Date: 19980325 Docket: CAC141429

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Morrisey, 1998 NSCA 91

Freeman, Pugsley and Bateman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant	)	Ms. Denise Smith for the Appellant
- and -	)	
MARTY LORRAINE MORRISEY Respondent	)	Malcolm S. Jeffcock for the Respondent
- and -	)	
THE ATTORNEY GENERAL OF CANADA Intervenor	)	Theodore K. Tax for the Intervenor
	)	Appeal Heard: February 12, 1998
	)	Judgment Delivered: March 25, 1998

THE COURT: Leave to appeal is granted, appeal allowed, judgment of Scanlan, J. set aside and sentence of four years incarceration imposed, per reasons for judgment of Bateman, J.A.; Freeman and Pugsley, JJ.A., concurring.

BATEMAN, J.A.:

The Crown seeks leave to appeal and, if granted, appeals from the sentence imposed upon the respondent, Marty Lorraine Morrisey, by Justice J. E. Scanlan of the Supreme Court. The respondent pleaded guilty to criminal negligence causing death with a firearm. Justice Scanlan held that the minimum sentence of four years for that offence, mandated by **s. 220(a)** of the **Criminal Code,** is unconstitutional in that it constitutes cruel and unusual punishment in violation of **s.12** of the **Canadian Charter of Rights and Freedoms**.

Background:

On May 14, 1996, the respondent, Adrian Teed and Karl Staples were at Essie Teed's house, where they were consuming "moonshine". Essie Teed is Adrian Teed's mother. The respondent was depressed over the breakup of his relationship with Mr. Teed's sister. Stored in the house was the respondent's 303 calibre, bolt action rifle. Mr. Morrisey asked Mr. Teed to help him cut off the barrel of the gun. The respondent told Mr. Teed that he planned to use the gun in a robbery. He later said that he actually intended to use the gun to commit suicide, but did not think Mr. Teed would assist in cutting the barrel him if he knew of his true purpose.

Mr. Teed, Mr. Morrisey and Mr. Staples went to the respondent's camp in the woods of Belmont Mountain. At some point Mr. Staples left. The other two continued drinking and taking drugs and working on the gun, successfully cutting the barrel. There was a live round in the chamber of the sawed off gun which the respondent was holding. Opposite

the respondent was Adrian Teed reclining on a bunk. The gun discharged, striking Mr. Teed above the left eye and killing him instantly. A subsequent examination of the rifle revealed that it was not susceptible to shock discharge.

The respondent then drove to the home of Essie Teed. He pointed the gun at her, telling her to shut up and sit down. She refused. He said; “Don’t fuck with me, I’ve already killed tonight.” Essie Teed succeeded in calming the respondent, who wanted to talk to his former girlfriend, Mrs. Teed’s daughter. They went to the girlfriend’s house together, leaving the rifle behind. Eventually, the respondent retrieved the rifle. It was later recovered by the R.C.M.P. from the Debert River. The following morning Mr. Morrisey checked himself into the psychiatric ward at the Colchester County Hospital. He subsequently admitted, on questioning by the R.C.M. Police, that he had killed Adrian Teed. Following directions provided by the respondent the police found Mr. Teed’s body about five kilometers from the camp, concealed under a blanket. The respondent had set fire to the camp which was substantially destroyed.

Following committal after a preliminary inquiry on September 10, 1996, the respondent entered pleas of guilty to unlawfully pointing a firearm at Essie Teed (**s.86(1)(a)** of the **Criminal Code**) and to criminal negligence causing death (**s.220(a)**).

At the sentencing hearing the respondent successfully challenged the constitutionality of the minimum sentence required by **s.220(a)** of the **Criminal Code**. [reported as **R. v. Morrisey** (1996), 154 N.S.R. (2d) 278]. While finding that the minimum

sentence would not result in a grossly disproportionate penalty in Mr. Morrisey's circumstances, Justice Scanlan held that the minimum sentence provision infringed **s.12** of the **Charter**. After credit for five months of pre-trial custody, Mr. Morrisey received sentences of two years on the charge of criminal negligence causing death, with a lifetime firearm prohibition pursuant to **s.100** of the **Criminal Code,** and one year, consecutive, on the charge of pointing a firearm. But for the pre-trial custody, Justice Scanlan would have imposed a sentence of three years for the criminal negligence causing death offence.

