



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Ferguson, 2008 SCC 6

**DATE:** 20080229

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**BETWEEN:**

**Michael Esty Ferguson**

Appellant

v.

**Her Majesty the Queen**

Respondent

- and -

**Attorney General of Canada, Attorney General of Quebec, Attorney General of Ontario  
and Canadian Civil Liberties Association**

Interveners

**CORAM:** McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 75)

McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps,  
Fish, Abella, Charron and Rothstein JJ. concurring)

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**Indexed as: R. v. Ferguson**

**Neutral citation: 2008 SCC 6.**

File No.: 31692.

2007: November 13; 2008: February 29.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella,  
Charron and Rothstein JJ.

on appeal from the court of appeal for alberta

*Constitutional law — Charter of Rights — Cruel and unusual punishment — Detainee being held in cell at RCMP detachment shot by police officer during altercation — Police officer convicted of manslaughter committed with use of firearm — Criminal Code providing for mandatory minimum four-year sentence — Whether minimum sentence constitutes cruel and unusual punishment in circumstances of this case — If so, whether trial judge entitled to grant constitutional exemption from four-year minimum and impose lesser sentence — Constitution Act, 1982, s. 52 — Canadian Charter of Rights and Freedoms, ss. 12, 24(1) — Criminal Code, R.S.C. 1985, c. C-46, s. 236(a).*

*Constitutional law — Charter of Rights — Remedy — Constitutional exemption — Availability — Whether constitutional exemption under s. 24(1) of Canadian Charter of Rights and Freedoms available to accused as remedy in particular case where minimum sentence of imprisonment found to be cruel and unusual punishment contrary to s. 12 of Charter — Whether appropriate remedy is declaration pursuant to s. 52 of Constitution Act, 1982 that law imposing such punishment is inconsistent with Charter.*

During an altercation with a detainee held in a cell at an RCMP detachment, the accused, an RCMP officer, shot and killed the detainee. The accused was charged with second-degree murder but was convicted by a jury of the lesser offence of manslaughter. Notwithstanding the mandatory minimum sentence of four years imposed by a s. 236(a) of the *Criminal Code* for manslaughter with a firearm, the trial judge imposed a conditional sentence of two years less a day. He granted the accused a constitutional exemption from the four-year sentence because, on the circumstances of this case, he found that the minimum mandatory sentence constituted cruel and unusual

punishment in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*. The majority of the Court of Appeal overturned that sentence and held that the mandatory minimum must be imposed.

*Held:* The appeal should be dismissed.

There is no basis for concluding that the four-year minimum sentence prescribed by Parliament amounts to cruel and unusual punishment on the facts of this case. In the absence of any s. 12 violation, the trial judge's proper course in the circumstances was to apply the four-year minimum sentence. [29] [31]

The appropriateness of the minimum sentence of four years that Parliament has prescribed for the offence of manslaughter committed with the use of a firearm depends on what the jury concluded about the accused's conduct. The trial judge in this case was required to find facts consistent with the jury's manslaughter verdict, to the extent that this was necessary to enable him to sentence the accused. The sentencing inquiry was shaped by a four-year mandatory minimum sentence prescribed by s. 236(a) of the *Criminal Code* and the only issues were whether the sentence should be more than four years, or whether the facts of the case were such that a four-year sentence would be grossly disproportionate. The trial judge correctly concluded that on the basis of the jury's verdict, he must find facts consistent with the jury's rejection of both self-defence and intent for murder. On the basis of the jury's rejection of intent for murder, the trial judge then properly concluded that the jury had found that when he fired the second shot, the accused neither intended to cause death nor bodily harm that he knew was likely to cause death. The trial judge, however, erred when he went on to make detailed findings of fact on the accused's conduct and went beyond what was required to deal with the

sentencing issues before him. It was not open to him to attempt to reconstruct the logical process of the jury and, more critically, to develop a theory to support the jury's verdict which was not only speculative, but contrary to the evidence. When the erroneous findings of the trial judge are set aside, no basis remains for concluding that the four-year mandatory minimum sentence prescribed by Parliament constitutes cruel and unusual punishment on the facts of this case. [15] [19-21] [24] [28]

In any event, a constitutional exemption is not an appropriate remedy for a s. 12 violation. If the law imposing a minimum sentence is found to be unconstitutional on the facts of a particular case, it should be declared inconsistent with the *Charter* and hence of no force or effect under s. 52 of the *Constitution Act, 1982*. The arguments for a constitutional exemption under s. 24(1) of the *Charter* are outweighed and undermined by counter-considerations. First, while the availability of constitutional exemptions for mandatory minimum sentencing laws has not been conclusively decided, the weight of authority thus far is against them and sounds a cautionary note. Second, since Parliament's intention in passing mandatory minimum sentence laws is to remove judicial discretion to impose a sentence below the stipulated minimum, to allow courts to grant constitutional exemptions for mandatory minimum sentences would directly contradict Parliament's intent and represent an inappropriate intrusion into the legislative sphere. Third, it is apparent that s. 52(1) of the *Constitution Act, 1982* and s. 24(1) of the *Charter* serve different remedial purposes. Section 52(1) provides a remedy for laws that violate Charter rights either in purpose or in effect; s. 24(1), by contrast, provides a remedy for government acts that violate *Charter* rights. Fourth, constitutional exemptions for mandatory minimum sentence laws buy flexibility at the cost of undermining the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability. Allowing unconstitutional laws to remain on the books deprives Parliament

of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances. [40] [48] [52-56] [61] [67-69] [73-74]

