NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacDonald***, 2014 NSCA 102

Date: 20141106
Docket: CAC 347642
Registry: Halifax

Between:

Erin MacDonald

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A.
Appeal Heard:	June 9, 2014, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of MacDonald, C.J.N.S. and Saunders, J.A. concurring; Beveridge, J.A. dissenting in part.
Counsel:	Hersh Wolch, Q.C., for the appellant Jennifer A. MacLellan, for the respondent Patricia MacPhee, for the intervenor, the Attorney-General of Canada

Reasons for judgment:

[1] When prosecuted by indictment, a conviction for possessing a loaded restricted firearm (s. 95 of the *Criminal Code*) carries a minimum three-year sentence. The main issue in this appeal is whether that punishment is unconstitutional, as representing cruel and unusual punishment, contrary to s. 12 of the *Charter*.

BACKGROUND

[2] The appellant, as an oil industry worker, maintained residences in both Calgary and Halifax. He was also a gun collector and from time-to-time would travel with his firearms to various events both within and outside Canada. His collection included a restricted 9mm *Beretta* handgun, that was registered in Alberta but not in Nova Scotia.

[3] Throughout November and December 2009, Mr. MacDonald was living in his Halifax condo and, having become a member of the Nova Scotia Rifle Association, had his *Beretta* with him. On the evening of December 28th, while entertaining friends over a bottle of wine, he was the subject of a noise complaint delivered by the concierge. His music was too loud. Mr. MacDonald responded by telling the concierge to "fuck off" and by promptly slamming his door shut. This was just as his friends were leaving. The music continued at a high volume. This prompted the concierge to call the police. A single police officer arrived and demanded that the music be turned down. Mr. MacDonald's response to her was, "Go fuck yourself". She requested and received assistance from her sergeant, and the two police officers, with the concierge, approached the door, first by knocking and then by kicking. This time, Mr. MacDonald answered carrying his loaded *Beretta* which he had apparently been packing in his suitcase at the time. A struggle ensued, as Mr. MacDonald was disarmed. This incident prompted a litany of *Criminal Code* charges for which Judge William B. Digby of the Nova Scotia Provincial Court convicted Mr. MacDonald of three, namely: s. 86 – careless use of a weapon, s. 88 – dangerous possession of a firearm and s. 95 – possession of a loaded restricted firearm. The Crown had proceeded by indictment for each.

[4] Rejecting Mr. MacDonald's s. 12 *Charter* challenge, Judge Digby sentenced him to the minimum three years for the s. 95 charge, with concurrent sentences for the remaining two offences.

[5] This Court allowed Mr. MacDonald's appeal, in part, by setting aside the s. 95 conviction (reported as 2012 NSCA 50). However, we sustained the convictions for the two lesser offences and adjusted the sentence accordingly. In the process, by a 2-1 majority decision, we rejected Mr. MacDonald's plea for a total acquittal based upon his assertion that this police action constituted an illegal search, contrary to s. 8 of the *Charter*.

[6] Mr. MacDonald's appeal to the Supreme Court of Canada on the s. 8 issue was dismissed (reported as 2014 SCC 3). However, the Crown successfully cross-appealed the s. 95 acquittal, with the Supreme Court restoring that conviction. It then remitted the matter to us for sentencing, along with a direction to determine the constitutional validity of s. 95's three-year minimum:

> ¶63 For the reasons set out above, I would dismiss Mr. MacDonald's appeal on the s. 8 issue and allow the Crown's appeal on the charge under s. 95(1). Mr. MacDonald's acquittal on that charge is set aside, and his conviction is restored. This matter will be remitted to the Court of Appeal for sentencing, and it will be necessary for that court to determine whether the mandatory minimum sentence applicable under s. 95(2)(*a*)(i) of the *Code* is constitutionally valid.

ISSUES

[7] In my analysis that follows, I will first assess the constitutional question. This has several aspects:

(a.) whether a three-year sentence would represent cruel and unusual punishment

  i. to Mr. MacDonald in his particular circumstances and, if not,

  ii. whether it would nonetheless represent cruel and unusual punishment based upon a reasonable hypothetical, and

(b.) should I find a breach of s. 12,whether this provision is nonetheless justified under s. 1 of the *Charter*.

Only after I resolve this constitutional question can I then proceed to the sentencing analysis.

ANALYSIS

Is the Three-Year Minimum Constitutionally Valid?

Overview

[8] Fundamentally, this issue explores the comparative roles of the judiciary and Parliament. Specifically, in our constitutional democracy, Parliament decides what actions will constitute a criminal offence together with the corresponding range of punishment for each. This may include, in Parliament's discretion, mandatory minimum sentences for certain offences. In this regard, the will of Parliament shall prevail, unless the sentencing provisions are so severe as to constitute cruel and unusual punishment as prohibited by our *Charter of Rights and Freedoms*. It then falls to the judiciary, as guardians of the *Charter*, to prevent such occurrences.

[9] What type of punishment would we classify as cruel and unusual? For starters, it is not enough that the punishment be simply disproportionate to the offender's actions and circumstances. Instead, out of deference to Parliament, it must be grossly disproportionate. Nor would we interfere even if the penalty appeared to be merely excessive. Instead, as the Supreme Court of Canada has confirmed on several occasions, it would have to appear "so excessive as to outrage our standards of decency". See, for example, **R. v. Wiles**, 2005 SCC 84, [2005] 3 S.C.R. 895, at ¶4.

[10] Procedurally, when faced with such a challenge, we engage in a two-step analysis. In the first "particularized" step, we would consider the effect of a three-year sentence on the offender personally. If that exercise produces no breach, then, as a second step, we would normally consider "reasonable hypothetical" circumstances upon which to judge the impugned provision. Gonthier, J. in **R. v. Goltz**, [1991] S.C.J. No. 90, explains:

> ¶41 There are two aspects to the analysis of invalidity under s. 12. One aspect involves the assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence in itself with the particular circumstances of the offence and the personal characteristics of the offender. If it is concluded that the challenged provision provides for and would actually impose on the offender a sanction so excessive or grossly disproportionate as to outrage decency in those real and particular circumstances, then it will amount to a *prima facie* violation of s. 12 and will be examined for justifiability under s.1 of the *Charter*. There may be no need to examine hypothetical situations or imaginary offenders. This was not the case in

> *Smith*, and for that reason the Court was obliged to examine other reasonably imaginable circumstances in which the challenged law might violate s. 12.
>
> ¶42 If the particular facts of the case do not warrant a finding of gross disproportionality, there may remain another aspect to be examined, namely a *Charter* challenge or constitutional question as to the validity of a statutory provision on grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases. (See generally C. Robertson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in R. Sharpe, *Charter Litigation* (1987).)
>
> ¶43 The section 12 analysis must now be undertaken as to both aspects. In the "particularized" section of analysis, the considerations of gravity of the offence, the particular circumstances of the case, the personal characteristics of the offender, and the effects of the sentence must be examined in light of the facts of the instant appeal. [Emphasis added]

Particularized Analysis

[11] I will now assess how this provision stacks up against Mr. MacDonald's particular circumstances. In doing so, I will defer to the judge's factual conclusions but will assess whether those facts constitute a *Charter* breach on a correctness standard.

[12] In **R. v. Morrisey**, 2000 SCC 39, Gonthier J. identifies several potential factors that inform our gross disproportionality analysis. Relying on the Supreme Court's earlier decision in **R. v. Smith**, [1987] 1 S.C.R. 1045, he reminds us that, while no one factor is to be considered paramount, our primary function is to identify an appropriate range of sentences for this particular offender, so as to then contextualize the severity of the mandatory minimum:

> ¶27 In order to properly consider a s. 12 challenge to a punishment, the court must examine all of the relevant contextual factors. No single factor set out in *Smith* or *Goltz* is paramount: see *Goltz*, at pp. 501-2. In *Smith*, at p. 1073, Lamer J., as he then was, set out some of the relevant factors as follows:
>
> > 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.
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> ¶28 In *Goltz*, at p. 500, I also noted that certain other factors were necessary for a full contextual understanding of the sentencing provision. In particular, a

> court is to consider: the actual effect of the punishment on the individual, the penological goals and sentencing principles upon which the sentence is fashioned, the existence of valid alternatives to the punishment imposed, and a comparison of punishments imposed for other crimes in the same jurisdiction. None of these factors will be "in themselves decisive to a determination of gross disproportionality" (p. 500).

[13] To identify the appropriate range in this case, I will therefore consider the three **Smith** factors; namely (a.) the gravity of the offence, (b.) the personal characteristics of this offender, and (c.) the circumstances of the offence. Then I will consider any guiding case law.

Gravity of the Offence

[14] As to the gravity of the offence, I begin with this basic premise. In today's Society, loaded guns have become dangerously prevalent. For decades now, successive Parliaments have been trying to protect us from their scourge. The intervening Attorney General of Canada in its factum reviews this history culminating with the provision under review. It bears highlighting:

> ¶12 Parliament's continuing efforts to control the access and use of firearms in the interest of public safety was acknowledged by the Supreme Court of Canada in the 1988 case of *R. v. Schwartz*. There, McIntyre, J. for the majority stated that "[s]ince [1892] there have been successive amendments which without exception have strengthened the controls upon possession and use of firearms." Dickson J., although in dissent, not only agreed that there was a continuum, but also acknowledged the legitimacy of the concerns which had given rise to it:
>
> > Part II.1 of the *Code* [now Part III]... embodies wholly legitimate societal concerns for stricter regulation and control of guns and other offensive weapons.
>
> ¶13 In 1995, Parliament amended Part III of the *Criminal Code* and enacted the *Firearms Act*, which took the administrative and regulatory aspects of the firearms' licencing and registration system out of the *Criminal Code* and sought to create a new scheme better aimed at controlling the misuse of firearms. These amendments also created a variety of new offences related to the unauthorized possession, transfer, import and export of firearms and to the use of firearms in the commission of offences. One of the key objectives was to impose tougher penalties for criminal firearm possession and use. Among the changes was the introduction of s.95. This offence provided a one year mandatory minimum sentence for possessing a loaded prohibited or restricted firearm, or an unloaded prohibited or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, unless the person is the holder of an

authorization or a licence to possess the firearm and a valid registration certificate.

¶14 The objectives of imposing minimum mandatory sentences were carefully weighed by Parliament at the time, including the Senate Committee on Legal and Constitutional Affairs. The object of the mandatory minimums was made clear by the Minister of Justice, the Hon. Allan Rock, in the House of Commons and in his testimony before the House. On second reading of the relevant Bill (C-68), he told Parliament that the object of the legislation was the "…preservation of the safe, civilized and peaceful nature of Canada." The Minister made it clear that "[o]ne of the key elements of this bill is deterrent sentencing for crime with guns." In support of his opinion regarding the deterrent effect of the mandatory sentences proposed in the bill, the Minister cited a number of studies on the effectiveness of such sentences.

¶15 In 2006, new legislation was introduced in the House of Commons aimed at further strengthening sentencing for firearms offences by imposing longer mandatory minimum sentences for serious firearms crimes and repeat firearms crime. Bill C-10 sought to impose higher mandatory minimum penalties of imprisonment for eight specific offences involving the use of restricted or prohibited firearms or firearms related conduct associated with organized crime. It also targeted trafficking, smuggling and the illegal possession of a restricted or prohibited firearm with ammunition. Among the proposed changes was an increase, when prosecuted by indictment, to a three year mandatory minimum sentence for the unauthorised possession of a restricted or prohibited firearm with ammunition as defined in s.95.

¶16 The Minister of Justice and Attorney General, then the Honourable Vic Toews, explained before the House of Commons that the proposed changes were aimed at addressing concerns raised by Crown attorneys, police forces and provincial governments from across the country, that tougher legislative measures were needed to combat firearms crime. In particular, the proposed changes were aimed at addressing the specific problem of illegal handguns, which were perceived to be a growing concern in this country. As stated by the Minister:

> Handgun crime is a problem in our cities. This is particularly true in connection with organized crime, including street gang activity such as in the drug trade or in turf wars. The statistics also show that while crimes committed with non-restricted long guns are down, handguns and other restricted or prohibited firearms have become the weapon of choice for those who use firearms to commit crimes.

¶17 Once again, the object of the proposed mandatory minimum sentences was the subject of careful consideration by Parliament. After highlighting statistics showing the increase in serious firearms crimes in many regions of the country, the Minister provided assurance that the approach was a proportionate response to the problem:

> While the overall trend in firearms offences is generally downward, when it comes to guns and gangs, Canada has not yet made meaningful progress in tackling the challenge. With the Bill C-10, we are aiming to make a positive dent in the recent trend of illegal firearms use and possession by street gangs. By specifically targeting serious firearms offences and repeat firearms offenders or organized criminals and recognizing the types of firearms they are using, Bill C-10 focuses on the problem it seeks to tackle.
>
> ¶18 While Bill C-10 did not pass in the first session of Parliament, it was re-introduced by the Minister of Justice and Attorney General, who was then the Honourable Rob Nicholson, as part of Bill C-2 in October, 2007. Before the Legislative Committee on Bill C-2, Minister Nicholson explained that "[T]he Tackling Violent Crime Act underscores our commitment to safeguard Canadians in their homes and on their streets and in their communities."
>
> ¶19 After hearing testimony from many experts in the field of criminal justice and stakeholders affected by the proposed amendments who gave evidence both in support and in opposition to the imposition of higher mandatory minimum sentences, Bill C-2 was passed on February 28, 2008.

