PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Adwan*, 2021 NSPC 64

Date: 20211117
Docket: 8305023, 8305024, 8302580, 8302579, 8305013, 8305014, 8305015, 8302591, 8302594
Registry: Amherst, NS

Between:

Her Majesty the Queen

v.

Bashar Mohammad Adwan and Mohammad Alharoun

DECISION ON SENTENCE AND ON MOTION BY THE DEFENDANTS UNDER SS. 7, 12 AND 52 OF THE CHARTER

Judge: The Honourable Judge Rosalind Michie

Decision: November 17, 2021

Charges: *Revenue Act* 39(1)(A), *Revenue Act* 39(1)(B), *Criminal Code* 121.1(1), *Excise Act* 32(1);
Revenue Act 39(1)(A), *Revenue Act* 39(1)(B), *Revenue Act* 40, *Criminal Code* 121.1(1), *Excise Act* 32(1)

Counsel: Mr. Paul Drysdale, for the Provincial Crown
Mr. Scott Millar, for the Federal Crown
Mr. Godfred Chongatera, for the Defence

By the Court

[1] The Accused, Bashar Mohammad Adwan, was charged in an Information sworn on January 16, 2019, that he did:

> *On or about November 19th, 2018 at, or near Saltsprings, Cumberland County, Nova Scotia, on or about the 19th day of November, 2018, did have in his/her possession tobacco on which tax had not been paid, contrary to section 39(1)(a) of the Revenue Act, thereby committing an offence contrary to section 85 of the Revenue Act, S.N.S. 1995-96, C. 17, as amended;*
>
> *AND FURTHERMORE at the aforesaid time and place did have in his/her possession tobacco not bearing the prescribed markings, contrary to section 39(1)(b) of the Revenue Act, thereby committing an offence contrary to section 85 of the Revenue Act S.N.S. 1995–96, C. 17, as amended.*

[2] Mr. Adwan was also charged in an information sworn on January 4, 2019, that he did:

> *On or about the 19th day of November 2018 at, or near Saltsprings, Nova Scotia, did transport and have in his possession for the purpose of sale a tobacco product that is not packaged, unless it is stamped and thereby committing an offence contrary to section 121.1 (1) of the Criminal Code.*

[3] Mr. Mohammed Alharoun was charged in an information sworn on January 16, 2019, that he did:

> *On or about November 19th, 2018 at, or near Saltsprings, Cumberland County, Nova Scotia, on or about the 19th day of*

> *November, 2018, did have in his/her possession tobacco on which tax had not been paid, contrary to section 39(1)(a) of the Revenue Act, thereby committing an offence contrary to section 85 of the Revenue Act S.N.S. 1995-96, C. 17, as amended;*
>
> *AND FURTHERMORE at the aforesaid time and place, did have in his/her possession tobacco not bearing the prescribed markings, contrary to section 39(1)(b) of the Revenue Act, thereby committing an offence contrary to section 85 of the Revenue Act S.N.S. 1995-96, c. 17, as amended;*
>
> *AND FURTHERMORE at the aforesaid time and place, did transport tobacco without being in possession of a bill of lading, waybill or document showing the origin and destination of the tobacco, in contravention of Section 40 of the Revenue Act S.N.S. 1995-96, c. 17, as amended, thereby committing an offence contrary to Section 85 of the Act.*

[4] Mr. Alharoun was also charged in an information sworn on January 4, 2019, that he did:

> *On or about the 19th day of November 2018 at, or near Saltsprings, Nova Scotia, did transport and have in his possession for the purpose of sale a tobacco product that is not packaged, unless it is stamped and thereby committing an offence contrary to Section 121.1(1) of the Criminal Code.*

[5] Both accused were also charged on separate Informations sworn January 4, 2019, that they did:

> *On or about the 19th of November 2018 at, or near Saltsprings, Nova Scotia did unlawfully have in his possession unstamped tobacco product contrary to section 32(1) of the Excise Act, 2001, S.C. 2002, c. 22, and thereby commit and offence contrary to section 216(1) of the said Act.*

[6] It was agreed in advance of trial that a single trial was to be held on all charges for both accused persons.

[7] A *Charter* motion was filed by defence alleging breaches of both accused's *Charter* rights under sections 8, 9, 10(a) and(b) of the *Charter*. It was agreed by counsel that the evidence could proceed by way of blended *voir dire* wherein the evidence given during the *Charter voir dire* would also be evidence at the trial.