## Cases Cited

**Referred to:** *R. v. Morrissey*, [2000] 2 S.C.R. 90, 2000 SCC 39; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Birchall* (2001), 158 C.C.C. (3d) 340, 2001 BCCA 356; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84; *R. v. Brown*, [1991] 2 S.C.R. 518; *R. v. Braun* (1995), 95 C.C.C. (3d) 443; *R. v. Fiqia* (1994), 162 A.R. 117; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71; *R. v. Thatcher*, [1987] 1 S.C.R. 652; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Kelly* (1990), 59 C.C.C. (3d) 497; *R. v. Madeley* (2002), 160 O.A.C. 346; *R. v. Desjardins* (1996), 182 N.B.R. (2d) 321; *R. v. McGillivray* (1991), 62 C.C.C. (3d) 407; *R. v. Netser* (1992), 70 C.C.C. (3d) 477; *R. v. Chief* (1989), 51 C.C.C. (3d) 265; *R. v. Kumar* (1993), 85 C.C.C. (3d) 417; *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332; *R. v. Chabot* (1992), 77 C.C.C. (3d) 371; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81; *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

## Statutes and Regulations Cited

*Canadian Charter of Rights and Freedoms*, ss. 1, 12, 24.

*Constitution Act, 1982*, s. 52.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 34(2), 220(a), 236(a), 718 to 718.2, 724(2), (3)(d), (e).

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APPEAL from a judgment of the Alberta Court of Appeal (Fruman, Paperny and O’Brien JJ.A.) (2006), 65 Alta. L.R. (4th) 44, 397 A.R. 1, 384 W.A.C. 1, 212 C.C.C. (3d) 161, 41 C.R. (6th) 97, 145 C.R.R. (2d) 309, [2006] 12 W.W.R. 1, [2006] A.J. No. 1150 (QL), 2006 CarswellAlta 1216, 2006 ABCA 261, varying the sentence imposed by Hawco J. (2004), 39 Alta. L.R. (4th) 166, 372 A.R. 309, [2005] 4 W.W.R. 737, [2004] A.J. No. 1535 (QL), 2004 CarswellAlta 1780, 2004 ABQB 928. Appeal dismissed.

*Noel C. O’Brien, Q.C.*, for the appellant.

*Richard A. Saull and Michael Conner*, for the respondent.

*Robert J. Frater and Nancy Dennison*, for the intervener the Attorney General of Canada.



*David Finley* and *Kimberley Crosbie*, for the intervener the Attorney General of Ontario.

*Jean-Vincent Lacroix* and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

*Andrew K. Lokan* and *Caroline V. Jones*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

The Chief Justice —

## I. Introduction

[1] This appeal raises two questions. First, does imposition of the four-year mandatory minimum sentence for manslaughter with a firearm constitute cruel and unusual punishment contrary to s. 12 of the *Canadian Charter of Rights and Freedoms* in the circumstances of this case? Second, can an offender who demonstrates that a mandatory minimum sentence would constitute cruel and unusual punishment in his case obtain a stand-alone constitutional exemption from the application of that minimum sentence?

[2] I conclude that the answer to both questions is no. On the facts of this case, the minimum sentence imposed by s. 236(a) of the *Criminal Code*, R.S.C. 1985, c.

C-46, is not grossly disproportionate and so does not constitute cruel and unusual punishment in violation of s. 12 of the *Charter*. In any event, a constitutional exemption is not an appropriate remedy for a s. 12 violation. If a minimum sentence is found to be unconstitutional on the facts of a particular case, the law imposing the sentence is inconsistent with the *Charter* and therefore falls under s. 52 of the *Constitution Act, 1982*.

## II. Facts and Procedural History

[3] This case arises out of the fatal shooting of Darren Varley by an RCMP officer, in the small town of Pincher Creek in southwestern Alberta, while he was being held in a cell at the RCMP detachment. The RCMP officer who shot Mr. Varley, Michael Esty Ferguson, was charged with second-degree murder but convicted by a jury of the lesser offence of manslaughter. The judge imposed a conditional sentence of two years less a day, notwithstanding the mandatory minimum sentence of four years imposed by s. 236(a) of the *Criminal Code* for manslaughter with a firearm ((2004), 39 Alta. L.R. (4th) 166, 2004 ABQB 928). The majority of the Alberta Court of Appeal overturned that sentence, and held that the mandatory minimum must be imposed ((2006), 65 Alta. L.R. (4th) 44, 2006 ABCA 261). Constable Ferguson appeals to this Court, contending that a four-year sentence in the circumstances would constitute cruel and unusual punishment contrary to s.12 of the *Charter*, and that the trial judge was right to grant him a constitutional exemption from the four-year minimum sentence imposed by Parliament.

[4] The events leading to the shooting of Mr. Varley may be briefly summarized. On the evening of October 2, 1999, Darren Varley went to Leo's bar in Pincher Creek to socialize with friends. He met up with his fiancée, Chandel Bachand, and his sister, Alaine Varley. At some point, unnoticed by Mr. Varley, Ms. Bachand left

the bar. Later in the evening, Mr. Varley and his friend Rod Tuckey became involved in a fight with a number of persons in the bar's parking lot, because he believed Ms. Bachand had gotten into a van with strangers. Mr. Tuckey required medical attention and was taken to hospital by Pat Bitango and Sarah Weatherhill. Mr. Varley stayed behind to search for Ms. Bachand, with the help of his sister.

[5] Around 3:30 in the morning of October 3, Darren Varley and Alaine Varley arrived at Pincher Creek Hospital to visit Mr. Tuckey. Mr. Varley remained concerned about the whereabouts of his fiancée. The security officer on duty, Earl Langille, called the RCMP and Mr. Varley spoke to the RCMP Telecoms Operator. As a result of this call, Constable Ferguson was dispatched to the hospital, where he met Darren Varley, Alaine Varley, Sarah Weatherhill, Pat Bitango, and Earl Langille in the lobby. Mr. Varley, who was intoxicated, insistently demanded that Constable Ferguson take action to find his fiancée. Constable Ferguson grabbed Mr. Varley and, according to the testimony of witnesses, punched him in the jaw and forced him to the ground. Constable Ferguson handcuffed Mr. Varley and took him to the police cruiser. Alaine Varley repeatedly asked Constable Ferguson to release Mr. Varley into her custody, but he refused.