[15] Thus, it is clear that s. 95 represents a significant component of Parliament's response to the extreme danger of loaded firearms. They put lives at serious risk, plain and simple. As the Supreme Court of Canada nicely put it in **R. v. Felawka**, [1993] 4 S.C.R. 199 at p. 211; [1993] S.C.J. No. 117 at ¶21: "No 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."

Personal Characteristics of this Offender

[16] Mr. MacDonald has no criminal record and by all accounts is otherwise a law-abiding, industrious Canadian. He fears that a three year sentence would result in him losing his job with little chance of re-employment. In his factum, he details his concerns:

> ¶45 Looking at the personal characteristics of the offender, the Appellant once again notes his lack of any prior record and his established career in the oil and gas industry. A three-year sentence of incarceration in a penitentiary is extraordinarily lengthy and severe for an individual who has never before been in conflict with the law. The actual impact it would have on him and his future employment opportunities is tremendous. His criminal record will already limit his ability to travel to many countries for work; incarceration for such a significant period of time would effectively destroy his career prospects going

> forward. It is submitted that the disproportionate impact of the mandatory minimum sentence on this particular offender is abundantly clear.

[17] I have no issue with much of this. However, I note that Mr. MacDonald would nonetheless be eligible for day parole after six months and full parole after one year. See ss. 119 and 120 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. Furthermore, while I accept that a three-year sentence may jeopardize his present employment, it is the conviction (as opposed to the length of incarceration) that I see posing the greater risk to his career.

The Circumstances of the Offence

[18] In his factum, Mr. MacDonald downplays the seriousness of this offence:

> ¶44 The Appellant submits that in this case, notwithstanding that the gun was in fact loaded as discussed above, the level of moral blameworthiness imputed clearly falls on the lower end of the scale. The Appellant was in his own home, not in public. There is nothing in the evidence to suggest he had any criminal or nefarious intent in bringing the gun to the door and again, his experience in the safe handling of firearms significantly lessens the dangerousness of the situation. The Appellant never raised or pointed the gun; it was only on account of Sgt. Boyd's actions that the gun was even identified as such. Furthermore, the Appellant's legal jeopardy would have been identical whether the gun was actually loaded or whether he had the ammunition in his other hand or his pocket, all other facts being exactly the same.

[19] However, despite, the offender's mistaken belief that he was licensed to possess the gun in Nova Scotia, the record reveals a very dangerous situation. The police were at the door. They were met by a homeowner wielding a loaded handgun, who had been drinking alcohol in his condo before the police arrived. When the struggle ensued, only luck and quick thinking on the part of the police stood between that loaded gun and four potential victims (including the appellant).

The Case Law

[20] I now turn to the existing case law for guidance. As this Court noted in **R. v. Cromwell**, 2005 NSCA 134 (at ¶ 26), the range "is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender". That said, in 2008, the present three-year mandatory minimum replaced what had been, since 1998, a one-year mandatory minimum. This should be taken into account. see **R. v. Smickle**, 2012

ONSC 602 at ¶77-78 , rev'd on other grounds, 2013 ONCA 678; and **R. v. Nur**, 2011 ONSC 4874 at ¶51-52, rev'd on other grounds, 2013 ONCA 677; leave to appeal to the Supreme Court of Canada granted, [2014] S.C.C.A. No. 17.)

[21] Not surprisingly, I have found no situations analogous to this very unique set of circumstances. Perhaps the best guidance comes from the Ontario Court of Appeal in **Nur** and **Smickle**, *supra*.

[22] Mr. Nur was a 21 year-old first offender who was acting in a threatening manner outside a youth centre. He fled once the police arrived and discarded an object onto the ground. The police caught and arrested him, finding, in the process, a loaded prohibited firearm with an oversized ammunition clip. Although the facts are quite different, Code J. at trial considered almost a dozen Ontario cases to establish that the range under s. 95 for a first-time offender like Mr. Nur would be two years less a day to three years. Doherty J.A. in the Court of Appeal agreed (at paras 108-109).

[23] **Smickle** is factually the closest to our situation. Mr. Smickle, a first-time offender, was posing with a loaded cocked handgun for a photograph in his cousin's apartment when the police burst in to execute a search warrant. The trial judge concluded that an appropriate sentence absent the mandatory minimum would have been one year and that the three-year mandatory minimum was grossly disproportionate. Doherty, J.A. disagreed, finding that the appropriate sentence absent the mandatory minimum was two years less a day. As a result, the three year sentence may have been excessive but it was not grossly disproportionate. Mr. Smickle was eventually sentenced to a further 12 months incarceration but the Ontario Court of Appeal permanently stayed the execution of that sentence: 2014 ONCA 49.

[24] Guided by this case law and considering the entire circumstances of our case, this particular offence, in my view, would have drawn a sentence in the two-year range but for the mandatory three year minimum. Thus, for Mr. MacDonald, the three-year mandatory minimum sentence under s. 95 would be excessive but would not be grossly disproportionate. I would therefore find no breach of s. 12 on these facts.

Reasonable Hypothetical

[25] In the alternative, the appellant insists that an analysis based on a reasonable hypothetical would, in any event, sound the death knell for s. 95's three-year

minimum. To advance this argument, he essentially relies on the analysis in **Nur**, *supra*. There, Doherty J.A., for a five-judge panel, delivered a comprehensive analysis of this very issue. He concluded that this punishment, based on a reasonable hypothetical, constituted cruel and unusual punishment. Before embarking on my own analysis, it would therefore be helpful to review this judgment.

R. v. Nur

[26] Following a comprehensive and accurate review of the applicable s. 12 jurisprudence (at ¶110-140), Doherty J.A. identified the parameters for reasonable hypotheticals generally:

> ¶142 In my view, after *Morrisey* and *Goltz*, a reasonable hypothetical is one that operates at a general level to capture conduct that includes all the essential elements of the offence that trigger the mandatory minimum, but no more. Characteristics of individual offenders, be they aggravating or mitigating, are not part of the reasonable hypothetical analysis. It flows from *Morrisey* that the broader the description of the offence in the provision creating the offence, the wider the range of reasonable hypotheticals.

[27] Then, tackling the reasonable hypothetical for s. 95, Doherty J.A. settled on three essential characteristics:

> ¶143 I begin my description of s. 95 reasonable hypotheticals by considering whether, in keeping with *Goltz* and *Brown*, the s. 95 reasonable hypothetical should be limited to cases which share the central features of the appellant's case, namely, possession of a loaded firearm and the absence of any kind of authorization or licence to possess that firearm anywhere at any time. Neither the Crown nor the Attorney General for Canada suggested at trial or in this court that the s. 95 reasonable hypothetical could be limited to cases that shared these aggravating features. Both defended the constitutionality of s. 95 in all its potential applications, although both argued that examples taken from the regulatory end of the spectrum were not sufficiently common to constitute reasonable hypotheticals.
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> ¶144 I was initially attracted to the idea of considering the constitutionality of the mandatory minimum as applied to cases where the gun was actually loaded and the offender had no authorization to have the gun under any circumstances in any place. Cases with those features fall more toward the true crime end of the spectrum. The mandatory minimum would more easily meet constitutional norms if those features existed.

¶145 I have, however, concluded that the Crown and the Attorney General for Canada's approach of considering all potential applications of s. 95 is correct. Section 95 is a different kind of offence than the offences considered in *Goltz* and *Brown*. In those cases, the offence that carried the minimum penalty depended on the commission of a predicate offence or the breach of some other statutory provision or order. The seriousness of the offence attracting the minimum penalty depended to some degree on the nature of the predicate offence, or the nature of the conduct giving rise to the prior order.

¶146 Section 95 does not depend on the commission of a predicate offence or the breach of any statutory or other order. Section 95, like the importing offence in *Smith*, prohibits a broad range of conduct. Upon reflection, I am satisfied that it would be no more appropriate to consider the constitutionality of s. 95 by reference only to the more egregious form of conduct captured by s. 95 than it would have been in *Smith* to consider the constitutionality of the mandatory minimum by reference only to the crime of importing the more harmful narcotics such as cocaine into Canada.

¶147 The trial judge developed several reasonable hypotheticals at para. 96. Distilled to their essentials, they involved:

- offenders of previous good character;
- brief possession of the firearm;
- no criminal purpose associated with the possession; and
- the appellant's possession was in the nature of a failure to comply with the regulatory licensing scheme.

¶148 Mr. Shandler, for the Crown, put forward a more restrictive reasonable hypothetical. In his helpful submissions, he argued that a reasonable hypothetical must involve a situation "of imminent and lethal danger inherent in the presence of a loaded handgun". According to Mr. Shandler, reasonable hypotheticals must be limited to cases in which the accused knowingly possesses a loaded restricted or prohibited firearm that has never been licensed or legitimately owned.

¶149 This submission does not reflect the broad scope of the offence as defined in s. 95. There is no suggestion in s. 95 that the firearms are limited to those that have "never been licensed or legitimately owned". Nor does the case law reflect any such limitation: *e.g. R. v. Laponsee*, 2013 ONCJ 295; and *MacDonald*. Furthermore, the offence is not limited to loaded restricted or prohibited firearms, but instead extends to such firearms even when unloaded if ammunition is readily accessible. I do not think that liability based on an unloaded firearm with ammunition stored nearby can be excluded as a reasonable hypothetical given the language of s. 95 any more than possession of a small amount of marijuana could be excluded from the importation offence considered in *Smith*.

¶150 Having regard to *Goltz* and *Morrisey* and, in particular, the emphasis in *Morrisey* on maintaining a level of generality commensurate with the description

> of the offence, *I would describe the s. 95 reasonable hypothetical to be used in the s. 12 analysis as having three characteristics:*
>
> > • *the accused is knowingly in possession of an unloaded restricted or prohibited firearm with useable ammunition stored nearby and readily accessible;*
> >
> > • *the accused has an authorization to possess the firearm and has registered the firearm, but to his or her knowledge the authorization does not permit possession of the firearm at the place or in the manner in which the accused has possession; and*
> >
> > • *the possession of the firearm is not connected to any unlawful purpose or activity and the offender is not engaged in any dangerous activity with the firearm.*
> >
> > [Emphasis added]

[28] Applying these characteristics, Doherty J.A. concluded that s. 95 constituted cruel and unusual punishment. The passages I have underlined below describe the features of the hypothetical Justice Doherty designed to test the constitutionality of s. 95:

> ¶164 I come now to test my reasonable hypothetical using the factors described above, at para. 78. I will focus on the gravity of the offence as reflected in my reasonable hypothetical as, in my view, the gravity of the offence is the crucial, if not determinative, consideration in this case.
>
> ¶165 The reasonable hypothetical I use involves no harm to anyone or anything and very little, if any, risk of harm to anyone or anything. The fact that the firearm in my hypothetical is unloaded, clearly a scenario contemplated by s. 95, significantly, in my view, decreases the risk of harm posed by the conduct described in my reasonable hypothetical. It is certainly arguable that a loaded gun always poses an immediate danger. The same cannot be said of an unloaded gun in the possession of a licensed gun owner who has ammunition stored nearby.
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> ¶166 The offender in my reasonable hypothetical is morally culpable in that he acts with the requisite knowledge of the elements of the offence. The offender knows that he or she is in possession of a restricted firearm and that the possession is not authorized at the place where he or she is in possession. Given the strict terms on which licences to possess restricted and prohibited firearms are given, a knowing breach of those terms is a morally blameworthy act.
>
> ¶167 The level of moral blameworthiness, however, as with the blameworthiness that knowledge of the possession of a narcotic imputes, depends on a number of variables, all of which fall within the broad scope of the offence as defined in s. 95. Knowledge that one has an unloaded restricted firearm safely stored in one's cottage with useable ammunition readily accessible in the next

> room, coupled with the knowledge that under the terms of one's licence, the firearm should be kept in one's dwelling, attracts a very different level of moral blameworthiness than does the knowledge of the person standing on the street corner with a loaded gun in his back pocket for which he knows he has no kind of authorization and which he intends to use as he sees fit. Section 95 is written so broadly as to capture offenders with both levels of moral blameworthiness. My reasonable hypothetical focuses on the less blameworthy category of potential offender.
>
> ¶168 I would also rank the moral culpability of the offender in my reasonable hypothetical below the moral culpability of persons who engage in activities with firearms that demonstrate a wanton or reckless disregard for the lives or safety of others. Offenders in the reasonable hypotheticals described in *Morrisey* are, in my view, more morally culpable than the reasonable hypothetical offender I describe.
>
> ¶169 In my view, a three-year minimum penitentiary term for an offender in my reasonable hypothetical is well beyond any punishment that would be considered proportionate to the gravity of the offence committed in the reasonable hypothetical. A three-year penitentiary sentence for what is essentially a violation of a term of a licence, albeit a knowing violation, is unheard of in Canada. Even accepting that the unique dangers posed by prohibited and restricted firearms could justify a mandatory jail sentence for what is in essence a licensing offence, a sentence of three years goes well beyond what could be justified for such an offence under any penal theory. A three-year penitentiary sentence is grossly disproportionate to the severity of the offence described in my reasonable hypothetical.
>
> [Emphasis added]

[29] This conclusion was bolstered by a comparison of the three-year mandatory minimum under s. 95 with sentences for related crimes:

> ¶170 A comparison of the mandatory minimum required in s. 95 with the sentences available for related crimes, another factor identified as relevant in the gross disproportionality analysis, confirms my view that the three-year mandatory minimum is grossly disproportionate. I will consider ss. 92 and 93. Both provisions apply to all firearms, including prohibited and restricted firearms, and both provisions describe offences that are very similar to the offence set out in s. 95.
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> ¶171 Section 92 creates an offence that applies to anyone who is in possession of a prohibited or restricted firearm "knowing that the person is not a holder" of a licence or registration certificate. As I read the offence described in s. 92, it applies to offenders who, to their knowledge, have no licence or registration certificate referable to the firearm. Section 92 does not require that the firearm be loaded or that useable ammunition be readily available.

