The Death of Mandatory Minimum Periods of Imprisonment in Canada?

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Over the last number of years, the Government of Canada (which has exclusive constitutional jurisdiction over criminal law in Canada) enacted various pieces of legislation mandating the imposition of mandatory minimum periods of imprisonment for specific offences contained within the *Criminal Code of Canada*, R.S.C. 1985. This has included:

– the *Safe Streets and Communities Act*, S.C. 2012, c 1 (which imposed mandatory minimum penalties for certain sexual offences against children and which amended the *Controlled Drugs and Substances Act*, R.S.C. 1985, to provide for minimum penalties for certain drug offences)[1]; and
– the *Increasing Offenders' Accountability for Victims Act*, S.C. 2013, c 11 (which requires that a minimum "victim surcharge" be imposed on all offenders regardless of ability to pay).[2]

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

These legislative initiatives have been subjected to constitutional challenge. These challenges have primarily been based upon section 12 of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982* (the *Charter*). Section 12 states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

In Canada, if a court finds that a legislative enactment violates section 12 of the *Charter*, the court must issue a declaration of invalidity pursuant to section 52(1) of the *Charter*.[3] Section 52(1) indicates that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." However, a finding of such an inconsistency does not automatically lead to a declaration of invalidity. Canadian courts are also required to determine if the legislation can be "saved" by section 1 of the *Charter*. That section states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[4]

Section 12 of the *Charter* has been the subject of significant commentary by the Supreme Court of Canada. As will be seen, the Supreme Court's latest pronouncements may suggest that all legislation mandating the imposition of a minimum period of imprisonment will be unconstitutional.

Footnotes

1. In *R. v. R. (E.R.D.)*, 2016 BCSC 684, 2016 CarswellBC 1055, ¶ 31 (Can. B.C.), it was held that "although the minimum one-year mandatory sentence required by s. 271(a) [sexual assault] is not grossly disproportionate for [E.R.D.R.], it would be grossly disproportionate for reasonably foreseeable less-serious offenders whose conduct would be captured by s. 271(a). Consequently, I find that s. 271(a) violates s. 12 of the *Charter*." In *R. v. Badali*, 2016 ONSC 788, 2016 CarswellOnt 1550 (Can. Ont.), it was declared that the minimum-sentence provisions in sections 212(2) and 212(4) of the *Criminal Code* (living off of the avails of prostitution with respect to a female under 18 years of age) violated section 12 of the *Charter* and were of no force and effect.
2. In *R. v. Flaro*, 2014 ONCJ 2, 2014 CarswellOnt 192 (Can. Ont.), it was held that the amendments made to section 737 of the *Criminal Code* by the *Increasing Offenders' Accountability for Victims Act* violated sections 7 and 12 of the *Charter* and were therefore of no force or effect. It was held that the mandatory nature of the victim surcharge constituted "cruel and unusual punishment." It has been suggested that this type of legislation "purports to rank, explicitly or implicitly, the objectives of sentencing by normative priority," and, therefore, it is "no exaggeration to claim that the effect of the amendments is to amend or repeal, expressly or impliedly, the principles and objectives enumerated in Part XXIII that were stated by Parliament in 1995 and later developed in the jurisprudence" (Patrick Healy, *Sentencing from There to Here and from Then to Now*, 17 CAN. CRIM. L. REV. 291, 300 (2013)).
3. *See* R. v. Ferguson, 2008 SCC 6, [2008] 1 S.C.R. 96 (Can.).
4. In *R. v. Oakes*, [1986] 1 S.C.R. 103, ¶¶ 70-71, the Supreme Court held that the test to be applied pursuant to section 1 of the *Charter* involves three elements:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" . . . .
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, [[1985] 1 S.C.R. 295, 352]. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

Let us start with a brief review of how the Supreme Court has interpreted section 12 of the *Charter*, and then we will look at its most recent decision before attempting to determine the effect of the Supreme Court's decisions on the ability of the Canadian Government to enact mandatory periods of imprisonment for specific criminal offences.