[8] At the conclusion of the *voir dire*, I denied the requested *Charter* relief and ruled that all evidence would be admissible at trial.

[9] After some COVID 19 delays, the trial was concluded on October 30, 2020. I gave an oral decision on December 3, 2020 which is followed by a written decision issued January 7, 2021 wherein the accused were found guilty of all charges. Defence counsel gave notice at that time they intended to challenge the mandatory minimum penalties applicable under both the *Excise Act* and the *Revenue Act*, pursuant to sections 7 and 12 of the *Charter*, alleging that the penalties constitute cruel and unusual punishment contrary to the principles of fundamental justice.

[10] Formal notice of motion was filed by the defence, and I received sentencing submissions and argument on the *Charter* motion in the form of briefs from defence counsel and both the federal and provincial Crowns. Counsel made closing

submissions orally on September 14, 2021, and I reserved decision at the conclusion of submissions. I would like to thank counsel for the submissions and briefs that were provided. They were very helpful.

Issues

1. Have the applicants met the burden of establishing, on a balance of probabilities, that the sentencing provisions of the *Excise Act* and the *Revenue Act*, 2001 constitute cruel and unusual punishment pursuant to sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*?
2. What is the appropriate sentence for these offences?

Position of the Parties

[11] Mr. Chongatera, on behalf of the offenders, submits that the minimum fine provisions of the *Excise* and *Revenue Acts* are not *Charter* compliant and must therefore be struck down, and that the defendants should instead be sentenced to an absolute discharge with respect to s. 121.1(1) and that the Court should reduce the fines and give the defendants up to three years to pay as a starting point.

[12] Both the federal and provincial Crown submit that the applicants have failed to establish that the sentencing provisions of the *Excise Act, 2001* and the *Revenue Act* infringe ss. 7 or 12 of the *Charter*.

[13] The provincial Crown submits that an appropriate sentence is:

a. For each offender, in relation to the offence of possession of tobacco on which tax has not been paid, contrary to s.39(1)(a) of the *Revenue Act*, the minimum fine of $134,956.00. In default of payment, a term of incarceration of not more than 180 days
b. The charges contrary to s.39(1)(b) and s.40 of the *Revenue Act* should be stayed pursuant to the *Kienapple* principle.
c. In relation to the offence contrary to s.121.1 of the *Criminal Code,* a suspended sentence and probation for a period of 12 months.

[14] The federal Crown submits that an appropriate sentence for the offence contrary to s.32(1) of the *Excise Act* is the minimum fine of $38,404.80 for each offender and forfeiture of the $2600.00 seized from the offenders at the time of the offence.

The Facts

[15] The facts were detailed in the trial decision. The relevant facts surrounding the circumstances of the offence can be summarized as follows:

- The offenders were travelling eastbound on Highway 104 in Cumberland County when they were stopped by an RCMP officer for speeding.

- The offenders were travelling in a rented SUV with tinted windows and blinds on the rear windows.

- The offenders were found in possession of the following:

    i. Sixteen cases of tobacco, each containing 50 cartons of contraband tobacco, with 200 cigarettes per carton, plus one additional package of 20 cigarettes for a total of 160,020 cigarettes, and,

    ii. Twenty-six $100.00 Canadian bills in an envelope.

Total Amounts of Taxes and Duties Evaded

[16] The total amounts of taxes and duties evaded by way of these offences are as follows:

- Federal duties evaded: $19,085.27

- Provincial taxes evaded: $44,032.00

Pre-Sentence Reports

[17] Pre-sentence reports were prepared by Correctional Services for both offenders. The Crown takes issue with the use that can be put to these reports and submits that there are few relevant or reliable facts contained therein that can be used for the purposes of an application for *Charter* relief.

[18] Pre-sentence reports are designed for a specific, limited purpose, to assist the Court in determining the appropriate sentence for offences and in determining whether a discharge is appropriate. The authority for their preparation and use can be found in section 721 of the *Criminal Code*, which reads as follows:

> ***721*** *(1) Subject to regulations made under subsection (2), where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused* ***for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730. (Emphasis added)***

[19] Pre-sentence reports are derived from interviews with offenders, family members, friends, employers, educational and health care providers, and other

collateral contacts who may have useful information to contribute. Essentially a broad range of information is collected to achieve the objectives set out in the *Code*.

[20] The admissibility of evidence is significantly different in a sentencing hearing than in a trial or an application for *Charter* relief. The presumption of innocence no longer applies at a sentencing hearing, and the rules of evidence are relaxed somewhat, although evidence must still meet the standard of accuracy, credibility, and reliability.