> ¶172 Section 92 carries no minimum penalty for a first offence. There are minimum penalties for second (one year) and subsequent (two years less one day) offences.
>
> ¶173 The offence described in s. 93 applies in circumstances that are very similar to the facts of my reasonable hypothetical. Section 93 applies to a person who has a licence for a restricted or prohibited firearm, but has possession of that weapon at a place not authorized under the licence. Section 93, unlike s. 95, does not require that the firearm be loaded or that ammunition be readily available.
>
> ¶174 Section 93, like s. 95, is a hybrid offence. If the Crown proceeds by indictment, the maximum penalty is five years. There is no minimum penalty under s. 93 regardless of whether the Crown proceeds by indictment or summarily.
>
> ¶175 The relatively minor distinctions between the conduct addressed in ss. 92 and 93, and the conduct in s. 95 does not explain the vast differences in the range of penalties available for the offences and, in particular, the three-year starting point for a s. 95 offence. I stress, again, that s. 95 does not require that the firearm be loaded or that the person in possession of the firearm have any intention of loading the firearm. The presence of useable ammunition stored in a nearby drawer strikes me as a totally inadequate basis upon which to move from an offence under ss. 92 or 93 carrying no minimum penalty to one demanding a three-year penitentiary term.

[30] Thus, Doherty J.A. concluded:

> ¶176 I do not propose to address the other factors relevant to the gross disproportionality analysis. In my view, the cavernous disconnect between the severity of the offence as described in my reasonable hypothetical and a three-year penitentiary sentence is determinative of the s. 12 analysis. The severity of the s. 95 minimum when compared to the range of sentences available for similar offences serves to confirm my conclusion. Even taking into account factors such as parole that would mitigate the effect of the three-year sentence, I remain convinced that it is grossly disproportionate in the reasonable hypothetical I have drawn. The three-year mandatory minimum upon conviction for a s. 95(1) offence constitutes cruel and unusual punishment.

Our Reasonable Hypothetical

[31] As I approach our reasonable hypothetical, I am mindful of the general parameters set out in **Morrisey**:

> ¶30 What constitutes a reasonable hypothetical? In *Goltz*, at p. 506, I said that reasonable hypotheticals could not be "far-fetched or marginally imaginable cases". They cannot be "remote or extreme examples" (p. 515). The

> reasonableness of the hypothetical cannot be overstated, but this means that it must be reasonable in view of the crime in question. In *Smith*, the hypothetical used to invalidate the impugned punishment was a very realistic one. There, the legislation attached criminal liability to importers of illegal narcotics, irrespective of the quantity imported. The natural and probable consequence of the legislation would be to catch individuals who could only be described as "small offenders" (p. 1080), such as the individual importing a single "joint".
>
> ¶31 In *Goltz*, I required examples that "could commonly arise in day-to-day life" (p. 516). This was appropriate for the offence of driving while prohibited under the B.C. *Motor Vehicle Act* because that *Act* touched upon everyday life. It must be recognized that criminal negligence homicides do not easily lend themselves to resorting to reasonable hypotheticals as guides to assessing punishment as cruel and unusual as they can be committed in an almost infinite variety of ways. Nevertheless, hypotheticals remain very useful in determining whether s. 12 is violated in this case.

[32] That said, I find the **Nur** analysis to be very compelling. It goes a long way to convince me that s. 95 is unconstitutional. However, the direction of the Supreme Court of Canada in our present case (overturning Mr. MacDonald's acquittal), in my view, places this provision on an even weaker constitutional footing. I will explain.

[33] Recall that Mr. MacDonald was authorized to possess his *Beretta* in his Alberta residence. On appeal, we rejected his assertion that this also authorized him to possess it in his Nova Scotia residence. However, we entered an acquittal, based on his mistaken belief that he was so authorized. In other words, we determined that, in order to be convicted, he would have to know that his possession was unauthorized.

[34] However, this conclusion was reversed by the Supreme Court:

> ¶55 The *mens rea* the Crown is required to prove under s. 95(1) does not, however, include knowledge that possession in the place in question is *unauthorized*. Rather, knowledge that one possesses a loaded restricted firearm, together with an intention to possess the loaded firearm in that place, is enough. An individual who knowingly possesses a loaded restricted firearm in a particular place with an intention to do so will be liable to punishment for the offence provided for in s. 95(1) unless he or she holds an authorization or a licence under which the firearm may be possessed in that place. Thus, a proper authorization or licence serves to negate the *actus reus* of the offence, thereby allowing someone who legitimately possesses a restricted firearm in a given place to avoid liability.

[35] Yet, Doherty J.A. in **Nur**, like us, assumed knowledge (or wilful blindness) of the unauthorization to be an essential element of the offence:

> ¶48 The *mens rea* of a s. 95 offence, as with most possession-based offences, consists of knowledge or wilful blindness of the existence of the elements of the *actus reus*: see *R. v. Briscoe*, 2010 SCC 13, 253 C.C.C. (3d) 140, at para. 21. The Crown must prove the following:
>
> * the accused knew or was wilfully blind that he or she was in possession of the firearm in issue: see *R. v. Williams*, 2009 ONCA 342, 244 C.C.C. (3d) 138, at paras. 10 and 18; *R. v. Chalk*, 2007 ONCA 815, 227 C.C.C. (3d) 141, at para. 18; and *R. v. Snobelen*, [2008] O.J. No. 6021, at paras. 34-35 (C.J.);
> * the accused knew or was wilfully blind that the firearm was loaded or, if unloaded, knew or was wilfully blind that useable ammunition was readily accessible; and
> * *the accused knew or was wilfully blind that he or she did not have both the required licence or authorization to possess the firearm at the place alleged and the required registration certificate: MacDonald, at para. 84.*
>
> [Emphasis added]

[36] This assumption understandably made its way to Doherty J.A.'s hypothetical. I refer specifically to his proposed second essential characteristic:

> ¶150 …the accused has an authorization to possess the firearm and has registered the firearm, but *to his or her knowledge* the authorization does not permit possession of the firearm at the place or in the manner in which the accused has possession; and
>
> [Emphasis added]

[37] Yet, in light of this recent direction from the Supreme Court of Canada, it is now clear that such knowledge is not necessary to support a conviction.

[38] I would therefore endorse the **Nur** characteristics but modify them as follows (with changes highlighted):

> • the accused is knowingly in possession of an unloaded restricted or prohibited firearm with useable ammunition stored nearby and readily accessible;

> • the accused has an authorization to possess the firearm and has registered the firearm but, *based on an honest but mistaken belief to the contrary,* the authorization does not permit possession of the firearm at the place or in the manner in which the accused has possession; and
>
> • the possession of the firearm is not connected to any unlawful purpose or activity and the offender is not engaged in any dangerous activity with the firearm.

[39] This modification solidifies my view that this mandatory minimum punishment represents cruel and unusual punishment. It leaves us with a hypothetical depicting even less moral culpability than that envisaged by Doherty J.A. This is enough to remove any concern one might have with the **Nur** analysis.

[40] In fact, I can see a reasonable link between this modified hypothetical and the facts at Bar. For example, instead of answering the door with his loaded gun, what if Mr. MacDonald, while packing his suitcase, opened the door, unarmed, with his gun (bullets nearby and accessible) in full view in his opened suitcase? After all, had he believed he was authorized to do so, he would have had nothing to hide. Or, what if a cleaner were authorized to enter the premises in the occupant's absence and saw a similar circumstance? What if the concierge was also authorized to enter in the occupant's absence, for example, to deliver a package? What if the property manager was also so authorized, for example, or to inspect for a potential water leak? In my respectful view, these are not "far-fetched or marginally imaginable cases". Instead, in my view, they represent "examples that could commonly arise in day to day life" for gun owners living in apartment and condominium units. Yet, by any of these examples, the offender would have been subjected to a three-year prison term. That, in my view, would represent cruel and unusual punishment.

[41] In reaching this conclusion, I acknowledge the strong submissions made by the Provincial Crown and the Intervenor that the hybrid nature of this offence goes a long way to justify its existence. For example, the Attorney-General of Canada, in its factum, asserts that with the **Nur** hypothetical, the Crown would have simply proceeded summarily:

> ¶56 The hypothetical in *Nur* was made even more unreasonable with the Court's finding that the Crown would proceed by way of indictment. In the *Nur* hypothetical, the Crown would have elected to proceed by summary conviction, rendering the mandatory minimum inapplicable. Being a hybrid offence,

> Parliament has acknowledged that some offenders should be sentenced according to a lower tariff, and effectively instructed the Crown to rationally distinguish between offenders - and the *Nur* hypothetical assumes irrationality. This is not *Smith*, where there was only one level of punishment. Some effect should be given to the hybrid nature of this offence, and the Ontario Court of Appeal gave it none.

[42] Respectfully, I disagree with this submission primarily for two reasons. Firstly, I endorse the reasoning in **Nur** that the decision on how to proceed (summarily or by indictment) is made early on in the process, when the facts are sparse. This would therefore prevent an otherwise well-intentioned Crown from completing the required fulsome analysis. Doherty J.A. explains:

> ¶155 Crown counsel accepts that the trial judge went too far in viewing the Crown's power to elect to proceed summarily as "the sine qua non of constitutionality under the s. 12 analysis". Crown counsel instead submits that the Crown's ability to proceed summarily provides "an additional safeguard" in those borderline reasonable hypothetical cases.
>
> ¶156 With respect, I do not agree with the trial judge's analysis of the effect of the Crown election on the constitutionality of the mandatory minimum. Further, while the Crown's ability to elect may provide a safeguard in those cases where the facts are known from the outset and agreed upon by the parties, the Crown election provides no safeguard in the vast majority of cases where the facts are in dispute or unknown at the time of the election.
>
> ¶157 The Crown elects to proceed by indictment or by way of summary proceedings at an early stage in the prosecution. The election is based on the information available to the Crown at that time. If the accused pleads not guilty and is convicted, he or she will be sentenced based on findings of fact made by the trial judge on sentencing. If the Crown chose to proceed by indictment, the constitutionality of the three-year minimum will be tested in the context of the facts as found for the purpose of sentencing and not the facts as understood by the Crown when the election was made.
>
> ¶158 If an accused pleads not guilty and is convicted, it is not unusual that the facts for the purpose of sentencing will be quite different from the Crown's understanding of the case when the Crown made its election. There will inevitably be cases in which the Crown elected to proceed by indictment, but would have elected to proceed summarily had the election been based on the facts as found at the time of sentencing.
>
> . . .
>
> ¶162 My holding that the Crown ability to elect to proceed summarily cannot avoid an infringement of s. 12 does not imply that the Crown cannot be relied on

> to exercise its discretion reasonably. Simply put, except perhaps when the accused pleads guilty, the Crown cannot know the facts on which the accused will be sentenced when the Crown makes its election. Consequently, the election cannot be expected to be responsive to those facts.

[43] Secondly, and more fundamentally, we must ask whether the constitutional validity of legislation can ever hinge on Crown discretion. In posing this question, I hastily acknowledge that, in Canada, we have many dedicated, fair and reasonable crown attorneys who consistently act with utmost good faith as *quasi* ministers of justice. However, in my view (and subject to s. 1 justification discussed below), a law that even accommodates the potential for cruel and unusual punishment must be struck pursuant to s. 52 of the *Charter*. As a matter of fundamental justice, such provisions cannot stand. In this regard, Lamer J.'s (as he then was) comments in **Smith**, *supra* (at p. 1078), dealing with the Crown's discretion to charge for lesser offences, apply with equal force to Crown discretion over hybrid offences:

> In its factum, the Crown alleged that such eventual violations could be, and are in fact, avoided through the proper use of prosecutorial discretion to charge for a lesser offence.
>
> 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.

(See also **R. v. Seaboyer; R. v. Gayme**, [1991] 2 S.C.R. 577, at p. 629; **R. v. Cuerrier**, [1998] 2 S.C.R. 371 at ¶136, Fish J. (in dissent) in **R. v. J.A.**, 2011 SCC 28 at ¶119-120; **R. v. Nur**, (Ont. C.A.), *supra*; and **R. v. Smickle**, (Ont. S.C.J.), supra, at ¶110.

