Supreme Court of Canada File No.: 31692

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Alberta)

BETWEEN:

MICHAEL ESTY FERGUSON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

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ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF NEW BRUNSWICK
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Interveners

FACTUM OF THE APPELLANT

(Michael Esty Ferguson, Appellant)
(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

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TABLE OF CONTENTS

PART I. STATEMENT OF FACTS

Overview

Jurists, legal scholars and appellate courts have sought answers to the long standing uncertainty surrounding the availability of stand alone constitutional exemptions for more than twenty years. This appeal directly confronts that question.

1. The Appellant, Michael Esty Ferguson, was found guilty of the offence of manslaughter on September 30, 2004 before the Honourable Mr. Justice G.C. Hawco, sitting with a jury, for which he received a "constitutional exemption" from the mandatory minimum penalty of four years imprisonment mandated by ***s. 236(a)*** *of the Criminal Code* and was sentenced to a conditional sentence of 2 years less one day.

   Ref: *s. 236(a) Criminal Code* , at Part VII Tab # 45

2. This Appeal involves an analysis of the law regarding the availability of a "constitutional exemption" from the mandatory minimum sentence of four years imprisonment required by ***s. 236 (a)*** *of the Criminal Code* upon a conviction for manslaughter involving the use of a firearm. The case is of particular importance to individuals such as police officers, prison guards, custom officers and any persons who are required by law to possess a firearm in the exercise of their duties. The Appellant falls within such a group.

3. The Appellant, Ferguson, made an application for a constitutional exemption from the mandatory four years imprisonment on the basis that, in his particular case, the imposition of the penalty would violate his right to be protected against cruel and unusual punishment under *s. 12 of the Charter of Rights.* He did not challenge the constitutionality of *s. 236(a)* generally but rather relied upon the rare and unique circumstances of his own case, as a police officer, acting in the course of his duties and being lawfully required to be in possession of the firearm.

   Ref: *s. 12 Charter of Rights* , at Part VII Tab #46

Chronological Facts

4. At all material times, the Appellant, Michael Ferguson, was a police officer with the Royal Canadian Mounted Police (RCMP). He had been so employed for a period of 19

years when the events giving rise to these matters occurred. As part of his police duties, the Appellant was required to carry a loaded firearm in a standard police issued holster.

5. The Appellant Ferguson was a married man with two children and stationed at the RCMP detachment in Pincher Creek Alberta.

6. The deceased, Darren Varley, was a local truck driver who was a life long resident of the Pincher Creek area. He had recently become engaged to Chandelle Bachand.

7. On the evening of Saturday, October 2, 1999, Darren Varley displayed a propensity for violence while at "Leo's" pub in Pincher Creek. He engaged in an argument with his fiancée, Ms. Bachand. [Appellant's Record [AR] 276/45] As he became more intoxicated he became pugnacious and provocative. Varley was involved in three separate fights. Firstly, he was engaged in a pushing match with Wade Lunn inside the bar. [AR 147/25]. Later in the evening he fought with Andrew Pettigrew, a former boyfriend of Ms. Bachand. [AR 149/35]. His fiancé left the bar alone. Finally, Varley and his friend, Rod Tuckey, engaged in a fistfight with a number of persons in the parking lot after the bar closed. [AR 280/15; 428/16; 429/7; 436/30; 462/22] His friend, Rod Tuckey was injured in one of the fights and ended up going to the hospital.

Ref: Evidence of Dyck App. Rec. Vol II Tab # 4(d) p. 276,280
Ref: Evidence of Bachand App. Rec. Vol II Tab # 4 (a) p. 147,149
Ref: Evidence of Alaine Varley App. Rec. Vol III Tab # 4(f) p.428,429,436,462

8. At about 2:45 a.m., two witnesses, Pat Bitango and Sarah Weatherill, came upon Varley and Tuckey walking down the street. They agreed to take Tuckey to the hospital. Tuckey did not want the police called.

9. Varley proceeded to the home of his sister, Alaine Varley. The two of them searched for Bachand. She was not found. She was staying at the home of her former boyfriend. Varley and his sister proceeded to the hospital.

10. While at the hospital, Varley contacted the police and the recording of that conversation shows him to be intoxicated and demanding. The Applicant, Constable Ferguson, responded by attending the hospital. He was on duty alone.

11. Varley was drunk. Alcohol readings taken subsequently established his blood alcohol level to be at approximately 200 mg. percent. He demanded that Ferguson immediately go find a van in which he now alleged his fiancé was being held. He demanded roadblocks be set up. Varley was agitated, aggressive, obnoxious and confrontational. Constable Ferguson attempted to calm him down by placing his hand on his shoulder. This led to a scuffle and a brief fight broke out. Ferguson eventually subdued Varley and was able to handcuff him. Varley was placed under arrest for public intoxication. When advised as to his right to counsel, Varley responded with "fuck you" [AR 237/46; 251/42; 254/40; 255/15; 258/30; 260/1; 268/5-20; 337/30; 375/40; 665/45; 666/1-12; 668/5; 673/25; 766/35; 799,802]

Ref: Evidence of Ferguson App. Rec. Vol IV Tab # 4(i) p. 665,666,669,673,766
Ref: Evidence of Ferguson Statement App. Rec. Vol IV Tab #4 (j) p. 799,802
Ref: Evidence of Langille App. Rec. Vol II Tab # 4(c) p. 237,251,254,255
Ref: Evidence of Sarah Weatherill, App. Rec. Vol III Tab # 4(e) p. 337, 375

12. After placing Varley into the police vehicle, Ferguson began walking toward the hospital to speak to the other parties when Alaine Varley approached the police unit and opened the rear door. Varley attempted to get out of the police vehicle. Ferguson ran back and ordered Alaine Varley away form the vehicle. Constable Ferguson then went into the hospital to speak with the others. While Ferguson was away, Varley kicked out the rear passenger window of the police car. [AR 445/1; 479/1-30; 672/10-45; 173/10; 198/12; 806,808,860,862]

Ref: Evidence of Alaine Varley App. Rec. Vol III Tab # 4(f) p. 445, 672
Ref: Evidence of Laura Weatherill, App. Re. Vol III Tab 4(b) 173,198
Ref: Evidence of Ferguson App. Rec. Vol IV Tab # 4(i) p. 672, 673
Ref: Evidence of Ferguson Statement App. Rec. Vol IV Tab # 4(j) p. 806, 808
Ref: Evidence of Ferguson Statement App. Rec. Vol IV Tab # 4(k) p.860, 862

13. At the detachment, Constable Ferguson, who was working alone, prepared to lodge Varley into a cell. Piet Schiebout was a commissionaire and night watchman and the only other person present at the detachment. It was the duty of Ferguson to place prisoners

into the cell. Ferguson was able to remove the handcuffs and shoes from Varley. When he was motioned toward the cell, Varley resisted. [AR 674/40- 680/23; 681/15]

Ref: Evidence of Ferguson App. Rec. Vol IV Tab # 4(i) p. 674-681

14. Once Constable Ferguson got Varley into the cell, Varley attacked him. Varley was able to pull Ferguson's bulletproof vest over the constable's head and face. In the course of the struggle, Varley pulled Constable Ferguson's firearm free from the holster that hung on the police officer's belt. The Applicant, Ferguson, fought vigorously for the gun and was able to regain sufficient control of it to enable him to discharge it twice in quick succession. The Appellant shot "instinctively" and without aiming the gun. The whole incident occurred within a matter of seconds. [AR 681/25; 777/37; 682/10; 683/1-10; 683/20; 683/42; 684/25; 709/35; 709/40; 775/25; 710/15; 684/10; 684/25, 870,877,878]

Ref Evidence of Ferguson App. Rec. Vol IV Tab # 4(i) p681,777,682,683,684,709,775,710,684
Ref: Evidence of Ferguson Statement App. Rec. Vol IV Tab # 4(k) p. 870,877,878

15. One bullet struck Varley in the abdomen and the other bullet struck him in the head. The Appellant Ferguson was in shock and phoned for help. An ambulance arrived and Varley was transported to hospital and thereafter air lifted to Calgary where he subsequently died. [AR 686-687]

Ref: Evidence of Ferguson App. Rec. Vol IV Tab # 4(i) p. 686-687

16. The two shots fired by the Appellant Ferguson were discharged in quick succession, one almost immediately after the other. The first bullet struck Varley in the abdomen; the second struck him in the head. Evidence was led with respect to "firearm training" of RCMP officers. One aspect of this training was a procedure referred to a "double tapping", which called for a police officer to fire "two" shots rapidly when faced with an imminent and serious threat. [AR 655/15; 717/25; 684/10; 684/25; 877,878,906,907,909]

Ref: Evidence of Ferguson Statement App. Rec. Vol IV Tab # 4(k) p. 877,878
Ref: Evidence of Ferguson Statement App. Rec. Vol IV Tab # 4(l) p. 906,907,909
Ref: Evidence of Ferguson App. Rec. Vol IV Tab # 4(i) p.655,717,684

17. The trial judge instructed the jury to consider whether, "*at the time of the second shot, did Michael Ferguson honestly believe that he was in danger of death or grievous bodily*

harm". [AR Jury Charge; 16/8] The focus was on the "second shot" because the Crown presented its case to the jury in that way by stating in his address to them; "*I have to prove that when the second shot was fired, there was no issue of self defence"* [Crown Address to Jury [AR 994/12]; and further, "*..even if, on the sudden the first shot was fired, the Crown's case is based on what happened at the time of the second shot."* [AR 995/1]

Ref: Crown Address to Jury App. Rec. Vol. V Tab # 4(o) p. 994,995
Ref: Charge to Jury App. Rec. Vol. I Tab # 2(a) p.16

18. The Appellant Ferguson was subsequently diagnosed with an acute stress disorder and posttraumatic stress disorder as a result of the incident. [AR 967/42-969/25; 971/40]

