NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Wiles*, 2004 NSCA 3

Date: 20040108
Docket: CAC 200952/200951
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Philip Neil Wiles

Respondent

Judges: Bateman, Oland and Hamilton, JJ.A.

Appeal Heard: November 28, 2003, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Bateman, J.A.; Oland and Hamilton, JJ.A. concurring.

Counsel: Stanley W. McDonald, for the appellant
Philip J. Star, Q.C., for the respondent

Reasons for judgment:

[1] This is an appeal from a decision of Batiot, C.J. Prov. Ct. (as he then was) wherein he held that the application of s. 109(1)(c) of the **Criminal Code of Canada,** R.S.C. 1985, c. C-46, as amended, which requires a mandatory firearms prohibition for a breach of s. 7(2) of the **Controlled Drugs and Substances Act**, R.S.C. 1996, c. 19, as amended ("**CDA**"), violates s. 12 of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 ("**Charter**").

BACKGROUND:

[2] On an Information dated May 3, 2001, Mr. Wiles was charged with unlawfully producing Cannabis (marihuana) (contrary to s. 7(1) of the **CDA**) and with possession for the purpose of trafficking (contrary to s. 5(4) of the **CDA**). While on release he was discovered to again be operating a marijuana grow operation and was charged on a second Information, with s. 7(1) and 5(2) offences. Marihuana plants sufficient to produce several pounds of cannabis were found in the possession of Mr. Wiles. The grow operation was discovered, on the first occasion, when one of Mr. Wiles' daughters accidentally dialled 911, thus summoning the police. Mr. Wiles entered guilty pleas to both offences. At sentencing the Crown sought the mandatory firearms prohibition under s. 109(1)(c) of the **Criminal Code** in addition to the penalty prescribed by the **CDA**. Mr. Wiles challenged the constitutionality of the mandatory firearms prohibition, as it relates to drug offences. The allegations in support of the two convictions in breach of s. 7(1) of the **CDA** are not in issue on this appeal, nor are the sentences for the two offences. On each occasion, the judge imposed the sentence jointly recommended by counsel which involved a fine and intermittent incarceration. The firearms disposition, in relation to the offences, was adjourned for a later hearing. As a result of that hearing the judge declined to impose the firearms prohibition. He held that the prohibition violated s. 12 of the **Charter**, reading the section down to provide for a discretionary, rather than a mandatory, order.

ANALYSIS:

[3] Various sections of the **CDA** prohibit activities related to a "scheduled substance". It is illegal to possess (s. 4); traffick in or possess for the purpose of trafficking (s. 5); import (s. 6) or produce (s. 7) - the offences to which Mr. Wiles entered guilty pleas) a scheduled substance. The list of scheduled substances is lengthy, but includes, generally, opiates, amphetamines, barbiturates and cannabis and their derivatives.

[4] In general terms, s. 109(1)(a), (b) and (d) of the **Criminal Code** require the imposition of a mandatory firearms prohibition where a person is convicted (or discharged under s. 730) of an indictable offence involving violence, which carries a possible ten year incarceratory sentence, and for certain offences involving the use of a firearm or restricted weapon. Section 109(1)(c), which is challenged here, provides:

> **109. (1)** Where a person is convicted, or discharged under section 730, of

. . .

> (c) an offence relating to the contravention of subsection 5(3) or (4), 6(3) or 7(2) of the *Controlled Drugs and Substances Act*, or

. . .

> the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.

(Emphasis added)

[5] Section 109(1)(c), therefore, requires a firearms ban for those who have been convicted of trafficking in (or possessing for the purpose of trafficking), importing or producing a scheduled substance.

[6] Batiot, C.J.Prov.Ct. determined that s. 109(1)(c) constituted cruel and unusual punishment contrary to s. 12 of the **Charter**. He held that there were no links between the threshold offence and the prohibition. He concluded that, as there was no violence in the commission of the offence, a weapons prohibition would be grossly disproportionate to the offence. He further found that the mandatory prohibition could not be justified under s. 1 of the **Charter**.

