

**SUPREME COURT OF CANADA
(on Appeal from the Court of Appeal for Alberta)**

BETWEEN:

MICHAEL ESTY FERGUSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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ATTORNEY GENERAL OF QUEBEC
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TABLE OF CONTENTS

PART I – Overview and Statement of Facts.....	1
PART II - Points in Issue.....	4
PART III – Statement of Argument.....	5
1. Constitutional Question #1 – Section 236(a) of the Criminal Code Does not Constitute Cruel and Unusual Punishment in the Applicant's case	5
A) The “Gross Disproportionality” Test.....	5
B) The General Inquiry.....	7
i) The Legislative Context	7
ii) The Pressing Nature of the Problem Addressed by 236(a).....	10
iii) The Moral Blameworthiness of the Crime	12

iv) Pursuit of Penological Goals and Applicable Sentencing	15
Principles	
v) The Severity of the Punishment.....	17
vi) Conclusion with Respect to the General Analysis.....	19
C) The Particularized Inquiry.....	19
D) The "Reasonable Hypothetical" Analysis.....	21
2. The Mandatory Minimum Penalty is a Reasonable Limit.....	23
on Section 12 Rights	
a) Importance of the Objective.....	23
b) Section 236(a) is Rationally Connected to the Objective.....	24
c) Section 236(a) Minimally Impairs the s. 12 Right.....	24
d) The Salutory effects of s. 236(a) Outweigh the Deleterious Effects.....	24
3. Case-By-Case Exemptions are not an Available Remedy for.....	24
Unconstitutional Mandatory Minimum Sentence Provisions	
 PART IV- Costs.....	 30
 PART V- Order Sought.....	 30
 PART VI -Table of Authorities.....	 32
 PART VIII - Statutory Provisions relied Upon.....	 35

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The purpose of s. 236(a) of the *Criminal Code* is to save lives. By enacting this provision Parliament intended to deter all types of unlawful use of firearms. Those who use them in a dangerous manner that results in the loss of life risk a significant deprivation of their liberty, whether they be police officers with firearm training, first time hunters, or any other firearm user. Given the significant level of moral blameworthiness that attaches to every person who commits this crime, the majority of the Court of Appeal properly held that there is nothing grossly disproportionate about requiring the Appellant to serve a four year sentence for criminally misusing his firearm.

2. Although the Appellant prefers to plead his case on the basis that the four year minimum is unconstitutional against him alone, this Court's judgment should not be so restricted. This Court's judgments under s.12 of the *Charter*, particularly its recent judgment in *R. v. Morrissey*, have never been confined to the particular circumstances of one offender. A key role of the courts, and this Court in particular, is to make authoritative pronouncements in constitutional matters and not leave the impression that the law may only be constitutional until a litigant with more compassionate circumstances is found. Notwithstanding the narrow way in which the first constitutional question is stated, the task of this Court in this case is to consider generally whether s. 236(a) infringes s.12.

3. Finally, while it is not necessary to answer the question as to whether Canadian law recognizes constitutional exemptions on a case-by-case basis, should the Court wish to consider this issue, the Attorney General submits that the use of constitutional exemptions is not an appropriate remedy for any legislative provision that provides for a mandatory minimum sentence. To permit the use of constitutional exemptions for this legislation would fundamentally undermine Parliament's role in prescribing penalties it considers appropriate to address the serious public safety problems posed by the criminal misuse of firearms. The use of exemptions in this context would upset the balance between the legislative and the judicial roles, contrary to what is contemplated by s. 52 of the *Constitution Act, 1982*.

Summary of the Facts

4. The Attorney General of Canada relies on the facts as set out by the majority of the Court of Appeal. The facts relevant to the disposition of the constitutional question are essentially those summarized below.

5. On October 3, 1999, veteran constable Michael Ferguson was dispatched to Pincher Creek hospital to investigate a complaint from 26 year old Darren Varley. Ferguson found Varley in an inebriated, agitated and uncooperative state.¹ A scuffle soon ensued between Varley and Ferguson which resulted in Varley being placed under arrest for being intoxicated in public.² Ferguson took Varley back to the R.C.M.P. detachment and placed him in the holding cell. Ferguson reported that a second altercation occurred in the holding cell, in the course of which Varley attempted to obtain Ferguson's gun.³ Ferguson got control of the gun and shot Varley, first in the abdomen, then in the head. Varley died in hospital shortly thereafter.⁴ Ferguson was charged with second degree murder. On September 20, 2004 a jury convicted Ferguson of unlawful act manslaughter, rejecting his claim of self defence. The trial judge granted Ferguson an individual constitutional exemption from the four year mandatory minimum sentence prescribed in section 236(a) of the *Criminal Code*, but the Alberta Court of Appeal held, 2-1, that the four year minimum was constitutionally valid.

¹ *R. v. Ferguson*, 2006 ABCA 261 at para.16 (per Fruman J.A.) [Appellant's Record "A.R." at Vol. I, Tab 2(D)].

² *Ibid* at para.16.

³ *Ibid* at para. 30.

⁴ *Ibid* at paras. 20-24 and 30.

PART II - POINTS IN ISSUE

6. On March 27, 2007, Chief Justice McLachlin stated the following constitutional questions:

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?

7. The Attorney General of Canada submits that:

1. The first question should be answered "no." Section 236(a) is not cruel and unusual. The prescribed punishment is not grossly disproportionate to the gravity of the offence when considered generally, in relation to the Appellant specifically, or in relation to any reasonable hypothetical offender. There is no constitutional infringement.
2. It is not necessary to answer the second question, but if it is the answer is "yes", that the law is a reasonable limit.

3. With respect to question 3, though it need not be answered, the answer would be “no” because the use of constitutional exemptions on a case-by-case basis is not appropriate in these circumstances or with respect to any legislative provisions that deal with mandatory minimum sentences of imprisonment.

PART III – STATEMENT OF ARGUMENT

1. Constitutional Question # 1- Section 236(a) of the *Criminal Code* Does not Constitute Cruel and Unusual Punishment in the Applicant’s Case

A) The “Gross Disproportionality” Test

8. The test for determining whether a punishment is cruel or unusual was set out by this Court in *R. v. Smith*,⁵ refined in *R. v. Goltz*,⁶ and applied most recently in *R. v. Latimer*,⁷ *R. v. Morrisey*,⁸ and *R. v. Wiles*.⁹ According to this test, the court must decide whether the potential punishment is “grossly disproportionate” to the gravity of the offence by assessing it: first, against the circumstances of the offence and the offender (the “particularized inquiry”); and second, against all “reasonable hypothetical” cases.

9. The first constitutional question focuses on the “particularized inquiry” branch of the s. 12 test: is s. 236(a) cruel and unusual in the circumstances of this case? The constitutional question was similarly narrowly framed in *R. v. Latimer*.¹⁰ Presumably because of this the Appellant’s factum reads (for the most part) like a standard sentence appeal factum that might be filed with a provincial or territorial court of appeal.

⁵ *R. v. Smith*, [1987] 1 S.C.R. 1045 at pp. 1072-1073 (per Lamer J.) [Appellant’s Book of Authorities “A.B.A”. Vol. II, Tab 37].

⁶ *R. v. Goltz*, [1991] 3 S.C.R. 485 at pp. 498—503 (per Gonthier J.) [A.B.A. Vol. I, Tab 13].

⁷ *R. v. Latimer*, [2001] 1 S.C.R. 3 at pp. 39-43 [A.B.A. Vol. 1, Tab 19].

⁸ *R. v. Morrisey*, [2000] S.C.R. 90 at paras. 26-56 (per Gonthier J.) [A.B.A. Vol. II, Tab 27].

