COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Nur, 2013 ONCA 677
DATED: 20131112
DOCKET: C54701

Doherty, Goudge, Cronk, Blair and Tulloch JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Hussein Jama Nur

Appellant

Dirk Derstine and Janani Shanmuganathan, for the appellant

Riun Shandler and Andreea Baiasu, for the respondent

Moiz Rahman and Nancy Dennison, for the intervener, the Attorney General of Canada

Paul F. Monahan and Kimberly Potter, for the intervener, the Canadian Civil Liberties Association

Bruce F. Simpson, for the intervener, the John Howard Society of Canada

Virginia Nelder and Faisal Mirza, for the intervener, the African Canadian Legal Clinic

Scott Hutchison and Danielle Robitaille, for the intervener, the Advocates' Society

Heard: February 19-22, 2013

On appeal from the sentence imposed by Justice Michael A. Code of the Superior Court of Justice in Toronto on August 30, 2011, with reasons reported at 2011 ONSC 4874, 275 C.C.C. (3d) 330.

Doherty J.A.:

I

OVERVIEW

[1] The court heard this appeal and five others together. The appeals raised constitutional challenges to various provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 imposing or related to the imposition of mandatory minimum terms of imprisonment for various firearm-related offences. In addition to the common constitutional questions, there are also issues specific to each appeal.

[2] In these reasons, I will address three issues:

- Does the three-year minimum sentence upon conviction for the offence under s. 95 of the *Criminal Code* (possession of a loaded restricted or prohibited weapon) violate s. 12 of the *Canadian Charter of Rights and Freedoms* and, if so, can the infringement be justified by s. 1?

- Does the three-year minimum sentence violate s. 15 of the *Charter* and, if so, can the infringement be justified by s. 1?

- Is s. 95 rendered arbitrary and, therefore, contrary to s. 7 of the *Charter* by virtue of the two-year gap that exists between the maximum sentence available when the Crown proceeds summarily (one year) and the mandatory minimum sentence when the Crown proceeds by indictment (three years) and, if so, can the infringement be justified by s. 1?

[3] The trial judge found no violation of either ss. 12 or 15 of the *Charter*. He did find that the scheme in s. 95, creating a two-year gap between the minimum penalty if the Crown proceeded by indictment and the maximum penalty if the Crown proceeded summarily, infringed s. 7 of the *Charter*. The trial judge held, however, that the appellant had no standing to advance the s. 7 claim as, on the facts, there was no reasonable possibility that the Crown would have elected to proceed summarily against him.

[4] I would hold that the three-year minimum sentence does infringe s. 12 of the *Charter* and cannot be saved by s. 1. I would declare the minimum three-year sentence required by s. 95(2)(a) of no force or effect.

[5] Although unnecessary to do so, I will address ss. 15 and 7 in deference to the trial judge's thoughtful reasons and counsel's helpful submissions. I agree with the trial judge's s. 15 analysis. I do not, however, agree with his s. 7 analysis. In my view, the two-year gap between the maximum penalty available when the Crown proceeds summarily and the minimum penalty available when the Crown proceeds by indictment does not make s. 95 arbitrary as that word is used in the s. 7 jurisprudence.

[6] Lastly, as to the fitness of the actual sentence imposed, the trial judge sentenced the appellant to one day in custody and gave him 40 months credit for 20 months pre-sentence custody. The Crown does not suggest that the appellant should be re-incarcerated. I see no practical value in going through the exercise of determining what would be an appropriate sentence for the appellant in the absence of the mandatory minimum and had he not served the equivalent of a 40-month sentence. I observe only that, even absent the mandatory minimum, and having regard to the appellant's age and his first offender status, a significant jail term was still necessary in the circumstances of this case.

II

TRIAL PROCEEDINGS

A. OVERVIEW

[7] The appellant was charged with one count of possession of a loaded prohibited firearm contrary to s. 95(1) of the *Criminal Code*. The Crown proceeded by indictment, and the appellant elected to be tried by judge alone. The appellant eventually pleaded guilty to the charge. The appellant did not, however, admit any of the facts relevant to the allegation beyond those essential to maintaining the plea, but put the Crown to the strict proof of any facts that the Crown relied on as aggravating features on sentence. The appellant also challenged the constitutionality of the minimum three-year penalty imposed by s. 95(2)(a)(i).

[8] A lengthy sentencing hearing ensued in which the parties produced substantial evidence relevant to the constitutionality of the challenged provision, and the Crown led evidence relevant to the circumstances of the offence. The appellant did not testify at the proceedings but did make an unsworn statement from the prisoner's dock pursuant to s. 726 of the *Criminal Code*. In that statement, the appellant indicated that somebody told him to hold the gun and run if the police came. He was not prepared to give evidence under oath because he had concerns for his own and his family's safety if he had been

obliged to identify any of the persons involved. The trial judge ultimately assigned no weight to the appellant's explanation for his possession of the gun.

[9] In his detailed and careful reasons, the trial judge held that the three-year minimum did not offend ss. 12 or 15 of the *Charter*. He also made findings of fact in respect of the circumstances surrounding the commission of the offence.

[10] The trial judge concluded that a sentence of 40 months was appropriate for the offence and the offender, having regard to the mandatory three-year minimum. The appellant had been denied bail and had been in custody for 26 months. The trial judge ultimately determined that the appellant should be given credit on this charge for 20 months of his pre-trial custody. The Crown and the defence agreed that the appellant should get two for one credit for those 20 months.[1] Applying that multiplier, the appellant had served the equivalent of 40 months, the same length as the sentence that the trial judge considered appropriate in the circumstances. The trial judge, therefore, imposed a sentence of one day in custody to be followed by two years' probation.

B. FACTS RELEVANT TO THE OFFENCE

[11] The events underlying the charge began at a community centre located in the Jane and Finch neighbourhood of Toronto. That area is described as a "priority" neighbourhood because of its very high levels of poverty, population

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[1] Section 719(3.1), which limits credit for pre-sentence custody to a maximum of one and one-half to one, did not apply to the appellant's sentencing.

density, and crime. Gun violence is a serious and ongoing problem in that community.

[12] Early one winter evening, a young man entered the community centre and spoke to a staff member. He advised the staff member that he was afraid of someone who was waiting outside the community centre to “get him”. The staff member saw a person lurking outside who looked very threatening. The staff member decided to put the community centre on lockdown and called the police.

[13] When the police arrived at the community centre, they saw four men standing at one of the entrances. The appellant was one of the four men. As one of the officers approached the group, all four men ran in different directions.

[14] The police officer chased the appellant. The appellant was holding his left hand against his body as he ran. He appeared to be concealing something. The officer was rapidly closing ground on the appellant when he saw the appellant throw something away. The officer continued his pursuit, catching and arresting the appellant moments later.

[15] After arresting the appellant, the officer returned to the area where he had seen the appellant throw something to the ground. The officer found a loaded handgun under a parked car. The gun was a fully operable 22-calibre semi-automatic, equipped with an oversized ammunition clip. There were 23 bullets in

the clip and one in the chamber. The gun could fire all 24 rounds in 3.5 seconds. The gun is a prohibited firearm as defined in the *Criminal Code*.

[16] The trial judge was not satisfied beyond a reasonable doubt that the appellant had anything to do with the events that led to the police being called to the community centre. He also could make no specific finding as to when, how, or why the appellant came into possession of the loaded handgun. The trial judge found, at para. 27:

> At some point, Nur [the appellant] came into possession of the prohibited firearm and he hid it under his coat. There is no clear evidence as to how long he had been in possession of the gun or how he came to possess it.

C. FACTS RELATING TO THE OFFENDER

[17] The appellant was 19 years old at the time of his arrest and 21 at the time of sentencing. He was born in Somalia. His family fled the armed conflict in that country, going first to the United States. When the appellant was five years old, his family crossed into Canada and claimed refugee status. Since then, the family has lived in Canada. The appellant has permanent resident status.

[18] The appellant is the sixth of nine siblings. All the children live with their parents in a home located in the same part of the city as the community centre. The appellant's father is the dominant person in the household. He is a firm but loving parent.

[19] The appellant's family is, by all accounts, a strong, close, and loving one. All the children go to school, work, or do both. None, other than the appellant, has had any trouble with the law. The family was shocked by the charges brought against the appellant. The appellant's older brother testified that, in the future, the entire family would be watching the appellant closely to ensure that he does not get into trouble again.

[20] At the time of his arrest, the appellant was attending high school. He was doing well academically and hoped to attend York University in the future.

[21] The appellant had worked various part-time jobs and also performed volunteer work in the community. Teachers and previous employers spoke highly of his performance and his potential. One employer referred to him as "Mr. Reliable".

[22] The trial judge summarized the evidence concerning the appellant in these terms, at para. 35:

> It can be seen that Nur is a young man with considerable potential. He also has the good fortune to come from a strong pro-social family who remain very supportive. Finally, he is a first offender with no apparent criminal antecedents.

[23] As a permanent resident, the appellant is subject to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which provides for deportation on grounds of "serious criminality". Should immigration officials decide to deport the

appellant to Somalia, a country he has not been in since he was a very young child, that decision could only be appealed to the Appeal Division of the Immigration and Refugee Board if the appellant received an effective sentence of less than two years. On the evidence before the trial judge, the possibility that the appellant would actually be deported to Somalia could not be quantified.

III

THE SECTION 12 CHALLENGE

A. INTRODUCTION

[24] Section 12 of the *Charter* reads:

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

[25] Clearly, the imposition of a jail sentence upon conviction is a “punishment” that engages s. 12. Section 12 will be infringed if the punishment is “grossly disproportionate”. I will examine the concept of gross disproportionality as developed in the s. 12 case law in detail below.

[26] Before turning to the s. 12 jurisprudence, I will place s. 95 in its legislative context and outline the purpose of the section. I do so because punishment cannot be grossly disproportionate in its own right. Proportionality describes a relationship between two things. In the present case, it is the relationship between the length of the mandatory minimum penalty demanded by the

statutory provision on the one hand, and the purpose of the statute, the nature of the prohibited conduct, and the circumstances of the offender on the other hand. The prohibited conduct is described by the terms of the *Criminal Code* provision creating the offence.

B. SECTION 95

[27] Section 95(1) provides:

> Subject to subsection (3),[2] every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of
>
> *(a)* an authorization or a licence under which the person may possess the firearm in that place; and
>
> *(b)* the registration certificate for the firearm.

[28] The offence created by s. 95 is a Crown election or hybrid offence. If the Crown proceeds by indictment, the offence is punishable by a maximum of 10 years and a minimum of three years imprisonment. The minimum increases to five years for a second or subsequent offence. If the Crown proceeds summarily, there is no minimum and the maximum is one year: s. 95(2).[3]

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[2] Subsection 95(3) exempts from criminal liability persons who are using the firearm under the "direct and immediate supervision" of a person who is lawfully entitled to possess the firearm and use it in the manner in which it is being used.

[3] Section 95 is one of four offences presently found in the *Criminal Code* with respect to which the Crown has an election and for which there is a mandatory minimum if the Crown proceeds by indictment, but no mandatory minimum if the Crown proceeds summarily: see s. 96 (possession of weapon obtained by

(i) Statutory Context

[29] Canada has a long history of gun control legislation: see *R. v. Schwartz*, [1988] 2 S.C.R. 443, at p. 483. Currently, Parliament, using its criminal law power to further public safety and deter crime, has established a scheme that combines a strict licensing and registration component found principally in the *Firearms Act*, S.C. 1995, c. 39 with a number of supporting restrictions, investigative powers, and criminal prohibitions found in Part III of the *Criminal Code*, "Firearms and Other Weapons": see *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 ("*Firearms Reference*").

[30] Under the scheme, firearms, a defined term in s. 2 of the *Criminal Code*, fall into three categories: prohibited firearms, restricted firearms, and all other firearms: see *Firearms Reference*, at para. 6. The terms "prohibited firearm" and "restricted firearm" are defined in s. 84 of the *Criminal Code*. Other guns that meet the definition of a firearm, but do not fall within the definition of a prohibited or restricted firearm, are classified as "firearms". Long rifles and shotguns are two examples of guns that are firearms but that are not prohibited or restricted firearms.[4]

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commission of offence), s. 102 (making an automatic handgun) and s. 333.1 (theft of a motor vehicle). None of those offences have a "gap" between the mandatory minimum if the Crown proceeds by indictment and the maximum penalty if the Crown proceeds summarily.

[4] Some firearms, such as antique firearms, are excluded from the definition of firearms for the purposes of certain sections of the *Criminal Code* including s. 95: see s. 84(3).

[31] The definitions of a prohibited firearm and a restricted firearm are somewhat complex. For present purposes, a prohibited firearm includes short-barrelled handguns,[5] sawed-off rifles and shotguns, and automatic firearms. A restricted firearm is defined to include any handgun that is not a prohibited firearm, some semi-automatic firearms, and some firearms that are less than the specified length.