[7] The **Charter** prohibits a punishment that is cruel or unusual:

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

[8] The protection against cruel and unusual punishment disallows barbaric punishments as well as sentences that are grossly disproportionate to the crime committed. Here we are concerned with alleged disproportionality.

[9] The Crown concedes that the firearms prohibition is a "punishment" within the meaning of s. 12 of the **Charter**. For the purpose of the following analysis I

will accept, without deciding, that the firearms prohibition is a "treatment or punishment".

[10] It is the Crown's position, simplified, that a "treatment or punishment" is only subject to challenge if it puts in jeopardy a constitutionally protected right. The loss of a privilege, such as the license to possess a firearm, therefore, cannot be held to be cruel and unusual punishment.

[11] Section 7 of the **Charter** guarantees the right to life, liberty and security of the person. It is followed by ss. 8 through 14 which have generally been considered a particularization of the s. 7 right. For example, in **Reference Re Section 94(2) of the B.C. Motor Vehicle Act**, [1985] 2 S.C.R. 486; S.C.J. No. 73 (Q.L.)(S.C.C.), Lamer, J., for the majority, explained the connection between ss. 8 to 14 of the **Charter** and s. 7 in this way (at p. 501 (S.C.R.)):

> In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.*, [(1985), 18 C.C.C. (3d) 385 (S.C.C.)]) it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

[12] And at p. 502 (S.C.R.):

> Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. ...

[13] Thus it can be argued, as it is by the Crown here, that unless s. 12 violates a right protected by s. 7 (life, liberty or security of the person), it cannot be found to be unconstitutional. The Supreme Court of Canada has, however, since the **Reference** case, clarified the scope of ss. 8 to 14. In **R. v. CIP Inc.**, [1992] 1 S.C.R. 843 Stevenson, J. wrote for a unanimous court at pp. 853-854 (S.C.R.):

> A second argument put forward by the respondent is based on the connection between s. 7 and ss. 8 through 14 of the *Charter*. The respondent relies upon *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, for the proposition that s. 11(b) is

simply illustrative of a specific s. 7 deprivation, and contends that the scope of the right can therefore be no greater than that of the s. 7 guarantee. In other words, if a corporation cannot rely upon s. 7 pursuant to *Irwin Toy Ltd.*, it stands to reason that it also cannot invoke s. 11(b). It is true that in *Re B.C. Motor Vehicle Act*, Lamer J. (as he then was), on behalf of the majority, was of the view that it would be "incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14" of the *Charter* (at p. 502 [S.C.R.]). He saw the latter (at p. 502) as:

> ... examples of instances in which the 'right' to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice.

However, the concern over incongruity related to the scope of the principles of fundamental justice, not that of life, liberty and security of the person. Establishing a deprivation of life, liberty or security of the person is not a prerequisite to relying upon the protection afforded through ss. 8 to 14. Section 7 does not define the scope of the rights contained in the provisions that follow it. A clear example of that is the right of a witness to the assistance of an interpreter as provided for in s. 14. In my opinion, it is therefore not inconsistent with *Re B.C. Motor Vehicle Act* to hold that s. 11(b) can encompass interests in addition to those that have been recognized as falling within s. 7. [emphasis added in original]

[14] This clarification in **CIP** was acknowledged in **R. v. Mills**, [1999] 3 S.C.R. 668. McLachlin and Iacobucci, JJ., writing for the majority, discussed the interplay between ss. 7 and 8 at pp. 725-26:

87 The present appeal asks how to define the privacy rights of third parties in light of the accused's right to gain access to evidence in order to make full answer and defence. As the right to make full answer and defence is a principle of fundamental justice protected by s. 7 of the *Charter*, it is helpful to explore the connection between ss. 7 and 8 of the *Charter*. In *Re B.C. Reference re s. 94(2) of the Motor Vehicle Act*, *supra*, at p. 502, Lamer J. stated for the majority:

> Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s.7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s.7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14.

Of course, later cases have held that the text of the *Charter* supports some differences between ss. 7 and 8. For example, s. 8 applies to corporations whereas s.

> 7 does not: *Hunter v. Southam Inc., supra*; *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 (S.C.C.). In *CIP Inc., supra*, at p. 854, this Court held that the concern that there be no incongruity between ss. 7 and 8-14 related to the principles of fundamental justice and not to the scope of life, liberty and security of the person.