[6] After placing Mr. Varley in the police cruiser, Constable Ferguson returned to the hospital. Left alone, Mr. Varley kicked in the window of the police cruiser. On returning, Constable Ferguson drove Mr. Varley to the detachment. Constable Ferguson booked Mr. Varley and the two entered the cell area with the assistance of the booking officer. After opening Mr. Varley's cell, the booking officer walked back to his desk, a few feet away, and Constable Ferguson entered the cell with Mr. Varley. Within a few seconds, Mr. Varley was shot twice: first, non-fatally, in the stomach, and then,

fatally, in the head. Up to three seconds elapsed between the first and second shot. Constable Ferguson emerged from the cell and telephoned an off-duty colleague. Mr. Varley died from the second shot after having been transported to Calgary Foothills Hospital by air ambulance. Constable Ferguson testified that Mr. Varley attacked him when he entered the cell, pulling his bulletproof vest over his head and face and grabbing his firearm from its holster. At trial, he testified that he and Mr. Varley were still struggling for the gun when the shots went off. However, in an earlier statement, supported by expert evidence and accepted by the trial judge for sentencing purposes, Constable Ferguson said that he had regained control of the gun when the shots were fired.

### III. Issues

[7] 1. Does imposition of the four-year minimum sentence imposed by s. 236(a) of the *Criminal Code* constitute cruel and unusual punishment contrary to s. 12 of the *Charter* in the circumstances of this case?

2. If so, was the trial judge entitled to grant a constitutional exemption from the four-year minimum and to impose a lesser sentence?

#### IV. Analysis

1. *Does imposition of the four-year minimum sentence imposed by Section. 236(a) of the Criminal Code constitute cruel and unusual punishment contrary to Section 12 of the Charter in the circumstances of this case?*

[8] Section 236(a) imposes a four-year minimum sentence for manslaughter with a firearm:

**236.** Every person who commits manslaughter is guilty of an indictable offence and liable (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years;

[9] Constable Ferguson argues that imposing the minimum sentence in his case violates s. 12 of the *Charter*, which provides a guarantee against cruel and unusual punishment.

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

[10] This Court has held that the four-year mandatory minimum sentence for criminal negligence causing death with a firearm (s. 220(a) of the *Criminal Code*) is not unconstitutional: *R. v. Morrissey*, [2000] 2 S.C.R. 90, 2000 SCC 39. In so holding, the Court applied the reasonable hypotheticals analysis of cases that might be expected to arise, developed in *R. v. Goltz*, [1991] 3 S.C.R. 485. Here we are concerned with the mandatory minimum sentence imposed by s. 236(a) for a different offence, manslaughter committed with the use of a firearm.

[11] As Arbour J. indicated in her concurring opinion in *Morrissey* (para. 61), there

is considerable overlap between unlawful act manslaughter, which is the offence we are dealing with in this case, and criminal negligence causing death, which was the offence before the Court in *Morrissey*. The British Columbia Court of Appeal has taken this fact into account in upholding the constitutionality of s. 236(a): *R. v. Birchall* (2001), 158 C.C.C. (3d) 340, 2001 BCCA 356. Constable Ferguson's argument at sentencing and in the Court of Appeal appears to have implicitly accepted that, as a matter of precedent, s. 236(a) does not violate s. 12 of the *Charter*.

[12] Constable Ferguson relies instead on Arbour J.'s concurring remarks in *Morrissey* to the effect that, given the wide range of circumstances under which the offences of unlawful act manslaughter and criminal negligence causing death can be committed, it is not possible to conclude on the basis of a reasonable hypotheticals analysis that the mandatory minimum sentence will be constitutional in every possible application. He argues that *Morrissey* should be read as having held that s. 220(a) and s. 236(a) are constitutional only in most of their applications, and that a constitutional exemption should be granted in those rare cases where applying the sentence would lead to an unconstitutional result.

[13] I have concluded that a constitutional exemption is not an appropriate remedy for a mandatory minimum sentence that results in a sentence that violates s. 12. This does not imply, however, that no remedy is available in the case of a mandatory minimum sentence that brings about an unconstitutional result — for instance, in circumstances not previously considered as part of a reasonable hypotheticals analysis. If a mandatory minimum sentence would create an unconstitutional result in a particular case, the minimum sentence must be struck down. It is therefore necessary to consider whether imposition of the mandatory minimum sentence provided for in s. 236(a) would result in

cruel and unusual punishment on the facts of Constable Ferguson's case.

[14] The test for whether a particular sentence constitutes cruel and unusual punishment is whether the sentence is grossly disproportionate: *R. v. Smith*, [1987] 1 S.C.R. 1045. 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": *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84, at para. 4, citing *Smith*, at p. 1072 and *Morrissey*, at para. 26. The question thus becomes: is a four-year sentence of imprisonment grossly disproportionate to the offence of manslaughter as committed by Constable Ferguson?

[15] The appropriateness of a sentence is a function of the purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code* as applied to the facts that led to the conviction. It follows that the appropriateness of the minimum sentence of four years that Parliament has prescribed for Constable Ferguson's offence depends on what the jury concluded about Constable Ferguson's conduct.

[16] This poses a difficulty in a case such as this, since, unlike a judge sitting alone, who has a duty to give reasons, the jury gives only its ultimate verdict. The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.