[44] Finally, in reaching this conclusion, I am mindful of the Provincial Crown's suggestion in its factum that we should be precluded from even considering hypotheticals because they were not raised at trial:

> ¶71 The Appellant did not advance a reasonable hypothetical at trial. The Crown submits since the onus is on the Accused with respect to this issue, the

> hypothetical inquiry should not be considered by this Court (**Latimer**, para. 79; **Ferguson**, para. 30). Alternatively, the Crown respectfully submits that the OCA in **Nur** was wrong, both in its formulation of the reasonable hypothetical and in its application.

[45] I am pleased to confirm that, in oral argument, the Crown conceded that we should not be prevented from attempting, for the first time on appeal, to conceive reasonable hypotheticals. This is an appropriate concession as I do not read the noted references in **Latimer** and **Ferguson** as preventing us from doing so.

[46] For all these reasons, I conclude that this provision breaches s. 12 of the *Charter*.

Section 1

[47] Nor do I see any hope of justifying this provision under s. 1 of the *Charter*. I say this essentially because of the high jurisprudential bar that must be reached in order to establish a s. 12 breach. In other words, for a penalty to represent cruel and unusual punishment it would have to be "grossly disproportionate" and appear "so excessive as to outrage our standards of decency". Thus, by its very nature, such a provision could not be justified. In my view, therefore, it would be incongruent to look to s. 1 to justify the unjustifiable. In fact, I can say it no better than Doherty J.A. in **Nur**:

> ¶177 All rights and freedoms guaranteed by the *Charter* are subject to the limitation in s. 1:
>
> > The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> ¶178 The format of the s. 1 analysis is well known: e.g. see *Smickl*e (reasons of Molloy J.), at paras. 97-123. I do not propose to go through the steps of that analysis. Given the very high bar set for a finding that a sentence constitutes cruel and unusual punishment, I find it very difficult to imagine how a sentence that clears that high bar could ever qualify as a reasonable limit demonstrably justified in a free and democratic society.
>
> ¶179 In essence, s. 1 permits what would otherwise be infringements of individual constitutional rights where the societal benefits flowing from the state action that infringes individual rights can "demonstrably" justify that infringement. In my view, the basic quid pro quo underlying s. 1 does not exist where the state imposes punishment that is "so excessive as to outrage standards

> of decency" and so disproportionate as to be "abhorrent or intolerable" to Canadians:
>
> > Ferguson, at para. 14. What possible societal benefit could render such punishment "demonstrably justified in a free and democratic society?"
>
> ¶180 No system of criminal justice that would resort to punishments that "outrage standards of decency" in the name of furthering the goals of deterrence and denunciation could ever hope to maintain the respect and support of its citizenry. Similarly, no system of criminal justice that would make exposure to a draconian mandatory minimum penalty, the cost an accused must pay to go to trial on the merits of the charge, could pretend to have any fidelity to the search for the truth in the criminal justice system.
>
> ¶181 If an argument can be made that could justify sheltering a sentence that amounted to cruel and unusual punishment under s. 1, I have not heard it. The mandatory minimum penalty of three years imposed under s. 95(2)(a) cannot be saved by s. 1.

[48] Pursuant to s. 52 of the *Charter*, I would therefore declare the mandatory three-year minimum sentence provided for in s. 95(2)(a)(i) when the Crown proceeds by indictment to be of no force and effect.

The Appropriate s. 95 Sentence

[49] What then is the appropriate sentence for Mr. MacDonald's s. 95 conviction?

[50] I begin by confirming the deference we owe to the trial judge, who heard firsthand from the various witnesses as they described the circumstances of this offence. My colleague, Justice Saunders, put it nicely in **R. v. Knockwood**, 2009 NSCA 98:

> ¶11 There is no dispute as to the proper standard of review in this case. This Court's review of a sentencing order is a highly respectful one. We must show great deference whenever we are asked to consider appeals against sentence. Absent an error in principle, a failure to consider a relevant factor, or an over-emphasis of appropriate factors, we should only vary a sentence imposed at trial if we are convinced that the sentence is demonstrably unfit. See for example, **R. v. L.M.**, 2008 SCC 31; **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500; **R. v. Longaphy**, 2000 NSCA 136 and **R. v. Conway**, 2009 NSCA 95.

[51] Here the judge embarked upon a particularized analysis only, when assessing the constitutional validity of the three-year minimum. In upholding the provision on that basis, he expressly avoided a reasonable hypothetical analysis:

> It is conceivable that someone who really has no moral culpability in the presence of that item might under the exigencies of the moment resort to that for purposes of self-defence or defence of another such as a threatened break-in or some other scenario.
>
> However, the Defence has not advanced the case on the basis of hypotheticals. The burden is on the Defence on the balance of probabilities to satisfy the **Charter** argument. I don't feel that there is sufficient basis for saying that that possibility which I have conceived of is a common enough possibility such that it would warrant striking down s. 12, and I do not do so on that basis. However, I put it out there for future consideration.
>
> . . .
>
> To be clear, I am not striking down the minimum sentence under s. 95 because of the circumstances in this particular case. I am going to leave it to others to decide whether in other cases that argument might be successful.

[52] However, although bound by the three-year minimum, the judge offered this insight as to what he might do if the minimum did not apply.

> Were it not for the minimum three-year sentence, my likely sentence would have been one in any event of one in a federal penitentiary. Victim fine surcharges are waived in light of the sentence imposed.

[53] It is difficult to know exactly what the trial judge meant by his reference. It is clear that he would have ordered at least two years. Yet, he did not say he would have ordered three years "in any event". In reading this passage in the context of the entire decision, my view is that he would have considered a sentence in the two-year range, but for the mandatory minimum. In reaching this conclusion, I am mindful that the judge ordered three years and two years respectively for the less serious dangerous possession and careless handling charges. However, these were appropriately concurrent to what he viewed as the inevitable three-year minimum for s. 95. Therefore, he understandably conducted no separate analysis for the other two charges. All in all, again in the context of the entire decision, I view this reference to telegraph that, but for the mandatory minimum, the judge would have sentenced Mr. MacDonald to a sentence in the two-year range for the s. 95 offence. That being the case, I view this to be well within the appropriate range and something that this Court should consider as a starting point. After all, the judge was keenly aware of Mr. MacDonald's circumstances, including the fact that this was his first offence:

> In support of the discharge, the Defence points out that Mr. MacDonald has an unblotted record up to this point. He's been a hard worker in the

community. He has the support of his cousin and some others, although I note he appears to be estranged from his immediate family.

The author of the Pre-Sentence Report says that Mr. MacDonald is an appropriate candidate for supervision, although the probation officer then goes on to suggest that Mr. MacDonald needs to address certain issues - his consumption of alcohol, and unresolved conflicts arising from his family background.

Mr. MacDonald, as I indicated earlier, works in the oil industry. That requires him to travel about the globe seeking various stints of employment in his consulting work. A criminal record would not do anything to enhance his ability to move about the globe. Each country has different requirements for admission or to work in that country. Some require visas, some don't. In any event, it would not be beneficial to Mr. MacDonald's efforts to keep himself employed. The economic consequences for Mr. MacDonald could be significant. The question is whether or not it would be contrary to the public interest.

[54] At the same time, the judge was properly concerned about the seriousness of this offence:

The use of firearms is a problem in our society, particularly in this area. And I say that not based on any particular data that's been provided by counsel, but from simply living in this city and being aware of the news reports, and reading the newspaper, listening to the radio, and listening to the television.

I can also acknowledge the fact that Courts usually impose sentences of incarceration where firearms are involved. I know I have done that personally. I have sentenced young persons without criminal records who have been in possession of unloaded firearms in their cars to sentences of incarceration based on the principle of specific and general deterrence in the hopes that by emphasizing that principle, we can have a safer and more peaceful society.

In light of what I have just said, I am of the opinion that a conditional discharge would not be in the best interests of society and I will not grant Mr. MacDonald a conditional discharge.

To some extent, with respect to the type of sentence that is then to be imposed in this situation, in my view it has to be a sentence which deprives Mr. MacDonald of his liberty. That would be consistent with the approach that the Courts have taken in other cases. The question is how long.

A sentence less than two years subject to the minimum can, of course, be served under the provisions of s.742.1 in the community provided it is a sentence of two years less a day, or less.

The Crown has indicated that in situations involving the use of firearms, significant periods of incarceration have been imposed where there has been a breach of s.95(1) of the **Criminal Code**. And the Crown in its *factum* has listed a number of cases for reference. I don't think it is necessary to go through them.

> I will say in Mr. MacDonald's favour that the individuals in I believe all or, if not all, most of those cases had significant criminal records. On the other hand, I don't recall that in any of those cases the individual actually had the firearm in their hand. The firearms were either in a backpack or in a drawer or somewhere in their residence.
>
> Well, not to belabour the obvious, but loaded firearms stored in drawers don't tend to go off without some human agency, whereas firearms in the hand don't require much to set them off. A flick of the finger, a knock on the safety, and the firearm will go off. It is a tremendous difference when one considers the issue of safety to the public.
>
> Obviously safety of the public is a primary factor in sentencing. Some guidance can be obtained from how the Courts have dealt with other situations where they feel the safety of the public is put at risk.

[55] I therefore accept the judge's two-year range as an appropriate starting point. This is, as well, consistent with my "particularized" analysis above.

[56] However, that was back in April 2011, over 3½ years ago. I must now consider the fact that, since then, Mr. MacDonald has been incarcerated for 16 days (between his sentencing and release on bail pending appeal) and has served a two-year term of probation. Taking these factors into account, I would reduce the sentence to 18 months going forward.

[57] That said, I am troubled by the fact that, in addition to serving his brief periods of incarceration and a term of probation, Mr. MacDonald has now been in jeopardy for almost five years. There is nothing to suggest that he has been in any kind of trouble since that fateful evening. In my view, it is therefore no longer in the interests of justice to enforce this 18 month sentence. In other words, it is one of those exceptional cases where justice commands that this sentence be stayed.

[58] This Court in **R. v. Best**, 2012 NSCA 34 recently considered the rare circumstances that would warrant such an order:

> [35] I realize that this represents an exceptional form of relief. However it is not unique. For example, in **R. v. Butler**, 2008 NSCA 102, the Crown appealed a community sentence for armed robbery (robbing a taxi driver at knife point by an offender suffering from addictions). This court found this disposition to be demonstrably unfit in the circumstances and declared a 30-month sentence to be appropriate:
>
> > ¶18 Mr. Butler spent the five and one half months between his arrest and sentencing on remand. In that period he made what efforts he could at rehabilitation, successfully completing the short term drug rehabilitation

course available to him in the institution. It was while on remand that he learned of the Salvation Army program, which he brought to his counsel's attention. Mr. Butler maintained that he was determined to overcome his addiction to drugs. He accepted responsibility for the offence and expressed remorse.

¶19 The judge made several factual findings which are supported by the record:

> Mr. Butler has a significant and chronic addiction to both powder and crack cocaine;
>
> he has an attachment to the work force;
>
> in the past he has not had any significant intervention with respect to his substance abuse;
>
> were it not for his chronic addiction he would not be involved in the criminal justice system.

¶20 It is clear that in crafting this sentence the judge had determined that the public could best be protected if Mr. Butler's drug addiction were successfully addressed. This, he determined, should be accomplished through a sentence which facilitated Mr. Butler attending the Salvation Army program.

• • •

¶38 The appropriate sentence, before credit for remand time, would have been 30 months. But it is important here to consider Mr. Butler's considerable progress since sentence was imposed.

[36] However, despite this conclusion, the court resolved not to incarcerate Mr. Butler:

¶39 Although I have concluded that the sentence imposed by the trial judge, notwithstanding the need for rehabilitation, inadequately reflects denunciation and general deterrence, in view of the sentence served and the post-sentence update, I am not persuaded that it is in the interests of justice to now substitute incarceration for the conditional sentence. (See, for example, *R. v. C.S.P.* 2005 NSCA 159, [2005] N.S.J. No. 498 (Q.L.) (C.A.); and *R. v. Hamilton*, [2004] O.J. No. 3252 (Q.L.) (C.A.) and *R. v. Edmondson*, 2005 SKCA 51, [2005] S.J. No. 256 (Q.L.) (C.A.); leave to appeal refused [2005] S.C.C.A. No. 273).

¶40 Mr. Butler has successfully completed the six month addiction program at Booth Centre. He is pursuing an upgrading program with a view to entering Community College for which he has funding in place. It would not be in the interests of justice to now commit him to a prison environment which may adversely affect his rehabilitation (*R. v. Bratzer*,

> supra, at para. 47 and *R. v. Parker* [1997] N.S.J. No. 194 (Q.L.) (C.A.)). I have considered, as well, the fact that Mr. Butler, having spent five and one half months on remand, prior to trial, is now aware of the realities of prison life. Indeed, that experience may well have motivated him to get his life in order and will hopefully keep him moving forward on that path. (*R. v. C.S.P.*, supra; *R. v. Hamilton*, supra; *R. v. Edmondson*, supra; *R. v. Symes*, [1989] O.J. No. 528 (Q.L.) (C.A.); *R. v. Shaw*, [1977] O.J. No. 147 (Q.L.) (C.A.); *R. v. Boucher*, [2004] O.J. No. 2689 (Q.L.) (C.A.); *R. v. Hirnschall*, [2003] O.J. No. 2296 (Q.L.) (C.A.); *R. v. Fox*, [2002] O.J. No. 2496 (Q.L.) (C.A.); and *R. v. G.C.F.*, [2004] O.J. No. 3177 (Q.L.) (C.A.)).

