No. 31692

SUPREME COURT OF CANADA
(on Appeal from the Court of Appeal for Alberta)

BETWEEN:

MICHAEL ESTY FERGUSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and-

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF BRITISH COLUMBIA
CANADIAN CIVIL LIBERTIES ASSOCATION

Interveners

FACTUM OF THE ATTORNEY GENERAL OF ONTARIO

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PART I – STATEMENT OF FACTS

1. The Attorney General of Ontario relies on the facts as set out by the majority of the Court of Appeal for Alberta,[1] although solely to provide context for the constitutional issues before this Court.

2. By way of brief summary, the Appellant, a peace officer, arrested the victim. While in the process of later lodging the victim in a cell, the victim

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[1] *R. v. Ferguson*, 2006 ABCA 261, at paras.14-38 [Appellant's Record – hereafter A.R. – Vol.1, Tab 2D].

resisted. As they struggled, the victim attempted to seize the Appellant's service handgun. The Appellant succeeded in recovering control over his handgun. He then twice shot the unarmed victim, the first time in the stomach, the second time, seconds later, in the head. At the Appellant's trial for second degree murder, he testified that he had acted in self-defence. While the jury ultimately acquitted the Appellant of second degree murder, they convicted him of the included offence of manslaughter. This much is clear from the jury's verdict: a) the jury rejected that the second shot was an act of self-defence; and b) while they either concluded or had a reasonable doubt that the Appellant did not have the *mens rea* for murder, they were satisfied, to a person, that the Appellant had unlawfully assaulted the victim in a manner that was objectively dangerous.

3. In short, the death of the victim was not an accident. It was not occasioned by simple negligence. It was not justified in law. It was caused by a serious criminal act.

PART II - POINTS IN ISSUE

4. The Chief Justice has stated the following constitutional questions:

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*?

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*?

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?

5. It is the position of the Attorney General of Ontario that:

1. The first question should be answered "no". Section 236(a) does not provide for a cruel and unusual punishment.

2. If it is necessary to answer question no.2, it is submitted that s.236(a) is a reasonable limit under s.1.

4. If it is necessary to answer question no.3, it is submitted that the use of constitutional exemptions on a case-by-case basis should not be available to grant relief from the statutory mandatory minimum sentence prescribed by s.236(a).

6. In addition, the Attorney General of Ontario seeks to assist this Court in its determination of the constitutional issues by offering submissions on the general nature of mandatory minimum jail sentences. In order to properly address whether a mandated minimum punishment violates s.12, it is necessary to first determine the impact of such a punishment on the range of punishment for the offence in issue. This case, in addition to providing the vehicle to determine the

constitutional validity of section 236(a) along with the availability of individual constitutional exemptions, presents an opportune occasion to provide an authoritative pronouncement on the nature of *minimum* punishments.

PART III – STATEMENT OF ARGUMENT

Constitutional Question # 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?*

7. The Attorney General for Ontario adopts and relies upon the submissions of the Respondent and the Attorney General for Canada,[2] subject to the following additional submissions.

Preliminary Question: What is the effect of a mandatory minimum punishment on the range of sentence for a given offence?

8. The Attorney General of Canada has submitted that the two-step *Smith* test[3] first should begin with "a general inquiry" that precedes "the particularized inquiry" (step one of the *Smith* test) and "the reasonable hypothetical inquiry" (step two of that test). The Attorney General of Ontario additionally submits that preliminary to the general inquiry, there is a fundamental question the answer to which of necessity impacts on the constitutionality of any mandatory minimum punishment: what is the effect of a mandatory minimum punishment on the range of punishment for a given offence?

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[2] At the time of the writing of this factum, the Attorney General for Ontario has not yet received the factums of the other interveners.

[3] The Intervener uses the "*Smith* test" as a compendious reference to *R. v. Smith*, [1987] 1 S.C.R. 104, at pp.1072-73 [Appellant's Book of Authorities – hereafter "A.B.A." – at Vol.2, Tab 37] and the evolution of that judgment in this Court's subsequent s.12 jurisprudence, most recently summarized in *R. v. Wiles*, [2005] 3 S.C.R. 895, at paras.4-5 [Respondent's Book of Authorities – hereafter "R.B.A." – at Vol.3, Tab 23].