The Crown appealed the sentence, in particular, the finding of the sentencing judge that the minimum penalty offended the **Charter**. The Appeal Court remitted the matter to Justice Scanlan, for reconsideration, directing that the federal Crown be given notice of the constitutional challenge. At the conclusion of the further hearing, and after receiving submissions from the defence, prosecution and counsel for the Attorney General of Canada, Justice Scanlan, in a supplemental decision, confirmed the sentence earlier imposed and his finding that **s.220(a)** violated **s.12** of the **Charter** [reported at (1997), 160 N.S.R. (2d) 13]. The Attorney General of Canada was granted intervenor status in this appeal by order made November 13, 1997.

Ground of Appeal:

> That the sentencing Judge erred in law in ruling that the provision in **s.220(a)** of the **Criminal Code** for a minimum punishment of imprisonment for four years following conviction for criminal negligence causing death where a firearm is used in the commission of the offence
>
> > (a) is inconsistent with the right not to be subjected to any cruel and unusual treatment or punishment guaranteed by **s.12** of the **Canadian Charter of Rights and Freedoms**,

and

(b) does not constitute a reasonable limit on **s.12** of the **Charter** under **s.1** thereof.

The Legislation:

Section 220 of the **Criminal Code** provides in relevant part:

> Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable
>
> (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
>
> (b) in any other case, to imprisonment for life.

Criminal negligence is defined in **s.219** of the **Code**:

> (1) Every one is criminally negligent who
>
> (a) in doing anything, or
>
> (b) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.

According to **s.12** of the **Canadian Charter of Rights and Freedoms**:

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

The **Firearms Act**, S.C. 1995, Chapter 39 was declared in force on January 1, 1996. The new law, *inter alia*, created in **s.220(a)** of the **Code** a minimum penalty of four years' imprisonment. The **Firearms Act**, at the same time, amended other sections of the **Criminal Code**, establishing a minimum sentence of four years for certain other offences including: manslaughter (**s.236**); attempted murder (**s.239**); causing bodily harm with intent

using a firearm (**s.244**); sexual assault with a weapon (**s.272**); aggravated sexual assault (**s.273**); kidnapping (**s.279**); hostage taking (**s.279.1**); robbery (**s.344**) and extortion (**s.346**). Some of these offences involve causing the death with a firearm while others pertain to situations in which a firearm is used to threaten or intimidate a victim.

Analysis:

The submissions of the appellant and the intervenor focus, not upon the sentence here, *per se*, but Justice Scanlan's finding that **s.220(a)** of the **Criminal Code** violates **s.12** of the **Charter**.

The law governing a constitutional challenge pursuant to **s.12** of the **Charter** is substantially contained in **Smith v. R.** (1987), 34 C.C.C. (3d) 97 (S.C.C.). Additional decisions confirm and clarify the principles laid down in **Smith**: **Luxton v. R.** (1990), 58 C.C.C. (3d) 449 (S.C.C.); **Lyons v. R.** (1987), 37 C.C.C. (3d) 1 (S.C.C.); **Steele v. Warden of Mountain Institution** (1990), 60 C.C.C. (3d) 1 (S.C.C.) and **R. v. Goltz** (1991), 67 C.C.C. (3d) 481 (S.C.C.).

In **Smith v. R.**, Lamer, J. (as he then was) writing for the plurality of the Court, found that the minimum mandatory imprisonment of seven years for importing a narcotic into Canada, pursuant to **s.5(2)** of the **Narcotic Control Act**, violated **s.12** of the **Charter**.

The appellant, Smith, had returned to Canada from Bolivia carrying 7½ oz. of cocaine. He pleaded guilty to importing contrary to **s.5(1)** of the **Narcotic Control Act** and was sentenced to eight years imprisonment. His appeal was dismissed by the British Columbia Court of Appeal. That Court found that the minimum sentence provision was not inconsistent with the **Charter** as it was not a grossly disproportionate sentence for this offender. The matter went on to the Supreme Court of Canada on a constitutional question stated by the Chief Justice.