[32] Firearms that fall within the definition of either a prohibited or restricted firearm are commonly connected to criminal activity and seldom associated with any legitimate employment or activity. Firearms that do not fall within either definition, *e.g.* long rifles and shotguns, are associated with legitimate activities such as hunting and farming.

[33] The *Firearms Act* requires that anyone wishing to possess any firearm must obtain a licence. Licences authorizing the possession of prohibited and restricted firearms, including handguns, are available under the *Firearms Act* but only in very limited circumstances: see *Firearms Act*, ss. 7(2) and 12.

[34] In addition to requiring a licence to possess any firearm, the *Firearms Act* requires a person seeking a licence to also obtain a registration certificate for that firearm: *Firearms Act*, s. 12.1. A prohibited or restricted firearm must be registered by a person who holds a licence authorizing that person to possess

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[5] "Handgun" is also defined in s. 84 of the *Criminal Code*.

that weapon. With one small exception, a registration certificate may be issued to only one person: *Firearms Act*, ss. 12.1-16.

[35] Even if a person obtains the necessary licence and registration certificate, the *Firearms Act* places significant restrictions on where that person can possess the firearm, especially if the firearm is a prohibited or restricted firearm. Section 17 provides that such firearms may be possessed only at the individual's dwelling as identified in the Canadian Firearms Registry, or at some other place authorized by the Chief Firearms Officer.

[36] There are also provisions in the *Firearms Act* requiring that licensed persons obtain authorization to transport firearms from one designated place to another, and provisions imposing restrictions on the transfer and lending of firearms. Once again, prohibited and restricted firearms are singled out for especially strict restrictions: see *Firearms Act*, ss. 22-28. A good example of the very specific and restrictive nature of authorizations to possess and transport restricted or prohibited firearms is found in the facts of *R. v. MacDonald*, 2012 NSCA 50, 283 C.C.C. (3d) 308, at para. 7 (S.C.C. appeal heard May 23, 2013).

[37] A person who has a licence to possess a handgun, by definition either a restricted or prohibited firearm, and who has registered that handgun may obtain authorization to carry that handgun. A "carry" permit, however, is available only in respect of a handgun that was subject to a licence or permit prior to December

1998: *Firearms Act*, s. 20. In addition to that requirement, the person seeking a "carry" permit must show that he or she needs the gun to protect his or her life or the lives of others, or that he or she needs the gun in connection with a lawful profession or occupation. Apart from recognized exceptions, most notably the police, very few people in Canada are authorized to carry a handgun.

[38] The licensing and registration requirements in the *Firearms Act* are supported by a series of *Criminal Code* provisions criminalizing the possession of firearms where that possession contravenes the terms and conditions of the scheme established under the *Firearms Act*. I will briefly review those provisions.

[39] Section 90 prohibits the carrying of a concealed weapon.[6] The prohibition does not apply if the person is authorized to carry the weapon under the *Firearms Act*. The offence created by s. 90 is a hybrid offence punishable by a maximum of five years if the Crown proceeds by indictment. There is no minimum.

[40] Sections 91 and 92 are similar; however, s. 92 contains an added *mens rea* component which requires that the accused know that he or she is not the holder of the required licence and registration certificate: *R. v. Meer*, 2011 ABQB 8; and *R. v. Egonu*, 2007 CarswellOnt 1985 (Ont. S.C). Both sections prohibit the possession of any firearm by a person who does not have the required

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[6] The definition of "weapon" in s. 2 of the *Criminal Code* includes any object that falls within the meaning of the word "firearm": see *R. v. Felawka*, [1993] 4 S.C.R. 199; and *R. v. Dunn*, 2013 ONCA 539.

licence and, if the firearm is a prohibited or restricted firearm, the required registration certificate. Section 91 is a hybrid offence punishable by a maximum of five years if the Crown proceeds by indictment. There is no minimum. Section 92 is an indictable offence punishable by a maximum of 10 years. It carries no minimum penalty for a first offence, but does carry a minimum penalty of one year for a second offence and two years less a day for a third or subsequent offence.

[41] Section 93 prohibits the possession of a firearm by a person who is a holder of a licence and, in the case of a prohibited or restricted firearm, a registration certificate, at a place other than the place identified in the licence or authorization. Section 93 is a hybrid offence which carries a maximum penalty of five years if the Crown proceeds by indictment. There is no minimum penalty.

[42] Section 94 criminalizes being in a motor vehicle in which the person knows there is a firearm, unless an occupant of the motor vehicle is the holder of a licence (and, in the case of a prohibited or restricted firearm, a registration certificate), or unless the person charged has reasonable grounds to believe that an occupant of the vehicle is a holder of the licence and registration certificate. The offence created by s. 94 is a hybrid offence and carries a maximum penalty of 10 years if the Crown proceeds by indictment. There is no minimum penalty.

[43] Section 95, the section in issue, came into force in December 1998: S.C. 1995, c. 39, s. 139. It prohibits the possession of a loaded prohibited or restricted firearm, or the possession of an unloaded prohibited or restricted firearm "together with readily accessible ammunition that is capable of being discharged in the firearm". The offence applies to anyone in possession of a prohibited or restricted firearm who does not have an authorization or a licence to possess the firearm at the specific place in issue and a registration certificate for the firearm.

[44] Section 95 is a hybrid offence punishable by a maximum of 10 years if the Crown proceeds by indictment. Initially, the offence carried a one-year minimum sentence if the Crown proceeded by indictment and a one-year maximum penalty if the Crown proceeded summarily. In May 2008, the minimum sentence was increased to three years for a first offence and five years for a subsequent offence if the Crown proceeded by indictment: S.C. 2008, c. 6, s. 8. The one-year maximum if the Crown proceeded summarily was not changed.

[45] Section 95 carries a more serious penalty than do any other possession *simpliciter* offences. The penalty reflects two aggravating factors found in the provision. Section 95 applies to prohibited and restricted firearms, and not to other firearms, and it applies only if the firearm is loaded or if ammunition for the firearm is readily available.

(ii) The Elements of the Section 95 Offence

[46] Criminal offences are typically analyzed in terms of their conduct component (the *actus reus*) and their fault component (the *mens rea*): *R. v. H. (A.D.)*, 2013 SCC 28, 295 C.C.C. (3d) 376, at para. 1. The *actus reus* of the s. 95 offence can be described as follows:

- possession of a firearm that falls within the definition of either a prohibited or restricted firearm;
- the firearm must be loaded or, if unloaded, useable ammunition must be readily accessible. "Readily accessible" ammunition has been interpreted as meaning ammunition that can be accessed quickly and without difficulty: see *R. v. Khan* (2007), 217 C.C.C. (3d) 209, at para. 17 (Ont. S.C.); and
- the accused must not be the holder of either a licence or authorization permitting possession at the place where the offence allegedly occurred, or a registration certificate for the firearm.

[47] The Crown must prove each element of the *actus reus* beyond a reasonable doubt, including the requirement that the accused did not have the required licence or authorization, and registration certificate: see *R. v. Cairns*, 2007 BCCA 572, 227 C.C.C. (3d) 149.

[48] The *mens rea* of a s. 95 offence, as with most possession-based offences, consists of knowledge or wilful blindness of the existence of the elements of the *actus reus*: see *R. v. Briscoe*, 2010 SCC 13, 253 C.C.C. (3d) 140, at para. 21. The Crown must prove the following:

- the accused knew or was wilfully blind that he or she was in possession of the firearm in issue: see *R. v. Williams*, 2009 ONCA 342, 244 C.C.C. (3d) 138, at paras. 10 and 18; *R. v. Chalk*, 2007 ONCA 815, 227 C.C.C. (3d) 141, at para. 18; and *R. v. Snobelen*, [2008] O.J. No. 6021, at paras. 34-35 (C.J.);

- the accused knew or was wilfully blind that the firearm was loaded or, if unloaded, knew or was wilfully blind that useable ammunition was readily accessible; and

- the accused knew or was wilfully blind that he or she did not have both the required licence or authorization to possess the firearm at the place alleged and the required registration certificate: *MacDonald*, at para. 84.[7]

[49] Section 95 casts a “wide net”: *MacDonald*, at para. 47. Unlike some firearm offences that carry a substantial minimum penalty (*e.g.* manslaughter, at s. 236(a), and criminal negligence causing death, at s. 220(a)), s. 95 does not require proof of any harm, or even any risk of harm, to any other person as a result of the possession of the firearm. Nor, unlike other sections carrying a mandatory minimum (*e.g.* discharging a firearm at a person with intent to wound, at s. 244(2)), does s. 95 require proof of an intention to cause any harm, recklessness as to the potential for harm flowing from the possession, or even criminally negligent behaviour relating to the firearm. It is irrelevant to a charge under s. 95 that the accused took all necessary precautions to ensure the safety of others.

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[7] The provincial Crown in *MacDonald*, joined by the Attorney General for Canada, has argued in its factum in the Supreme Court of Canada, that knowledge that the possession is unauthorized is not an element of the *mens rea* of the offence created by s. 95 (Factum of the Appellant, at para. 5). I do not understand the Attorney General to take that position here. Counsel for the appellant in this case, in making his s. 12 argument, appears to agree with the position taken by the Crown in *MacDonald*. I agree with the analysis of MacDonald C.J.N.S., speaking for a unanimous court, on this issue: *MacDonald*, at paras. 77-96.

[50] Section 95 differs from other firearm possession offences that carry a minimum penalty in another respect. Unlike, for example, the offences created by ss. 85, 96, 100, and 279, there is no requirement in s. 95 that the Crown prove that the possession of the firearm was connected to some other unlawful activity or intended unlawful activity. Possession is criminal under s. 95 even if it is entirely untainted by any other unlawful activity.

[51] The scope of s. 95 is best understood by considering the range of potential offenders caught by that section. At one end of the spectrum stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. By any reasonable measure, this person is engaged in truly criminal conduct and poses a real and immediate danger to the public. At the other end of the spectrum stands the otherwise law-abiding responsible gun owner who has possession of an unloaded restricted or prohibited firearm, but with readily accessible ammunition stored nearby. That person has a licence and registration certificate for the firearm, but knowingly possesses the firearm at a place that falls outside of the terms of that licence. That person's conduct may well pose little, if any, risk to others. I would characterize that misconduct as more in the nature of a regulatory offence.

[52] There is no doubt that the vast majority of persons charged under s. 95 fall at the true crime end of the spectrum. Most guns that are the subject matter of a s. 95 charge exist entirely outside of the regulatory scheme established under the

Firearms Act. Most people charged under s. 95 would never think of applying for a licence and, were they to apply, would never obtain a licence or a registration certificate. Furthermore, the vast majority of s. 95 charges arise in situations where the possession of the firearm is directly connected to criminal activity and/or poses some other immediate danger to other persons.

[53] The reality that the vast majority of s. 95 offenders will be engaged in conduct that would be classified as dangerous and criminal under any definition does not alter the reach of the section as drawn by Parliament. Section 95 applies not only to offenders like the appellant, whose conduct poses an immediate and serious risk to the public, but also to persons whose conduct cannot be said to pose any real risk to the public. The potential application of the mandatory minimum to persons at what I have called the regulatory end of the s. 95 spectrum figures prominently in the s. 12 analysis.

(iii) The Purpose of Section 95

[54] The purpose of s. 95 is obvious and non-controversial. All firearms pose a danger, both to users and to others. The possession and use of firearms have been tightly regulated in Canada for many years. Experience teaches that certain kinds of firearms, *e.g.* handguns, sawed-off rifles, and automatic firearms, are the weapons of choice of the criminal element. Those kinds of firearms pose an added danger to the public. They become even more dangerous when

loaded or when useable ammunition is readily available to the person in possession of the firearm.

[55] Section 95 seeks to protect the public by criminalizing the possession of potentially dangerous firearms in circumstances that increase the danger posed to the public by the possession of those firearms. By criminalizing possession *simpliciter*, the criminal law can intercede before someone is actually harmed and before criminal activity, so often associated with the possession of these kinds of firearms, actually occurs or is attempted.

[56] Section 95 is, without question, a valid expression of the federal criminal law power: *Firearms Reference*, at para. 33. Nor, in my view, can it be successfully argued that the criminal prohibition created by s. 95, coupled with a mandatory minimum penalty, is not a rational legislative response to the very real public safety concerns associated with the possession of the kinds of firearms described in s. 95, either when loaded or readily capable of being loaded. In 1994-1995 and again in 2005-2006, Parliament had before it a wealth of information indicating that gun violence and related criminal activity were taking a massive human and economic toll, especially in communities in Canada's large cities where social and economic conditions provided fertile ground for gang-related activities. Young males in those communities were particularly likely to be caught up in gun violence, both as users and as victims. The evidence before

Parliament in 2005-2006 indicated that earlier attempts to stem the increase in gun violence and related criminal activity had not been successful.