⁹ *R. v. Wiles*, [2005] 3 S.C.R. 895, [R.B.A., Vol III, tab 23]

¹⁰ *R. v. Latimer*, *supra* at p. 36.

10. The difficulty with approaching the constitutional issue in this way is that it suggests that the constitutionality of the provision may be determined on a case-by-case basis. As will be argued further below in relation to constitutional exemptions, such an approach provides insufficient certainty concerning the state of the law, and is inconsistent with the remedial authority conferred on courts under s.52 of the *Constitution Act, 1982*. If the Court upholds the constitutionality of s. 236(a), it should not be on the basis that the provisions are not cruel and unusual solely in relation to the Appellant. To do so would be to preserve their constitutionality only until the next “unlawful act” manslaughter case comes along.

11. It would be more appropriate to begin the constitutional inquiry by examining the gravity of the offence and the severity of the punishment in a general rather than case-specific way. Indeed this Court’s judgments in both *R. v. Morrisey*¹¹ and *R. v. Latimer*¹² began by looking at the gravity of the offence in that way. The *Smith/Goltz* test should not be read as requiring a narrow focus on the application of the law to a particular offender before considering the law itself.

12. This case presents an opportunity for the court to restate the essential elements of the *Smith/Goltz* test in a manner more consistent with the way it actually has, and should, approach s.12 matters. An appropriate starting point for that determination is the general inquiry as to whether the legislative provisions are capable of requiring the imposition of a sentence that is grossly disproportionate to the gravity of the offence. It is only after that analysis is complete that the particular circumstances of the offence and offender, and other reasonable hypothetical circumstances should be considered. While there may be no particular magic to the order in which the *Smith/Goltz* elements are addressed, the court’s judgment should include an authoritative pronouncement

¹¹ *R. v. Morrisey*, *supra* at paras. 34 -37 (per Gonthier J.).

¹² *R. v. Latimer*, *supra* at pp. 39-41.

on the constitutionality of Parliament's law, and not just an assessment of its application to this offender.

13. In effect, this Court's "gross disproportionality" test may be appropriately stated as a three part test:

a) The General Inquiry – in which the relevant considerations are: the purpose of the provisions; the gravity of the offence, including the moral blameworthiness of the crime; the relevant penological goals and sentencing principles; and the effect of the provisions, including the existence of sentencing alternatives and a comparison with other offences;

b) The Particularized Inquiry – in which the particular circumstances of the offence and offender are considered;

c) The Reasonable Hypothetical Inquiry – in which commonly arising applications of the provisions are considered.

B) The General Inquiry

i) The Legislative Context

14. The seriousness of this offence cannot be appreciated without regard to its legislative context, including the evolution of firearms regulation in Canada. Section 236(a) of the *Criminal Code* requires the imposition of a minimum sentence of four years' imprisonment on any individual committing manslaughter while using a firearm. The Appellant, who was tried for second degree murder, became liable to that penalty by being convicted of the lesser offence of so-called "unlawful act" manslaughter, described in s. 222(5)(a) of the *Criminal Code* in this way:

S. 222(5)(a)

- | | |
|--|--|
| <p>(5) A person commits culpable homicide when he causes the death of a human being,</p> <p>(a) by means of an unlawful act;</p> | <p>(5) Une personne commet un homicide coupable lorsqu'elle cause la mort d'un être humain :</p> <p>(a) soit au moyen d'un acte illégal;</p> |
|--|--|

"Unlawful act" is not further defined in the Code.

15. The inherent dangerousness of firearms has been a concern in Canada since Confederation. Controls on firearms were first enacted by Parliament prior to the first codification of the criminal law in 1892, and upon the adoption of the original *Criminal Code*.¹³ The recurring theme of legislative intervention since 1892 has been to increase both the restrictions on access to firearms and the penalties associated with misuse.

16. Mandatory minimum penalties for firearms offences were introduced into the *Criminal Code* in 1933, when a minimum two year imprisonment penalty was prescribed, consecutive to any other sentence, for carrying a handgun while committing a criminal offence. In 1938 this mandatory minimum was also applied to long guns. The provision was repealed in 1951 following an adverse decision of this Court, *R. v. Quon*,¹⁴ concerning the statutory construction of the offence in relation to the offence of armed robbery. In 1977 the provision was re-enacted in a revised form as what is now s. 85 of the *Criminal Code*, providing for a mandatory minimum sentence of one year imprisonment consecutive to that imposed for committing an indictable offence, where a firearm was used in the committing that offence.¹⁵ Section 85 was upheld as constitutional by this Court in *R. v. Brown*.

¹³ *Reference re Firearms Act (Canada)* (1998), 164 D.L.R. (4th) 513 (Alta. C.A.) at pp. 551-52 (per Fraser C.J.A.); [Attorney General of Canada's Book of Authorities "A.G.C.B.A." Vol. I, Tab 27]; appeal dismissed [2000] 1 S.C.R. 783 [Respondent's Book of Authorities "R.B.A." Vol. III, Tab 24].

¹⁴ *R. v. Quon*, [1948] S.C.R. 508 [A.G.C.B.A. Vol I, Tab18].

¹⁵ Section 236(a) is now carved out of s.85 as an exception: see s.85(1)(a).

17. Mandatory minimum sentences for firearms used in the commission of offences have been introduced concurrently with other legislative measures to regulate firearms, such as registration for all handguns in 1934 and registration for all long guns pursuant to the 1995 *Firearms Act*. In *R. v. McGuigan*, Dickson J. for the majority of this Court accepted that the mandatory minimum sentences found in s. 85 of the *Code* “formed part of a comprehensive ‘gun control’ legislative scheme intended to discourage the use of firearms by the criminal element of our society.” He also stated that the focus on “use” of a firearm and the narrow and clear definition of “firearm” now present in the *Code* represented a significant improvement over the legislation which this Court had found objectionable in *R. v. Quon*.¹⁶

18. This legislative continuum was again recognized by this Court in 1988, in *R. v. Schwartz*. There, McIntyre J. for the majority stated that “[s]ince [1892] there have been successive amendments which without exception have strengthened the controls upon possession and use of firearms.”¹⁷ Dickson J., although in dissent, not only agreed that there was a continuum, but also acknowledged the legitimacy of the concerns which had given rise to it.¹⁸

Part II.1 of the *Code* [now Part III]...represents the latest attempt by Parliament to strike the proper balance between the interest of Canadian society in protecting its members from violent actions and the freedom of individuals to possess and use guns for legitimate purposes. It embodies wholly legitimate societal concerns for stricter regulation and control of guns and other offensive weapons. [emphasis added]

¹⁶ *R. v. McGuigan*, [1982] 1 S.C.R. 284 at pp. 316-17 [A.G.C.B.A. Vol. I, Tab 15]. *Canadian Firearms Program Implementation Evaluation (to September 2002) Technical Support* (Ottawa: Evaluation Division Policy Integration and Coordination Section, Department of Justice, April 2003) at pp. 1-5 (<http://www.justice.gc.ca/en/ps/eval/reports/03/cfp/tech/table.html>); [A.G.B.A. Vol I, Tab 28]

¹⁷ *R. v. Schwartz*, [1988] 2 S.C.R. 443 at p. 483 [A.G.C.B.A. Vol. I, Tab 21].