[21] If facts are not in dispute, the Court can make inferences and rely on the undisputed information. However, when facts are in dispute, as is the case in this instance, section 724 of the *Criminal Code* directs how the Court should resolve the issue. Mitigating facts must be proven on a balance of probabilities (see *R. v. Holt*, 1983, CanLII 3521 (ONCA), 4 CCC (3d) 32). More importantly, the absence of facts or evidence cannot permit a presumption for mitigating circumstances, per *Holt*, *supra*, at paragraph 11.

[22] The federal Crown submits that the pre-sentence reports contain information that consist of primarily untested, self-serving statements and that the report itself is unreliable and uncorroborated. It provides a picture of the personal circumstances of a particular offender at the time of sentence, but was not designed, nor is it suitable

as evidence in a *Charter* application, and specifically a challenge to legislation that might possibly affect the Constitutionality of legislation in this province.

[23] I agree with the Crown that the contents of the pre-sentence report are admissible for sentencing purposes only, and not as evidence to be relied upon by the Court in a *Charter* application. Evidence would have to be called by defence counsel and proven on a balance of probabilities.

[24] The Crown submits that to the extent that the pre-sentence reports provide information on sources of income, the effects of health on finances, or the circumstances of the offences, that information is disputed and inadmissible and I would agree with that contention. (See *R. v. Foster*, 2017 ABCA 66, at Paras. 34-35 and 49-50.)

[25] I have considered the argument of the federal Crown in this matter, and I am prepared to accept some, but not all of the information contained in the two pre-sentence reports in support of the applicant's s.12 *Charter* application. The facts or details in the report that I accept are what have been described by the Crown as neutral or non-contentious facts which are as follows:

[26] Mr. Alharoun:

- Mr. Alharoun is 36 years old.
- Mr. Alharoun is “always actively looking for work” and receives assistance in his job search from Immigration Services Association of Nova Scotia (ISANS)
- He attends ISANS and takes English classes there.
- He owes no outstanding fines.
- Mr. Alharoun described his overall health as ‘good’, noting he suffers from back and neck pain; he “has no mental health issues and is not prescribed medication”.
- He has no issues with alcohol, drugs, or gambling.

[27] Mr. Adwan:

- Mr. Adwan is 30 years old.
- He owns his own moving company. He enjoys his work.
- He has completed a two-year English language program.
- He has a small ($532.00) outstanding fine, he has no credit card debt, and has never been bankrupt.
- He is in “great” physical health and has no mental health issues.
- He has never tried alcohol or any illicit substance.

- He has pro-social friends who provide him positive support.

The *Charter*

[28] Section 12 of the *Charter* reads as follows:

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

[29] Section 7 of the *Charter* states:

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

[30] The *Charter* is contained within and comprises the first 32 sections of the *Constitution Act*, 1982.

[31] Section 52 of the *Constitution Act* reads as follows:

> *52. (1) The Constitution of Canada is 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 Relevant Legislation

[32] Both the *Excise Act, 2001* and the *Revenue Act* contain their own penalty provisions. Both mandate the imposition of minimum fines. The relevant penalty provisions of the *Revenue Act*, S.N.S. 1995-96, c. 17, as amended, reads as follows:

> *89(2)(b) for a first conviction, if the quantity of tobacco is greater than fifty cartons of cigarettes or capable of making cigarettes in this quantity, to*
>
> *(i) a fine of not less than twenty-five hundred dollars and not more than twenty-five thousand dollars, and*
>
> *(ii) a fine equal to three times the tax that would have been due had the tobacco been sold to consumers required to pay the tax,*
>
> *and, in default of payment, to imprisonment for a term not exceeding one hundred and eighty days;*

The Excise Act, 2001

[33] Section 32 of the *Excise Act, 2001* makes it an offence to sell, offer for sale, or possess contraband tobacco. On summary conviction, the offence is penalized under section 216(1)(b) of the *Act*, with reference to Schedule 1. It is penalized by a range of fine which is directly connected to the amount of duties that were evaded. As the federal Crown submitted in their written submissions, the formula is complex, but the result of the calculation is that the minimum fine is approximately two times; and the maximum fine is approximately three times the amount of the duties evaded.

[34] There is a $500,000.00 cap on the maximum fine that can be imposed, per s.216.