[57] Parliament reacted to these very real public safety concerns with a package of legislation, one part of which provided for a lengthy mandatory minimum jail sentence for those convicted under s. 95, if the Crown chose to proceed by indictment. The certainty that a significant jail term would follow upon conviction for a s. 95 offence reflected Parliament's determination that the community could best be protected by severe sentences that would denounce gun-related activity, deter those who might resort to such activity, and incapacitate for significant periods those who chose to engage in such activity.

[58] A constitutionally valid legislative purpose and a means that is rationally connected to that purpose does not guarantee that the means chosen to achieve the purpose is constitutional: see *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1071. The constitutionality of the means chosen here – the three-year minimum jail term – falls to be determined under s. 12 of the *Charter*.

C. THE GROSS DISPROPORTIONALITY ANALYSIS

(i) Section 12 is a Principle of Fundamental Justice

[59] For convenience, I repeat the terms of s. 12:

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

[60] Section 12 provides constitutional protection against state-inflicted punishment that is cruel and unusual. Section 12 claims can be based on the nature of the punishment, the conditions in which the punishment is served, the duration of the punishment, or some combination of those factors: see Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (2007-Rel. 1), 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2007), at pp. 53-3 to 53-4. This appeal raises the most common kind of s. 12 claim. The appellant argues that the mandatory minimum penalty of three years is cruel and unusual primarily because of its length.

[61] A statutory provision which imposes a mandatory minimum jail term engages s. 7 of the *Charter*. A person who is subject to that penalty suffers a deprivation of his or her liberty. That deprivation is constitutional only if it is consistent with the principles of fundamental justice.

[62] Section 12, like the other legal rights protected in ss. 8 to 14 of the *Charter*, is illustrative of a principle of fundamental justice. Punishment that is cruel and unusual is an interference with liberty that is contrary to the principles of fundamental justice: *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486, at pp. 501-02.

[63] A claim that a statutorily-imposed sentence is so harsh as to constitute an infringement on liberty that is inconsistent with the principles of fundamental

justice falls to be determined exclusively under the s. 12 prohibition against cruel and unusual punishment. Attempts to introduce some less stringent standard against which to measure the constitutionality of mandatory minimum sentences under the rubric of the principles of fundamental justice have been rejected: *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 160.[8]

(ii) What is "Cruel and Unusual" Punishment?

[64] The words "cruel and unusual" have a long constitutional pedigree and are used together as "a compendious expression of a norm" to describe a punishment that is so beyond what would be proper or proportionate punishment as to be grossly disproportionate: *R. v. Miller*, [1977] 2 S.C.R. 680, at pp. 689-90, per Laskin C.J., concurring; and *Smith*, at p. 1072.

[65] A sentence may be excessive, even sufficiently excessive to warrant appellate intervention, despite the high deference owed to sentences imposed at trial, and still not reach the level of gross disproportionality: see *Smith*, at p. 1072; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26; *R. v. McDonald* (1998), 40 O.R. (3d) 641 (C.A.), at p. 665; and *R. v. K.(R.)* (2005), 198 C.C.C. (3d) 232 (Ont. C.A.), at para. 66.

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[8] See Allan Manson, "Arbitrary Disproportionality: A New *Charter* Standard for Measuring the Constitutionality of Mandatory Minimum Sentences" (2012) 57 S.C.L.R. (2d) 173, at pp. 200-202. Professor Manson would introduce as a principle of fundamental justice the concept of "arbitrary disproportionality" which, as far as I can tell, would render unconstitutional any provision capable of yielding an unfit sentence.

[66] The Supreme Court of Canada has consistently used strong language to describe the kind of sentence that will run afoul of s. 12. For example, Laskin C.J. in *Miller*, at p. 688, described a cruel and unusual sentence as one that is "so excessive as to outrage standards of decency". His language echoes throughout the Supreme Court of Canada's s. 12 jurisprudence. In *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14, the present Chief Justice said:

> As this Court has repeatedly held, to be considered grossly disproportionate, the sentence must be more than merely excessive. The sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable" [citation omitted].

[67] I see no value in characterizing the gross disproportionality inquiry as objective, subjective, or a combination of the two. As with the application of any legal standard, the inquiry cannot turn simply on the individual judge's personal sense of the harshness of the sentence, or on the individual judge's perception of the public reaction to the sentence. Identifiable criteria drawn from legal sources generally looked to when fixing sentences will guide the gross disproportionality inquiry. In broad terms, that inquiry demands a comparison of the minimum penalty required by the challenged statute with what would be regarded as an appropriate range of sentence for the same offence committed by the same offender but for the challenged mandatory minimum.

[68] Again, in broad terms, the comparative exercise described above looks to a variety of factors, including the specifics of the offence and the offender, the gravity of the offence as reflected in the statutory provision creating the offence, the generally applicable principles of sentencing, the kinds of sentences imposed for similar or related offences, the social harm targeted by the mandatory minimum penalty, and the purpose animating Parliament's decision to use a mandatory minimum sentence.

[69] Until relatively recently, mandatory minimum jail terms were a rarity in Canadian criminal law: see Nicole Crutcher, "Mandatory Minimum Penalties of Imprisonment: An Historical Analysis" (2001) 44 Crim. L.Q. 279; and Julian Roberts, "Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process" (2001) 39 Osgoode Hall L.J. 305. There is, however, no presumption that a mandatory minimum penalty is constitutionally suspect: see *Smith*, at p. 1077. Sentencing policy is first and foremost Parliament's responsibility. A mandatory minimum is a "forceful expression of government policy in the area of criminal law": *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 45; *Ferguson*, at para. 54; and *R. v. Gill*, 2012 ONCA 607, at para. 45. Simply because mandatory minimums restrict judicial discretion, long the centrepiece of the sentencing process in Canada, does not mean that they offend the constitutional norm in s. 12. As with any

other constitutional challenge, the onus of proof rests on the party alleging the *Charter* violation: see *R. v. Goltz*, [1991] 3 S.C.R. 485, at pp. 518-20.

[70] The case law reflects the high bar set by the gross disproportionality standard. After *Smith*, no decision of the Supreme Court of Canada or this court has declared a mandatory minimum jail term unconstitutional under s. 12. As observed by Cory J. in *Steel v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417:

> It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding.

[71] The stringent gross disproportionality standard is justified on two grounds. First, s. 12, like other constitutional protections, sets a minimum standard for legislation. Section 12 fixes the outer boundary of Parliament's authority over sentencing in criminal matters: see *Smith*, at pp. 1107-08, per McIntyre J., dissenting. Section 12 is not intended to constitutionalize any particular penological policy or theory, or to prohibit any legislation that the court may see as unreasonable or falling short of a best practices standard. Properly restrained judicial constitutional review accepts the primary law-making responsibility of legislatures by acknowledging the wide ambit of legislative choices available to elected officials.

[72] Second, the stringency of the gross disproportionality standard is justified by the nature of sentencing in the criminal law. The fixing of an appropriate penalty, or more usually an appropriate range of penalties, is far from a science. Different punishments can be justified using various theories of punishment. Thus, a punishment regime that emphasizes utilitarian concerns will in many cases impose a very different sentence than would a regime emphasizing a "just desserts" model of sentencing. Neither theory enjoys a constitutional status: see Morris J. Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 Oxford J. Legal Stud. 57.

[73] Part XXIII of the *Criminal Code* describes the fundamental purpose of sentencing in Canadian criminal law and identifies the operative principles of sentencing. While both utilitarian and "just desserts" considerations are evident in the various sentencing principles identified in Part XXIII, the overall aim of Part XXIII is to impose a sentence that is tailored to both the offence and the offender. Individualized sentencing through the exercise of judicial discretion sounds the keynote of Part XXIII.

[74] Part XXIII does not, however, describe a constitutional standard. In the same way that Part XXIII reflects Parliament's authority over and responsibility for penal policy, specific statutory provisions that depart from the generally applicable approach to sentencing in Part XXIII reflect that same authority and responsibility. Mandatory minimums that limit judicial discretion on sentencing

are as much a reflection of sentencing policy as are the statutory provisions that create broad sentencing discretion. The gross disproportionality standard recognizes that Parliament is free to set sentencing policy, even a policy that restricts the individualized approach to sentencing in Part XXIII, so long as the policy does not impose sentences that are so excessive as to be grossly disproportionate: *Ferguson*, at para. 54; and *Goltz*, at pp. 501-03.

(iii) The Two-Step Inquiry into Gross Disproportionality

[75] A claim that a mandatory minimum sentence constitutes cruel and unusual punishment is tested in two ways. First, the court must decide whether the punishment is grossly disproportionate as applied to the accused before the court. This particularized inquiry asks whether the mandatory minimum is a grossly disproportionate punishment for the particular accused in the particular circumstances: *Goltz*, at p. 505.

[76] If the sentence survives the particularized inquiry, the court goes on to decide whether the sentence is grossly disproportionate when applied to reasonable hypotheticals: see *Goltz*, at pp. 505-06. The selection of an appropriate reasonable hypothetical is a matter of some controversy and is the key to the outcome of this constitutional challenge.

[77] If a minimum penalty fails either the particularized or reasonable hypothetical component of the gross disproportionality inquiry, the provision,

assuming it cannot be "saved" by s. 1 of the *Charter*, will be found to violate s. 12. After some doubt, it is now established that if a mandatory minimum sentence violates s. 12, the remedy lies under s. 52 of the *Constitution Act, 1982*. The offending provision to the extent that it is inconsistent with s. 12 will be of "no force or effect" and will be struck down. A more narrow case-specific remedy in the form of a constitutional exemption applicable to the individual accused is not an available remedy: *Ferguson*, at paras. 34-74.

[78] A number of factors may inform the gross disproportionality analysis, both as it applies to the particular accused and to reasonable hypotheticals: see *Smith*, at p. 1073; *Goltz*, at paras. 25-27; and *Morrisey*, at paras. 27-28. The factors identified in the case law are:

- the gravity of the offence;
- the personal characteristics of the offender;
- the particular circumstances of the case;
- the actual effect of the punishment on the individual;
- the penological goals and sentencing principles reflected in the challenged minimum;
- the existence of valid effective alternatives to the mandatory minimum; and
- a comparison of punishments imposed for other similar crimes.

[79] There is no formula to be applied in weighing and assessing the various factors in any given case: *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at para. 75. Several of the factors are self-explanatory; however, the gravity of the offence, the actual effect of the punishment on the individual, and the impact of penological goals and sentencing principles require further comment.

(a) The Gravity of the Offence

[80] If, as in this case, the challenged mandatory minimum penalty requires the imposition of a three-year penitentiary term, a significant period of incarceration by any measure, the gravity of the offence will probably be the most important single factor in assessing constitutionality under the gross disproportionality standard. Unless an offence that attracts a three-year minimum sentence can be described as a serious criminal offence, I do not see how a three-year minimum sentence could survive a s. 12 challenge.

[81] The gravity of the offence is measured by reference to the essential elements of the offence that the Crown must prove to establish guilt and not by the circumstances surrounding the commission of the offence in the particular case before the court. The particularized factors are separately addressed in the s. 12 analysis. For the purpose of measuring the gravity of the offence, a more generic approach to the offence is taken.

[82] It cannot be gainsaid that all crime is serious. In describing the gravity of a particular crime, however, one necessarily speaks in relative terms and by reference to the seriousness of other crimes, particularly related crimes. When speaking of firearm-related offences, the seriousness inquiry, while acknowledging the inherent danger of all firearms, must go beyond that level of generality to the specifics of the offence as described in the offence-creating provision.

[83] The seriousness of a crime is the product of the harm targeted by the elements of the crime and the moral culpability required to establish guilt for the crime. The greater the harm and the higher the moral culpability, the more serious the crime.

[84] I use the word “harm” in a broad sense to refer to a variety of consequences ranging from death, to injury to another, to damage to property, to interference with other legally protected interests, or to the risk of one or more of those consequences. Crimes that require proof of actual harm to others, especially death, are generally more serious than crimes that prohibit other forms of harm. Crimes that do not require proof of any harm or risk of harm of any kind are generally less serious than crimes that do require proof of some kind of harm or risk of harm.

[85] As explained above, while most s. 95 offences will involve conduct that at the very least poses a risk of harm to others, s. 95 as written does not require proof of any harm or proof of any realistic risk of harm flowing from the unauthorized possession of the restricted or prohibited firearm. Evidence that the firearm was safely stored and posed virtually no risk to anyone would not afford a defence to a s. 95 charge. In short, proof that the accused's conduct harmed or posed a risk of harm to others is not a prerequisite to the imposition of a three-year penitentiary sentence under s. 95.