¹⁸ *R. v. Schwartz*, *supra*, at p. 470.

ii) The Pressing Nature of the Problem Addressed by 236(a)

19. The prevalence of firearms and their potential for misuse continues to raise public safety concerns. Approximately 7.1 million firearms are currently legally owned by individuals and businesses in Canada, and between December 1, 1998 and December 31, 2006, 19,600 firearm licences were refused or revoked.¹⁹ Each year, thousands of firearms are reported missing or stolen in Canada and many are never recovered; in 2004, 628 of the 5,631 firearms reported missing or stolen were recovered.²⁰ While the precise number of illegal firearms in circulation is unknown,²¹ statistics demonstrate the grim toll exacted by the criminal use of firearms: in 2004, firearms were involved in 27.7% of homicides, with 172 deaths.²²

20. In 1995, Parliament enacted the *Firearms Act*. One of the key elements was to impose tougher penalties for criminal firearm use. The objectives and the constitutionality of imposing minimum mandatory sentences were carefully weighed by Parliament, including the Senate Committee on Legal and Constitutional Affairs.²³ The *Act* created four year mandatory minimum sentences for ten offences involving firearms use: criminal negligence causing death (s. 220(a)), manslaughter (s. 236(a)), attempted murder (s. 239(a)), discharging a firearm with intent (s. 244), sexual assault with a weapon (s. 272(2)(a)), aggravated sexual assault (s. 273(2)(a)), kidnapping (s. 279(1.1)(a)), hostage taking (s. 279.1(2)(a)), robbery (s. 344(a)) and extortion (s. 346(1.1)(a)).

¹⁹ Canada Firearms Centre, *Quick Facts about the Canadian Firearms Program as of March 2007*, (http://www.cfc-cafc.gc.ca/media/program_statistics/default_e.asp); [A.G.C.B.A. Vol I, Tab 31]

²⁰ Hung, Kwing, *Firearm Statistics: Updated Tables*. Ottawa: Department of Justice, Research and Statistics Division (January 2006), Table 7. (<http://www.justice.gc.ca/en/ps/rs/rep/2006/r06-2/index.html>); [A.G.C.B.A. Vol I, Tab 29]

²¹ According to estimates published by an independent research organization, the total estimated civilian firearm holdings in Canada range from 7.9 million to 12 million (approximately 7.1 million are registered, therefore there could be up to 5 million illegal firearms in circulation in Canada), see *The Small Arms Survey 2007*, chapter 2, page 47 (<http://www.smallarmssurvey.org/files/sas/publications/yearb2007.html>) [A.G.C.B.A. Vol I, Tab 32]

²² *Firearms Statistics*, *supra*, Table 10

²³ Senate of Canada, Legal and Constitutional Affairs, Thursday Oct 19, 1995, Comments by Mr. T.L. Quigley at 60:33 [A.G.C.B.A. Vol. I, Tab 30].

21. The object of the mandatory minimums was made clear by the Minister of Justice, the Hon. Allan Rock, in the House of Commons and in his testimony before the House. On second reading of the relevant Bill (C-68), he told the House:²⁴

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.

22. Mr. Rock made it clear that "[o]ne of the key elements of this bill is deterrent sentencing for crime with guns." In support of his opinion regarding the deterrent effect of the mandatory sentences proposed in the bill, the Minister cited a number of studies on the effectiveness of such sentences.²⁵ While criminology experts may be unable to reach a consensus as to the efficacy of such sentences, it is rational to infer that at least some people are deterred by the prospect of incarceration.²⁶

²⁴ *House of Commons Debates* (16 February 1995) at pp. 9706-9707 [R.B.A. Vol. III, Tab 32] See also: *Proceedings of Standing Committee on Justice and Legal Affairs* (24 April 1995) at 105:2 [A.G.C.B.A. Vol. I, Tab 33]; *Proceedings of Standing Committee on Justice and Legal Affairs* (19 May 1995) at 147:1 [A.G.C.B.A. Vol. I, Tab 34]; *Proceedings of Standing Senate Committee on Legal and Constitutional Affairs* (28 June 1995) at 46:26 [A.G.C.B.A. Vol. I, Tab 35].

²⁵ *Proceedings of Standing Committee on Justice and Legal Affairs* (24 April 1995) at pp. 105:7 & 105:23-24; [A.G.B.A. Vol. I, Tab 33]

²⁶ *R. v. H. (C.N.)* (2002), 170 C.C.C. (3d) 253 (Ont.C.A.) at para. 36 [A.G.C.B.A. Vol. I, Tab 7].

iii) The Moral Blameworthiness of the Crime

23. The appellant asserts that unlawful act manslaughter "cover[s] a very broad spectrum of factual circumstances and wide degrees of moral culpability."²⁷ While this statement may be literally true, it is misleading in relation to the constitutional issue raised in the case because it fails to focus on the specific range of conduct that exposes offenders to the four year minimum. Simply put, not every unlawful act manslaughterer is liable to the four year minimum; it is only those who use a firearm during the commission of an offence, and it is their moral blameworthiness that bears on the gravity of the offence.

24. The constitutional analysis in the case is greatly assisted by this Court's consideration of the constitutionality of the offence of unlawful act manslaughter in *R. v. Creighton*.²⁸ In rejecting the argument that the offence lacked a constitutionally sufficient level of *mens rea*, McLachlin J. stated:

The cases establish that in addition to the *actus reus* and *mens rea* associated with the underlying act, all that is required to support a manslaughter conviction is reasonable foreseeability of the risk of bodily harm. While s. 222(5)(a) does not expressly require foreseeable bodily harm, it has been so interpreted: see *R. v. DeSousa*, supra. The unlawful act must be objectively dangerous, that is, likely to injure another person...

25. As the B.C. Court of Appeal noted in a pre-*Creighton* case, the objective foreseeability of harm requirement:²⁹

...guards against an unjust conviction for manslaughter that could arise from a breach of a section of the *Criminal Code*, a breach that in some bizarre or unexpected way caused the death of a human being.

²⁷ Appellant's factum, at para. 79.

²⁸ *R. v. Creighton*, [1993] 3 S.C.R. 3 at pp. 42-43 (per McLachlin J.) [R.B.A., Vol. I, Tab 10].

²⁹ *R. v. Adkins* (1987), 39 C.C.C. (3d) 346 (B.C.C.A.) at pp. 355-6 [A.G.C.B.A., Vol. I, Tab 3].

26. The definition of "firearm" in the *Criminal Code* is also important in that it emphasises the objective dangerousness of gun use, as this Court recognized in *Reference Re Firearms Act*³⁰:

"firearm" means a barrelled weapon from which any shot, bullet or other projectile can be discharged **and that is capable of causing serious bodily injury or death to a person**, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;

« arme à feu » Toute arme **susceptible**, grâce à un canon qui permet de tirer du plomb, des balles ou tout autre projectile, **d'infliger des lésions corporelles graves ou la mort à une personne**, y compris une carcasse ou une boîte de culasse d'une telle arme ainsi que toute chose pouvant être modifiée pour être utilisée comme telle.

27. The objective seriousness of the crime is also apparent by examining what it means to "use" a firearm. In *R. v. Steele*, the Court had to define the meaning of "use" for the purpose of s. 85, the offence of using a firearm in the commission of an indictable offence. Fish J. stated:³¹

"Use" has been held to include *discharging* a firearm, *pointing* a firearm, "pulling out a firearm which the offender has upon his person and holding it in his hand to intimidate another", and *displaying* a firearm for the purpose of intimidation. In *Gagnon*, the court indicated in passing that "use of firearm" may include revealing its presence by word or deed. [citations omitted]

Each of these situations involves objectively dangerous activity.

28. The requirement that a firearm be "used" serves to limit the range of predicate offences to those for which the moral blameworthiness of the offence is substantial. In the case at bar, a violent offence, assault or assault causing bodily harm, was the predicate "unlawful act" which exposed the Appellant to the four year minimum sentence. Caselaw reveals that the other firearm-related

³⁰ *Reference Re Firearms Act*, *supra* at para. 33.

