



SUPREME COURT OF CANADA

CITATION: R. v. Nur, 2015 SCC 15

DATE: 20150414

DOCKET: 35678, 35684

BETWEEN:

Her Majesty The Queen
Appellant
and
Hussein Jama Nur
Respondent

AND BETWEEN:

Attorney General of Canada
Appellant
and
Hussein Jama Nur
Respondent
- and -

**Attorney General of Quebec, Attorney General of British Columbia,
Attorney General of Alberta, Pivot Legal Society, John Howard Society of
Canada, Canadian Civil Liberties Association, British Columbia Civil Liberties
Association, Advocates' Society, Canadian Bar Association, Canada's National
Firearms Association, Canadian Association for Community Living and African
Canadian Legal Clinic**
Interveners

AND BETWEEN:

Her Majesty The Queen
Appellant
and
Sidney Charles
Respondent

AND BETWEEN:

Attorney General of Canada
Appellant
and
Sidney Charles
Respondent
- and -

Attorney General of Quebec, Attorney General of British Columbia,

Attorney General of Alberta, Pivot Legal Society, Canadian Civil Liberties Association, British Columbia Civil Liberties Association and Canadian Association for Community Living

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ. concurring)
(paras. 1 to 120)

DISSENTING REASONS: Moldaver J. (Rothstein and Wagner JJ. concurring)
(paras. 121 to 199)

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Indexed as: R. v. Nur

2015 SCC 15

File Nos.: 35678, 35684.

2014: November 7; 2015: April 14.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law — Charter of Rights — Cruel and unusual treatment
or punishment — Sentencing — Mandatory minimum sentence — Firearms —*

Accused convicted of possessing loaded prohibited firearms contrary to s. 95(1) of Criminal Code — Accused sentenced under s. 95(2)(a)(i) and (ii) to three and five year mandatory minimum imprisonment terms, respectively — Whether mandatory minimum imprisonment terms result in cruel and unusual punishment on accused — If not, whether s. 95(2)'s reasonably foreseeable applications would impose cruel and unusual punishment on other offenders — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 12 — Criminal Code, R.S.C. 1985, c. C-46, s. 95.

N and C were convicted of possessing loaded prohibited firearms contrary to s. 95(1) of the *Criminal Code*. They were sentenced under s. 95(2)(a)(i) and (ii) to three and five year mandatory minimum imprisonment terms, respectively. In N's case, the trial judge held that the three-year minimum sentence imposed by s. 95(2)(a)(i) did not offend either s. 12 or 15 of the *Charter*. However, he concluded that the two-year gap between the one-year maximum sentence if the Crown proceeded summarily and the three-year minimum sentence if the Crown proceeded on indictment offended s. 7 because it was arbitrary and was not justified under s. 1. Nevertheless, the trial judge held that N was not personally affected by the gap, and therefore dismissed the s. 7 claim.

In C's case, the judge also dismissed the s. 12 challenge. She held that the five-year mandatory minimum sentence imposed by s. 95(2)(a)(ii) was not grossly disproportionate for C, in light of the gravity of his crimes. She also held that C had

failed to put forward any reasonable hypothetical cases in which the application of the five-year mandatory minimum sentence would be grossly disproportionate.

The Court of Appeal held that the mandatory minimum terms of imprisonment in s. 95(2)(a) resulted in grossly disproportionate sentences in reasonable hypothetical cases at the licensing end of the s. 95 spectrum, and therefore held that they violate s. 12 of the *Charter*. However, the Court of Appeal held that the sentences imposed on N and C were appropriate and should be upheld.

Held (Rothstein, Moldaver and Wagner JJ. dissenting): The appeals should be dismissed.

Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ.: The mandatory minimum sentences imposed by s. 95(2)(a)(i) and (ii) of the *Criminal Code* violate s. 12 of the *Charter* and are null and void under s. 52 of the *Constitution Act, 1982*. However, N and C's sentences were appropriate and are upheld. In most cases, including those of N and C, the mandatory minimum sentences of three and five years do not constitute cruel and unusual punishment. But in some reasonably foreseeable cases, they may do so.

When a mandatory minimum sentencing provision is challenged under s. 12, two questions arise. The first is whether the provision imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular individual before the court. If the answer is no, the second question is whether the

provision's reasonably foreseeable applications would impose cruel and unusual punishment on other offenders. This approach is consistent with the long and settled jurisprudence of this Court relating to *Charter* review generally and to s. 12 review in particular, is workable, and provides sufficient certainty. There is no reason to overrule this jurisprudence, especially as the effect would be to diminish *Charter* protection.

Where mandatory minimum sentencing laws are challenged under s. 12 on the basis of their reasonably foreseeable application to others, the question is what situations may reasonably arise, not whether such situations are likely to arise in the general day-to-day application of the law. Only situations that are remote or far-fetched are excluded.

In this case, N and C do not argue that the mandatory minimum terms of imprisonment in s. 95(2) are grossly disproportionate as applied to them. Rather, they argue that those mandatory minimum terms of imprisonment are grossly disproportionate as they apply to other offenders.

Turning first to s. 95(2)(a)(i), the question is whether the three-year minimum term of imprisonment would result in grossly disproportionate sentences in reasonably foreseeable cases. The answer to this question is yes.

Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct

at the far end of the range may not. At that far end stands, for example, the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. Given the minimal blameworthiness of this offender and the absence of any harm or real risk of harm flowing from the conduct, a three year sentence would be disproportionate. Similar examples can be envisaged. The bottom line is that s. 95(1) foreseeably catches licensing offences that involve little or no moral fault and little or no danger to the public.

Firearms are inherently dangerous and the state is entitled to use sanctions to signal its disapproval of careless practices and to discourage gun-owners from making mistakes, to be sure. But a three year term of imprisonment for a person who has essentially committed a licensing infraction is totally out of sync with the norms of criminal sentencing set out in the s. 718 of the *Criminal Code* and legitimate expectations in a free and democratic society. As the Court of Appeal concluded, there exists a cavernous disconnect between the severity of the licensing-type offence and the mandatory minimum three-year term of imprisonment. Consequently, s. 95(2)(a)(i) breaches s. 12 of the *Charter*.

As for s. 95(2)(a)(ii), there is little doubt that in many cases those who commit second or subsequent offences should be sentenced to terms of imprisonment, and some for lengthy terms. The seven-year term of imprisonment imposed on C is an example. But the five-year mandatory minimum term of imprisonment would be

grossly disproportionate for less serious offenders. For them, the five-year term goes far beyond what is necessary in order to protect the public, to express moral condemnation of the offenders, and to discourage others from engaging in such conduct. Therefore, s. 95(2)(a)(ii) violates s. 12 of the *Charter*.

These s. 12 *Charter* violations are not justified under s. 1. Although the government has not established that mandatory minimum terms of imprisonment act as a deterrent, a rational connection exists between mandatory minimums and the goals of denunciation and retribution. However, the government has not met the minimal impairment requirement under s. 1, as there are less harmful means of achieving its legislative goal. In addition, given the conclusion that the mandatory minimum terms of imprisonment in s. 95(2) when the Crown proceeds by indictment are grossly disproportionate, the limits are not a proportionate justification under s. 1. It follows that the mandatory minimum terms of imprisonment imposed by s. 95(2) are unconstitutional.

This conclusion makes it unnecessary to consider N and C's arguments that s. 95(2) violates s. 7 of the *Charter*.

Per Rothstein, **Moldaver** and Wagner JJ. (dissenting): The reasonable hypothetical approach under s. 12 of the *Charter* does not justify striking down s. 95(2) of the *Criminal Code*. The hypothetical licensing-type cases relied upon by the majority are not grounded in experience or common sense. First, experience shows that there is not a single licensing-type case over the entire history of s. 95(2)

where the imposition of a mandatory minimum could be regarded as grossly disproportionate. Moreover, the parties cannot identify a single case where an offender who has committed a licensing-type offence has been prosecuted by indictment, thus attracting a mandatory minimum. In fact, in the only licensing-type case raised by the parties, the Crown proceeded summarily.

Second, an application of the reasonable hypothetical approach which assumes that the Crown will elect to proceed by indictment when the fair, just, and appropriate election would be to proceed summarily does not accord with common sense. The Crown election has been purposely integrated into the legislative scheme and is a clear expression of Parliament's intent to confer on prosecutors the ability to divert the least serious licensing-type cases into summary proceedings. It is a mistake to shunt this factor aside when crafting reasonable hypotheticals.

Parliament's choice to raise the mandatory minimums in s. 95 reflects valid and pressing objectives, and it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture. This Court has warned against the use of hypotheticals that are "far-fetched or only marginally imaginable." The hypothetical scenario advanced by the majority stretches the bounds of credulity. It is not a sound basis on which to nullify Parliament's considered response to a serious and complex issue.

The majority identifies an alternative scheme that, in its view, would accomplish Parliament's goals without offending s. 12 of the *Charter*. Under this

scheme, the impugned mandatory minimums could be enacted as part of a revised offence containing an additional element beyond the existing elements of s. 95(1). For example, the offence could be limited to “those engaged in criminal activity” or to “conduct that poses a danger to others.” The problem with this suggestion is two-fold.

First, it is discordant with Parliament’s true objective in creating mandatory minimums for the unlawful *possession* of a loaded or readily loaded prohibited or restricted firearm. Section 95 targets the simple possession of guns that are frequently used in gang-related or other criminal activity. Parliament has concentrated on simple possession for a reason: firearms — and particularly the firearms caught by s. 95 — are inherently dangerous. Outside of law enforcement, prohibited and restricted firearms are primarily found in the hands of criminals who use them to intimidate, wound, maim, and kill. Given the inherent danger associated with these guns, it was open to Parliament to conclude that their simple possession should attract a significant mandatory custodial sentence.

Second, adding new elements to the offence would render the mandatory minimums under-inclusive. Limiting the offence to “those engaged in criminal activity” could exclude cases where the imposition of a mandatory minimum is uncontroversial. Likewise, limiting the offence to “conduct that poses a danger to others” could exclude certain situations to which the mandatory minimums in s. 95 are intended to apply.

In sum, the reasonable hypothetical approach does not justify striking down the impugned mandatory minimums. In any event, a different analytical framework is required here. To date, this Court's s. 12 jurisprudence has only considered the constitutionality of mandatory minimum sentences in the context of straight indictable offences. This is the first time it has examined their constitutionality in a hybrid scheme, which calls for a different analytical framework under s. 12.

The proper analytical framework has two stages. First, the court must determine whether the hybrid scheme adequately protects against the imposition of grossly disproportionate sentences *in general*. Second, the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence *for a particular offender*. This two-stage approach offers a more compelling framework than the use of reasonable hypotheticals to resolve a s. 12 constitutional challenge to a mandatory minimum sentence in a hybrid scheme.

The first stage of the analysis has two parts. First, the court must determine the sentencing range for indictable convictions under the sentencing regime that existed prior to the enactment of the impugned mandatory minimum. This is done with reference to actual sentences found in reported cases. The court must then isolate the low end of that sentencing range. This low end serves as an objective indicator of appropriate sentences for the least serious instances of the offence that would realistically be prosecuted by indictment.

Second, the court must compare the impugned mandatory minimum with the low end of the prior range. If the mandatory minimum is grossly disproportionate to sentences at the low end, then the scheme does not adequately protect against the imposition of grossly disproportionate sentences *in general*. On the contrary, it puts an identifiable set of offenders directly at risk of cruel and unusual punishment in violation of s. 12. The proper remedy here lies under s. 52(1), and the mandatory minimum must be struck down.

If the scheme itself is upheld, the court must move on to the second stage and determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence for the particular offender before the court. In those rare cases where the Crown's decision to proceed by indictment leads to a grossly disproportionate sentence, a remedy will lie under s. 24(1). The focus here is on the constitutionality of state action, and not the law itself. Specifically, the state action at issue is the Crown election, which is a matter of core prosecutorial discretion reviewable only for abuse of process.

A decision to prosecute by indictment that would give rise to a grossly disproportionate sentence represents a *per se* abuse of process in violation of s. 12. Imposing such a sentence would "undermine society's expectations of fairness in the administration of justice". Grossly disproportionate sentences are "so excessive as to outrage standards of decency" and are "abhorrent or intolerable" to society. They constitute a breach of an accused's fundamental right to be free from cruel and

unusual punishment, and are incompatible with the integrity of our justice system. An exercise of prosecutorial discretion — be it by design or effect — that leads to such an outcome must be regarded as a *per se* abuse of process.

The offender bears the burden of proof to show an abuse of process at the sentencing phase. If the offender discharges this burden of proof, he or she is entitled to a remedy under s. 24(1). In most cases, the appropriate and just remedy would be a sentence reduction below the mandatory minimum.

The responsibility to ensure constitutional compliance under the proposed framework rests with judges, and not with prosecutors. The framework includes two checks to ensure compliance with s. 12, neither of which relies on prosecutorial discretion. First, if the sentencing scheme itself is challenged, the judge may strike it down as unconstitutional. Second, if an offender argues that the mandatory minimum would be grossly disproportionate in his or her case, the judge may find a *per se* abuse of process and grant a sentence reduction under s. 24(1).

In N's case, Code J. found that, prior to the enactment of the three-year mandatory minimum, the sentencing range for a first offence under s. 95 was a term of imprisonment between two years less a day and three years. Thus, the low end of the range is around two years less a day. The three-year mandatory minimum for a first offence under s. 95(2) is not grossly disproportionate to this low end. Therefore, at the first stage, the mandatory minimum does not violate s. 12. N's concession that a

three-year sentence is not grossly disproportionate in his case disposes of the second stage.