Ref: Evidence of Dr. Schmalz App. Rec. Vol V Tab # 4(n) p. 967,969,971

19. The Appellant was convicted of "unlawful act manslaughter". Responsibility fell to the learned trial judge to determine the facts for the purpose of sentencing. Pursuant to ***Section 724*** *of the Criminal Code*, the learned trial judge conducted a full hearing into the "fact finding" requirement in order to impose the appropriate sentence upon the Appellant. In his Reasons for Judgment, the learned trial judge made the following findings of facts:

    a. That the deceased Varley did "unlawfully assault" the Appellant Ferguson while attempting to get by him in the "cell"
    b. That the deceased Varley was "highly excited and agitated" while in the police detachment, in the police car and at the hospital
    c. That the deceased Varley was able to "get control" of the Appellant's gun
    d. That the Appellant police officer was able to regain control of his firearm and fire at the deceased, Varley
    e. That when the Appellant fired the "first" shot he "honestly believed" that he was in danger of death or grievous bodily harm
    f. That the same degree of fear of imminent death or bodily harm was not present at the time of the "second" shot
    g. That the "second shot" was not a deliberate shot to the head, but rather a shot fired unnecessarily in close quarters

h. That the action of the Appellant in firing a "second" shot was something instilled into him as part of his police training

i. That Varley was obviously intoxicated, but not incapacitated at the Hospital and was "very agitated, aggressive and loud"

j. That the Appellant was pretty "calm" and "cool" after the confrontation with Varley at the Hospital and "just doing his job"

k. That there was no simmering anger on the part of the Appellant as alleged by Crown as a result of the Varley altercation in the Hospital, nor from the fact that Varley kicked out the "window" of the police vehicle

l. That the shooting of Varley was the result of his own determination not to remain in cells, his struggle for the Applicant's loaded firearm, the serious threat which resulted from the altercation and the actions of the Appellant based upon "instinct" from his training and a failure to appreciate the consequences of the "second shot".

Ref: Trial Judge *Section 724* Ruling, App. Rec. Vol. I, Tab 2(b) at p. 32-33

20. The trial judge concluded that the mandatory minimum penalty of four years imprisonment imposed by law would constitute "cruel and unusual" punishment in violation of s. 12 of the Charter of Rights and granted a "constitutional exemption" from the mandatory penalty to the Applicant and sentenced him to two years less one day conditional sentence.

Ref: Trial Judge Ruling on *s. 12*, App. Rec. Vol. I, Tab #2(c)

Judicial History

21. Constable Ferguson was originally charged with second degree murder. His first trial commenced in September 2001 before Mr. Justice Hembroff of the Alberta Court of Queen's Bench, sitting with a jury. The jury was deadlocked and a mistrial declared. A second trial took place in April 2003 before Mr. Justice Belzil, sitting with a jury. This jury was also deadlocked. The Crown proceeded with a third trial before Mr. Justice Hawco, sitting with a jury, giving rise to these proceedings. The jury convicted the Applicant of manslaughter on September 30, 2004. The trial judge granted a

constitutional exemption from the mandatory minimum sentence to the appellant on December 10, 2004.

22. The majority in the Alberta Court of Appeal (O'Brien J.A. dissenting) ruled that the trial judge had no jurisdiction to impose a "constitutional exemption" in law and concluded, after a re-examination of the evidence that the mandatory imprisonment did not amount to cruel and unusual punishment. O'Brien J.A dissented and held that the law does recognize the existence of "constitutional exemptions" and that the trial judge was correct, on the facts supported by the evidence, in granting the exemption from the mandatory minimum sentence.

Ref: Court of Appeal Reasons for Judgment, App. Rec. Vol. I, Tab # 2(d)

23. Leave to Appeal to the Supreme Court of Canada from the judgment of the Alberta Court of Appeal was granted by this Honourable Court on February 1, 2007. An Order stating the Constitutional Questions for this appeal was granted on April 27, 2007 by this Court.

Ref: Order Granting Leave to Appeal App Rec Vol II Tab 3(h);
Ref: Order Stating Constitutional Question App Rec Vol II Tab 3(k) Appendix "A"

PART II. QUESTIONS IN ISSUE

This case raises important issues of constitutional law regarding the legal availability of stand alone "constitutional exemptions" from mandatory minimum penalties imposed by law. It was ordered by this Honourable Court on April 27, 2007, that the "constitutional questions" be stated as follows:

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*?

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*?

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?

Ref: Constitutional Question Order, Appendix "A", App Rec Vol II Tab 3(k)

PART III. ARGUMENT

QUESTION #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*?

Deferential Standard of Review

24. The trial judge ruled that the mandatory minimum sentence of four years imprisonment prescribed by s.236 (a) constituted cruel and unusual punishment in violation of s. 12 of the Charter in the appellant's case. In coming to that conclusion, the trial judge correctly applied the factors he was required to consider by ***R. v. Latimer*** including the gravity of the offence, the personal characteristics of the appellant, and the particular circumstances of the case, the actual effect of the punishment on the appellant, the penological goals and sentencing principles, valid alternatives and a comparison of punishments for other crimes. It is submitted that the trial judge made no palpable or overriding error in his fact-finding nor did he err in principle in his approach to his ruling under s. 12 of the Charter or in his sentencing of the appellant. It is submitted that the Court of Appeal erred in overturning the decision of the trial judge.

Ref: *R. v. Latimer [2001] 1 S.C.R. 3 (S.C.C.)* at para. [74] Tab # 19

25. In this case the trial judge presided over a trial that took almost four weeks. As pointed out by O'Brien J.A., dissenting, the trial judge heard the witnesses and gained an insight that the court of record could not equal. In addition, the trial judge carefully exercised his duties under ***s. 724*** *of the Criminal Code* to determine the facts for the purpose of sentencing after extensive argument from both counsel. He reserved judgment on the finding of facts. His findings require deference upon review. The standard of review in the appellate court is whether there exists palpable and overriding error by the trial judge on

issues of fact finding. Facts found by a trial judge in support of a Charter application also require deference.

Ref: *s. 724* Ruling Rec. of App. Vol. I Tab #2(b);
Ref: *s. 12* Ruling Rec. of App. Vol. Tab #2(c)
Ref: *R. v. Ngo (2003) 175 C.C.C. (3d) 290 (Alta C.A.)* App. Auth Tab # 29
Ref: *s. 724 Criminal Code*, App. Auth. Tab # 48

26. In his dissenting opinion O'Brien J.A. ruled that the facts relied upon by the trial judge were wholly sustainable by the evidence and applied the deferential standard of review mandated by this court in ***R. v. McDonnell*** and ***R. v. M. (C.A.)*.** In his Reasons for Judgment, the learned trial judge made the following findings of fact, that are clearly supported in the evidence upon review of the trial transcript, as indicated by the corresponding references to the Appeal Record below: *[References in brackets refer to the evidence at trial supporting the findings of fact]*:

a. That the deceased Varley did "unlawfully assault" the Appellant Ferguson while attempting to get by him in the "cell" (in support see: **[Ferguson:AR Vol IV Tab 4(i) 681/25; 777/37]**

b. That the deceased Varley was "highly excited and agitated" while in the police detachment, in the police car and at the hospital (in support see: **[AR Vol II Langille Tab # 4(c) 251/42; 254/40; 255/15; 260/11; Ferguson Vol IV Tab 4(j) 806,808, Tab 4(k) 860,862]**

c. That the deceased Varley was able to "get control" of the Appellant's gun (in support see: **[AR Vol IV Ferguson Tab #4(i) 775/35; 782/11]**

d. That the Appellant police officer was able to regain control of his firearm and fire at the deceased, Varley (in support see: **[AR Vol IV Ferguson Tab # 4(i) 683/42; 775/35; 782/10;Tab # 4(j) 829-830, 844]**

e. That when the Appellant fired the "first" shot he "honestly believed" that he was in danger of death or grievous bodily harm (in support see: **[AR Vol IV Ferguson Tab# 4(i) 775/25; 710/15; 763/37 Tab 4(j) 844,846; Tab 4(k) 871,873; Tab 4(l) 896,898,932]**

f. That the same degree of fear of imminent death or bodily harm was not present at the time of the "second" shot

g. That the "second shot" was not a deliberate shot to the head, but rather a shot fired unnecessarily in close quarters (in support se: **[AR Vol IV Ferguson Tab 4(i) 684/25; 709/35; 684/1; Tab 4(j) 831,832 Tab 4(k) 875-876,879]**

h. That the action of the Appellant in firing a "second" shot was something instilled into him as part of his police training (in support see: **[AR Vol IV Ferguson Tab # 4(i) 655/15; 717/25; Tab 4(l) 906-907,909]**

i. That Varley was obviously intoxicated, but not incapacitated at the Hospital and was "very agitated, aggressive and loud"(in support see: **[AR Vol II Langille Tab # 4(c) 251/42; 254/40; 255/5; AR Vol IV Ferguson Tab # 4(i) 665/45; 666/5; 666/12; Tab 4(l) 938]**

j. That the Appellant was pretty "calm" and "cool" after the confrontation with Varley at the Hospital and "just doing his job" (in support see: **[AR Vol II Langille Tab # 4 (c) 237/46; 268/5-20; AR Vol IV Ferguson Tab # 4(i) 742/40-743/40]**

k. That there was no simmering anger on the part of the Appellant as alleged by Crown as a result of the Varley altercation in the Hospital, nor from the fact that Varley kicked out the "window" of the police vehicle (in support see: **[AR Vol IV Ferguson Tab # 4(i) 746/45; 748/20; Tab 4(j) 809; Tab 4(l) 899-890, 935]**

l. That the shooting of Varley was the result of his own determination not to remain in cells, his struggle for the Applicant's loaded firearm, the serious threat which resulted from the altercation and the actions of the Appellant based upon "instinct" from his training and a failure to appreciate the consequences of the "second shot". (in support see: **[AR Vol IV Ferguson Tab 4(i) 655/15; 717/25; 684/25 Tab 4(j) 820,831,832; Tab 4(k) 873,879; Tab 4(l) 906,907,945; AR Vol V Tab 4(m) 950]**

Ref: Trial Judge *s. 724* Ruling, Rec. of App., Vol. I, Tab #2(b)at p. 32-33
Ref: *R. v. McDonnell [1997] 1 S.C.R. 948 (SCC)*, App. Auth. Tab # 25
Ref: *R. v. M. (C.A.) [1996] 1 S.C.R. 500 (SCC)*, App. Auth. Tab # 24

27. It is submitted that the majority opinion is in error where it interferes with the fact finding of the trial judge. As particularized below, the majority engaged in an isolated examination of some of the evidence while ignoring other portions which the trial judge relied upon to make his findings. The majority erred in second guessing the findings of fact of the trial judge. The dissenting opinion of O'Brien J.A. is correct when he states "*there is no permissible basis for this Court to substitute its own findings of fact for those of the trial judge*".

