SCC File No.: 35678

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE ONTARIO COURT OF APPEAL)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

and

ATTORNEY GENERAL OF CANADA

Appellant

and

HUSSEIN JAMA NUR

Respondent

and

THE ADVOCATES' SOCIETY, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, PIVOT LEGAL SOCIETY, JOHN HOWARD SOCIETY OF CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN BAR ASSOCIATION, CANADA'S NATIONAL FIREARMS ASSOCIATION, CANADIAN ASSOCIATION FOR COMMUNITY LIVING, AFRICAN CANADIAN LEGAL CLINIC

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Interveners

FACTUM OF THE INTERVENER
THE ADVOCATES' SOCIETY

PART I – OVERVIEW

1. The Advocates' Society will limit its submissions to the relationship between mandatory sentencing regimes and s.7 of the *Charter of Rights and Freedoms* (*Charter*).[1] The Society respectfully submits that the impugned provisions frustrate access to justice, are inconsistent with the fundamental values underlying s.7 of the *Charter* and, accordingly, are of no force and effect.

[1] The parties and other interveners will address the Court with respect to compliance with s.12 of the *Charter*.

PART II – QUESTIONS IN ISSUE

2. In answer to Questions 3 and 4[2] as stated by The Honourable Chief Justice, The Society respectfully submits that the sentencing regime created by s.95 (1) to (3) of the *Code* is inconsistent with s.7 of the *Charter* and, accordingly, is unconstitutional.[3] In particular, the impugned provisions fail to respect and maintain the following core constitutional values:

a) the right to an individualized sentence, which is the product of the application of sentencing principles to an offender's background and particular criminal conduct;

b) the right to participate in the process that determines the sentence imposed;

c) the right to be sentenced in an open hearing by an independent, impartial tribunal.

The Society takes no position on the disposition of this matter.

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[2] 3. Does s.95 (2) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s.7 of the *Canadian Charter of Rights and Freedoms*; 4. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s.1 of the *Canadian Charter of Rights and Freedoms*?

[3] There is no issue that s.7 is engaged in this matter. See *R v Nur,* 2013 ONCA 677, at para. 61.

PART III - ARGUMENT

A) The Principles of Fundamental Justice Include the Right to an Individualized Sentence

3. Sentencing is an inherently individualized process. This is a cornerstone of our criminal justice system. The appropriateness of a sentence depends on the particular circumstances of the offence, the offender, and the community in which the offence took place. [4] Put slightly differently, one should do the time for the crime they *actually* commit. Any mandatory sentencing regime that metes out a jail sentence without regard to the offender's antecedents and criminal conduct will, by its very nature, allow unjust sentences to be imposed.

4. Jailing a person is the most significant deprivation of liberty the State can impose. Consequently, everything about the c*ontinuum* in the criminal process is tailored to determining an individual's responsibility for a specific alleged criminal narrative said to support a criminal conviction. It is a highly idiosyncratic and contextual exercise. Guilt is related directly to an individual's conduct. So too must be the sentence. No two offenders are the same, regardless of whether the issue is guilt or sentence. There are variances across offenders; these include the narrative of the criminal conduct, the offender's background, as well as a myriad of other circumstances that a criminal trial will reveal. At a minimum, fundamental justice has as its focus the determination of an *individual's* guilt and sentence. This is apparent when one considers that in arriving at a just sentence, Courts apply the principles of sentencing[5] to specific factual findings about the offence and the offender. These principles are discernable, foundational and, by their application, form the basis upon which our Courts deprive offenders of their liberty. Viewed in this light, individualized sentencing is part of the fabric of fundamental justice.

5. The provisions at issue compromise the individualization of the sentencing process by determining that all offenders will be subjected to a minimum period of incarceration,

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[4] *R v CAM*, [1996] 1 S.C.R. 500 at para. 92; *R v Gladue,* [1999] 1 SCR 688 at paras. 75-76.
[5] Found in s.718 of the *Criminal Code*

regardless of their conduct. These submissions are not directed at the proportionality or quantum of the sentence, which is an issue for s. 12 of the Charter. Rather, we submit that the insensitivity of mandatory sentences to the particular facts regarding an offender's criminal conduct, history and prospects for rehabilitation runs afoul of s.7 of the *Charter*. One is responsible for his or her own actions, not the actions of a "class" of offenders. With respect, a mandatory minimum sentence fails to respect this principle and, therefore, fails to respect the individual and frustrates access to justice.