³¹ *R. v. Steele*, 2007 S.C.C. 36 at para. 27 [A.G.C.B.A. Vol. I, Tab 22].

unlawful acts that commonly form a basis for manslaughter charges are: pointing a firearm,³² careless use of a firearm³³ and possession of a weapon for a purpose dangerous to the public peace.³⁴ It is also not uncommon for "unlawful act" manslaughter to be prosecutable as "criminal negligence causing death" based on the handling of the gun.³⁵

29. Thus, in order to be liable to the four year minimum an individual must have:

- a) Committed an unlawful act (with its attendant mental element);
- b) Committed the act in such a way that the likelihood of injury to another person was objectively foreseeable;
- c) Used a firearm in committing the act; and
- d) Caused the death of another person.

In other words, each person subject to the four year minimum has a threshold level of moral blameworthiness that involves killing a person, with a gun, in objectively dangerous circumstances. Each of those people rise above that threshold according to the blameworthiness of the underlying act.

30. In addressing the persistent problem of gun crime, Parliament has chosen to single out those unintentional killers who cause death by their misuse of a firearm. Because of the potential severity of the consequences of misuse of firearms, a clear message is sent not just to those who access and use firearms unlawfully, but also to those granted the privilege of gun ownership or use.

³² *R. v. Adkins*, *supra*; *R. v. Tennant and Naccarato* (1975), 23 C.C.C. (2d) 80 (Ont. C.A.) [A.G.C.B.A. Vol. I, Tab 23]; *R. v. Lelievre* (1962), 132 C.C.C. 288 (Ont. C.A.) [A.G.C.B.A. Vol. I, Tab 10].

³³ *R. v. Gosset*, [1993] 3 S.C.R. 76 [A.G.C.B.A. Vol. I, Tab 6]; *R. v. Finlay*, [1993] 3 S.C.R. 103 [A.G.C.B.A. Vol. I, Tab 5].

³⁴ *R. v. Toon*, [2006] A.J. 1370 (C.A.) [A.G.C.B.A. Vol. I, Tab 24].

³⁵ *R. v. Pettigrew* (1990), 56 C.C.C. (3d) 390 (B.C.C.A.) [A.G.C.B.A. Vol. I, Tab 17]; *R. v. Mack* (1975), 22 C.C.C. (2d) 257 (Alta.C.A.) [A.G.C.B.A. Vol. I, Tab 13]; *R. v. Mezzarobba*, [1974] 3 W.W.R. 191 (Alta.C.A.) [A.G.B.A. Vol. I, Tab 16]; and see cases cited in *R. v. Morrissey*, *supra* at para. 21.

Access to guns requires the highest standard of care, and deviation from the standard that results in a death where at least injury was foreseeable is made subject to serious sanction, as it ought to be.

iv) Pursuit of Penological Goals and Applicable Sentencing Principles

31. The majority of the Court of Appeal recognized that deference must be given to valid legislative objectives in criminal law when considering whether a sentence is cruel and unusual. Parliament is "entitled to take appropriate measures to address the pressing problem of firearm-related deaths,"³⁶ particularly in view of the fact that the criminal misuse of a firearm always "presents the ultimate threat of death to those in its presence."³⁷

32. Deference to legislative choice in sentencing is necessary given the varied purposes of penal sanctions. The importance of these principles may vary depending upon the crime and the offender.³⁸ The fact that a legislative sentencing regime focuses on the principles of general deterrence, denunciation and retribution more than on the rehabilitation of the appellant and specific deterrence does not render the sentencing regime unconstitutional, as discussed by Gonthier J. in *Morrisey*:³⁹

Extra vigilance is necessary with guns, and while society would expect people to take precautions on their own, unfortunately people do not always do so. Consequently, Parliament has sent an extra message to such people; failure to be careful will attract severe criminal penalties. The sentence represents society's denunciation, having regard to the gravity of the crime; it provides retributive justice to the family of the victim and the community in general; and it serves a general deterrent function to prevent others from acting so recklessly in the future.

³⁶ *R.v. Morrisey*, *supra* at para. 44 (per Gonthier J.).

³⁷ *Ibid* at para. 43.

³⁸ *R.v. Lyons*, [1987] 2 S.C.R. 309 at p. 329. [A.G.C.B.A. Vol. I, Tab 12].

³⁹ *R.v. Morrisey*, *supra* at para. 54 (per Gonthier J.).

Similarly, under American jurisprudence, the U.S. Supreme Court has held that their constitution “does not mandate adoption of any one penological theory”, and that “[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”⁴⁰

33. The imposition of a minimum four year sentence for a conviction for manslaughter where a firearm is used properly focuses on the same principles of general deterrence, denunciation and retribution discussed by the majority in *Morrisey*. It cannot be disputed that there is a need to generally deter persons from using firearms in an illegal manner, given the dire consequences of such use. Equally, there must be denunciation for conduct that “encroaches on our society’s basic code of values including the respect for life.”⁴¹ The fact that there was no subjective intention to kill, as required for murder, does not substantially diminish the importance of denunciation. There is a need to make it clear that the “wanton or reckless disregard for the life and safety of others is simply not acceptable.”⁴² In addition, such a sentence also addresses the principle of proportionality⁴³ which ensures that the sentence is just and appropriate in the circumstances where the actions of the offender resulted in the taking of a human life.

34. *R. v. Morrisey* considered the constitutionality of s. 220(a) of the *Criminal Code*, which mandates a four year minimum sentence where death results from criminally negligent use of a firearm. It is difficult to comprehend how that offence, described in the majority judgment of Gonthier J. as “particularly grave,” can be meaningfully distinguished from the offence at issue in the present case; indeed, as noted above, they are often alternative ways of prosecuting the same conduct. Gonthier J.’s exhaustive consideration of the

⁴⁰ *Ewing v. California* 538 U.S. 11, (2003); 155 L Ed 2d 108 at p. 25 [A.G.C.B.A. Vol. I, Tab 1].

⁴¹ *Criminal Code*, s.718 (a); *R. v. Morrisey*, *supra* at para. 47.

⁴² *R. v. Morrisey*, *supra*, at para. 47

⁴³ *Criminal Code*, s.718.1.

gravity of that crime⁴⁴ encompasses situations involving the pointing of a firearm that could have been, or were also, “unlawful act” prosecutions. Both crimes depend on the commission of dangerous acts involving high degrees of moral culpability.

35. To avoid the logical impact of the *Morrissey* decision, the appellant repeatedly refers not to the majority judgment of Gonthier J., but to the concurring judgment of Arbour J.⁴⁵ But Arbour J.’s judgment contains two key features which were clearly not accepted by a majority of this Court: 1) the use of a broader range of hypothetical situations to describe the potential severity of the punishment (including “unlawful act” manslaughter scenarios); and 2) the abandonment of the “reasonable hypothetical” inquiry in favour of case-by-case adjudication on the infringement of s. 12 of the *Charter*. There is no reason, let alone a compelling reason, to depart from *Morrissey*.⁴⁶

v) The Severity of the Punishment

36. The reasons of Gonthier J. in *R. v. Morrissey* demonstrate that though a four year sentence may be considered significant by Canadian standards, it is not so severe that it risks being unconstitutionally harsh. More recently, Rosenberg J.A. of the Ontario Court of Appeal echoed this sentiment when considering the constitutionality of the one year minimum mandatory sentence that is to be served consecutive to any other punishment imposed where a firearm is used in the commission of an indictable offence.⁴⁷

⁴⁴ *Ibid* at paras. 17-25 and 36-37.

⁴⁵ Appellant’s factum at paras. 50, 80, 84 and 94.