[86] The moral culpability component of an offence, the second factor to be considered when assessing seriousness, usually refers to the mental state that must accompany the commission of the prohibited act. There are a variety of culpable mental states, including intention, recklessness, and knowledge. An intention to bring about a prohibited consequence ranks at the top of the criminal law hierarchy of blameworthiness or moral culpability.

[87] Although moral culpability is generally reflected in a *mens rea* requirement, blameworthiness can lie in the nature of the conduct engaged in, as for example where proof of criminally negligent conduct will suffice to establish guilt. Blameworthiness based on the nature of the conduct as opposed to the offender's mental state will usually reduce the seriousness of the offence. Thus, criminal negligence causing death is significantly less serious than murder, even

though the conduct and consequences required for the two crimes may be identical: see *Morrisey*, at para. 36.

[88] Section 95 is a *mens rea* offence. It requires proof of knowledge or wilful blindness of the elements of the *actus reus* of the offence. The requirement that the Crown establish knowledge increases the moral culpability or blameworthiness of an accused's conduct and, therefore, increases the seriousness of the offence: *Goltz*, at p. 507.

[89] The broad scope of the conduct captured by s. 95 makes it difficult to come to any definitive conclusion as to the relative gravity of the conduct proscribed by s. 95. Unlike other firearm provisions that carry a significant mandatory minimum sentence for a first offence, there is no common denominator in the conduct captured by s. 95 that allows one to say that, because of the harm involved, a s. 95 offence is a very serious criminal offence. Indeed, Parliament has recognized that s. 95 offences are not inherently serious crimes by providing that the Crown can proceed summarily, in which case there is no mandatory minimum and the full panoply of sentencing options, including discharges, are available to the sentencing judge.

[90] In attempting to gauge the seriousness of a s. 95 offence, it is helpful to compare that offence to the offence of criminal negligence causing death with a firearm. That offence attracts a four-year minimum under s. 220(a) and can be

committed in an infinite variety of fact situations. However, all those fact situations require proof that the accused's conduct caused the death of another person. The most serious of all possible harms is, therefore, a common element of all offences punishable under s. 220(a). No such common feature can be found in the conduct component of s. 95. Indeed, the section is written to eliminate even the requirement that the firearm be loaded, the strongest harm-related component of the offence as defined in s. 95.

[91] The reach of the offence described in s. 95 is more akin to that of the offence of importing a narcotic into Canada considered in *Smith*. Like the importation offence, s. 95 requires proof of blameworthiness through a knowledge requirement. Also like s. 95, the conduct captured by the importation offence encompasses widely differing levels of harm ranging from the virtually non-existent (importation of a very small amount of marijuana) to the devastating (the importation for resale of large amounts of cocaine). The broad sweep of the conduct captured by the importation offence figured prominently in the court's ultimate determination in *Smith* that the seven-year minimum period violated s. 12 of the *Charter*.[9]

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[9] Parliament has recently re-introduced minimum penalties for the importation of drugs into Canada. The current provisions, however, draw distinctions based on the nature of the drug and the amount imported: see *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, as amended by the *Safe Streets and Communities Act*, S.C. 2012, c. 1.

[92] In summary, while the offence under s. 95 will almost always involve some element of risk of harm, and must in all cases involve knowledge or wilful blindness of the existence of the elements of the offence, the harm associated with a s. 95 offence is significantly, if not entirely, attenuated in some fact-situations that still fall squarely within the prohibition created by s. 95 and that attract the mandatory minimum if the Crown proceeds by indictment.

(b) The Actual Effect of the Punishment on the Individual

[93] The gross disproportionality analysis is not done in the abstract. The actual impact of the sentence on the offender must be considered. The conditions under which the offender will serve his or her sentence and any particular negative effects the sentence may have on an offender are relevant considerations. If an offender seeks to show some special negative impact flowing from the imposition of the mandatory minimum penalty, evidence to support that contention will be necessary. However, I think judges can take judicial notice that first offenders, especially young first offenders, will have a difficult time when placed in the federal penitentiary system.

[94] It is also understood that persons sentenced to a specific term of imprisonment in Canada will seldom serve the full term in custody. Credit for pre-sentence custody and the operation of the parole system will have a very real impact on the actual sentence to be served by an offender.

[95] If a convicted person is incarcerated prior to sentencing, the trial judge may deduct a credit for pre-sentence custody from the mandatory minimum: *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455; and *McDonald*. The calculation for pre-trial custody is now controlled by ss. 719(3) and (3.1). Those provisions set the credit at one day for each day in pre-sentence custody, subject to an increase to one and one-half days for each day in pre-sentence custody "if the circumstances justify it": see *R. v. Summers*, 2013 ONCA 147, 114 O.R. (3d) 641, leave to appeal to S.C.C. granted August 15, 2013: [2013] S.C.C.A. No. 191; and *R. v. Bradbury*, 2013 BCCA 280, 298 C.C.C. (3d) 31.

[96] Credit for pre-sentence custody does not mean that the offender receives a sentence which is less than the mandatory minimum. Particularly after the enactment of s. 719(3.1), credit for pre-sentence custody affects the impact of the mandatory minimum not by reducing the sentence below that minimum, but by avoiding the potential gross disproportionality that could occur were an accused required to serve the entirety of a mandatory minimum after already serving a significant period of time in pre-sentence custody: see *McDonald*, at p. 669.

[97] The potential impact of pre-sentence custody on the actual sentence to be served by an accused subject to a mandatory minimum is demonstrated on the facts of this case. The trial judge, as he was entitled to do at the time, gave the appellant two for one credit for his pre-sentence custody. Based on that

calculation, he imposed a further period of incarceration of one day. Consequently, the mandatory minimum sentence had no practical impact on the time spent in custody by the appellant.

[98] Parole and other forms of post-sentence mitigation of time spent in custody must also be taken into account when considering whether the sentence imposed meets the gross disproportionality standard: *R. v. Luxton* (1990), 58 C.C.C. (3d) 449 (S.C.C.), at p. 460; *Goltz*, at p. 514; and *Morrisey*, at para. 55. To assume for the purpose of constitutional analysis that a sentence of three years means that a person will serve three years in jail, is to ignore the reality of the Canadian penal system. Parole will, in most cases, reduce, sometimes significantly, the actual time spent in custody by an individual offender. That, of course, is not to say that parole is a right or that offenders on parole do not have substantial restrictions on their liberty. However, parole undoubtedly mitigates the impact of a sentence on an offender.

[99] Evidence as to the likelihood of parole for a specific offender would clearly be admissible on a s. 12 challenge. Public Safety Canada data indicates that between 2001 and 2011, persons sentenced to penitentiary terms served about 32 per cent of their sentences before receiving day parole and about 38 per cent before receiving full parole. The same statistics for 2012 indicate that the average federal prisoner in 2012 served about 38 per cent of his or her sentence before receiving day parole and about 41.5 per cent before receiving full parole:

Public Safety Canada, *Corrections and Conditional Release Statistical Overview* (2012 Annual Report) (Ottawa: Minister of Public Works and Government Services Canada, 2012), online: <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2012-ccrs/2012-ccrs-eng.pdf>, at pp. 83-84. These increases are apparently attributable to the *Abolition of Early Parole Act*, S.C. 2011, c. 11.[10]

[100] Averages do not predict the date of parole for any particular offender. It is, however, realistic to assume that the kind of offender for whom a three-year minimum jail term could most likely be described as grossly disproportionate is the very same offender who would be most likely to gain early release on day parole and then full parole.

(c) Penological Goals and Sentencing Principles

[101] The gross disproportionality analysis must also examine the rationale for the minimum sentence and its justification under recognized sentencing principles. As explained in *Morrisey*, at paras. 43-48, the constitutionality of a minimum sentence cannot be determined by reference to any single sentencing principle. In considering the four-year minimum penalty for the offence of criminal negligence causing death with a firearm, Gonthier J. said, at para. 46:

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[10] The *Abolition of Early Parole Act* does not alter the eligibility dates for day parole or full parole of persons convicted under s. 95. However, the Act apparently produces administrative and procedural changes in the parole process that can result in longer periods of incarceration before release on day parole or full parole. See *Corrections and Conditional Release Statistical Overview* (2012 Annual Report), at p. 83.

> I am convinced that this legislation survives constitutional scrutiny even if the sentence pursues sentencing principles of general deterrence, denunciation, and retributive justice more than the principles of rehabilitation and specific deterrence. In other words, the punishment is acceptable under s. 12 while having a strong and salutary effect of general deterrence.

[102] I understand Gonthier J. to mean that minimum sentences that stress denunciation and general deterrence over other sentencing goals are not thereby rendered unconstitutional. It is equally true, however, that sentences that are said to be justified by those same principles do not automatically pass constitutional review: *Smith*, at pp. 1073-74.

[103] A consideration of a mandatory minimum sentence in light of generally accepted theories of punishment and sentencing principles including proportionality inevitably drives one back to the gravity of the offence. Thus, in *Morrisey*, a strong emphasis on the principles of general deterrence, denunciation, and retribution as reflected in a four-year minimum sentence was justified in light of the seriousness of the offence of criminal negligence causing death. A four-year mandatory minimum for an offence that did not involve the same level of harm or did not have a blameworthiness requirement, while no doubt reflecting the same principles of deterrence, denunciation, and retribution, would likely not survive a s. 12 analysis.

(iv) The Particularized Inquiry as Applied to the Appellant

[104] The factors relevant to a determination of whether a minimum sentence is grossly disproportionate vis-à-vis the accused can be considered compendiously by comparing the mandatory minimum sentence to the sentence that would have been imposed under a sentencing scheme that was identical to the existing scheme save for the requirement of the mandatory minimum. The trial judge followed this approach.[11]

[105] The trial judge reviewed the s. 95 sentencing jurisprudence as of 2008 before the three-year minimum sentence was introduced. As he pointed out, that jurisprudence developed under a sentencing scheme that carried a maximum penalty of ten years and a minimum penalty of one year when the Crown proceeded by indictment. The trial judge reasoned that as the one-year minimum had never been successfully challenged, he must accept it for the purpose of deciding what would have been an appropriate sentence but for the three-year minimum.

[106] I tend to agree with the trial judge. However, I do not think the mandatory one-year minimum has much effect on what would have been an appropriate sentence for the appellant but for the three-year minimum. Under the relevant

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[11] The trial judge took this approach, in part, to address the Crown's submission that the appellant's *Charter* motion was moot if the appellant would have received a sentence of three years regardless of the existence of the minimum: see *Nur* (reasons of Code J.), at para. 37. I do not understand the Crown to have taken that position on appeal.

principles of sentencing, and having regard to the case law, this appellant would have received a sentence well beyond one year regardless of whether the one-year minimum existed.

[107] As the many cases reviewed by the trial judge indicate, sentencing under s. 95 before 2008 stressed denunciation and deterrence. Mitigating factors personal to a particular accused necessarily took on a less significant role when fixing the appropriate penalty: *e.g.* see *R. v. D.(Q.)* (2005), 199 C.C.C. (3d) 490 (Ont. C.A.), at paras. 77-78; and *R. v. Nguyen*, 2005 BCCA 115, 209 B.C.A.C. 133, at para. 5.

[108] The trial judge, at para. 45, described the sentencing range for a s. 95 offence before the introduction of the three-year minimum as between two years less one day and three years. In his view, at para. 71, the appellant would have received a sentence of two and one-half years. He concluded that the three-year minimum was not grossly disproportionate as applied to the appellant.

[109] I am in substantial agreement with the trial judge's analysis of the sentencing case law. Had the trial judge been sentencing the appellant without the three-year minimum in place, the crucial question would have been whether a penitentiary term was necessary. I am satisfied that a trial judge, properly balancing all the factors, could have sentenced the appellant to a maximum reformatory term. I am equally satisfied that another trial judge, also properly

balancing the various factors, could have imposed a penitentiary sentence of up to three years. As the range of appropriate sentences includes a three-year sentence, a mandatory minimum three-year sentence cannot be described as grossly disproportionate.

(v) The Reasonable Hypothetical

(a) The case law

[110] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at p. 314, established that, assuming standing,[12] a person may challenge the constitutionality of a law on the basis that it infringes a right protected by the *Charter* regardless of whether that law infringes the constitutional rights of the person advancing the challenge. As Dickson J. explained, where legislation is challenged as incompatible with the *Charter* under s. 52 of the *Constitution Act, 1982*, either in its purpose or effect, "[i]t is the nature of the law, not the status of the accused, that is in issue". The Supreme Court of Canada has repeatedly reaffirmed that a s. 52 challenge to a law does not depend on whether the challenged provision offends the rights of the claimant: see *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Mills*, [1999] 3 S.C.R. 668; and *Ferguson*, at paras. 58-66.