[35] Section 228 of the *Excise Act*, 2001 states as follows:

> *Despite the Criminal Code or any other law, the court has, in any prosecution or proceeding under this Act, neither the power to impose less than the minimum fine fixed under this Act nor the power to suspend sentence.*

[36] Following the calculations set out in the *Excise Act*, the range of available sentence based on the amount of tobacco seized is a fine between $38,404.80 and $57,607.20; or a term of up to 18 months imprisonment, or both fine and imprisonment.

Sentencing Contraband Tobacco Offences

[37] The federal Crown has submitted that the sentencing regime contained in the *Excise Act 2001* has withstood extensive constitutional scrutiny since its inception nearly 100 years ago. The legislation has withstood s. 12 *Charter* challenges and has been upheld in various provincial appellate courts and found not to constitute cruel and unusual punishment. See *R. v. Desjardins* (1996), 182, N.B.R. (2d) 321

(N.B.C.A), *R v. MacFarlane*, [1997] P.E.I.J. No. 116 (P.E.I. C.A.), *R. v. Calvin*, [1996] A.Q. No. 2970 (Que. C.A.).

[38] Contraband tobacco offences are, at their heart, tax offences. Cigarettes are not illegal in Canada, but the lawful sale of them attaches very high taxes.

[39] There are clear and understandable policy reasons for the high taxation rate on tobacco products. Both the federal and provincial Crowns provided reference materials attached to their sentencing briefs including backgrounders and policy statements of both the provincial and federal government with respect to the taxation of and the government's response to the trafficking of contraband tobacco.

[40] Trafficking in contraband tobacco is an economic crime which harms our economy, the public health and facilitates the harm caused by organized crime.

[41] Taxes and duties collected from the lawful sale of tobacco products are diverted back to the public purse to fund social and public health initiatives which include harm reduction programs to address the economic impact that the consumption of tobacco products has on our provincial healthcare systems. Materials and statistics demonstrating the harmful effects of tobacco consumption on Canadians was attached to the Crown materials in support of their position.

[42] The harms associated with trafficking contraband tobacco were discussed in the decision of *R. v. Allen*, [2011] N.J. No. 411 wherein Judge Gorman noted at paragraph 10 that "offences contrary to such statutes as the *Excise Act*, 2001… are offences against a democratically imposed taxation system. A modern social democracy cannot exist without the imposition and collection of taxes. Such offences therefore harm the entire community."

[43] By trafficking in contraband tobacco, offenders are profiting at the expense of the community. Public health resources are strained as tobacco use is encouraged by the trafficking of cheaper untaxed tobacco, while the taxes which are evaded are not available to fund harm reduction and public health resources.

[44] There can be no dispute that tobacco consumption is harmful to the health of the consumer. Tobacco products create a huge strain on the healthcare system, and as a result these products are heavily taxed in order to recoup at least some of the healthcare costs to Canadians that arise as a result of consumption of tobacco products.

[45] Trafficking contraband tobacco exposes Canadians to all of the resulting harm to our health and the economy with none of the recovery through taxation. The

sentencing regime contained in the *Excise Act, 2001* creates an economic penalty for an economic crime.

[46] The harms of trafficking contraband tobacco were also addressed by Parliament in 2014 with the passage of Bill C-10: An Act to amend the *Criminal Code* (trafficking in contraband tobacco) which resulted in what is now section 121.1 of the *Criminal Code*. The legislative summary in support of Bill C-10 also noted the connection between contraband tobacco and organized crime.

[47] The sentencing regime in contraband tobacco cases is designed to address that economic harm and essentially rebalance the scales.

[48] The sentencing provisions contained in the *Excise Act, 2001* have been in place for nearly a century, and have been fine-tuned over the decades that the legislation has been in place. The provincial Crown provided supplementary materials demonstrating that the sentencing regime established by the *Excise Act* 2001 has been adopted in one form or another by every province in Canada.

[49] The federal Crown submits that the sentencing regime established by the *Excise Act, 2001* is directly connected and proportional to the harm done by the trafficking of contraband tobacco and many of the available sentencing regimes that are available in Canadian law. This sentencing regime is tightly linked not only to

the harm done by the offence of trafficking contraband tobacco, but to broader taxation policies and legislation.

[50] The Crown submitted that offenders sentenced under the regime have ranged from large-scale wealthy wholesalers to people living on social assistance, to everything in between and that the amount of the fine is directly proportional to the scale of the offender's conduct. The regime is designed so that those who possess or traffic in small amounts received smaller fines and those who deal with larger amounts received larger fines.

