Court File No. 31692

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

B E T W E E N:

MICHAEL ESTY FERGUSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF QUEBEC,
CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM
OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I – OVERVIEW

1. This appeal concerns the application of s.236(a) of the *Criminal Code*, which imposes a mandatory minimum sentence of four years' imprisonment for 'unlawful act' manslaughter committed while using a firearm. The Canadian Civil Liberties Association ("CCLA") intervenes to make submissions on the constitutionality of s.236(a) generally, and (if this provision is upheld), the availability of more limited remedies, if this Court is of the view that the application of s.236(a) would be unconstitutional in the specific circumstances of this case.

2. The range of human experience is such that there will almost always be unanticipated factual circumstances that do not fit the assumptions that led to the

enactment of a minimum sentence. The objections to mandatory minimum sentences apply with particular force to s.236(a), in view of the breadth of factual circumstances that may be captured by 'unlawful act' manslaughter. This breadth makes manslaughter a poor fit for the procrustean bed of an inflexible mandatory minimum sentence.

3. The CCLA submits that an inflexible rule requiring a 4-year mandatory minimum sentence for all cases of manslaughter involving the use of a firearm constitutes cruel and unusual punishment, contrary to s.12 of the *Charter*, and cannot be justified under s.1. Accordingly, s.236(a) of the *Criminal Code* should be struck down. In the alternative, if the Court is not prepared to strike down the legislated minimum sentence entirely, a limited discretion to depart from it in exceptional circumstances could be "read in", or a "case-by-case" remedy of a constitutional exemption could be recognized, to rectify breaches of fundamental *Charter* rights that would otherwise go unaddressed.

4. The CCLA does not take a position on any issue of contested fact in this case. The CCLA's submissions on the constitutionality of s.236(a) or the general availability of alternative remedies are not based upon the specific facts of this case. Likewise, the CCLA takes no position on whether the Appellant should qualify for a constitutional exemption on the facts of this case, if this remedy is available.

PART II – POSITION ON THE QUESTIONS IN ISSUE

5. The CCLA takes the following positions on the questions in issue:

I. 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*?

The CCLA takes the position that the mandatory minimum sentence prescribed by s.236(a) is cruel and unusual punishment, contrary to s.12.

II. 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*?

The CCLA takes the position that the infringement is not a reasonable limit that can be justified under s.1 of the *Charter*.

III. 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?

The CCLA takes the position that Canadian law permits more limited remedies, such as reading in a limited discretion to depart from the mandatory minimum in exceptional cases, or granting a constitutional exemption from the mandatory minimum on a case-by-case basis.

PART III – STATEMENT OF ARGUMENT

I. Cruel and Unusual Punishment and Mandatory Minimum Sentences

A. Overview

6. Section 12 of the *Charter* requires the Court to consider "whether the punishment prescribed is so excessive as to outrage standards of decency".[1] Certain types of punishment will meet this standard by their very nature – for example the "infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed, or, to give examples of treatment, the lobotomisation of certain dangerous offenders or the castration of sexual offenders."[2] In addition, it has long been recognized that punishments that are "grossly disproportionate to the offence" are also cruel and unusual punishment, within the meaning of s.12 of the *Charter*.[3]

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[1] *R v. Miller and Cockriell*, [1977] 2 S.C.R. 680, at p. 688 per Laskin C.J., quoted with approval in *R.* v. *Smith*, [1987] 1 S.C.R. 1045, at para. 1072 [hereinafter "*Smith*"]; see also *R. v. Goltz*, [1991] 3 S.C.R. 485 [hereinafter "*Goltz*"]; *R. v. Morrisey*, [2000] 2 S.C.R. 90 [hereinafter "*Morrisey*"]; *R. v. Latimer*, [2001] 1 S.C.R. 3 [hereinafter "*Latimer*"] and *R. v. Wiles*, [2005] 3 S.C.R. 895 [hereinafter "*Wiles*"]

[2] *Smith*, at paras. 1073-1074

[3] *Smith*, at 1072-1074; *Goltz*, at 498-499; *Morrisey*, at p. 108, para. 26; *Latimer*, at 36-37, paras. 73-75

7. The “grossly disproportionate” test focuses upon two inquiries: whether the punishment is grossly disproportionate in the circumstances of the particular case before the Court; and whether the punishment is grossly disproportionate in the circumstances of any reasonable hypothetical case. The mandatory minimum sentence required by s.236(a) will infringe s.12 if it is grossly disproportionate under either inquiry.