[15] I do not view the above authorities as deciding, directly, that s. 12 is not limited to a treatment or punishment which deprives a person of his "life, liberty or security of the person". It is difficult to envision a circumstance where a treatment or punishment that did not do so, could be viewed as "cruel or unusual" as that phrase has been interpreted in the jurisprudence. Counsel for the Crown suggested at trial, and I would agree, that it would be a rare case where a punishment or treatment that is cruel and unusual, thus violative of a principle of fundamental justice, would be found to meet the minimal impairment test under s. 1 of the **Charter**. Accepting, however, for the purposes of this analysis, that the scope of s. 12, is not strictly limited to a deprivation of life, liberty or security of the person, at a minimum, any assessment of an alleged s. 12 breach must be informed by s. 7 and ss. 8 through 14. As Lamer, J. (as he then was) said in **R. v. Smith**, [1987] 1 S.C.R. 1045 at p. 1075:

> . . . In Canada, the protection of one's liberty is to be found in various provisions of the *Charter* and the content of each of those sections must be determined in light of the guarantees enunciated in the other sections and the content the courts will be putting into those sections. Thus, any comments on the meaning of s. 12 must be made with s. 9 in mind and, as whenever ss. 8 to 14 are at issue, in light of s. 7 (see *Re B.C. Motor Vehicle Act, supra*).

[16] To date discussions of "cruel and unusual punishment" have focussed, commonly, upon a loss of liberty through a mandatory minimum term of imprisonment. In such cases some form of restriction on liberty is a probable result of the sentence. The issue is one of degree. Here the "punishment", i.e. the firearms prohibition, involves a sanction different in character from that to which the offender is liable under the **CDA**.

[17] The law governing a constitutional challenge pursuant to s.12 of the **Charter** is extensively discussed in **Smith, supra**. Subsequent decisions have confirmed and clarified the principles laid down in **Smith**: **R. v. Luxton,** [1990] 2 S.C.R. 711; **R. v. Lyons**, [1987] 2 S.C.R. 309 ; **Steele v. Mountain Institution**, [1990] 2 S.C.R. 1385 and **R. v. Goltz**, [1991] 3 S.C.R. 485. The Supreme Court of Canada has

spoken on the issue more recently, in **R. v. Morrisey**, [2000] 2 S.C.R. 90 and **R. v. Malmo-Levine; R. v. Caine**, [2003] S.C.J. No. 79 (Q.L.) (S.C.C.).

[18] In **Smith, supra**, Lamer, J. (as he then was), writing for the majority 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** R.S.C. 1970, c. N-1 [now the **Controlled Drugs and Substances Act**] violated s.12 of the **Charter**.

[19] 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 held that the minimum sentence provision was not inconsistent with the **Charter** as it was not a grossly disproportionate sentence for Mr. Smith.

[20] A further appeal to the Supreme Court of Canada was allowed. In finding that the seven-year minimum sentence in **Smith** violated s.12 of the **Charter**, Lamer, J. (as he then was) 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 (at p. 143).

[21] The test to be met on a challenge to legislation pursuant to s.12 of the **Charter** is an exacting one. Lamer, J. said in **Smith, supra**, commencing at p. 1072:

> . . . The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin C.J.C. in *Miller and Cockriell, supra*, [(1975), 24 C.C.C. (2d) 401] at p. 183 C.C.C., p. 330 D.L.R., p. 688 S.C.R.], "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.
>
> . . . 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)

[22] The importance of restraint in assessing constitutionality was confirmed in **Steele**, **supra**, at p. 1417, where Cory, J. cautioned:

> 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 test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*.