In C's case, Backhouse J. did not refer to the sentencing range for a second or subsequent offence prior to the enactment of the five-year mandatory minimum. Code J., however, noted that while the sentencing range for a first offence was between two years less a day and three years, much longer sentences were imposed for recidivists. It is clear, then, that a second or subsequent offence would have attracted a sentence considerably longer than three years — at the very least, in the range of four or five years. The present five-year mandatory minimum is not grossly disproportionate to the previous low end of the range for second or subsequent offences under s. 95. Like N, C concedes that the mandatory minimum is not grossly disproportionate in his case.

In conclusion, neither the sentencing scheme itself, nor its application to N or C, offends s. 12 of the *Charter*. Moreover, s. 95 is neither arbitrary nor overbroad, and therefore does not offend s. 7 of the *Charter*.

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Firearms Act (Can.), 2000 SCC 31, [2000] 1 S.C.R. 783; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Brown*, [1994] 3 S.C.R. 749; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Smickle*, 2012 ONSC 602, 110 O.R. (3d) 25; *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.

By Moldaver J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Goudge, Cronk, Blair and Tulloch JJ.A.), 2013 ONCA 681, 117 O.R. (3d) 456, 311 O.A.C. 316, 303 C.C.C. (3d) 352, 296 C.R.R. (2d) 72, 5 C.R. (7th) 370, [2013] O.J. No. 5115 (QL), 2013 CarswellOnt 15470 (WL Can.), affirming a sentencing decision

of Backhouse J., 2010 ONSC 5437, 262 C.C.C. (3d) 120, [2010] O.J. No. 4209 (QL), 2010 CarswellOnt 7496 (WL Can.). Appeal dismissed, Rothstein, Moldaver and Wagner JJ. dissenting.

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Solomon Friedman, for the intervener Canada's National Firearms Association.

Joanna L. Birenbaum, for the intervener the Canadian Association for Community Living.

Faisal Mirza and *Anthony N. Morgan*, for the intervener the African Canadian Legal Clinic.

The judgment of McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ. was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] Gun-related crime poses grave danger to Canadians. Parliament has therefore chosen to prohibit some weapons outright, while restricting the possession of others. The *Criminal Code*, R.S.C. 1985, c. C-46, imposes severe penalties for violations of these laws.

[2] Section 95(2)(a) imposes mandatory minimum sentences for the offence of possessing prohibited or restricted firearms when the firearm is loaded or kept with readily accessible ammunition (s. 95(1)) — three years for a first offence and five years for a second or subsequent offence.

[3] The respondents Hussein Jama Nur and Sidney Charles were convicted under s. 95(1). They assert that the mandatory minimum sentences imposed by

s. 95(2)(a) are unconstitutional because they result in grossly disproportionate sentences in some cases, violating the guarantee in s. 12 of the *Canadian Charter of Rights and Freedoms* against cruel and unusual punishment. The Ontario Court of Appeal agreed, and held that the mandatory minimum sentences imposed by s. 95(2)(a) were unconstitutional.

[4] I agree with the Court of Appeal that the mandatory minimum sentences imposed by s. 95(2)(a) of the *Criminal Code* violate s. 12 of the *Charter*. Accordingly, the mandatory minimum sentences in s. 95(2)(a) of the Code are null and void under s. 52 of the *Constitution Act, 1982*. In most cases, including those of Nur and Charles, the mandatory minimum sentences of three and five years respectively do not constitute cruel and unusual punishment. But in some reasonably foreseeable cases that are caught by s. 95(1) they may do so. This has not been shown to be justified under s. 1 of the *Charter*. It follows that s. 95(2)(a) is unconstitutional as presently structured. This conclusion makes it unnecessary to consider the respondents' arguments that s. 95(2)(a) violates s. 7 of the *Charter*.

[5] This does not prevent judges from imposing exemplary sentences that emphasize deterrence and denunciation in appropriate circumstances. Nur and Charles fall into this category. Like the Court of Appeal, I would uphold the sentences imposed by the trial judges in their cases.

II. Legislative Background

[6] Firearm-related offences are serious crimes. Parliament has sought to protect the public from firearm-related injuries and to deter crimes involving firearms through a combination of strict licensing and registration requirements under the *Firearms Act*, S.C. 1995, c. 39, and criminal prohibitions under Part III of the *Criminal Code: Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 (“*Firearms Reference*”).

[7] The *Criminal Code* imposes severe restrictions and sanctions on two classes of firearms. A “prohibited firearm” includes short-barrelled handguns, sawed-off rifles and shotguns, and automatic firearms: *Criminal Code*, s. 84(1). It is unlawful to possess a prohibited firearm unless the individual possessed the firearm prior to the prohibition coming into force: *Firearms Act*, s. 12. This grandfathering also applies to next of kin. A “restricted firearm” includes any handgun that is not a prohibited firearm, some semi-automatic firearms, and some firearms that are less than the specified length: *Criminal Code*, s. 84(1). These weapons are inherently dangerous and are commonly used in criminal activity.

[8] Anyone who wishes to possess a firearm must obtain a licence under the *Firearms Act*. Although one can obtain licences that authorize the possession of prohibited or restricted firearms, stringent criteria must be met: *Firearms Act*, ss. 7(2) and 12. The *Firearms Act* imposes controls on places where a person who has a licence can possess the restricted or prohibited firearms: s. 17. A Chief Firearms Officer may deny a person a licence in the interests of public safety: s. 5. A licensed

person must obtain authorization to transport firearms from one designated place to another: s. 19. In addition, the Act requires that a person obtain a registration certificate for the firearm: s. 12.1.

[9] Restricted or prohibited firearms must be stored unloaded, with a secure locking device and in a locked container or in a vault, safe or room that has been constructed or modified for the secure storage of firearms. Ammunition may not be stored with the firearm unless both the ammunition and the unloaded locked firearm are stored in a securely locked room or container that cannot be readily broken open or into: *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*, SOR/98-209, ss. 6 and 7. The firearms may only be loaded in a place where they can be lawfully discharged: s. 15.

[10] These licensing and registration requirements under the *Firearms Act* are reinforced through a series of *Criminal Code* offences that criminalize the possession of firearms where the possession contravenes the terms and conditions of the *Firearms Act*. The provision at issue in this appeal is s. 95 of the *Criminal Code*. The relevant version came into force in December 1998: S.C. 1995, c. 39, s. 139. It prohibits the possession of a loaded prohibited or restricted firearm, or the possession of an unloaded prohibited or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm: s. 95(1). The offence applies to a person in possession of a prohibited or restricted firearm who does not

have an authorization or a licence to possess the firearm at the specific place at issue and a registration certificate for the firearm.

[11] The respondents challenge the constitutionality of the provisions in s. 95(2)(a)(i) and (ii) of the *Criminal Code* (as it read at the relevant time):

95. (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, unless the person is the holder of

(a) an authorization or a licence under which the person may possess the firearm in that place; and

(b) the registration certificate for the firearm.

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

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

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

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

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

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

[12] Section 95 is a hybrid offence punishable by a maximum of 10 years' imprisonment if the Crown proceeds by way of indictment. When the provision was

first introduced by Parliament, the offence carried a one-year minimum sentence if the Crown proceeded by indictment, and a one-year maximum penalty if the Crown proceeded summarily. In May 2008, Parliament increased the minimum term of imprisonment to three years for a first offence and five years for a subsequent offence if the Crown proceeded by indictment: S.C. 2008, c. 6, s. 8. But Parliament did not change the one-year maximum sentence if the Crown proceeded summarily. Therefore, there is a two-year gap between the maximum penalty on summary conviction and the minimum penalty on indictment. Nur challenges this gap under s. 7 of the *Charter*.

[13] A review of the firearms offences in the *Criminal Code* reveals that s. 95 carries a more serious penalty than any other simple possession offence. The mandatory minimum terms of imprisonment found in s. 95 reflect two aggravating factors. It applies to prohibited and restricted firearms, which present the most significant danger to public safety. It only applies if the firearm is loaded or if ammunition for the firearm is readily available.

[14] Section 95(2)(a)(ii) imposes a five-year mandatory minimum term of imprisonment for a second or subsequent offence. For the purpose of determining whether a person has committed a second or subsequent offence within the meaning of s. 95(2)(a)(ii), one must have regard to s. 84(5) and (6):

(5) In determining, for the purpose of subsection 85(3), 95(2), 99(2), 100(2) or 103(2), whether a convicted person has committed a second or

subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under section 85, 95, 96, 98, 98.1, 99, 100, 102 or 103 or subsection 117.01(1);

(b) an offence under section 244 or 244.2; or

(c) an offence under section 220, 236, 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

(6) For the purposes of subsection (5), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

[15] Charles challenges s. 84(5) and (6) as being overbroad and arbitrary, contrary to s. 7 of the *Charter*.

[16] The relevant provisions of the *Charter* state:

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

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

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

III. Facts and Judicial History

A. *Nur*

[17] One evening in January 2009, a young man entered a community centre in the Jane and Finch neighbourhood of Toronto and told a staff member that he was afraid of someone who was waiting outside to get him. The staff member saw someone waiting outside who looked threatening. The neighbourhood had very high levels of crime. Gun violence was a serious problem. The supervisor put the community centre on lockdown and called the police. When the police arrived, they saw four men standing at one of the entrances of the community centre. Nur was among them. As one of the police officers approached, the men scattered.

[18] The police officer chased Nur. He held his left hand against his body and appeared to be concealing something. As the officer gained ground on Nur, he saw Nur throw something away. The officer caught and arrested Nur moments after. Returning to the area where he had seen Nur throw something to the ground, the officer found a loaded handgun under a parked car. The gun was a working 22-calibre semi-automatic with an oversized ammunition clip. There were 23 bullets in the clip and one in the chamber. The gun is a prohibited firearm. When functioning properly, the gun can fire all 24 rounds in 3.5 seconds.

[19] Nur was not found to be involved with the threatening behaviour, and it was not clear when, for how long, or how Nur came to possess the loaded handgun.

(1) Ontario Superior Court of Justice

[20] Nur was charged with one count of possession of a loaded prohibited firearm contrary to s. 95(1) of the *Criminal Code*. The Crown proceeded by indictment and Nur elected to be tried by judge alone. He ultimately pleaded guilty to the charge, but he did not admit any facts relevant to the allegations beyond those essential to the plea. At his sentencing, Nur put the Crown to the proof of any facts that it relied on as aggravating factors for sentencing. Nur also challenged the constitutionality of the three-year mandatory minimum sentence imposed by s. 95(2)(a)(i).

[21] Nur comes from a supportive, law-abiding family who came to Canada as refugees. At the time of the offence, he was 19 and attending high school. He was performing well and hoped to eventually attend university. He had worked a number of part-time jobs and volunteered in the community. Teachers and past employers praised his performance and his considerable potential. One teacher described Nur as “an exceptional student and athlete who excelled in the classroom and on the basketball court . . . an incredible youth with unlimited academic and great leadership skills” (2011 ONSC 4874, 241 C.R.R. (2d) 306, at para. 34). Nur had no prior criminal record.

[22] The trial judge held that the three-year mandatory minimum sentence did not offend ss. 12 and 15 of the *Charter*. However, he concluded that the two-year gap between the one-year maximum sentence if the Crown proceeded summarily and

the three-year minimum sentence if the Crown proceeded on indictment offended s. 7 of the *Charter* because it was arbitrary and was not justified under s. 1. Nevertheless, the trial judge held that Nur was not personally affected by the gap. In his view, the gap only posed a constitutional problem for a small class of accused, in those cases where the Crown would reasonably elect to proceed summarily but for the arbitrary two-year gap. The trial judge held that the Crown would not have proceeded summarily against Nur regardless of the maximum penalty available on a summary conviction proceeding. The trial judge therefore dismissed the s. 7 claim.

[23] The trial judge held that a sentence of 40 months was appropriate for the offence and the offender, having regard to the “inflationary floor” of the mandatory minimum sentence. Nur had been denied bail and had been in custody for 26 months. Nur received two to one credit for 20 months of pre-trial custody at the time of sentencing. As a result, the trial judge imposed a sentence of one day in custody to be followed by two years of probation.

(2) Court of Appeal for Ontario, 2013 ONCA 677, 117 O.R. (3d) 401

[24] Nur appealed to the Court of Appeal, which heard his appeal, and five others, concerning constitutional challenges to various provisions of the *Criminal Code* imposing or related to the imposition of mandatory minimum sentences for various firearm-related offences.

[25] Doherty J.A., for the court, allowed the appeal. He held that the three-year mandatory minimum penalty imposed by s. 95(2)(a)(i) was contrary to s. 12 of the *Charter* based on a reasonable hypothetical on the licensing end of the s. 95 spectrum, and that it was not saved by s. 1. He held that the appropriate remedy was to hold s. 95(2)(a)(i) of no force or effect to the extent that it imposes a three-year mandatory minimum term of imprisonment when the Crown proceeds by way of indictment. His declaration did not affect the 10-year maximum penalty in s. 95(2)(a). However, he also concluded that his analysis did not prevent Parliament from retaining the three-year mandatory minimum for the “true crime end” of the s. 95 spectrum, that is “[i]ndividuals who have loaded restricted or prohibited firearms that they have no business possessing anywhere or at any time, and who are engaged in criminal conduct or conduct that poses a danger to others” (para. 206). These offenders, Doherty J.A. held, should continue to receive exemplary sentences that emphasize deterrence and denunciation.

[26] The Court of Appeal held that, despite mitigating factors, the trial judge’s sentence was appropriate and should be upheld.

B. *Charles*

[27] In May 2008, Charles and another man were living in a Toronto rooming house. An incident at the rooming house was reported to the police. They attended and secured the scene. The Emergency Task Force arrived and searched the house, finding a loaded Ruger semi-automatic handgun and ammunition in Charles’

bedroom. It was equipped with an over-capacity magazine, which is a prohibited device under the *Criminal Code*, containing 13 rounds of live 9-mm ammunition. A further round of ammunition was found on Charles' bed near the gun. The serial number on the gun had been removed. Charles admitted to police that he did not have a licence to possess a firearm and did not hold a current registration certificate for the firearm. Charles was arrested and charged with various firearm-related offences.