Ref: Appeal Reasons Dissent App. Rec Vol. I Tab # 2(d) para [166]

28. In assessing whether the mandatory minimum sentence of 4 years imprisonment prescribed by *s. 236(a)* would violate *s. 12 of the Charter* when applied to the appellant, the trial judge properly considered all the necessary factors to determine if the sentence was grossly disproportionate; including the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case (para [9]). He instructed himself on the effect of the punishment on the Appellant, the comparison of punishments imposed for similar crimes and whether the mandatory sentence was consistent with the penological goals (para [17]) and sentencing principles (para 43).

Ref: *s. 12* Ruling Rec. of App. Vol.I Tab #2(c) para [9]; [17]; [43]

<u>Gravity of the Offence and Moral Culpability</u>

29. The trial judge placed the Appellant Ferguson on the very low rungs on the ladder of moral culpability. The dissenting opinion of O'Brien J.A. carefully set out the circumstances and the sustainable findings of fact that justified such a finding. It is submitted that the dissent was correct in ruling that the trial judge was in the best position to make this assessment of moral blameworthiness, and that he undertook the appropriate analysis and took into account the factors necessary to make that finding. The dissenting opinion was that the trial judge made no palpable or overriding error in that regard.

Ref: Trial Judge *s. 724* Ruling, Rec. of App., Vol. I, Tab #2(b) at para [32]
Ref: Ref: Appeal Reasons Dissent App. Rec Vol. I Tab # 2(d) para [188]

30. Regarding the gravity of the offence, it should be recognized that in some cases of manslaughter where the complete defence of "self defence" is not made out, there may

remain a thin line between guilt and innocence, and that this borderline guilt is an important factor in assessing moral culpability and the ultimate sentence to be imposed. Many of the very low sentences imposed for manslaughter involve these types of "borderline cases' where the defence is lost as a result of "excessive force" yet the offender may still be described as only marginally guilty. Similar principles apply to "provocation" which is considered an important factor in assessing the offender's moral culpability upon sentencing.

Ref: *R. v. Maheux (1987) Nadin Davis 73.90 (Que. C.A.)*, App. Auth. Tab # 23
Ref: *R. v. Simonson (1982), 43 N.B.R. (2d) 617 (N.B.C.A.)*, App. Auth. Tab # 36
Ref: *R. v. Durocher (2006) 71 W.C.B. (2d) 966 (Alta Q.B.)*, App. Auth. Tab # 12
Ref: *R. v. Owens, (1985) B.C.J. 431(B.C.S.C.)*, App. Auth. Tab # 31
Ref: *R. v. Stone, [1999] 2 S.C.R. 290 (S.C.C.) at p. 405*, App. Auth. Tab # 38
Ref: *R. v. Lecaine (1990) 105 A.R. 261 (Alta C.A.)*, App. Auth. Tab # 21

31. It is submitted that this case involves a similar form of manslaughter as stated in the dissenting opinion of O'Brien J.A. wherein he correctly categorized the case as manslaughter by unlawful act and states that although the second shot "could not be justified on an objective basis", the Appellant lacked any appreciable time to consider his actions, the second shot being an "almost instantaneous" reaction to what had been, moments before, a life threatening situation (Appeal Reasons para [177-182]) The dissenting view was that the case was properly characterized as "near self defence" when assessing moral culpability.

Ref: Appeal Reasons Dissent App. Rec. Vol. I Tab #2(d) para [177-182]
Ref: Appeal Reasons Dissent App. Rec. Vol I Tab #2(d) para [188]

32. The majority opinion says that this case cannot be characterized as a "near self defence" because the jury had rejected the defence as it related to the "second" shot. Although the majority opinion does not challenge the finding that the two shots were in rapid succession, the Court was troubled by the finding of the trial judge that the Appellant's second shot was "almost instantaneous" and instinctive and whether that finding would be inconsistent with a rejection of self defence. Yet the fact that the shots were fired within seconds is the unchallenged evidence and the finding of the trial judge. It is this very finding of a compressed time frame which justifies characterizing the case as "near self defence". Furthermore, the Crown itself argued that it was the "second shot", in this

condensed time frame, which it relied upon in urging the jury to reject self defence. The focus was on the "second shot" because the Crown argued its case to the jury in that way by stating *"I have to prove that when the second shot was fired, there was no issue of self defence"* ; and further, "*..even if, on the sudden the first shot was fired, the Crown's case is based on what happened at the time of the second shot."* Based upon this position the trial judge instructed the jury to consider whether *"at the time of the second shot, did Michael Ferguson honestly believe that he was in danger of death or grievous bodily harm*."

Ref: *s. 12* Ruling App. Rec. Vol. I Tab 2(c) para [35]
Ref: Appeal Reasons Majority App. Rec. Vol. I Tab #2(d) para [[69]; [34-36]
Ref: Crown Address to Jury App. Rec. Vol. V Tab #4(o) p. 994,995
Ref: Charge to Jury App. Rec. Vol. I Tab # 2(a) p. 16/8

33. With the focus by the Crown squarely upon the second shot, which occurred "almost instantaneously" after the first shot, it is easy to understand how the trial judge and the dissenting opinion could correctly characterize the case as "near self defence" for sentencing purposes.

Ref: Appeal Reasons Dissent App. Rec. Vol. I Tab #2(d) para [188]

34. On the issue of the moral blameworthiness of the Appellant, the majority states that "the trial judge made a critical finding that Ferguson had regained control of the gun before firing" and interpreted that finding as an implicit rejection, by the trial judge, of the testimony of Mr. Ferguson. It is submitted the majority opinion was in error. In fact the Appellant made pre-trial statements and testified at trial about regaining "control" of the firearm. He said, "*I know I had enough control of the gun to pull the trigger"*. In cross-examination he does not deny that he regained control of the gun. The trial judge was simply describing the dynamics of the shooting that was in fact consistent with the Appellant's version at trial and his findings are consistent with the Appellants evidence.

Ref: Appeal Reasons Majority App. Rec. Vol. I Tab #2(d) para [67]; [29-30]
Ref: Evidence of Ferguson App. Rec. Vol. IV Tab # 4(i) p. 683/42;775/35; 782/10
Ref: Statement of Ferguson App. Rec.Tab #4(j) 829-830; 844

35. It is submitted that the Court of Appeal erred in making an unwarranted intrusion into the findings of fact of the trial judge and in engaging in a substitution of its own opinion

regarding the level of moral culpability in this case. The trial judge approached the matter with a consideration of the whole of the evidence with the proper degree of emphasis on provocation, near self defence, compressed time frame, instinctive reaction to an unexpected and life threatening situation, the heat and fear of the moment, police training, and cooperation. As the dissenting opinion points out, the trial judge "adamantly rejected" the Crown's view of the evidence and in fact told the Crown so.

Ref: Appeal Reasons Dissent App. Rec. Vol. I Tab #2(d) para [163]
Ref: *s. 12* Ruling App. Rec. Vol. I Tab 2(c) para [41]

36. The gravity of the offence is to be considered as it relates to the nature of the offender's actions and the consequences of those actions: see ***R. v. Morrisey*****.** The Appellant was executing his duties as a police officer at the time of the shooting. It is submitted that the actions of the Appellant must be considered in light of Section 495, which provided him with the lawful authority to apprehend criminal offenders. In addition, the Appellant was required, as part of his duties as a police officer, to carry a "firearm" on his person. The Appellant was clearly acting in the course of his duties when Varley unlawfully assaulted him. The deceased Varley took control of the Appellant's firearm placing him in serious danger only moments prior to the shooting.

Ref: *R. v. Morrisey [2000] 2 S.C.R. 90 (SCC)* at para [35] App. Auth. Tab #27

37. The following cases are but just a few examples in support of the submission that the gravity of the offence of manslaughter can vary greatly with the circumstances surrounding the events. It is submitted that the following cases show that the mere use of a firearm will not always, in and of itself, justify the mandatory minimum sentence of four (4) years imprisonment.

38. In ***R. v. Maheux*** the accused was convicted on manslaughter. He had purchased a gun to protect himself from threats made by his brother. When his brother came to his home, the accused, thinking the brother was armed, fired at him. The bullet struck the victim in the head and killed him. In imposing a sentence of **"probation"**, the Court of Appeal agreed with the trial judge that the case was exceptional and involved actions "on the borderline between legality and illegality"

Ref: *R. v. Maheux (1987) Nadin Davis 73.90 (Que. C.A.)* App. Auth. Tab # 23

39. In ***R. v. Owens*** the accused was convicted of manslaughter. Following an altercation outside of his home with several people, the accused went into his home and retrieved a shotgun. He loaded the shotgun and came outside with the intention of shooting it in the air to scare the people away. As he came out, the occupants of the other vehicle got into their vehicle. The accused fell on the ice and when he got up the gun discharged through the passenger window killing one of the female occupants. The court concluded that although he was entitled to bring out the firearm in these circumstances, his handling of the firearm was careless and the accused was convicted of manslaughter. In these circumstances, the trial judge imposed a **suspended sentence** upon the accused with 1,000 hours of community service work.

Ref: R. v. Owens, (1985) B.C.J. 431 (B.C. S.C.), App. Auth. Tab # 31

40. In ***R. v. Ball*** the accused was found guilty of manslaughter. The accused had carelessly handed a firearm. The rifle discharged killing the friend of the accused. The court imposed a **"suspended sentence**" and probation.