[23] In **R. v. Morrisey**, **supra**, Gonthier, J., expressed the test in this way:

> ¶ 26 Section 12 of the *Charter* provides a broad protection to Canadians against punishment which is so excessive as to outrage our society's sense of decency: *Smith, supra*, at p. 1072; *Goltz, supra*, at p. 499; *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 724. The court's inquiry is focussed not only on the purpose of the punishment, but also on its effect on the individual offender. Where a punishment is merely disproportionate, no remedy can be found under s. 12. Rather, the court must be satisfied that the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable. As I said in *Goltz*, at p. 501, "the test is not one which is quick to invalidate sentences crafted by legislators".
> (Emphasis added)

[24] In **R. v. Luxton**, **supra**, where the punishment for first degree murder was held not to breach s. 12, Lamer, C.J. adopted the statement of Borins, D.C.J. in **R. v. Guiller et. al.** (1986), 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)

(See also **R. v. Malmo-Levine, supra**, at ¶ 173)

[25] This latitude is essential to permit appropriate balance among the many, often disparate, objectives of sentencing 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 not be 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. 503.)

[26] As a result, there need not be perfect alignment between the required minimum punishment and the appropriate sentence for the offender. This was recognized by La Forest, J. in **Lyons, supra**, at pp. 328-329:

> . . . 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 the Queen* (1984), 10 C.C.C. (3d) 306 (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. ...
> (Emphasis added)

[27] And at p. 344 - 345:

> . . . 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.

[28] To similar effect, Gonthier, J. said in **Goltz** at p. 503:

> **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)

[29] The inquiry into constitutionality posits a two-stage test. The court must first consider the sentence in the context of the offender before the court. In addition to the effect on the offender of the sentence actually imposed, relevant factors include (**Smith v. R.** per Lamer J. at p. 1073):

> In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. ...

[30] And in **R. v. Goltz**, **supra** at p. 500, per Gonthier, J.:

> Although not in themselves decisive to a determination of gross disproportionality, other factors which may legitimately inform an assessment are whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, whether there exist valid alternatives to the punishment imposed, and to some extent whether a comparison with punishments imposed for other crimes in the same jurisdiction reveals great disproportion. An arbitrarily imposed sentence does not necessarily result in gross disproportionality and does not necessarily violate s. 12. . . .

[31] Although the minimum sentence may be 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. At the second stage of the test, the court must consider hypothetical circumstances in which the legislation could result in cruel and unusual punishment. In **Goltz**, **supra**, Gonthier, J. emphasized that such hypotheticals must be reasonable. It is not "any or all imaginable commissions of the offence in which the punishment would be grossly disproportionate to the wrongdoing ..." (at p. 500) which warrant a finding of infringement. 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. 519). He said at pp. 515 - 516:

> 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. . . . The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life. (Emphasis added)

[32] As cautioned by Gonthier, J. in **Goltz**, one must be mindful in this inquiry of the "broad and varied purposes" of penal sanctions. He said:

> This acknowledgement that sanctions serve numerous purposes underscores the legitimacy of a legislative concern that sentences be geared in significant part to the continued welfare of the public through deterrent and protective aspects of a punishment. This perspective is explicitly affirmed in *R. v. Luxton, supra*, *per* Lamer C.J., at p. 721. Thus, while the multiple factors which constitute the *Smith* test are aimed primarily at ensuring that individuals not be subjected to grossly disproportionate punishment, it is also supported by a concern to uphold other legitimate values which justify penal sanctions. These values unavoidably play a role in the balancing of elements in a s. 12 analysis.

[33] In **R. v. Morrisey**, **supra**, the full court was in agreement that the four year minimum sentence of imprisonment for criminal negligence causing death did not constitute cruel and unusual punishment. There was, however, lack of unanimity on the place of hypotheticals in the s. 12 analysis. This result had been foreshadowed by the remarks of Gonthier, J. in **Goltz**, **supra**, at p. 504:

> . . . The jurisprudence to date exhibits significant confusion about the use of hypothetical examples which may readily demonstrate that in some imaginable circumstances a minimum penalty might result in a punishment whose effects are grossly or excessively disproportionate to the particular wrongdoing in a given case.