(1) Ontario Superior Court of Justice

[28] The Crown elected to proceed by way of indictment. Charles pleaded guilty to possession of a loaded prohibited firearm, contrary to s. 95(1) of the *Criminal Code*. He also pleaded guilty to possession of a firearm knowing that the serial number had been defaced, contrary to s. 108(1)(b); possession of a firearm while subject to a firearms prohibition order, contrary to s. 117.01(1), and without being the holder of a licence, contrary to s. 91(1); and possession of ammunition while subject to a firearms prohibition order, contrary to s. 117.01(1).

[29] Charles has a lengthy and serious criminal record. At the time of sentencing, it included approximately 20 prior convictions, five of which involved crimes of violence and five other convictions for firearm-related offences. Two of Charles's prior convictions are relevant (under s. 84(5) and (6)) to the application of the mandatory minimum sentence in s. 95(2)(a)(ii).

[30] The first notable conviction was in 2002, when Charles pleaded guilty to a charge of possession of ammunition while subject to a firearms prohibition order, contrary to s. 117.01(1) of the *Criminal Code*. He was charged following a dispute with his grandmother regarding a gun. The police responded to the dispute and found a locked box containing a single .38 calibre bullet, as well as identification documents belonging to Charles. Returning later to arrest him, the police also found Charles in possession of a large quantity of crack cocaine, electronic scales, a cell phone, scissors and a screwdriver. He was charged with possession of ammunition contrary to a prohibition order and possession of cocaine for the purpose of trafficking. It appears from the record that he was sentenced to two months' imprisonment on each charge, to be served concurrently, plus 96 days' credit for pre-sentence custody.

[31] The second notable conviction was in 2004, when Charles pleaded guilty to robbing an employment agency with three accomplices, while using an imitation firearm and having his face masked with the intent to commit an indictable offence, contrary to s. 85(2) of the *Criminal Code*. He was sentenced to 18 and a half months' imprisonment on each count, to be served concurrently, after credit of four and a half months of pre-sentence custody.

[32] At sentencing for the present offence, Charles contested the Crown's invocation of the five-year mandatory minimum penalty. He challenged the combined effect of ss. 84(5)(a) and 95(2)(a)(ii) as being contrary to ss. 7, 9 and 12 of the *Charter*, though he later conceded that the determination of the s. 12 claim was

dispositive of the ss. 7 and 9 challenges. Charles argued that the inclusion in s. 84(5)(a) of offences that did not involve the possession of firearms as earlier offences for the purpose of s. 95(2) violated s. 12.

[33] The sentencing judge dismissed Charles' s. 12 challenge. She held that the five-year mandatory minimum sentence imposed by s. 95(2)(a)(ii) was not grossly disproportionate for Charles, in light of the gravity of these crimes. She also held that Charles had failed to put forward any reasonable hypothetical circumstances in which the application of the five-year mandatory minimum sentence on conviction for a s. 95(1) offence to an offender previously convicted of an offence under ss. 85(2) or 117.01(1), would be grossly disproportionate. She sentenced Charles to seven years' imprisonment, less five years' credit on a two to one basis for two years, six months of pre-sentence custody (2010 ONSC 8035, 222 C.R.R. (2d) 118).

(2) Court of Appeal for Ontario, 2013 ONCA 681, 117 O.R. (3d) 456

[34] Charles appealed to the Court of Appeal, which heard his appeal with Nur and four others concerning constitutional challenges arising out of the imposition of mandatory minimum sentences for various firearm-related offences.

[35] Cronk J.A., for the court, held that the five-year mandatory minimum sentence of imprisonment for a second offence under s. 95(2) is grossly disproportionate when measured against a reasonable hypothetical in the nature of a licensing offence, even where the offender has previously been convicted of an

offence listed under s. 84(5). Consequently, she declared s. 95(2)(a)(ii) of no force or effect to the extent that it imposes a mandatory minimum sentence of five years' imprisonment for a second or subsequent offence when the Crown proceeds by way of indictment. However, Cronk J.A. dismissed Charles' claims under s. 7 of the *Charter*, holding that the impugned provisions were neither arbitrary nor overbroad and, therefore, did not infringe s. 7.

[36] Charles did not otherwise attack his overall sentence and conceded that a sentence of five years' imprisonment for his s. 95(1) offence alone was appropriate, even without the application of the five-year mandatory minimum. Consequently, Cronk J.A. affirmed the sentence imposed by the sentencing judge.

IV. Issues

[37] This appeal raises the following issues:

- (a) Do the mandatory minimum terms of imprisonment in s. 95(2)(a)(i) and (ii) of the Criminal Code infringe s. 12 of the Charter?
- (b) Do the mandatory minimum terms of imprisonment in s. 95(2)(a)(i) and (ii) of the Criminal Code infringe s. 7 of the Charter?
- (c) If so, are they saved under s. 1 of the Charter?

V. Discussion

A. *Do the Mandatory Minimum Terms of Imprisonment in Section 95(2)(a)(i) and (ii) Infringe s. 12 of the Charter?*

(1) The Test for Infringement of Section 12

[38] Section 12 of the *Charter* states that everyone has the right not to be subjected to any cruel and unusual punishment. The question is whether the mandatory minimum sentences imposed by s. 95(2) violate this guarantee. The respondents say they do, because s. 95(2) catches conduct that falls far short of true criminal conduct — for example licensing offences. The Attorney General for Ontario responds that these examples are inadmissible hypotheticals and should not enter into the constitutional analysis, and that in any event, the Crown will choose to prosecute offences of lesser culpability by summary conviction, avoiding the mandatory minimum provisions.

[39] This Court has set a high bar for what constitutes “cruel and unusual . . . punishment” under s. 12 of the *Charter*. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. Lamer J. (as he then was) explained at p. 1072 that the test of gross disproportionality “is aimed at punishments that are more than merely excessive”. He added, “[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation”. A prescribed sentence may be grossly disproportionate as applied to the offender before

the court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional.

[40] In determining an appropriate sentence for purposes of the comparison demanded by this analysis, regard must be had to the sentencing objectives in s. 718 of the *Criminal Code*, which instructs the sentencing judge as follows:

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

(a) to denounce unlawful conduct;

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

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

(d) to assist in rehabilitating offenders;

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

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

[41] The sentencing judge must also have regard to the following: any aggravating and mitigating factors, including those listed in s. 718.2(a)(i) to (iv); the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(b)); the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (s. 718.2 (c)); and the principle that courts should exercise restraint in imposing imprisonment (ss. 718.2(d) and (e)).

[42] In reconciling these different goals, the fundamental principle of sentencing under s. 718.1 of the *Criminal Code* is that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[43] It is no surprise, in view of the constraints on sentencing, that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 80. “Only if this is so can the public be satisfied that the offender ‘deserved’ the punishment he received and feel a confidence in the fairness and rationality of the system” (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533, per Wilson J.). As LeBel J. explained in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433:

Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. [para. 37]

[44] Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit

sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.

[45] General deterrence — using sentencing to send a message to discourage others from offending — is relevant. But it cannot, without more, sanitize a sentence against gross disproportionality: “General deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual” (*R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 45, per Gonthier J.). Put simply, a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending.

[46] To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum

requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.

(2) Whose Situation Is Considered in the Section 12 Analysis?

[47] We have seen that a s. 12 challenge to a mandatory sentencing provision compares a fit and proportionate sentence for the offence with the sentence imposed by the mandatory minimum. At this point, a question arises — a question that is at the heart of this case. In analyzing the constitutionality of a mandatory minimum sentencing provision, who does the court take as the offender? Does the court consider only the offender who brings the s. 12 challenge? Or should it also, if necessary, consider how the provision impacts on other persons who might reasonably be caught by it?

[48] Nur and Charles do not argue that the mandatory minimum terms of imprisonment in s. 95(2) are grossly disproportionate as applied to them. Rather, they argue that these mandatory minimum terms of imprisonment violate s. 12 as they apply to other offenders. Against this, the Attorney General of Ontario, supported by other Attorneys General, argues for a test that puts the primary or exclusive focus on the offender before the court. (The Attorney General of Ontario says the analysis should ask whether the mandatory minimum is grossly disproportionate having regard to the purpose and gravity of the offence as manifested in *actual* common instances of committing the offence, as well as the *actual* case before the court (A.F. (Nur), at

para. 41). The Attorney General of British Columbia goes further, asserting that only the circumstances of the offender should be considered.)

[49] For the reasons that follow, I conclude that excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would run counter to the settled authority of this Court and artificially constrain the inquiry into the law's constitutionality.

[50] To confine consideration to the offender's situation runs counter to the long and settled jurisprudence of this Court relating to *Charter* review generally, and to s. 12 review in particular.

[51] I turn first to the general jurisprudence of *Charter* review. This Court has consistently held that a challenge to a law under s. 52 of the *Constitution Act, 1982* does not require that the impugned provision contravene the rights of the claimant: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 314; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 58-66. As I wrote in *Ferguson*, “[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” (para. 59). This is because “[i]t is the nature of the law, not the status of the accused, that is in issue” (*Big M*, at p. 314, per Dickson J.). Section 52 of the *Constitution Act, 1982* entrenches not only the supremacy of the Constitution but also

commands that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. If the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely. This violates the rule of law. No one should be subjected to an unconstitutional law: *Big M.* at p. 313. This reflects the principle that the constitution belongs to all citizens, who share a right to the constitutional application of the laws of Canada.

[52] The argument that the focus should be mainly or exclusively on the offender before the court is also inconsistent with the jurisprudence of the Court on the review of mandatory minimum sentences under s. 12 of the *Charter*. The cases have sometimes referred to this review as proceeding on “reasonable hypotheticals”. The Attorney General of Ontario concedes that the cases under s. 12 support looking beyond the circumstances of the offender before the court, but asks us to overrule them. She says the cases on what constitutes a “reasonable hypothetical” are “irreconcilable”. A review of the cases does not, with respect, support this contention.

[53] The first case to consider the question was *Smith*. The majority of the Court, per Lamer J. (as he then was) struck down a seven-year mandatory minimum sentence for importing narcotics on the basis that the law could catch a student driving home to Canada from the United States with her first joint of grass. The Court acknowledged that a long prison sentence was appropriate with few exceptions

for people who import drugs into the country, but held that because it could catch people for whom the seven-year minimum sentence would be grossly disproportionate, it violated the s. 12 guarantee against cruel and unusual punishment.

[54] A few years later in *R. v. Goltz*, [1991] 3 S.C.R. 485, the Court, per Gonthier J. for the majority, confirmed that a s. 12 review of mandatory minimum sentencing laws may look at cases other than that of the offender, and commented on the scope of that review. Laws should not be struck down as unconstitutional on the basis of examples that were unlikely ever to arise. The focus must be on “reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases” (p. 506 (emphasis in original)). The Court upheld a minimum sentence of seven days’ imprisonment for driving while prohibited.

[55] Once again, in *Morrisey*, the majority of the Court, per Gonthier J., stressed that the “reasonableness of the hypothetical cannot be overstated” (para. 30). The Court upheld a four-year mandatory minimum sentence for criminal negligence causing death by using a firearm.

[56] These are the only three cases to directly address the question of what cases, or “hypotheticals”, the court should consider on a s. 12 challenge to a mandatory minimum sentencing provision.¹ In my view, they do not establish that

¹ In a brief oral judgment in *R. v. Brown*, [1994] 3 S.C.R. 749, the Court declined to consider a reasonable hypothetical with an underlying offence different from that in the case before the Court for the offence of using a firearm in the commission of an indictable offence under s. 85 of the *Criminal Code*, given that the Attorney General of Manitoba limited his defence of the constitutionality of the

the jurisprudence is “irreconcilable”. A single theme underlies *Goltz* and *Morrissey* — the only two cases to discuss the issue in detail — reasonable foreseeability. When Gonthier J. in *Goltz* speaks of the “reasonable hypothetical” he is speaking of a *situation that may reasonably be expected to arise* — not “marginally imaginable”, not “far-fetched”, but “reasonable”. The early case of *Smith* is not inconsistent in words or result with the theme developed in *Goltz* and *Morrissey* — in determining whether mandatory minimum sentencing laws violate s. 12, it is appropriate to consider how the law may impact on third parties in reasonably foreseeable situations.

[57] Unfortunately, the word “hypothetical” has overwhelmed the word “reasonable” in the intervening years, leading to debate on how general or particular a hypothetical must be, and to the unfortunate suggestion that if a trial judge fails to assign a particular concatenation of characteristics to her hypothetical, the analysis is vitiated. With respect, this overcomplicates the matter. The question is simply whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples’ situations, resulting in a violation of s. 12. The terminology of “reasonable hypothetical” may be helpful in this regard, but the focus remains squarely on whether the sentence would be grossly disproportionate in reasonably foreseeable cases. At its core, the process is simply an application of well established principles of legal and constitutional interpretation.

provision to the underlying offence of armed robbery. The Court did not give sustained consideration to the scope of the reasonable hypothetical.

[58] I conclude that the jurisprudence on general *Charter* review and on s. 12 review of mandatory minimum sentencing provisions supports the view that a court may look not only at the offender's situation, but at other reasonably foreseeable situations where the impugned law may apply. I see no reason to overrule this settled principle.

[59] I add this. This Court does not and should not lightly overrule its prior decisions, particularly when they have been elaborated consistently over a number of years and when they represent the considered view of firm majorities: see, e.g., *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 27. Deciding whether to do so requires us to balance correctness against certainty: *Craig*, at para. 27; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47. We must be especially careful before reversing a precedent where the effect is — as it would be here — to diminish *Charter* protection: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44.