In finding that the seven-year minimum sentence in **Smith** violated **s.12** of the **Charter**, Lamer, C.J.C., agreed that the statutory minimum sentence was not grossly disproportionate in relation to Mr. Smith, but determined that it was a virtual certainty that imposition of the minimum punishment would result in a grossly disproportionate sentence for some "small" offenders. He focused upon the "wide net" cast by **s.5(1)**. At p.143:

> As indicated above, the offence of importing enacted by **s.5(1)** of the **Narcotic Control Act** covers numerous substances of varying degrees of dangerousness and totally disregards the quantity of the drug imported. The purpose of a given importation, such as whether it is for personal consumption or for trafficking, and the existence or non-existence of previous convictions for offences of a similar nature or gravity are disregarded as irrelevant. Thus, *the law is such that it is inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate.*
>
> This is what offends **s.12,** the certainty, not just the potential. . . .
>
> [Emphasis added]

In **R. v. Goltz, supra**, the accused was convicted of driving while prohibited and received the mandatory minimum sentence of seven days imprisonment plus a $300 fine pursuant to **s.88(1)(c)** of the **Motor Vehicle Act of British Columbia**. On appeal to the

County Court it was held that the minimum mandatory sentence constituted cruel and unusual punishment, contrary to **s.12** of the **Charter**, and that it was not saved by **s.1**. This decision was upheld by the Court of Appeal. The Crown appealed to the Supreme Court of Canada, where Gonthier, J., writing for the majority, found that the section was constitutional.

In accordance with the law established in these cases, the test to be met on a challenge to legislation pursuant to **s.12** of the **Charter** is an exacting one: "Is the punishment so excessive as to outrage standards of decency?". Lamer, C.J.C. said in **Smith, supra**, at p.139:

> . . . The test for review under *s. 12* of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. *We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12* will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.
>
> [Emphasis added]

The impugned law must be tested both for its purpose and effect. The pursuit of a constitutionally valid purpose is not a guarantee of constitutional validity (per Lamer, C.J.C. in **Smith** at p.138). Nor is a minimum mandatory term of imprisonment, in and of itself, cruel and unusual (at p.143). Although legislation requiring the imposition of a minimum sentence may operate arbitrarily, this is a minimal factor in determining whether the punishment is cruel and unusual. A complaint of arbitrariness is more appropriately dealt with under **s.9** and **s.15** of the **Charter** (per Gonthier, J. in **Goltz**, at p.493).

Cory, J. noted in **Steele Mountain**, **supra**, at p.24, that "it will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of **s.12** of the **Charter**".

The approach mandated by **Smith** and confirmed in subsequent cases calls for a two stage analysis.

(i) The first stage:

This review is specific to the offender before the court. The court is to determine what range of sentence would have been appropriate to punish, rehabilitate or deter the offender or to protect the public from him/her, considering the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case. The court must also evaluate the effect of the sentence actually imposed, that effect often being a composite of many factors including the nature of the sentence and the conditions under which it is applied. Additional factors include an assessment of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed. These are all considerations which, without being determinative in themselves, help to assess whether the punishment is grossly disproportionate.

Applying this first branch of the **Smith** test to Mr. Morrisey's circumstances, Scanlan, J. held that the imposition of the statutory minimum would not be grossly disproportionate. He said at p.284 ((1996), 154 N.S.R. (2d) 278):

> The factors that I consider in determining whether the four-year minimum term is grossly disproportionate in the present case include asking; is the punishment necessary to achieve a valid penal purpose? Are there valid alternatives to the mandated punishment? In comparison to other crimes in this jurisdiction is the four-year minimum grossly disproportionate? *These questions must all be answered at this stage having regard to the particular offence and the circumstances of the defendant.*
>
> *I would say that in the circumstances of this particular case the mandatory sentence of four years would not be cruel and unusual punishment.* This case resulted in the death of an innocent victim. As I had noted above, sentences in this type of situation must reflect the serious risk that the combination of firearms and alcohol present to the public. I want to go on and say that without the provisions as regards minimum sentence as set out in section 220, I would have imposed a sentence of three years imprisonment on the offence of criminal negligence causing death in this case. The additional one year as prescribed by parliament is not so drastic an increase, in this case, so as to amount to cruel and unusual punishment within the meaning of the provisions of section 12. That is not the end of my inquiry into the constitutional validity of the provisions of section 220. It is appropriate that the court considers the broader application of the minimum sentence as it may apply to reasonable hypotheticals.
>
> [Emphasis added]

Scanlan, J. appropriately recognized that, while the analysis at this stage is individualized, the test does not require that, in order to pass **s.12** scrutiny, the minimum sentence must be perfectly suited to the offender. This view was expressed by LaForest, J. in **Lyons v. R.**, **supra**, at p.33:

> . . . The word “grossly”, it seems to me, reflects this court’s concern not to hold Parliament to a standard so exacting, at least in the context of s.12, as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender.