9. It is trite that the maximum punishment for a given offence is an indicator of the seriousness with which Parliament views that offence – rather simply, the higher the maximum sentence, the more serious is the conduct proscribed by the offence. It is likewise well established that when Parliament increases the maximum punishment for an offence, the Courts generally regard that as a signal that sentences for that offence should increase within the new range.

10. This Court has yet to make a definitive statement on the impact of a mandatory minimum sentence on the range of punishment for a given offence. Obviously, a mandatory minimum punishment establishes precisely that - a mandatory minimum punishment. That said, does the mandatory minimum punishment do nothing more than establish a minimum punishment? Or does the mandatory minimum punishment manifest a signal that the range of punishment for the offence should now begin and move upwards from the mandatory minimum level? It is submitted that the answer to this question impacts on how a mandatory minimum punishment is perceived, and in turn, informs the constitutional character of a mandatory minimum punishment.

11. To date, only Arbour, J., has expressly addressed this matter. In her minority judgment in *R. v. Morrisey*,[4] Arbour, J. (McLachlin, J., as she then was, concurring) wrote:

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[4] *R. v. Morrisey*, [2000] 2 S.C.R. 90, at paras.75-76 [A.B.A., Vol.2,Tab 27]. Also see *R. v. Wust*, [2000] 1 S.C.R. 455, at paras.22, 42-43 [A.G. Canada Book of Authorities – hereafter "A.G.Can.B.A." – Tab 25]

> To the extent possible, mandatory minimum sentences must be read consistently with the general principles of sentencing expressed, in particular, in ss.718, 718.1 and 718.2 of the *Criminal Code*: *Wust*, ... at para.22. By fixing a minimum sentence, particularly when the minimum is still just a fraction of the maximum penalty applicable to the offence, Parliament has not repudiated completely the principle of proportionality and the requirement, expressed in s.718.2(b), that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Therefore, in my view, the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called "best" offender whose conduct is caught by these provisions. The mandatory minimum must not become the standard sentence imposed on all but the very worst offender who has committed the offence in the very worst circumstances. The latter approach would not only defeat the intention of Parliament in enacting this particular legislation, but also offend against the general principles of sentencing designed to promote a just and fair sentencing regime and thereby advance the purposes of imposing criminal sanctions.
>
> The proper approach to the determination of the constitutional validity of mandatory minimum sentences, under the guidance of the jurisprudence of this Court, is, in my view, to give effect to this inflationary scheme, except when the statutory impossibility of going below the minimum is offensive to s.12 of the *Charter* where the mandatory minimum requires the imposition of a sentence that would be not merely unfit, which is constitutionally impermissible, but rather one that is grossly disproportionate to what the appropriate punishment should be. ... [citation omitted]

12. This Court should adopt the foregoing as the principle of sentencing that governs mandatory minimum punishments. The minimum punishment of four years in jail is sufficiently low in the available sentencing range for manslaughter – the maximum punishment is life imprisonment – to make this more than an academic question.[5]

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[5] Indeed, this is also fair comment in light of the many non-murder mandatory minimum sentencing provisions in the *Criminal Code.*

13. If the mandatory minimum sentence signals a decision by Parliament to inflate the range of sentence for an offence, then the minimum punishment for the first or "small" (small by virtue of their particular crime and/or background) offender will at least present as fair and proportional to longer sentences[6] imposed on "bigger" offenders (bigger either by virtue of their particular crime and/or background) in the same category. This does not foreclose a challenge to the mandatory minimum punishment,[7] but insofar as it does make for a fair imposition of the new tariff, this inflationary feature of a mandatory minimum punishment is relevant to the question of its impact on offenders and so its constitutionality.

14. The point can be made by assuming that Arbour, J., was wrong, and that a mandatory minimum punishment has no impact on the original tariff. In that case, while the first or "small offender" will receive four years, so might the "bigger" offender – or a sentence only marginally longer - not based on the mandatory minimum punishment, but rather on the original tariff or range for that offender and offence. From the perspective of the first or small offender, that has to be unfair, potentially to the point of grossly unfair.

15. Arbour, J., made a similar point in *Regina v. Wust*, wherein this Court considered the issue of the availability of pre-sentencing custody to lower a

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[6] To be sure, the inflationary impact is not a simple matter of adding four years to sentences above the mandatory minimum punishment. Totality would have a moderating, braking effect on the inflationary impact, most particularly at the upper end of the range.