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[12] The appellant is subject to the mandatory minimum and given the potential inflationary effect of mandatory minimums (see *Morrisey*, at para. 82, *per* Arbour J., concurring), any sentence he might receive for his conviction under s. 95 could be affected by the existence of the mandatory minimum. His standing to challenge the mandatory minimum is beyond doubt.

[111] The nature of the inquiry required by a s. 52 challenge demands that the inquiry into the constitutionality of a mandatory minimum sentence embrace potential fact situations other than those presented in the individual case. The reasonable hypothetical provides the method by which that broader constitutional inquiry is made.

[112] The reasonable hypothetical methodology first appeared, albeit unnamed and unexplained, in the seminal case of *Smith*. In *Smith*, no one argued that the seven-year minimum penalty would constitute cruel and unusual punishment for the accused, who had a criminal record and had imported cocaine valued at over $100,000 into Canada. For the purposes of the constitutional challenge, the actual facts of the case quickly gave way to those of a hypothetical offender described at p. 1053 as:

> [A] young person who, while driving back into Canada from a winter break in the U.S.A., is caught with only one, indeed, let's postulate, his or her first "joint of grass".

[113] Justice Lamer, for the majority, at p. 1054, acknowledged that in his long experience in the criminal law, he was not aware of any person matching his description of his hypothetical offender ever being prosecuted for importing a narcotic into Canada. However, the possibility that this hypothetical offender could be charged "lurked" and were that person ever to be charged and

convicted, a seven-year sentence would be a certainty because of the mandatory minimum.

[114] The essence of Lamer J.'s analysis appears at p. 1078:

> As indicated above, the offence of importing enacted by s. 5(1) of the *Narcotic Control Act* covers numerous substances of varying degrees of dangerousness and totally disregards the quantity of the drug imported. The purpose of a given importation, such as whether it is for personal consumption or for trafficking, and the existence or nonexistence of previous convictions for offences of a similar nature or gravity are disregarded as irrelevant. Thus, the law is such that it is inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate.
>
> That is what offends s. 12, the certainty, not just the potential. … However, the effect of the minimum is to insert the certainty that, in some cases, as of conviction the violation [of s. 12] will occur. It is this aspect of certainty that makes the section itself a *prima facie* violation of s. 12, and the minimum must, subject to s. 1, be declared of no force or effect.

[115] Professor Hogg aptly describes the hypothetical used in *Smith* as "the most innocent possible offender principle": *Constitutional Law of Canada*, at p. 53-4. As described in *Smith*, the virtues of the hypothetical offender and the mitigating factors relevant to the commission of the offence seem limited only by the imaginations of counsel and judges.

[116] Unmodified, the hypothetical offender analysis described in *Smith* would have left very few, if any, mandatory minimum jail terms standing. However, that

is not what happened. In two subsequent cases, *Goltz* and *Morrisey*, the Supreme Court narrowed the scope of the reasonable hypothetical as applied to s. 12 challenges to mandatory minimum sentences.[13] Both cases require careful examination.

[117] In *Goltz*, the accused was charged under s. 88(1) of British Columbia's *Motor Vehicle Act*, R.S.B.C. 1979, c. 288 ("*MVA*"). That section made it an offence to drive while knowingly prohibited from driving under any of the provisions enumerated in s. 88 of the *MVA.* The offence was punishable by a minimum term of imprisonment of seven days and a $300 fine.

[118] The accused in *Goltz* was prohibited from driving under s. 86(1)(a)(ii) of the *MVA*, one of the provisions that is listed in s. 88(1). Subparagraph 88(1)(a)(ii) authorized the Registrar to prohibit a person from driving based on that person's bad driving record. The *MVA* contained various procedural safeguards, including a mandatory pre-prohibition interview with the Registrar designed to ensure that the Registrar made a prohibition order only in those cases that fully warranted the order.

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[13] Except for Professor Hogg, academic commentary has criticized the retreat from *Smith*: see Kent Roach, "Searching for *Smith*: The Constitutionality of Mandatory Sentences" (2001) 39 Osgoode Hall L.J. 367, at p. 369; Lisa Dufraimont, "*R. v. Ferguson* and the Search for a Coherent Approach to Mandatory Minimum Sentences Under Section 12" (2008) 42 S.C.L.R. (2d) 459, at p. 472; Benjamin L. Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, The Rule of Law and *R. v. Ferguson*" (2009) 47 S.C.L.R. (2d) 101, at p. 103; and Allan Manson, "Arbitrary Disproportionality: A New *Charter* Standard for Measuring the Constitutionality of Mandatory Minimum Sentences" (2012) 57 S.C.L.R. (2d) 173, at pp. 178-81.

[119] The accused in *Goltz* did not contend that the seven-day mandatory minimum was unconstitutional as applied to him. He argued, however, that there would be cases where, having regard to the nature of the offences that could precipitate a s. 88(1) prohibition order and the circumstances in which the driving under prohibition might occur, a seven-day minimum sentence would be grossly disproportionate. The accused did not limit his challenge to prohibitions issued under s. 86(1)(a)(ii), but submitted that the court was required to consider all prohibitions that could possibly support a conviction under s. 88(1). The accused succeeded at trial and the mandatory minimum was declared unconstitutional: see (1988) 44 C.C.C. (3d) 166 (B.C. Co. Ct.). The Crown appeal to the British Columbia Court of Appeal was dismissed: see (1990), 52 C.C.C. (3d) 527 (B.C.C.A.).

[120] In reversing the decision of the British Columbia Court of Appeal and holding the section constitutional, Gonthier J., for the majority, at pp. 503-04, began by acknowledging that the constitutionality of a minimum penalty had to be tested not only on the facts of the particular case, but also by reference to a broader factual background. He observed that the need to examine the constitutionality of a mandatory minimum from a broader prospective than that afforded by the specific facts of the case presented a problem which "the jurisprudence to date exhibits significant confusion about". He proceeded to

identify and describe the reasonable hypothetical methodology. His approach narrowed the approach taken in *Smith* in three important ways.

[121] First, the majority in *Goltz* took a more restricted view of the potential fact situations encompassed by reasonable hypotheticals. Although Gonthier J. did not expressly take issue with the hypothetical offender used in *Smith* to test the constitutionality of the mandatory minimum, his description of the reasonable hypothetical was quite different from that used in *Smith*. Justice Gonthier, at p. 504, referred to the hypothetical offender in *Smith* as "that imaginary small offender". He described his reasonable hypothetical in these terms, at pp. 515-16:

> A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility. *While the Court is unavoidably required to consider factual patterns other than that presented by the respondent's case, this is not a licence to invalidate statutes on the basis of remote or extreme examples.* Laws typically aim to govern a particular field generally, so that they apply to a range of persons and circumstances. It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the *Charter* [citations omitted]. Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. *The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life.* [Emphasis added.]

[122] The reasonable hypothetical in *Goltz* describes those cases that fall within the broad mainstream of fact situations contemplated by the terms of the offence in issue. Fact situations that represent true outliers, the "remote or extreme examples", may, if and when they arise, give rise to an argument that the mandatory minimum is unconstitutional as applied to the specific accused and, therefore, of no force or effect. Those extreme examples cannot, however, be used as reasonable hypotheticals to strike down mandatory minimums in cases where the minimum as applied to the specific accused does not constitute cruel and unusual punishment. After *Goltz*, the reasonable hypothetical designed to capture every "lurking" possibility in *Smith* had been narrowed to capture those possibilities that "could commonly arise". The exact contours of the reasonable hypothetical remained unclear.

[123] The second of the three restrictions on the selection of an appropriate reasonable hypothetical found in *Goltz* flows from the majority's acceptance of the Crown's position that the court should limit its consideration of the constitutionality of the minimum penalty to cases where the driving prohibition was based on the same section of the *MVA* as was the prohibition in *Goltz*. The majority left for another day the constitutionality of prohibitions based on other sections identified in s. 88: see *Goltz*, at p. 496.

[124] By limiting its analysis to minimum penalties imposed on those who drove while prohibited from driving by a Registrar's order, the majority eliminated a

wide-range of potential hypothetical offenders who were prohibited from driving under other sections and who had not had the benefit of the various procedural safeguards applicable to prohibition orders made by the Registrar. By allowing the Crown to narrow the scope of the constitutional challenge, the court eliminated from the reasonable hypothetical analysis a variety of fact situations in which the seven-day minimum penalty would arguably have been much more amenable to constitutional challenge.[14]

[125] The significant impact on the reasonable hypothetical methodology produced by limiting the offence to the particularized version as it arose in the actual case is evident in *R. v. Brown*, [1994] 3 S.C.R. 749. In *Brown*, the accused was convicted of three robberies and three related counts of using a firearm while committing an indictable offence, contrary to s. 85 of the *Criminal Code*. He challenged the constitutionality of the statutory provisions providing for mandatory minimum consecutive sentences upon conviction on the charges of using a firearm in the commission of an indictable offence.

[126] The challenge succeeded in the Manitoba Court of Appeal: (1993), 80 C.C.C. (3d) 275. Justice Helper, for the court, considered reasonable hypotheticals that involved the use of a firearm in the commission of a property-related indictable offence (*e.g.* mischief). She said, at p. 285:

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[14] Justice McLachlin, in dissent, at p. 526, reasoned that the majority approach effectively read down s. 88 and addressed only one part of the statutory scheme that gave rise to the challenged mandatory minimum seven-day sentence for driving while prohibited.

> The certainty remains that an offender who has a previous firearms conviction and commits a series of property offences using a firearm would be subject to an inordinately long period of incarceration upon conviction.

[127] The Supreme Court of Canada reversed in a unanimous and very brief judgment holding, at p. 751:

> Here, the Attorney General of Manitoba limited its defence of s. 85 to the case which concerns armed robbery as the underlying offence. As such, the hypothetical proposed by the respondent relating to mischief is not a reasonable hypothetical envisioned by *Goltz*. We agree with these submissions and would therefore find no violation of s. 12 of the *Charter*.

[128] After *Goltz* and *Brown*, it seems clear that if the offence to which the mandatory minimum attaches is predicated on the commission of some other offence (*e.g.* using a firearm in the commission of indictable offence), or on the breach of some statutory provision or order (*e.g.* driving while prohibited), the Crown can limit the constitutional challenge and, hence, the reasonable hypothetical analysis to the same predicate offence or the breach of the same statutory provision or order as occurred on the facts of the case giving rise to the constitutional challenge.[15] I will examine the application of this line of authority to s. 95 when I examine the reasonable hypotheticals available under s. 95.

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[15] The same approach is evident in *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895. The court considered the constitutionality of a mandatory weapons prohibition applicable upon conviction for any of several enumerated indictable offences by reference only to the indictable offence for which the accused had been convicted.

[129] The third and final restriction on reasonable hypotheticals advanced in *Goltz* arises from the connection drawn between the facts of the case before the court and the ambit of the reasonable hypothetical. On the majority's analysis, the facts of the case before the court afforded an excellent indicator of the scope of the appropriate reasonable hypotheticals. Two passages of the majority judgment, at pp. 516 and 519, make this point:

> *The particular facts of the instant appeal provide an important benchmark for what is a reasonable example in the context of s. 86(1)(a)(ii) of the Act.* This is because they represent one real application of the challenged statutory provision. A finding of absence of *Charter* infringement on the sole basis of these particular facts therefore lends support to a conclusion that the challenged legislation is valid under s. 12. In this appeal, this indication is particularly significant because the administrative guidelines and internal review system which screen out genuinely bad drivers ensure that responsible drivers will not be prohibited, and because the facts of this appeal are highly representative of commonly imaginable instances of the offence.
>
> …
>
> *Even if the respondent had submitted a relevant example, it is doubtful that it would have overcome the strong indication of validity arising from the first, particularized step of s. 12 analysis.* [Emphasis added.]

[130] It is not clear to me why the facts of a given case are necessarily representative of available reasonable hypotheticals. On this approach, the two stages of the gross disproportionality inquiry begin to merge into one. However,

after *Goltz*, the actual facts of the case have become an important “benchmark” in shaping reasonable hypotheticals.

[131] The reasonable hypothetical as reshaped in *Goltz* was further considered in *Morrisey*, the Supreme Court of Canada’s most recent decision describing the use of reasonable hypotheticals to challenge the constitutionality of mandatory minimum penalties under s. 12 of the *Charter*.[16] The accused in *Morrisey*, while drunk and carrying a loaded rifle, attempted to rouse a friend who was sleeping. The accused slipped, the gun went off, and his friend was killed. At first, the accused attempted to hide the body, but later confessed to the police and pleaded guilty at trial to criminal negligence causing death. Because the homicide involved a firearm, it attracted a mandatory four-year minimum penalty.