This latitude is essential to permit appropriate balance among the disparate objectives of the sentencing process and to afford the necessary level of deference to the legislative function. Sentences are geared not only to the punishment of the offender but

also to “the continued welfare of the public through deterrent and protective aspects of a punishment. . . . Thus while the multiple factors which constitute the **Smith** test are aimed primarily at ensuring that individuals are not subjected to grossly disproportionate punishment, it is also supported by a concern to uphold other legitimate values which justify penal sanctions.” (**Goltz, supra**, per Gonthier, J. at p.495.)

As a result, there may not be perfect alignment between the required minimum punishment and the appropriate sentence for the offender. This was recognized by LaForest, J. in **Lyons, supra**, at p.22:

> . . . I accordingly agree with the respondent’s submission that *it cannot be considered a violation of fundamental justice for Parliament to identify those offenders who, in the interests of protecting the public, ought to be sentenced according to considerations which are not entirely reactive or based on a “just deserts” rationale.* The imposition of a sentence which “is partly punitive but is mainly imposed for the protection of the public” (Re Moore and R. (1984), 54 O.R. (2d) 3, 10 C.C.C. (3d) 306 at 308, 6 D.L.R. (4th) 294 (Ont. H.C.)), seems to me to accord with the fundamental purpose of the criminal law generally, and of sentencing in particular, namely, the protection of society. In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender.

To similar effect, Gonthier, J. said in **Goltz** at p.495:

> *Smith* makes it plain that gross disproportionality must be determined by paying close attention both to the particular situation in which the offence occurred and to the personal traits of the offender, *though it clearly does not go as far as a complete individualization of sentencing, which might put into question the constitutional validity of mandatory minimum sentences generally. . . .*

[Emphasis added]

With respect to deference to the legislative process, Lamer, C.J.C. in **Smith, supra**, at p.137, quoted with approval the following statement by Borins, Dist. Ct. J. (as he then was) in **R. v. Guiller** (1985), 48 C.R. (3d) 226 at p.238:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, *the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.*
>
> [Emphasis added]

I agree with the conclusion of Scanlan, J. that, balancing the factors required under this branch of the **Smith** test, the legislation is not, *prima facie*, invalid.

Subsequent to the hearing of this appeal the decisions of Taylor, J. in **R. v. Bill** have come to my attention (reported at [1997] B.C.J. No. 3031 and [1998] B.C.J. No. 240). There, the accused was found guilty, by a jury, of unlawful act manslaughter. On the facts assumed by the judge for the purpose of sentencing, the accused, while intoxicated, used a loaded rifle to scare off a group of people who were approaching his home and with whom he anticipated a confrontation. The judge described the circumstances as follows [from [1997] B.C.J. No. 3031]:

> [para24] As the melee or confrontation that had developed on the trail between the bootlegger's home and the neighbour's moved closer to the neighbour's house, so too did Lonny Bill move from the opposite direction until he stood approximately 20 feet from the confrontation that had developed between his sister, her boyfriend and other people who were to be later identified as George Seaward and his brother, Wayne Alleck.

