraphes 109(1), 110(1), 111(5), 117.05(4) ou 515(2), de l'alinéa 732.1(3)d) ou du paragraphe 810(3).

113(5) Sens de « juridiction compétente »

Au présent article, **« juridiction compétente »** s'entend de la juridiction qui a rendu l'ordonnance d'interdiction ou a la compétence pour la rendre.

117.07(1) Public officers

Notwithstanding any other provision of this Act, but subject to section 117.1, no public officer is guilty of an offence under this Act or the *Firearms Act* by reason only that the public officer

(a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance in the course of or for the purpose of the public officer's duties or employment;

(b) manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition in the course of the public officer's duties or employment;

(c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition in the course of the public officer's duties or employment;

(d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm in the course of the public officer's duties or employment;

(e) in the course of the public officer's duties or employment, alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger;

(f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance that occurs in the course of the public officer's duties or employment or the destruction of any such thing in the course of the public officer's duties or employment; or

(g) alters a serial number on a firearm in the course of the public officer's duties or employment.

117.07(2) Definition of "public officer"

In this section, **"public officer"** means

(a) a peace officer;

(b) a member of the Canadian Forces or of the armed forces of a state other than Canada who is attached or seconded to any of the Canadian Forces;

(c) an operator of a museum established by the Chief of the Defence Staff or a person employed in any such museum;

(d) a member of a cadet organization under the control and supervision of the Canadian Forces;

(e) a person training to become a police officer or a peace officer under the control and supervision of

(i) a police force, or

(ii) a police academy or similar institution designated by the Attorney General of Canada or the lieutenant governor in council of a province;

(f) a member of a visiting force, within the meaning of section 2 of the *Visiting Forces Act*, who is authorized under paragraph 14(a) of that Act to possess and carry explosives, ammunition and firearms;

(g) a person, or member of a class of persons, employed in the federal public administration or by the government of a province or municipality who is prescribed to be a public officer; or

(h) the Commissioner of Firearms, the Registrar, a chief firearms officer, any firearms officer and any person designated under section 100 of the *Firearms Act*.

117.07(1) Fonctionnaires publics

Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un fonctionnaire public n'est pas coupable d'une infraction à la présente loi ou à la *Loi sur les armes à feu* du seul fait que, dans le cadre de ses fonctions, il:

a) a en sa possession une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions prohibées ou des substances explosives;

b) fabrique, cède ou offre de fabriquer ou de céder une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées;

c) exporte ou importe une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées;

d) exporte ou importe quelque élément ou pièce conçu exclusivement pour être utilisé dans la fabrication ou l'assemblage d'armes automatiques;

e) modifie ou fabrique une arme à feu de façon à ce qu'elle puisse tirer rapidement plusieurs projectiles à chaque pression de la détente ou assemble des pièces d'armes à feu en vue d'obtenir une telle arme;

f) omet de signaler la perte, le vol ou la découverte d'une arme à feu, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé, de munitions, de munitions prohibées ou de substances explosives, ou la destruction de tels objets;

g) modifie le numéro de série d'une arme à feu.

117.07(2) Définition de « fonctionnaire public »

Pour l'application du présent article, sont des fonctionnaires publics:

a) les agents de la paix;

b) les membres des Forces canadiennes ou des forces armées d'un État étranger sous les ordres de celles-ci;

c) le conservateur ou les employés d'un musée constitué par le chef d'état-major de la défense nationale;

d) les membres des organisations de cadets sous l'autorité et le commandement des Forces canadiennes;

e) les personnes qui reçoivent la formation pour devenir agents de la paix ou officiers de police sous l'autorité et la surveillance soit d'une force policière soit d'une école de police ou

d'une autre institution semblable désignées par le procureur général du Canada ou par le lieutenant-gouverneur en conseil d'une province;

f) les membres des forces étrangères présentes au Canada, au sens de l'article 2 de la *Loi sur les forces étrangères présentes au Canada*, qui sont autorisés, en vertu de l'alinéa 14a) de cette loi, à détenir et à porter des armes à feu, munitions ou explosifs;

g) les personnes ou catégories de personnes désignées par règlement qui sont des employés des administrations publiques fédérale, provinciales ou municipales;

h) le commissaire aux armes à feu, le directeur, les contrôleurs des armes à feu, les préposés aux armes à feu et les personnes désignées en vertu de l'article 100 de la *Loi sur les armes à feu*.

220. Causing death by criminal negligence

Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

220. Le fait de causer la mort par négligence criminelle

Quiconque, par négligence criminelle, cause la mort d'une autre personne est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

236. Manslaughter

Every person who commits manslaughter is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

236. Punition de l'homicide involontaire coupable

Quiconque commet un homicide involontaire coupable est coupable d'un acte criminel passible:

(a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

(b) dans les autres cas, de l'emprisonnement à perpétuité.

239. Attempt to commit murder

Every person who attempts by any means to commit murder is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

239. Tentative de meurtre

Quiconque, par quelque moyen, tente de commettre un meurtre est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

244. Causing bodily harm with intent – firearm

Every person who, with intent

(a) to wound, maim or disfigure any person,

(b) to endanger the life of any person, or

(c) to prevent the arrest or detention of any person,
discharges a firearm at any person, whether or not that person is the person mentioned in paragraph (*a*), (*b*) or (*c*), is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of four years.