THE EARLY DECISIONS

The Supreme Court of Canada's initial consideration of section 12 of the *Charter* occurred in *R. v. Smith*.[5] In *Smith*, the Court held that a seven-year minimum-sentencing provision that applied to the offence of importing narcotics under section 5(1) of the *Narcotic Control Act*, R.S.C. 1970, violated section 12 of the *Charter*. The Court held that the protection afforded by section 12 of the *Charter* "governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed."[6] The Court described the test to be applied when attempting to determine if a sentencing provision violated section 12 of the *Charter* in the following manner:

> The test for review under s. 12 of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.[7]

This test was subsequently affirmed and applied in *R. v. Lyons*,[8] *R. v. Luxton*,[9] *Steele v. Mountain Institution*,[10] *R. v. Goltz*,[11] *R. v. Morrisey*,[12] and *R. v. Latimer*.[13] In *Goltz*, the Court indicated that "although not in themselves decisive to a determination of gross disproportionality, other factors which may legitimately inform an assessment are 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 to some extent whether a comparison with punishments imposed for other crimes in the same jurisdiction reveals great disproportion."[14] In *Latimer*, the Court held that the mandatory period of parole ineligibility (10 years) prescribed by the *Criminal Code* for second-degree murder did not violate section 12 of the *Charter*.

In *Ferguson*, the Court held that the imposition of the four-year mandatory minimum sentence for manslaughter with a firearm did not violate section 12 of the *Charter*. The Court also held that a constitutional exemption is not an appropriate remedy for a section 12 violation. The Court concluded that if a minimum sentence is found to be unconstitutional, the law imposing the sentence is inconsistent with the *Charter* and therefore falls under section 52 of the *Constitution Act, 1982*.

R. v. NUR

Last year, the Supreme Court considered section 12 of the *Charter* in *R. v. Nur*.[15] In *Nur*, the accused were convicted of the offence of possession of a prohibited/restricted weapon with ammunition, contrary to section 95(1) of the *Criminal Code*. The minimum prescribed penalty for this offence (see section 95(2)(a)) was three years imprisonment for a first offence and five years imprisonment for a second or subsequent offence. The Court noted that it "has set a high bar for what constitutes 'cruel and unusual . . . punishment' under s. 12 of the *Charter*. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender."[16]

The Supreme Court held in *Nur* that "a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps":

> In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty.[17]

The Court explained that the "reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are 'remote' or 'far-fetched' are excluded."[18]

In *Nur*, the Court held that section 95(2)(a) violated section 12 of the *Charter* because for certain offenders "a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the *Criminal Code*":

> At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as

5. [1987] 1 S.C.R. 1045 (Can.).
6. *Id.* ¶ 53.
7. *Id.* ¶ 54.
8. [1987] 2 S.C.R. 309 (Can.)
9. [1990] 2 S.C.R. 711 (Can.)
10. [1990] 2 S.C.R. 1385 (Can.)
11. [1991] 3 S.C.R. 485 (Can.)
12. 2000 SCC 39, [2000] 2 S.C.R. 90 (Can.)
13. 2001 SCC 1, [2001] 1 S.C.R. 3 (Can.)
14. *Goltz*, [1991] 3 S.C.R. 485, ¶ 27.
15. 2015 SCC 15, [2015] 1 S.C.R. 773 (Can.).
16. *Id.* ¶ 39.
17. *Id.* ¶ 77.
18. *Id.* ¶ 68.

to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the *Criminal Code*.[19]

THE SUPREME COURT OF CANADA'S MOST RECENT SECTION 12 DECISION

Earlier this year, the Supreme Court once again considered section 12 of the *Charter*.

In *R. v. Lloyd*,[20] the accused was convicted in the Provincial Court of the offence of possession of a controlled substance for the purpose of trafficking. Because of a prior conviction for a similar offence, he was subject to a mandatory minimum sentence of one year of imprisonment pursuant to section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*. The sentencing judge declared this provision to be contrary to section 12 of the *Charter* and not justified under section 1.