B) The Impugned Provisions Deprive the Offender of the Right to Participate in a Meaningful Judicial Process

6. It is an overarching principle of fundamental justice that no person shall lose his or her liberty without a meaningful judicial process.[6]

7. The greater the effect on the life of an individual by the decision the greater the need for procedural protection to meet the common law duty of fairness and the requirements of fundamental justice. [7]

8. Furthermore, persons accused of committing a crime have the right to participate in the process by which their liberty may be restricted or will be determined; this includes the right to participate in the sentencing process.[8] Meaningful access to justice requires that offenders participate in the process that determines whether they will be deprived of liberty by a jail sentence. Section 7 guarantees to offenders, whose liberty is at stake, the right to know the case and the right to answer the case. Participatory rights, such as receiving disclosure, attending at a hearing, making submissions and calling evidence, are the means by which one answers the case. [9] In the security certificate context, this

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[6] *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 at paras. 28-29, hereinafter referred to as *Charkaoui*.
[7] *Harkat (Re)*, [2012] 3 FCR 432 at para. 83; and *Suresh v Canada (Citizenship and Immigration)*, [2002] SCJ No 3, at para. 118
[8] For example, where the Crown seeks to rely upon contested aggravating facts on sentencing the offender is entitled to a *Gardiner* hearing. See *R v Gardiner,* (1982) 68 CCC (2d) 477 (SCC).
[9] *Supra* note 6, *Charkaoui* at paras. 28-29

Honourable Court has regarded the special advocate regime as a means to vindicate participatory rights.[10]

9. By enacting the statutory scheme at issue, Parliament has removed the determination of the appropriateness of jail for any given offender from the public criminal trial process to the Crown Attorney's private office. If the Crown Attorney elects to proceed summarily, the court decides, in an open and public hearing in which the offender is entitled to participate, whether the offender will be incarcerated. If she elects to proceed by indictment, the offender must be jailed for at least three years.

10. Mandatory jail sentences pre-ordained by Parliament through the Crown's election eviscerate an offender's ability to participate in the process that will determine whether he will be deprived of his liberty.[11] There is no hearing in which the appropriateness of jail is 'on the table', so there can be no participation by the individual affected. This is inconsistent with s.7 of the *Charter*.

C) The Impugned Provisions Deny an Offender the Right to be Sentenced by an Independent, Impartial Tribunal in a Public Hearing

11. As Sir James Fitzjames Stephen said, in words endorsed by this Court, "the sentence is the gist of the proceeding. It is to the trial what the bullet is to the powder." [12]

12. Where mandatory jail sentences are imposed by Parliament, the Court is removed from the "gist of the proceeding" – determining whether jail is appropriate. Parliament's choice to divest the Court of this key aspect of sentencing is inconsistent with the right to be tried[13] by an independent, impartial tribunal.

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[10] *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para. 60.
[11] The Society's position is that mandatory minimums which require licence suspension do not attract the same individualization and participatory concerns as does a mandatory minimum, such as s.95, which attracts a minimum period of incarceration and so a loss of liberty.
[12] *R v Gardiner*, (1982) 68 CCC (2d) 477 at 513 quoting Olah, Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97, at p. 98), hereinafter referred to as *Gardiner*.
[13] The Society argues that this includes sentencing, as it is an integral part of the trial, see *supra* note 12, *Gardiner*, at 513.

13. Parliament has empowered Crown counsel, rather than the Court, with the power to deprive an offender of his or her liberty. The Crown Attorney has no obligation to justify her election decision, even though this decision determines whether an offender will be jailed. There is no meaningful avenue of review of that decision, unless abuse of process can be established.[14]

14. The Crown Attorney is neither independent nor impartial. He is a partisan litigant in the proceedings and a "strong advocate within [the] adversarial process".[15] Section 95 replaces a public hearing before an independent and impartial tribunal with the decision of a Crown Attorney, made in secret, who is acting in an adversarial role to the accused.[16] The trouble is compounded when the Crown's exercise of its prosecutorial discretion may only be reviewed for abuse of process.

D) Section 1

15. Violations of s.7 are not easily saved by s.1, and legislation can rarely be justified if found contrary to s.7. Only in exceptional conditions such as "natural disasters, the outbreak of war, epidemics" will s.1 be able to rescue a violation of s.7.[17] The Society submits that Parliament's initiative to deter and denounce the unlawful possession of prohibited and restricted firearms is not an "exceptional condition" warranting the rescue of a s.7 breach.

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[14] *R. v. Anderson,* 2014 SCC 41, at paras. 46 – 51. Moreover, as a practical matter it will be rare that one will be able to successfully argue that the Crown's exercise of discretion has resulted in an abuse of process.
[15] *R v Cook* (1997), 114 CCC (3d) 481 (SCC) at para. 21.
[16] A related casualty of mandatory minimum jail terms is the open court principle. As this Honourable Court observed in *Edmonton Journal v Alberta (Attorney General)*, [1989] SCJ No 124 at para. 5: "There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public." The public's ability to see the reasoning behind a particular sentence is paramount and decisions made in an open court reinforce public confidence in the administration of justice (see *R v Sheppard,* 2002 SCC 26, at para. 15). Secret considerations informing a Crown election undermine these policy goals.
[17] *BC Motor Vehicle Act,* [1985] 2 SCR 486 para. 83.