⁴⁶ *God’s Lake First Nation v. McDiarmid Lumber*, [2006] 2 S.C.R. 846, at para. 26. [A.G.C.B.A. Vol. I, Tab 2].; and *R. v. Henry*, [2005] 3 S.C.R. 609, at para. 44. [A.G.C.B.A. Vol. I, Tab 8].

⁴⁷ *R. v. McDonald* (1998), 127 C.C.C. (3d) 57 (Ont.C.A.) at para. 72; *R. v. R.K.* (2005), 198 C.C.C. (3d) 232 (Ont.C.A.) at para.78 [A.G.C.B.A. Vol. I, Tab 20].

I am not convinced that having regard to the objective gravity of any offence involving the use of a firearm, even an unloaded one, that a sentence approaching four years shocks the conscience.

Further, the fact that a four year minimum has been upheld for conduct which can and frequently does overlap with the conduct punishable under s. 236(a), is significant evidence that the legislated minimum does not infringe s. 12 of *Charter*. Finally, as Arbour J. pointed out in *R. v. Morrissey*, numerous courts have upheld four year minimum sentences for other serious offences.⁴⁸

37. Assessment of the severity of a minimum sentencing regime also requires looking at whether the sentence may be ameliorated in any way, as noted by Charron J. in *R. v. Wiles*.⁴⁹ For example, the scheme permits pre-trial custody to be credited in such a way that the term of incarceration may be less than four years.⁵⁰ In this case the trial judge significantly mitigated the Appellant's sentence by granting three to one credit for the 70 days the appellant spent in pre-trial custody, reducing his sentence by approximately 7 months.⁵¹ While there is no "mathematical formula for crediting pre-trial custody", three to one credit is certainly not the norm.⁵² As Moldaver J.A. has noted, such credit unchecked "can skew and even swallow up the entire sentencing process"⁵³ and as in this case, significantly diminishes a sentence already at the bottom of the scale.

38. While the constitutionality of the mandatory sentencing scheme for unlawful act manslaughter does not depend on the existence of a method for dealing with unusual cases, it should be noted that one exists. This Court's decision in *R. v. Luxton*—concerning the mandatory minimum sentence for

⁴⁸ *R. v. Morrissey*, *supra* at para. 71.

⁴⁹ *R. v. Wiles*, *supra*, at para. 10.

⁵⁰ *R. v. Wust* [2000] 1 S.C.R. 455 at paras. 42-43 [A.G.C.B.A. Vol. I, Tab 25].

⁵¹ Appellant's Record, Reasons of the Trial Judge, Vol. I, at p.50, para.

⁵² *R. v. Wust*, *supra* at paras. 44-45; *R. v. Rezaie*, (1996), 31 O.R. (31) 713 at 721 (C.A.) [A.G.C.B.A. Vol. I, Tab 19]

⁵³ *R. v. J.B.*, [2004] O.J. No. 2559 (C.A.) at note 1 [A.G.C.B.A. Vol. I, Tab 9].

murder—took cognizance of the fact that the sentencing scheme was tempered by the availability of the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes, and for early parole.⁵⁴ *R. v. Morrisey* also mentioned the possibility of parole as tempering the severity of the punishment.⁵⁵ These cases recognize that the statutory scheme, considered as a whole, appropriately metes out severe punishment to serious offenders, while maintaining the capacity to deal with exceptional cases.

vi) Conclusion with Respect to the General Analysis

39. The foregoing analysis of the legislative provisions reveals nothing that would form the basis for a holding that the prescribed punishment is grossly disproportionate to the gravity of the offence. The punishment has been tailored to a particular class of offenders, unlike *R. v. Smith*, where the punishment failed to distinguish between cocaine drug lords and weekend marihuana smokers. The mental element of this crime is significant, requiring proof of a high degree of moral culpability, and it addresses a pressing social problem by warning those with lawful or unlawful access to firearms that they risk significant deprivation of their liberty for misuse.

40. The tentative conclusion that there is no s. 12 violation should now be tested against the particular circumstances of the case and the offender, and against those of reasonable hypothetical cases.

⁵⁴ *R. v. Luxton*, [1990] 2 S.C.R. 711 at p. 725 [A.G.C.B.A. Vol., I, Tab 11].

⁵⁵ *R. v. Morrisey*, *supra* at para. 41.

C) The Particularized Inquiry

41. The majority judgment of Fruman J.A. in the Court below assiduously and fairly considers the circumstances of both the offence and the offender in determining that a four year sentence would not be cruel and unusual to the appellant. The essence of those findings is:

Aggravating Factors

1) The Appellant exhibited a high degree of *mens rea* – the predicate offence(s), assault or aggravated assault were offences of violence,⁵⁶ the Appellant formed the intent to shoot the victim at close range at a time he had no honest belief he was in danger of death or grievous bodily harm.⁵⁷

2) The Appellant was in a position of trust with respect to the victim.⁵⁸

3) The Appellant was well-trained in the use of firearms.⁵⁹

Mitigating Factors

1) The crime was unplanned, and the actions of the Appellant were a response to an altercation initiated by the victim;⁶⁰

⁵⁶ Appellant's Record, Vol. I at p.63, paras. 57-58.

⁵⁷ Appellant's Record, Vol. I at p. 65, para. 67.

⁵⁸ Appellant's Record, Vol. I at p. 65, para. 70.

⁵⁹ Appellant's Record, Vol. I at p. 66, paras. 74, 90.

⁶⁰ Appellant's Record, Vol. I at p. 65-66, para. 70.

2) The Appellant had an exemplary record professionally and personally prior to this such that specific deterrence was irrelevant.⁶¹

3) As a police officer, incarceration would be particularly difficult because of the need for protective custody.

42. Having carefully considered those factors, the majority concluded that “[a]n informed public would not consider a sentence of four years in this case to be outrageous or intolerable.”⁶² That conclusion is consistent with the standard enunciated by this Court.⁶³

D) The “Reasonable Hypothetical” Analysis

43. Although the Appellant focuses primarily on the “particularized inquiry” to attempt to demonstrate the unconstitutionality of s. 236(a), he also relies on reported cases to attempt to show “reasonable hypothetical” circumstances in which a sentence of less than four years has been imposed.⁶⁴ The same methodology was used by the Appellant in *R. v. Morrisey*. As Gonthier J. noted in *R. v. Morrisey*, courts must exercise care in relying on these cases because, *inter alia*, the facts may be inaccurately reported.⁶⁵ Gonthier J.’s cautionary note applies to the Appellant’s reliance on the case of *R. v. Owens*, in which Wood J. regarded the predicate act, careless use of a firearm, as an offence of “inadvertent negligence.”⁶⁶ This Court subsequently held that the mental state required for “penal negligence” was “a marked departure from the

⁶¹ Appellant’s Record, Vol. I at p. 67, para 74-75.

⁶² Appellant’s Record, Vol. I at p. 71, para 92.

⁶³ *R. v. Morrisey*, *supra* at para. 27 (per Gonthier J.); *Lyons*, *supra* at pp. 344-45; see also *R. v. McDonald* (1998), 127 C.C.C. (3d) 57 (Ont.C.A.) at para. 72 (per Rosenberg J.A.) [R.B.A. Vol. II, Tab 18].

⁶⁴ Appellant’s factum at paras. 38-42, and 82.

⁶⁵ *R. v. Morrisey*, *supra* at paras 32-33 and 50.