Ref: *R. v. Ball, (1993) O.J. 3207 (Ont. S.C.*), App. Auth. Tab # 3

41. In ***R. v. Deane*** the accused was convicted of manslaughter. Here the accused was a member of the Ontario Provincial Police. During a confrontation with Native protestors, violence erupted. A bus and car with Native protestors reversed in retreat while a number of police officers fired at the vehicles. One person died as a result of the gunfire. The accused had fired three rounds in the general direction of the unarmed protestor who was shot. One mitigating factor the court took into account was the fact that "Sergeant Deane was engaged in the lawful performance of his duty". The court sentenced the accused to a **two year less one day conditional sentence**.

Ref: *R. v. Deane, (1997) O.J. 3578 (Ont. Prov. Ct.),* App. Auth. Tab # 10
Ref: *R. v. Deane, (2000) 143 C.C.C. (3d) 84 (Ont. C.A.)*, App. Auth. Tab # 11

42. In ***R. v. Lecaine*** the accused had returned to the home of the deceased in a conciliatory attempt to apologize for his brother's prior behaviour. The deceased immediately attacked

the accused, punching him in the face and kicking him in the leg, at which point the accused immediately reacted by pulling out the gun he had in his pocket and shot the deceased in the chest and in the neck killing him. A third shot was fired at a friend of the deceased but missed. The accused had no previous record and was a responsible citizen. The trial judge sentenced the accused to **twelve months imprisonment**. The Alberta Court of Appeal upheld the decision.

Ref: *R. v. Lecaine, (1990) 104 A.R. 175 (Alta. Q.B.)*, App. Auth. Tab # 20
Ref: *R. v. Lecaine, 105 A.R. 261 (Alta. C.A.)*, App. Auth. Tab # 21

Personal Characteristics and Particular Circumstances of the Case

43. The trial judge considered extensive arguments, a pre-sentence report, numerous character references and the evidence led at trial in considering the particular characteristics of the Appellant and the case. The Appellant presented as a 19-year veteran of the RCMP, with an impeccable background. He now suffered from post-traumatic stress disorder as a result of this incident.

Ref: Character References; App. Rec Vol V Tab # 5(a)
Ref: Pre Sentence Report; App. Rec. Vol V Tab #5(d)
Ref: Medical Report; App. Rec. Vol. V Tab # 5(c)

44. The trial judge noted that the Appellant did not initiate the altercation in the cell; he responded to an unexpected and life threatening situation precipitated by Mr. Varley . The offence occurred in "the heat and fear of the moment" in an "extremely compressed time frame"

Ref: Trial Judge Reasons Sentence App. Rec. Vol I Tab #2 (c) para [41]; [46]

45. The majority opinion acknowledges that the sentencing goals of protection of the public, individual rehabilitation and specific deterrence do not present themselves in this case. Despite the fact that the general practice at the time was for a police officer to retain possession of his firearm while placing a prisoner in cells, the majority, nevertheless pointed to the need for general deterrence related to the possession of the gun. The dissenting view is that this position amounts to mere "hindsight" which was neither policy nor practice at the time of the events.

Ref: Appeal Reasons Majority App. Rec. Vol. I Tab #2(d) para[75]
Ref: Appeal Reasons Dissent App. Rec. Vol I Tab #2(d) para[205]

46. It is submitted that the dissenting view best describes the circumstances of the offence here. O'Brien J.A. states at para [187];

> "In short, based upon the findings of the trial judge, this is a case of a police officer acting in the course of his duty and wearing a firearm in accordance with the standard practice being assaulted by a prisoner who takes the officer's weapon leaving him fearful for his life. The officer regains control of his weapon and fires a first shot in self defence but as a matter of instinct and training almost simultaneously fires a lethal second shot that was subsequently determined not to have been necessary in the circumstances. The officer's reaction constituted excessive force and cost Varley his life.
> Accepting the findings of the trial judge, the manslaughter is not near murder. It was not near accident but is was near self defence."

Ref: Appeal Reasons Dissent App. Rec. Vol I Tab #2(d) para[187-188]

Effect of Punishment

47. The trial judge found that the Appellant, as an ex RCMP officer would have to be placed in protective custody for the full period of his incarceration, with his safety and well being, if not his life, in constant danger. The majority opinion acknowledged that this would mean a 23 hour a day lock-up for the Appellant who suffers for PTSD. Based upon the above factors, this sentence is grossly disproportionate to the circumstances surrounding the conviction.

Ref: Trial Judge Reasons Sentence App. Rec. Vol I Tab #2(c) para [45]
Ref: Appeal Reasons Majority App. Rec. Vol. I Tab #2(d) para[79]

48. The majority opinion says that the trial judge erred in not considering the effect of "parole. Merely because the trial judge did not mention "parole" in his reasons does not mean it was not considered. In fact, the Crown made arguments on the parole issue and it is reasonable to assume he did consider it. The dissenting view considered the matter of parole and concluded that the mandatory sentence was grossly disproportionate in this case.

Ref: Appeal Reasons Majority App. Rec. Vol. I Tab #2(d) para[82]
Ref: Appeal Reasons Dissent App. Rec. Vol I Tab #2(d) para[212-213]
Ref: Crown Submissions on Sentence App. Rec. Vol V Tab # 4(p)

Penological Goals and Sentencing Principles

49. It is understandable that Parliament wants to take appropriate measures regarding offences relating to firearms, but it is submitted that the enforcement of the mandatory minimum sentence in all cases of manslaughter would result in turning a blind eye to the historical view that this type offence covers a myriad of circumstances which led the Courts to consistently avoid "starting points" for sentencing for manslaughter.

50. The decision in ***R. v. Morrisey*** focussed on manslaughter by criminal negligence and the reasonable hypotheticals referred to in that case are largely restricted to persons playing with firearms or negligent hunters. They have no application to the case at bar, particularly having regard to the finding of the trial judge that the Appellant did not exhibit a wanton and reckless disregard for life. Those hypotheticals do not contemplate an unintentional killing by a police officer who is required to carry a firearm. As asserted by Arbour J. in ***R. v. Morrisey***, circumstances arising out of these situations may result in a violation of *s. 12* where there is a mandatory minimum punishment of four (4) years imprisonment. (at para 82]

Ref: Trial Reasons Sentence para [37] App. Rec. Vol I Tab # 2 (c)
Ref: *R. v. Morrisey [2000] 2 S.C.R. 90 (SCC*) at para [82] App. Auth. Tab #27

51. The trial judge found the circumstances here to be unique and rare. A constitutional exemption from the mandatory sentence in this case doesn't offend the general penological goals associated with Parliament's attempt to curb offences involving the use of firearms. The exemption here is not inconsistent with the deference to valid legislative objectives; it merely recognizes that in the pursuit of those goals, rare cases do arise in which a strict application of the legislation will in fact violate the individual rights protected by *s. 12 of the Charter of Rights.*

52. The reasons stated by the trial judge and O'Brien J.A. dissenting, are not to be interpreted as suggesting that Parliament didn't intend that laws apply to police officers. In fact O'Brien J.A., dissenting, clearly stated that "I do not advocate special treatment for the police". These opinions merely state that it is doubtful that Parliament had in mind the

circumstances of this case involving a police officer, required to carry a firearm when enacting the mandatory sentence. O'Brien J.A. states at para 206:

> "I question that the imposition of a mandatory prison sentence upon a police officer carrying a firearm in the course of his or her duty, and in the circumstances of this case, was ever considered by the legislators and therefore within their contemplation at the time of passing the legislation in 1996. I think such consideration to have been unlikely as the circumstances of this case are uncommon and unique."

Ref: Appeal Reasons Dissent App. Rec. Vol I Tab #2(d) para[206]
Ref: Appeal Reasons Majority App. Rec. Vol. I Tab #2(d) para[88]
Ref: Trial Reasons Sentence App. Rec. Vol I Tab # 2(c)para [18]

QUESTION # 2

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*?

53. The Court of Appeal's majority opinion held that the trial judge also erred in failing to undertake the s. 1 analysis after concluding that the mandatory sentence was grossly disproportionate in this case**.** It is to be noted that the onus was upon the Crown to establish that the violation was demonstrably justified and the Crown took no steps to do so despite the appropriate constitutional notices having been served. It is submitted that O'Brien J.A., in his dissent, is correct when he states at para [233]

> "In this case, the Crown was served with notice prior to sentence that Ferguson was seeking a constitutional exemption and it made no effort to establish the applicability of s. 1 of the Charter. While there can be no doubt that the objective of the mandatory sentences in the case of firearms is to deter the carrying of weapons and their improper use, the onus is on the Crown to show that the means chosen are reasonably and demonstrably justified. In my view, the mandatory sentence in the case of a police officer carrying his weapon in the course of his duties fails this test."

Ref: Appeal Reasons Majority App. Rec Vol. I Tab #2(d) para [94]
Ref: Appeal Reasons Dissent App. Rec Vol. I Tab #2(d) para [233]

54. To that statement it may be added that it is difficult to reconcile a finding that a punishment is "grossly disproportionate" under the *s.12* analysis with the argument that it is also demonstrably justified under *s.1.* This is so because the *s.1* analysis also requires a "proportionality" test that includes the necessity of "minimum impairment of the rights

protected by *s. 12*". The decision of the Crown not to advance an argument under *s. 1* at trial may be explained by the difficulty, if not impossibility, of reconciling the inherent findings in a *s. 12* violation that a particular sentence is "grossly disproportionate" and "outrages standards of decency" with the argument that the sentencing measures prescribed by the legislation under review are "proportionate".

Ref: *R. v. Oakes (1986) 1 S.C.R. 103 (SCC)* App. Auth Tab # 30
Ref: *R. v. Smith [1987] 1 S.C.R. 1045 (SCC)* App. Auth Tab # 37

55. The usefulness of a *s. 1* analysis is debatable here particularly when the balancing of the objectives of the legislation with the measures it employs is already a consideration in deciding if a *s. 12* violation exists in the first place. (e.g. the "penological goals" portion of the *s. 12* analysis). In addition, it has been questioned whether a violation of *s.12* could ever be saved under s. 1 in order to justify cruel and unusual punishment in a free and democratic society.