16. However, should the Court find that this is such an exceptional circumstance, the s.1 test requires that the legislation be directed to a pressing and substantial objective and employ a proportionate means to achieve that objective. Proportionality requires a means rationally connected to the objective, a minimal impairment of rights, and proportionality between the effects of the infringement and the importance of the objective.[18]

17. Section 95 hybrid sentencing does not minimally impair rights. Parliament could have chosen to create a rebuttable presumptive sentence of jail for s.95 offenders, which would have occasioned a minimal impairment. This approach would have satisfied society's concerns, expressed by Parliament, while also ultimately leaving it to the Courts to identify the circumstances in which there would be a departure from the 3-year minimum. As well, s.7 values would be respected and maintained by permitting participation, some modicum of individualization, and providing for a decision made after a public hearing by an independent tribunal. Also, this approach is sensitive to specific community concerns. Consider a s.95 conviction in a sparsely populated rural setting in Saskatchewan with a low incidence of gun crime, as compared to one in an inner city setting which is ravaged by gun violence. These two communities present differing contexts for sentencing and, arguably, differing approaches to the appropriateness of incarceration. A presumptive sentencing regime would have maintained the *Charter* values expressed in the previous paragraphs without compromising the public's desire for stricter sentencing.

E) Criticisms of The American Experience with Mandatory Minimums

18. With respect, we should heed the criticisms of American experience with mandatory minimum sentencing. American jurisdictions introduced sentencing guidelines and mandatory minimums in the late 1970s and 1980s. The American reforms reflected an attempt to achieve uniform sanctions and minimize socio-economic disparities, which may

[18] *R v Oakes*, [1986] 1 SCR 103 at para. 70.

have resulted from "unbridled judicial discretion".[19] However, commentators have criticized the reforms as overlooking the significance of a shift from judicial discretion to prosecutorial discretion in charging practices[20] - a "transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant is misguided".[21] American mandatory sentence reforms have resulted in less transparency and often disproportionately harsh sentences.[22]

19. Mr. Justice Kennedy[23] addressed the shift in discretion occasioned by mandatory minimums in his speech to the American Bar Association on August 9, 2003:

> … Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. *The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.*[24]

The American Bar Association's President identified the issues associated with this shift in an open letter to the Subcommittee on Crime, Terrorism and Homeland Security:

> … In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that it is prosecutors who sentence by the charging decisions they make, rather than judges imposing a sentence, taking into account all relevant factors regarding an offender and a charged offense. *Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and*

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[19] Terance D. Miethe*, Charging and Plea Bargaining Practices Under Determinate Sentencing: An investigation of the Hydraulic Displacement of Discretion*, 78 J. Crim. L. & Criminology 155 (1987-1988), at p. 156.
[20] *Ibid.*
[21] *American Bar Association Justice Kennedy Commission: Reports with Recommendations to the ABA House of Delegates*, August 2004, at pg. 3 (hereinafter referred to as *ABA Report*.)
[22] *Ibid*, at pg. 26-27: "Aside from the fact that mandatory minimums are inconsistent with the notion that sentences should consider all of the relevant circumstances of an offense by an offender, *they tend to shift sentencing discretion away from courts to prosecutors.* Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, *the judge has no discretion in most jurisdictions to impose a lower sentence*. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. *Although prosecutors have discretion throughout the criminal justice system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward."* [Emphasis added].
[23] Justice of the United States Supreme Court
[24] Mr. Justice Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting,* August 9, 2003 at pg. 2: http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03. [Emphasis added].

> *often appropriate information to properly consider a defendant's mitigating circumstances at the charging stage of a case*.[25]

PART IV - COSTS

20. The Society seeks no costs and asks that no costs be awarded against it.

[25] Karen J. Mathis, *American Bar Association open letter to the Subcommittee on Crime, Terrorism and Homeland Security re: Hearing on "Mandatory Minimum Sentencing Laws",* July 3, 2007, pg. 2 [Emphasis added].
http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_l.authcheckdam.pdf [Emphasis added].

PART V – ORDER SOUGHT

21. The Society takes no position on the ultimate disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 22nd day of October, 2014

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PART VI - TABLE OF AUTHORITIES

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PART VII - TABLE OF STATUTES

***Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11:**

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.

7. 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.

***Criminal Code*, SC 1985, c C-46, as amended:**

Possession of prohibited or restricted firearm with ammunition

95. (1) Subject to subsection (3), 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.

Punishment

(2) Every person who commits an offence under subsection (1)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, three years, and

(ii) in the case of a second or subsequent offence, five years; or

(*b*) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

Exception

(3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it.

R.S., 1985, c. C-46, s. 95; 1991, c. 28, s. 8, c. 40, ss. 9, 37; 1993, c. 25, s. 93; 1995, c. 39, s. 139; 2008, c. 6, s. 8; 2012, c. 6, s. 5(E).

Purpose and Principles of Sentencing

Purpose

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

R.S., 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6.