[34] Gonthier, J., writing for the majority, in **R. v. Morrisey** noted that criminally negligent homicides do not easily lend themselves to reasonable hypotheticals because the offence can be committed in an infinite variety of ways. It was the majority view that hypotheticals at the extreme end of the spectrum were not "reasonable" and should not be used as the foundation for a s. 12 infringement. Justices Arbour and McLachlin agreed that the mandatory minimum sentence was not so excessive so as to constitute cruel and unusual punishment. The minority opined, however, that it could not be said that the mandatory minimum sentence was not grossly disproportionate for any reasonable hypothetical offender. In order to

give effect to Parliament's explicit desire to increase penalties for firearms-related offences, while recognizing the inevitability that a four-year penalty will be grossly excessive for at least some plausible future manslaughter convictions, the minority would uphold the constitutionality of the provision generally, while declining to apply it in a future case if the minimum penalty were found to be grossly disproportionate for that future offender.

[35] The Crown cites **R. v. Kelly** (1990), 59 C.C.C. (3d) 497; O.J. No. 1606 (Q.C.)(Ont.C.A.) in support of its position that the firearms prohibition does not offend s. 12. There, the appellants, who were police officers and had been convicted of assault causing bodily harm, sought a constitutional exemption from the mandatory firearms prohibition. In refusing to grant the exemption the court considered the constitutionality of s. 100(1) (the equivalent to the current s. 109(1)(a)) of the **Criminal Code** which required a firearms prohibition for an offence involving actual or threatened violence. Finlayson, J.A. wrote, for the Court, at pp. 512 - 514 (C.C.C.):

> As counsel for the Crown has pointed out, the prohibition we are dealing with is narrowly focused. It is directed against persons who have committed violent crimes against the person and are in consequence the very persons who should not be in possession of instruments of violence. Under the circumstances a request for a constitutional exemption is somewhat paradoxical. The only persons who would request it are those who have firearms and want to keep them. To exclude them from the prohibition would denude s. 100(1) of any utility because it would exempt from its operation the very persons who pose the greatest risk to society.
>
> . . .
>
> . . . But in Canada there is no constitutionally protected right to bear arms, nor for that matter to be secure in one's present employment, and accordingly s. 100(1) of the **Code** cannot be inconsistent with the Charter. It does not override a constitutional right. There is no Charter protected right to exempt.

[36] Similarly, in **R. v. Sawyer**, [1992] 3 S.C.R. 809 that Court held that s. 100 of the **Criminal Code** did not offend s. 12 of the **Charter**.

[37] With respect, these pronouncements are not directly determinative of the issue here. In **R. v. Kelly**, the underlying crime was one of violence. I assume that to be so, as well, in **Sawyer**, although the very brief judgment does not provide details of the crime. Section 100(1) of the **Code** required the firearms prohibition for crimes

of violence. Neither case involved the imposition of the prohibition for a **CDA** offence, not involving violence or threatened violence, as is the case here.

[38] At trial and before this Court Mr. Wiles stressed the alleged lack of connection between the firearms prohibition and his crime. Although weapons were found in his residence they were properly secured and licenced. There is no evidence that they were used for protection or otherwise in the grow operation. It is not disputed that, but for s. 109(1)(c), the judge here would not have considered imposing a firearms prohibition.

[39] It was the trial judge's view that the prohibition was grossly disproportionate as applied to Mr. Wiles' circumstances. The judge said:

> ¶13. There is no evidence as to his need for the six firearms; I would infer, from the fact of his legal ownership of them, that he is a recreational hunter and shooter, who abides by the law regulating such ownership. To be prohibited from possessing them would, at the very least, cause a change in his recreational pursuits. It would also cause him an additional loss - there is no evidence as to its quantum - since these firearms would be forfeited to the Crown as they are in his possession (s.115(1) of the **Code**).
>
> ¶14. The fine and forfeiture have a total value of about $3500.00. As mentioned by Crown counsel, it is difficult to evaluate accurately the real worth of those items forfeited, as the market value can change drastically. It seems a reasonable estimate of cost to the accused. It is a substantial financial penalty to him, and, I may add, to his family.

[40] As directed in **Smith, supra** and **Goltz, supra**, at the first stage of the analysis it is relevant to look at the circumstances of the offence and of the offender as well as the gravity of the offence.