Ref: Allan Manson, "Answering Some Questions about Cruel and Unusual Punishment" (1987), C.R. (3d) 247 at pp.250-251) App. Auth Tab # 43
Ref: Don Stuart, "Charter Justice in Canadian Criminal Law" (2005) (4th ed.) at p. 448 App. Auth Tab # 44

QUESTION #3

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?

56. *S. 236(a) of the Criminal Code* provides that a mandatory minimum sentence of 4 years imprisonment shall be imposed upon a conviction for manslaughter where a firearm is used in the commission of the offence.

Ref: *Section 236(a) Criminal Code*, Part VII para # 45; App. Auth Tab # 45

57. *S. 12 of the Charter of Rights* provides a constitutional right to an individual not to be subjected to any cruel or unusual punishment.

Ref: *Section 12 Charter of Rights*, Part VII para # 46; App. Auth Tab # 50

58. The Appellant was convicted of unlawful act manslaughter and the trial judge concluded that the imposition of the mandatory minimum sentence of 4 years imprisonment would, in the unique and rare circumstances of this case, amount to a violation of the Appellant's rights protected by *s. 12 of the Charter* on the basis that it would be grossly disproportionate for this individual offence and offender.

59. The Crown made no attempt to justify this violation under *s.1 of the Charter* as being reasonable and demonstrably justified in a free and democratic society.
Ref: *Section 1 Charter of Rights*, Part VII para # 47; App. Auth Tab # 47

60. The trial judge provided an individual remedy of a constitutional exemption from the mandatory minimum sentence prescribed by law under *s. 236 of the Code* rather than invoking the more drastic remedy of striking down the legislation in its entirety.

61. In this case the Court of Appeal was split on the controversial question raised in this appeal that has been the subject of many conflicting opinions across Canada. The question is this; where an individual establishes that a mandatory minimum sentence amounts to cruel and unusual punishment in his or her own particular case, is a stand alone constitutional exemption lawfully available as an alternative to the more drastic remedy of striking down the law itself as unconstitutional?

62. The dissenting view of O'Brien J.A. in this case, followed the line of authorities that held that legislation providing a mandatory minimum sentence that is beneficial and constitutionally valid in the vast majority of cases should not be struck down. A constitutional exemption can be granted to the rare and unique offender who establishes that the punishment is cruel and unusual in his own particular circumstances.

63. The majority opinion followed the line of authority that suggested that the existing legal analytical structure in place for *s. 12* challenges, which includes both the "particularized" inquiry and the "reasonable hypothetical" inquiry did not leave room for the individual remedy of a constitutional exemption and that where a violation of *s. 12* arose, no matter

how unique or rare the circumstances, the only remedy would be that the legislation would have to be declared unconstitutional and invalid. It is submitted that the Court of Appeal erred in that finding.

64. Fruman J.A., writing the majority opinion, did recognize that the existing law on the subject is in an unsatisfactory state and noted at para [143] that *"the lack of certainty will continue to be a problem as long as the current s. 12 analysis is maintained*". Fruman J.A. acknowledged the need for direction from the Supreme Court of Canada and stated the following at para [145]:

> "While I do not advocate the introduction of purely individual exemptions, if a sea change is to occur in constitutional remedies, direction must come from the Supreme Court of Canada. *There is confusion in the lower courts about the existence of these exemptions and guidance would be welcomed".*

Ref: Appeal Reasons Majority App. Rec Vol. I Tab # 2(d) para [143] & [145]

65. Legal scholars have debated the issue as to the availability of constitutional exemptions for many years. As one author states, the uncertainty in the law on the matter *"creates difficulty for litigants, statutory drafters, government respondents and lower courts grappling with an uncertain remedial framework"*.

Ref: Peter Sankoff, "Constitutional Exemptions: An Ongoing Problem Requiring a Swift Resolution, (2003) 36 U.B.C.L. Rev.231: App. Auth Tab # 42

<u>Current State of the Law</u>

66. There is a divergence of opinion across Canada among the courts at the appellate level as to the availability of stand-alone constitutional exemptions. The Supreme Court of Canada has not definitively decided the issue, yet arguably such a remedy was assumed to be available in one case (see ***R. v. Sawyer*** *)* and seemingly implied as available in another. *(**R. v. Latimer***).

Ref: *R. v. Sawyer [1992] 3 S.C.R. 809 (S.C.C.)* App Auth Tab # 35
Ref: *R. v. Latimer [2001] 1 S.C.R. 3 (S.C.C.)* App Auth Tab # 19

67. Stand-alone constitutional exemptions from mandatory minimum penalties have been found to be available in many provincial jurisdictions either through direct application to an individual or in obiter statements from the courts. For example in British Columbia see ***R. v. Kumar*** **(1993), 85 C.C.C. (3d) 417 (BCCA) App Auth Tab #17);** ***R. v. Birchall*** **(2001) 158 C.C.C. (3d) 340 (BCCA) App Auth Tab # 6);** ***R. v. Walcott*** **(2001) 154 C.C.C. (3d) 385 (BCCA) App Auth Tab # 39); in N.W.T. see** ***R. v. Netser*** **(1992) 70 C.C.C. (3d) 477 (NWTCA) App Auth Tab # 28); in Yukon see** ***R. v. Chief*** **(1989), 51 C.C.C. (3d) 265 (YTCA) App Auth Tab # 8); in Saskatchewan see** ***R. v. McGillivary*** **(1991). 62 C.C.C. (3d) 407 (Sask. CA) App Auth Tab # 26); in Alberta see** ***R. v. Bowen*** **(1991), 59 C.C.C. (3d) 515 (Alta CA) App Auth Tab # 5).** ***R. v. Wald*** **(1989), 47 C.C.C.315 (Alta CA) App Auth Tab # 40); in Manitoba, see** ***R. v. Joe*** **(1993) 87 C.C.C. (3d) 234 (C.A.) App Auth Tab # 15); in Quebec see** ***R. v. Lapierre*** **(1998) 123 C.C.C. (3d) 332 (Que. CA) App Auth Tab # 18) but c.f.** ***R. v. Chabot*** **(1992), 77 C.C.C.(3d) 371 (C.A.) App Auth Tab # 7) in New Brunswick see** ***R. v. Roberts*** **(1998), 125 C.C.C. (3d) 471 (C.A.) App Auth Tab #33).**

68. In Ontario, the Ont. C.A. rejected the availability of stand-alone constitutional exemptions in the decision of ***R. v. Kelly*** and confirmed that position more recently, without analysis, in ***R. v. Madeley***. On the other hand this position has been questioned in Ontario in ***R. v. Padda*** in light of ***R. v. Latimer***.

Ref: ***R. v. Kelly (1990), 59 C.C.C. (3d) 497 (Ont. CA*****) App Auth Tab # 16**
Ref: ***R. v. Madeley [2002] O.J. No. 2410 (Ont. CA)*** **App Auth Tab # 22**
Ref: ***R. v. Padda [2003] O.J. 5503(Ont.C.J.)*** **Auth Tab # 32**

69. Confusion in the appellate courts has even arisen from diametrically opposed interpretations of cases decided by the Supreme Court of Canada on the issue. For example, in the within case the majority opinion relies on ***R. v. Morrisey*** as an authority denying the availability of constitutional exemptions. However, McEachern C.J.B.C. held in case of ***R. v. Birchall***, supra, (BCCA) that "the reasons for judgment in ***Morrisey*** make it clear that constitutional exemptions may be given in proper cases". Similarly, in ***Madeley***, supra, the Ont. C.A., without any analysis at all, stated that ***R. v. Latimer,*** supra had not changed the law on exemptions while ***R. v. Padda***, supra, suggested that ***Latimer***

does indeed assume the availability of the remedy. These are but examples of the need for clarification by the Supreme Court of Canada on the issue.

The Argument for Constitutional Exemptions

70. Parliament has moved toward an increase in mandatory minimum punishments in recent years. There exists a need for a modern approach guided by common sense and logic which would provide for proper procedures and remedies striking a balance between upholding mandatory minimum sentencing legislation which is constitutionally valid when applied to the vast majority of offenders and the right of an individual whose rare and unique circumstances would subject him to a grossly disproportionate sentence in violation of *s. 12* of the Charter when the legislation is applied to him individually.

71. In the within appeal, the majority of the Alberta Court of Appeal ruled that, as a matter of law, the trial judge lacked the legal jurisdiction to grant the individual remedy of a constitutional exemption. The dissenting view of O'Brien J.A. (hereinafter referred to as the dissent) strongly disagrees and concluded that there was ample legal precedent and reasonable logic to support the individual remedy of a constitutional exemption without the necessity of striking down the legislation and as such no error of law could be attributed to the trial judge. In doing so he adopted the opinion of L"Heureux-Dube J. in ***R. v. Rose*** where she states at p. 304:

> "Section 24(1) of the Charter, however, enables a Court to grant a constitutional exemption from legislation that is constitutional in its general application if in the circumstances of a particular case an unconstitutional result would otherwise occur."

