Constitutional Challenges to Mandatory Minimum Sentences after *Nur* and *Anderson*

M.A. Code J.

[1] One of the responses of the bar to the recent increase in mandatory minimum sentences, throughout the *Criminal Code*, has been to launch various *Charter of Rights* attacks on the legislation. These *Charter* challenges have utilized the traditional "cruel and unusual treatment or punishment" vehicle, found in s. 12, but they have also engaged the s. 7 "fundamental justice" power. In both areas, there have been a number of new and important developments which I will summarize.

(i) Developments under section 12 "cruel and unusual treatment or punishment"

[2] The recent release of four Ontario Court of Appeal decisions, striking down s. 95 mandatory minimum sentences for possession of a loaded handgun, has breathed new life into s. 12 *Charter* challenges. Historically, s. 12 of the *Charter* had not been a particularly successful means of attacking mandatory minimum sentences. Indeed, only one case (*R. v. Smith* (1987), 34 C.C.C. (3d) 97 (S.C.C.)) had ever succeeded in using s. 12 to strike down a mandatory minimum sentence. Accordingly, these four recent Ontario decisions can be seen as a breakthrough in the jurisprudence under s. 12.

- *R. v. Nur*, 2013 ONCA 677.
- *R. v. Charles*, 2013 ONCA 681
- *R. v. Smickle*, 2013 ONCA 678.
- *R. v. Chambers*, 2013 ONCA 680.

[3] The Supreme Court of Canada's traditional and binding two step approach to "cruel and unusual treatment or punishment" under s. 12 of the *Charter* has not changed: first, you must analyse whether the minimum sentence results in "gross disproportionality" for this particular accused; and second, you must analyse whether the minimum sentence results in "gross disproportionality" in any "reasonable hypothetical" case. What is new in the four recent Ontario cases is the application of the second stage of this analysis to hybrid offences. None of the earlier case law had addressed this issue because the prior cases were either straight indictable or straight summary offences. In particular, the Court of Appeal's approach to this new issue allows for hypotheticals where the Crown should proceed summarily (in which case there generally would be no mandatory minimum) but where the Crown simply does not have all the relevant facts at the time of making their election or where the Crown simply makes what turns out to be the wrong election. See: *R. v. Nur*, *supra* at paras. 147-163, where the Court adopted the hypothetical of an accused who is licensed to possess a handgun, and has registered the handgun, but commits the s. 95 offence simply by breaching the terms of his license (e.g. by storing the gun at an unauthorized location). The Court appeared to accept that the Crown would normally proceed summarily on these facts but, in this hypothetical, the Crown proceeds by indictment because all the mitigating or less aggravating facts that eventually emerge at trial were simply not known to the Crown, when the initial election was made. The Court did not mention whether the Crown would or should exercise its common law power to re-elect, once the true facts eventually became known, when fashioning this hypothetical. See: *R. v D.M.E.*, 2014 ONCA 496 at paras. 32-45.

[4] Applying this reasoning to other hybrid offences with mandatory minimum sentences could give rise to future s. 12 *Charter* challenges. For example, s. 271(a)

provides that sexual assault of a complainant under age sixteen carries a one year mandatory minimum, on indictment. A *Charter* litigant could now arguably hypothesize a case where the Crown should proceed summarily as the basis for a s. 12 challenge to the minimum sentence (e.g. a case involving brief external touching over clothing, a fifteen year-old complainant, and no repetition and no threats). Section 151 sexual interference, s. 152 invitation to sexual touching, and s. 153 sexual exploitation are similar hybrid offences that provide for a mandatory one year minimum on indictment.

[5] While the four recent Ontario Court of Appeal decisions give renewed scope to s. 12 *Charter* challenges to sentencing legislation, they do not appear to change much in terms of the actual length of s. 95 sentences. For example, in *R. v. Charles*, a seven year sentence was upheld for a s. 95 recidivist, without resort to the five year minimum. In *R. v. Chambers*, an eight year total sentence was upheld for a recidivist, including six years for the s. 95 offence and one year consecutive sentences for each of two s. 109 breaches of prior prohibition orders. In other words, sentences well over the 5 year minimum were imposed in both cases, thus suggesting that the judiciary has independently arrived at a range of sentence that is well above the "inflationary floor" established by the new statutory minimum, at least in the case of recidivists. However, there is some new flexibility for young first offenders. Both *R. v. Smickle*, *supra* at para. 30 and *R. v. Nur*, *supra* at paras. 104-109 hold that two years less a day to three years is the appropriate range of sentence in such cases, absent any 3 year mandatory minimum, and that young first offenders can be situated at the bottom end of that range, even where there are some aggravating features. This should provide renewed scope for resolution discussions in these cases, given that the "inflationary floor" of the statutory 3 year minimum has been removed and

is no longer the starting reference point. See: *R. v. Delchev*, 2014 ONCA 448 at paras. 18-20.