[41] At the time of the first offence, April 16, 2001, the police, responding to the 911 call accidentally placed by Mr. Wiles' daughter, discovered a cannabis grow operation in the basement of the home. They found lighting, pots, potting soil, nutrients, fertilizer, umbrellas (to better direct the light), ballasts, timers, a hydroponic system and a partially empty box which had originally contained five hundred plant pots. About 178 marijuana plants were seized. The wet weight of the plant material was just under three kilograms. There was, as described by the police officer who responded to the 911 call, a "fierce" Rottweiler in the home. The

dog was in the basement where the grow operation was located. When released from the basement the dog charged at the officer.

[42] On September 22, 2002, the date of the second offence, the equivalent of about three pounds of cannabis was seized along with production apparatus including two scales and a large amount of cash.

[43] The s. 109(1)(c) application in relation to the first offence was adjourned, the defence having given notice of a constitutional challenge. By the time that application came before the court, Mr. Wiles had been convicted of the second offence. The application thus related to both offences.

[44] Mr. Wiles was, at the time of sentencing on the first offence, forty-six years old, living with his wife and twin thirteen year old daughters. He generally worked full time as a labourer, although not employed at that time. When sentenced for the second offence, Mr. Wiles was working with his brother in the auto body business.

[45] Because both sentencings proceeded on a guilty plea with a jointly recommended sentence, there is little additional information about Mr. Wiles' circumstances or about the offences in the record,

[46] Section 109(1)(c) of the **Criminal Code** is part of a larger initiative embodied in the **Firearms Act**, S.C., 1995, c. 39. The purpose of that **Act** is "the protection of public safety from the misuse of firearms, whether in firearms-related crimes, suicides or accidents". **(Reference re: Firearms Act (Canada)** (1998), 164 D.L.R. (4th) 513 (Alta.C.A.) at ¶ 151, per Fraser, C.J.A. for the majority, affirmed [2000] 1 S.C.R. 783, S.C.J. No. 31 (Q.L.)(S.C.C.)) This is a valid state interest.

[47] The question raised in **Reference re: Firearms Act (Canada), supra,** was whether Parliament had the constitutional authority to enact those provisions in the **Firearms Act** requiring licensing and registration of "ordinary firearms" and the related enforcement provisions of the **Criminal Code**. The court found the **Act** to be a valid exercise of the federal criminal law power, insofar as it required the registration and control of firearms. In that decision can be found a detailed history of firearms control in Canada. This provides helpful context here. I refer to some of the relevant facts revealed in the judgment of the Alberta Court of Appeal:

> All firearms have been considered weapons at common law since before Confederation and both the possession and use of all firearms are presently subject to extensive controls under the criminal law.
>
> Since 1892, controls on firearms have been part of the **Criminal Code**;
>
> The "mischief" which Parliament sought to address through the **Firearms Act** is the magnitude of the dangers to citizens posed by firearms.
>
> The firepower and accuracy of modern firearms coupled with the increase in population densities due to the urbanization of Canadian society makes them more dangerous than ever before.
>
> Where there are more guns, there are often more deaths and injuries from guns.

[48] The predicate offence, s. 7(1) of the **CDA**, is a serious one carrying a potential sentence of seven years incarceration when the drug involved is cannabis and life imprisonment for certain other scheduled substances.

[49] At the hearing before Batiot, C.J.Prov. Ct., Staff Sergeant Thomas Alexander Grant testified as a Crown witness. He is an officer with 28 years of experience with the R.C. M. Police and has worked with the force in every Province in Canada. It was his evidence that there is a nexus between **Criminal Code** s. 109(1)(c) and s. 7 of the **CDA**. He testified that in many police raids of drug production operations, it is usual to find weaponry, in particular, firearms, even in the case of simple marihuana grow operations. Such weapons are kept by the operators, not necessarily to deal with police but, to protect the operation from others who would steal the product or proceeds. These vary from a single .22 calibre rifle readily available by the front door of the operation to a virtual arsenal of firearms. In some cases, the guns are rigged as mantraps. It was his evidence that the presence of guns is driven by basic economics. A mature marihuana plant is currently worth about five hundred dollars in product. A grow operation with multiple plants can easily be valued in the thousands of dollars. It is an investment worth protecting from the perspective of the operators. The THC (tetrahydrocannabinol) level in marihuana is now sufficiently high that in certain areas it trades pound for pound with cocaine. The concern about the presence of

weapons is a significant one for officers involved in drug raids. They approach every such raid expecting firearms.