244. Fait de causer intentionnellement des lésions corporelles -- arme à feu

Est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans et d'une peine minimale d'emprisonnement de quatre ans quiconque, dans l'intention:

a) soit de blesser, mutiler ou défigurer une personne,

b) soit de mettre en danger la vie d'une personne,

c) soit d'empêcher l'arrestation ou la détention d'une personne,

décharge une arme à feu contre quelqu'un, que cette personne soit ou non celle qui est mentionnée à l'alinéa *a)*, *b)* ou *c)*.

272(1) Sexual assault with a weapon, threats to a third party or causing bodily harm

Every person commits an offence who, in committing a sexual assault,

(a) carries, uses or threatens to use a weapon or an imitation of a weapon;

(b) threatens to cause bodily harm to a person other than the complainant;

(c) causes bodily harm to the complainant; or

(d) is a party to the offence with any other person.

272(2) Punishment

Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for a term not exceeding fourteen years.

272(1) Agression sexuelle armée, menaces à une tierce personne ou infliction de lésions corporelles

Commet une infraction quiconque, en commettant une agression sexuelle, selon le cas:

a) porte, utilise ou menace d'utiliser une arme ou une imitation d'arme;

b) menace d'infliger des lésions corporelles à une autre personne que le plaignant;

c) inflige des lésions corporelles au plaignant;

d) participe à l'infraction avec une autre personne.

272(2) Peine

Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, d'un emprisonnement maximal de quatorze ans, la peine minimale étant de quatre ans;

b) dans les autres cas, d'un emprisonnement maximal de quatorze ans.

273(1) Aggravated sexual assault

Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

273(2) Aggravated sexual assault

Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

273(1) Agression sexuelle grave

Commet une agression sexuelle grave quiconque, en commettant une agression sexuelle, blesse, mutile ou défigure le plaignant ou met sa vie en danger.

273(2) Peine

Quiconque commet une agression sexuelle grave est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

279(1) Kidnapping

Every person commits an offence who kidnaps a person with intent

(a) to cause the person to be confined or imprisoned against the person's will;

(b) to cause the person to be unlawfully sent or transported out of Canada against the person's will; or

(c) to hold the person for ransom or to service against the person's will.

279(1.1) Punishment

Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

279(2) Forcible confinement

Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

279(3) Non-resistance

In proceedings under this section, the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition or force.

279(1) Enlèvement

Commet une infraction quiconque enlève une personne dans l'intention:

a) soit de la faire séquestrer ou emprisonner contre son gré;

b) soit de la faire illégalement envoyer ou transporter à l'étranger, contre son gré;

c) soit de la détenir en vue de rançon ou de service, contre son gré.

279(1.1) Peine

Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

279(2) Séquestration

Quiconque, sans autorisation légitime, séquestre, emprisonne ou saisit de force une autre personne est coupable:

a) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.

279(3) Non-résistance

Dans les poursuites engagées en vertu du présent article, le fait que la personne à l'égard de laquelle il est allégué que l'infraction a été commise n'a pas offert de résistance, ne constitue une défense que si le prévenu prouve que l'absence de résistance n'a pas été causée par des menaces, la contrainte, la violence ou une manifestation de force.

279.1(1) Hostage taking

Every one takes a person hostage who

(a) confines, imprisons, forcibly seizes or detains that person, and

(b) in any manner utters, conveys or causes any person to receive a threat that the death of, or bodily harm to, the hostage will be caused or that the confinement, imprisonment or detention of the hostage will be continued

with intent to induce any person, other than the hostage, or any group of persons or any state or international or intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage.

279.1(2) Hostage-taking

Every person who takes a person hostage is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

279.1(3) Non-resistance

Subsection 279(3) applies to proceedings under this section as if the offence under this section were an offence under section 279.

279.1(1) Prise d'otage

Commet une prise d'otage quiconque:

a) d'une part, séquestre, emprisonne, saisit ou détient de force une personne;

b) d'autre part, de quelque façon, menace de causer la mort de cette personne ou de la blesser, ou de continuer à la séquestrer, l'emprisonner ou la détenir,

dans l'intention d'amener une autre personne, ou un groupe de personnes, un État ou une organisation internationale ou intergouvernementale à faire ou à omettre de faire quelque chose comme condition, expresse ou implicite, de la libération de l'otage.

279.1(2) Peine

Quiconque commet une prise d'otage est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

279.1(3) Non-résistance

Le paragraphe 279(3) s'applique aux procédures engagées en vertu du présent article comme si l'infraction que ce dernier prévoit était celle que prévoit l'article 279.

344. Robbery

Every person who commits robbery is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

344. Peine

Quiconque commet un vol qualifié est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

346(1) Extortion

Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

346(1.1) Extortion

Every person who commits extortion is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

346(2) Saving

A threat to institute civil proceedings is not a threat for the purposes of this section.

346(1) Extorsion

Commet une extorsion quiconque, sans justification ou excuse raisonnable et avec l'intention d'obtenir quelque chose, par menaces, accusations ou violence, induit ou tente d'induire une personne, que ce soit ou non la personne menacée ou accusée, ou celle contre qui la violence est exercée, à accomplir ou à faire accomplir quelque chose.

346(1.1) Peine

Quiconque commet une extorsion est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

346(2) Réserve

Une menace d'intenter des procédures civiles n'est pas une menace pour l'application du présent article.