[37] A similar approach has been taken by other Canadian appellate courts. For example, in *R. v. Shaw*, [1977] O.J. No. 147, two respondents were convicted of "serious drug trafficking offences" for which the trial judge gave them no jail-time, but rather, strict probation for two years. The sentences were imposed ten months after the offence, and at the time of the appeals the two respondents had carried out four months of their two-year probation order. Post-sentence reports meanwhile indicated that their work records were exemplary, and that their community involvement was providing needed services in the community. The Ontario Court of Appeal observed: "[i]t is apparent that the rehabilitation program directed by the trial judge is working" and "[t]o impose a custodial term now would be a sentence far more crushing than it would have been if it had been imposed at the time of trial". The court moreover stated:

> ¶15 Although as I have observed this was a case in which an appropriate sentence should have included the imposition of a custodial term, in the circumstances which now confront this Court general principles of sentencing are not paramount.

[38] Then in *R. v. Boucher*, [2004] O.J. No. 2689, the respondent was sentenced to two years (less one day) plus two years of probation for attempting to murder his estranged wife. The Ontario Court of Appeal held that this sentence was unfit and that a term of six years less time on remand was more appropriate. However, the sentence at trial was varied only to increase the probation period to three years. The court stated:

> ¶33 …[A]t the time this appeal was heard, [the respondent] had been out of custody for several months. On the record before us, there is no indication that the [respondent] has made any attempt to contact the complainant, or otherwise repeat his previous misconduct, since being released. This court has commented on other occasions about the potentially deleterious impact of re-incarceration, particularly in relation to its effect on rehabilitation. ... In all of the circumstances, I do not consider that it would be in the interests of justice to re-incarcerate the appellant at this time.

[59] As well, this was the same approach taken by the Ontario Court of Appeal in **Smickle,** *supra*; a situation very similar to ours:

> 10 This court has, on occasion, declined to re-incarcerate a respondent even though the sentence imposed at trial was manifestly inadequate. Sometimes after identifying the sentence that should have been imposed and explaining why the respondent should not be re-incarcerated, this court has simply dismissed the appeal: e.g. see *R. v. Hamilton* (2004), 72 O.R. (3d) 1, at para. 165 (C.A.); and *R. v. Banci*, [1982] O.J. No. 58 (C.A.). The court also has the power to impose the appropriate sentence but stay the execution of the remaining custodial part of that sentence: see *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 132. As explained in *R. v. F. (G.C.)* (2004), 71 O.R. (3d) 771, at para. 35, the imposition of the appropriate sentence followed by a stay of the execution of the remainder of the custodial sentence is probably a more appropriate disposition than is an outright dismissal in that it identifies the sentence that should have been imposed.
>
> 11 When, as in this case, the sentencing of an accused has been delayed by a lengthy appellate process, and the accused has served the sentence imposed at trial, the imposition of a "just sanction" demands that those factors be taken into account. The respondent completed the sentence imposed on him long ago. He has spent the last two years in legal limbo uncertain as to whether he would be required to return to jail and, if so, for how long. Those hardships must be taken into account. As observed in *Hamilton*, at para. 165:
>
> > This court has recognized both the need to give offenders credit for conditional sentences being served pending appeal and the added hardship occasioned by imposing sentences of imprisonment on appeal. The hardship is readily apparent in these cases. Had the respondents received the appropriate sentences at trial, they would have been released from custody on parole many months ago, and this sad episode in their lives would have been a bad memory by now.
>
> 12 We adopt the observation of Green C.J.N.L. in *R. v. Taylor*, 2013 NLCA 42, at para. 133, who, in the course of explaining the function of the appellate court when deciding whether to re-incarcerate an accused who had received in inappropriately low sentence at trial, said:
>
> > ... there is nothing inconsistent with saying that the sentencing judge, with the record in front of him, should have sentenced the offender to greater incarceration than he did and at the same time saying that, with what the court now knows, the application of the sentencing principles does not now require the offender actually to serve the remainder of the sentence. *Unlike the sentencing judge, the court of appeal will be deciding whether the offender should actually serve the rest of his sentence with the benefit of hindsight, a perspective that the sentencing judge did not have. The corrective appellate function of giving guidance as to what the sentencing judge ought to have done can therefore be achieved while at the same time*

> *the court can make an appropriate practical disposition, based on current circumstances.*
>
> [Emphasis added.]

13 Counsel for the respondent relies primarily on two arguments in urging the court to not re-incarcerate the respondent. First, counsel submits that, through no fault of the respondent, the determination of an appropriate sentence comes almost five years after the commission of the offence, almost three years after the conviction, almost two years after sentence was imposed at trial, and a year and a half after the respondent successfully completed the sentence imposed at trial. Counsel argues that this timeline speaks loudly to the significant added hardship that the respondent would suffer should he be incarcerated at a point so distant from the events that led to his conviction.

14 Second, counsel stresses that incarceration at this time poses a significant risk to the stability of the respondent's present life and, therefore, to his ultimate rehabilitation. That ultimate rehabilitation provides, by far, the best long-term hope for "a just, peaceful and safe society".

15 The respondent, who apart from this offence has no other convictions, has continued in the years since his conviction to live a positive law-abiding lifestyle. He works two jobs, is developing his own business, has a stable loving relationship with his fiancée, and a close relationship with his two children from earlier relationships. He supports both children financially.

16 Counsel submits that incarceration of the respondent in the name of the abstract notions of deterrence and denunciation puts at very real risk the positive and tangible steps the respondent has taken to establish himself as a responsible father, spouse, employee, and contributing member of society. Counsel, relying on the respondent's latest affidavit, submits that the respondent has even come to appreciate the seriousness of the conduct that led to his conviction. He has taken steps to avoid any further such conduct by disassociating himself from his cousin, the owner of the firearm that the respondent had in his possession at the time of the offence.

17 Counsel urges the court to give priority to the very real benefits to society flowing from the respondent's ongoing positive lifestyle over the much more nebulous and uncertain societal benefits that may flow from further incarceration in the name of denunciation and deterrence. Finally, counsel submits that the denunciation/deterrence message can be forcefully sent by a clear statement as to the appropriate sentence for this offence, and an equally clear explanation of the extraordinary circumstances that justify the staying of what would otherwise be the appropriate sentence in this case: see Taylor, at paras. 67 and 154.

18 We agree with Crown counsel's submission that the offence committed by the respondent was serious and that the principles of deterrence and denunciation must be paramount in fixing an appropriate sentence. If those principles cannot be adequately served without further incarceration, then incarceration is necessary,

> despite the significant hardship to the respondent and the risk it may pose to his rehabilitation and full reintegration into the community.
>
> 19 We are satisfied that the principles of deterrence and denunciation can be fully served without re-incarcerating the respondent at this time. This court has clearly indicated that convictions under s. 95 of the *Criminal Code* demand denunciatory sentences: see *Smickle*, at para. 30; and *R. v. Nur*, 2013 ONCA 677, at para. 206. Most s. 95 offences will attract a penitentiary term even for first offenders. Offences like that committed by the respondent, while somewhat less serious than the typical s. 95 offence, will demand the imposition of sentences at or very near the maximum reformatory sentence, even for first offenders. Staying the execution of the appropriate sentence in this case should not dilute in any way the pronouncements in *Nur* and *Smickle* as to the appropriate sentences for s. 95 offences.
>
> 20 Given that the principles of denunciation and deterrence can be adequately served without re-incarceration, we agree with counsel for the respondent that re-incarceration would not serve the other principles of sentencing and would undermine the fundamental purpose of sentencing set out in s. 718. The community is best protected if the respondent continues along the rehabilitative path that he has followed in the five years that he has been before the court.

[60] Therefore, in these exceptional circumstances, it is appropriate to stay the enforcement of this sentence. However, this should not be seen as diluting the seriousness with which this Court views gun crimes.

[61] We have also been asked to reconsider our disposition as it applied to Mr. MacDonald's convictions for s. 88 (dangerous possession of a weapon) and s. 86 (careless use of a firearm). There, the judge issued sentences of three years and two years respectfully (both concurrent to the three years for the s. 95 offence). On appeal, we reduced these to 18 days and 14 days respectively (or time served). In my respectful view, there is nothing to add or detract from our initial analysis. Therefore, except to declare these dispositions to be concurrent to the 18 month sentence for the s. 95 offence, I would not make a change.

DISPOSITION

[62] Pursuant to s. 52 of the *Charter*, I would declare s. 95(2)(a)(i) to be of no force or effect to the extent that it imposes a mandatory minimum punishment of imprisonment of three years for a first offence when the Crown proceeds by indictment. The maximum punishment of 10 years under s. 95(2)(a)(i) remains intact. I would instead impose a sentence of 18 months going forward for this offence but stay its enforcement. Finally, I would confirm our original dispositions

for the s. 86 (careless use of a firearm) and s. 88 (dangerous possession of a weapon) offences, both concurrent to the 18-month sentence for the s. 95 offence.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Beveridge, J.A.'s Dissenting Reasons:

INTRODUCTION

[63] I have the privilege of reading the draft reasons for judgment penned by the Chief Justice. I agree with his conclusion that the mandatory minimum sentence enacted by Parliament in s. 95(2)(a)(i) infringes s. 12, and it is not saved by s. 1 of the *Charter*. Accordingly, it is of no force or effect.

[64] But, with respect, I cannot agree with his analysis of the principles that govern our determination of the sentence for the appellant, nor with his conclusion that a sentence of 18 months incarceration is an appropriate sentence given the circumstances of the offence, and those of the offender. The majority would permanently stay that sentence. I would impose a sentence of time served.

[65] I acknowledge that from the appellant's perspective, my different path to a result of no further period of actual incarceration may make no difference.

[66] To understand my disagreement, I will set out a brief review of the history of these proceedings, and the trial judge's reasons for sentence.

HISTORY OF THE PROCEEDINGS/SENTENCE

[67] The appellant faced seven charges at trial. The Information charged him with: assault of Sgt. Derrick Boyd (s. 267) with a weapon (the 9 mm Beretta handgun); resisting Sgt. Boyd in the lawful execution of his duty (s. 129); possession of a restricted firearm together with readily accessible ammunition, not being the holder of an authorization or licence and registration certificate under which he may possess that firearm (s. 95(1)); being the holder of a licence under which he was entitled to possess a prohibited weapon, was at a place at which he was not entitled to possess it, as indicated in the licence (s. 93(1)(a)); possession of a weapon (the 9mm Beretta handgun) for a purpose dangerous to the public peace (s. 88); without lawful excuse pointed a firearm at Sgt. Boyd (s. 87(1)); use of a firearm (the 9mm Beretta handgun) in a careless manner without reasonable precaution for the safety of others (s. 86(1)).

[68] These were serious charges. It was the theory of the Crown, based on the testimony of Sgt. Boyd, that the appellant assaulted Boyd by deliberately pointing

the loaded 9 mm handgun at him. The appellant denied having done so. He testified that the gun only became visible because Sgt. Boyd pushed open the door, knocking the appellant off balance.

[69] The trial judge made findings of fact. He concluded that the appellant did not intentionally point the handgun at Sgt. Boyd. The trial judge was satisfied that the appellant did not intentionally apply force or threaten to do so. Acquittals on pointing the handgun under s. 87, and assaulting Sgt. Boyd with a weapon under s. 267 were ordered.

[70] The evidence of Sgt. Boyd was that his struggle with the appellant lasted ten seconds. Despite its short duration he felt he was in a life and death struggle. The appellant testified he was only trying to keep the firearm pointed away, and not drop it. Again, the trial judge was satisfied there was no intention by the appellant to resist Sgt. Boyd, and he was found not guilty on the s. 129 charge.

[71] On the charges of careless handling (s. 86) and possession of the weapon for a purpose dangerous to the public peace (s. 88), the defence suggested that the appellant was entitled to load and bring the gun to the door to defend himself and his property. This was rejected by the trial judge. The trial judge intimated that the appellant was not sober, and he did not have to open the door to the police presence. He had other options. The trial judge reasoned:

> I am satisfied that when one weighs all of the factors into account, it is a purpose dangerous to the public peace. It is an action which can result in others being injured. It is way out of proportion to any actual threat or any basis of a perceived threat. I am also satisfied that although Mr. MacDonald was intoxicated, he was not so intoxicated as to be unable to form the intention to have it for a purpose which, what is in my view, dangerous to the public peace. I find him guilty of that offence.
>
> For essentially the same reasons, I find him guilty of the offence of handling in a careless manner without reasonable precaution for the safety of other persons, the Beretta 9- millimeter handgun. He knew before he opened the door that it was the police, or persons claiming to be the police, and he knew that if it was the police they would have a significant reaction to being confronted with a handgun, which put Mr. MacDonald's own safety at risk, and the safety of the officers and the safety of Mr. Sears. I find him guilty of that.

[72] On the remaining two counts, the trial judge referred to these as the "licensing offences". He observed that it was common ground that the appellant had a possession and acquisition license— the Beretta handgun was properly

registered in his name, and he had a right to possess it in his dwelling. The trial judge acquitted the appellant of the s. 93(1)(a) charge on the basis that the licence did not specify a particular location.