[17] Two principles govern the sentencing judge in this endeavour. First, the

sentencing judge “is bound by the express and implied factual implications of the jury’s verdict”: *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge “shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty” (*Criminal Code*, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown*; *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).

[18] Second, when the factual implications of the jury’s verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge “may find any other relevant fact that was disclosed by evidence at the trial to be proven” (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: (ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.)). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

[19] Following these principles, the trial judge in this case was required to find facts, consistent with the jury’s manslaughter verdict, to the extent that this was necessary to enable him to sentence Constable Ferguson. The sentencing inquiry was shaped by s. 236(a)’s prescription of a four-year mandatory minimum sentence. The only issues were



whether the sentence should be more than four years, as the Crown contended, and whether the facts of the case were such that a four-year sentence would be grossly disproportionate, as Constable Ferguson contended.

[20] The trial judge correctly turned his mind to the basis on which he had instructed the jury it could reach a verdict of manslaughter. The trial judge had instructed the jury that if it rejected both self-defence and intent for murder (intent to cause death or bodily harm likely to cause death), it must reach a verdict of manslaughter. The trial judge did not leave any other basis for a manslaughter verdict with the jury. Hence the trial judge correctly concluded that on the basis of the jury's verdict, he must find facts consistent with the jury's rejection of both self-defence and intent for murder. On the basis of the jury's rejection of intent for murder, the trial judge properly concluded that the jury had found that when he fired the second shot, Constable Ferguson neither intended to cause death nor bodily harm that he knew was likely to cause death.

[21] However, the trial judge did not stop with these conclusions. He went on to make detailed findings of fact on Constable Ferguson's conduct. It was open to him under s. 724(2)(b) of the *Criminal Code* to supplement the jury's findings insofar as this was necessary for sentencing purposes. However, it was not open to him to go beyond what was required to deal with the sentencing issues before him, or to attempt to reconstruct the logical process of the jury: *Brown; Fiqia*. Nor was it open to him to find facts inconsistent with the jury's verdict or the evidence; a trial judge must never do this. The trial judge in the case at bar committed both these errors.

[22] First, the trial judge erred in attempting to reconstruct the logical reasoning of

the jury. The law holds that the trial judge must not do this, and for good reason. Jurors may arrive at a unanimous verdict for different reasons and on different theories of the case: *R. v. Thatcher*, [1987] 1 S.C.R. 652. It is speculative and artificial to attribute a single set of factual findings to the jury, unless it is clear that the jury must unanimously have found those facts. Where any ambiguity on this exists, the trial judge should consider the evidence and make his or her own findings of fact consistent with the evidence and the jury's findings.

[23] Here the trial judge, having properly concluded that the jury must have rejected self-defence and intent for murder, went on to attempt to reconstruct further facts that may or may not reflect what was in the mind of the jurors. First, he found that the jury must have concluded that the first shot had been fired in self-defence. Although there is evidence capable of supporting such a finding, this finding was not required by the jury's verdict. The jury's verdict does not unequivocally indicate a particular characterization of the two shots. Indeed, the jury was not asked to make a finding one way or the other about the first shot. The Crown based its case on the second shot, presumably because the evidence was that the second shot caused death, and the first shot did not. The trial judge should have considered all the evidence in order to make his own findings of fact consistent with the jury's verdict to the extent they were relevant to the two issues before him.

[24] Second, and more critically, the trial judge went on to develop a theory to support the jury's verdict which was not only speculative, but contrary to the evidence. This theory was that Constable Ferguson's second shot was instantaneous and instinctive, the virtually automatic result of his police training. The theory rests on the premise that Constable Ferguson was following training that made the second shot following on a first

self-defence shot a matter of instinctive reaction rather than conscious decision. Based on this theory, the trial judge found as a fact that Constable Ferguson was not acting in anger when he fired the second shot, but in response to his training. This finding was critical to the trial judge's conclusion that the minimum sentence of four years prescribed by s. 236(a) of the *Criminal Code* constituted cruel and unusual punishment, violating s. 12 of the *Charter*.

[25] There are two problems with this crucial finding. First, it is inconsistent with the trial judge's other conclusions as well as with the jury's verdict. As the Court of Appeal noted, the instantaneous and instinctive shot theory contradicts the trial judge's conclusion that the first shot was fired in self-defence and the second was not, a conclusion that requires that the two shots be regarded as two separate transactions to be evaluated individually according to the criteria for self-defence in *Criminal Code*, s. 34(2).

The instantaneous and instinctive theory, on the other hand, rests on the premise that the second shot was a virtual continuation of the first shot, motivated by the same mental state, namely self-defence. Had the trial judge found that the second shot was instantaneous and instinctive, he should have considered the two shots together as a single transaction, and would have been required by the jury's verdict to hold that this transaction, in its entirety, did not constitute self-defence.

[26] Second, the instantaneous and instinctive explanation for the second and fatal shot does not sit comfortably with uncontradicted evidence relating to the circumstances of the shooting. The booking officer estimated the time between the two shots at up to three seconds, as did the inmate in the next cell, Herman No Chief. While the length of the interval between the two shots may be difficult to determine with precision, it seems clear that there was an interval. This was not a case of immediately successive shots. This is

supported by the fact that Constable Ferguson's firearm did not permit rapid, automatic second shots.

[27] The finding that Constable Ferguson's second shot was not a matter of anger or judgment, but simply a matter of training, is a vital component of the trial judge's conclusion that Constable Ferguson was at the very low end of the spectrum of moral blameworthiness, such that four years imprisonment would be grossly disproportionate and intolerable to an informed public, and so would violate s. 12 of the *Charter*. It follows that his conclusion that the four-year minimum sentence was unconstitutional in this case is fatally flawed.