8. The CCLA submits that the inflexible 4-year mandatory minimum sentence in s.236(a) for unlawful act manslaughter committed with a firearm infringes s.12, because the range of circumstances captured by the offence is such that there are likely to be many situations that do not fit within the assumptions that led to its enactment. Parliament’s specific focus in enacting s.236(a) and its companion provisions was upon the use of firearms in the commission of certain offences, or (to speak colloquially), “gun crimes”. The minimum sentences appear to be based upon the assumption that using firearms in the commission of these offences will invariably amount to a significant exacerbating factor.

9. Parliament may be justifiably concerned with the dangers presented by “gun crimes” involving the careless or unlawful use of firearms. However, in creating an inflexible sentencing regime that mandates a four-year minimum sentence for all instances of unlawful act manslaughter committed with a firearm, Parliament has required courts to blind themselves to the different contexts in which the offence can arise. Mandatory minimum sentences restrict the application of individualized sentencing principles. These principles are the cornerstone of fair and just sentencing.

B. The Relationship Between Section 12 and Section 1

10. This Court has set out differing approaches to the analysis of s.12, and in particular whether the court should consider broader penological objectives in assessing whether a sentence qualifies as “grossly disproportionate”. In *R.* v. *Smith*, Lamer J. (as he then was) emphasized the primacy of the entitlement to be free from cruel and

unusual punishment over broader penological objectives (such as general deterrence) at the initial stage of the inquiry. In his view, broader penological objectives could potentially be used to override the right not to be subjected to cruel and unusual punishment, but only if they met the justification test under s.1.[4]

11. However, in *R*. v. *Goltz*, Gonthier J. noted that there may be additional factors to be considered in determining whether or not a mandatory minimum sentence violates s.12, including "whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, whether there exist valid alternatives to the punishment imposed, and… whether a comparison with punishments imposed for other crimes in the same jurisdiction reveals great disproportion."[5]

12. The CCLA submits that whatever approach is taken, the Court should insist upon a sufficient evidentiary foundation for claims that mandatory minimum sentences achieve broader penological goals. The rationale for minimum sentencing laws should not be subjected to less strenuous analysis under s.12 than it properly attracts under s.1. Under s.1, the Court must consider whether the means chosen by Parliament are proportionate to the identified penological objectives, including: whether they are rationally connected to these objectives, constitute the least intrusive means of achieving them, and are not outweighed by their deleterious effects.

13. If broader penological objectives are invoked under s.12 to justify what would otherwise be a grossly disproportionate sentence, they should be based upon more than mere conjecture as to the efficacy of the minimum sentence to achieve these objectives. The possibility of subjecting an offender to longer periods of incarceration that what is appropriate for them individually, undermines the Kantian notion - at the very foundation of human rights law[6] - that human beings have inherent dignity that

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[4] *Smith* at p. 1073
[5] *R. v. Goltz*, [1991] 3 S.C.R. 485 at p. 500
[6] Errol P. Mendes, "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity", (2000) 12 N.J.C.L. 1; online: http://www.uottawa.ca/hrrec/publicat/dignity.html.

must not be violated by treating them as a means to an end.[7] In the absence of evidence that mandatory minimum sentences work to achieve those broader goals, this would have the effect of sacrificing individual human dignity to no purpose.

14. There is limited evidence to support the claim that mandatory sentences achieve any broader penological objectives. To the contrary, as Professor Roach notes:

> There is little evidence to support the hope that mandatory penalties of imprisonment, which may not even be known by the general public, will serve as effective deterrents of crimes committed against vulnerable people. …
>
> Mandatory sentences may be defended in the often vain and, at best, uncertain hope that they will provide protection for various disadvantaged groups that are subject to disproportionate victimization. However, they will also result in injustice when applied to exceptional offenders, including exceptional offenders with the same characteristics as the disadvantaged group that is supposed to be protected by the mandatory penalty. The dichotomy between victims and offenders that drives many punitive forms of victims' rights often breaks down in practice and individuals such as women, the young, Aboriginal people, the disabled, and other vulnerable minorities who are thought to be protected by mandatory sentences may also be caught by them.[8]

15. The state's claims of general deterrence arising from s.236(a) of the *Criminal Code*, particularly for an offence marked by its lack of intent to cause death, should be subjected to an evidence-based evaluation, whether this occurs under s.12 or s.1.[9]