[60] The Attorney General of Ontario raises a second argument for abandoning the s. 12 jurisprudence — that it is “unworkable” and leads to uncertainty. This contention rests on the debate about reasonable hypotheticals. As just discussed, the term “reasonable hypothetical” simply means that the court must look at reasonably foreseeable applications of the mandatory minimum at issue, and ask whether these would be grossly disproportionate and thus impose cruel and

unusual punishment. This is the sort of inquiry judges have consistently conducted in *Charter* review. It is an inquiry into the range or scope of the law — into what Dickson J. in *Big M* referred to as the “nature of the law”.

[61] To be sure, the language of “reasonable hypotheticals” in the context of mandatory minimum sentences and the exaggerated debate that has surrounded the term has led some to fear that the potential for finding a law inconsistent with the *Charter* is limited only by the bounds of a particular judge’s imagination. This fear is misplaced. Determining the reasonable reach of a law is essentially a question of statutory interpretation. At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law’s reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality.

[62] The inquiry into cases that the mandatory minimum provision may reasonably be expected to capture must be grounded in judicial experience and common sense. The judge may wish to start with cases that have actually arisen (I will address the usefulness of reported cases later), and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable. Fanciful or remote situations must be excluded: *Goltz*, at p. 506. To repeat, the exercise must be grounded in experience and common sense. Laws should not be set aside on the basis of mere speculation.

[63] Not only is looking at the law's impact on persons whom it is reasonably foreseeable the law may catch workable — it is essential to effective constitutional review. Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order. The protection of individuals' rights demands constitutional review that looks not only to the situation of the offender before the court, but beyond that to the reasonably foreseeable reach of the law. Testing the law against reasonably foreseeable applications will prevent people from suffering cruel and unusual punishment in the interim until the mandatory minimum is found to be unconstitutional in a particular case.

[64] Refusing to consider an impugned law's impact on third parties would also undermine the prospect of bringing certainty to the constitutionality of legislation, condemning constitutional jurisprudence to a wilderness of single instances. Citizens, the police and government are entitled — and indeed obliged — to know what the criminal law is and whether it is constitutional. Looking at whether the mandatory minimum has an unconstitutional impact on others avoids the chilling effect of unconstitutional laws remaining on the statute books.

[65] I conclude that a mandatory minimum sentence may be challenged on the ground that it would impose a grossly disproportionate sentence either on the offender or on other persons in reasonably foreseeable situations. The constant jurisprudence

of this Court and effective constitutional review demand no less. In the result, a mandatory minimum sentencing provision may be challenged on the basis that it imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular offender before the court, or failing this, on the basis that it is reasonably foreseeable that it will impose cruel and unusual punishment on other persons.

[66] I turn now to some of the ancillary debates surrounding how a court should proceed where mandatory minimum sentencing laws are challenged under s. 12 on the basis of their reasonably foreseeable application to others.

[67] The first debate concerns the degree of “likelihood” required to satisfy the reasonable foreseeability test. The Attorney General of Ontario argues that the s. 12 question is whether it is *likely* that the *general application* of the offence would result in the imposition of a grossly disproportionate sentence amounting to cruel and unusual punishment (A.F. (Nur), at para. 66). She says the Court of Appeal erred by failing to confine itself to common instances of conduct caught by the provision and basing its decision on unlikely scenarios (para. 68-73). These instances create a presumption of constitutionality that can be defeated only by showing that the offender before the court would suffer cruel and unusual punishment (para. 68).

[68] The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured

by the minimum conduct caught by the offence. Only situations that are “remote” or “far-fetched” are excluded: *Goltz*, at p. 515. Contrary to what the Attorney General of Ontario suggests there is a difference between what is foreseeable although “unlikely to arise” and what is “remote [and] far-fetched” (A.F. (Nur), at para. 66). Moreover, adoption of the likelihood standard would constitute a new and radically narrower approach to constitutional review of legislation than that consistently adhered to since *Big M*. The Court has never asked itself whether a projected application of an impugned law is common or “likely” in deciding whether a law violates a provision of the *Charter*. To set the threshold for constitutional review at common or likely instances would be to allow bad laws to stay on the books.

[69] The Attorney General of Ontario urges that the approach she proposes is necessary to prevent uncertainty in the law. A presumption of constitutionality arising from the appropriateness of the mandatory minimum (having regard to the purpose and gravity of the offence) in common or likely cases, she asserts, will set a constant standard that can only exceptionally be rebutted by a finding that the mandatory minimum is grossly disproportionate as applied to a particular offender. This, she argues, will provide certainty.

[70] I am not persuaded by this argument. In essence, it would make the sentencing range for common occurrences of the offence the constitutional norm. This is problematic for two reasons. Appropriate sentencing ranges are themselves subject to debate and, more importantly, any gain in clarity would come at the price

of appropriate constitutional review and unconstitutional applications of the law. The question is, certainty for whom? The Attorney General of Ontario's test provides a degree of certainty for offenders in situations that commonly occur. But it provides no certainty for offenders outside that category. They — and their prosecutors and judges — are left to wonder whether the mandatory minimum will be unconstitutional in their situation. Finally, as discussed below, the reasonably foreseeable test, applied in accordance with the principle of *stare decisis*, will provide sufficient certainty in the law.

[71] This brings us to the second ancillary question — the effect of a ruling that a particular mandatory minimum provision does not violate s. 12. Two questions arise. First, can a particular offender argue in a future case that the provision violates s. 12 because it imposes cruel and unusual punishment on him or her? The answer, all agree, must be yes. If the offender can establish new circumstances or evidence, including mitigating factors specific to the offender, it is open to a court to reconsider the constitutionality of the law. Second, can the offender in a future case argue that the provision as applied to others violates s. 12? The answer to this question is that it depends. Once a law is held not to violate s. 12, *stare decisis* prevents an offender in a later case from simply rearguing what constitutes a reasonably foreseeable range of the law. But *stare decisis* does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case. A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future of different reasonable

applications (*Morrissey*, at para. 89, per Arbour J.). That said, the threshold for revisiting the constitutionality of a mandatory minimum is high and requires a significant change in the reasonably foreseeable applications of the law. In a nutshell, the normal rules of *stare decisis* answer the concern raised by the Attorney General of Ontario that “each subsequent trial court [will be asked] to duplicate the analysis” (A.F. (Nur), at para. 39).

[72] A third ancillary question is whether reported cases should be considered in determining whether it is reasonably foreseeable that a mandatory minimum sentencing provision will result in cruel and unusual punishment, contrary to the s. 12 guarantee. The majority in *Morrissey* said reported cases should be excluded if the court considers them “marginal”, and the minority, without qualification, said they may be considered. In my view, they can. Reported cases illustrate the range of real-life conduct captured by the offence. I see no principled reason to exclude them on the basis that they represent an uncommon application of the offence, provided that the relevant facts are sufficiently reported. Not only is the situation in a reported case reasonably foreseeable, it has happened. Reported cases allow us to know what conduct the offence captures in real life. However, they do not prevent the judge from having regard to other scenarios that are reasonably foreseeable: see *Morrissey*, at para. 33.

[73] A fourth ancillary question concerns the personal characteristics of hypothetical offenders that should be considered. Some have suggested that the

consideration must be generalized to the point where all personal characteristics are excluded, while others assert that any and all characteristics should be included. This debate is largely the result of the reification of the notion of the reasonable hypothetical discussed earlier. It is answered by recognizing two aspects of the reasonably foreseeable application test.

[74] First, what is reasonably foreseeable necessarily requires consideration of the sort of situations that may reasonably be expected to be caught by the mandatory minimum, based on experience and common sense. This means that personal characteristics cannot be entirely excluded. For example, as we will see in applying the test to this case, it may be relevant to look at the fact that an offender at the licensing end of the spectrum caught by the mandatory minimum might come into innocent possession of the prohibited or restricted firearm, or be mistaken as to the scope of the prohibition.

[75] Second, cutting the other way, is the admonition of *Goltz* that far-fetched or remotely imaginable examples should be excluded from consideration. This excludes using personal features to construct the most innocent and sympathetic case imaginable — on that basis almost any mandatory minimum could be argued to violate s. 12 and lawyerly ingenuity would be the only limit to findings of unconstitutionality. To repeat, the inquiry must be grounded in common sense and experience.

[76] Thus, the inquiry into reasonably foreseeable situations the law may capture may take into account personal characteristics relevant to people who may be caught by the mandatory minimum, but must avoid characteristics that would produce remote or far-fetched examples.

[77] In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty.

(3) Application to Nur

[78] Nur does not argue that the mandatory minimum in s. 95(2)(a)(i) results in a grossly disproportionate sentence in his case. Rather, he argues it violates s. 12 in its reasonably foreseeable application to some other offenders. The question is whether the three-year minimum sentence imposed by s. 95(2)(a)(i) will result in grossly disproportionate sentences in reasonably foreseeable cases.

[79] I would answer this question in the affirmative. The Court of Appeal, using the language of "reasonable hypotheticals", described a situation at the

licensing end of the spectrum of conduct caught by s. 95(1) for which a three-year sentence would be grossly disproportionate — where a person who has a valid licence for an unloaded restricted firearm at one residence, safely stores it with ammunition in another residence, e.g. at her cottage rather than her dwelling house.

[80] The Attorney General of Ontario objects that this is a speculative scenario. On the contrary, occurrences such as this are reasonably foreseeable. In *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, this Court was concerned with a charge against a gun owner who, unaware that his licence was confined to his Calgary residence, had it in his possession at his Halifax residence. The Court (contrary to what the Ontario Court of Appeal assumed in its example) took a broad view of the offence, holding that the Crown is not required to prove that the accused knew that possession in the place in question was unauthorized (para. 55), and upheld Mr. MacDonald's conviction. The Court commented that, "in ordinary circumstances, his mistake of law would be a mitigating factor to be considered in fashioning a sentence that is proportionate to his crime" (para. 61).

[81] The Attorney General of Ontario argues that the scenarios posited by the Court of Appeal are uncommon, and that few s. 95 cases do not warrant at least a three-year sentence (A.F. (Nur), at para. 72). But as discussed above, the test is not whether prosecutions at the lower end of the spectrum are common. Rather, the question is whether the provision would reasonably be expected to capture the conduct. The answer to this question is yes.

[82] Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, “stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. . . . [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public” (para. 51). At this end of the range — indeed for the vast majority of offences — a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years’ imprisonment may be disproportionate, but not grossly so. At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the *Criminal Code*.

[83] Given the minimal blameworthiness of the offender in this situation and the absence of any harm or real risk of harm flowing from the conduct (i.e. having the gun in one residence as opposed to another), a three-year sentence would be grossly disproportionate. Similar examples can be envisaged. A person inherits a firearm and before she can apprise herself of the licence requirements commits an offence. A spouse finds herself in possession of her husband’s firearm and breaches the regulation. We need not focus on a particular hypothetical. The bottom line is that s. 95(1) foreseeably catches licensing offences which involve little or no moral fault

and little or no danger to the public. For these offences three years' imprisonment is grossly disproportionate to a fit and fair sentence. Firearms are inherently dangerous and the state is entitled to use sanctions to signal its disapproval of careless practices and to discourage gun owners from making mistakes, to be sure. But a three-year term of imprisonment for a person who has essentially committed a licensing infraction is totally out of sync with the norms of criminal sentencing set out in the s. 718 of the *Criminal Code* and legitimate expectations in a free and democratic society. As the Court of Appeal concluded, there exists a "cavernous disconnect" between the severity of the licensing-type offence and the mandatory minimum three-year term of imprisonment (para. 176). Consequently, I conclude that s. 95(2)(a)(i) breaches s. 12 of the *Charter*.

[84] It may be noted that the offence in s. 95(1) captures less serious conduct than other gun-related crimes that attract mandatory minimum terms of imprisonment. For example, in *Morrissey*, the Court upheld a four-year mandatory minimum term of imprisonment for the offence of criminal negligence causing death with a firearm. Unlike the offence of criminal negligence causing death with a firearm, s. 95(1) does not require proof of harm — it is a simple possession offence.

[85] The Attorneys General of Canada and Ontario argue that the Court of Appeal erred by not taking into account the Crown's ability to elect to proceed summarily and thereby avoid the mandatory minimum sentence in the indictable offence. They argue that the hybrid nature of the offence should be taken into

account as a factor when assessing the likelihood that a general application of the offence would result in a grossly disproportionate sentence being imposed. Put differently, they contend that the Crown's election to proceed summarily and thereby avoid a mandatory minimum prevents s. 95 from being grossly disproportionate when the conduct is at the less serious end of the spectrum.

[86] I cannot agree. To accept this argument would result in replacing a public hearing on the constitutionality of s. 95 before an independent and impartial court with the discretionary decision of a Crown prosecutor, who is in an adversarial role to the accused.

[87] Sentencing is inherently a judicial function. It is the courts that are directed by Parliament to impose a mandatory minimum term of imprisonment, and it is the duty of the courts to scrutinize the constitutionality of the provision. The Crown's submission is in effect an invitation to delegate the courts' constitutional obligation to the prosecutors employed by the state, leaving the threat of a grossly disproportionate sentence hanging over an accused's head.

[88] Lamer J., for the majority of the Court, firmly rejected this argument in *Smith*, at p. 1078:

In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the Charter. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the

Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter. [Emphasis added.]

[89] This Court recently considered the distinction between the prosecution's function in exercising its discretion to proceed summarily or by way of indictment and the courts' sentencing function in *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167. The Court emphasized that sentencing is a judicial function, and opined that the fact a mandatory regime may require a judge to impose a disproportionate sentence does not alter the prosecutorial function in electing the mode of trial. As Moldaver J. explained for a unanimous Court:

Mr. Anderson's argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process. It is *the judge's* responsibility to impose sentence; likewise, it is *the judge's* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged. [Underlining added; para. 25.]

[90] This is not to say that the Crown election to proceed summarily is in itself problematic. It is entirely appropriate that the Crown should exercise its discretion in order to screen out some offences at the lower end of the spectrum captured by s. 95(1). Hybrid offences allow the Crown to take into account the variation that exists between cases. They recognize that the same offence can be committed in more and less serious ways, and allows the Crown to take the specific circumstances of each case into account. As the trial judge noted in *Nur*, the "state interest, in enacting a

hybrid offence, is to provide flexibility so that Crown prosecutors can adapt available procedures and sentences to the needs of a particular case” (para. 126).