[50] It was Mr. Wiles' counsel's submission to the trial judge that the constitutional challenge related "not so much . . . as it applied to Mr. Wiles, but in so far as it applies just generally to the offence". It was Mr. Wiles' position and also a concern of the court that there was no nexus between the offence and the firearms prohibition.

[51] The overarching objective of sentencing is protection of the public, as was recognized in **R. v. Goltz**, **supra**, per Gonthier, J. for the majority at pp. 502-503:

> The deference to legislated sentences . . . is especially comprehensible when one considers the broad and varied purposes of penal sanctions. In *Lyons, supra*, La Forest J. articulated the common view that while sentences are partly punitive in nature, they are mainly imposed for the protection of the public. This view accords with the purpose of the criminal law in general and of sentencing in particular. He stated, at p. 329:
>
> > 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.
>
> This acknowledgement that sanctions serve numerous purposes underscores the legitimacy of a legislative concern that sentences be geared in significant part to the continued welfare of the public through deterrent and protective aspects of a punishment. This perspective is explicitly affirmed in *R. v. Luxton, supra, per* Lamer C.J., at p. 721. Thus, while the multiple factors which constitute the *Smith* test are aimed primarily at ensuring that individuals not be subjected to grossly disproportionate punishment, it is also supported by a concern to uphold other legitimate values which justify penal sanctions. These values unavoidably play a role in the balancing of elements in a s. 12 analysis.
> (Emphasis added)

[52] In assessing constitutionality, it is appropriate to consider penological goals and sentencing principles. Gonthier, J. in **R. v. Morrisey**, **supra**, spoke about the pressing problem of firearms related deaths:

> 43. These factors [penological goals and sentencing principles] are analysed to determine whether Parliament was responding to a pressing problem, and whether

> its response is founded on recognized sentencing principles. The respondent and the interveners made ample submissions on the necessity for a unified approach on firearm-related crimes. While it is true that gun-related deaths in general have been decreasing steadily since the 1970s, certain key statistics are telling. In 1995 alone, there were 49 "accidents" causing death involving firearms, coupled with 145 homicidal deaths involving firearms: K. Hung, *Firearm Statistics* (1999), Table 14. Accidental deaths involving firearms in Canada have remained relatively constant since 1979. Unquestionably, Parliament is entitled to take appropriate measures to address the pressing problem of firearm-related deaths, especially given that it has been consistently a serious problem for over 20 years. Further, it is appropriate for Parliament to discourage the careless use of firearms generally since, as Cory J. noted in *R. v. Felawka*, [1993] 4 S.C.R. 199 at p. 211, a firearm always "presents the ultimate threat of death to those in its presence".

[53] Fundamental to the trial judge's conclusion was his view that the mandatory firearms prohibition, as applied to Mr. Wiles, did not address any recognized sentencing principles. He said:

> 28. But for the rationale alluded to in para 17 above [the evidence of Sgt. Grant], to be more fully explored later in this decision, there are obviously no links between the prohibition order and the threshold offence but for s. 109. More particularly, in this case, where there was no violence in the commission of this offence, whether threatened or actual, or even perceived, except by the accidental 911 call, a mandatory order, prohibiting the accused to possess firearms for 10 years, and restricted or prohibited weapons or ammunition, for life, is grossly disproportionate to the offence for which he has pled guilty, as well as to the offender. . . .
>
> . . .
>
> 42. The accused in this case was not producing marihuana commercially, but for his own use; the police did not have concerns abut his ownership of six guns and left them in his residence. But for the initial 911 call, there was otherwise no apprehension of violence, and this apprehension was put to rest when the officers met with the accused. On the total evidence there is no allusion that the accused is a danger to himself and, more importantly, to others. There is thus no requirements, pursuant to ss. 718 or 718.2 of the **Code, (Purpose and Principles of Sentencing)**, to impose on the accused an order of prohibition. It would be assuming facts which do not exist, and anticipating consequences without reasonable grounds.