C. Reasonable Hypotheticals Under s.236(a)

16. The CCLA does not take a position on the particular circumstances of the Appellant. Rather, the CCLA submits that the mandatory minimum sentence set out in s.236(a) of the *Criminal Code* is grossly disproportionate in the circumstances of reasonable hypothetical cases. In the context of unlawful act manslaughter, an offence

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[7] "The practical imperative will therefore be the following: Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.": Immanuel Kant, *Grounding for the Metaphysics of Morals with "On a Supposed Right to Lie Because of Philanthropic Concerns," *third edition, trans. James W. Ellington (Indianapolis; Cambridge: Hackett Publishing Company, Inc., 1993), p. 36.

[8] Kent Roach, 'Searching for Smith: the Constitutionality of Mandatory Sentances", (2001) 39 Osgoode Hall L.J. 367 at paras. 49-50. See also Anthony N. Doob and Carla Cessaroni, "The Political Attractiveness of Mandatory Minimum Sentences", 39 Osgoode Hall L.J. 287 (2001).

[9] More detailed submissions on s.1 are provided at paras. 26-30 below.

marked by the absence of any requirement of intent to cause death, it is not hard to find examples of real or hypothetical cases illustrating a broad spectrum of culpability.

17. The offence of manslaughter captures an extremely broad range of circumstances. As noted by Arbour J. (concurring) in *Morrisey* (quoting with approval from the judgment of Taylor J. in *R. v. Bill*), manslaughter "can be based upon an almost infinitely wide range of conduct" that "ranges from near accident to near murder".

> The offence of manslaughter requires only an unlawful homicide which in simplistic terms is a homicide occurring in the course of an unlawful act or as a result of criminal negligence. Thus the offence of manslaughter can range from one end of the spectrum where all that need be absent is the intention to cause death, to the other end of the spectrum which is something approaching a mere accident. For this reason, manslaughter ordinarily carries no minimum sentence…
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> Manslaughter is quite unlike attempted murder, robbery, sexual assault, or most of the other offences to which I have earlier referred and for which Parliament has imposed a four year minimum sentence when a firearm is used in the commission of the offence. In those offences, the very reason that the offender possesses a firearm is for an unlawful purpose: an intention to murder, to rob, or to commit sexual assault. In contrast, where a firearm is used in commission of the offence of manslaughter, there may be no subjective unlawful intention, given that manslaughter can be committed in circumstances of purely objective recklessness. I note that, in such circumstances, the effectiveness of the principle of deterrence is to some extent diminished.

> Taylor J., in evaluating the constitutionality of the sentence, found that the four-year minimum sentence provided in s. 236(a) would result in a grossly disproportionate sentence for the accused, thus invalidating the sentence on the first branch of the s. 12 analysis. Of particular importance to Taylor J. was the direction found in s. 718.2(e) of the Code, that all available sanctions other than imprisonment should be considered, particularly for aboriginal offenders...[10]

18. Unlawful act manslaughter requires only that the offender have caused a death, while committing an underlying "unlawful act" (a term that is not defined in the *Criminal Code*) in a manner that the likelihood of an injury to another person was foreseeable, and that a firearm must be used in committing the unlawful act (which may include

[10] *Morrisey* at p. 130-132, paras. 72-73

discharging, displaying or pointing a firearm[11]). This "almost infinitely wide range of conduct" underpinned the comments of McLachlin J. (as she then was) in *R. v. Creighton*:

> 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. An unintentional killing while committing a minor offence, for example, properly attracts a much lighter sentence than an unintentional killing where the circumstances indicate an awareness of risk of death just short of what would be required to infer the intent required for murder. The point is, the sentence can be and is tailored to suit the degree of moral fault of the offender.[12]

19. In this context, where the offence is one of such remarkable breadth, it is not difficult to identify situations in which the mandatory minimum sentence would be grossly disproportionate to the circumstances of the offender and the offence. While hypothetical situations (such as Lamer J's young student driving back to Canada with his or her "first joint of grass"[13]) are an integral part of the s.12 analysis, in the case of manslaughter, one need not go beyond reported decisions to find examples where the mandatory minimum sentence would be grossly disproportionate.