[7] In theory, a mandatory minimum punishment could be so excessive as to make for a s.12 breach for all offenders, in which case how that punishment works is of little consequence.

punishment below the minimum jail sentence mandated by Parliament. Arbour, J., wrote:

> If this Court were to conclude that the discretion provided by s.719(3) to consider pre-sentencing custody was not applicable to the mandatory minimum sentence of s.344(a), it is certain that unjust sentences would result. First, courts would be placed in the difficult situation of delivering unequal treatment to similarly situated offenders, for examples, see *McDonald*, ... Secondly, because of the gravity of the offence and the concern for public safety, many persons charged under s.344(a), even first time offenders, would often be remanded in custody while awaiting trial. Consequently, discrepancies in sentencing between least and worst offenders would increase, since the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose would sentence would be set at the minimum, would not receive credit for his or her sentencing detention. An interpretation of s.719(3) and s.344(a) that would reward the worst offender and penalize the least offender is surely to be avoided. [citation omitted, emphasis added][8]

16. Likewise, mandatory minimum punishments should not be interpreted in such a manner as to effectively pit small offenders against big offenders and create a conflict with the principle of proportionality and ultimately with s.12. Respectfully, the inflationary model proposed by Arbour, J., makes sense.

17. Examined from this perspective, a mandatory minimum punishment is not unlike the setting of the maximum punishment for an offence. It is another signaling by Parliament of the seriousness with which it views that offence.

The *Smith* Test

18. There are fit sentences. Then there are disproportionate or excessive sentences. These are the subject of sentence appeals. Then there are grossly

[8] *R. v. Wust, supra*, at fn.4, para.42.

disproportionate sentences, sentences which shock the conscience of the community or outrage society's standards of decency. Only grossly disproportionate sentences attract s.12 scrutiny. It is important to bear these distinctions in mind.

19. The Appellant, Respondent, and Attorney General of Canada have reviewed sentences imposed in other manslaughter cases. Such cases must be approached with care.

20. It is beyond reasonable argument that Parliament and the Courts are not bound to maintain a range of punishment for a given offence. They must, of course, respect the *Charter of Rights*, in particular, s.12, and the *Criminal Code's* fitness standard. But the range of punishment for a given offence can undergo change, either effected by legislative amendment or through judicial pronouncement(s), either of which are typically prompted by changing social conditions. There can be no question that in enacting s.236(a) and related mandatory minimum jail sentences Parliament intended to effect a change in the status quo. Accordingly, relying upon cases from even just a few years ago, and certainly several to many years ago, is of limited value. [9] (Because Parliament and the Courts are not tied by precedent, our society has been able to abandon severe sentencing methods that were part of our laws only a matter of a few generations ago.)

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[9] Toronto's gun problem demonstrates the point. It is a matter of judicial notice that that problem has gotten worse in recent years.

21. Further, it is fair observation that the sentences in the various manslaughter cases cited by the Courts below, the Appellant, Respondent, and Attorney General of Canada, are examples of ultimately "fit" sentences. Yet, again, s.12 does not protect against an unfit sentence that is disproportionate or excessive. Rather, the impugned sentence must be so unfit as to be grossly disproportionate, such as to outrage society's standards of decency. More simply, while a cruel and unusual punishment will of necessity be unfit, not every unfit sentence will violate s.12. As a consequence, although a court might conclude that a mandatory minimum jail sentence constitutes a disproportionate punishment at either or both of the *Smith* test steps, such a finding will not justify striking down that minimum jail sentence. Perforce, looking to examples of "fit" sentences, while of value, is of limited value in assessing whether an impugned mandatory minimum jail sentence violates the cruel and unusual standard of s.12 of the *Charter of Rights*.[10]

22. On the other hand, other mandatory minimum jail sentences which have been constitutionally vetted arguably offer a better, certainly just as useful, source of comparison. Thus, in *Regina v. McDonald*,[11] the Court of Appeal for Ontario had to consider the constitutionality of s.344(a), which mandates a minimum four year jail sentence for the offence of armed robbery. In that case, the youthful near first offender held up a fast food outlet while armed with an unloaded BB gun. Beyond lifting his shirt to expose the BB gun, the offender