[132] The Supreme Court unanimously upheld the constitutionality of the mandatory minimum.[17] Justice Gonthier, once again speaking for the majority, referred back to *Goltz* in describing the reasonable hypothetical. He said, at para. 30:

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[16] The court considered the mandatory minimum penalties in *Latimer* and *Ferguson*. However, in *Latimer*, the appellant did not rely on the reasonable hypothetical arm of the gross disproportionality analysis, and in *Ferguson*, the appellant’s attempt in the Supreme Court of Canada to make arguments based on reasonable hypotheticals when those arguments were not made in the courts below was summarily rejected.

[17] Justice Arbour, in a concurring judgment joined by McLachlin C.J., argued that because the offence of criminal negligence causing death could arise in so many different situations, the court should address the question of whether the minimum penalty was unconstitutional on a case-by-case basis. In her view, it was not unconstitutional as applied to the accused in *Ferguson*.

> The reasonableness of the hypothetical cannot be overstated, but this means that it must be reasonable in view of the crime in question.

[133] Justice Gonthier acknowledged that the facts of actual cases involving the offence provided a logical place to look for reasonable hypotheticals. However, at para. 33, he cautioned against treating each and every reported case as a freestanding reasonable hypothetical:

> Again, it is to be remembered that the courts are to consider only those hypotheticals that could *reasonably* arise [emphasis in original]. Homicide is far from a common occurrence in Canada. Criminal negligence causing death with a firearm is even less common. It is thus appropriate to develop hypotheticals from the case law by distilling their common elements. *Goltz* requires that hypotheticals be "common" rather than "extreme" or "far-fetched". *It is sufficient when dealing with a rare and uncommon crime that the hypotheticals be common examples of the crime rather than examples of common occurrences in day-to-day life. However, in constructing hypotheticals, courts can be guided by real life cases,* but to the extent that these cases may not be exhaustively reported, they are not bound to limit the fashioning of hypotheticals to the cases that are made available to them. *In fashioning hypotheticals for the purpose of a s. 12 analysis, reported cases can be used with caution as a starting point, and additional circumstances can be added to the scenario to construct an appropriate model against which to test the severity of the punishment.* [Emphasis added.]

[134] Still later in his reasons, at para. 50, Gonthier J. explained why prior cases did not necessarily amount to reasonable hypotheticals:

> The hypotheticals used by the trial judge were actual reported cases. As I explained above, these reported

> cases have inherent problems, based as they are on evidence adduced by way of agreed facts. Further, it is questionable whether all of the cases considered by the trial judge are common examples of cases that arise under s. 220(a). Finally, each of these reported cases turns on its own idiosyncrasies and involves considerations at a level of specificity never contemplated by *Smith* [citation omitted]. Under all of these circumstances, *I am reluctant to enter into a case-by-case analysis of the specific circumstances of each of the individuals who pleaded guilty to this offence. Instead, the proper approach is to develop imaginable circumstances which could commonly arise with a degree of generality appropriate to the particular offence.* [Emphasis added.]

[135] Justice Gonthier, at paras. 51-52, identified only two reasonable hypotheticals involving the use of firearms to commit the offence of criminal negligence causing death. The first involved a person who took possession of the gun for the purpose of "playing around with a gun" and who in the course doing so, shot and killed another person. The second involved a person engaged in a lawful activity (hunting) who used a firearm in a criminally negligent manner and caused another person's death. Both hypotheticals described conduct at a general level and neither hypothetical referred to any factors particular to the individual offender, such as longstanding abuse, extreme youth, ill health, or intellectual impairment that might mitigate the penalty.

[136] The reasonable hypothetical used in *Morrisey* describes a much more generic offender than does the reasonable hypothetical in *Smith*. The reasonable hypothetical in *Morrisey* captures any offender who engages in the

"common elements" of the offence that attract the mandatory minimum. All one knows about the offenders in the reasonable hypotheticals used in *Morrisey* is that both caused the death of another person by using a firearm in a manner that showed a wanton or reckless disregard for the safety of others. Individual characteristics of an offender that might mitigate or aggravate the penalty are virtually eliminated in the two reasonable hypotheticals used in *Morrisey*.

[137] The focus in the hypothetical on the nature of the act committed and the essential components of the offence as opposed to the individual characteristics of the hypothetical offender is, in my view, an important refinement on the reasonable hypothetical as used in *Smith*. It seems to me that if the hypothetical offender is to be endowed with individual characteristics that can mitigate the penalty, then, regardless of the offence, one could describe an offender for whom a mandatory minimum punishment would be grossly disproportionate.

[138] The reasonable hypothetical described in *Morrisey* seems a long way from the "most innocent possible offender" hypothetical used in *Smith*. In some ways it is. However, a careful reading of *Morrisey* suggests that, depending on the nature of the offence, there may not be a significant difference between the reasonable hypotheticals described in *Morrisey* and *Smith*.

[139] In *Morrisey*, at para. 30, the majority expressly approved of the hypothetical used by Lamer J. in *Smith*:

> In *Smith*, *the hypothetical used to invalidate the impugned punishment was a very realistic one.* There, the legislation attached criminal liability to importers of illegal narcotics, irrespective of the quantity imported. The natural and probable consequence of the legislation would be to catch individuals who could only be described as "small offenders" [citation omitted] such as the individual importing a single joint. [Emphasis added.]

[140] Two things about the approving reference to *Smith* in *Morrisey* are noteworthy. First, in describing the hypothetical from *Smith*, Gonthier J., in *Morrisey*, does not refer to any of the personal characteristics of the hypothetical offender in *Smith*, such as age and motive, but refers only to factors relevant to the nature of the offence, namely, the nature and quantity of the drug imported.

[141] Second, in referring to the hypothetical used in *Smith* as "very realistic", Gonthier J. was not suggesting that it was realistic in the sense that it reflected the kind of case that routinely arose in the criminal courts. Rather, it was realistic in the sense that it reflected the scope of the prohibition as described in the legislation that defined the crime to which the seven-year minimum applied.

[142] In my view, after *Morrisey* and *Goltz*, a reasonable hypothetical is one that operates at a general level to capture conduct that includes all the essential elements of the offence that trigger the mandatory minimum, but no more. Characteristics of individual offenders, be they aggravating or mitigating, are not part of the reasonable hypothetical analysis. It flows from *Morrisey* that the

broader the description of the offence in the provision creating the offence, the wider the range of reasonable hypotheticals.

(b) Section 95 reasonable hypotheticals

[143] I begin my description of s. 95 reasonable hypotheticals by considering whether, in keeping with *Goltz* and *Brown*, the s. 95 reasonable hypothetical should be limited to cases which share the central features of the appellant's case, namely, possession of a loaded firearm and the absence of any kind of authorization or licence to possess that firearm anywhere at any time. Neither the Crown nor the Attorney General for Canada suggested at trial or in this court that the s. 95 reasonable hypothetical could be limited to cases that shared these aggravating features. Both defended the constitutionality of s. 95 in all its potential applications, although both argued that examples taken from the regulatory end of the spectrum were not sufficiently common to constitute reasonable hypotheticals.

[144] I was initially attracted to the idea of considering the constitutionality of the mandatory minimum as applied to cases where the gun was actually loaded and the offender had no authorization to have the gun under any circumstances in any place. Cases with those features fall more toward the true crime end of the spectrum. The mandatory minimum would more easily meet constitutional norms if those features existed.

[145] I have, however, concluded that the Crown and the Attorney General for Canada's approach of considering all potential applications of s. 95 is correct. Section 95 is a different kind of offence than the offences considered in *Goltz* and *Brown*. In those cases, the offence that carried the minimum penalty depended on the commission of a predicate offence or the breach of some other statutory provision or order. The seriousness of the offence attracting the minimum penalty depended to some degree on the nature of the predicate offence, or the nature of the conduct giving rise to the prior order.

[146] Section 95 does not depend on the commission of a predicate offence or the breach of any statutory or other order. Section 95, like the importing offence in *Smith*, prohibits a broad range of conduct. Upon reflection, I am satisfied that it would be no more appropriate to consider the constitutionality of s. 95 by reference only to the more egregious form of conduct captured by s. 95 than it would have been in *Smith* to consider the constitutionality of the mandatory minimum by reference only to the crime of importing the more harmful narcotics such as cocaine into Canada.

[147] The trial judge developed several reasonable hypotheticals at para. 96. Distilled to their essentials, they involved:

- offenders of previous good character;
- brief possession of the firearm;

- no criminal purpose associated with the possession; and
- the appellant's possession was in the nature of a failure to comply with the regulatory licensing scheme.

[148] Mr. Shandler, for the Crown, put forward a more restrictive reasonable hypothetical. In his helpful submissions, he argued that a reasonable hypothetical must involve a situation "of imminent and lethal danger inherent in the presence of a loaded handgun". According to Mr. Shandler, reasonable hypotheticals must be limited to cases in which the accused knowingly possesses a loaded restricted or prohibited firearm that has never been licensed or legitimately owned.

[149] This submission does not reflect the broad scope of the offence as defined in s. 95. There is no suggestion in s. 95 that the firearms are limited to those that have "never been licensed or legitimately owned". Nor does the case law reflect any such limitation: *e.g. R. v. Laponsee*, 2013 ONCJ 295; and *MacDonald.* Furthermore, the offence is not limited to loaded restricted or prohibited firearms, but instead extends to such firearms even when unloaded if ammunition is readily accessible. I do not think that liability based on an unloaded firearm with ammunition stored nearby can be excluded as a reasonable hypothetical given the language of s. 95 any more than possession of a small amount of marijuana could be excluded from the importation offence considered in *Smith*.

[150] Having regard to *Goltz* and *Morrisey* and, in particular, the emphasis in *Morrisey* on maintaining a level of generality commensurate with the description of the offence, I would describe the s. 95 reasonable hypothetical to be used in the s. 12 analysis as having three characteristics:

- the accused is knowingly in possession of an unloaded restricted or prohibited firearm with useable ammunition stored nearby and readily accessible;
- the accused has an authorization to possess the firearm and has registered the firearm, but to his or her knowledge the authorization does not permit possession of the firearm at the place or in the manner in which the accused has possession; and
- the possession of the firearm is not connected to any unlawful purpose or activity and the offender is not engaged in any dangerous activity with the firearm.

[151] The Crown correctly points out that there are no reported cases that share the characteristics of the reasonable hypothetical I have described. Counsel also observes that my reasonable hypothetical is far removed from the facts of this appeal or any of the other appeals that were heard with this appeal. Counsel submits that reasonable hypotheticals that have no resemblance to any reported cases or the facts of the case before the court are illegitimate reasonable hypotheticals after *Goltz* and *Morrisey*.

[152] There is considerable force to counsel's submissions. However, the scheme of s. 95 compels me to reject that argument. Section 95 creates a hybrid offence. The Crown may proceed by indictment or summarily. If the Crown proceeds summarily, there is no minimum penalty and the accused may receive a non-custodial sentence or even an absolute discharge: *e.g.* see *Snobelen*. The essential elements of the offence are, of course, the same whether the Crown proceeds by indictment or summarily. By making s. 95 a hybrid offence, Parliament has acknowledged that the appropriate penal response for the criminal conduct prohibited by s. 95 runs the full gamut of sentencing options from an absolute discharge to 10 years in the penitentiary. That sentencing range tells me that Parliament must have anticipated prosecutions under s. 95 at what I have referred to as the regulatory end of the spectrum. The reasonable hypothetical I have constructed is consistent with that view of the offence.

[153] My reference to the hybrid nature of a s. 95 offence as germane to the construction of a reasonable hypothetical leads logically to a consideration of the trial judge's reliance on the Crown election to prevent any breach of s. 12. The trial judge concluded that there were reasonable hypotheticals in which a three-year penitentiary sentence upon conviction on a charge under s. 95 would constitute cruel and unusual punishment. He was satisfied, however, at para. 115, that in those cases, the "reasonable exercise of Crown discretion would

result in summary proceedings", thereby avoiding the three-year minimum and any constitutional infringement.

[154] In this court, counsel for the appellant argues that the Crown election at the outset of the proceedings cannot avoid a potential imposition of the mandatory minimum in reasonable hypotheticals where that minimum would violate s. 12. He relies on the analysis in *R. v. Smickle*, 2012 ONSC 602, 280 C.C.C. (3d) 365, at paras. 85-87. Counsel further submits that the appellant's constitutional right not to be subject to cruel and unusual punishment cannot depend on the Crown's exercise of its prosecutorial discretion, be it in respect of the charge to be laid or the mode of proceedings: see *Smith*, at pp. 1078-79.

[155] Crown counsel accepts that the trial judge went too far in viewing the Crown's power to elect to proceed summarily as "the *sine qua non* of constitutionality under the s. 12 analysis". Crown counsel instead submits that the Crown's ability to proceed summarily provides "an additional safeguard" in those borderline reasonable hypothetical cases.