20. This is in keeping with Gonthier J.'s refinement of the approach to a hypothetical example in *Goltz*, noting the hypothetical case had to be reasonable and not "far-fetched",[14] and stating that that the hypothetical "must focus on imaginable circumstances which could commonly arise in day-to-day life."[15] As set out in the Appellant's factum, there have been numerous cases where offenders convicted of manslaughter involving the use of a firearm were appropriately sentenced to substantially less than the mandatory minimum sentence at issue in the instant case.[16]

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[11] *R. v. Steele*, 2007 SCC 36 at para. 27
[12] *R.* v. *Creighton*, [1993] 3 S.C.R. 3 at p. 48
[13] *Smith* at p. 1053
[14] *Goltz* at 515
[15] Ibid
[16] See the Factum of the Appellant, paras. 38 -41, including: *R. v. Maheux*, in which the accused was sentenced to probation after, believing him to be armed, he killed his brother, and *R. v. Lecaine*, in which the accused was sentenced to 12 months imprisonment, after twice shooting an acquaintance who punched and kicked him.

21. There is particular risk of gross disproportionality in cases involving members of marginalized or disadvantaged groups. In *Morrisey*, Arbour J. notes the startlingly disproportionate effect of a mandatory minimum sentence in cases involving women who had been subjected to physical, mental, and emotional abuse at the hands of their husbands, for example in the Ontario case of *R. v. Ferguson*.[17] It is clear from cases such as *R. v. Ferguson* and *R. v. Bill* that there are easily identifiable real-life circumstances in which the mandatory minimum for unlawful act manslaughter would be grossly disproportionate.

10 22. Further, even if the facts of the present case do not demonstrate gross disproportionality (an issue which the CCLA leaves to the Court), it is not hard to construct hypotheticals that would qualify. For example, to build on the facts of this case slightly, a police officer who is required by policy to carry a gun in certain circumstances, and reacts to a real or perceived threat in a manner that unintentionally

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[17] *Morrisey* at p. 137, para. 83. In *R. v. Ferguson*, Mercier J. made the following comments about a woman who had been subjected to shocking spousal abuse before she shot her husband:

> Applying those principles I am of the view that this is a proper case for conditional sentence. The offender, Lisa Ferguson, poses no danger to the community. The pre-sentence report is one of the most positive I have ever seen. The probation officer strongly recommends a disposition which would allow her to remain in the community. Although the probation officer mentions that Ferguson House is willing to accept Ms. Ferguson, she does not feel a structured living arrangement is necessary.
> …
> The strict conditions I will set out below will satisfy the objective of a denunciation while the imposition of the maximum reformatory term will satisfy the objective of general deterrence.
>
> As I have said, I have no trouble with the prospects for specific deterrence and rehabilitation. These will in fact be enhanced by the imposition and conditions to be adhered to pursuant to the conditional sentence. I have already indicated that there are several mitigating factors to be considered which warrant the conditional sentence, and the relevant aggravating circumstances do not change that.

R. v. Ferguson, [1997] O.J. No. 2488 at paras. 112, 115-116; see also, *R. v. D.E.C*. [1995] B.C.J. No. 1074 (S.C.); *R. v. Chivers*, [1988] N.W.T.R. 134 (S.C.), and *R. v. Pettigrew* (1990), 56 C.C.C. (3d) 390 (B.C.C.A); see also Larry N. Chartrand, "Aboriginal Peoples and Mandatory Sentencing", (2001) 39 Osgoode Hall L.J. 449 and Fiona Sampson, "Mandatory Minimum Sentences and Women with Disabilities", (2001) 39 Osgoode Hall L.J. 589 at para. 16 in respect of the discriminatory and disproportionate effect of mandatory minimum sentences on aboriginal peoples and women with disabilities.

causes the death of a person, may well be found to be a hair's breadth (or a split second)[18] short of having established that he or she acted in self-defence.

23. There are also other circumstances where the law may authorize the use of force, such as a woman confronted by an intruder in her residence, a homeowner acting to protect property, or a police officer acting in the line of duty, in which a person could be found to have acted in a manner that falls just short of being legally justified, but still raises significant mitigating factors. For example, in *R. v. Levert* a police officer who was investigating an alarm at a gas station, discharged his gun twice and grazed the left arm of a burglar on his second shot. He was convicted of assault with a weapon, but his sentence was reduced on appeal on the basis that he was "acting in a situation of high stress that demanded split second decision making when he fired the second shot".[19] In cases such as these, if lengthy minimum sentences apply, requiring the court to make a choice between complete exoneration or imposing the minimum sentence, based upon a split-second or hair's breadth judgment, is not an adequate response to the circumstances.