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[10] Somewhat perversely, it is more useful to consider disproportionate sentences.
[11] *R. v. McDonald* (1998), 127 C.C.C.(3d) 57 (Ont.C.A.) [R.B.A., Vol.2, Tab 18] . Also see: *R. v. Lapierre* (1998), 123 C.C.C.(3d) 332 (Que.C.A.) [A.B.A., Vol.1, Tab 18].

committed no violence. The robbery was over very quickly, and the offender netted $300 in spoils. At trial, he was remorseful and pleaded guilty. The Court of Appeal for Ontario held that s.344(a) did not violate s.12. Contrast the key fact of this case: the Appellant unlawfully fired a gun and killed someone. There can be no more serious a consequence than taking another person's life.[12]

23. The complaint that a given mandatory minimum jail sentence violates s.12 of necessity invites the question: what sentence would not have violated s.12? This question is an instructive one. The trial Judge in this case concluded that a fit sentence was a sentence of two years less a day imprisonment, which could be served in the community.[13] Once again, the standard of review under s.12 is not fitness. Having said that, if a maximum reformatory length sentence would have been an appropriate punishment but for the operation of s.236(a), it is very debatable whether an additional two years of imprisonment would make for a cruel and unusual punishment – one that outrages society's standards of decency – as opposed to a merely excessive and therefore unfit sentence. This point is more obviously made if one assumes a mandatory minimum punishment of not four years but, say, three years. At a certain point, one is debating fitness, not cruel and unusual punishment.

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[12] Assuming for the sake of argument that this Court restores the Appellant's sentence imposed at trial, were McDonald and the Appellant to meet and discuss their respective sentences, McDonald, even though properly informed about the differences between the two cases, still might be expected to sense some unfairness, or at least experience bewilderment.

[13] Less pre-trial custody credit (based on a 3:1 ratio) for 210 days.

24. The Intervener does not wish to be taken as minimizing the impact of an additional two years of punishment. On the other hand, it is important that the s.12 standard not be confused with fitness or, more to the point, mere unfitness. It is a much higher standard. Failure to respect the boundary between mere unfitness and gross disproportionality will undermine the s.12 standard and make for an unwarranted intrusion into Parliament's legitimate sphere of authority in matters of sentencing.

Constitutional Question # 2

> If s.236(a) violates s.12, 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*?

25. The Attorney General for Ontario adopts and relies upon the submissions of the Respondent and the Attorney General for Canada, subject to the following submissions.

26. Briefly, while such a breach is, in theory, remediable by resort to s.1, the Attorney General of Ontario acknowledges the challenge in defending an impugned punishment that has been found to outrage society's standards of decency as nonetheless "a reasonable limit ... as can be demonstrably justified in a free and democratic society." So long as examples of the reasonable hypothetical offender are, in fact, reasonable "everyday" examples, reliance by

the Crown on s.1 to justify a cruel and unusual punishment will be a difficult exercise.[14]

27. This acknowledged, if s.236(a) violates s.12, either in the circumstances of this case, and/or having regard to reasonable hypotheticals, it simply cannot be argued that the minimum four year sentence would be cruel and unusual in all or a majority of cases. Indeed, one can imagine many cases in which a four year sentence would be either fit, or, more critically, at least not so unfit as to outrage society's standard of decency – the colloquial but easily understood s.12 standard. This is not a situation as in *Smith* where Parliament has cast the net so wide that, for example, it scoops up "small offences". Manslaughter occasioned by objectively dangerous unlawful use of a firearm always will be a serious offence. If, Parliament has cast the net too wide, it has cast it only just so. Section 236(a) minimally impairs the right protected by s.12.

Constitutional Question # 3:

> If s.236(a) does not constitute a reasonable limit under s.1, 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?

28. The Attorney General of Ontario adopts and relies upon the submissions of the Respondent and the Attorney General for Canada, subject to the following submissions.

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[14] Simply to make the point, were hypotheticals extended to include cases extreme enough to be fairly regarded as rare, it would be easier to defend an impugned mandatory minimum punishment under current s.1 jurisprudence.

29. In brief, one can never grant a case-specific constitutional exemption so long as s.12 analysis is governed by the *Smith* two-step test. This long ago informed the judgment of the Court of Appeal for Ontario in *Regina v. Kelly*.[15] The exempted individual will stand as a reasonable hypothetical offender for the very next litigant facing the same mandatory minimum punishment. That litigant will not have to seek an exemption. Instead, they properly can advance the previous case of the exempted offender – the best of all reasonable hypothetical offenders, an actual litigated case - as a basis upon which to insist that the mandatory minimum punishment be struck down as unconstitutional.