[91] The argument of the Attorneys General of Canada and Ontario, however, goes further. They seek to insulate otherwise unconstitutional laws through the exercise of prosecutorial discretion as to when and to whom the laws apply. But unconstitutional laws are null and void under s. 52 of the *Constitution Act, 1982*. The Attorneys General’s argument is essentially the converse of a constitutional exemption. As I observed on behalf of a unanimous Court in *Ferguson*, “[t]he 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” (para. 72). It deprives citizens of the right to know what the law is in advance and to govern their conduct accordingly, and it encourages the uneven and unequal application of the law. To paraphrase *Ferguson*, bad law, fixed up on a case-by-case basis by prosecutors, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada (paras. 72-73).

[92] Since writing these reasons, I have had the opportunity to read the reasons of my colleague, Justice Moldaver, who concludes that s. 95(2) does not violate s. 12 of the *Charter* essentially on the ground that the prosecution may elect to proceed by summary conviction where the conduct at issue is such that imposing the mandatory minimum sentence would be grossly disproportionate. I do not agree that *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3

S.C.R. 134, supports the rule that a mandatory minimum law that imposes grossly disproportionate sentences in foreseeable cases may be saved from unconstitutionality by prosecutorial discretion to proceed by another route.

[93] *PHS* was concerned with the federal Minister of Health's decision not to grant a medical exemption to a safe-injection site from the application of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. This was an administrative decision under a statutory exemption that was designed to promote public health. The essence of the challenge before the Court in *PHS* was whether the Minister's administrative law decision was compliant with the *Charter*. But the scenario in *PHS* is a far cry from the proposition advanced by the Attorneys General in the present appeals — that the exercise of a prosecutor's discretion as to whether to invoke the mandatory minimum sentence in an adversarial criminal trial can effectively insulate a legislated mandatory minimum term of imprisonment from review under s. 12 of the *Charter*.

[94] I add this about my colleague's proposed framework. The protection it offers against grossly disproportionate punishment is illusory: in practice it would create a situation where the exercise of the prosecutor's discretion is effectively immune from meaningful review. The abuse of discretion standard is a notoriously high bar and has no place in this Court's jurisprudence under s. 12 of the *Charter*. The proposed framework would be a radical departure from the constitutional

framework in these cases, and offers scant protection from grossly disproportionate sentences being imposed on offenders.

[95] Two further objections may be raised against the argument that prosecutorial discretion can cure a sentencing provision that violates s. 12 of the *Charter*. The first is that one cannot be certain that the discretion will always be exercised in a way that would avoid an unconstitutional result. Nor can the constitutionality of a statutory provision rest on an expectation that the Crown will act properly: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 45. As Cory J., for the majority, stated in *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-4:

Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.

[96] This leads to a related concern that vesting that much power in the hands of prosecutors endangers the fairness of the criminal process. It gives prosecutors a trump card in plea negotiations, which leads to an unfair power imbalance with the accused and creates an almost irresistible incentive for the accused to plead to a lesser sentence in order to avoid the prospect of a lengthy mandatory minimum term of imprisonment. As a result, the “determination of a fit and appropriate sentence, having regard to all of the circumstances of the offence and offender, may be

determined in plea discussions outside of the courtroom by a party to the litigation” (R. M. Pomerance, “The New Approach to Sentencing in Canada: Reflections of a Trial Judge” (2013), 17 *Can. Crim. L.R.* 305, at p. 313). We cannot ignore the increased possibility that wrongful convictions could occur under such conditions.

[97] Second, as noted by Doherty J.A. in the Court of Appeal below, the exercise of discretion typically occurs before the facts are fully known. An analysis that upholds s. 95(2) on the basis of the summary conviction option “does not come to grips with the timing of the Crown election and the factual basis upon which that election is made” (para. 163). The existence of the summary conviction option is therefore not an answer to the respondents’ s. 12 claim. As stated in *R. v. Smickle*, 2012 ONSC 602, 110 O.R. (3d) 25, at para. 110:

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

[98] Finally, the Attorney General of Canada, relying on *Morrisey*, argues that parole eligibility reduces the actual impact of the three-year mandatory minimum penalty for an offence. We simply cannot know whether that is in fact the case. Nur correctly argues that parole is a statutory privilege rather than a right. The discretionary decision of the parole board is no substitute for a constitutional law. Canada’s submission also misunderstands the role of the parole board — which is to ensure that an offender is safely released into the community, not to ensure that an

offender serves a proportionate sentence. That is the function of one person alone — the sentencing judge.

(4) Application to Charles

[99] In *Charles*, the Court of Appeal modified the reasonably foreseeable application of the offence to take into account that it would be a second offence following a conviction under s. 117.01(1) of the *Criminal Code* for a breach of a prohibition order.

[100] Prohibition orders seek to protect the public by prohibiting a person from possessing certain weapons, firearms, ammunition or explosive substances. They are made by the courts in a number of situations, including as part of the conditions of bail (s. 515(4.1)); they can be obtained preventatively (s. 111); they can be made following the conviction of an offender for certain offences (ss. 109 and 110); and they can also be made as part of the conditions of probation (s. 732.1), of a conditional sentence (s. 742.3), or of a peace bond (s. 810(3.1)). Some are mandatory and others discretionary.

[101] The Court of Appeal acknowledged that the moral culpability of a repeat offender under s. 95(2)(a)(ii) is higher than that of a first-time offender. Even so, the Court of Appeal concluded that the five-year mandatory minimum term of imprisonment would be grossly disproportionate for a conviction under s. 95(1)

where an offender was previously convicted and sentenced under s. 117.01(1) of the *Criminal Code* for a breach of a prohibition order.

[102] The Attorney General of Ontario argues that the Court of Appeal erred in formulating a licensing offence under s. 95(1) where the offender had a prior conviction under s. 117.01(1) because such a prior conviction would trigger an automatic lifetime prohibition in relation to prohibited or restricted firearms under s. 109 of the *Criminal Code*. In Ontario's submission, this makes it virtually impossible that an offender convicted under s. 117.01(1) could have a licence and registration for a prohibited or restricted firearm. The prohibition order can be lifted under s. 113 of the *Criminal Code*, but only for sustenance or employment purposes, and a prohibited and restricted firearm, it is argued, will never be needed for hunting or trapping to sustain one's family.

[103] I agree that the Court of Appeal erred in concluding that it was reasonably foreseeable that a repeat offender could be a licensed owner of a prohibited or restricted firearm. This does not end the analysis, however. The court must test the reasonably foreseeable applications of s. 95(2)(a)(ii). Under the impugned mandatory minimum, a five-year term of imprisonment could be imposed on an individual who breached a prohibition order imposed while on bail and who, some years later, innocently came into possession of a restricted or prohibited firearm without an authorization or a licence together with usable ammunition that he stored nearby and which was readily accessible.

[104] A five-year minimum term of imprisonment for offenders such as these would be draconian. It goes far beyond what is necessary in order to protect the public, far beyond what is necessary to express moral condemnation of the offender, and far beyond what is necessary to discourage others from engaging in such conduct. In a phrase, such a sentence would be grossly disproportionate. An offender in these circumstances has not caused any harm, nor is there a real risk of harm to the public. Such an offender is not engaged in any criminal activity.

[105] There is little doubt that in many cases those who commit second or subsequent offences for the purpose of s. 95(2)(a)(ii) should be sentenced to terms of imprisonment, and some for lengthy terms of imprisonment. The seven-year term of imprisonment imposed on Charles is an example. But the five-year minimum term of imprisonment would be grossly disproportionate for less serious offenders captured by the provision.

[106] It follows that s. 95(2)(a)(ii) violates the guarantee against grossly disproportionate punishment in s. 12 of the *Charter*.

B. *Does the Mandatory Minimum Infringe Section 7 of the Charter?*

[107] In addition to their challenges under s. 12, Nur and Charles also challenge s. 95(2)(a)(i) and (ii) under s. 7 of the *Charter*. Section 7 guarantees everyone “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. Two principles of

fundamental justice are invoked by Nur and Charles: the principle that a law which deprives a person of his liberty cannot be arbitrary — where there is no connection between the effect and the object of the law — and the principle that a law which deprives a person of his liberty cannot be overbroad — where the law goes too far and interferes with some conduct that bears no connection to its objective.

[108] Nur argues that the two-year gap between the one-year maximum sentence when the Crown proceeds summarily and the mandatory minimum of three years when the Crown proceeds by way of indictment is arbitrary, contrary to s. 7 of the *Charter*, because it frustrates the flexibility of the hybrid scheme by eliminating an entire two-year range of sentence if the Crown proceeds summarily. He argues that the two-year gap is not related to any legislative objective.

[109] Charles argues that s. 95(2)(a)(ii) includes less serious and non-firearm-related offences among the definition of “second or subsequent offence” in s. 84(5) and thus is arbitrary and overbroad, contrary to s. 7 of the *Charter*. He also argues that s. 84(6) — which provides that only the order of convictions, and not the order in which the offences were committed, is relevant to whether a person has committed a “second or subsequent offence” under s. 95(2)(a)(ii) — violates s. 7 of the *Charter* because it is arbitrary.

[110] I do not rule out the possibility that despite the detailed sentencing jurisprudence that has developed under s. 12 of the *Charter*, situations may arise requiring recourse to s. 7 of the *Charter*. In this case, having concluded that the

impugned provisions fail under s. 12 of the *Charter*, it is unnecessary to consider whether they also violate s. 7 of the *Charter*.

C. *Is the Infringement Justified Under Section 1 of the Charter?*

[111] In order to justify the infringement of the respondents' s. 12 rights under s. 1 of the *Charter*, the Attorney General of Ontario must show that the law has a pressing and substantial objective and that the means chosen are proportional to that objective. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103. It will be difficult to show that a mandatory minimum sentence that has been found to be grossly disproportionate under s. 12 is proportionate as between the deleterious and salutary effects of the law under s. 1.

(1) Rational Connection

[112] The state bears the burden of showing that the mandatory minimum sentences of imprisonment found to violate s. 12 of the *Charter* are rationally connected to the goals of denunciation, deterrence, and retribution. To do so, the government must establish that there is a causal connection between the infringement and the benefit sought "on the basis of reason or logic": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. Viewed thus, are the means the law adopts a rational way for Parliament to pursue its objective?

[113] The government has not established that mandatory minimum terms of imprisonment act as a deterrent against gun-related crimes. Doubts concerning the effectiveness of incarceration as a deterrent have been longstanding. *Sentencing Reform: A Canadian Approach — Report of The Canadian Sentencing Commission* (1987), concludes as follows:

- a) Even if there seems to be little empirical foundation to the deterrent efficacy of legal sanctions, the assertion that the presence of some level of legal sanctions has no deterrent effects whatsoever, has no justification. The weight of the evidence and the exercise of common sense favour the assertion that, taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.
- b) The proper level at which to express strong reservations about the deterrence efficacy of legal sanctions is in their usage to produce particular effects with regard to a specific offence. For instance, in a recent report on impaired driving published by the Department of Justice, Donelson asserts that “law-based, punitive measures alone cannot produce large, sustained reductions in the magnitude of the problem” (Donelson, 1985; 221-222). Similarly, it is extremely doubtful that an exemplary sentence imposed in a particular case can have any perceptible effect in deterring potential offenders.
- c) The old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research. In his extensive review of studies on deterrence, Beyleveld (1980; 306) concluded that “recorded offence rates do not vary inversely with the severity of penalties (usually measured by the length of imprisonment)” and that “inverse relations between crime and severity (when found) are usually smaller than inverse crime-certainty relations”. [Emphasis added; 136-37.]

[114] Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes: see, e.g., A. N. Doob and C. M. Webster, “Sentence Severity and Crime: Accepting the Null Hypothesis” (2003), 30 *Crime & Just.* 143; M. Tonry,

“The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings” (2009), 38 *Crime & Just.* 65. The empirical evidence “is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences” (A. N. Doob and C. Cesaroni, “The Political Attractiveness of Mandatory Minimum Sentences” (2001), 39 *Osgoode Hall L.J.* 287, at p. 291).

[115] Despite the frailty of the connection between deterrence and mandatory minimum sentence provisions, a rational connection exists between mandatory minimum terms of imprisonment and the goals of denunciation and retribution. Therefore, this requirement of the s. 1 test is met.

(2) Minimal Impairment

[116] The question at this stage is whether the limit on the right is reasonably tailored to the objective. A court asks “whether there are less harmful means of achieving the legislative goal” (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 53). The government must show the absence of less drastic means of achieving the objective “in a real and substantial manner” (*ibid.*, at para. 55). The impingement on the *Charter* right must be no more than what is reasonably necessary to achieve the state’s objective.

[117] Parliament could have achieved its objective by drafting an offence with a close correspondence between conduct attracting significant moral blameworthiness — such as those engaged in criminal activity or conduct that poses a danger to others

— and the mandatory minimum, rather than a sweeping law that includes in its ambit conduct attracting less blameworthiness for which the mandatory minimum sentence would be grossly disproportionate. The government has not discharged its burden on this branch of the *Oakes* test. There are less harmful means of achieving the legislative goal.

(3) Proportionality

[118] This stage of the analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good. In light of the conclusion that the mandatory minimum terms of imprisonment in s. 95 when the Crown proceeds by indictment are grossly disproportionate, I do not find that the limits are a proportionate justification under s. 1.

VI. Conclusion

[119] I would dismiss the appeals. The mandatory minimum sentences imposed by s. 95(2)(a) are inconsistent with s. 12 of the *Charter* and are therefore declared of no force or effect under s. 52 of the *Constitution Act, 1982*.