24. The CCLA acknowledges that this Court upheld the 4-year mandatory minimum sentence for criminal negligence causing death with a firearm in *Morrisey*, although Justices McLachlin (as she then was) and Arbour, in their concurring judgment, would have found that constitutional exemptions should be available in an appropriate case. However, even assuming that *Morrisey* is correctly decided, unlawful act manslaughter could be distinguished from criminal negligence causing death, in that the former may cover situations involving a broader spectrum of moral culpability.

25. Indeed, while the CCLA agrees that police officers should undoubtedly be held to an exacting standard of care and responsibility in the use of their firearms (and is

[18] The Respondent puts great emphasis on evidence that the second shot in this case came two to three seconds after the first. Without taking a position on the facts, the CCLA submits that it is implicit in this submission by the Respondent that a hypothetical case where the shots were closer together but still fell short of self-defence might well lead to a different result on the sentencing analysis.

[19] See *R. v. Levert*, [1994] O.J. No. 2627 (C.A.), where a police officer was charged after shooting at and wounding a fleeing burglar. In reducing the sentence from 12 to 6 months, the Court noted "the situation of high stress that demanded split second decision making": para. 10.

gratified to see the Attorneys General endorsing that position), there may be many circumstances in which it is not inappropriate for certain individuals (farmers, hunters, police officers, security guards, etc.) in certain circumstances to carry loaded weapons. In these circumstances, the line between lawful reasonable use of force and "unlawful acts" may be a fine one. The courts are rightly vigilant in ensuring that police officers whose conduct crosses that line face legal consequences, but it does not necessarily follow that those consequences should be the same as, for example, those that apply to a criminally negligent and inebriated person whose recklessness caused a death as in *Morrisey*.[20] The dynamics of the situation, and the issues of social policy that are engaged, may be entirely different.

II. Cruel and Unusual Punishment and Section 1

26. The CCLA submits that a mandatory minimum sentence that constitutes cruel and unusual punishment should not readily be found to be justified under s. 1. This Court has held that the *Oakes* test is to be applied strictly in this context.[21]

27. The Respondent characterizes the objective of s.236(a) as being to "deter and denunciate the horrific problem of firearm-related crime and death"[22] Even if deterring the use of firearms when committing manslaughter is found to be a sufficiently significant and pressing objective to warrant breaching fundamental *Charter* rights, the provision does not survive scrutiny under the proportionality element of the *Oakes* test.

28. The Respondent has not demonstrated any rational connection between the mandatory minimum sentence required under s.236(a), and deterring the use of firearms. The mere assertion of the rational connection is insufficient. Nor has the Respondent pointed to any evidence that mandatory minimum sentences have any salutary effects, either in deterring crime or in leading to more appropriate sentencing.

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[20] It was common ground in *Morrisey* that the minimum sentence would not be grossly disproportionate on the facts of that case: see p.. 121, para. 55
[21] *Oakes*, [1986] 1 S.C.R. 103; see also *Smith*, p. 1080-1081
[22] Factum of the Respondent Attorney General of Alberta, at page 26, para. 92

29. Further, even if the rational connection branch of the test is met, s.236(a) does not minimally impair the right to be free from cruel and unusual punishment. The legislative history of this provision and its companion enactments, briefly mentioned in the Respondent's factum,[23] does not show that there has been any effort to tailor the mandatory minimum sentences to the different circumstances of these extremely disparate offences. To the contrary, a broad range of offences was subjected to the same mandatory minimum sentence at the same time. Similarly, there is no evidence that Parliament paid any attention to the importance of individualized sentencing in exceptional cases.[24]

30. Finally, the deleterious effects of s.236(a) outweigh any salutary effects that it may have. As noted above, there is no compelling empirical evidence to support the claim that there are any salutary effects at all to mandatory minimum sentences. Indeed, there is some evidence that they have the paradoxical effect of making juries more reluctant to convict.[25] Some commentators suggest that mandatory minimum sentences may owe as much to political considerations as to responsible policy choices by the legislature.[26] In this context, the CCLA submits that where provisions are found to infringe s.12, their salutary effects, as demonstrated through reliable evidence, needs to be weighed against their deleterious effects. Such a balancing exercise is not possible in the absence of this evidence.