Ref: *R. v. Rose [1998] 3 S.C.R. 262 (S.C.C.)* at p. 304 App. Auth Tab # 34

72. The traditional approach to a *s. 12* analysis in determining if punishment is cruel and unusual, involves a two stage process. Firstly, the trial judge must make a "particularized inquiry" to determine if the punishment is grossly disproportionate to the individual offence and offender. If the answer is yes, the legislation would be declared unconstitutional and struck down subject to it being demonstrably justified under *s. 1*. If the answer is no, the court must go on to consider if the legislation can withstand similar

scrutiny when applied to "reasonable hypothetical" situations. Recently, the Supreme Court of Canada has declared that the scope of the "reasonable hypothetical" analysis is limited to cases which are "common" as opposed to the marginal or remote. (see ***R. v. Morrisey***,)

Ref: *R. v. Smith [1987] 1 S.C.R. 1045 (SCC)* App Auth Tab # 37
Ref: *R. v. Goltz [1991] 3 S.C.R. 485 (SCC)* App Auth Tab # 13
Ref: *R. v. Morrisey [2000] 2 S.C.R. 90 (SCC)* App Auth Tab # 27

73. If legislation imposing a mandatory minimum sentence survives this two phase analysis under *Section 12* and as such is declared constitutional, the question arises as to what remedy is to be granted to an individual who subsequently establishes that the mandatory sentence is a grossly disproportionate sentence in his unique circumstances. There are only three options. The first would be to deny the individual a remedy at all. This result would be contrary to constitutional principles and the obligation of the courts to protect the individual rights guaranteed by the Charter. As stated by Lamer J. [as he then was] in ***Nelles v. Ontario*** at p.196

> "..to create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur"

Ref: *Nelles v. Ontario [1989] 2 S.C.R. 170 (S.C.C.)* at p. 196, App Auth Tab # 2

74. The second option is that suggested by the majority view in the within appeal, which is to strike down the legislation notwithstanding it may have already withstood constitutional scrutiny under *s.12* when applied to the majority of cases. The third option, respectfully advanced by the Appellant is that favoured by the dissenting view of O'Brien J.A. in the within appeal and supported by courts in several provincial jurisdictions, which is, to grant a constitutional exemption from the mandatory sentence to the individual as a remedy under *Section 24(1) of the Charter of Rights*, thereby saving the legislation with its proper and valid application to the majority of cases.

75. Strict application of the traditional *s. 12* analysis requires a court to declare the legislation creating a mandatory minimum sentence unconstitutional, subject to *s. 1*, whenever the sentence is grossly disproportionate, even in a case where the circumstances of the offence

and offender are uncommon, rare and unique. Several appellate courts found such a declaration to be an overly blunt instrument, particularly where the mandatory punishment would, in the vast majority of cases be constitutionally valid, beneficial to the general public, and an expression of the will of Parliament. The solution provided by this line of authority was to grant a constitutional exemption to the rare offender to give effect to his individual rights under *s. 12*, while upholding the law in its general application to give effect to the proper Parliamentary purpose and intent of the legislation. The reasons advanced for this approach have been echoed by the various courts and well stated in ***R. v. Chief***, supra, where the BCCA granted a constitutional exemption from a mandatory firearm prohibition. Esson J.A. stated at p. 281:

> "I see this as a matter of the court selecting, from the armoury of remedies made available by s. 24 of the Charter, the remedy which will do justice in the instant case without damaging the general good. Section 98(1), in its application to the great majority of Canadians, cannot possibly be considered to offend the Charter. But it is capable of doing so in relation to a comparable few.

Ref: *R. v. Chief (1989), 51 C.C.C. (3d) 265 (YTCA)* at p. 281,App Auth Tab # 8

76. In the within appeal, the dissenting opinion of O'Brien J.A. of the Alberta Court of Appeal has endorsed this reasoning as a valid justification for the granting of a constitutional exemption to the Applicant. He states at para 227:

> "It would be unfortunate if it were to be concluded that the only remedy to legislation, which in unique and unusual circumstances effects an unconstitutional result, is to strike down the legislation. The remedy of strike down is a very blunt instrument... It is preferable that the legislation be continued to serve its legitimate purpose rather than striking it down when in a rare case it effects an unintended and unconstitutional result"

Ref: Appeal Reasons Dissent Rec. of App. Vol I Tab #2(d) para[227]

77. The same rationale in support of the availability of the constitutional exemptions have been expressed in ***R. v. Kumar***, supra; *R. v.* ***Netser,*** supra and ***R. v. McGillivary***, supra. Despite the obiter statements by the Alberta Court of Appeal in ***R. v. Bowen*** and ***R. v. Wald***, supra supporting the availability of the exemptions, the majority opinion in this case has now ruled that such a remedy is not legally available. The majority opinion states that it is bound by a strict application of the two phase analysis in ***R. v. Goltz***, supra, which

results in the inevitable striking down of the legislation once any offender, no matter how unique or rare his circumstances may be, establishes that a mandatory minimum sentence would be grossly disproportionate within the meaning of *s. 12 of the Charter***.**

Ref: Appeal Reasons Majority Rec. of App. Vol I Tab #2(d) para [142]

78. It is respectfully submitted that the majority view in the within appeal ought to be rejected and that the dissenting view be adopted for several reasons. *Firstly*, the traditional review of legislation under a *s. 12* analysis has undergone a significant reduction in its scope since ***R. v. Morrisey***, supra. In that case, this Court clarified that the "reasonable hypothetical" analysis will be restricted to cases which commonly arise as opposed to the remote or the marginal: see para [30; 32; 50] even to the exclusion of "actual reported cases" which turn on "idiosyncracies at a level of specificity never contemplated by Smith, supra." This approach will serve to save the mandatory sentence legislation which is constitutional in its application to the majority of cases which are classified as "common", but, if the majority opinion of the Alberta Court of Appeal is correct, the same legislation would be constitutionally doomed once the uncommon, remote or marginal individual, in some future case, shows the sentence is grossly disproportionate in his particular case.

Ref: *R. v. Morrisey [2000] 2 S.C.R. 90 (SCC)* at para [30;32;50] App Auth Tab # 27

79. *Secondly*, the majority opinion ignores the fact that some offences cover a very broad spectrum of factual circumstances and wide degrees of moral culpability. Such is the case of the offence of unlawful act manslaughter. Sentences for this offence range from suspended sentence to life imprisonment. To adopt the rigid approach to the *s. 12* analysis when assessing the constitutionality of a mandatory minimum sentence for this offence will inevitably result in striking down the legislation because a rare and unique case will inevitably arise where such a punishment is grossly disproportionate. This type of legislation, if the majority opinion were correct, would eventually have to be struck down even if it could withstand *s. 12* scrutiny in the vast majority of cases.

80. The concern arising from the strict application of the traditional analysis under *s. 12* for all offences, including manslaughter was highlighted in the minority opinion of Arbour J. (McLachlin J. as she then was, concurring) in ***R. v. Morrisey,*** supra, wherein she states at para [82];

> "As I indicated at the outset, I believe that there will unavoidably be a case in which a four year minimum sentence for this offence will be grossly disproportionate."

And at para [93]

> "In the case of some offences, it is possible for the courts to decide once and for all, with adequate certainty, whether, and if so, when, the mandatory minimum will not be constitutionally acceptable. This was so in the previous decisions of this Court. I do not believe that this is one of these cases.

and at para [94]

> "In cases of manslaughter involving the use of a firearm and arising from criminal negligence causing death, I believe that the better approach is to read the mandatory minimum as applicable in all cases save those in which it would be unconstitutional to do so. In a sense, rather than embarking on a search for the fit sentence, the sentencing judge would begin by applying the mandatory minimum unless he or she was persuaded that the minimum was grossly disproportionate to the particular circumstances of the case. This approach is, in my view, more consistent with Parliament's desire to see an increase in the rate and length of imprisonment for this type of offence, while giving effect to Parliament's obligation to operate within the framework set out by the Constitution."

Ref: *R. v. Morrisey [2000] 2 S.C.R. 90 (SCC)* para [82][93][94] App Auth Tab # 27

81. In the within case, the issue arises again, but this time with respect to the offence of "unlawful act manslaughter", an offence which can vary so greatly in its gravity and moral blameworthiness that sentences in the past range from suspended sentence to life imprisonment. In ***R. v. Creighton*** this court declared the existence of a broad scope of mens rea for the offence of manslaughter (foreseeable risk of bodily harm) justifiable in part by the flexibility in the sentence available for that offence. McLachlin J. (as she then was) stated at p.48

> " Here again the offence of manslaughter stands in sharp contrast to the offence of murder. Murder entails a mandatory life sentence; manslaughter carries with it no minimum sentence. This is appropriate. Because manslaughter can occur in a wide

> variety of circumstances, the penalties must be flexible. .....The point is, the sentence can be and is tailored to suit the degree of moral fault of the offender."

Ref: *R. v. Creighton [1993] 3 S.C.R. 3 (S.C.C.)* App Auth Tab # 9

82. There are many examples of sentences in our jurisprudence for unlawful act manslaughter involving the use of a firearm in which the sentence imposed was a suspended sentence, conditional sentence or a short sharp term of imprisonment because of the unique circumstances of the case. [**see: *R. v. Ball,* (1993) O.J. 3207 (Ont. S.C.) Tab #3; *R. v. Owens,* (1985) B.C.J. 431(B.C.S.C.) Tab #31; *R. v. Bill* (1997) B.C.J. 3031 (B.C.S.C.)Tab #4; *R. v. Lecaine* (1990) 105 A.R. 261 (Alta C.A.) Tab #21; *R. v. Maheux* (1987) Nadin Davis 73-90 (Que. C.A. Tab #23); *R. v. Deane*, (1997) O.J. 3578 (Ont. S.C.) Tab #10,aff'd (2000), 143 C.C.C. (3d) 84 (Ont. C.A.) Tab #11]**

83. In contrast is the offence of murder where a high degree of moral culpability is inevitable because an "intention to kill" is an essential element inherent in the finding of guilt, and therefore it may be that the traditional analysis is more palpable because it is less likely that the mandatory penalty would amount to cruel and unusual punishment. (see for example ***R. v. Latimer***, supra) Even if one should encounter a rare and unique case where the mandatory sentence for murder is grossly disproportionate, the answer is not to strike the legislation , but to grant a constitutional exemption and maintain the overall constitutionality of the provision. This was the approach suggested in obiter in ***R. v. Bowen,*** where the mandatory minimum sentence for first degree murder of a police officer was challenged. Cote J. A. stated at p.524:

> "If such a rare fact situation is really possible, and if it someday occurs, that unusual convict may apply to a court of competent jurisdiction seeking a constitutional exemption. (I would not prejudge such a case in advance.) But I would not skew the law and all ordinary cases for the possibility of such an aberration"

Ref: *R. v. Bowen, (1990), 59 C.C.C. (3d) 515 (Alta. C.A.)* App. Auth Tab # 5

84. *Thirdly*, it is unreasonable to demand that Parliament have the ability to foresee every unlikely or rare scenario, which may potentially offend *s. 12* when enacting a mandatory minimum sentence. It is unlikely that Parliament had its focus upon police officers who

are required to possess firearms in the ordinary course of their duties when implementing mandatory minimum sentences for offences related to the use of firearms. The issue was addressed in the minority opinion in ***R. v. Morrisey***, supra, where Arbour J. states at para. [86]:

> "Another type of situation in which the four year mandatory minimum sentence under Section 220(a) could be found to violate Section 12 involves police officers or security guards who are required to carry firearms as a condition of their employment and who, in the course of their duty, negligently kill someone with their firearm. Of course, the law will hold such persons to a high standard of care in the use and handling of their firearms; however, it is nonetheless conceivable that circumstances could arise in which a four year penitentiary term could constitute cruel and unusual punishment."