[156] With respect, I do not agree with the trial judge's analysis of the effect of the Crown election on the constitutionality of the mandatory minimum. Further, while the Crown's ability to elect may provide a safeguard in those cases where the facts are known from the outset and agreed upon by the parties, the Crown

election provides no safeguard in the vast majority of cases where the facts are in dispute or unknown at the time of the election.

[157] The Crown elects to proceed by indictment or by way of summary proceedings at an early stage in the prosecution. The election is based on the information available to the Crown at that time. If the accused pleads not guilty and is convicted, he or she will be sentenced based on findings of fact made by the trial judge on sentencing. If the Crown chose to proceed by indictment, the constitutionality of the three-year minimum will be tested in the context of the facts as found for the purpose of sentencing and not the facts as understood by the Crown when the election was made.

[158] If an accused pleads not guilty and is convicted, it is not unusual that the facts for the purpose of sentencing will be quite different from the Crown's understanding of the case when the Crown made its election. There will inevitably be cases in which the Crown elected to proceed by indictment, but would have elected to proceed summarily had the election been based on the facts as found at the time of sentencing.

[159] A slight variation on the facts in *Snobelen*, a case much discussed as a potential reasonable hypothetical during oral argument, demonstrates that the Crown election cannot avoid an infringement of s. 12. In *Snobelen*, the accused owned a ranch in Oklahoma. He sold the ranch, and the personal property on

the ranch was shipped to him in Ontario. Unbeknownst to the accused, that property shipped to him included a handgun that was a restricted firearm and ammunition for the handgun. The accused did not have a licence and the gun was not registered in Canada, although its possession in Oklahoma was apparently lawful. The accused did not become aware that the gun and ammunition were in his home until sometime after they were delivered with the rest of the property from the Oklahoma ranch. He intended to dispose of the gun and believed that his wife had done so. He was, however, aware that the gun was in his home for a period of time and that he did not have a licence to possess the gun. The accused and his wife were having marital problems, and she reported the existence of the gun to the police. The police executed a search warrant and found the gun in the home. The accused readily admitted he should have disposed of the weapon. There was no suggestion that he had used the gun in any way or that there was ever ammunition in the gun.

[160] On the facts outlined above, the accused was charged with possession of a restricted firearm and readily accessible ammunition. The Crown chose to proceed summarily, the accused pleaded guilty, and the trial judge imposed an absolute discharge.

[161] If one assumes, however, that in addition to the facts outlined above, the Crown had a credible allegation from the spouse that the accused had used the presence of the handgun in the home to intimidate her and attempt to dissuade

her from taking any legal steps she was entitled to take against him, the Crown could, acting reasonably, have decided to proceed by indictment.[18] Assuming that the accused pleaded not guilty and the rest of the evidence was identical to the actual facts in *Snobelen*, and that the trial judge did not believe the spouse's evidence about the intimidation, the trial judge would have convicted the accused under s. 95. However, because the Crown, relying on an aggravating factor that was ultimately rejected by the trial judge, had elected to proceed by indictment, the trial judge would have been required to impose a three-year penitentiary term based on facts that were identical to those that would have led to an absolute discharge had the Crown proceeded summarily. In those circumstances, the three-year penitentiary term would surely be a grossly disproportionate sentence.[19]

[162] My holding that the Crown ability to elect to proceed summarily cannot avoid an infringement of s. 12 does not imply that the Crown cannot be relied on to exercise its discretion reasonably. Simply put, except perhaps when the accused pleads guilty, the Crown cannot know the facts on which the accused

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[18] This variation on the facts from *Snobelen* is taken from the trial judge's reasons in *Smickle*, at para. 111.

[19] The Crown's authority to elect to proceed summarily at the outset of a proceeding can be compared to the "three strikes" legislation in California, considered in *Ewing v. California*, 538 U.S. 11 (2003): see Cal. Penal Code § 17(b) (West 2012). Under that legislation, which imposes severe sentences upon conviction for a third felony, the trial judge has discretion at the time of sentence to reduce certain less serious felonies (known as wobblers) to misdemeanours and, thereby, avoid the minimum penalties that flow from the third felony conviction: see also s. 113 of the *Criminal Code*, which gives trial judges very limited discretion, based on findings of fact made at the time of sentencing, to relieve against the mandatory minimum weapons prohibition imposed by s. 109.

will be sentenced when the Crown makes its election. Consequently, the election cannot be expected to be responsive to those facts.

[163] The trial judge's analysis, at paras. 105-15, does not come to grips with the timing of the Crown election and the factual basis upon which that election is made in reaching the conclusion that the Crown power to elect to proceed summarily provided a "complete answer" to the appellant's s. 12 claim. I prefer the analysis of the trial judge in *Smickle*, who albeit in the context of s. 1 of the *Charter*, observes, at para. 110:

> The Crown discretion is exercised at an early stage when all of the facts, particularly those favourable to the defence, are often not known. Often the full facts will not be known until the trial judge delivers his or her reasons or the jury delivers a verdict.

[164] I come now to test my reasonable hypothetical using the factors described above, at para. 78. I will focus on the gravity of the offence as reflected in my reasonable hypothetical as, in my view, the gravity of the offence is the crucial, if not determinative, consideration in this case.

[165] The reasonable hypothetical I use involves no harm to anyone or anything and very little, if any, risk of harm to anyone or anything. The fact that the firearm in my hypothetical is unloaded, clearly a scenario contemplated by s. 95, significantly, in my view, decreases the risk of harm posed by the conduct described in my reasonable hypothetical. It is certainly arguable that a loaded gun always poses an immediate danger. The same cannot be said of an

unloaded gun in the possession of a licensed gun owner who has ammunition stored nearby.

[166] The offender in my reasonable hypothetical is morally culpable in that he acts with the requisite knowledge of the elements of the offence. The offender knows that he or she is in possession of a restricted firearm and that the possession is not authorized at the place where he or she is in possession. Given the strict terms on which licences to possess restricted and prohibited firearms are given, a knowing breach of those terms is a morally blameworthy act.

[167] The level of moral blameworthiness, however, as with the blameworthiness that knowledge of the possession of a narcotic imputes, depends on a number of variables, all of which fall within the broad scope of the offence as defined in s. 95. Knowledge that one has an unloaded restricted firearm safely stored in one's cottage with useable ammunition readily accessible in the next room, coupled with the knowledge that under the terms of one's licence, the firearm should be kept in one's dwelling, attracts a very different level of moral blameworthiness than does the knowledge of the person standing on the street corner with a loaded gun in his back pocket for which he knows he has no kind of authorization and which he intends to use as he sees fit. Section 95 is written so broadly as to capture offenders with both levels of moral blameworthiness. My reasonable hypothetical focuses on the less blameworthy category of potential offender.

[168] I would also rank the moral culpability of the offender in my reasonable hypothetical below the moral culpability of persons who engage in activities with firearms that demonstrate a wanton or reckless disregard for the lives or safety of others. Offenders in the reasonable hypotheticals described in *Morrisey* are, in my view, more morally culpable than the reasonable hypothetical offender I describe.

[169] In my view, a three-year minimum penitentiary term for an offender in my reasonable hypothetical is well beyond any punishment that would be considered proportionate to the gravity of the offence committed in the reasonable hypothetical. A three-year penitentiary sentence for what is essentially a violation of a term of a licence, albeit a knowing violation, is unheard of in Canada. Even accepting that the unique dangers posed by prohibited and restricted firearms could justify a mandatory jail sentence for what is in essence a licensing offence, a sentence of three years goes well beyond what could be justified for such an offence under any penal theory. A three-year penitentiary sentence is grossly disproportionate to the severity of the offence described in my reasonable hypothetical.

[170] A comparison of the mandatory minimum required in s. 95 with the sentences available for related crimes, another factor identified as relevant in the gross disproportionality analysis, confirms my view that the three-year mandatory minimum is grossly disproportionate. I will consider ss. 92 and 93. Both

provisions apply to all firearms, including prohibited and restricted firearms, and both provisions describe offences that are very similar to the offence set out in s. 95.

[171] Section 92 creates an offence that applies to anyone who is in possession of a prohibited or restricted firearm "knowing that the person is not a holder" of a licence or registration certificate. As I read the offence described in s. 92, it applies to offenders who, to their knowledge, have no licence or registration certificate referable to the firearm. Section 92 does not require that the firearm be loaded or that useable ammunition be readily available.

[172] Section 92 carries no minimum penalty for a first offence. There are minimum penalties for second (one year) and subsequent (two years less one day) offences.

[173] The offence described in s. 93 applies in circumstances that are very similar to the facts of my reasonable hypothetical. Section 93 applies to a person who has a licence for a restricted or prohibited firearm, but has possession of that weapon at a place not authorized under the licence. Section 93, unlike s. 95, does not require that the firearm be loaded or that ammunition be readily available.[20]

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[20] Section 93 is also distinguishable from s. 95 in that the onus is on the accused to show that he or she is the holder of a licence or authorization under s. 93: see *Criminal Code*, s. 117.11.

[174] Section 93, like s. 95, is a hybrid offence. If the Crown proceeds by indictment, the maximum penalty is five years. There is no minimum penalty under s. 93 regardless of whether the Crown proceeds by indictment or summarily.

[175] The relatively minor distinctions between the conduct addressed in ss. 92 and 93, and the conduct in s. 95 does not explain the vast differences in the range of penalties available for the offences and, in particular, the three-year starting point for a s. 95 offence. I stress, again, that s. 95 does not require that the firearm be loaded or that the person in possession of the firearm have any intention of loading the firearm. The presence of useable ammunition stored in a nearby drawer strikes me as a totally inadequate basis upon which to move from an offence under ss. 92 or 93 carrying no minimum penalty to one demanding a three-year penitentiary term.

[176] I do not propose to address the other factors relevant to the gross disproportionality analysis. In my view, the cavernous disconnect between the severity of the offence as described in my reasonable hypothetical and a three-year penitentiary sentence is determinative of the s. 12 analysis. The severity of the s. 95 minimum when compared to the range of sentences available for similar offences serves to confirm my conclusion. Even taking into account factors such as parole that would mitigate the effect of the three-year sentence, I remain convinced that it is grossly disproportionate in the reasonable hypothetical I have

drawn. The three-year mandatory minimum upon conviction for a s. 95(1) offence constitutes cruel and unusual punishment.

(vi) The Application of Section 1 to the Section 12 Breach

[177] All rights and freedoms guaranteed by the *Charter* are subject to the limitation in s. 1:

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

[178] The format of the s. 1 analysis is well known: *e.g.* see *Smickle* (reasons of Molloy J.), at paras. 97-123. I do not propose to go through the steps of that analysis. Given the very high bar set for a finding that a sentence constitutes cruel and unusual punishment, I find it very difficult to imagine how a sentence that clears that high bar could ever qualify as a reasonable limit demonstrably justified in a free and democratic society.

[179] In essence, s. 1 permits what would otherwise be infringements of individual constitutional rights where the societal benefits flowing from the state action that infringes individual rights can "demonstrably" justify that infringement. In my view, the basic *quid pro quo* underlying s. 1 does not exist where the state imposes punishment that is "so excessive as to outrage standards of decency" and so disproportionate as to be "abhorrent or intolerable" to Canadians:

Ferguson, at para. 14. What possible societal benefit could render such punishment “demonstrably justified in a free and democratic society?”

[180] No system of criminal justice that would resort to punishments that “outrage standards of decency” in the name of furthering the goals of deterrence and denunciation could ever hope to maintain the respect and support of its citizenry. Similarly, no system of criminal justice that would make exposure to a draconian mandatory minimum penalty, the cost an accused must pay to go to trial on the merits of the charge, could pretend to have any fidelity to the search for the truth in the criminal justice system.

[181] If an argument can be made that could justify sheltering a sentence that amounted to cruel and unusual punishment under s. 1, I have not heard it. The mandatory minimum penalty of three years imposed under s. 95(2)(a) cannot be saved by s. 1.

IV

THE SECTION 15 CHALLENGE

[182] I agree with the analysis and conclusion of the trial judge, at paras. 74-82. There is no breach of s. 15.

V

THE SECTION 7 CHALLENGE

[183] Unlike the ss. 12 and 15 challenges, the s. 7 challenge does not take issue directly with the mandatory minimum penalty. Rather, it challenges the gap in the sentencing provisions in s. 95(2). As outlined above, if the Crown proceeds by indictment, an accused is liable to a three-year minimum penalty (s. 95(2)(a)). If the Crown proceeds summarily, the accused is liable to a one-year maximum penalty (s. 95(2)(b)). Consequently, regardless of how the Crown proceeds, an accused cannot receive a jail sentence of between one year plus one day and three years less one day. The trial judge focused on this gap in his s. 7 analysis.