III. "Reading In" Discretion or Granting Constitutional Exemptions

31. If the Court finds that the mandatory minimum sentence imposed by s.236(a) of the *Criminal Code* violates s.12 of the *Charter*, but does not strike down the provision, the CCLA submits that the Court may grant alternative remedies, including reading in a

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[23] Ibid
[24] *Smith*, at page 1080-81 per Lamer J.; see also *R. v. Bill* (1998), 13 C.R. (5th)125 (B.C.S.C.) and *Morrisey*, p. 129-130, para. 70
[25] Doob & Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences"*, supra* at p. 293.
[26] *Ibid*; J. Roberts, "Public Opinion and Mandatory Sentencing: A Review of International Findings", 30 Criminal Justice and Behaviour 483 (2003), at p. 487.

limited discretion to depart from the mandatory minimum sentence (which would remain presumptively valid), or granting constitutional exemptions on a case-by-case basis.

32. In circumstances where legislation is constitutional in the majority of its applications, but may occasionally or in isolated circumstances have unconstitutional applications, the Court should not be precluded from granting a remedy. While striking down an overbroad provision is preferable, the CCLA can envision circumstances in which these more limited remedies might be granted to address the constitutional defect, but preserve the provision. As Professor Kent Roach states in his analysis of constitutional exemptions:

> Constitutional exemptions, like reading down, are a means of recognizing that statutes may have unconstitutional effects on Charter rights in a few cases, but can be validly applied in most cases. They allow the courts to provide a remedy when necessary, but otherwise preserve legislation that may infringe Charter rights.[27]

33. Reading in or reading down are well established as available remedies to address constitutional defects while preserving the main thrust of legislation.[28] Likewise, constitutional exemptions are not new to Canadian constitutional jurisprudence. Since *R*. v. *Big M. Drug Mart*,[29] members of this Court have considered the use of constitutional exemptions to remedy overbroad legislation in several cases,[30] although the remedy has not yet been expressly applied by a majority of the Court. A number of lower courts have granted constitutional exemptions,[31] both as an individual remedy under s.24(1) and in conjunction with a declaration of invalidity under s.52(1).[32]

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[27] Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora: Canada Law Book, 1994), at p.14-27, ¶ 14.560

[28] *Schachter v. Canada*, [1992] 2 S.C.R. 679, *Vriend v. Alberta*, [1998] 1 S.C.R. 493. Note that the U.S. Supreme Court "read in" a discretion to federal sentencing guidelines in order to preserve their constitutionality from sixth amendment challenge in *U.S. v. Booker*, 543 U.S. 220 (2005).

[29] *R*. v. *Big M. Drug Mart*, [1985]1 S.C.R. 295.

[30] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at paras. 101-117 *per* Lamer C.J.C. (dissenting); *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 66 *per* L'Heureux-Dubé J. (concurring); cf. *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at paras. 82-89.

[31] Roach, *Constitutional Remedies in Canada*, *supra* at paras. 14.560 – 14.869.1 and cases cited therein.

[32] As Professor Peter Sankoff has noted, constitutional exemptions may be either 'narrow', coming into play to protect an individual litigant during the period of suspension where a declaration of invalidity is suspended, or 'broad', where a court declines to strike down a piece of legislation on the basis that while it may have unconstitutional effects, these only occur in rare and defined instances, but provides an

34. Although this Court has to date declined to grant a constitutional exemption in challenges to mandatory minimum sentences, the CCLA submits that it should be able to do so in appropriate cases. There is no reason in principle why this remedy should not be available.

35. In the Court below, the majority identified three bases upon which it relied in rejecting the remedy of constitutional exemptions: the absence of a textual basis in the Constitution, concerns about the certainty and predictability of the criminal law, and concerns about the court's intrusion into Parliament's role. The CCLA submits that none of these objections is compelling. The CCLA will address each of them, in relation to both a remedy of reading in a limited discretion to the statute, and granting constitutional exemptions on a case-by-case basis.

Textual Basis in the Constitution

36. There is no issue as to the textual basis in the Constitution for a remedy of "reading in", as this has been recognized in several previous cases. With respect to the textual basis for constitutional exemptions, the CCLA submits that the Court may find its authority in either the ability to grant an "appropriate and just" remedy under s.24(1) of the *Charter*, or the ability under s.52(1) to declare the section of "no force or effect… to the extent of the inconsistency".