30. Assuming for the sake of argument that one might be able to conceive of a test that would restrict the availability of a constitutional exemption in such a manner as to avoid the foregoing conundrum,[16] this remedy would not be without potentially serious side effects. First, exemptions are bound to effectively make for a discretionary minimum sentence. This is a real risk, insofar as the Courts are more accustomed to trying to impose fit sentences[17] – that is, proportional sentences – as opposed to disproportionate sentences – which represent the true point of comparison for s.12 purposes. In the result, exemptions will tend to undermine the traditional purview of Parliament to determine the punishment for an offence. In the particular case of mandatory minimum jail sentences,

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[15] *R. v. Kelly* (1990), 59 C.C.C.(3d) 497 Ont.C.A, at 513e-514c. [A.B.A., Vol.1, Tab 16]

[16] Thus, the test would have to make distinguishable the category of reasonable hypothetical offender from the category of offender who would qualify for a constitutional exemption. The latter might be, for example, the rare/uncommon hypothetical offender.

[17] In point of fact, this is precisely what the trial Judge in the instant case first determined. See Reasons for Judgment of Hawco, J., at paras.47-48 [Appellant's Record – hereafter, "A.R." - Vol.1, Tab 2C, at 45]

exemptions will erode Parliament's decision not only to mandate a jail sentence but also a jail sentence of a certain length.

31. In the instant case, this particular side effect was magnified by the imposition of a conditional sentence. The trial Judge explicitly exempted the Appellant from the application of s.236(a). However, the trial Judge also effectively exempted the Appellant from the application of s.742.1. Section 742.1, a provision of general application, expressly limits the availability of a conditional sentence. A trial Judge cannot impose a conditional sentence for an offence for which Parliament has mandated a minimum term of imprisonment. This limitation applies even in cases of short minimum jail sentences, such as the fourteen day jail sentence mandated by s.255(1)(b) for a second conviction for Impaired Operation of a Motor Vehicle. In enacting s.742.1, Parliament spoke clearly and unequivocally: conditional sentences are not available to offenders who have committed certain serious offences (or, for example, have committed such offences for a second time, etc.), for which only a period of actual incarceration, according to Parliament, will suffice as punishment.

32. The majority of the Court of Appeal also recognized that the trial Judge's decision implicated s.742.1:

> Before delving into the constitutional issues, a preliminary issue must be whether a conditional sentence is legally available as a sentence for the crime Ferguson committed.
>
> As noted, instead of the mandatory minimum four-year jail term stipulated in s.236(a) of the *Criminal Code*, the trial judge imposed a sentence of two

> years less a day to be served in the community. Section 742.1 of the *Criminal Code*, which sets out the threshold requirements for a conditional sentence, provides that such a sentence cannot be imposed for "an offence that is punishable by a minimum term of imprisonment." In *R. v. Proulx*, ..., the Supreme Court confirmed that offences with a minimum term of imprisonment are excluded by statute from the conditional sentence regime. This exclusion is offence-specific, not offender-specific. Thus, granting a constitutional exemption to an offender (Fergsuon) does not make the offence he committed eligible for a conditional sentence. In order to sentence Ferguson to a term of imprisonment to be served in the community, the trial judge had to strike down s.742.1 or s.236(a) as unconstitutional. As he did neither, the two-year conditional sentence imposed has no basis in law and cannot stand.[18] [citation omitted]

33. Respectfully, in expressly exempting the Applicant from the application of s.236(a) and effectively exempting the Applicant from s.742.1, the trial Judge cut a judicial swath through two *Criminal Code* sentencing provisions which clearly were intended to restrict judicial discretion.

34. There is another potential side effect of constitutional exemptions. Assuming that a mandatory minimum punishment signals Parliament's intention that the range of sentence for a given offence begins with and moves upwards from the mandatory minimum punishment, exemptions may in time not only erode a mandatory minimum punishment but also the range of sentence for a given offence.