> [para25] By that point hockey sticks had been produced by one or more of those involved and were being swung about.
>
> [para26] It is at this point that there functioned within Bill a deadly combination of factors, being a mind whose function was impaired by alcohol, a sense of fear, distress and anger.
>
> [para27] Bill was holding the gun at waist level and, in the confusion of the moment, discharged it, causing the death of Wayne Alleck.
>
> [para28] I am satisfied on the evidence and from the verdict reached by this jury that there was no intention to kill anyone let alone Hank Sampson, and that Bill's intention in taking the firearm to the confrontation was to scare off the group that he associated with the Warriors. Whether that was to be achieved simply by holding the rifle or brandishing it or, indeed, firing it off in the air is not entirely clear. However I am satisfied from the evidence that had the gun not gone off in the manner that it did causing Wayne Alleck's death, then Bill would have discharged it to scare off this group in a manner that would have constituted the careless use of a firearm.
>
> [para29] It is really as a consequence of purely bad luck that the bullet struck Wayne Alleck on the top of his hip bone and was deflected downward on its fatal path.
>
> [para30] I am satisfied that the jury must have rejected the evidence of Sampson and Smith as to what they described as taunts after the gun was fired. Such evidence unquestionably would have gone to the issue of intention and this jury by its verdict concluded there was no intention to kill.
>
> [para31] I do not accept the conviction for manslaughter was founded upon an intention to assault but rather upon the offence of careless use of a firearm in which the firearm was intended to be used to scare off this group.

Mr. Bill's manslaughter conviction attracted the minimum penalty of four years pursuant to **s.236(a)** of the **Criminal Code**:

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

Taylor, J. found that the application of the statutory minimum punishment in Mr. Bill's circumstances would result in a grossly disproportionate sentence, thus **s.236(a)**, *prima facie,* offended **s.12** of the **Charter** and was not saved under a **s.1** analysis.

With respect, I disagree with the analysis and conclusions of Taylor, J. which are premised, in part, upon the following remarks:

> [para46] Unlike most other conduct proscribed by the *Criminal Code*, the offence of manslaughter can be based on an almost infinitely wide range of conduct. Often referred to as an offence that ranges from near accident to near murder, the circumstances that lead to convictions for manslaughter are almost like snowflakes bounded by a basic construction but infinite in details within that construction. *The offence of manslaughter requires only an unlawful homicide which in simplistic terms is a homicide occurring in the course of an unlawful act or as a result of criminal negligence. Thus the offence of manslaughter can range from one end of the spectrum where all that need be absent is the intention to cause death, to the other end of the spectrum which is something approaching a mere accident.* For this reason, manslaughter ordinarily carries no minimum sentence.
> [Emphasis added]

While Justice Taylor's comments may be true of manslaughter generally, it is only manslaughter where a firearm is used in committing the offence that attracts the minimum penalty. An offender who causes the death of a person while using a firearm in the commission of an unlawful act cannot be likened to the hypothetical small offender in **Smith**, **supra**. Although the minimum punishment might, in occasional circumstances be severe, it would not commonly be grossly disproportionate.

I have referred in some detail to **R. v. Bill** inasmuch as there is a degree of symmetry between the offences of unlawful act manslaughter (using a firearm) and criminal negligence (causing death with a firearm). I note, however, that in certain circumstances

the unlawful act sufficient to support a conviction for manslaughter (for example, handling a firearm in a careless manner or without reasonable precautions for the safety of others (**s.86(2)**) could be viewed as less egregious than the minimum conduct required for a conviction for criminal negligence causing death with a firearm.

(ii) The second stage:

Although a minimum sentence is found not to be grossly disproportionate in the circumstances of the offender before the court, it does not necessarily follow that the legislative provision is constitutionally valid. The court must consider, as did Lamer, C.J.C. in **Smith, supra**, hypothetical circumstances in which the legislation could result in cruel and unusual punishment. In **Goltz**, **supra**, Gonthier, J., clarified, however, that such hypotheticals must be reasonable. He said at p.504:

> A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility. While the court is unavoidably required to consider factual patterns other than that presented by the respondent's case, this is not a licence to invalidate statutes on the basis of remote or extreme examples. Laws typically aim to govern a particular field generally, so that they apply to a range of persons and circumstances. It is true that this court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the **Charter**: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1099, 43 C.P.C. (2d) 165, 73 D.L.R. (4th) 686, 50 C.R.R. 59, 41 O.A.C. 250, 112 N.R. 362, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361-62, [1989] 6 W.W.R. 351, 61 D.L.R. (4th) 385, 43 C.R.R. 1, 61 Man. R. (2d) 270, 99 N.R. 116. Yet it has been noted above that **s.12** jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances *which could commonly arise in day-to-day life.*
>
> [Emphasis added]

A review of the constitutionality of legislation based upon a hypothetical example is fraught with difficulty. A hypothesis lacks the factual depth of real events which are normally available to underpin the court's analysis. Thus, in choosing the hypothetical

examples, care must be taken that each is representative of an imaginable, common occurrence of the offence.