[6] One other significant recent decision in this area is a Manitoba case involving an accused with significant mental impairment issues. In that case, the Court struck down the mandatory minimum for s. 95 offences under the first branch of s. 12 *Charter* analysis, that is, the Court held that the three year minimum was "grossly disproportionate" for this particular accused. The Court imposed a sentence of 6 months imprisonment followed by probation. See: *R. v. Adamo*, 2013 MBQB 225. This case is a useful reminder to counsel and the Courts, that you do not always need to reach the more complex "reasonable hypothetical" second stage of s. 12 analysis, if you have a particularly sympathetic set of facts in your own individual case (unlike the four recent Ontario cases that all turned on the second stage of analysis). It is also a reminder to the Crown to be sure to proceed summarily in these kinds of sympathetic cases, so as not to risk a s. 12 *Charter* challenge to the legislation. Alternatively, judges conducting judicial pre-trials (and trials) can remind the Crown of their ability to re-elect, pursuant to the powers discussed in *R. v. D.M.E.*, once the sympathetic facts become known and the prospect of a *Charter* challenge to the legislation becomes apparent.

(ii) Developments under section 7 "fundamental justice"

[7] In a recent judgment dealing with the sentencing of two Aboriginal accused, the Supreme Court of Canada suggested somewhat tentatively that "proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*".

- *R. v. Ipeelee* (2012), 280 C.C.C. (3d) 265 at paras. 36-39 (S.C.C.).

[8] In a subsequent unanimous judgment, dealing with the Crown's discretion when giving notice under ss. 255(1) and 727(1) of the *Code* that a greater sentence will be sought, the Court stated definitively that "proportionality is the *sine qua non* of a just sanction and a principle of fundamental justice" and that a disproportionate sentence "breaches both the judge's statutory obligations, under ss. 718.1 and 718.2 of the *Code*, and the principle of fundamental justice that sentences be proportionate". The Court held that the Crown's discretion, when giving notices that have the effect of introducing a mandatory minimum sentence, was not subject to the "proportionality" principle but that the judge's power to impose sentence was controlled by this s. 7 requirement. More importantly, for purposes of the present topic, the Court stated:

> "If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged."
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> - *R. v Anderson*, 2014 SCC 41 at paras. 21-25.

[9] The exact impact of *R. v. Anderson*, as introducing a potential new *Charter* vehicle for challenging mandatory minimum sentences, has yet to be determined. The further appeal in *R. v. Nur* was heard in late November 2014 and judgment was reserved. That judgment will likely clarify whether s. 7 of the *Charter*, in addition to s. 12 of the *Charter*, is now available as a means of constitutionally challenging mandatory minimum sentences. A number of questions emerge from the interplay between s. 7 and s. 12, in this context, including the following:

- If the s. 7 requirement is simply "proportionality", as codified in s. 718.1, then what remains of the apparently more exigent s. 12 "gross disproportionality" test? The "gross disproportionality" standard was deliberately developed by the Court as a "stringent and demanding"

test, in the s. 12 context, in order to accord deference to Parliament in this area and in recognition of the text used in s. 12 ("cruel and unusual"). The s. 7 "proportionality" standard would appear to be different.

- *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385 at para. 80

- If the Crown's election to give notice of a greater mandatory minimum punishment is not subject to the s. 7 "proportionality" requirement and is only subject to review on the basis of "abuse of process", as *Anderson* holds, then should the Crown's election to proceed by indictment in the hypothetical case utilized in the s. 12 argument in *Nur*, be subject to the same analysis? In other words, if the Crown's election to proceed by indictment in *Nur*, pursuant to its statutory powers, produces a disproportionate and unconstitutional mandatory minimum sentence, *Anderson* could be read as suggesting that it is the judge's duty to refuse to impose that disproportionate sentence in that particular case (as a s. 7 and s. 24(1) remedy), rather than resorting to s. 52 and s. 12 to strike down the entire sentencing regime for a hybrid offence that merely gives the Crown a similar statutory discretion which the Crown is entitled to utilize without regard to s. 7 "proportionality". This might be a way of avoiding all of the difficulties associated with the "reasonable hypothetical" analysis under s. 12, in the context of hybrid offences, but it would require a substantial reconsideration of the old s. 12 case law in this new context.

- Finally, if "proportionality" in sentencing is now an established s. 7 "principle of fundamental justice", what other statutory powers relating

> to the sentencing process interfere with this principle, short of imposing mandatory minimums, and are therefore vulnerable to constitutional attack? The Ontario Court of Appeal recently struck down s. 719(3.1) of the *Code* on this basis. That is the provision that denies enhanced credit for pre-trial custody in cases where the accused has been denied bail "primarily because of a previous conviction" and where the justice has so endorsed the record at the bail hearing.
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> - *R. v Safarzadeh-Markhali*, 2014 ONCA 627

[10] I leave these difficult questions for you to consider, in the reasonable certainty that answers will emerge in the inevitable *Charter* litigation that will ensue in the coming years.

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