Ref: *R. v. Morrisey [2000] 2 S.C.R. 90 (SCC)* App Auth Tab # 27

85. For example, in the case of a conviction for unlawful act manslaughter, the overall moral culpability of a convicted police officer, who is lawfully bound to carry a firearm in the course of his duties may be significantly less than an offender in unlawful possession of a firearm. In his dissenting opinion in the within appeal, O'Brien J.A. says at para [206]

> "I do not advocate special treatment for the police. They are subject to the law as are other citizens. Nevertheless, when it comes to punishment for breaking the law, it is neither fair nor reasonable to treat as an aggravating circumstance the fact that a firearm was involved when the firearm was being carried in the course of duties. I question that the imposition of a mandatory prison sentence upon a police officer carrying a firearm in the course of his or her duty, and in the circumstances of this case, was ever considered by the legislators and therefore within their contemplation at the time of passing the legislation in 1996. I think such consideration to have been unlikely as the circumstances of this case are uncommon and unique."

Ref: Appeal Reasons Dissent App Rec Vol I Tab #2(d) para [206].

86. The trial judge in the this case placed a significant emphasis on the fact that the Appellant was a police officer "required to carry a gun" when assessing the moral culpability involved in this case in an attempt to gauge if the mandatory minimum sentence would be grossly disproportionate and therefore contrary to *s. 12* (see Trial Judge Reasons for Sentence and *Section 12* Ruling at para. [36] [18]). It is submitted he was correct in doing so.

Ref: Trial Judge *Section 12* Ruling App Rec Vol I Tab 2(c) para [18] [36]

87. It is respectfully submitted that the traditional analysis under *s. 12* need not undergo a major variation to accommodate constitutional exemptions. It might be suggested that legislation providing for a mandatory minimum sentence should only be struck down as unconstitutional when the punishment would be grossly disproportionate where applied to the reasonable hypotheticals as described in Morrisey, supra.(ie. the common cases). *S. 52 of the Charter* is well suited to strike such legislation, subject of course to it being demonstrably justified under *s. 1*. For those "uncommon" cases, variously described as rare and unique, remote and marginal, if the mandatory sentence would amount to cruel and unusual punishment, the court would grant the individual remedy of a stand-alone constitutional exemption under *s. 24(1).*

Ref: *s. 52 Charter of Rights,* App. Auth. Tab # 53
Ref: *s. 24 Charter of Rights,* App. Auth. Tab #52

88. *Fourthly*, the stand-alone constitutional exemption does not add any complexity to the *s. 12* analysis. This is clearly borne out by the case of ***R. v. Latimer***, supra, where the overall constitutionality of the mandatory minimum sentence for murder was not challenged. A constitutional exemption was sought. The Supreme Court of Canada in pursuit of the ultimate question as to whether a constitutional exemption should be granted, approached the application by considering the same factors considered in any *s. 12* analysis as to whether the sentence is grossly disproportionate, namely, the gravity of the offence, the personal characteristics of the accused, the individual circumstances of the case, the effect of the punishment on the individual, penological goals and sentencing principles, valid alternatives and comparative sentences. If Latimer had been able to establish that the sentence was grossly disproportionate in his circumstances, a constitutional exemption would have permitted the Court to uphold the legislation as constitutionally valid in the vast majority of cases while granting a remedy for a *s. 12* violation.

Ref: *R. v. Latimer [2001] 1 S.C.R. 3 (S.C.C.)* App Auth Tab # 19

89. *Fifthly*, confirmation of the jurisdiction to use a constitutional exemption as an individual remedy for the rare and unique offender instead of the blunt instrument of striking down legislation imposing a mandatory sentence recognizes the present day reality surrounding

this type of legislation. There are pre-Charter examples of legislation imposing mandatory minimum sentences, which were later struck down in their entirety because violations under *s. 12* would commonly occur. Such was the case of the seven year minimum sentence struck down for importation of any amount of narcotic in ***R. v. Smith***, supra. However, today that type of legislation will be rare. Parliament has the responsibility of enacting legislation, which is consistent with Charter rights and generally does so. [see statutory requirement to enact laws consistent with the Charter: ***s. 4.1 Department of Justice Act***.] As noted above, Parliament cannot be expected to foresee every imaginable case, which might result in a *s. 12* violation when enacting mandatory minimum sentences. It seems illogical to defeat the will of Parliament and strike down ordinarily constitutionally valid legislation merely because it may, in rare cases, violate *s. 12.* The remedy of a stand-alone constitutional exemption formulated by the court decisions referred to above have effectively struck the appropriate balance required between the individual rights protected under *s.12* and the desire to give proper deference to Parliament's right to legislate mandatory sentences.

Ref: *s. 4.1 Department of Justice Act,* App. Auth Tab # 54

90. It should also be noted that the Supreme Court of Canada has already recently confirmed in ***Morrisey***, supra, that the second phase of the traditional *Section 12* analysis will only lead to a declaration of unconstitutionality where the mandatory minimum sentence would be grossly disproportionate in hypothetical cases properly described as "common" cases. This will no doubt have the effect of increasing the likelihood that more legislated mandatory penalties may survive *s. 12* challenges because the court would not be called upon, at this phase, to consider the uncommon or rare and unique hypothetical cases which may have the effect of imposing cruel and unusual punishment. However, if the reasoning of the majority opinion in this case is applied, the legislation may still be struck when a rare and unique offender establishes that, in his peculiar case, the sentence is grossly disproportionate. It is illogical to strike the legislation that has already passed the reasonable hypothetical scrutiny. Public confidence in the judicial process is undermined when the courts strike down legislation, constitutionally valid for all but a rare few. Therein lies the defect in the reasoning of the majority opinion in the within case.

91. *Finally*, it is respectfully submitted that the granting of a constitutional exemption recognizes the fact that the purpose of legislation may be constitutionally valid in its general application, but its individual effect may require a remedy. In ***Morgentaler et al v. The Queen***, Dickson C.J.C. stated at p. 62-63

> "It is important to note that, in speaking of the effects of legislation, the court in R. v. Big M Drug Mart Ltd. was still referring to effects that can invalidate legislation under s.52 of the Constitution Act, 1982 and not to the individual effects that might lead a court to provide a personal remedy under s. 24(1) of the Charter."

Ref: *Morgentaler et al v. The Queen [1988] 1 S.C.R. 30 (SCC)* at p. 62 App Auth Tab # 1

Identifiable Group Exemptions

92. The majority opinion in the within appeal, concluded that the law did support constitutional exemptions for identifiable groups. The dissenting opinion countered that there is *"no principled reason for denying exemptions to individuals if such remedies are available to groups of persons*". The majority opinion acknowledged that constitutional exemptions had been granted in ***Chief; Netser*** and ***McGillivary***, supra, but added that those courts "could" have defined a group in those cases ie: persons who require a firearm to earn a livelihood. The dissenting opinion pointed out that in the above cases the constitutional exemptions were granted as "individual remedies" as distinct from any identifiable group.

Ref: Appeal Reasons Majority App. Rec. Vol I Tab #2(d) para [117]
Ref: Appeal Reasons Dissent App. Rec. Vol 1 Tab #2(d) para [226]

93. It is submitted that the dissenting view is correct. *Firstly* the majority acknowledged the difficulty in defining such groups. *Secondly*, as the dissent points out, there is no rationale to deny an individual a right under the *Charter* that is accorded to a group. The *Charter* exists to protect "individual rights".

Ref: Appeal Reasons Majority App. Rec. Vol I Tab #2(d) para [115]
Ref: Appeal Reasons Dissent App. Rec. Vol I Tab #2(d) para [225]

94. It is submitted that in the case at bar, the Applicant, was, in any event, a member of an "identifiable group", namely "police officers or security guards who are required to carry firearms as a condition of their employment". Arbour J.A. in ***R. v. Morrisey***, referred to such a group supra, as an example where the mandatory minimum sentence could result in cruel and unusual punishment. Indeed, in the case at bar, the entire underlying rationale of the trial judge prompting him to find this to be a rare and unique situation warranting the constitutional exemption was the fact that the Applicant was a police officer, acting in the course of his duties, and required to possess the firearm.

Ref: *R. v. Morrisey [2000] 2 S.C.R. 90 (SCC)* App Auth Tab # 27 at para [86]

<u>Certainty and Predictability</u>

95. The majority opinion states that the granting of individual remedy of a constitutional exemption might compromise certainty and predictability in the law**.** [Appeal Reasons para[123] The majority states that a case by case analysis would result in the unpredictability of the law and in the consequences of a criminal act. It is submitted that such a fear is not warranted for several reasons. *Firstly*, individual *Charter* remedies are regularly applied for on a case by case basis. It is a reflection of the fact that the *Charter* protects "individual" rights. *Secondly*, the law is already clear that violations of *s. 12* will only be found in "rare and unique occasions" and that the test for finding a sentence grossly disproportionate is "very properly stringent and demanding": see ***Steele v. Mountain Institution***. The application for an individual remedy of constitutional exemption can be likened to an application for a "stay of proceedings" which imports a test of "exceptional and rare circumstances". The narrow circumstances in which such a remedy may be granted eliminates any concern for lack of certainty or predictability, while at the same time affords a remedy to the rare offender who can establish a *s. 12* violation. Indeed, the element of "certainty" is better served with the preservation of the law, enacted with a valid purpose by Parliament and constitutionally valid in the vast majority of cases.