Gonthier, J. cautioned, in **Goltz**, at p.493, that the **Smith** test "does not envision that any or all imaginable commissions of the offence in which the punishment would be grossly disproportionate to the wrongdoing warrant a finding of infringement of **s.12**." He noted, as well, that the "strong indication of validity arising from the first, particularized step of **s.12** analysis" will be difficult to overcome at the second stage (at p.506).

The difficulty of a hypothesis based constitutional analysis was the subject of comment by Taylor, J.A. in **R. v. Kumar** (1993), 85 C.C.C. (3d) 417 (B.C.C.A.). There, the Court entertained, *inter alia*, a **s.12** challenge to the graduated minimum penalties for impaired driving and breathalyzer offences pursuant to **s.255(1)(a)** of the **Criminal Code**. Taylor, J.A. for the majority commented at p.449:

> The task of the court in applying the second aspect of the *Goltz* test is a difficult one. Judges of the United States Supreme Court have stated in memorable phrases their reluctance to base constitutional conclusions on hypothetical foundations. In *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984), Justice Blackman spoke (at p. 955, n. 5) of the "abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate", and Justice Rehnquist concluded his judgment (at p. 985) with the observation: "When the Court's sights are not focused on the actual application of a statute to a specific set of facts, its vision proves sadly deficient." In *New York v. Ferber*, 458 U.S. 747 (1982), Justice Stevens made the observation (at pp. 780–781):
>
> > When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.

It is on this second branch of the **Smith** test that Scanlan, J. found that the legislation failed. In so doing, he accepted, as appropriate hypotheticals, five cases that had been presented by defence counsel to establish the range of sentence.

The first case considered was **R. v. Yun Yin Lee,** June 8, 1981, Ont. Prov. Ct., Bark Prov. Ct. J., (unreported). The only information presented to the judge was the following, short, sentencing summary:

> Reasons for sentence following the accused's guilty plea to a charge of criminal negligence causing death, contrary to s.203 of the Criminal Code - While visiting relatives in Canada, the accused, a resident of Hong Kong, posed for photographs with her nephew, each person holding a rifle - The rifle held by the accused discharged, killing her nephew - the accused, aged 33, was married with three children and, following the incident, was virtually hysterical and suicidal - *Held*: Sentence suspended, accused place on probation for one year.

In the second case, **R. v. Lefthand** (1981), 31 A.R. 459 (P.C.), the 18-year old accused pleaded guilty to a charge of pointing a firearm contrary to **s.84(1)(a)** of the **Criminal Code**. The accused was highly intoxicated. The pointing resulted in the death of a person. There was no explanation why the firearm had discharged. The Crown sought a period of incarceration of nine to twelve months. The judge suspended the passing of sentence. In so doing, the judge emphasized that he was not sentencing on a charge of unlawful homicide, that the reason for the gun discharging was not known and that he viewed the death as a tragic accident.

The third case before Justice Scanlan was **J. C. v. The Queen** (1992), 58 O.A.C. 157. The 17-year old accused, a young offender, pleaded guilty to a charge of criminal

negligence causing death. He and the deceased were playing with a revolver, pointing it at each other, knowing there was one live bullet in the chamber. At least twice the appellant pulled the trigger. At a later point the accused pointed the gun at the back of the deceased's head and pulled the trigger four times. The accused then opened the cylinder and, mistakenly thinking that the bullet had fallen out of the gun, pointed it again at the deceased and pulled the trigger, with tragic consequences. The Ontario Court of Appeal confirmed a sentence of 18 months open custody.

In **R. v. Saswirsky**, unreported, June 22, 1981, Ont. Co. Ct., the accused pleaded guilty to a charge of criminal negligence causing death. The accused, a police officer, deposited one live shell in his gun and after pulling the trigger three times, the gun not having fired, pointed the gun at his girlfriend in a playful manner and pulled the trigger once, thinking that he had verified that the live shell was not in the firing chamber. The gun fired, killing the girlfriend. It was accepted that he did not intend to kill her. The accused was sentenced to one year in jail, after receiving three months credit for time spent in custody.