[28] When the erroneous findings of the trial judge are set aside, no basis remains for concluding that the four-year mandatory minimum sentence prescribed by Parliament constitutes cruel and unusual punishment on the facts of this case. The trial judge recognized as aggravating factors that Constable Ferguson was well trained in the use of firearms and stood in a position of trust with respect to Mr. Varley, and correctly noted that the standard of care was higher than would be expected of a normal citizen. By way of mitigation, the trial judge noted that Constable Ferguson's actions were not planned, that Mr. Varley initiated the altercation in the cell, that Constable Ferguson had little time to consider his response, and that his instincts and training played a role in the shooting. The mitigating factors are insufficient to make a four-year sentence grossly disproportionate. The absence of planning, the apparent fact that Mr. Varley initiated the altercation in the cell, and the fact that Constable Ferguson did not have much time to consider his response, are more than offset by the position of trust Constable Ferguson held and by the fact that he had been trained to respond appropriately to the common situation of resistance by a detained person. I agree with the Court of Appeal that the

mitigating factors do not reduce Constable Ferguson's moral culpability to the extent that the mandatory minimum sentence is grossly disproportionate in his case.

[29] I conclude that there is no basis for concluding that the four-year minimum sentence prescribed by Parliament amounts to cruel and unusual punishment on the facts of this case.

[30] Ordinarily, a s. 12 analysis for a mandatory minimum sentence requires both an analysis of the facts of the accused's case and an analysis of reasonable hypothetical cases: *Goltz*, at pp. 505-6. At his sentencing hearing and in the Court of Appeal, however, Constable Ferguson did not rely on reasonable hypotheticals to contest the constitutionality of s. 236(a). He contended simply that s. 236(a) was unconstitutional as applied to the facts of his case. The reasonable hypotheticals not having been argued, there was no basis for the sentencing judge or the Court of Appeal to reach a conclusion on whether s. 236(a) was unconstitutional on a reasonable hypotheticals analysis. Constable Ferguson offers an alternative argument based on reasonable hypotheticals for the first time in this Court. In my view, Constable Ferguson has not pointed to a hypothetical case where the offender's minimum level of moral culpability for unlawful act manslaughter using a firearm would be less than that in the reasonable hypotheticals considered in *Morrissey*.

[31] In the absence of any s. 12 violation, the trial judge's proper course in the circumstances was to apply the four-year minimum sentence: *Morrissey*.

[32] Furthermore, the absence of any s. 12 violation renders it unnecessary to proceed to a consideration of whether s. 236(a) could be justified under s. 1.

*2. If the imposition of the four-year mandatory minimum sentence violated Section 12 of the Charter in the circumstances of this case, was the trial judge entitled to grant a constitutional exemption from the four-year minimum and to impose a lesser sentence?*

[33] Having found that the four-year minimum sentence of imprisonment required by s. 236(a) does not violate Constable Ferguson's right not to suffer cruel and unusual punishment contrary to s. 12 of the *Charter*, it is not necessary to consider whether a constitutional exemption would have been available had we found a violation of s. 12. As the Court of Appeal recognized, however, there has been considerable debate and disagreement in the lower courts as to whether the remedy of a constitutional exemption is available. The matter having been fully argued, it is appropriate to settle the question of whether a constitutional exemption would have been available to Constable Ferguson, had the minimum sentence violated s. 12 of the *Charter*.

[34] I note at the outset that the issue is not *whether* a remedy lies to prevent the imposition of cruel and unusual punishment contrary to the *Charter*, but *which* remedies are available. The imposition of cruel and unusual punishment contrary to ss. 12 and 1 of the *Charter* cannot be countenanced. A court which has found a violation of a *Charter* right has a duty to provide an effective remedy. The only issue is whether a law imposing such punishment can be permitted to stand subject to constitutional exemptions in particular cases, or whether the only remedy is a declaration that the law is inconsistent with the *Charter* and hence falls under s. 52 of the *Constitution Act, 1982*.

[35] Two remedial provisions govern remedies for *Charter* violations: ss. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*. Section 24(1) confers on judges a wide discretion to grant appropriate remedies in response to *Charter* violations:

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 24(1) has generally been seen — at least until now — as providing a case-by-case remedy for unconstitutional acts of government agents operating under lawful schemes whose constitutionality is not challenged. The other remedy section, s. 52(1) of the *Constitution Act, 1982*, confers no discretion on judges. It simply provides that laws that are inconsistent with the *Charter* are of no force and effect to the extent of the inconsistency:

**52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

When a litigant claims that a law violates the *Charter*, and a court rules or “declares” that it does, the effect of s. 52(1) is to render the law null and void. It is common to describe this as the court “striking down” the law. In fact, when a court “strikes down” a law, the law has failed by operation of s. 52 of the *Constitution Act, 1982*.

[36] The usual remedy for a mandatory sentencing provision that imposes cruel and unusual punishment contrary to s.12 of the *Charter* is a declaration that the law is of no force and effect under s. 52 of the *Constitution Act, 1982*. This was the remedy

sought in *Goltz*, *Morrisey*, and *R. v. Luxton*, [1990] 2 S.C.R. 711. The mandatory minimum sentence provisions in these cases were held to be constitutional. But it was argued that had the provisions been held to be unconstitutional, the appropriate remedy was the s. 52 remedy of striking down.

[37] In this case, despite the allegation of a constitutional violation, Constable Ferguson does not request that the law that caused the alleged violation, s. 236(a) of the *Criminal Code*, be struck down. Instead, Constable Ferguson argues that if the four-year mandatory sentence is found to violate the *Charter*, a constitutional exemption under s. 24(1) should be granted. The argument for a constitutional exemption proposes that the law remain in force, but that it not be applied in cases where its application results in a *Charter* violation. The judge would thus be free to impose a sentence below the minimum set by law, which would nevertheless continue to stand.