THE MANDATORY MINIMUM SENTENCE RULED TO BE UNCONSTITUTIONAL

On appeal, the Supreme Court indicated:

> [T]he reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.[21]

The Supreme Court also suggested that another "solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries."[22] The Supreme Court of Canada concluded the challenged mandatory minimum sentence of one year of imprisonment violated section 12 of the *Charter* on the basis that it "'casts its net over a wide range of potential conduct' . . . . As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. This renders it constitutionally vulnerable."[23]

This is very strong and broad language. The suggestion by the Court to as to how Parliament might wish to draft its future legislation may not bode well for future mandatory minimums being upheld.[24]

SECTION 1

The Supreme Court concluded that the provision was not saved by section 1 of the *Charter*:

> Parliament's objective—to combat the distribution of illicit drugs—is unquestionably an important objective: *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 141. This objective is rationally connected to the imposition of a one-year mandatory minimum sentence for the offence of possession for the purpose of trafficking of Schedule I drugs. However, the law does not minimally impair the s. 12 right. As discussed above, the law covers a wide array of situations of varying moral blameworthiness, without differentiation or exemption, save for the single exception in s. 10(5) of the *CDSA*. The Crown has not established that less harmful means to achieve Parliament's objective of combatting the distribution of illicit drugs, whether by narrowing the reach of the law or by providing for judicial discretion in exceptional cases, were not available. Nor has it shown that the impact of the limit on offenders deprived of their rights is proportionate to the good flowing from their inclusion in the law.[25]

CONSIDERATION OF NUR AND LLOYD

Lloyd was applied in *R. v. Elliott,*[26] in which it was held that section 7(2)(b)(i) of the *Controlled Drugs and Substances Act* (which requires the imposition of a minimum sentence of six months imprisonment for the offence of production of marihuana) violated section 12 of the *Charter.*

Nur was recently considered by the British Columbia Court of Appeal in *R. v. Dickey*.[27]

In *Dickey*, the accused were charged with the offences of traf-

19. *Id.* ¶ 82. In *Ewing v. California*, 538 U.S. 11 (2003), the defendant was convicted of the offence of grand theft and sentenced to a term of 25 years to life under the state of California's three-strikes law. The California Court of Appeal, Second Appellate District, affirmed the sentence, and the California Supreme Court denied review. Certiorari was granted by the Supreme Court of the United States. The Supreme Court held that the sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. At page 1190, the Court stated:

> Ewing's is not "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S., at 1005, 111 S. Ct. 2680 (KENNEDY, J., concurring in part and concurring in judgment).
>
> We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments. The judgment of the California Court of Appeal is affirmed.

20. 2016 SCC 13 (Can.)
21. *Id.* ¶ 35.
22. *Id.* ¶ 36. *See* Levi Vandersteen, *Building a Safety Valve for Mandatory Minimums: How to Construct a Statutory Exemption Scheme*, 27 CRIM. REP. (7th) 249 (2016).
23. *Id.* ¶ 27.
24. In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court of the United States held that the Eighth Amendment prohibited the imposition of a life-without-parole sentence on a juvenile offender who did not commit homicide.
25. *Lloyd*, 2016 SCC 13, ¶ 49.
26. 2016 BCSC 1135, 2016 CarswellBC 1672 (Can. B.C.).
27. 2016 BCCA 177, 2016 CarswellBC 1107 (Can. B.C.).

ficking and possession for the purpose of trafficking, contrary to section 5(3) of the *Controlled Drugs and Substances Act*. The offences were committed in a public place usually frequented by persons under the age of 18 years or by using the services of a person under the age of 18 years or with the involvement of such a person. Sections 5(3)(a)(ii)(A) and (C) of *Controlled Drugs and Substances Act* provide for a minimum two-year prison sentence when an offence is committed in or near a school, on or near school grounds, or in or near any other public place usually frequented by persons under the age of 18 years; or using the services of, or involving, such a person.