[120] It remains appropriate for judges to continue to impose weighty sentences in other circumstances, such as those in the cases at bar. For this reason, I would decline to interfere with the sentences that the trial judges imposed on Nur and Charles.

The reasons of Rothstein, Moldaver and Wagner JJ. were delivered by

MOLDAVER J. —

I. Overview

[121] The Chief Justice observes that gun crimes pose a “grave danger to Canadians” (para. 1). She notes that Parliament, through a combination of regulatory provisions under the *Firearms Act*, S.C. 1995, c. 39, and criminal prohibitions under the *Criminal Code*, R.S.C. 1985, c. C-46, “has sought to protect the public from firearm-related injuries and to deter crimes involving firearms” (para. 6). To advance these goals, Parliament has enacted strict penalties for gun crimes. These include the mandatory minimum sentences under s. 95(2) of the *Code* for unlawful possession of loaded or readily loaded prohibited or restricted firearms — primarily handguns, machine guns, and sawed-off rifles and shotguns. These weapons have few legitimate purposes and are commonly used by criminals to devastating effect. Yet, despite Parliament’s valid and important objectives, the majority would declare these mandatory minimums unconstitutional on the basis that, in “reasonably foreseeable” cases, they could lead to grossly disproportionate sentences in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*.

[122] With respect, I disagree. Parliament has crafted s. 95 as a hybrid offence. As such, it provides for mandatory minimum sentences when the Crown proceeds by

way of indictment, but no mandatory minimum when the Crown proceeds summarily. In my view, this demonstrates Parliament’s recognition that s. 95 captures a wide array of conduct, ranging from the “true crime” end of the spectrum to conduct that resembles a licensing infraction. I readily agree with the majority that the latter, least serious instances of the offence “involve little or no moral fault and little or no danger to the public”, and manifestly do not warrant a lengthy term of incarceration (para. 83). However, in my view, allowing for summary proceedings under s. 95 all but ensures that the least serious instances of the offence referred to by the majority (“licensing-type offences”) will *not* attract a mandatory minimum sentence. I address this issue in the first part of my reasons at paras. 125-45. In short, I conclude that it is not reasonably foreseeable that the licensing-type offences about which the majority is concerned — to the point of striking down otherwise validly enacted legislation — would ever be prosecuted by way of indictment.

[123] In any event, as I will explain in the second part of my reasons at paras. 146-88, the reasonable hypothetical approach is redundant in the context of hybrid sentencing schemes. I would adopt a different framework that is, in my view, better suited to that context. In the end, the framework I propose eliminates any theoretical risk of grossly disproportionate sentences.

[124] In sum, whether applying the reasonable hypothetical approach or my proposed framework, I am satisfied that s. 95(2) does not violate s. 12 of the *Charter*.

Nor, in my view, does it violate s. 7 of the *Charter*. I would therefore allow the appeals.

II. Part 1: Section 12 Analysis Under the Reasonable Hypothetical Approach

A. *The Reasonable Hypothetical Approach Does Not Justify Striking Down Section 95(2)*

[125] In finding s. 95(2) unconstitutional, the majority adopts the “reasonable hypothetical” approach first developed by this Court in *R. v. Smith*, [1987] 1 S.C.R. 1045, and subsequently applied in *R. v. Goltz*, [1991] 3 S.C.R. 485, and *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90. Tracing through these authorities, the Chief Justice states that reasonable hypotheticals should be “grounded in experience and common sense” (para. 62). I agree. She then refers to s. 95(2) and expresses concern about imposing lengthy custodial sentences in certain hypothetical cases, namely “licensing offences which involve little or no moral fault and little or no danger to the public” — a concern which I share (para. 83). Where I part company with the majority is in treating these licensing-type cases as *reasonable* hypotheticals. With respect, experience and common sense provide proof positive that they are not.

[126] I start with experience. Section 95 was enacted in 1995 and has been in force for nearly two decades. It has always included a mandatory minimum sentence for cases prosecuted by indictment. Since 2008, it has included the present three-year and five-year mandatory minimums. And yet, the respondents Mr. Nur and Mr.

Charles are unable to point to a single licensing-type case over its entire history where a mandatory minimum imposed under s. 95(2) could be regarded as grossly disproportionate. Moreover, they cannot identify a single case where an offender who has committed a “licensing offence . . . involv[ing] little or no moral fault and little or no danger to the public” has been prosecuted by indictment, thus attracting a mandatory minimum (para. 83). In fact, in the only reported licensing-type case raised before this Court, the Crown proceeded summarily: *R. v. Snobelen*, [2008] O.J. No. 6021 (QL).²

[127] In *Snobelen*, the accused pleaded guilty to an offence under s. 95(1), as well as careless storage of a firearm under s. 86. He admitted to possession of an unregistered semi-automatic handgun with readily accessible ammunition, for which he lacked a valid licence. The gun came into his possession when it was shipped to his home along with other property from his ranch in Oklahoma. He was aware of the gun’s existence and intended to dispose of it — indeed, at the time of his arrest, he believed his wife had done so. Given the circumstances, the Crown elected to proceed summarily and sought a \$750 fine on each count, a weapons prohibition order, and a term of probation. In light of the mitigating factors, the sentencing judge entered an absolute discharge.

² The majority, at para. 80, uses *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, as an example that licensing-type cases are reasonably foreseeable. However, *MacDonald* cannot be characterized as a licensing-type case, given the aggravating factors involved. Mr. MacDonald’s conduct went far beyond simply possessing the firearm in a place where he was not authorized to possess it under the terms of his licence. Indeed, the majority of this Court held that the arresting officer had reasonable grounds to believe that he posed an imminent threat to the safety of the public or the police: *MacDonald*, at para. 46.

[128] If licensing-type cases like *Snobelen* are the “experience” on which this sentencing scheme is to be evaluated, I perceive no foreseeable risk, reasonable or otherwise, that grossly disproportionate sentences will result.

[129] I turn to common sense. In this regard, I endorse Code J.’s observation that

as a matter of common sense it is hard to conceive of a “reasonable hypothetical” that depends on the Crown unreasonably electing to proceed by indictment, when the fair, just and appropriate election is to proceed summarily.

(2011 ONSC 4874, 241 C.R.R. (2d) 306 (the “*Nur*” sentencing reasons), at para. 110)

The reasonably foreseeable cases advanced by the majority assume that the Crown election is irrelevant. This perspective is at odds with Parliament’s deliberate choice to structure s. 95 as a hybrid offence, recognizing its wide ambit and empowering prosecutors to separate licensing-type cases from instances of more serious misconduct. This legislative choice is hardly controversial — hybrid offences abound in the *Criminal Code*. Crown counsel are granted the discretion to make these elections and do so on a daily basis in accordance with their sworn duty to act in the public interest. With respect, an application of the reasonable hypothetical approach that denies this reality — and indeed assumes the opposite — does not accord with common sense.

[130] I should add that the Crown election under s. 95 differs from the prosecutorial discretion discussed in *Smith*. In that case, the Court rejected the argument that the Crown's discretion *not to apply the law* — that is, to charge a lesser offence or no offence at all — could salvage the impugned mandatory minimum. Here, the relevant discretion is the Crown election, which has been *purposely integrated into the legislative scheme*. Far from being a discretion not to apply the law, the Crown election is a clear expression of Parliament's intent to confer on prosecutors the ability to divert the least serious cases into summary proceedings. It is a mistake, in my view, to shunt this factor aside when crafting reasonable hypotheticals.

B. *Respecting Parliament*

[131] Gun crime is a matter of grave and growing public concern. Successive Parliaments have responded by enacting laws designed to denounce and deter such crime. The mandatory minimums in s. 95(2) were part of a suite of legislative changes put forward as “a direct response to the scourge of handgun crime that plagues our country”: House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 30, 1st Sess., 39th Parl., November 7, 2006, at p. 1. The parliamentary committee studying those changes heard compelling testimony from law enforcement about the devastating impact of gun violence across Canada. Toronto Police Chief William Blair noted a “significant increase in the number of shooting[s]” in Toronto and a rise in gun-related homicides in excess of 85 percent

from 2004 to 2005: *ibid.*, No. 34, November 23, 2006, at p. 1. Due to the surge in shootings and gun deaths, 2005 was dubbed by local media as “the year of the gun” (*ibid.*).

[132] This is the context in which Parliament’s choice to raise the mandatory minimums in s. 95 must be understood. That choice reflects valid and pressing objectives, and it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture. As LeBel J. observed in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, mandatory minimums are “a forceful expression of governmental policy in the area of criminal law” (para. 45).

[133] This Court in *Goltz* warned against the use of hypotheticals that are “far-fetched or only marginally imaginable” (p. 515). The Chief Justice echoes this point, stating that “[l]aws should not be set aside on the basis of mere speculation” (para. 62). Yet, I fear that the majority’s approach does precisely that. Indeed, the jurisprudence does not reveal any licensing-type cases that have been prosecuted by indictment. Moreover, the confluence of events necessary for a licensing-type offender to face the prospect of a grossly disproportionate sentence strikes me as more imaginary than real. With respect, this hypothetical scenario stretches the bounds of credulity. It is not, in my view, a sound basis on which to nullify Parliament’s considered response to a serious and complex issue.

[134] I believe the Chief Justice shares my concern that striking down the impugned mandatory minimums would, to some extent, frustrate Parliament's efforts to denounce and deter gun crime. She identifies an alternative scheme that, in her view, would accomplish Parliament's goals without offending s. 12 of the *Charter*:

Parliament could have achieved its objective by drafting an offence with a close correspondence between conduct attracting significant moral blameworthiness — such as those engaged in criminal activity or conduct that poses a danger to others — and the mandatory minimum [para. 117]

[135] If I understand the Chief Justice correctly, Parliament could enact the impugned mandatory minimums as part of a revised offence containing an additional element beyond the existing elements of s. 95(1). For example, the offence could be limited to “those engaged in criminal activity” or to “conduct that poses a danger to others” (para. 117). Respectfully, the problem with this suggestion is two-fold. First, it is discordant with Parliament's true objective in creating mandatory minimums for the unlawful *possession* of a loaded or readily loaded prohibited or restricted firearm. Second, as a practical matter, it may lead to an under-inclusive offence that fails to encompass certain conduct which Parliament sought to punish with mandatory terms of imprisonment.

[136] Section 95 targets the simple possession of guns that are frequently used in gang-related and other criminal activity: see *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, at paras. 54-57. Parliament has concentrated on simple possession for a reason: firearms — and particularly the firearms caught by s. 95 — are inherently

dangerous. In *R. v. Felawka*, [1993] 4 S.C.R. 199, the Court recognized that “[a] firearm is expressly designed to kill or wound” and that “[n]o matter what the intention may be of the person carrying a gun, the firearm itself presents the ultimate threat of death to those in its presence” (p. 211). As the Attorney General of Canada observes in his factum, this sober reality resonates all the more for “restricted firearms (principally handguns) and prohibited firearms (principally machine guns and sawed-off rifles or shotguns)” (A.F. (*Nur*), at para. 64). These firearms are “the most strictly regulated because they are either easily concealable or generally do not serve a legitimate hunting or target shooting purpose” (*ibid.*). Outside of law enforcement, these guns are primarily found in the hands of criminals who use them to intimidate, wound, maim, and kill.

[137] Courts have repeatedly emphasized the inherent danger associated with these types of firearms. In *R. v. Elliston*, 2010 ONSC 6492, 225 C.R.R. (2d) 109, Aston J. rejected the argument that simple possession of a prohibited or restricted firearm, absent a harmful outcome, is insufficient to warrant an exemplary sentence:

The applicant submits that there are no actual adverse consequences that necessarily flow from the criminal conduct captured by s. 95 because the defined offence is simply the possession of the firearm as opposed to its actual use. It is true that adverse consequences do not *necessarily* flow from possession of a loaded handgun, but sometimes they do. And, because the risk is so grave that people will be seriously injured or killed, even when discharging the gun is not intentional, the gravity of the offence of simply possessing the weapon should not be underestimated [Emphasis in original; para. 15.]

Similarly, in *R. v. Chin*, 2009 ABCA 226, 457 A.R. 233, the Alberta Court of Appeal observed that “[m]ere possession of loaded firearms is inherently dangerous” (para. 10). The court underscored the reality that “[w]hen such weapons are allowed in the community, death and serious injury are literally at hand, only an impulse and trigger-pull away” (*ibid.*).

[138] Given this inherent danger, it was open to Parliament to conclude that simple possession of a loaded or readily loaded restricted or prohibited firearm should attract a significant mandatory custodial sentence. As the Minister of Justice stated when introducing the 2008 amendments to s. 95, “illegal possession of these firearms is becoming a growing concern” and “police especially are interested in the higher mandatory minimums for the possession of loaded or restricted firearms”: *House of Commons Debates*, vol. 141, No. 33, 1st Sess., 39th Parl., June 5, 2006, at p. 1941 (emphasis added). Adding further elements to the offence beyond simple possession would, in my view, unduly limit the application of the mandatory minimums, and thereby undermine Parliament’s objective to get dangerous weapons off the streets *before* they generate a specific risk of harm.

[139] This is borne out by the committee testimony of Chief Blair, who stressed the importance of empowering police to target possession before a specific risk of harm materializes:

If you’re not a police or security professional in the city of Toronto, the only reason to carry a loaded handgun in our streets is to kill people. When we apprehend those individuals for those offences who are in

possession of those guns, we need to be able to intervene at that point. It is a significant and serious enough trigger that the individual represents an overwhelming threat to public safety, and the criminal justice system has to be able to deal effectively with that individual. [Emphasis added.]

(Standing Committee on Justice and Human Rights, No. 34, at p. 4)

Chief Blair further noted that heightened mandatory minimums would play a vital role in deterring this dangerous conduct:

. . . there is certainly a perception of a lack of consequences for those very serious offences, and the sentences that people have been receiving for carrying firearms are more reflective of the carrying of a loaded handgun in the city of Toronto as if it were a regulatory problem as opposed to a significant public safety problem.