The fifth case cited by Scanlan, J. was **R. v. Bell** (1992), 17 B.C.A.C. 36. There, the accused pleaded guilty to criminal negligence causing death and possession of a restricted weapon. The 20-year old accused was playing with a revolver, pointing it at his friends. He mistakenly put a live round in the chamber and shot and killed a 14-year old friend. He was sentenced to three years on the criminal negligence and two years concurrent on the weapons offence. The British Columbia Court of Appeal reduced his sentence to 18 months imprisonment for the criminal negligence and one year concurrent on the weapons

offence. In reducing the sentence the Court of Appeal commented that the three-year sentence would be “excessive” for a person with no prior convictions who had been in custody for nine months prior to sentencing.

About these fact situations, Scanlan, J. said:

> I have referred, in detail, to a number of these cases only to point out that in each and every one of those cases regardless of the circumstances of the offence, whether there is alcohol involved or not, whether they are young people, old people, men, women, even children, with the exception of the limiting provisions of the *Young Offenders Act*, a mandatory sentence of four years would have been imposed in each and every one of those cases. When the Supreme Court of Canada said I could refer to reasonable hypotheticals, I do not have to refer to pure hypothetical situations, I refer to actual case situations. As in *Smith*, I am satisfied that it is inevitable that this minimum sentence provision is going to cast such a wide net that people will be caught by that net where the punishment of four years would indeed be cruel and unusual having regard to the circumstances of the accused and the offence.
>
> . . .
>
> . . . As I said earlier, it is inevitable that an accused will be subject to the minimum four-year sentences in circumstances where it would be totally inappropriate to the circumstances of the accused and the offence. There have been and will most certainly be future cases where a serious lack of judgment sees people with firearms point them and pull the trigger not knowing the firearms are loaded. These and similar cases will result in convictions on charges of criminal negligence causing death. Any activity resulting in the death of another is tragic. I am convinced that so long as there is any possession of firearms allowed, there will be tragic accidents. As pointed out, the lack of reported cases would indicate that criminal negligence causing death while using firearms is not a widespread problem. This is a risk which the legislators must consider when permitting any possession of firearms.
>
> There will be circumstances where a four-year mandatory sentence will amount to cruel and unusual punishment contrary to section 12. The provisions of section 220 overreach the legitimate objective and its [sic] is not a reasonable limit within the meaning of section 1 of the *Charter*. The infringement of rights is not a reasonable limit prescribed by law which is justifiable in a free and democratic society.

In respect of **R. v. Yun Yin Lee,** while the accused apparently pleaded guilty to the offence of criminal negligence causing death, the facts available from the above summary would not support a conviction. One is left to conclude that there are relevant facts not reported or, perhaps, that the plea was entered in response to an agreement on sentence. This, then, is not a reasonable hypothetical.

In **R. v. Lefthand** the accused was sentenced not for criminal negligence causing death, but pointing a firearm. Again, the facts available do not support a conviction for a **s.220(a)** offence.

Nor is **J.C. v. The Queen** a reasonable hypothetical against which to test the legislation, in that a young offender would not be subject to the minimum sentencing provisions. In my view, however, had this offender been an adult, the minimum sentence would not be grossly disproportionate in the circumstances.

Both **R. v. Bell** and **R. v. Saswirsky** are representative hypotheticals. I disagree, however, with Justice Scanlan that the minimum sentence of four years, notwithstanding that it substantially exceeds the sentence actually imposed, would be grossly disproportionate in the circumstances of those offences.

Of the five cases considered, then, two provide reasonable hypotheticals. To these should be added the facts of the offence under appeal which “provide an important

benchmark for what is a reasonable example" (**Goltz, supra**, per Gonthier, J. at p.540). These two cases and Mr. Morrisey's own circumstances represent "imaginable circumstances which could commonly occur in day-to-day life". They exemplify precisely the kind of conduct that the legislation is aimed at punishing or preventing. In none of the cases could it be said that the minimum sentence of four years is so excessive as to outrage standards of decency.

Justice Scanlan, with respect, fell into error when he assumed, without further inquiry, that the cases cited were reasonable hypotheticals. He did not ask himself, whether these factual situations, reflected circumstances which could commonly arise in day-to-day life and would support a conviction for criminal negligence causing death with a firearm. He appeared to have accepted, as well, that inasmuch as the minimum four year sentence exceeded that imposed in the cases before him, it would therefore have been grossly disproportionate, as opposed to harsh or excessive.