⁶⁶ *R. v. Owens*, [1985] B.C.J. 431 (B.C.S.C.) [A.B.A Vol. II Tab 31].

standard of care of a reasonably prudent person in the circumstances," a more rigorous standard.⁶⁷

44. The Appellant's reliance on these cases as "reasonable hypotheticals" is also compromised by identifying the "unlawful acts" at issue in these cases. *R. v. Deane* is in fact a criminal negligence case,⁶⁸ and thus *R. v. Morrisey* has conclusively determined that the example can have no persuasive effect in this case. *R. v. Lecaine*⁶⁹ is a case that, like the Appellant's, involved an intentional shooting by the person. Lecaine's circumstances are even less sympathetic than those of the Appellant, in that he chose to travel (armed) to a location to confront two intoxicated, belligerent acquaintances. The case demonstrates only that he was treated gingerly by the sentencing judge, and may be considered as evidence of the sort of case Parliament felt ought to attract harsher punishment.

45. The other cases cited by the Appellant, *R. v. Maheux*, *R. v. Ball*, and *R. v. Bill*,⁷⁰ all appear to involve careless handling of firearms. In *R. v. Maheux* and *R. v. Bill*, the offences involved taking loaded firearms to confront volatile individuals. Predictably, altercations occurred that led to the discharge of firearms and the death of a victim. It is wholly understandable that Parliament should seek to deter individuals from fanning the flames of violence by bringing firearms. The facts of *R. v. Ball* demonstrate what can happen when knowledgeable gun users permit their firearms to be handled by the untrained. Parliament is entitled to send a forceful message of deterrence to those individuals.

⁶⁷ *R. v. Gosset*, *supra*; *R. v. Finlay*, *supra*.

⁶⁸ *R. v. Deane* (2000), 143 C.C.C. (3d) 84 (Ont. C.A.) [A.B.A. Vol. I, Tab 10].

⁶⁹ *R. v. Lecaine* (1990), 104 A.R. 175 (Alta Q.B.) [A.B.A. Vol. I, Tab 20]; affirmed (1990), 105 A.R. 261 (Alta C.A.) [A.B.A. Vol. I, Tab 21].

⁷⁰ *R. v. Maheux*, [1987] A.Q. no. 1215 (C.A.) [A.B.A. Vol. I, Tab 23]; *R. v. Ball*, [1993] O.J. 3207 (Ont. S.C.) [A.B.A. Vol. 1, Tab 3]; *R. v. Bill*, [1997] B.C.J. 3031 (B.C.S.C.) [A.B.A. Vol. I, Tab 4].

2) Constitutional Question # 2 -The Mandatory Minimum Penalty is a Reasonable Limitation on Section 12 Rights

46. In *R. v. Morrisey*, Gonthier J. adverted to the possibility that infringements of s. 12 could be justified under s. 1 of the *Charter*.⁷¹ It is acknowledged that circumstances in which that happens are likely to be rare, given that the test for infringement of the s. 12 right incorporates a proportionality analysis more favourable to state interests than the s. 1 *Oakes* test. As with s. 7 of the *Charter*, s.1 is likely to come into play in s.12 cases only where it is more appropriate to consider the balancing of state interests and individual interests under s. 1.⁷² This Court has yet to identify a situation in which that may be appropriate.

47. With respect to the application of the *Oakes* test, the Attorney General agrees with and adopts the analysis of the Respondent. In summary form, the Attorney General's position is that:

a) Importance of the Objective – it should be self-evident that Parliament's objective, to deter and denounce the criminal use of firearms,⁷³ is of sufficient importance to override s. 12 rights. In this context, deterrence means saving lives.

b) Section 236(a) is Rationally Connected to the Objective – As this Court held in *R. v. Morrisey*, the use of the mandatory minimum to deter gun

⁷¹ *R. v. Morrisey*, *supra* at para 29.

⁷² Compare *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571 at para. 97 [A.G.C.B.A. Vol. I, Tab 14].

⁷³ *R. v. Morrisey*, *supra* at para. 70 (per Arbour J.) at para. 45 (per Gonthier J.); *R. v. Wiles*, *supra*, at para. 9.

crime is a rational way of advancing significant sentencing principles such as denunciation, general deterrence and retribution.⁷⁴

c) Section 236(a) Minimally Impairs the s. 12 Right – This Court's s. 12 jurisprudence emphasises that Parliament is entitled to a large margin of deference in crafting punishments for crime,⁷⁵ deference that ought to be reflected in the "minimal impairment" analysis. Given the way the offence has been tailored, the section serves to ensure that people who kill with guns will always be subject to incarceration. Given that the vast majority of individuals who kill in this way would receive significant carceral sentences in any event, the overall effect—raising some individuals' sentences to four years-- is within a reasonable range of legislative choice.

d) The Salutory Effects of s. 236(a) Outweigh the Deleterious Effects

The deleterious affects of this law are clear: some small number of people will be subject to lengthier periods of incarceration than if there were no minimum. Against this are the fact that lives may be saved by deterring criminal misuse of firearms; and that respect for the administration of justice may be promoted, particularly among those forced to deal with the devastating impact of losing a loved one in a senseless crime.

3) Constitutional Question # 3 - Case-By-Case Exemptions are not an Available Remedy for Unconstitutional Mandatory Minimum Sentence Provisions

48. Because the appropriate answer to the first constitutional question is that there is no s. 12 violation, it is not necessary to answer the third constitutional question, which concerns the existence or non-existence of

⁷⁴ *Morrissey supra* at para. 46.

⁷⁵ *Ibid* at para. 26; *Smith, supra* at p. 1077 and 1072 (per Lamer J.); *Goltz, supra* at p. 501 (per Gonthier J.).

individual exemptions as a constitutional remedy. There is some justification for answering the question, given the disparate views expressed by courts of appeal concerning the existence of the remedy.⁷⁶ Answering the question would also be of some assistance to this Court in stating constitutional questions; if such a remedy is unavailable for unconstitutional mandatory minimum sentencing cases, it would be inappropriate to frame questions in the way question one is framed in this case. Should this Court find it appropriate to answer the question, the inquiry should be limited to its availability in the context of mandatory minimum sentencing cases; whether they may be appropriately employed in other contexts may be better addressed in those contexts.

49. Definition of terms is essential in answering the third question. The Attorney General does not dispute the existence of the type of "exemption" in which a s. 24(1) of the *Charter* remedy is given after a s.52 declaration of invalidity is suspended;⁷⁷ this is simply a matter of fairness to the party who successfully demonstrates a law is unconstitutional. He does dispute the existence of the type of remedy contemplated by Arbour J.'s decision in *R. v. Morrisey*: a case-by-case determination of whether legislative provisions produce a result that a sentence is grossly disproportionate solely to that offender in his or her case.

⁷⁶ **In favour of existence:** *Yukon- R. v. Chief* (1989), 51 C.C.C. (3d) 265 (Yukon C.A.) [A.B.A., Vol. I Tab 8]; *N.W.T- R. v. Netser* (1992), 70 C.C.C. (3d) 477 (N.W.T.C.A.) [A.B.A. Vol. II, Tab 28]; **Saskatchewan- R. v. McGillivray** (1991), 62 C.C.C. (3d) 407 (Sask. C.A.) [A.B.A. Vol. I, Tab 26]; *R. v. Westfair Foods* (1989), 65 D.L.R. (4th) 56 (Sask. C.A.) [A.G.C.B.A. Vol. I, Tab 26]; **Manitoba- R. v. Joe** (1993), 87 C.C.C. (3d) 234 (Man C.A.) [A.B.A. Vol. I, Tab 15]; **Probably in favour: B.C.- R. v. Kumar** (1993), 85 C.C.C. (3d) 417 (B.C.C.A.) [A.B.A. Vol. I, Tab 17]; *R. v. Birchall* (2001), 158 C.C.C. (3d) 340 (B.C.C.A.) [A.B.A. Vol. I, Tab 6]; *R. v. Walcott* (2001), 154 C.C.C. (3d) 385 (B.C.C.A.) [A.B.A. Vol. II Tab 39]; **Against: Ontario- R. v. Kelly** (1990), 59 C.C.C. (3d) 497 (Ont. C.A.) [A.B.A. Vol. I Tab 16]; *R. v. MacDonald* (1998), 127 C.C.C. (3d) (Ont. C.A.) [R.B.A. Vol. II, Tab 18]; *R. v. Madeley*, [2002] O.J. No. 2410 (Ont. C.A.) [A.B.A. Vol. I, Tab 22]; **New Brunswick- R. v. Desjardins**, [1996] N.B.J. No. 467 (C.A.) [A.G.C.B.A. Vol. I, Tab 4]; **On the fence: Quebec- R. v. Lapierre** (1998), 123 C.C.C. (3d) 332 (Que C.A.) [A.B.A. Vol. I, Tab 18]; **Alberta-** see reasons of Court of Appeal, A.R., Vol. I, Tab 1d, at p.85, para. 110.