[38] The argument in favour of recognizing constitutional exemptions is simply put. The first prong of the argument is that where a mandatory minimum sentence that is constitutional in most of its applications generates an unconstitutional result in a small number of cases, it is better to grant a constitutional exemption in these cases than to strike down the law as a whole. The s. 52(1) remedy of declaring invalid a law that produces a result inconsistent with the *Charter* is a blunt tool. A law that may be constitutional in many of its applications — and indeed ruled constitutional on a reasonable hypothetical analysis — is struck down because in one particular case, or in a few cases, it produces an unconstitutional result. Would it not be better, the argument goes, to allow the law to stand, while providing an individual remedy in those cases — arguably rare — where its application offends the *Charter*?



[39] The second and complementary prong of the argument asserts that the remedy is available on the wording of the *Charter* and the jurisprudence. Section 24(1), it is argued, grants courts a wide discretion to grant such constitutional remedies as are “appropriate and just”. Granting a constitutional exemption and substituting a constitutional sentence removes the law’s inconsistency with the *Charter*, making s. 52(1) inapplicable. The cases that have considered the matter, while inconclusive, do not rule constitutional exemptions out as a remedy for unconstitutional sentences flowing from mandatory minimum sentence laws. More generally, granting constitutional exemptions for unconstitutional effects of mandatory minimum sentence laws fits well with the Court’s practices of severance, reading in and reading out in order to preserve the law to the maximum extent possible: see *Schachter v. Canada*, [1992] 2 S.C.R. 679.

[40] Attractive as they are, the arguments for constitutional exemptions in a case such as this are, on consideration, outweighed and undermined by counter-considerations. I reach this conclusion on the basis of four considerations: (1) the jurisprudence; (2) the need to avoid intruding on the role of Parliament; (3) the remedial scheme of the *Charter*; and (4) the impact of granting constitutional exemptions in mandatory sentence cases on the values underlying the rule of law.

(1) The Jurisprudence

[41] This Court has not definitively ruled whether constitutional exemptions are available as a remedy for mandatory minimum sentences that produce unconstitutional sentences. In concurring opinions, judges of this Court have expressed both positive and negative evaluations of constitutional exemptions as remedies for unconstitutional minimum sentences.

[42] In his concurring opinion in *Smith*, at pp. 1111-12, Le Dain J. considered and

rejected the constitutional exemption as a means of upholding minimum sentences that could generate unconstitutional results in some circumstances. He stated that allowing such exemptions would create uncertainty, and the assumed validity or application of the provision could have prejudicial effects in particular cases. On the other hand, Arbour J. commented favourably on the possibility of exemptions from mandatory minimum sentence laws in a concurring opinion in *Morrisey*. Arbour J. expressed the concern that the mandatory minimum sentences for certain offences would inevitably be declared unconstitutional if judges had no discretion to grant exemptions to avoid unconstitutional results in unusual cases.

[43] Lower courts have taken contradictory positions on the availability of constitutional exemptions from mandatory minimum sentences. The Ontario and New Brunswick courts of appeal have held against the availability of constitutional exemptions from mandatory sentence laws: *R. v. Kelly* (1990), 59 C.C.C. (3d) 497 (Ont. C.A.); *R. v. Madeley* (2002), 160 O.A.C. 346; *R. v. Desjardins* (1996), 182 N.B.R. (2d) 321. By contrast, such exemptions have been granted in Saskatchewan and the Northwest and Yukon Territories and have been recognized in *obiter* in British Columbia: *R. v. McGillivray* (1991), 62 C.C.C. (3d) 407 (Sask. C.A.); *R. v. Netser* (1992), 70 C.C.C. (3d) 477 (N.W.T.C.A.); *R. v. Chief* (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.); *R. v. Kumar* (1993), 85 C.C.C. (3d) 417 (B.C.C.A.). The Quebec Court of Appeal has expressed both positive and negative views on the question in *obiter*: *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332; *R. v. Chabot* (1992), 77 C.C.C. (3d) 371.

[44] Constitutional exemptions have been recognized and discussed in other contexts. In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, Wilson J. suggested that once a court finds a legislative provision to violate the *Charter*, it has no

alternative but to strike it down under s. 52 of the *Constitution Act, 1982*. To do otherwise would be to leave “the legislation in its pristine over-inclusive form outstanding on the books” (p. 77). On the other hand, in *R. v. Rose*, [1998] 3 S.C.R. 262, L’Heureux-Dubé J. opined that s. 24(1) of the *Charter* enables a court to grant a constitutional exemption from legislation that is “constitutional in its general application” if an unconstitutional result would otherwise occur in a particular case (para. 66).

[45] In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, the majority, *per* McLachlin J., suggested that a constitutional exemption cannot be used to remedy a constitutional defect in a provision that Parliament intended to be mandatory, because allowing an exemption would “import into the provision an element which the legislature specifically chose to exclude — the discretion of the trial judge”(p. 628). It was also noted that constitutional exemptions could in principle remove all recourse to s. 52(1), rendering it redundant.

[46] However, in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, this Court recognized the availability of a constitutional exemption granted as an interim remedial measure alongside a suspended declaration of invalidity under s. 52(1). Although the Court declined to grant a constitutional exemption, it recognized that a court may grant such an exemption in order to relieve the claimant of the continued burden of the unconstitutional law during the period that the striking out remedy is suspended. The majority emphasized the ancillary nature of this remedial exemption and refused to consider expanding the remedy to a stand-alone constitutional exemption.