37. Section 24(1) provides a high degree of remedial flexibility where the *Charter* rights of an individual have been infringed. This provision has been used, for example, to mandate legal aid funding (contrary to a restrictive government policy) in child custody cases.[33] Likewise, three members of this Court would apparently have considered that an exception to the normal application of a zoning by-law would be

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individual exemption from the legislation for a particular litigant who can demonstrate unconstitutional effects on him or her: Peter Sankoff, "Constitutional Exemptions: An Ongoing Problem Requiring a Swift Resolution", (2003) 36 U.B.C.L. Rev. 231-258 at para. 5-6. In the instant case, the Court is asked to acknowledge the availability of the broader form of constitutional exemption, in cases where the application of s.236(a) would constitute a grossly disproportionate punishment.

[33] *New Brunswick (Minister of Health and Community Services v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 2

appropriate if it infringed freedom of religion by prohibiting the construction of a place of worship in a particular community.[34] These cases illustrate that this Court has already been prepared to grant s.24 remedies that are very similar to a constitutional exemption.

38. The authority to declare a statute invalid "to the extent of" an inconsistency with the Constitution would also support granting a constitutional exemption.[35] Without expressly referring to constitutional exemptions, this Court has often held that regulatory prohibitions on hunting and fishing are inapplicable to holders of aboriginal rights under s.35 of the Constitution.[36] Since s.24 does not apply to s.35, s.52 is the only basis for this remedy in the text of the Constitution. The CCLA submits that the broad and general wording of s.52, and the need for effective and appropriate remedies for infringements of constitutional rights, support an interpretation of s.52 that would include the authority to grant such exemptions – a remedy that is conceptually not dissimilar to the remedy of "reading in".

Certainty and Predictability

39. The CCLA submits that neither reading in a limited discretion, nor granting individualized constitutional exemptions, will undermine certainty and predictability to an undue extent. It must be remembered that in crafting these remedies, the courts are addressing cases where the rights of the claimant are breached. If there is some uncertainty and unpredictability, this may be the price of a just and constitutional sentencing regime.

40. Moreover, the Court can further the goal of certainty and predictability by requiring certain criteria to be met. This is the model that has been adopted (by statute)

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[34] *Congregation des témoins de Jéhovah de St-Jérome-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, at paras. 80-83; Roach, *Constitutional Remedies in Canada, supra*, para. 14.695. Lower courts have granted constitutional exemptions in Sunday closing cases: *R. v. Edwards Books and Art* (1984), 14 D.L.R. (4th) 10 (Ont.C.A.); rev'd [1986] 2 S.C.R. 713; *R. v. Westfair Foods Ltd.*, (1987) 65 D.L.R. (4th) 56 (Sask.C.A.)

[35] Roach, *Constitutional Remedies in Canada, supra*, para. 14.570.

[36] See Roach, *Constitutional Remedies in Canada*, *supra*, at paras. 15.790 – 15.830, and cases cited therein. Roach describes the remedies in these cases as amounting to a constitutional exemption.

in the United Kingdom. Legislation there imposes an automatic life sentence for certain offences, but allows for some possibility of flexibility in the sentencing regime.[37] The *Crimes (Sentences) Act 1997*, require a sentence of life imprisonment for certain "serious offences"[38]. However, the legislation permits the courts to deviate from this mandatory minimum sentence where "the court is of the opinion that there are exceptional circumstances relating to either the offences or to the offender which justify it not doing so."[39] The court, in not imposing a life sentence, is required to "state in open court that it is of that opinion and what the exceptional circumstances are".[40]

41. This Court could adopt a similar approach in defining the circumstances in which a trial judge could exercise its discretion to depart from a mandatory minimum sentence. In effect, the mandatory minimum sentence would be presumptively valid, but a limited discretion to depart from it would arise in exceptional circumstances where the imposition of the mandatory minimum would constitute a breach of s.12 of the *Charter*, subject to a requirement that the trial judge set out the exceptional circumstances.

42. To ensure that the remedy is meaningful and accessible, this Court should ensure that it is a discrete remedy, tailored to the individual circumstances of the case. Such cases are likely to be very fact-specific, and are unlikely to raise the systemic issues that are presented by a request to strike down a statute. An applicant should be able to present a case similar to a sentence appeal, and the court would determine whether the standard of gross disproportionality is met. In this context, it should be noted that there are often severe constraints on the resources available to litigants to make Charter arguments, especially under legal aid tariffs.[41]

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[37] *Crime (Sentences) Act 1997*, (U.K.) 1997, c.43, s.2
[38] *Ibid*, s.2(2)
[39] Ibid
[40] Ibid, s.2(3)
[41] In 2000, the Ontario Legal Aid Tariff Review Task Force Report ("Kaufman/Holden Report") noted that the maximum number of allowable hours for a *Charter* motion was two, and recommended that this be increased to four: http://legalaid.on.ca/en/publications/reports/task_force_review.pdf.