⁷⁷ *Schachter v. Canada*, [1992] 2 S.C.R. 679 at p. 720 [R.B.A. Vol. III, Tab 27]; *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [R.B.A. Vol. I, Tab 1].

50. In the judgment appealed from, Fruman J.A. identifies three reasons why individual, or case-by-case, exemptions ought not to exist: a) that they would undermine certainty and predictability in the law; b) that they fail to respect Parliament's role; and c) that they lack textual support in the constitution.⁷⁸ To these the Respondent adds a fourth: that in the specific context of s.12 *Charter* analysis, recognition of individual exemptions would be inconsistent with the "reasonable hypothetical" inquiry. The correctness of the Respondent's point is demonstrated by the judgment of Arbour J. in *R. v. Morrisey*, which implicitly jettisons the reasonable hypothetical inquiry.

51. Those courts that have found textual support in the constitution for the ability to employ individual exemptions, have adverted to the words "to the extent of the inconsistency" in s.52 of the *Constitution Act, 1982*.⁷⁹ These words have been read as imposing an obligation on the courts to minimize the interference with democratically passed laws in providing remedies for constitutional breaches. In considering a potentially far-reaching remedy such as "reading in", for example, a court must consider whether the remedy would further the legislature's objective and whether it would constitute an "unacceptable intrusion into the legislative domain."⁸⁰

52. The difficulty with the use of constitutional exemptions in mandatory minimum sentencing cases is that they cannot be justified as a restrained response to a constitutional defect. The legislative object in this case could not be clearer: to deter firearms-related crime through severe and certain punishment. The means chosen was the restriction of judicial discretion in sentencing.

⁷⁸ Appellant's Record,

⁷⁹ *R. v. Chief*, *supra* at pp. 278-279; *R. v. Westfair Foods*, *supra*; *R. v. Kelly*, *supra* at pp. 513-514; compare *R. v. Lapierre*, *supra*, which assumes s. 24(1) to be the source.

⁸⁰ *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 121 [R.B.A. Vol. II, Tab 21].

53. Use of constitutional exemptions restores the very feature of sentencing that Parliament sought to remove, the discretion of a judge to impose a sentence lying anywhere on the continuum between a suspended sentence and life imprisonment. Parliament wanted the sentence to be certain in terms of type (incarceration) and length (at least four years). The availability of individual exemptions in the context of mandatory minimum sentences defeats both of Parliament's objective. Further, it does so by the very means - judicial discretion - Parliament wished to constrain. The reasons of Chief Justice McLachlin in *Seaboyer* are apposite.⁸¹

...leave aside the question of whether, having found the legislation suffers from overbreadth which is not cured by s. 1 of the Charter, it is open to the court to declare it valid in part by techniques such as reading down and constitutional exemption. Assuming, without deciding, that this course is open, the question is whether the doctrine of constitutional exemption could appropriately apply in this case. In my opinion, it could not.

The first reason this case is not an appropriate one for application of the doctrine is that it would not achieve the end of substantially upholding the law which Parliament enacted. It would import into the provision an element which the legislature specifically chose to exclude-- the discretion of the trial judge. Add to this the host of judge-made procedures which have been proposed to effect this judicial amendment to the legislation, and the will of the legislature becomes increasingly obscured. The exemption, while perhaps saving the law in one sense, dramatically alters it in another. Where the effect is to change the law so substantially, one may question whether it is useful or appropriate to apply the doctrine of constitutional exemption. [emphasis added]

54. To the limited extent the Appellant is right about the wide number of circumstances in which unlawful act manslaughter can be committed, it tends to defeat the claim for constitutional exemptions rather than support it by creating an unacceptable level of uncertainty in the law. As LeDain J. pointed out in his concurring judgment in *R. v. Smith*.⁸²

⁸¹ *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at p. 630 [R.B.A. Vol. II, Tab 20]; See also *R. v. Smith*, *supra* at pp.143-144 (per Lamer J.).

⁸² *R. v. Smith*, *supra* at para.120 (per LeDain J.).

I have considered whether that should not be sufficient to sustain the validity, on its face, of the mandatory minimum sentence of seven years' imprisonment, subject to the power of a court in a particular case to find that the mandatory minimum sentence is constitutionally inapplicable because it would in all the circumstances of the case be cruel and unusual punishment. Although I have found the flexibility of this approach attractive I have come to the conclusion 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. [emphasis added]

55. It should be noted that even in the firearms prohibition cases⁸³ where the case for constitutional exemptions found favour with several courts, the same result could have been achieved through a declaration of invalidity coupled with a suspension. When Parliament chose to respond to that line of cases in legislation, it crafted an exception to the former blanket prohibition that responded to the constitutional defect identified. Had a suspension been imposed, Parliament would have had to act within a prescribed time to ensure that the law as it appears on the statute books respected the constitutional standard.

56. The Appellant also argues that constitutional exemptions can be conferred on "identifiable groups", and defines the group as "police officers or security guards who are required to carry firearms as a condition of their employment."⁸⁴ The argument for the existence of "group exemptions" finds some support in the concurring judgments of Arbour J. in *R. v. Morrissey*⁸⁵ and of L'Heureux-Dubé J. in *Corbière*.⁸⁶

⁸³ *R. v. Chief, supra*; *R. v. Netser, supra*; *R. v. McGillivray, supra*.

⁸⁴ Appellant's factum at para. 94.

⁸⁵ *R. v. Morrissey, supra*, at para. 86 (per Arbour J.).

⁸⁶ *Corbière v. Canada, supra* at para. 111 (per L'Heureux-Dubé J.).

57. At the theoretical level it is doubtful that so-called "individual" and "group" exemptions are truly distinct categories, at least in the context of mandatory minimum sentences provisions. It is highly unlikely that a particular individual possesses unique attributes such that he or she alone would get an exemption: rather, the individual would be more likely to have committed the offence in unusual circumstances, or have compelling personal circumstances, which would be the markers of a describable class. This was true in the firearms prohibition cases⁸⁷ where aboriginal people who required firearms for hunting formed an identifiable class.

58. This issue need not be resolved in this case because the group described by the Appellant should not be entitled to an exemption. By virtue of their employment, police officers and security guards are necessarily highly trained in the use of firearms. By virtue of their employment, they are uniquely conscious of the dangers of misusing firearms. For this group the objective foreseeability of harm will usually be perilously close to subjective foreseeability of serious injury or death. Aside from moral blameworthiness, the carving out of the police/security guard group could diminish respect for the administration of justice if police are perceived as receiving special consideration in gun crimes that result in death. There is a real danger of fostering a perception that lives taken at the hands of the police are less worthy than other citizens' lives.

PART IV - COSTS

59. There is no reason to depart from the ordinary practice in which costs are not awarded.

⁸⁷ *R. v. Chief, supra*; *R. v. Netser, supra*; *R. v. McGillivray, supra*.