The British Columbia Court of Appeal concluded that "in some circumstances, s. 5(3)(a)(ii)(A) and (C) would constitute cruel and unusual punishment and accordingly infringe s. 12 of the *Charter* because a minimum two-year prison sentence would be grossly disproportionate to an appropriate sentencing disposition. They would do so in a way that cannot be demonstrably justified in a free and democratic society such that they are of no force or effect."[28]

The Court of Appeal concluded that in *Dickey*, a sentence of six months imprisonment was appropriate. They concluded that the imposition of the minimum two-year sentence would infringe section 12 of the *Charter*:

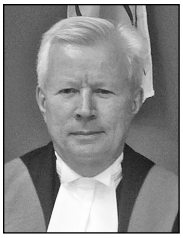
> The imposition of a two-year prison sentence in a federal penitentiary would not only be a disproportionate punishment, but one that would be grossly so if imposed on Dickey (and more so on a younger hypothetical offender) when compared to an appropriate sentence. In determining whether a minimum sentence is grossly disproportionate, the comparison of the appropriate sentence and the statutory minimum sentence to be imposed would seem to always be the first consideration, as it was in *Nur*. There are contextual factors to consider that may have a bearing on the determination in any given instance, but there would appear to be none that would render a minimum two-year prison sentence for Dickey other than grossly disproportionate. As the judge concluded, it does infringe s. 12 of the *Charter*.[29]

The Court of Appeal concluded that "while the section has a pressing and substantial objective, being the protection of young people from the drug trade, it cannot be said that it is proportional to that objective because, while there may be a rational connection to what are the penological objectives of denunciation and deterrence, the section does not constitute a minimal impairment of the right infringed and the deleterious and salutary effects of it are not proportional."[30] However, in *R. v. Oud*,[31] the British Columbia Court of Appeal in applying *Lloyd* held that the four-year mandatory minimum period of imprisonment for the offence of intentionally discharging a firearm into a place knowing or being reckless as to whether another person is present, contrary to section 244.2(1) of the *Criminal Code*, did not infringe section 12 of the *Charter*.

CONCLUSION

The broad language utilized by the Supreme Court in *Lloyd* and the Court's use of hypotheticals that are not related to the actual offender and that are not likely to arise in the general day-to-day application of the law suggests that mandatory minimum periods of imprisonment will always be vulnerable to constitutional challenge.[32] For instance, in a minority judgment authored by three of the justices in *Lloyd*, it was suggested that some of the hypotheticals utilized by the majority "were 'far-fetched' or 'marginally imaginable', and thus inappropriate for the s. 12 analysis."[33] The minority also suggested that the majority's opinion constituted "a departure from the Court's jurisprudence, which has consistently maintained that mandatory minimums are not per se unconstitutional."[34]

Indeed, as we have seen, *Nur* and *Lloyd* appear to have taken an approach that suggests mandatory minimum periods of imprisonment will be consistently declared to be unconstitutional in Canada.



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28. *Id.* ¶ 11.
29. *Id.* ¶ 68. In *Harmelin v. Michigan*, 501 U. S. 957 (1991), the offender was convicted of possessing more than 650 grams of cocaine and was sentenced to a mandatory term of life in prison without possibility of parole. The Supreme Court held that imposition of the mandatory sentence of life in prison without possibility of parole did not constitute cruel and unusual punishment.
30. *Id.* ¶ 73.
31. 2016 BCCA 332, 2016 CarswellBC 2090 (Can. B.C.).
32. In *Badali*, 2016 ONSC 788, ¶ 66, for instance, in declaring that the minimum-sentence provisions in sections 212(2) and 212(4) of the *Criminal Code* (living off of the avails of prostitution with respect to a female under 18 years of age) violated section 12 of the *Charter* and were of no force and effect, the application judge referred to the following unlikely hypothetical in support of the ruling:

    > Another example that comes to mind is a young couple who have encountered hard times and conclude that their only salvation is if the female partner engages in sexual experiences for money and her male partner acts to draw in customers. And the female partner is under 18 years of age. She is the one to suggest this economic salvation. The male is arrested and charged with living on the avails of prostitution. In such a situation, the public might very well conclude that the framers of the law never intended the legislation to apply to the male partner.

33. *Lloyd*, 2016 SCC 13, ¶ 91.
34. *Id.* ¶ 106. *See* Don Stuart, *Pragmatism and Inconsistency from the Supreme Court on Mandatory Minimums*, 27 Crim. Rep. (7th) 245 (2016).