Criminal Code Fine Provisions

[51] The provisions respecting fines are set out in sections 734 to 737 of the *Criminal Code*. Section 734 (2) provides that prior to issuing a fine, "except when the punishment for an offence includes a minimum fine," the sentencing court must be satisfied that the offender has the ability to pay the fine or discharge it by way of a fine option program.

[52] Section 734.1(c) of the *Code* requires the sentencing court to set out the period of time permitted for payment of the fine.

[53] Section 734.3 permits the offender to apply to the court for an extension of time to pay.

[54] In *R. v. Wu*, 2003 SCC 73, at paragraph 23, the Supreme Court of Canada found that the fine provisions contained in the *Excise Act* were a legislated exception to the usual sentencing principles contained in the *Criminal Code*, and that the offender's ability to pay such a fine is irrelevant.

[55] Section 736 of the *Code* provides an offender may participate in a fine options program and may discharge a fine "in whole or in part or credits for work performed during the period not greater than two years in a program established for that purpose".

[56] In Nova Scotia, a fine option program is available for any adult who has been ordered to pay a fine.

The General Principles of Sentencing Contraband Tobacco Offences

[57] The purpose and principles of sentencing are set out at section 718, 718.1 and 718.2 of the *Criminal Code*. Previous jurisprudence makes it clear that emphasis is to be placed on deterrence and denunciation when sentencing contraband tobacco cases.

[58] The Newfoundland Court of Appeal in *R. v. Noseworthy* (2000), 2000 NFCA 45, 147 C.C.C. (3d) 97 (Nfld. C.A.) noted that in contraband tobacco sentencing cases specific and general deterrence are the primary considerations. The Court noted the following at paragraph 25:

> *[25] Offences of the nature of smuggling goods that have a very high taxation component, such as alcohol and tobacco, have characteristics Parliament has seen fit to deal with in a special way. As the trial judge found, in respect of the appellant and his co-conspirator here, persons involved in such activities are usually carrying out a well-planned and organized business effort to cheat government, and therefore their fellow citizens, by achieving for themselves very large sums of money by way of unearned profits. They are seldom violent persons and protection of the public does not usually require incarceration. Parliament has thus legislated a very specific penalty, obviously designed to counteract any incentive that the opportunity to achieve very large profits may give to persons prepared to take the risk of engaging in such an illegal activity.*

[59] Offences contrary to the *Excise Act*, 2001 and the *Revenue Act* are, as the Court of Appeal in *Allen* pointed out in paragraph 10, cited above, "Offences against a democratically imposed taxation system. A modern social democracy cannot exist without the imposition and collection of taxes. Such offences therefore harm the entire community."

[60] The ability of an offender to pay a minimum fine prescribed by legislation is not a relevant consideration, per s. 734(2) of the *Code*.

[61] The court held in *Wu*, supra, at paragraph 31 that if "it is clear that the offender does not have the means to pay immediately, he or she should be given time to pay…" and that it "is wrong to assume, as was done in this case, that the circumstances of the offender at the date of sentencing will necessarily continue into the future."

[62] In *Noseworthy*, the Court of Appeal held at paragraph 26, that the:

> *…ability to pay is not to form any part of the determination of the fine to be imposed. It is also clear that Parliament intended a fine to be the primary penalty. It is mandatory that a fine be imposed and that it be calculated to range between the minimum and the maximum, depending on the circumstances of the crime found by the trial judge.*

S. 12 *Charter*

Scope of Power of a Provincially Appointed Judge

[63] In *R. v. Lloyd*, 2016 SCC 13, paragraphs 16-24, the Court considered the power of a Provincial Court Judge when considering the constitutional validity of mandatory minimum legislation:

> *16. Just as no one may be convicted of an offence under an invalid statute, so too may no one be sentenced under an invalid statute. Provincial court judges must have the power to determine the constitutional validity of mandatory minimum provisions when the issue arises in a case they are hearing. This power flows directly*

from their statutory power to decide the cases before them. The rule of law demands no less.

17 . In my view, the provincial court judge in this case did no more than this. Mr. Lloyd challenged the mandatory minimum that formed part of the sentencing regime that applied to him. As the Court of Appeal found, he was entitled to do so. The provincial court judge was entitled to consider the constitutionality of the mandatory minimum provision. He ultimately concluded that the mandatory minimum sentence was not grossly disproportionate as to Mr. Lloyd. The fact that he used the word "declare" does not convert his conclusion to a formal declaration that the law is of no force or effect under section 52(1) of the Constitution Act, 1982.