Scanlan, J., in his remarks quoted above, referred to "tragic accidents", or incidents of "terrible judgment" in the use of a firearm that result in death which would, inappropriately in his view, attract the minimum penalty. A conviction pursuant to **s.220(a)** requires the Crown to prove, beyond a reasonable doubt, that the accused:

1. Has used a firearm;
2. In a manner that shows wanton or reckless disregard for the lives or safety of other persons; and
3. Such conduct has resulted in the death of another person.

"Wanton or reckless" conduct is that which shows a marked and substantial departure from what would be expected of a reasonable person in the circumstances. It is not a small error or a momentary lapse. Justice Scanlan's reference to minimum imprisonment for "tragic accidents" is inappropriate. True "accidents" are not the subject of a conviction under **s.220(a)**. The requirements for a conviction for criminal negligence causing death pursuant to **s.220(a)** do not admit of a hypothetical "small" or "trivial" offender akin to the notional single marijuana cigarette importer in **Smith**. The handling of a firearm, a weapon principally designed to kill, demands a substantial level of care. Those who choose to handle a firearm in a reckless manner, risk the lives of others. This is conduct that Parliament has denounced, as is reflected in the maximum penalty of life imprisonment. When death results, a threshold sentence of four years cannot be said to be grossly disproportionate for commonly occurring instances of the offence.

Justice Scanlan was concerned, as well, that the minimum sentence requirement might preclude a judge from giving appropriate credit for remand time. This issue was recently considered by the Quebec Court of Appeal in **LaPierre v. R.**, February 2, 1998, [1998] A.Q. No 91. The Court upheld the trial judge's decision that the mandatory minimum sentence of 4 years imprisonment, where a firearm is used in the commission of a robbery, did not violate **s.12** of the **Charter**. Proulx, J.A., writing for the Court, accepted that an injustice might flow when a lengthy remand detention cannot be properly credited due to the requirement that the statutory minimum sentence be imposed. He concluded, however,

that if, in a particular case, the statute that prescribes the minimum sentence, but bars consideration of the remand custody, causes the sentence to become grossly disproportionate, the appropriate remedy is a constitutional exemption. He noted that while the Supreme Court of Canada has yet to produce a majority judgment granting a constitutional exemption, the remedy is not without precedent. (See, for example, **R. v. Kumar, supra**; **R. v. Chief** (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.); and **The Queen v. Robert W. Latimer**, [1997] S.J. No. 701 (Sask. Q.B.)).

The analysis of Proulx, J.A. on this issue differed somewhat from that followed by the courts in **Kumar**, and **Chief**, but leads to the same result. In his view, the fact that, in certain cases, the lack of judicial discretion to give appropriate credit for remand time has the potential to result in a grossly disproportionate sentence does not invalidate the legislation. Where a valid provision leads to a result that infringes a **Charter** right, a remedy flows under **s.24** of the **Charter**, the appropriate remedy, here, being the constitutional exemption. As Lamer, J. commented in **Smith, supra**, it is not legislation that has the potential of operating so as to impose cruel and unusual punishment that violates **s.12**, it is the certainty that it will so operate (at p.143). The appellant, in **LaPierre,** failed to satisfy the court that the statutory preclusion of credit for the remand time would render the sentence grossly disproportionate.

It is unnecessary to further explore the availability of the remedy of constitutional exemption, Justice Scanlan having found that the minimum sentence would not be grossly disproportionate for Mr. Morrisey.

Disposition:

I would grant leave to appeal, allow the appeal and set aside the judgment of Justice Scanlan in relation to the term of imprisonment for the **s.220(a)** offence. I would sentence Mr. Morrisey to the minimum penalty of four years' incarceration for the **s.220(a)** offence. The firearms prohibition imposed by the trial judge shall remain in place.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.

C.A.C. No.141429

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN	)	
	)	
Appellant	)	
- AND -	)	
	)	
MARTY LORRAINE MORRISEY	)	
	)	REASONS FOR
Respondent	)	JUDGMENT BY:
- AND -	)	
	)	BATEMAN, J.A.
THE ATTORNEY GENERAL OF CANADA	)	
	)	
Intervenor	)	
	)	