[184] Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

A: THE REASONS OF THE TRIAL JUDGE

[185] At para. 123, the trial judge first considered and rejected the submission that a scheme which creates a mandatory minimum penalty dependent upon the Crown election violated s. 7 of the *Charter*. He then went on to hold that the two-year sentencing gap created by the provisions in s. 95(2) did contravene s. 7. He opined that the two-year gap rendered s. 95(2) an arbitrary limitation on the liberty of persons charged under s. 95. The trial judge said, at para. 131:

> I am satisfied that the two year "gap" is inconsistent with the true legislative purposes that underlie s. 95. It severely restricts the flexibility of hybrid procedures, it will inevitably lead to unfit sentences in the low and mid-range of s. 95 cases, and it puts the three-year mandatory minimum sentence, when proceeding by indictment, at constitutional risk. These are all irrational purposes and effects. There is simply no clear connection between the legislative goal of the 2008 reforms and the two year "gap" in the sentencing scheme. It appears to have been a mere legislative oversight, which Parliament would quickly have corrected by raising the summary conviction maximum sentence to three years, had the oversight been pointed out.

[186] The trial judge identified s. 95(2)(b), the provision which limited the maximum penalty to one year where the Crown proceeded summarily, as the constitutionally offensive part of s. 95(2). In his view, however, the appellant had no standing to challenge s. 95(2)(b) as the Crown would not have proceeded summarily against the appellant regardless of the maximum penalty available on a summary conviction proceeding. As the appellant had no standing to raise the challenge, the trial judge dismissed the s. 7 claim.

[187] I do not understand the Crown to support the trial judge's standing analysis. As I am satisfied that the two-year gap referred to by the trial judge does not infringe s. 7, I propose to address the merits of the s. 7 argument and to assume that the appellant has the necessary standing to raise the argument.

B. THE ARGUMENTS ON APPEAL

[188] There are two s. 7 arguments raised on appeal. One relies on the trial judge's analysis and focuses on the two-year gap in the sentencing options available, depending on whether the Crown proceeds summarily or by indictment. The other s. 7 argument contends that the s. 95 scheme is unconstitutional because it gives the Crown the power to decide that the s. 95 charge will proceed by indictment, thereby bringing into play a mandatory minimum penalty. This argument was most forcefully put forward by the Advocates' Society, one of the interveners. I will address this argument first.

(i) Is a mandatory minimum triggered by the Crown's decision to proceed by indictment contrary to s. 7?

[189] Counsel for the Advocates' Society submits that legislation that combines the creation of a hybrid offence with a minimum penalty applicable if the Crown proceeds by indictment is contrary to s. 7 and must be "struck down" under s. 52. Counsel submits that the scheme created by s. 95 offends s. 7 of the *Charter*, first, because it does not require the Crown to explain or justify its election to proceed by indictment in a public and transparent manner and, second, because it allows the Crown, by electing to proceed by indictment, to "substantially determine", "dictate", and "choose" the sentence to be imposed.

[190] I would reject both submissions. The exercise of Crown discretion throughout the criminal process, including the choice of the mode of trial where Parliament provides that an offence is punishable by indictment or summarily, is a longstanding and essential component of the fair and efficient operation of the criminal justice system: see *R. v. Beare; R. v. Higgins*, [1988] 2 S.C.R. 387, at p. 411; and *R. v. Smythe*, [1971] S.C.R. 680, at pp. 685-86.

[191] In exercising prosecutorial discretion in matters like the decision to proceed to trial, or the choice of mode of trial, the Crown must act independently, including independently of judicial influence and oversight. As explained in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 32:

> The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. *To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution.* Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added.]

[192] The submission that the Crown is constitutionally required to explain or justify its election as to the mode of trial to a judge implies some form of judicial oversight over the exercise of that discretion. Any such oversight could only blur the important and constitutionally fundamental distinction between the role of the

prosecutor and the role of the judiciary and potentially undermine the independence of both: *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at p. 761.

[193] The argument that the Crown determines the sentence to be imposed when it elects to proceed by indictment in the face of a mandatory minimum misses the distinction between Crown decisions that affect the sentence ultimately imposed and Parliament's determination as to the range of sentences that will be available to a trial judge. Several decisions made by the Crown will influence the range of sentence available to the trial judge and the ultimate sentence imposed by the trial judge. For example, a prosecutor's determination as to which charge to prosecute, the mode of procedure to be followed, and the aggravating factors to be proved on sentencing, may all have a significant influence on the ultimate sentence imposed by the trial judge. In exercising his or her prosecutorial discretion, however, the Crown does not "dictate" or "choose" the sentence to be imposed. Parliament determines the range of sentences available to the trial judge.

[194] This court addressed and rejected this very argument in *Gill*, at para. 49. In *Gill*, the appellant challenged a mandatory minimum sentence triggered by the Crown's decision on sentencing to prove a prior conviction for the same offence. It was argued that in exercising this discretion, the Crown effectively pre-empted the trial judge's sentencing discretion. This court said:

> The Crown is no more limiting the sentencing discretion of a trial judge when it chooses to prove the notice under s. 727 than it is when it chooses to prove the use of a firearm in the commission of certain offences; chooses to charge an offence that attracts a minimum penalty; or *chooses to proceed by indictment when that procedure attracts a greater minimum penalty. In each instance, it can be said that the Crown's action limits the sentencing judge's discretion in the sense that, but for the Crown's actions, a minimum penalty would not apply. The exercise of the Crown's discretion, however, has the effect of limiting the judge's sentencing discretion because of the statutory provisions enacted by Parliament. It is those provisions that limit the trial judge's sentencing discretion.* As the Supreme Court of Canada made clear in *Ferguson* and again in *Nasogaluak* [citations omitted], unless minimum penalties are unconstitutional, judges must accept them and impose sentences that fall within the range fixed by Parliament. [Emphasis added.]

[195] In holding that s. 95 does not contravene s. 7 because it combines a hybrid procedure with a mandatory minimum penalty if the Crown proceeds by indictment, I do not suggest that the Crown's election as to the mode of proceeding is beyond *Charter* review. The Crown's election to proceed by indictment in a given case will impact on the accused's liberty interest and can be challenged as a breach of s. 7. The accused may seek a case-specific remedy under s. 24(1) of the *Charter*.

[196] The scope of review on a s. 7 challenge will necessarily be circumscribed by the need to maintain the constitutionally rooted distinction between the prosecutorial and judicial roles in the criminal justice system. That distinction,

itself a principle of fundamental justice, must inform any s. 7 claim challenging the exercise of prosecutorial discretion: see *Gill*, at para. 57; and *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 27.

(ii) Does the two-year gap make section 95 arbitrary?

[197] Legislation that limits an individual's liberty in an arbitrary manner is contrary to the principles of fundamental justice and infringes s. 7 of the *Charter*. A law is arbitrary for the purposes of s. 7 if the effect of the challenged law bears no relation to, or is inconsistent with, the legislative objective of the challenged law: see *Bedford v. Canada*, 2012 ONCA 186, 282 C.C.C. (3d) 1, at paras. 145-47, leave to appeal to S.C.C. granted October 25, 2012: [2012] S.C.C.A. No. 159.

[198] An assessment of the merits of an arbitrariness claim must begin with a clear understanding of the objective or purpose animating the impugned legislation. As explained earlier in these reasons, s. 95 is part of a package of legislation presented by various governments over the last 20 years in response to the very real and increasing societal danger posed by the proliferation of illegal firearms and the escalation of gun-related violence and other criminal activity. Parliament's response to this pressing societal concern has included an expansion of the reach of the criminal law and the creation of sentencing ranges for firearm-related offences that place a premium on deterrence and

denunciation. Punitive, mandatory minimum penalties have become a central feature of sentencing for gun-related crimes. The certainty of severe punishment for those convicted of gun-related crimes, such as s. 95 offences, is intended to maximize deterrence and denunciation. In short, s. 95, with its three-year mandatory minimum in particular, has as its objectives the deterrence and denunciation of gun-related criminal activity and the incapacitation of those who engage in that activity.

[199] Parliament's decision to make s. 95 a hybrid offence, punishable by a maximum of one year if the Crown proceeds summarily, tends to diminish or undermine the deterrence/denunciation objective of s. 95 in that it reduces the certainty of significant punishment upon conviction. However, no one suggests that Parliament has offended any constitutional provision by creating a summary proceeding "safety valve" for those s. 95 cases in which a three-year penalty would be clearly unwarranted. In providing the summary proceedings option, Parliament no doubt recognized that given the very wide net cast by s. 95, there would be some cases where the imposition of a three-year sentence in the name of deterrence and denunciation would be entirely inappropriate and unnecessary.

[200] The appellant submits, relying on the trial judge's reasons, that once Parliament decided that a summary proceeding was an appropriate option for some s. 95 prosecutions, Parliament was constitutionally required to frame that option in a manner that provided for the potential imposition of the full range of

sentencing options up to the three-year minimum imposed if the Crown proceeded by indictment. I do not agree. Parliament decided that despite the need to stress deterrence and denunciation in the vast majority of s. 95 prosecutions, there were some s. 95 prosecutions where those factors could not justify a mandatory minimum. Parliament identified those cases as those in which a sentence of up to one year would be appropriate. By framing the summary proceeding option as it did, Parliament clearly sought to ensure that the vast majority of s. 95 offences would be prosecuted by indictment and would attract the certainty of a three-year minimum sentence. That certainty served the denunciatory and deterrence goals of the provision. By framing the summary proceeding option narrowly, Parliament sought to minimize the dilution of the denunciation/deterrence message. In my view, a limited summary proceeding option is entirely consistent with the purpose of s. 95.

[201] I agree with the trial judge who observed, at para. 131, that by providing for a maximum of one year if the Crown proceeds summarily, Parliament had “severely restrict[ed] the flexibility of hybrid procedures”. However, in my view, that restriction is not arbitrary in the constitutional sense, but is instead consistent with the deterrence and denunciation objectives of s. 95. The more narrow the summary proceeding option, the stronger the deterrence/denunciation message.

[202] I also agree with the trial judge that the scheme in s. 95(2) inevitably means that some persons will receive “unfit” sentences. Persons who under the

generally applicable sentencing provisions might have received sentences of between one and three years, will receive sentences of three years if the Crown proceeds by indictment. I do not see this as any evidence that the section acts arbitrarily. Mandatory minimums inevitably mean that some offenders will receive sentences that would be considered unfit using generally applicable sentencing principles. Those potentially unfit sentences become a constitutional problem only if the unfitness reaches the level of gross disproportionality.

[203] Nor, in my view, does the risk that the Crown will elect to proceed summarily in a case deserving a sentence of more than one year raise a s. 7 problem. The imposition of a shorter sentence than the offender deserved strikes me as a strange infringement on that offender's liberty.

[204] In summary, in making s. 95 a hybrid offence punishable by a maximum of one year if the Crown proceeds summarily, Parliament sought to provide an appropriate procedure for those few s. 95 cases where the circumstances do not warrant pursuing the goals of deterrence and denunciation through the imposition of at least a three-year jail term. In framing the summary proceeding option as it did, Parliament sought to limit the option to cases where the appropriate penalty was clearly well below the three-year minimum provided in indictable proceedings. By limiting the summary conviction option, Parliament further emphasized the objective of s. 95: the deterrence and denunciation of gun-related criminal activity.

VI

CONCLUSION

[205] I have found that the three-year minimum penalty imposed by s. 95 is unconstitutional because, as I understand the reasonable hypothetical methodology, the constitutionality of the minimum penalty must be measured against a hypothetical at what I have called the regulatory end of the s. 95 spectrum. Having concluded that the mandatory minimum offends s. 12, s. 52 of the *Constitution Act, 1982* demands that the section be held to be "of no force or effect". My analysis, of course, leaves untouched the 10-year maximum penalty under s. 95(2)(a).

[206] Nor do my reasons have any significant impact on the determination of the appropriate sentence for those s. 95 offences at what I have described as the true crime end of the s. 95 spectrum. Individuals who have loaded restricted or prohibited firearms that they have no business possessing anywhere or at any time, and who are engaged in criminal conduct or conduct that poses a danger to others should continue to receive exemplary sentences that will emphasize deterrence and denunciation. Thus, as outlined earlier, and regardless of the three-year minimum penalty, this appellant, despite the mitigating factors, could well have received a sentence of three years.

[207] For the reasons set out above, I would declare s. 95(2)(a)(i) of no force or effect to the extent that it imposes a mandatory three-year minimum term of imprisonment when the Crown proceeds by indictment.

[208] As the trial judge effectively imposed a sentence of time served, there is no reason to alter that disposition. I would, therefore, affirm the sentence imposed by the trial judge.

Released: “DD” NOV 12 2013”

“Doherty J.A.”
“I agree S.T. Goudge J.A.”
“I agree E.A. Cronk J.A.”
“I agree R.A. Blair J.A.”
“I agree M. Tulloch J.A.”