. . .

. . . I believe a rational person would be deterred by two things: first of all, the likelihood of being caught; and when caught, suffering with real consequences for their actions. I think both of those things would deter a rational person. [*ibid.*, at pp. 3 and 8]

[140] Based on this compelling testimony, Parliament chose to punish simple possession with significant custodial penalties, while leaving open the option of summary proceedings for the licensing-type offences about which the majority is rightly concerned. I would respect that legislative choice. In my view, sending our elected representatives back to the drawing board on s. 95 would impede the goals of deterring and denouncing the unlawful possession of deadly weapons and keeping them out of the hands of those who would use them as instruments of intimidation, death, and destruction.

[141] Moreover, I am concerned that adding new elements to the offence would render the mandatory minimums under-inclusive. The majority identifies two possible elements that could be added to s. 95. The first would limit the offence to “those engaged in criminal activity” (para. 117). As I understand it, this element would require the Crown to prove that the accused possessed the firearm for a criminal purpose — a high bar for prosecutors to meet. Even on the facts of Mr. Nur’s case, it does not appear that the Crown could prove this element beyond a reasonable doubt: *Nur* sentencing reasons at paras. 61, 66 and 68-69. Incorporating a criminal purpose element could thus exclude cases like Mr. Nur’s, where the imposition of a mandatory minimum sentence is uncontroversial.

[142] The second suggestion would limit the offence to “conduct that poses a danger to others” (para. 117). I understand this element to mean something more than the inherent danger posed by all instances of possession contrary to s. 95. The element would therefore require the Crown to prove a *specific* risk of harm. In my view, the addition of this element would again render the offence under-inclusive.

[143] A simple example illustrates this point. A police officer stops a vehicle in a remote, unpopulated area and sees a handgun in plain view on the back seat. The driver is cooperative, but does not have a licence for the firearm. The officer suspects that he may be involved in gang-related activity. In these circumstances, it is unclear whether the Crown could prove, beyond a reasonable doubt, that the driver’s possession of the firearm created a specific risk of harm. Yet, this is precisely the type

of situation to which the mandatory minimums in s. 95 are intended to apply. Indeed, the Minister specifically indicated that “increasing numbers of handguns [are being] found in cars”, and that “it is very important to have . . . higher minimum penalties” to address such situations: *House of Commons Debates*, vol. 141, at pp. 1943 and 1941.

[144] The record plainly demonstrates that, after lengthy debate and study, Parliament responded to the pressing issue of gun crime by enacting the heightened mandatory minimums in s. 95(2). In my view, that policy choice merits considerable deference. Where matters of public safety are implicated, we should be wary of second-guessing the choices of our elected representatives, absent a compelling justification.

[145] For these reasons, I see no basis for striking down s. 95(2) using the reasonable hypothetical approach.

III. Part 2: Section 12 Analysis Under a Different Framework

A. *Hybrid Offences Call for a Different Analytical Framework Under Section 12 of the Charter*

[146] As I have explained, the reasonable hypothetical approach does not justify striking down the impugned mandatory minimums. The scenarios contemplated by the majority — sending someone to jail for three years for what

amounts to a licensing-type offence — are, in my respectful view, speculative and strain the bounds of credulity. They are not grounded in experience or common sense.

[147] In any event, I believe that a different analytical framework is required here. Why? Because, to date, our s. 12 jurisprudence from *Smith* to *Morrisey* has only considered the constitutionality of mandatory minimum sentences in the context of straight indictable offences. This is the first time we have examined their constitutionality in a hybrid scheme. As I will explain, that makes a world of difference and justifies a different analytical framework under s. 12.

[148] Section 95 is a hybrid offence that carries no minimum sentence when the Crown proceeds summarily. When the Crown proceeds by indictment, there is a mandatory minimum of three years for a first offence, and five years for a second or subsequent offence. The legislative intent underlying this hybrid scheme is evident. Section 95 captures a wide array of conduct involving varying degrees of moral blameworthiness. The least blameworthy conduct — licensing-type cases — is meant to be prosecuted summarily, thereby avoiding the application of the mandatory minimum.

[149] Parliament's intention to divert the least serious cases into summary proceedings is critical to assessing the constitutionality of s. 95(2). By creating a "safety valve" to shield licensing-type cases from the reach of the mandatory minimum, Parliament has effectively *conceded* the existence of reasonably

foreseeable cases in which a mandatory minimum would be grossly disproportionate. Given this concession, the reasonable hypothetical approach is redundant.

[150] Rather, the proper analytical framework should focus on the safety valve — the Crown’s discretion to elect summary proceedings in the least serious cases. I will describe that framework in detail below. Briefly, it has two stages. First, the court must determine whether the hybrid scheme adequately protects against the imposition of grossly disproportionate sentences *in general*. Second, the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence *for a particular offender*.

[151] This Court adopted a similar framework in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, where the analysis turned on the existence of a safety valve in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“CDSA”). Section 4(1) of the CDSA prohibits possession of certain controlled substances, but s. 56 empowers the Minister of Health to grant exemptions from this prohibition where necessary for a medical or scientific purpose. In *PHS*, the claimants were clients of Vancouver’s safe injection facility who challenged the constitutionality of the drug possession prohibition, arguing that it violated their rights under s. 7 of the *Charter*. The facility had previously been granted an exemption under s. 56, but the Minister had declined to renew it.

[152] The Chief Justice dealt with the constitutional challenge in two stages. First, she examined whether the prohibition in s. 4(1) was unconstitutional. In her view, the availability of a ministerial exemption was crucial to this analysis. She noted that “[t]he constitutional validity of s. 4(1) of the [CDSA] cannot be determined without considering” the exemption in s. 56, which is “designed to relieve against unconstitutional or unjust applications of that prohibition” (para. 109). Ultimately, she concluded that s. 4(1) was constitutional because “[t]he availability of exemptions acts as a safety valve that prevents the CDSA from applying where such application would be [unconstitutional]” (para. 113 (emphasis added)). Second, the Chief Justice inquired into whether the Minister had exercised his discretion in a manner that violated the claimants’ s. 7 rights. She found that he had, and granted a remedy under s. 24(1) of the *Charter*. In my view, this two-stage approach offers a more compelling framework than the use of reasonable hypotheticals to resolve a s. 12 constitutional challenge to a mandatory minimum sentence in a hybrid scheme.

[153] The majority states that the use of reasonable hypotheticals to evaluate mandatory minimums is settled law and necessarily applies here. It characterizes my proposed framework as “a radical departure from the constitutional framework” that has animated this Court’s s. 12 jurisprudence (para. 94). With respect, I disagree with this assessment. Parliament’s choice to craft s. 95 as a hybrid offence distinguishes the present context from our previous s. 12 jurisprudence. None of those cases involved a hybrid sentencing scheme that effectively conceded the existence of

reasonably foreseeable cases where the mandatory minimum would be grossly disproportionate.

[154] By way of example, s. 95 is markedly different from the offence in *Smith*. In that case, the narcotics importing offence was a straight indictable offence carrying a seven-year mandatory minimum. Like s. 95, it covered a wide array of conduct, from large-scale drug smuggling to the hypothetical “young person who, while driving back into Canada from a winter break in the U.S.A., is caught with . . . his or her first ‘joint of grass’” (p. 1053). However, unlike s. 95, that offence did not include the option for prosecutors to proceed summarily. Parliament had not turned its mind to the possibility that the offence might catch less serious cases that would not merit a seven-year custodial sentence. Rather, Parliament targeted the problem of narcotics importation with the blunt instrument of a straight indictable offence carrying a long mandatory term of imprisonment. The scheme did not adequately protect against the imposition of grossly disproportionate sentences, and the Court rightly struck it down.

[155] However, if *Smith* had involved a hybrid offence like s. 95, I believe that the Court’s analysis would have been different. A hybrid offence would have signalled Parliament’s intention to shield the least serious cases from the mandatory minimum. In such circumstances, Lamer J.’s hypothetical would have had little persuasive force. Simply put, it is virtually impossible to imagine Crown counsel proceeding by indictment against a young person caught bringing a single joint of

marijuana across the border, especially when he or she would face a minimum penalty of seven years' imprisonment.

[156] In sum, I am not persuaded that the reasonable hypothetical approach is binding or even useful in this context. The legislative intent in enacting a hybrid sentencing scheme points to a different analytical framework.

B. *The Proper Analytical Framework Under Section 12 for Hybrid Offences Containing a Mandatory Minimum Sentence*

[157] I would adopt a two-stage framework to evaluate whether a mandatory minimum sentence in a hybrid scheme complies with s. 12. First, the court must determine whether the scheme adequately protects against grossly disproportionate sentences *in general*. Second, the court must determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence *for the particular offender* before the court.

(1) Determining Whether the Scheme Adequately Protects Against Grossly Disproportionate Sentences in General

[158] This stage of the analysis has two parts. First, the court must determine the sentencing range for indictable convictions under the sentencing regime that existed prior to the enactment of the impugned mandatory minimum.³ This is done

³ This will be the case even when the prior regime included a mandatory minimum. For example, where an offence previously carried a mandatory minimum of two years that was later raised to four years, the sentencing range under the prior sentencing regime will be the range of sentences imposed

with reference to actual sentences found in reported cases. The court must then isolate the low end of that sentencing range. By “low end”, I do not mean the absolute lowest sentence that can be found in the reported cases. Rather, I refer to the types of sentences that are generally imposed on the least blameworthy offenders in the indictable category. This low end serves as an objective indicator of appropriate sentences for the least serious instances of the offence that would realistically be prosecuted by indictment.

[159] Second, the court must compare the impugned mandatory minimum with the low end of the prior range. If the mandatory minimum is grossly disproportionate to sentences at the low end, then the scheme does not adequately protect against the imposition of grossly disproportionate sentences *in general*. On the contrary, it puts an identifiable set of offenders directly at risk of cruel and unusual punishment in violation of s. 12. The proper remedy here lies under s. 52(1) of the *Constitution Act, 1982*, and the mandatory minimum must be struck down.

(2) Determining Whether the Crown Has Exercised Its Discretion in a Manner That Results in a Grossly Disproportionate Sentence for the Particular Offender

[160] If the scheme itself is upheld, the court must move on to the second stage and determine whether the Crown has exercised its discretion in a manner that results in a grossly disproportionate sentence for the particular offender before the court. In

while the two-year mandatory minimum was in effect. Where an offence is newly enacted such that no prior sentencing range exists, the court would look to sentences imposed for similar offences to construct a plausible sentencing range.

those rare cases where the Crown's decision to proceed by indictment leads to a grossly disproportionate sentence, a remedy will lie under s. 24(1) of the *Charter*.

[161] As noted, the focus here is on the constitutionality of state action, and not the law itself. Specifically, the state action at issue is the Crown election. The decision to proceed summarily or by indictment is a matter of core prosecutorial discretion, reviewable only for abuse of process: *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 44 and 48. In my view, a decision to prosecute by indictment that would give rise to a grossly disproportionate sentence represents a *per se* abuse of process in violation of s. 12. Generally, the appropriate and just remedy in the circumstances will be a sentence reduction below the mandatory minimum.

(a) *Applying the Abuse of Process Doctrine Under the Proposed Framework*

[162] The abuse of process jurisprudence under s. 7 of the *Charter* is consistent with my proposed framework. In *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, the Court described two categories of abuse of process. The first category involves “prosecutorial conduct affecting the fairness of the trial” (para. 36). The second, residual category relates to “conduct that ‘contravenes fundamental notions of justice and thus undermines the integrity of the judicial process’” (*ibid.*, quoting *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73).

[163] I rely on this residual category to address Crown conduct that would lead to a grossly disproportionate sentence. State action that puts an offender at risk of

cruel and unusual punishment necessarily “contravenes fundamental notions of justice” and “undermines the integrity of the judicial process” (*ibid.*). Although the Court in *Nixon* was discussing s. 7 of the *Charter*, I am satisfied that an abuse of process in the residual category may lie under s. 12 as well.

[164] Abuse of process is typically characterized by intentional misconduct or bad faith. However, in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, the Court held that

while it is generally true that the residual category [of abuse of process] will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. [Emphasis in original; para. 37.]

Charron J. made a similar point in *Nixon*, noting that “proof of prosecutorial misconduct, while relevant, is not a prerequisite” to finding an abuse of process (para. 39).

[165] This is a long-standing principle. Indeed, in *Nixon*, Charron J. cites *R. v. Keyowski*, [1988] 1 S.C.R. 657, in which the Court observed that “requiring misconduct or an improper motive would . . . unduly restrict the operation of the doctrine”, and that “[p]rosecutorial misconduct and improper motivation are but two of many factors to be taken into account” (p. 659). Nothing in our subsequent jurisprudence has altered this principle.

[166] By way of example, this principle was applied in *R. v. Jack* (1996), 113 Man. R. (2d) 260 (C.A.). In that case, the Manitoba Court of Appeal considered whether it would constitute an abuse of process for the Crown to subject the accused to a fourth trial on the same charge. Citing *Keyowski*, the court observed that a series of trials, absent any prosecutorial misconduct, could be characterized as a *per se* abuse of process. In the circumstances, the court held that a stay of proceedings would be appropriate, since a fourth trial would be an affront to the community's sense of fair play and decency. Lamer C.J. upheld the finding on abuse of process and entered a stay of proceedings: *R. v. Jack*, [1997] 2 S.C.R. 334. The law is clear. An accused need not demonstrate prosecutorial misconduct in order to establish an abuse of process.

[167] Accordingly, to find an abuse of process under s. 12, I would not require proof of bad faith or malicious intent on the part of the Crown. Rather, an abuse of process will lie, regardless of intent, where the Crown's decision to proceed by indictment "tend[s] to undermine society's expectations of fairness in the administration of justice" (*Nixon*, at para. 41).