Ref: Appeal Reasons Majority App. Rec. Vol I Tab #2(d) para [123]
Ref: *Steele v. Mountain Institution*, *[1990] 2 S.C.R. 1385 at p.1417 (S.C.C.)*
App Auth Tab # 41

96. *Finally*, the "lack of certainty" argument is not persuasive in light of the acknowledgment of the majority opinion that the denial of the individual remedy of a constitutional exemption will not alleviate this concern in any event because, as the majority stated: *"lack of certainty will continue to be a problem as long as the current s. 12 analysis is maintained*"**.** This is so, the majority states, because of the narrow focus of the "reasonable hypothetical" to common cases under the *s. 12* analysis will still lead to inevitable successive challenges until an individual has a sufficiently rare enough case to warrant constitutional intervention.

Ref: Appeal Reasons Majority App. Rec. Vol. I Tab #2(d) para [143]

Parliament's Role and Responsibility

97. The majority opinion concludes that a stand-alone constitutional exemption remedy would introduce "discretion" of the trial judge where Parliament decided that a sentence was to be mandatory. [Appeal Reasons para [112] It is submitted that such a position confuses the mere "fitness" of a sentence with an actual *s. 12 Charte*r violation. *Section 12* has never been a tool to be invoked to grant "discretion" to as trial judge to overrule a mandatory sentence merely because he or she may feel the sentence is "unfit". That is not the test to be applied to the *s. 12* analysis. It is submitted O'Brien J.A., dissenting, is correct in stating that it is not about "discretion" of the trial judge but rather the providing of a "remedy" where an act of Parliament has created an unintentional result, namely cruel and unusual punishment. O'Brien J.A. must be correct when he finds that Parliament never intended to have a mandatory sentence create such an unconstitutional result and to the contrary, expresses its will through the Charter to ensure a remedy is available to the individual.

Ref: Appeal Reasons Majority App. Rec Vol. I Tab #2(d) para [112]
Ref: Appeal Reasons Dissent App. Rec. Vol. I Tab #2(d) para [228]

98. The majority opinion in the Court of Appeal also expressed a concern that individual constitutional exemptions would somehow foreclose the opportunity of Parliament to respond to concerns regarding the constitutionality of a mandatory sentences. (Appeal Reasons para [131]) It is submitted that such a concern is unwarranted. In fact, the

constitutional exemptions granted in ***R. v. Chief***, supra, and ***R. v. Netser***, supra, from mandatory firearms prohibition unquestionably resulted in Parliament revisiting the issue and amending the Criminal Code; ***(see s. 113 Criminal Code.)*** This section addresses the circumstances arising in those cases where constitutional exemptions were granted because the mandatory sentence resulted in "cruel and unusual punishment". Consequently, the overall mandatory prohibition, enacted for the general good and, with valid purpose in the vast majority of cases, was not struck down, and Parliament acted appropriately to correct the unintended result for the rare cases that potentially violated *s. 12.*

Ref: Appeal Reasons Majority App. Rec Vol. I Tab #2(d) para [131]
Ref: *s. 113 Criminal Code*, App. Auth Tab # 49

99. Of note also is that Parliament has incorporated a "grossly disproportionate" test to exempt certain other offenders from the otherwise mandatory requirements for the Sex Offender Registry (see s. ***490.012 (4) Criminal Code)*** and DNA Orders (see ***s. 487.051 (2) Criminal Code)***. It is a clear recognition that mandatory sentence provisions will require exemptions where the punishment is grossly disproportionate. Constitutional exemptions provide a similar remedy for any mandatory sentence that is grossly disproportionate.

Ref: *s. 490.012(4) Criminal Code,* App Auth Tab # 50
Ref: *s. 487.051(2) Criminal Code*, App Auth Tab # 51

100. In summary, it is submitted that this Court ought to recognize the availability of stand-alone constitutional exemptions from mandatory minimum sentences prescribed by law for the following reasons:

a. A "constitutional exemption" under *s. 24(1)* is the appropriate remedy to effect a balance between the deference to the will of Parliament and the protection of an individual 's rights under *s. 12 of the Charter of Rights and Freedoms*?

b. A "constitutional exemption" formulates a remedy that will avoid the striking down of mandatory sentence legislation that a court recognizes as constitutionally valid and beneficial in the vast majority of cases but offending *s. 12* in rare and unique cases.

c. The recognition of the availability of constitutional exemptions for an individual eliminates the anomaly that such a remedy may be available for an "identifiable group" while denying it for an individual suggested by the Alberta Court of Appeal.

d. A constitutional exemption granted to an individual is entirely workable within the existing framework of the traditional *s. 12* analysis established by this Court in previous decisions.

e. The recognition of the availability of a constitutional exemption for an individual will finally resolve the debate and the opposing views expressed by the various provincial appellate jurisdictions across Canada and bring certainty to the law in this area.

ALTERNATIVE POSITION; SECTION 236 IS UNCONSTITUTIONAL

101. If the Court of Appeal's position is correct on the issue of the unavailability of a constitutional exemption in law, then the trial judge's finding that the sentence would be grossly disproportionate in the appellant's case satisfies the first step of the *s. 12* analysis mandated by the Supreme Court of Canada in ***R. v. Goltz***, supra, and therefore *s. 236* must be declared invalid subject to a *s. 1* analysis. The Crown made no effort to justify the violation at the trial under *s. 1*.

102. In addition, there is a strong argument that the application of the second step of the *s. 12* analysis which involves a consideration of reasonable hypothetical cases, must also result in the striking down of *s. 236(a)* in the absence of the availability of constitutional exemptions as a remedy. It is submitted that the broad circumstances encompassed by "unlawful act manslaughter", which may include predicate offences such as "careless use of a firearm", or "pointing a firearm" are such that it is inevitable that the mandatory sentence under *s. 236(a)* will, in some cases, violate *s.12 of the Charter*, particularly in cases of a police officers who are duty bound to possess a firearm in the course of their duties.

Ref: *R. v. Gosset, [1993] 3 S.C.R. 76 (SCC)* App. Auth Tab # 14
Ref: *s. 86(1) Criminal Code,* App. Auth Tab # 55
Ref: *s. 87(1) Criminal Code,* App Auth Tab # 56

103. The "reasonable hypotheticals" considered in ***Morrisey,*** supra, which are restricted to those cases where the "moral culpability" is at the level of "criminal negligence" (ie; a wanton and reckless disregard for the lives and safety of others") have no application in the case at bar having regard to the findings of the trial judge. Unlawful act manslaughter may cast a wider net of moral culpability and reasonable hypotheticals, even restricted to common cases, will inevitably lead to *s. 12* violations. Consequently, *s. 236(a)* should also be struck down under the second step of the traditional analysis set out in ***Goltz,*** supra.

104. This argument was considered in the decision in ***R. v. Bill*** where the accused was convicted of unlawful act manslaughter based upon a "careless use of a firearm". The court held that a mandatory sentence of four (4) years imprisonment would create a grossly disproportionate sentence for this accused. In addition, the court held that *s. 236(a)* was not constitutionally valid because it also failed the proportionality test when considering reasonable hypothetical cases. The court concluded that where manslaughter was based upon the offence of "careless use of a firearm" then the mandatory sentence of four (4) years imprisonment was in violation of s. *12 of the Charter of Rights* (note: *this matter was sent back for a new trial on the charge of manslaughter because the trial judge failed to put self-defence to the jury. Thus, the British Columbia Court of Appeal did not pass upon the constitutionality of the sentencing provisions*).

Ref: *R. v. Bill, (1997) B.C.J. 3031 (B.C. S.C.)* App. Auth. Tab # 4

SUMMARY OF APPELLANT'S POSITION

105. The question as to the availability of a constitutional exemption ought to be answered in the affirmative in order,

a. To import some finality and consistency in the application of the law in the various jurisdictions across Canada

b. To ensure that the individual rights set out in the *Charter* are meaningful by guaranteeing an effective remedy

c. To structure the analysis required under *s. 12* so as to provide a balanced approach between providing a remedy under the Charter while still giving effect to the true intent and purpose of legislation passed by Parliament

d. To eliminate the more drastic and blunt remedy of striking down legislation where it would only rarely offend *s. 12 of the Charter*, thus increasing the confidence of the public in the administration of justice.

PART IV. SUBMISSIONS ON COSTS

106. The Applicant makes no submissions as to costs.

PART V. ORDER SOUGHT

107. The Appellant respectfully requests that the appeal be allowed and that the original sentence imposed by the trial judge be restored with the affirmation of the trial judge's decision to grant a constitutional exemption, or in the alternative, a declaration that the mandatory sentence required by s. *236(a) of the Criminal Code* is of no force or effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st DAY OF MAY 2007.

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Noel C. O'Brien, Q.C.
O'Brien Devlin MacLeod
Counsel for the Appellant

PART VI. TABLE OF AUTHORITIES

Cases **Para**

PART VII. STATUTORY PROVISIONS

45. Criminal Code of Canada, s. 236(a)

s.236. 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

s. 236. Quiconque commet un homicide involontaire coupable est coupable d'un act criminel passible:
(a) s"il y a usage d'une arme a fue lors de la perpetration de l'infraction, de l'emprisonnement a perpetuite, la peine minimale etant de quatre ans.

46. Canadian Charter of Rights and Freedoms, s. 12

s. 12. Everyone has the right not to be subject to any cruel and unusual treatment or punishment

s. 12. Chacun a droit a la protection contre tous traitements ou peines cruels et inusites.

47. Canadian Carter of Rights and Freedoms, s. 1

s. 1 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 an democratic society.

s. 1 La *Charte canadienne des droits et libertes* garantit les droits et libertes qui y sont enonces. Ils ne peuvent etre restreints que par une regle de droit, dans des limites qui soient raisonnables et dont la justification puisse se demontrer dans le cadre d'une societe libre et democratique.