18. To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in this case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the laws constitutional validity, would place artificial constraints on the trial and decision-making process.

19. The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s.52(1) of the Constitution Act, 1982. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however,

> ***the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction. [Emphasis added]***

[64] It is clear that Provincial Court Judges do not have the power to make formal declarations that a law is of no force or effect under s.52 of the *Constitution Act*, but they do have the power to determine the constitutionality of mandatory minimum provisions when the issue arises in a case that they are hearing.

The Burden on the Applicant

[65] The applicants have the onus of establishing a breach of their s.7 and s.12 *Charter* rights on a balance of probabilities. The applicants have challenged the penalty provisions of the *Excise Act*, 2001 and the *Revenue Act* under both sections. The analysis for each section is the same.

[66] The Supreme Court in *R. v. Malmo-Levine*, 2003 SCC 74, at paras. 160-161 stated:

> *Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the Charter by attributing contradictory*

> *standards to ss. 12 and 17 in relation to the same subject matter. Such a result, in our view, would be unacceptable.*
>
> *Accordingly, even if we were persuaded… that punishment should be considered under s. 7 instead of s. 12, the result would remain the same. In both cases, the constitutional standard is gross disproportionality. In neither case is the standard met.*

[67] Prior to 2017, there were only three instances where the Supreme Court of Canada found mandatory minimum sentences to be unconstitutional, *R. v. Smith*, 1987, CanLII 64 (SCC), [1987] 1 S.C.R. 1045; *R. v. Nur*, 2015 S.C.C. and *R. v. Lloyd*, *supra*.

[68] The test for review of a breach of s. 12 of the *Charter* was set out in *R. v. Smith*. This was a challenge to the seven-year minimum sentence for importing a narcotic under the *Narcotic Control Act.*

[69] Justice Lamer discussed the test at paragraph 55:

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

[70] Justice Lamer, at paragraph 84 of the *Smith* decision considered what constituted gross disproportionality and found that the question is, quoting Laskin, C.J. in *Miller & Cockreill v. The Queen* [1977] 2 S.C.R. 680, "whether the punishment prescribed is so excessive as to outrage standards of decency".

[71] The Court struck down the seven-year mandatory minimum.

[72] This analysis was further considered and refined to a two step process more recently in *R. v. Nur,* and in *R. v. Boudreault,* 2018 SCC 58, at paragraph 93.

[73] The Supreme Court of Canada in *R. v. Nur***,** at paragraph 39 reaffirmed that there is a "high bar" for what constitutes cruel and unusual punishment. A sentence must be **"grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender".**

[74] The "grossly disproportionate" analysis is a two-step process. First, the Court must determine an appropriate sentence for the offence, having regard to the purpose and principles of sentencing in the *Criminal Code*. Second, the Court must then determine whether the statutorily prescribed mandatory minimum sentence requires the Court to impose a sentence that is grossly disproportionate to the offence and its circumstances (*Nur* at para. 46; *Lloyd* at paragraph 23). The relevant factors to consider include:

1. the gravity of the offence;
2. the personal circumstances of the offender;
3. the particular circumstances of the offence;
4. the effect of punishment on the offender; and
5. the penological goals and sentencing principles on which the sentence is fashioned.

[75] Not all of these factors will be present in every case. The presence or absence of any of these factors is not determinative on the question of gross disproportionality. (*R. v. Morrissey* 2000 SCC 39.)

[76] In *R. v. Morrissey*, the Court found that a sentence was a violation of section 12 where it is so grossly disproportionate to the circumstances of the offence and characteristics of the offender that it would outrage the community's sense of decency. The four-year prison sentence for criminal negligence causing death was upheld.

[77] In *R. v. Goltz*, 1991CanLII 51 (SCC), [1991] 3 S.C.R. 485 the Court found that in some cases, mandatory minimum sentences might be justified, and that the issue addressed in s.12 *Charter* analysis is whether the sentence was grossly

disproportionate for a particular offence committed by a particular offender. The Court confirmed that it was appropriate to focus on "reasonable hypothetical circumstances" as part of the scope of that review, but that the hypothetical must be reasonable, as opposed to far-fetched or highly unimaginable. The Court upheld the minimum sentence of seven days' imprisonment for driving while prohibited.

[78] As submitted by the federal Crown, the appellate jurisprudence have universally endorsed the sentencing regime set out in the *Excise Act , 2001*, and the provisions have repeatedly been upheld and withstood *Charter* scrutiny, see *R. v. Desjardins*, [1996] N.B.J. No. 123, *R. v. Calvin*, [1996] R.J.Q. 2484 (QCCA), *R. v. MacFarlane, supra, R. v. Pham*, [2002] O.J. No.2545 (ONCA).