PART V – ORDER SOUGHT

The Constitutional questions should be answered 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*?

Answer: No

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*?

Answer: Not necessary to decide, but if decided, the answer should be yes

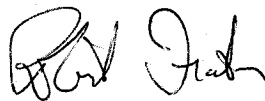
3) If the answer to Question 2 is "no", does Canadian law recognize the availability of a constitutional exemption on a case-by-case basis from the statutory mandatory minimum sentence set out in s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46?

Answer: Not necessary to decide, but if decided, the answer should be no

ALL OF WHICH is respectfully submitted this 2nd day of October, 2007.



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PART VI - TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<i>Corbière v. Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 S.C.R. 203	49, 56
<i>Ewing v. California</i> 538 U.S. 11(2003), 155 L Ed 2d 108	32
<i>God's Lake First Nation v. McDiarmid Lumber</i> , [2006] 2 S.C.R. 846	35
<i>R. v. Adkins</i> (1987), 39 C.C.C. (3d) 346 (B.C.C.A.)	25, 28
<i>R. v. Ball</i> , [1993] O.J. 3207 (Ont. S.C.)	45
<i>R. v. Bill</i> , [1997] B.C.J. 3031 (B.C.S.C.)	45
<i>R. v. Birchall</i> (2001), 158 C.C.C. (3d) 340 (B.C.C.A.)	48
<i>R. v. Brown</i> , [1994] 3 S.C.R. 749	16
<i>R. v. Chief</i> (1989), 51 C.C.C. (3d) 265 (Yukon C.A.)	48, 51, 55, 57
<i>R. v. Creighton</i> , [1993] 3 S.C.R. 3	24
<i>R. v. Deane</i> (2000), 143 C.C.C. (3d) 84 (Ont. C.A.)	44
<i>R. v. Desjardins</i> , [1996] N.B.J. No. 467 (C.A.)	48
<i>R. v. Ferguson</i> , 2006 ABCA 261	8
<i>R. v. Finlay</i> , [1993] 3 S.C.R. 103	28
<i>R. v. Goltz</i> , [1991] 3 S.C.R. 485	8, 47
<i>R. v. Gosset</i> , [1993] 3 S.C.R. 76	28, 43
<i>R. v. H. (C.N.)</i> (2000), 170 C.C.C. (3d) 67 (Ont.C.A.)	22
<i>R. v. Henry</i> , [2005] 3 S.C.R. 609	35
<i>R. v. J.B.</i> , [2004] O.J. No. 2559 (C.A.)	37

Cases**Paragraph(s)**

<i>R. v. Joe</i> (1993), 87 C.C.C. (3d) 234 (Man C.A.)	48
<i>R. v. Kelly</i> (1990), 59 C.C.C. (3d) 497 (Ont. C.A.)	48
<i>R. v. Kumar</i> (1993), 85 C.C.C. (3d) 417 (B.C.C.A.)	48
<i>R. v. Lapierre</i> (1998), 123 C.C.C. (3d) 332 (Que C.A.)	48, 51
<i>R. v. Latimer</i> , [2001] 1 S.C.R. 3	8, 10, 11
<i>R. v. Lecaine</i> (1990), 104 A.R. 175 (Alta Q.B.); (1990) 105 A.R. 261 (Alta. C.A.)	44
<i>R. v. Lelievre</i> (1962), 132 C.C.C. 288 (Ont. C.A.)	28
<i>R. v. Luxton</i> , [1990] 2 S.C.R. 711	37
<i>R. v. Lyons</i> , [1987] 2 S.C.R. 309	32, 42
<i>R. v. MacDonald</i> (1998), 127 C.C.C. (3d) (Ont. C.A.)	36, 42, 48
<i>R. v. Mack</i> (1975), 22 C.C.C. (2d) 257 (Alta.C.A.)	28
<i>R. v. Madeley</i> , [2002] O.J. No. 2410 (Ont. C.A.)	48
<i>R. v. Maheux</i> , [1987] A.Q. no. 1215 (C.A.)	45
<i>R. v. Malmo-Levine</i> , [2003] 3 S.C.R. 571	46
<i>R. v. McGillivray</i> (1991), 62 C.C.C. (3d) 407 (Sask C.A.)	48, 51, 57
<i>R. v. McGuigan</i> , [1982] 1 S.C.R. 284	17
<i>R. v. Mezzarobba</i> , [1974] 3 W.W.R. 191 (Alta.C.A.)	28
<i>R. v. Morrissey</i> , [2000] S.C.R. 90	8, 11, 28, 31, 32, 33, 36, 38, 42, 43, 46, 56
<i>R. v. Netser</i> (1992), 70 C.C.C. (3d) 477 (N.W.T.C.A.)	48-57

Cases**Paragraph(s)**

<i>R. v. Owens</i> , [1985] B.C.J. 431 (B.C.S.C)	43
<i>R. v. Pettigrew</i> (1990), 56 C.C.C. (3d) 390 (B.C.C.A.)	28
<i>R. v. Quon</i> , [1948] S.C.R. 508	16
<i>R. v. Rezaie</i> , [1996] O.J. No. 4468 (C.A.)	37
<i>R. v. R.K.</i> (2005), 198 C.C.C. (3d) 232 (Ont.C.A.)	36
<i>R. v. Seaboyer</i> , [1991] 2 S.C.R. 577	53
<i>R. v. Schwartz</i> , [1988] 2 S.C.R. 443	18
<i>R. v. Sharpe</i> , [2001] 1 S.C.R. 45	51
<i>R. v. Smith</i> , [1987] 1 S.C.R. 1045	8, 47, 53, 54
<i>R. v. Steele</i> , 2007 S.C.C. 36	27
<i>R. v. Tennant and Naccarato</i> (1975), 23 C.C.C. (2d) 80 (Ont. C.A.)	28
<i>R. v. Toon</i> , [2006] A.J. 1370 (C.A.)	28
<i>R. v. Walcott</i> (2001), 154 C.C.C. (3d) 385 (B.C.C.A.)	48
<i>R. v. Westfair Foods</i> (1989), 65 D.L.R. (4th) 56 (Sask. C.A.)	48, 51
<i>R. v. Wiles</i> , [2005] 3 S.C.R. 895	8, 38, 47
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<i>Reference re Firearms Act (Canada)</i> (1998), 164 D.L.R. (4 th) 513 (Alta. C.A.) ; [2000] 1 S.C.R. 679	15, 26
<i>Schachter v. Canada</i> , [1992] 2 S.C.R. 679	49

Statutes and Regulations**Paragraph(s)**

<i>Charter of Rights and Freedoms, s. 1</i>	46, 59
<i>Charter of Rights and Freedoms, s. 12</i>	2, 6.1, 46, 47, 50, 59
<i>Charter of Rights and Freedoms, s. 24(1)</i>	49
<i>Criminal Code, s. 236(a)</i>	1, 59
<i>Criminal Code, s. 222(5)a)</i>	14
<i>Criminal Code, s. 85</i>	16
<i>Criminal Code, s. 85(1)a)</i>	16
<i>Criminal Code, s. 220a)</i>	20
<i>Criminal Code, s. 239a)</i>	20
<i>Criminal Code, s. 244</i>	20
<i>Criminal Code, s. 272a)</i>	20
<i>Criminal Code, s. 273(2) a)</i>	20
<i>Criminal Code, s. 279(1.1)a)</i>	20
<i>Criminal Code, s. 279.1(2)a)</i>	20
<i>Criminal Code, s. 344a)</i>	20
<i>Criminal Code, s. 346(1.1)a)</i>	20
<i>Criminal Code, s. 718.1</i>	33
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<i>Firearms Act, 1995</i>	17, 20

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