[54] With respect, it is my view that the judge erred in this regard. As is clear from Sgt. Grant's evidence, the prohibition has a legitimate connection to s. 7 offences. Additionally, I am satisfied that it relates to a recognized sentencing goal

- protection of the public, and, in particular, protection of police officers engaged in **CDA** enforcement operations. Finally, the protection of public safety through a reduction in the misuse of firearms is a valid state interest.

[55] The hypothetical put forward by counsel for Mr. Wiles was that of a 75 year old grandmother experimenting with growing a single marijuana plant on the kitchen windowsill who is caught and charged under s. 7(1), then necessarily prohibited from possessing a firearm for ten years. The trial judge said:

> ¶ 23. Without going to such extremes, it is reasonable to contemplate other hypotheticals of the occasional user, an older or younger person, growing one or a few plants without any record or inclination to use violence. Such a person could be an aboriginal, entitled to hunt for food, and thus who may require a shotgun or rifle. True, s. 113 off the **Code** would, in that case, permit the court to lift that order for *sustenance or employment* reasons. In considering doing so, however, the court would have to apply s. 113(2) which dictates the factors to be considered, including the *nature and circumstances* of the offence. The presence or absence of violence would be highly relevant to the exercise of such discretion, factors which are, in this case, ignored in the imposition of the order in the first place. [Italics in original]

[56] Section 113, referred to by the trial judge, provides:

> **113. (1)** Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that
>
> > (a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or
> >
> > (b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,
>
> the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or employment purposes.
>
> **(2)** A competent authority may make an order under subsection (1) only after taking the following factors into account:

(a) the criminal record, if any, of the person;

(b) the nature and circumstances of the offence, if any, in respect of which the prohibition order was or will be made; and

(c) the safety of the person and of other persons.

. . .

(4) For greater certainty, an order under subsection (1) may be made during proceedings for an order under subsection 109(1), 110(1), 111(5), 117.05(4) or 515(2), paragraph 732.1(3)(d) or subsection 810(3).

(5) In this section, "competent authority" means the competent authority that made or has jurisdiction to make the prohibition order.
(Emphasis added)

[57] It is my view that the above remarks reveal that the judge did not properly weigh the ameliorative effect of s. 113 of the **Code**. Nor did he refer to the fact that the order for relief from forfeiture can be made at the same time as the proceedings for a prohibition order (s. 113(4)). Section 109(1)(c) could, in some cases, visit unacceptable hardship, thereby becoming grossly disproportionate, if it deprives a person of a livelihood or sustenance. Such effect is, however, eliminated by the discretion afforded in s. 113. This is a key companion provision to s. 109(1)(c) which would eliminate, where appropriate, any unacceptable consequences of a firearms prohibition.

[58] Applying the test of "gross", not simply "mere", disproportionality; keeping in mind the exacting nature of the test (". . . whether the punishment prescribed is so excessive as to outrage standards of decency . . ." - **R. v. Smith**, **supra**; " . . . Canadians would find the punishment abhorrent or intolerable . . ." **- R. v. Morrisey**, **supra**); considering the nexus between the offence and the prohibition; taking into account the primary goal of sentencing, which is protection of the public; and considering the ameliorative effect of s. 113, I am persuaded that the trial judge erred in concluding that s. 109(1)(c) of the **Code** violated s. 12 of the **Charter**. It is my view that the firearms prohibition is neither grossly disproportionate as applied to Mr. Wiles in these circumstances nor is it grossly disproportionate for the

reasonable, hypothetical offender. To hold otherwise would, using the words of Cory, J. in **Steele**, **supra**, ¶ 22 above, trivialize the **Charter**.

DISPOSITION:

[59] Accordingly, I would allow the appeal and alter the sentence imposed upon Mr. Wiles by Batiot, C.J.Prov.Ct. by adding the mandatory firearms prohibition in accordance with s. 109(1)(c) of the **Criminal Code**, without prejudice to Mr. Wiles' right to make application for relief pursuant to s. 113.

Bateman, J.A.

Concurred in:
Oland, J.A.
Hamilton, J.A.