[47] In summary, the majority of this Court in *Seaboyer* has commented critically on the use of constitutional exemptions as a stand-alone remedy in the case of mandatory

laws generally, a view supported by Wilson J. in *Osborne* and consistent with the majority's reasoning in *Corbiere*. In *Smith*, Le Dain J. rejected their use in the context here at issue, mandatory minimum sentence laws. On the other side of the issue are the remarks of L'Heureux-Dubé and Arbour JJ. in their respective concurring opinions in *Rose* and *Morrisey*.

[48] I conclude that while the availability of constitutional exemptions for mandatory minimum sentencing laws has not been conclusively decided, the weight of authority thus far is against them and sounds a cautionary note.

(2) Intrusion on the Role of Parliament

[49] Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. It follows that if the constitutional defect of a law can be remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down. Constable Ferguson is proposing a constitutional exemption under s. 24(1) as an additional tool for minimizing interference with Parliament's legislative role when a court must grant a remedy for a constitutionally defective provision.

[50] On the other hand, it has long been recognized that in applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere. An alternative to striking down that initially appears to be less intrusive on the legislative role may in fact represent an inappropriate intrusion on the legislature's role. This Court has thus emphasized that in considering alternatives

to striking down, courts must carefully consider whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the *Charter*: *Schachter*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. These principles apply with equal force to the proposed alternative remedy of the constitutional exemption. In this case, the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended. It follows that a constitutional exemption should not be granted.

[51] When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in. For instance, as this Court noted in *Schachter*, the test for severance "recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part" (p. 697). If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere. In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under s. 52. It is then left up to Parliament to decide what legislative response, if any, is appropriate.

[52] It follows that we must ask whether granting a constitutional exemption for a mandatory minimum sentence would represent a lesser intrusion on Parliament's

legislative role than striking it down. In my view, the answer to this question is no, because allowing courts to grant constitutional exemptions for mandatory minimum sentences directly contradicts Parliament's intent in passing mandatory minimum sentence legislation.

[53] A constitutional exemption has the effect of conferring on judges a discretion to reject the mandatory minimum sentence prescribed by Parliament. The mandatory minimum applies, unless the judge concludes that its application constitutes unjustifiable cruel and unusual punishment and that it therefore should not apply.

[54] The intention of Parliament in passing mandatory minimum sentence laws, on the other hand, is to remove judicial discretion to impose a sentence below the stipulated minimum. Parliament must be taken to have specifically chosen to exclude judicial discretion in imposing mandatory minimum sentences, just as it was taken to have done in enacting the rape shield provisions struck down in *Seaboyer*. Parliament made no provision for the exercise of judicial discretion in drafting s. 236(a), nor did it authorize any exceptions to the mandatory minimum. There is no provision permitting judges to depart from the mandatory minimum, even in exceptional cases where it would result in grossly disproportionate punishment. Parliament has cast the prescription for the minimum four-year prison sentence here at issue in clear unambiguous terms. Parliament must be taken to have intended what it stated: that all convictions for manslaughter with a firearm would be subject to a mandatory minimum sentence of four

years imprisonment. The law mandates a floor below which judges cannot go. To permit judges to go below this floor on a case-by-case basis runs counter to the clear wording of the section and the intent that it evinces.

[55] In granting a constitutional exemption, a judge would be undermining Parliament's purpose in passing the legislation: to remove judicial discretion and to send a clear and unequivocal message to potential offenders that if they commit a certain offence, or commit it in a certain way, they will receive a sentence equal to or exceeding the mandatory minimum specified by Parliament. The discretion that a constitutional exemption would confer on judges would violate the letter of the law and undermine the message that animates it.

[56] It is thus clear that granting a constitutional exemption from a mandatory minimum sentence law that results in an unconstitutional sentence goes directly against Parliament's intention. To allow constitutional exemptions for mandatory minimum sentences is, in effect, to read in a discretion to a provision where Parliament clearly intended to exclude discretion. If it would be inappropriate to read in such a discretion under s. 52, then necessarily it would be inappropriate to allow judges to grant constitutional exemptions having the same effect under s. 24(1). It cannot be assumed that Parliament would have enacted the mandatory minimum sentencing scheme with the discretion that allowing constitutional exemptions would create. For the Court to introduce such a discretion would thus represent an inappropriate intrusion into the legislative sphere.

[57] I conclude that these considerations are sufficient to exclude constitutional exemptions as an appropriate remedy for unconstitutional mandatory minimum sentences.

In the absence of any provision providing for discretion, a court that concludes that a mandatory minimum sentence imposes cruel and unusual punishment in an exceptional case before it is compelled to declare the provision invalid.

(3) The Remedial Scheme of the Charter

[58] As I noted at the outset, remedies for breaches of the *Charter* are governed by s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*.

[59] When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R. v. Big M Drug Mart Ltd.*, [1985]1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: *Big M*; see also Peter Sankoff, “Constitutional Exemptions: Myth or Reality?” (1999-2000), 11 *N.J.C.L.* 411, at pp. 432-34; Morris Rosenberg and Stéphane Perrault, “Ifs and Buts in *Charter* Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada” (2002), 16 *S.C.L.R.* (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*: see Sankoff, at p. 438.

[60] Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the



authority of legal regimes which are accepted as fully constitutional: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or “effect” of the law, but of the government agent’s applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).

[61] It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party’s own constitutional rights: *Big M; R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*: *Schachter; R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81. We are here concerned with a *law* that is alleged to violate a *Charter* right. This suggests that s. 52(1) provides the proper remedy.

[62] It is argued that s. 24(1), while normally applicable to government acts, can also be used to provide a stand-alone remedy for the unconstitutional effects of mandatory minimum sentence laws. The wording of s. 24(1) is generous enough to permit this, it is argued, conferring a discretion on judges to grant “such remedy as the court considers appropriate and just in the circumstances”.