[73] There was no question that the appellant had in his possession a loaded restricted firearm in his residence in Halifax. A number of arguments were advanced at trial, and on appeal, based on the appellant's evidence that he believed that he could possess that gun in his dwelling in Halifax. In a general way, it was submitted that if he was not so authorized, it was an honest but mistaken belief on his part.

[74] The trial judge found that the appellant was authorized to keep the gun in his residence and to transport it to shooting ranges within the province of Alberta. The appellant had no authority to bring the gun to Nova Scotia, nor was his dwelling in Halifax recorded in the Canadian Firearms Registry as a place authorized by a chief firearms officer. A guilty verdict on s. 95(1) followed.

[75] At the sentencing phase of these proceedings, the Crown sought a sentence of three years, plus ancillary orders. The appellant advocated for a conditional discharge, a sentence not legally available if the mandatory minimum provision survived constitutional challenge (see s. 730 of the *Code*).

[76] The trial judge concluded that the mandatory minimum did not offend the *Charter*. He then set out his opinion that a fit and proper sentence was two years' incarceration on the careless handling charge (s. 86); three years' incarceration for possession of the handgun for a purpose dangerous to the public peace (s. 88); and three years concurrent for the s. 95(1) offence. This is what he said:

> Having made those cautionary remarks, it is my considered opinion that in this particular case a fit and proper sentence with respect to the first charge - that is careless use, handling a firearm in a careless manner - the appropriate sentence is the maximum permissible under that section which is two years in a federal penitentiary.
>
> With respect to possession of the Beretta 9-millimetre handgun for a purpose dangerous to the public peace, a ten-year offence, in my view the appropriate sentence for that is three years in a federal penitentiary concurrent with the first sentence.
>
> With respect to the charge of having possession of a loaded restricted firearm, not being the holder of an authorization or a licence under which he may possess the said firearm in that place contrary to s.95(1), the appropriate sentence is one of three years in a federal penitentiary concurrent with the other two sentences.

[77] I will refer in more detail later to the trial judge's reasons.

[78] On appeal to this Court, the appellant challenged his convictions and sought leave to appeal sentence. This Court's decision is reported as 2012 NSCA 50. The Crown did not appeal any of the acquittals.

[79] The majority reasons for judgment were written by the Chief Justice. I dissented on the basis that the evidence should have been excluded under s. 24(2) of the *Charter* due to a s. 8 violation. The majority found no s. 8 violation.

[80] The appellant was unsuccessful with respect to his appeal of the ss. 86 and 88 offences. However, the majority concluded that to attract criminal liability for the s. 95(1) offence, the Crown was required to prove that the appellant knew his possession was unauthorized, and the trial judge erred in law in failing to deal with this issue (¶ 96).

[81] Rather than order a new trial, the Chief Justice decided that there was no evidence that the appellant knew, or was wilfully blind, that his possession was unauthorized (¶ 98). In fact, the only evidence was the appellant's unchallenged assertion that he honestly believed he was so authorized— an assertion that was never challenged (¶ 99). In the eyes of this Court, the trial judge appeared to have accepted the appellant's evidence on this point (¶ 100). An acquittal was entered.

[82] The acquittal rendered the appellant's constitutional challenge to the three year minimum sentence moot. It was not addressed by this Court.

[83] On the sentence appeal, the appellant did not suggest any error in law or principle, only that the sentences imposed were excessive. This Court agreed. The Chief Justice found the three-year sentence for the offence of possession of a weapon for a purpose dangerous to the public peace (s. 88) to be simply too harsh in the circumstances (¶ 115).

[84] He explained why. The Chief Justice quoted with approval an excerpt from Clayton C. Ruby et al. *Sentencing*, 7th ed. (Markham, Ont: LexisNexis, 2008) for the proposition that the range of sentence can be from suspended sentences to three years' imprisonment. The excerpt was:

> § 23.622 Section 88 of the Criminal Code is, in substance, an extremely flexible offence. It covers instances of mere possession of a weapon where it is possessed

> for one of the described unlawful purposes. The offence is also frequently charged in fact situations which are equally suited to charges of assault or of other weapons offences such as careless use or pointing of a firearm (section 87). Section 88 is the most frequently charged of the weapons offences under the Code.
>
> ...
>
> §23.625 ... As can be seen in the discussion of sentences for assault, the variety of motives, personal backgrounds and factual circumstances involved in each case results in the court weighing the net effect of the particular collection of circumstances before it, before coming up with what is essentially an individualized sentence, somewhere within a broad range from a suspended sentence up to a three-year sentence. ...

[85] In terms of the circumstances of the offence, the Chief Justice placed the appellant's actions at the lower end of the spectrum. He reasoned:

> [117] Considering our circumstances, I would place Mr. MacDonald's actions at the lower end of the spectrum considering, among other things, (a) although very serious, it did not involve the more typical scenario such as a highly volatile public confrontation or a dangerous domestic dispute, and (b) the gun was neither fired, nor (in light of the acquittal) intentionally pointed.

[86] The Chief Justice then canvassed a number of reported decisions with similar circumstances to demonstrate that three years would be well outside the range. The Chief Justice concluded that in these circumstances and those of the appellant, the three year sentence was demonstrably unfit. Instead, a sentence of time served, representing 18 days in custody, was ordered:

> [122] The above cases reveal sentences less than 3 years in circumstances much more grave than ours, often involving guns being discharged and offenders with significant records. Therefore, considering Mr. MacDonald's individual circumstances including his having no criminal record, this 3-year sentence is, respectfully, demonstrably unfit. It therefore now falls to us to craft an appropriate disposition. See **R. v. Shea**, 2011 NSCA 107, [2011] N.S.J. No. 653 (Q.L.) at ¶ 92.
>
> [123] Considering the principles of sentencing, the circumstances of this offence and Mr. MacDonald's individual circumstances, particularly his positive pre-sentence report and his previous unblemished record, in my view a sentence of time served would be appropriate. This would represent 18 days in custody (considering the 2 days following his arrest, his release on his own recognizance and then the 16 days between his sentencing and his release on bail pending appeal).

[87] With respect to the two-year sentence for careless handling of a firearm under s. 86, the majority concluded that it too was unduly harsh. A sentence of 14 days for the s. 86 offence was substituted, concurrent to the 18 days (time served) for the s. 88 (¶ 127).

[88] Mr. MacDonald appealed as of right to the Supreme Court of Canada on the s. 8 issue. The Crown successfully sought leave to appeal the s. 95 acquittal. The Supreme Court dismissed Mr. MacDonald's appeal, but allowed the Crown appeal (2014 SCC 3).

[89] LeBel J. wrote the reasons for judgment, which were unanimous in relation to the s. 95 issue, and the ultimate disposition of the appeal. He concluded that the majority of this Court erred by reading into s. 95 the requirement for the Crown to prove that an offender knew that he or she was not authorized to possess a restricted firearm in a given place. To do so would be to accept that a mistake of law was a valid defence.

[90] The conviction under s. 95(1) was restored. The Supreme Court acknowledged that the appellant's mistake of law would be a mitigating factor in fashioning an appropriate sentence for that offence. The Supreme Court declined to consider the Crown's appeal against the sentences imposed for the ss. 86 and 88 offences. Instead, the Supreme Court remitted the proceedings back to this Court to decide the constitutional validity of the three year minimum and reconsider all the sentences together. The direction of the Supreme Court was:

> [61] Although I am of the view that the conviction must be restored, I nevertheless appreciate the Court of Appeal's concern that Mr. MacDonald may a result of this conviction be sentenced to a mandatory three-year term of imprisonment despite the fact 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 (C. C. Ruby, G. J. Chan and N. R. Hasan, Sentencing (8th ed. 2012), at pp. 319-21). Whether the mandatory minimum three-year term of imprisonment provided for in s. 95(2)(a)(i) is constitutional will now be a matter for the Court of Appeal to decide.
>
> D. *Appeal Against the Sentence Imposed by the Court of Appeal*
>
> [62] Having restored Mr. MacDonald's conviction under s. 95(1), this Court is not in a position to consider the Crown's appeal against the sentences imposed by the Court of Appeal on the charges under ss. 86(1) and 88(1). Because the Court

> of Appeal acquitted Mr. MacDonald on the charge under s. 95(1), it did not consider his argument that the mandatory minimum three-year sentence provided for in s. 95(2)(a)(i) is unconstitutional. Given the decision to restore Mr. MacDonald's conviction on this count, the matter should be remitted to the Court of Appeal for consideration of this argument. Because of the close factual tie between the sentences imposed for the convictions under ss. 86 and 88 and the one imposed for the conviction under s. 95, the Court of Appeal should reconsider all the sentences together after deciding whether s. 95(2)(a)(i) is constitutionally valid.

[91] It is with this background I turn to the sole remaining issue: what is a fit and proper sentence for these offences in light of the circumstances of the offence and those of the offender, without the existence of the three year mandatory minimum?

POSITIONS OF THE PARTIES

[92] The Crown says a substantial period of incarceration is required for the s. 95(1) offence. She says the sentence of three years imposed by the trial judge, (and his later comment that he would have given penitentiary time in any event), are sentences within the range identified by the Ontario and British Columbia Courts of Appeal. Three years' incarceration should be imposed regardless of the mandatory minimum.

[93] For the ss. 86 and 88 offences, the Crown says the majority's reduction to time served was dependent on the quashing of the s. 95(1) conviction. Since that conviction has now been restored, those sentences should be reconsidered.

[94] On the reconsideration, the Crown urges that the original sentences be restored. The Crown says the trial judge made no error in principle. Although the majority decision found the sentences imposed by the trial judge to be "too harsh" and well outside the range, at least some of the cases relied upon by the majority are in fact distinguishable. Hence, it cannot be concluded that the sentences imposed by the trial judge were demonstrably unfit.

[95] The appellant submits that the appropriate sentence for the s. 95(1) offence should be one of time served. The rationale for this submission is based on a combination of factors. He points out that the circumstances are unique because of the appellant's honest but mistaken belief that he was authorized to possess the gun in his home in Halifax. This makes the conduct of the appellant on the s. 95(1) charge situate at the lower end of the continuum as discussed in *Nur*, 2013 ONCA 677. He also relies on the fact that the appellant, before, and in the three and a half

years since conviction, has been a model citizen, demonstrating that he is not at all criminally oriented. Furthermore, he has served the entirety of the sentences imposed, including the two years' probation ordered by this Court.

[96] The appellant argues that there is no basis to change what he says were fit and proper sentences for the ss. 86 and 88 offences—that the addition of the s. 95(1) conviction does not aggravate the conduct covered by the other offences.

ANALYSIS

[97] I am in essential agreement with the position of the appellant about the appropriate disposition in these unusual circumstances. The appellant should be sentenced to time served.

[98] The Chief Justice concludes that there is no reason to revisit the time served dispositions on the ss. 88 and 86 offences, but would order 18 months incarceration for the s. 95 offence. With respect, there is a logical disconnect between these two conclusions. I will explain, and then set out in more detail my reasons for arriving at my proposed disposition.

[99] The Chief Justice cited the well-known principle that absent an identifiable error in law or principle, deference is owed to the trial judge who must balance the oft competing principles and purposes of sentencing to arrive at a fit sentence in light of the circumstances of the offence and those of the offender. From this premise, my colleague quotes the trial judge, who in the course of giving reasons for rejecting the constitutional challenge to the mandatory three year minimum sentence, said that his likely sentence would have been one in a federal penitentiary for the s. 95 offence "in any event" (see ¶ 52 above).

[100] My colleague then quotes (at ¶ 54 above) from the trial judge's reasons where he set out his reasons for rejecting a request for a conditional discharge. Included in that quote is the trial judge's reference to the cases relied upon by the Crown where significant periods of incarceration have been imposed for section 95 offences. The trial judge acknowledged that in most, if not all of those cases, the offenders had significant criminal records. What seems to have swayed the trial judge is the fact that the appellant had the gun in his hand.

[101] From this, the Chief Justice writes: " I therefore accept the judge's two-year range as an appropriate starting point" (¶ 55). With respect, the trial judge did not conclude that a sentence of two years' incarceration was the starting point.

[102] After the trial judge expressed his concern over the fact that the appellant actually had the gun in his hand, the judge referred to other situations where he said the Nova Scotia Court of Appeal had dealt with other offences where public safety was at risk. These included robbery, trafficking in cocaine, and break and enters into homes. He then referred to the case law that set out the analytical framework for a s. 12 *Charter* challenge.

[103] At this point, the trial judge said:

> Given my earlier comments, **the range of sentence here is one of incarceration from whatever, it could be a number of months to what the Crown is seeking, a three-year sentence.**
>
> The circumstances of this particular offence are the use of a loaded firearm in a condominium where other people could be found possibly to be present or to travelling in either as residents or having business with residents. The lives of the officers present were at risk. This case demands a significant period of incarceration because of that risk to the public.
>
> [Emphasis added]

[104] As described earlier (¶ 76 above), the trial judge concluded that a fit and proper sentence for the s. 86 and s. 88 offences were two and three years' incarceration, concurrent. He then imposed three years for the s. 95 offence, also to be served concurrently.