[79] A number of common themes can be taken from the appellate court decisions. They extensively discuss the harms posed by the trafficking of contraband tobacco in Canada and the close ties to organized crime. All cases upheld the *Excise Act*, 2001, sentencing regime, noting that it was directly proportionate to the economic harm of the offence committed. Fines in all cases were noted to be high, but proportional to deter offenders and ensure that the fine does not simply become a "cost of doing business." Perhaps most importantly, many of the offenders in the appellate cases were living in poverty and were unable, and in fact possibly would

never be able to pay the minimum fine. In all cases the inability of offenders to pay the minimum fine was determined not to be sufficient to meet the standard of gross disproportionality.

[80] In *R. v. MacFarlane, supra*, the PEI Court of Appeal stated the following at paragraphs 5-6:

> *The mandatory minimum fine…in this case amounts to a considerable sum, and I do not doubt that it will be a great hardship for each of the respondents but that does not make it unconstitutional. According to the Supreme Court of Canada in R. v. Smith, [1987] 1 S.C.R. 1045, for a punishment to be constitutionally impermissible, it is not enough that it be severe or even excessive. It must be so grossly disproportionate as to outrage standards of decency.*

[81] In *Smith*, *supra*, the Supreme Court held that a mandatory minimum sentence is not in itself unconstitutional. However, in that case the Court found the mandatory minimum seven-year imprisonment term under s.5(2) of the *Narcotic Control Act* unconstitutional because it applied to all cases regardless of the quantity of drugs involved or the circumstances of the offender. In the case at bar, unlike in *Smith*, it is the quantity of contraband that determines the minimum penalty under s. 240(1) of the *Excise Act,* and that penalty is a fine, not imprisonment. It is difficult to see that a fine determined by reference to a statutorily fixed amount of a few cents per

unit of contraband involved is so grossly disproportionate that its imposition would outrage standards of decency. Unlike the situation under consideration in *Smith*, a person convicted of conspiring to sell a small quantity of tobacco is liable to only a small fine. In fact, the amount of the minimum fine is very much in the hands of the offender. In a case such as the one under consideration here, the size of the fine is determined from the amount of tobacco he or she conspires to sell. It was therefore easy for the respondents to calculate the minimum fine they were exposing themselves to if caught. Apparently, they considered the venture worth the risk involved.

[82] It is noteworthy that in *R. v. Hills*, 2020 ABCA 263 at paragraphs 207-209, the Court of Appeal noted that s. 12 of the *Charter* prohibits punishment that is both cruel *and* unusual, and that separate assessments for each word are not required, and that they should be read as a "compendious expression of a norm", see paragraph 114. In essence, the Court found that it is acceptable to impose a punishment that is either cruel or unusual, but not one that is both.

[83] The federal Crown also noted that a fine provision has never been struck down by the Superior Courts for being cruel and unusual punishment. Reference was made to *R. v Lambe*, 2000 NFCA 23, wherein the court stated at paragraph 69:

> *If it is only in "rare and unique" occasions that s. 12 can be invoked in respect of sentences affecting the personal liberties and freedoms of an individual's the protection of which is the essential reason for the Charter's existence, then* ***it appears eminently reasonable that the occasions for bringing fines and forfeitures under s. 12's umbrella will be even more exceptional. [Emphasis added]***

[84] The *Criminal Code* was amended in 1996 to include a fine regime which included more fulsome provisions permitting more time to pay fines, and the establishment of "fine option programs", making it clear that offenders cannot be jailed in default of payment of fines unless they have "no reasonable excuse" for non-payment.

[85] The Supreme Court of Canada has considered the constitutionality of the mandatory minimum sentencing provisions of the *Excise Act, 2001* in *R. v. Wu*, 2003 SCC 73. The Court found that the new provisions of the *Criminal Code* served to reduce concerns regarding the ability of the offender to pay and that Canadian law no longer allowed for offenders to be imprisoned because they were unable to pay high fines.