35. Finally, as submitted by the Respondent, constitutional exemptions may serve to foster unsatisfactory constitutional litigation. Legislation that should be struck down will remain on the books. As well, however, legislation that is

[18] *R. v. Ferguson*, 2006 ABCA 261, at paras.39-40 (*per* Fruman, J.A.) [A.R., at Vol.1, Tab 2D].

constitutional may not be so affirmed because, with the availability of a case-specific exemption, there is no need to take a constitutional challenge to that level of analysis. "Assuming without deciding" will prove sufficient. In short, hard questions posed by constitutional challenges to legislation may receive unsatisfactory answers.

36. The potential negative effects of constitutional exemptions also would extend to lawmakers. Drafting legislation (and re-drafting legislation that has been struck down) to comport with constitutional standards, and having that legislation become law is challenging and demanding work, and appropriately so.[19] Yet if a constitutional exemption is held to be available to redress an alleged s.12 breach, the pressure on lawmakers to comport with constitutional standards might be expected to lessen, at least unconsciously or at a systemic level.

37. In the result, constitutional exemptions may serve in time to subtly undermine the vigilance required of and by the *Charter*. The Appellant is right: striking down legislation is a blunt tool, but that is precisely why it is a better tool than the remedy of a constitutional exemption.

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[19] It is submitted that the mandatory minimum jail sentence of four years – an unusual figure if one peruses the *Criminal Code* –manifests Parliament's respect for s.12. Four years represents a comparatively modest and measured increase from the previous constitutionally vetted regime under s.85, which in the instant case would have provided for a mandatory minimum one year jail sentence for the use of the firearm (in the commission of an indictable offence) in addition, however, to the sentence for the offence of manslaughter.

PART IV - COSTS

38. The Attorney General for Ontario makes no submissions as to costs.

PART V – ORDER SOUGHT

39. The Constitutional questions should be answered 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 the answer to Question 1 is "yes", 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: Not necessary to decide, but if decided, the answer should be yes

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: Not necessary to decide, but if decided, the answer should be no

ALL OF WHICH is respectfully submitted this 15th day of October, 2007.

David Finley
Counsel for the Attorney General of Ontario

Kimberley Crosbie
Counsel for the Attorney General of Ontario

PART VI - TABLE OF AUTHORITIES

* Appellant's Book of Authorities
** Respondent's Book of Authorities
*** Attorney General of Canada's Book of Authorities

PART VII - STATUTORY PROVISIONS RELIED UPON

Criminal Code of Canada

s.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 minimun punishment of imprisonment for a term of four years.

s. 236. Quiconque commet un homicide involontaire coupable est coupable d'un acte criminel passible :

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

s. 255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

(a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than six hundred dollars,

(ii) for a second offence, to imprisonment for not less than fourteen days, and

(iii) for each subsequent offence, to imprisonment for not less than ninety days;

(b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and

(c) where the offence is punishable on summary conviction, to imprisonment for a term not exceeding six months.

s. 255. (1) Quiconque commet une infraction prévue à l'article 253 ou 254 est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire ou par mise en accusation et est passible :

a) que l'infraction soit poursuivie par mise en accusation ou par procédure sommaire, des peines minimales suivantes :

(i) pour la première infraction, une amende minimale de six cents dollars,

(ii) pour la seconde infraction, un emprisonnement minimal de quatorze jours,

(iii) pour chaque infraction subséquente, un emprisonnement minimal de quatre-vingt-dix jours;

b) si l'infraction est poursuivie par mise en accusation, d'un emprisonnement maximal de cinq ans;
c) si l'infraction est poursuivie par procédure sommaire, d'un emprisonnement maximal de six mois.

s.344. Every person who commits robbery 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; and
(b) in any other case, to imprisonment for life.

s.344. Quiconque commet un vol qualifié est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;
b) dans les autres cas, de l'emprisonnement à perpétuité.

s.742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and
(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

s.742.1 Lorsqu'une personne est déclarée coupable d'une infraction — autre qu'une infraction pour laquelle une peine minimale d'emprisonnement est prévue — et condamnée à un emprisonnement de moins de deux ans, le tribunal peut, s'il est convaincu que le fait de purger la peine au sein de la collectivité ne met pas en danger la sécurité de celle-ci et est conforme à l'objectif et aux principes visés aux articles 718 à 718.2, ordonner au délinquant de purger sa peine dans la collectivité afin d'y surveiller le comportement de celui-ci, sous réserve de l'observation des conditions qui lui sont imposées en application de l'article 742.3.

Canadian Charter of Rights and Freedoms

s. 1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and deomocratic society.

s. 1 La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

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

s. 12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.