[105] There are well recognized limits to the general admonition to defer to sentencing decisions reached by a trial judge. If a trial judge errs in law or principle, deference dissipates in relation to the discretionary decision reached (see *R. v. Hawkins*, 2011 NSCA 7 at ¶ 43; *R. v. Bernard*, 2011 NSCA 53; *R. v. Brunet*, 2010 ONCA 781; *R. v. MacDonald*, 2009 MBCA 36; *R. v. Provost*, 2006 NLCA 30; and *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.).

[106] In addition, if a trial judge imposes a sentence that is outside the range, it may be unreasonable as either manifestly excessive or inadequate. It is not a "fit sentence".

[107] *R. v. Shropshire*, [1995] 4 S.C.R. 227 was the first case decided by the Supreme Court of Canada on the appropriate standard of review of a trial judge's sentencing decision. Iacobucci J. wrote the unanimous reasons for the full Court. He adopted the approach earlier articulated by the Nova Scotia Court of Appeal. He wrote:

> [47] I would adopt the approach taken by the Nova Scotia Court of Appeal in *R. v. Pepin* (1990), 98 N.S.R. (2d) 238 and *R. v. Muise* (1994), 94 C.C.C. (3d) 119. In *Pepin*, at p. 251, it was held that:
>
> > ... in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.
>
> [48] Further, in *Muise* it was held at pp. 123-24 that:
>
> > In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate ...
> >
> > ...
> >
> > The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. ... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.
> >
> > ...
> >
> > [50] Unreasonableness in the sentencing process involves the sentencing order falling outside the "acceptable range" of orders. ...

(See also: *R. v. McDonnell*, [1997] 1 S.C.R. 948 at ¶ 30; *R. v. W. (G.)*, [1999] 3 S.C.R. 597 at ¶ 19; and *R. v. L.M.*, [2008] 2 S.C.R. 163 at ¶ 14.)

[108] It is important to acknowledge that deciding a fit and proper sentence is not a science; there may not be a "single appropriate sentence for a similar offender and a similar crime" (*R. v. C.A.M.*, [1996] 1 S.C.R. 500 at ¶ 92). Furthermore, a sentence that falls outside the range can nevertheless be upheld if that departure is in accord with the principles and objectives of sentencing (*R. v. Nasogaluak*, 2010 SCC 6 at ¶ 44).

[109] As described earlier, the majority reasons for judgment in the first appeal (2012 NSCA 50) concluded that the sentences of three and two years' incarceration were demonstrably unfit. Eighteen and fourteen days concurrent were substituted. The Chief Justice in the present appeal concludes that there is

nothing to add or detract from his initial analysis. Those substituted sentences would stand.

[110] Without reference to the principles and purposes of sentencing, or the appropriate range for the s. 95 offence, my colleague says he defers to the trial judge's view that the starting point is two years. From that goalpost, weight is given to the fact that the appellant's original sentence date was 3 ½ years ago, he has served 16 days, and completed the two year term of probation. This reduces the appropriate sentence to one of 18 months' incarceration, going forward (¶ 56).

[111] With respect, I am unable to agree. First, I do not see that we owe deference to the trial judge's opinion of the appropriate range of sentence. That issue is one of law; after all, one of the roles for appellate courts is to minimize the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada (*R. v. C.A.M., supra* at ¶ 92) — which must include a determination as to what is the appropriate range of sentence.

[112] Secondly, the trial judge, as I detailed earlier (¶ 103), did not find that the range or starting point for sentence was one of two years. He described the range of sentence as being between a number of months and three years.

[113] Lastly, the trial judge was not required to wrestle with the complicated issue as to what would be the range of sentence for the s. 95 offence absent the mandatory minimum sentence of three years. He was of the view that in the particular circumstances, the three year minimum would not be grossly disproportionate in light of the range of sentence for the same offence committed by the same offender in the absence of the mandatory minimum.

[114] My colleague agrees with this conclusion. I also would agree, with one proviso— that the range of sentence to be utilized in the particularized analysis for the appellant is grounded in the range of sentence created by the one year mandatory minimum triggered by the Crown election to proceed by indictment. This was the approach used by Code J. in *Nur* (2011 ONSC 4874 at ¶ 46 et seq.), and endorsed by the Ontario Court of Appeal (2013 ONCA 677 at ¶ 105-6).

[115] But this Court's conclusion that the three year mandatory minimum is unconstitutional creates a conundrum. Are we to craft a sentence for the appellant as if the three year mandatory minimum has resurrected the one year mandatory minimum; or are we to determine a fit and proper sentence without regard to any mandatory minimum, but with due regard for the seriousness of the offence?

[116] In my view, it must be the latter. Neither party made any specific submissions on this question. Certainly, the Crown did not suggest that the declaration of invalidity had the effect of resurrecting the previous legislation that mandated a one year minimum.

[117] The order of this Court has found the three year mandatory minimum to be inconsistent with the *Charter* and of no force or effect. In *Nova Scotia v. Martin*, [2003] 2 S.C.R. 504, Gonthier J. reviewed the consequences of declaring a law to be of no force or effect:

> [28] First, and most importantly, the Constitution is, under s. 52(1) of the Constitution Act, 1982, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". **The invalidity of a legislative provision inconsistent with the Charter does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. . . .**
>
> [Emphasis added]

[118] More recently, Chief Justice McLachlin in *R. v. Ferguson*, 2008 SCC 6 elaborated on the effect of a declaration of invalidity. Where there is no request to sever or read in language to bring legislation in compliance with the *Charter*, the declaration of invalidity removes the offending provision from the statute books. Writing for the full Court, she said:

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

[Emphasis added]

[119] I do not see that the removal from the statute books of the mandatory minimum of three years revives the previous law that mandated a one year minimum for s. 95 offences proceeded with by indictment. That provision was repealed by its replacement (*Tackling Violent Crime Act*, S. C. 2008, c. 6, s. 8(2)). Assuming that the declarations of invalidity by the Ontario Court of Appeal in *Nur* and by this Court are upheld, it is up to Parliament to decide how it wants to respond.

[120] What then is the appropriate range of sentence? I acknowledge that ordinarily a conviction for a s. 95 offence, where the Crown has proceeded by indictment, prior to the three year minimum, would routinely attract sentences of at least 12 months' to lengthy periods of incarceration in a federal penitentiary.

[121] The reasons for this are evident. The additional prohibition against possession of a restricted or prohibited weapon that is loaded, or with readily accessible ammunition, was a new offence introduced by the *Firearms Act*, S.C. 1995 c. 39, s. 139. If prosecuted by indictment, the maximum sentence was ten years, and the minimum, one year. If the Crown proceeded summarily, there was no minimum, and the maximum was one year.

[122] Furthermore, where the Crown did proceed by indictment, the circumstances of the offence were typically very serious. The possession was usually accompanied by circumstances indicating active involvement in either a violent offence or serious criminality, with the offender possessing a considerable criminal record.

[123] However, where the circumstances of the offence were arguably less serious and the offender of previous good character, the Crown proceeded by summary conviction. In these types of cases, discharges, fines, conditional sentences or short periods of incarceration are the norm. The following cases, in chronological order, are illustrative:

> *R. v. Scales*, 2001 BCSC 1693. Police saw two men run from a car. A loaded 9 mm handgun dropped from the offender's pants when he was handcuffed by police. The twenty-two year old accused had no criminal record, Grade XII education, and had competed nationally and internationally in karate competitions. The offender pled guilty to possession of a loaded restricted firearm. The trial judge fined him $300 and

placed him on probation for one year. The offender appealed, seeking a conditional discharge. The appeal to the Summary Conviction Appeal Court was dismissed.

R. v. Snobelen, [2008] O.J. No. 6021 (Ont. C.J.). Mr. Snobelen purchased a ranch in Oklahoma in October 2001 which included all equipment and contents (including guns and ammunition). He sold the ranch two years later, and the belongings were trucked back to Canada. Snobelen was unaware of the guns. He was unpacking items three to four months later when he found the handgun. He intended to dispose of it, but did not deal with it. He left it in a night table and a dresser until the summer of 2004; when he noticed the gun was missing he assumed his wife had disposed of it.

At that time, he was having difficulties in his marriage. His wife, on the advice of a friend, hid the handgun. In January 2007 she went to the police and advised them of the existence of the weapon. Police executed a search warrant, and Snobelen presented himself and gave an inculpatory statement. He pled guilty to careless storage of a firearm and the charge under s. 95 of the *Code*. Snobeldon was a former elected member of the Provincial Parliament, with no criminal record. The trial judge granted him an absolute discharge and imposed a victim fine surcharge of $1500.

R. v. Beaman, 2010 NBQB 103. Police executed a search warrant at Mr. Beaman's property where they found a .22 caliber semi-automatic handgun, over $10,000 in cash, and approximately one pound of marijuana. The gun was found in a garage. Mr. Beaman was a collector, and there is no evidence that it had any connection with any criminal activity. He did have a dated criminal record. He pled guilty to possession of a prohibited weapon with readily accessible ammunition (s. 95) and possession of the marijuana. The gun and $7000 were ordered forfeited. The trial judge imposed a three month conditional sentence (s. 95), and a five month conditional sentence (marijuana) for total of eight months.

R. v. Kurkcuoglu, 2010 BCSC 633. The accused pled guilty to one count of possession of a loaded prohibited firearm. He was sentenced to a $100 fine, a victim fee surcharge and a mandatory weapons prohibition order. He appealed, seeking a conditional discharge. The appellant owned a jewellery store. He obtained the gun followed a previous robbery on his store. The loaded gun (.357 magnum) was stored under the counter. During an armed

robbery, a robber aimed a shotgun at the chest of the appellant's son. The appellant grabbed his gun and struggled with one of the robbers. Two shots were discharged from the appellant's gun; one was never found and the other went into the ceiling to try to scare off the robbers. The Summary Conviction Appeal Court substituted a sentence of a conditional discharge plus one year probation for the fine.

R. v. Tessman, 2010 ABPC 184 The accused and his former partner separated after a seven year relationship. He called her and asked to come by to pick up a few things, including his loaded gun. She declined. The next morning, she woke up to find him in the home in possession of a loaded sawed-off shotgun. The partner, her mother and three children were in the house at the time. He refused to give up the gun. Police were called and surrounded the house. All the children were able to leave voluntarily. The accused did not threaten anyone or confine anyone within house. He voluntarily surrendered seven hours later.

The police found five other firearms in the house. The accused had no licence to possess any of the weapons. The accused pled guilty to possession of a loaded prohibited firearm and possession of a weapon for a purpose dangerous to the public peace. At the time of the offence, he had a conviction for driving over .08 and for dangerous operation of a motor vehicle and was on probation and a peace bond. The trial judge imposed a sentence of 3 months imprisonment for both offences, to be served concurrently, followed by 3 years' probation. The accused had spent the equivalent of 9 months in pre-sentence custody.

R. v. Carbone, 2012 ONCJ 22. The two accused imported and distributed tobacco products into and across Canada legally. Ontario Ministry of Revenue was concerned that one of the accused's companies breached the *Tobacco Tax Act* with respect to the filing of tax returns.

A search warrant was executed. Two prohibited firearms and ammunition were discovered in the office. Eighteen months previously, the two accused had been seriously threatened, reported it to the police, and out of fear, decided to purchase illegal guns. One gun was unloaded with ammunition in a separate drawer in the same cabinet. The other, a 9mm semi-automatic was loaded and found in a backpack under one offender's desk. Neither accused had criminal record. Both were involved in the community. The

trial judge imposed a sentence of 60 days imprisonment, to be served intermittently, plus 18 months' probation.

R. c. Gardner, 2013 QCCQ 318. The accused pleaded guilty to production of cannabis and possession of a restricted firearm with ammunition (s. 95). Police seized eight cannabis plants, 16.7 g of marihuana and sums of money totalling $3,000. They also found a revolver in the master bedroom. The accused worked in a pub, had another part-time job and was working towards a secretarial diploma. The accused, who was a first offender, sought an absolute discharge. Marchard J.C.Q. stated that under the circumstances, an absolute discharge was not warranted. The trial judge granted the accused a conditional discharge with respect to both offences, with probation for 9 months and 50 hours of community service.

R. v. Laponsee, 2013 ONCJ 295. The Crown proceeded by indictment. The trial judge struck down the mandatory minimum provision. The offender was convicted of a variety of firearms related offences. He went to the Ottawa airport to board a flight to Calgary. When his duffel bag (a checked piece of luggage) was screened, they found a .22 Smith and Wesson handgun, an empty clip, and a box of .22 caliber bullets wrapped between two licence plates. The gun was not registered. He was found guilty of transporting a firearm in a careless manner (s. 86(3)); possessing a firearm without a licence (s. 91(3)); possessing an unloaded restricted weapon with readily accessible ammunition (s. 95(2)); attempting to take on board a civilian aircraft an offensive weapon and an explosive substance (ammunition) without the consent of the owner (s. 463(b)). The offender at one time had a possession and acquisition licence for a restricted weapon, but it had expired. He was 48 with no criminal record and was a good employee. There was no hint his possession of the restricted weapon had any suggestion of criminality. The trial judge imposed a one-year conditional sentence for the s. 95(2) offence, and a six months' conditional concurrent sentence on all of the other offences.