The Relationship Between the Courts and Parliament

43. The CCLA submits that neither reading in a limited discretion, nor granting constitutional exemptions on a case-by-case basis, necessarily undermines the relationship between the courts and Parliament. In *Vriend v. Alberta*, this Court confirmed that the purposes of *Charter* remedies include the preservation of the proper role of the legislature and the courts.[42] However, this purpose does not preclude the application of more limited remedies than striking down a provision in its entirety. If the court has reason to believe that the legislature, faced with a choice between abandoning the provision in issue and enacting it with limited modifications to make it constitutional, would have chosen the latter, then the more limited remedy may be appropriate. Just as "reading in" may be used to cure a constitutional defect (as in *Vriend* itself), recognizing constitutional exemptions to mandatory minimum sentences on a case-by-case basis may further the remedial purposes of the Charter.

44. In the absence of more limited remedies, legislation that infringes a *Charter* right in an exceptional case must be struck down rather than preserved.[43] Constitutional exemptions can therefore act to preserve parliamentary intent. For example, a number of lower courts granted constitutional exemptions to mandatory restrictions on possessing weapons after conviction, for Aboriginals and others who were dependent upon firearms for their livelihood or to protect against wild animals.[44] These cases prompted Parliament to clarify its intent by enacting a more carefully tailored provision, now found in s.113 of the *Criminal Code*.[45] By granting constitutional exemptions, the courts were able to preserve the important legislative aims of the prohibition, while introducing necessary remedial flexibility.

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[42] *Vriend*, at paras. 148-49.
[43] *Smith*, at p. 1078-1079
[44] *R. v. Chief* (1989), 51 C.C.C. (3d) 265 (Yukon C.A.); *R. v. McGillivary* (1991), 62 C.C.C. (3d) 407 (Sask. C.A.); *R. v. Netser* (1992), 70 C.C.C. (3d) 477 (NWT.C.A.); see also *R. v. Austin* (1994), 94 C.C.C. (3d) 252 (B.C.C.A.), reversed [1996] 1 S.C.R. 72
[45] The former R.S.C. 1985, c.C-46, s.100(1) was repealed by S.C. 1995, c.39, s.139 and replaced by s.113.

PART IV – NATURE OF ORDER SOUGHT CONCERNING COSTS

45. The CCLA does not seek costs, and asks that no costs be awarded against it.

PART V – NATURE OF ORDER SOUGHT

46. The CCLA requests an order granting it leave to present oral argument. The CCLA supports the Appellant's request for a declaration that s.236(a) of the *Criminal Code* violates of s.12 of the *Charter* and is of no force or effect. The CCLA does not take any other position on the disposition of the case, but asks that this Court adopt the analysis set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: October 16, 2007

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PART VI - TABLE OF AUTHORITIES

PART VII - TABLE OF STATUTORY AUTHORITIES

Criminal Code, R.S.C. 1985, c. C-46

PART III: FIREARMS AND OTHER WEAPONS
Prohibition Orders

Lifting of prohibition order for sustenance or employment

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

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

(*b*) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,

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

Factors

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

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

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

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

Effect of order

(3) Where an order is made under subsection (1),

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

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

When order can be made

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

Meaning of "competent authority"

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

Code criminel
PARTIE III : ARMES À FEU ET AUTRES ARMES
Ordonnance d'interdiction

Levée de l'interdiction

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

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

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

Critères

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

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

b) le cas échéant, de la nature de l'infraction à l'origine de l'ordonnance d'interdiction et des circonstances dans lesquelles elle a été commise;

c) de la sécurité de toute personne.

Conséquences de l'ordonnance

(3) Une fois l'ordonnance rendue :

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

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

Quand l'ordonnance peut être rendue

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

Sens de « juridiction compétente »

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

Criminal Code, R.S.C. 1985, c. C-46

Criminal Code
PART VIII: OFFENCES AGAINST THE PERSON AND REPUTATION
Murder, Manslaughter and Infanticide

Manslaughter

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; and

Code criminel
PARTIE VIII : INFRACTIONS CONTRE LA PERSONNE ET LA RÉPUTATION
Meurtre, homicide involontaire coupable et infanticide

Punition de l'homicide involontaire coupable

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

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