[63] The jurisprudence of this Court allows a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy: *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46. However, the argument that s. 24(1) can provide a stand-alone remedy for laws with unconstitutional effects depends on reading s. 24(1) in isolation, rather than in conjunction with the scheme of the *Charter* as a whole, as required by principles of statutory and constitutional interpretation. When s. 24(1) is read in context, it becomes apparent that the intent of the framers of the Constitution was that it function primarily as a remedy for unconstitutional government acts.

[64] The highly discretionary language in s. 24(1), “such remedy as the court considers appropriate and just in the circumstances”, is appropriate for control of unconstitutional acts. By contrast, s. 52(1) targets the unconstitutionality of laws in a direct non-discretionary way: laws are of no force or effect to the extent that they are unconstitutional.

[65] The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies: see *Osborne, per Wilson J.* In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole: *Vriend*; *Sharpe*. Where this is not possible — as in the case of an unconstitutional mandatory minimum sentence — the unconstitutional provision must be struck down. The ball is thrown back into Parliament’s court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects. In either case, the remedy is a s. 52 remedy that renders the

unconstitutional provision of no force or effect to the extent of its inconsistency. To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books.

[66] As pointed out in *Seaboyer*, if the unconstitutional effects of laws are remediable on a case-by-case basis under s. 24(1), in theory all *Charter* violations could be addressed in this manner, leaving no role for s. 52(1). To meet this concern, it is suggested that s. 24(1) should only be used in the case of laws that usually produce constitutional results and only rarely produce an unconstitutional effect. The mandatory minimum sentence provision in s. 236(a) is said to be such a law. However one defines the “rare” case, discussed more fully below, the risk is that the role intended for s. 52(1) would be undermined and that laws that should be struck down — over-inclusive laws that pose a real risk of unconstitutional treatment of Canadians — would remain on the books, contrary to the intention of the framers of the *Charter*.

(4) The Rule of Law

[67] Constable Ferguson’s principal argument for constitutional exemptions, as we have seen, is an appeal to flexibility. Yet this flexibility comes at a cost: constitutional exemptions buy flexibility at the cost of undermining the rule of law.

[68] The principles of constitutionalism and the rule of law lie at the root of democratic governance: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. It is fundamental to the rule of law that “the law must be accessible and so far as possible intelligible, clear and predictable”: Lord Bingham, “The Rule of Law,” (2007), 66 *Cambridge L.J.* 67, at p. 69. Generality, promulgation, and clarity are among the essential

elements of the “morality that makes law possible”: Lon L. Fuller, *The Morality of Law*, (2nd ed. 1969), at pp. 33-39.

[69] Constitutional exemptions for mandatory minimum sentence laws raise concerns related to the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability.

[70] As noted in the last section, a constitutional exemption under s. 24(1) is a personal remedy. The remedy proposed by Constable Ferguson is thus distinct from a s. 52 remedy that reads in an exception for a well-defined class of situations — as, for instance, the remedy in *Sharpe*. When a constitutional exemption is granted, the successful claimant receives a personal remedy under s. 24(1), but the law remains on the books, intact. As Wilson J. put it in *Osborne*, the legislation remains as enacted “in its pristine over-inclusive form” (p. 77). The mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply. As constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied.

[71] Constitutional exemptions from mandatory minimum sentences leave the law uncertain and unpredictable, as Le Dain J. pointed out in *Smith*. It is up to judges on a case-by-case basis to decide when to strike down a minimum sentence that is inconsistent with the *Charter*, and when to grant an individual exemption under s. 24(1). But the *Charter* is silent on how a judge should make this decision — the decision, literally, of whether the law stands or falls. In theory, all violations could be remedied under s. 24(1), leaving no role for s. 52(1). The only option would be to introduce a meta-rule as to when a s. 24(1) exemption is available and when a declaration of invalidity should be

made under s. 52(1). How such a rule should be fashioned — where the line should be drawn — is far from clear. Constitutional exemptions, it is suggested, should be confined to laws that usually operate constitutionally and only occasionally result in constitutional violations. But how is the judge to decide whether the case before her is rare? The bright line required for constitutional certainty is elusive.

[72] The divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly — a fundamental tenet of the rule of law. Second, it risks over-application of the law; as Le Dain J. noted in *Smith*, the assumed validity of the law may prejudice convicted persons when judges must decide whether to apply it in particular cases. Third, it invites duplication of effort. The matter of constitutionality would not be resolved once and for all as under s. 52(1); in every case where a violation is suspected, the accused would be obliged to seek a constitutional exemption. In so doing, it creates an unnecessary barrier to the effective exercise of the convicted offender's constitutional rights, thereby encouraging uneven and unequal application of the law.

[73] A final cost of constitutional exemptions from mandatory minimum sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament

as to what the Constitution requires in the circumstances: Rosenberg and Perrault, at p. 391. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.

## V. Conclusion

[74] I conclude that constitutional exemptions should not be recognized as a remedy for cruel and unusual punishment imposed by a law prescribing a minimum sentence. If a law providing for a mandatory minimum sentence is found to violate the *Charter*, it should be declared inconsistent with the *Charter* and hence of no force and effect under s. 52 of the *Constitution Act, 1982*.

[75] I would dismiss the appeal and answer the constitutional questions as follows:  
1. Does the mandatory minimum sentence prescribed by s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, constitute cruel and unusual punishment in the appellant's case, in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer the question.

3. If the answer to Question 2 is “no”, does Canadian law recognize the availability of a constitutional exemption on a case-by-case basis from the statutory mandatory minimum sentence set out in s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46?

Answer: No.

*Appeal dismissed.*

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