R. v. Adamo, 2013 MBQB 225. The police executed a search warrant at a home in Winnipeg where the offender lived with his elderly mother. The object of the warrant was a .32 calibre gun and ammunition. The police believed the offender to be in possession of these items. They were found in an unlocked backyard shed, along with a list of names of different gang members. A bulletproof vest was also seized from the house. The offender

> had a criminal record spread out over 14 years, ranging from mischief to uttering threats, possession for the purpose of trafficking, and aggravated assault. At the time of the offence, he suffered from significant cognitive impairment. He had suffered a severe brain trauma caused by being beaten with a baseball bat by two members of the Hell's Angels. At trial, the accused was convicted of s. 95(1) and possessing a firearm while prohibited from doing so (s. 117.01(1) of the *Code*).
>
> The trial judge struck down the mandatory three year minimum because it precluded consideration of the reduced moral blameworthiness of a mentally disabled offender such as the accused. As to the appropriate sentence, the trial judge considered six months' imprisonment to be appropriate, which in light of the almost seven months' pre-trial custody, was already served. Three years' probation was also ordered.

[124] I recognize that in all of these cases (other than the last two), the Crown proceeded summarily, whereas in the case at bar, it elected to proceed by indictment. But the fact the Crown has proceeded by indictment cannot be, by itself, an aggravating factor that is given weight by a Court in the process of arriving at a fit sentence. The mode of election certainly impacts procedure and the maximum sentence that is available, but plays no role in the process of considering the purposes and principles of sentencing and applying them to the circumstances of the offence and those of the offender.

[125] The election by the Crown is usually made before the facts that reveal the circumstances of the offence are crystallized. The evidence at trial or at a sentence hearing may shed considerably more light on the actual circumstances of the offence and those of the offender, revealing a much more egregious factual matrix, or as in this case, much less so. This reality was recognized by Doherty J.A. in *R. v. Nur* at ¶ 156-8, and accepted by my colleague (see ¶ 42 above).

[126] In this case, at the time the Crown proceeded by indictment, it was thought that the appellant had deliberately pointed the loaded, cocked handgun at Sgt. Boyd, who then had to engage in a life and death struggle with the appellant to disarm him. The trial judge found otherwise. He accepted that the appellant did not point, or otherwise use the weapon to assault Sgt. Boyd. The judge further accepted the appellant's evidence that he had done his best—apparently successfully—to ensure the gun was neither dropped nor pointed at anyone during the 10 second struggle that Sgt. Boyd described.

[127] Furthermore, as described earlier, the appellant had an honest but mistaken belief that he was authorized to possess the restricted firearm at his residence in Halifax. One can doubt the wisdom of such a belief. But support for it can be found in the evidence, and it is uncontradicted by any other evidence.

[128] The appellant testified that he had joined the Nova Scotia Rifle Association, and as a member could take his firearms to the local facility for competitions and practices. He also testified that he had travelled to Halifax with the Beretta via Air Canada, having properly packaged and declared the gun—and that he had done so before. There was no challenge to this evidence.

[129] These facts lend support to his belief that he complied with the law on where he could transport and possess the restricted firearm. Moreover, he was a fully trained individual, licensed and authorized to possess a number of firearms, restricted and otherwise. His evidence was unchallenged that he had, and used, all of the appropriate equipment in terms of trigger guards and cases to safely transport and store his firearms and ammunition.

[130] Nonetheless, the Crown advocates that the trial judge's sentence of three years was within the "range of sentence" for the appellant identified by the British Columbia Court of Appeal in *R. v. Ball*, 2014 BCCA 120 and by the Ontario Court of Appeal in *Nur*, and argues we have no basis to intervene. With respect, I do not agree.

[131] It is important to recognize what is meant by the "range of sentence". It is not the available minimum and maximum sentences that could legitimately be imposed. As Bateman J.A. explained in *R. v. Cromwell*, 2005 NSCA 137, it has a much more nuanced meaning:

> [26] Counsel for Ms. Cromwell says this joint submission is within the range. He broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. **In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender** ("... sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in *R. v. Mafi* (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.
>
> [Emphasis added]

(See also *R. v. A.N.*, 2011 NSCA 21 at ¶ 34)

[132] With this in mind, I turn to the cases relied upon by the Crown.

[133] In *R. v. Ball, supra*, the British Columbia Court of Appeal accepted its earlier determination in *R. v. Borecky*, 2013 BCCA 163 that the range of sentence for a s. 95 offence, absent the mandatory minimum of three years, was between 18 months and 7.5 years. It is plain in examining the cases relied upon in *Borecky* to establish the range for those offenders involved conduct of the more serious nature, typically associated with a s. 95 offence— involvement in the drug trade, gangs or other serious criminality.

[134] In *Nur*, the Ontario Court of Appeal accepted the trial judge's identification of the appropriate range of sentence, absent the three year minimum, as being between two years less one day and three years (¶ 108-9). Code J. was the trial judge. He summarized a number of cases that he found the most helpful in determining the range of sentence. In each case, there was a mandatory minimum sentence of one year, and a variety of aggravating factors (¶ 43).

[135] This fact, and the necessarily fluid nature of a "range" was recognized by Justice Code. He explained:

> [45] I should note that the "range" of two years less a day to three years imprisonment, suggested by the above line of cases, is precisely that, a "range". The effect of a "range" of appropriate sentences for a particular offence is not the same as a mandatory minimum sentence or a maximum sentence. A "range" is simply a flexible guideline for the normal case. It assists in achieving "parity", but without sacrificing "proportionality"**.** Departures from the "range" can be justified, by particularly strong aggravating or mitigating circumstances. Furthermore, there will always be unusual, rare or exceptional cases which, by definition, fall outside the normal "range". **The above line of cases all involved accused who possessed loaded handguns for some unlawful purpose and where the Crown elected to proceed by indictment.** As will be seen below, there are cases where handguns are possessed for lawful self-defence, but have simply not been licensed for that purpose. There are also cases where handguns can be and have been lawfully possessed under the regulatory licensing provisions of the *Firearms Act* but, due to some brief violation of the regulatory regime, the accused's possession has become unlawful. These are all cases that would fall outside the normal "range" and where the Crown could properly proceed by way of summary conviction, in which case there is no mandatory minimum sentence. The case at bar is not one of these cases that fall outside the "range". The accused Nur should be sentenced within the normal "range" for this kind of offence and

> offender. See: *R. v. Wright* (2006), 216 C.C.C. (3d) 54 at paras. 16-24 (Ont. C.A.); *R. v. Jacko and Manitowabi* (2010), 256 C.C.C. (3d) 113 at paras. 82 and 89-90. (Ont. C.A.).
>
> [Emphasis added]

[136] The very broad range of conduct captured by s. 95 was also commented on by Doherty J.A. in *Nur*:

> 51 The scope of s. 95 is best understood by considering the range of potential offenders caught by that section. At one end of the spectrum stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. By any reasonable measure, this person is engaged in truly criminal conduct and poses a real and immediate danger to the public. **At the other end of the spectrum stands the otherwise law-abiding responsible gun owner who has possession of an unloaded restricted or prohibited firearm, but with readily accessible ammunition stored nearby. That person has a licence and registration certificate for the firearm, but knowingly possesses the firearm at a place that falls outside of the terms of that licence. That person's conduct may well pose little, if any, risk to others. I would characterize that misconduct as more in the nature of a regulatory offence.**
>
> [Emphasis added]

[137] I do not mean to suggest that the appellant committed a mere regulatory offence. It was unreasonable for him to believe that he needed to load the gun and take it with him to the door. The trial judge found this to be the case, and I agree.

[138] On the other hand, this case is one of the "unusual, rare or exceptional cases" referred to by Justice Code (see ¶ 135 above). The appellant was licensed to lawfully possess the restricted handgun (and other firearms), and did not knowingly possess the gun at a place that fell outside the terms of his licence. That mistake of law is a significant mitigating factor.

[139] My colleague proposes a sentence of 18 months' incarceration without reference to the purpose and principles of sentencing or to sentences imposed on similar offenders for similar offences committed in similar circumstances. Instead, he relies on deference to the trial judge's reasons to arrive at that sentence.

[140] The trial judge sentenced the appellant pursuant to the mandatory minimum. I see no reason to defer to the three year concurrent sentence he imposed; nor, for the reasons set out earlier, to his reference to what he might have imposed "in any event".

[141] In my respectful view, such a sentence is not in accord with the principles of sentencing, nor within the appropriate range; nor, with respect, is one of 18 months incarceration.

[142] The *Criminal Code* was amended in 1996. The purpose and principles of sentencing were no longer the sole province of case law. Parliament codified what is to guide courts in arriving at a fit sentence. The new provisions were:

> 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.
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
>
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
>
> (v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[143] None of the statutorily defined aggravating factors are relevant. There are a number of mitigating factors. The appellant has never been in trouble with the law. Although he did not progress very far in terms of formal education, he has pursued what appears to be a successful career in a highly skilled field. He has complied with restrictive bail conditions following his arrest in December 2009. He has spent some 18 days in pre and post-trial custody. He has completed his two year probationary term, subject to a variety of conditions without incident. He has lost his restricted firearm and is prohibited from being able to participate in his life-long hobby of hunting and gun competitions.

[144] I do not overlook the aggravating fact that the conduct of the appellant in loading and taking the restricted gun with him to the door, and then opening the door with the gun partially secreted behind his back, was an unreasonable response to his claim of a perceived threat. It created a dangerous situation. That morally blameworthy conduct is covered by the offence of possessing a weapon for a purpose dangerous to the public peace (s. 88) and careless handling of the firearm (s. 86).

[145] There was no need at trial, nor at this stage, to craft a sentence to specifically deter the appellant. He has shown by his life before and since these proceedings to be a productive and normally law abiding citizen. Rehabilitation was important. There were hints that consumption of alcohol likely triggered his behaviour that night. For more than four and one-half years, that issue has been addressed through bail conditions, and by the terms of the probation order that mandated

assessment and counselling, and prohibited the appellant from possession or consumption of all intoxicating substances.

[146] This leaves general deterrence and denunciation. They are relevant objectives and cannot be overlooked. However, people who are involved in criminality will not likely be deterred by any sentence this Court may impose on the appellant. On the other hand, normally law abiding citizens who lawfully possess firearms must know that lawful possession is not a licence to load and bring such weapons to the door. Such conduct deserves to be denounced and deterred.

[147] It has been, by the prosecution of these offences, the findings of guilt, his service of incarceration, two years' probation, the impact of the ancillary orders forfeiting the handgun, a ten year prohibition of any firearm, and lifetime prohibition from possessing any restricted firearm.

[148] In arriving at sentence, Parliament has mandated that a court shall take into account the principles set out in s. 718.2 of the *Code*. I have quoted the full section above (¶ 142). None of the aggravating factors are relevant. The principles of parity and restraint must be considered. For convenience, I repeat them:

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[149] As I described earlier, offenders with no prior record who have violated s. 95(1) (where there is no mandatory minimum) have received sentences that range from discharges or fines, up to relatively short periods of incarceration. In light of the need to denounce the conduct of the appellant and ensure those who lawfully possess firearms understand the consequences, I would have thought at trial a relatively short period of incarceration plus probation would have been appropriate for his overall conduct that night. I offer no comment as to whether the incarceration could be ordered to be served by way of a conditional sentence order. Whether such an option is now available was not argued by any of the parties. I therefore leave that issue to another day.

[150] But our task is not to impose sentence as if we were the trial court. It is to reconsider all of the sentences together after determining the constitutional validity of the three year mandatory minimum and to impose sentence, knowing what we know today.

[151] I have earlier set out the mitigating factors that are present. The sole aggravating factor is the danger that the appellant created by loading his handgun in response to the pounding and kicking at his door. Fortunately, there was no actual harm was caused by his unreasonable conduct.

[152] Courts are required to consider the principles of parity and that of restraint (s. 718.2). As explained in *R. v. Batisse* (2009), 93 O.R. (3d) 643 (C.A.) the principle of restraint requires the court to consider all sanctions apart from incarceration, and where incarceration must be imposed, the term should be as short as possible and tailored to the individual circumstances of the accused (¶ 33).

[153] The circumstances that come closest to those of the appellant, and to the circumstances of the offence, would indicate a range of sentence from a non-custodial sentence to one of a relatively short period of incarceration.

[154] My colleague would leave as is the previous sentences imposed for the ss. 86 and 88 offences—time served and the probation order already served. I agree. But I see no significant additional morally blameworthy conduct by virtue of the reinstatement of the conviction for the s. 95(1) offence. The appellant honestly but mistakenly believed he was lawfully entitled to transport, and then possess the gun, with readily accessible ammunition at his home in Halifax.

[155] An honest but mistaken belief is usually a mitigating factor (per Lebel J. *MacDonald*, *supra*, ¶ 61; see also, *R. v. Liwyj*, 2010 CMAC 6 ¶ 55). I see no reason why it would not be so in this case. In these unusual circumstances, and considering the history of these proceedings, no additional penalty is warranted.

[156] I would impose a sentence of time served for the s. 95 offence and leave unchanged our earlier dispositions for the ss. 86 and 88 offences.

Beveridge, J.A.