[168] While proof of bad faith or malicious intent is not necessary, it would certainly suffice to establish an abuse of process under s. 12. For example, if the Crown election was influenced by discriminatory factors such as the race of the offender, this would be an abuse of process: see *Anderson*, at para. 50.

[169] Similarly, an improper use of the mandatory minimum in plea bargaining — a concern raised by the majority, which I share — would also warrant the court's

intervention. Thus, if a prosecutor proceeded by indictment in order to use the threat of a mandatory minimum to extort a guilty plea, this would likely qualify as an abuse of process and justify a s. 24(1) remedy: see *Babos*, at paras. 58-61. It follows that we do not need to strike down the sentencing scheme to guard against these concerns. To the extent that the majority holds otherwise, I respectfully disagree.

[170] The offender bears the burden of proof to show an abuse of process at the sentencing phase, after evidence of mitigating or aggravating factors has been put before the court. He or she must demonstrate that the mandatory minimum would be grossly disproportionate in his or her case. Imposing such a sentence would “undermine society’s expectations of fairness in the administration of justice” (*Nixon*, at para. 41). Grossly disproportionate sentences are “so excessive as to outrage standards of decency” and are “abhorrent or intolerable” to society (*R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 4, citing *Smith*, at p. 1072, and *Morrissey*, at para. 26). They constitute a breach of an accused’s fundamental right to be free from cruel and unusual punishment, and are incompatible with the integrity of our justice system. An exercise of prosecutorial discretion — be it by design or effect — that leads to such an outcome must be regarded as a *per se* abuse of process.

[171] If the offender discharges this burden of proof, he or she is entitled to a remedy under s. 24(1). In most cases, the appropriate and just remedy would be a sentence reduction below the mandatory minimum.

[172] For these reasons, I am unable to agree with the majority's assertion that the abuse of process doctrine creates "a notoriously high bar" and "offers scant protection from grossly disproportionate sentences" (para. 94). With respect, this contention misconstrues how the doctrine operates under my proposed framework. Far from offering *scant* protection, my proposal offers *total* protection from grossly disproportionate sentences. If an offender can show that a mandatory minimum would be grossly disproportionate in his or her case, the judge must declare a *per se* abuse of process and grant a s. 24(1) remedy.

(b) *The Proposed Framework Is Consistent With This Court's Rejection of Constitutional Exemptions*

[173] In *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, this Court held that where a mandatory minimum sentencing scheme is found to violate s. 12, the proper remedy lies under s. 52 and the law must be struck down. The Court expressly rejected the possibility that the law could be saved by granting case-by-case exemptions for any unconstitutional applications.

[174] I agree that constitutional exemptions are not an appropriate response to unconstitutional laws. My proposed framework is consistent with this principle. The remedy it contemplates is *not* a response to an unconstitutional law. Rather, the remedy is a response to a state actor's *exercise of discretion* under a law which a judge has held to be constitutionally compliant at stage one of the framework. As the Chief Justice explained in *Ferguson*:

Section 24(1) . . . 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 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). [Emphasis added; para. 60.]

This logic applies to the acts of prosecutors making an election under s. 95. In my view, once a court has determined that a sentencing scheme itself is constitutional, it is entirely appropriate to guard against its rare unconstitutional application by providing a case-by-case s. 24(1) remedy.

C. *The Responsibility for Ensuring Constitutional Compliance Under My Proposed Framework Lies With Judges, Not Prosecutors*

[175] The Chief Justice states that reliance on the Crown election to uphold the impugned mandatory minimums effectively “replac[es] a public hearing on the constitutionality of s. 95 before an independent and impartial court with the discretionary decision of a Crown prosecutor” (para. 86). She emphasizes that it is incumbent on courts to scrutinize the constitutionality of the sentencing schemes they apply.

[176] I agree that the responsibility to ensure constitutional compliance rests with judges, and not with prosecutors. The framework I propose places that responsibility squarely in the hands of judges. In this respect, it is consistent with the admonition in *Smith* that “courts are duty bound” to evaluate whether a law is

constitutional, and must not “delegate the avoidance of a [*Charter*] violation to the prosecution” (p. 1078).

[177] Specifically, the framework includes two checks to ensure compliance with s. 12, neither of which relies on prosecutorial discretion. First, if the sentencing scheme itself is challenged, the judge may strike it down as unconstitutional. Second, if an offender argues that the mandatory minimum would be grossly disproportionate in his or her case, the judge may find a *per se* abuse of process and grant a sentence reduction under s. 24(1).

[178] I repeat and emphasize that the Crown election under s. 95 does not require prosecutors to go outside the law. Rather, it is a discretion built into the legislative scheme that acts as a safety valve to guard against unconstitutional applications of the law. In my view, any meaningful assessment of the law’s constitutionality must take this factor into account: *PHS*, at paras. 109-14. However, in recognizing the relevance of the Crown election, I should not be taken as saying that this safety valve insulates the law from *Charter* scrutiny. Rather, it simply informs *how* that scrutiny should be applied.

[179] Nor does my framework conflate the respective functions of prosecutors and judges. The majority, citing *Anderson*, insists that “sentencing is a judicial function” (para. 89). In its view, the fact that “a mandatory [minimum] regime may require a judge to impose a disproportionate sentence does not alter the prosecutorial function in electing the mode of trial” (*ibid.*). I agree. In prosecuting an accused under

a hybrid offence, it is the *Crown's* responsibility to elect a mode of proceedings bearing in mind the gravity of the conduct. Where an election would lead to a grossly disproportionate sentence, it is the *judge's* responsibility to avoid that outcome.

[180] In light of these checks, I cannot accept the majority's suggestion that my framework insulates mandatory minimums from *Charter* scrutiny. With respect, that is just not so. The two checks I have described ensure that judges make the ultimate call as to the constitutionality of the law itself, as well as its application to a particular offender. The majority, relying on *R. v. Bain*, [1992] 1 S.C.R. 91, states that "one cannot be certain that [prosecutorial] discretion will always be exercised in a way that would avoid an unconstitutional result" (para. 95). I agree. It is precisely for this reason that my proposed framework empowers judges to intervene where the Crown election puts an offender at risk of a grossly disproportionate sentence. In my view, this is a full answer to the majority's concerns.

[181] I wish to add one further point. The Chief Justice notes that the Crown election is exercised at an early stage of the proceedings before all of the facts related to an offence have emerged. It follows that the Crown might make an inappropriate election prior to discovering mitigating circumstances. As a result, she contends that "[t]he existence of the summary conviction option is therefore not an answer to the respondents' s. 12 claim" (para. 97).

[182] With respect, I disagree for two reasons. First, if Crown counsel becomes aware of facts suggesting that the initial election was not appropriate, he or she can

stay the indictment and initiate summary proceedings: see *Criminal Code*, ss. 579 and 786(2).⁴ Second, even if Crown counsel does not re-elect in this manner, it is always open to the judge to find a *per se* abuse of process where the mandatory minimum would be grossly disproportionate for a particular offender.

D. *Applying the Section 12 Framework*

[183] I now apply this framework to each of the cases before us.

(1) Application to Mr. Nur

[184] Code J. found that, prior to the enactment of the three-year mandatory minimum, the sentencing range for a first offence under s. 95 was a term of imprisonment between two years less a day and three years: *Nur* sentencing reasons, at para. 42. Thus, the low end of the range is around two years less a day. The three-year mandatory minimum for a first offence under s. 95(2) is not, in my view, grossly disproportionate to this low end. Therefore, at the first stage, the mandatory minimum does not violate s. 12.

[185] Mr. Nur's concession that a three-year sentence is not grossly disproportionate in his case disposes of the second stage.

(2) Application to Mr. Charles

⁴ Within six months of the date of the offence, the Crown may do so unilaterally; if six months have passed, the consent of the accused would be required: see *Criminal Code*, s. 786(2).

[186] In her oral reasons for sentencing, Backhouse J. did not refer to the sentencing range for a second or subsequent offence prior to the enactment of the five-year mandatory minimum (2010 ONSC 5437, 262 C.C.C. (3d) 120). However, as noted by Code J., while the sentencing range for a first offence was between two years less a day and three years, “[m]uch longer sentences were imposed for recidivists” (*Nur* sentencing reasons, at para. 42). It is clear, then, that a second or subsequent offence would have attracted a sentence considerably longer than three years — at the very least, in the range of four or five years. The present five-year mandatory minimum is not grossly disproportionate to the previous low end of the range for second or subsequent offences under s. 95.

[187] Like Mr. Nur, Mr. Charles concedes that the mandatory minimum is not grossly disproportionate in his case.

[188] I thus conclude that neither the sentencing scheme itself, nor its application to Mr. Nur or Mr. Charles, offends s. 12 of the *Charter*.

IV. Part 3: Analysis Under Section 7

[189] I now turn to the s. 7 arguments raised in each of the cases before us.

A. *Mr. Nur*

[190] Mr. Nur challenges the sentencing scheme in s. 95(2) as arbitrary in violation of s. 7. His challenge relates to the two-year “gap” between the maximum penalty of one year where the Crown proceeds summarily, and the minimum penalty of three years where the Crown proceeds by indictment. Mr. Nur concedes that the purpose of the three-year mandatory minimum is to denounce and deter gun crime: R.F., at para. 76. Nevertheless, he submits that the gap is arbitrary because it “frustrates the flexibility of the hybrid scheme and . . . is not related to any identifiable legislative objective” (*ibid.*, at para. 77). Specifically, it “undermines . . . flexibility by constraining Crown discretion and driving more offences into the indictable category” (*ibid.*, at para. 83).

[191] With respect, I am not persuaded by this submission. I do not gainsay the possibility that, in other circumstances, this type of gap might raise s. 7 concerns. However, no such concerns arise here. As Mr. Nur acknowledges, Parliament’s primary objective is to denounce and deter gun crime. The legislative history and the jurisprudence on s. 95 make clear that the vast majority of conduct captured by this offence is inherently dangerous and warrants a significant term of imprisonment. Yet, Parliament has also recognized the possibility of rare, licensing-type cases, and created a safety valve which provides the option of summary proceedings.

[192] Seen in this light, there is nothing arbitrary about the sentencing scheme. On the contrary, the scheme has a clear connection to Parliament’s objectives. It reserves more lenient sentences for the least blameworthy offenders. At the same

time, for the vast majority of offenders, it imposes strict mandatory minimum penalties which are consistent with the goals of denunciation and deterrence. Accordingly, the two-year gap in s. 95(2) does not offend s. 7 of the *Charter*.

B. *Mr. Charles*

[193] For his part, Mr. Charles makes two additional s. 7 arguments. He is subject to a five-year mandatory minimum under s. 95(2)(a)(ii) since his s. 95(1) conviction constitutes a “second or subsequent offence”. Section 84(5) provides a list of offences that may trigger the application of this five-year mandatory minimum. A prior conviction for any of the listed offences makes a later s. 95(1) conviction a “second or subsequent offence”. Section 84(6) specifies that, for the purposes of s. 84(5), “the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences”.

[194] Mr. Charles’s first argument pertains to the list of offences in s. 84(5). He argues that the inclusion of “less serious” or “non-firearm offences” in this list renders the provision overbroad in violation of s. 7. In particular, he points to two listed offences which he considers to be examples of “less serious” and “non-firearm offences”: committing an indictable offence using an imitation firearm contrary to s. 85(2), and breaching a prohibition order contrary to s. 117.01(1).

[195] I would not give effect to this submission. On this point, I am substantially in agreement with Cronk J.A.’s reasons at the Court of Appeal: *R. v.*

Charles, 2013 ONCA 681, 117 O.R. (3d) 456. As she notes, Mr. Charles’s assertion “minimizes the seriousness of the conduct prohibited by” ss. 85(2) and 117.01(1), and “ignores the purpose of the provisions and their role in Parliament’s firearms control scheme” (*ibid.*, at para. 94). These offences are serious, even when they do not involve the use of a firearm. Their inclusion in s. 84(5) does not, in my view, result in overbreadth.

[196] Second, Mr. Charles submits that the application of s. 84(6) may be unconstitutionally arbitrary in some situations. Under that provision, it is the order of convictions, and not the order in which offences are committed, that determines whether an offence counts as “second or subsequent”. Thus, an offender who *first* commits a s. 95(1) offence and *later* commits a listed offence under s. 84(5) could still be subject to the five-year mandatory minimum if the conviction for the later offence happens to be entered first. In his view, this leads to an arbitrary result.

[197] This argument is purely hypothetical. The two offences that trigger the five-year mandatory minimum in Mr. Charles’s case were both committed and had convictions registered prior to his commission of the s. 95 offence. Assuming without deciding that s. 84(6) is unconstitutional, Mr. Charles’s situation would remain the same. If s. 84(6) were struck down, this would revive the long-standing common law rule described in *R. v. Skolnick*, [1982] 2 S.C.R. 47:

The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must

have been committed after the first or second conviction, as the case may be [p. 58]

Applying this common law rule, Mr. Charles would still be subject to a five-year mandatory minimum. As such, I would respectfully decline to pronounce on the constitutionality of s. 84(6).

[198] In sum, I would not accede to any of the s. 7 arguments. The sentencing scheme in s. 95(2) passes constitutional muster.

V. Conclusion

[199] Section 95 represents Parliament's considered response to the pressing problem of gun violence in our communities. Parliament chose to craft a wide-reaching offence to denounce and deter serious criminal activity with lengthy mandatory minimums. At the same time, it provided a safety valve to divert the least serious cases into summary proceedings carrying no minimum sentence. With respect, I see no reason to second-guess Parliament based on hypotheticals that do not accord with experience or common sense. Nor, on my proposed framework, is there any sound basis for disturbing the extensive deliberations of our elected representatives on this important issue. I would allow the appeals, and uphold the constitutional validity of s. 95(2).

Appeals dismissed, ROTHSTEIN, MOLDAVER and WAGNER JJ. dissenting.

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