[86] The Court also warned trial judges to uphold the mandatory minimum fine provisions even in the face of very sympathetic individuals because such people are often the exact people recruited by large scale criminal organizations or smuggling

rings because they might be seen as more sympathetic and thusly receive lesser sentences. As noted in paragraph 37:

> *I do not overlook the corollary problem that poverty should not become a shield against any punishment at all. Otherwise, smugglers will simply be encouraged to redouble their efforts to recruit impoverished people as runners.*

[87] The Court noted that the amendments to the *Criminal Code* afforded Mr. Wu the availability of the fine options program or he could be given time to pay. The Court had this to say at paragraph 31:

> *If it is clear that the offender does not have the means to pay immediately, he or she should be given time to pay…The time should be what is reasonable in all the circumstances.…The courts have considerable flexibility to respond to the particular facts of an offender's situation. It is wrong to assume, as was done in this case, that the circumstances of the offender at the date of the sentencing will necessarily continue into the future.*

[88] The second case involving s.12 *Charter* challenges was *R. v. Boudreault*, *supra*, which challenged the mandatory victim fine surcharge set out in the *Criminal Code*.

[89] The Supreme Court of Canada in *Boudreault* considered, and struck down as unconstitutional, the mandatory victim fine surcharge provisions set out in the *Criminal Code*. In that case, the victim fine surcharge was a universal punishment

imposed on every offender, regardless of their personal circumstances or the circumstances surrounding the offence.

[90] The Court found that the mandatory surcharge "fundamentally disregards proportionality in sentencing" and violates section 12 of the *Charter* (paragraph 61).

[91] In the course of striking down the provisions, the Court referred to the penalty regime contained in the *Excise Act, 2001* with approval as an example of a sentencing regime that was Constitutionally valid. The Court noted the direct connection between the quantity of the illegal substance possessed and the size of the fine.

[92] The Supreme Court of Canada in *R. v. Boudreault* cited *R. v. Pham* and noted that the most important consideration in the section 12 *Charter* analysis is the direct connection between the quantity of the substance and the size of the fine, and that this factor ensures that the penalty will not be disproportionate.

[93] The federal Crown submits that thousands of people from all walks of life and all kinds of circumstances have been sentenced to the significant fines set out in the *Excise Act*, 2001 over the years. That is important because what the cases demonstrate is that the circumstances that the Court is dealing with in the case at bar are not in any way rare or unique. By way of example, the Crown referred the Court

to the facts in *R. v. Pham*, wherein two youthful offenders transported tobacco for a stranger for the cost of expenses. One offender did not even know that he was transporting contraband tobacco until a few days before he left. In that case, each offender was fined $154,000.00.

[94] In the *Desjardins* case, the offender had a grade five education, and his source of income was social assistance in the amount of $327.00 per month. He was fined $112,000.00. This penalty was upheld as constitutional by the New Brunswick Court of Appeal.

[95] Further, in *R. v. Wu*, *supra*, the offender in that case also lived in poverty, and the Supreme Court noted that he would perhaps never be able to pay his fine.

[96] In each of these cases, the minimum penalties imposed were challenged and survived s.12 *Charter* challenges at the appellate level and in the Supreme Court of Canada.

Analysis

[97] Turning to the case at bar and applying the two-part test set out in *R. v. Boudreault*, I must decide the following:

1. What would constitute a proportionate sentence for the offence according to the principles of sentencing?
2. Is the mandatory punishment grossly disproportionate when compared to the fit sentence for either the applicant or a reasonable hypothetical offender?

[98] The courts have repeatedly emphasized that specific and general deterrence are the key sentencing principles in contraband tobacco cases. The fines are substantial. The *Criminal Code* provides a payment mechanism through extended time to pay and through provincial fine options programs.

[99] With respect to the personal circumstances of the offenders, some information is available from the pre-sentence reports. Both men are in their early thirties. Both individuals are eligible to enrol in the Nova Scotia Fine Option Program to pay their fines and there is no risk of incarceration should they be unable to pay.

[100] Both men are in their thirties. Mr. Alharoun is 36 years old and is actively working to improve his English language skills.

[101] Mr. Adwan is 30 years old and owns his own business and has completed a two-year English language program. Both men are in good physical health, do not suffer from any substance abuse or mental health issues and enjoy the support of their families.

[102] With respect to consideration of a reasonable hypothetical, the applicants have not put forward a hypothetical offender who would suffer cruel and unusual treatment if subject to the sentence regime set out in either the *Excise Act, 2001,* or the *Revenue Act*. As the federal Crown pointed out in their submissions, the Courts of Appeal for New Brunswick, PEI, Quebec and Newfoundland were unable to identify such a reasonable hypothetical offender.

[103] It is clear that the penalty provisions of both the *Excise* and *Revenue Acts* are directly linked to the specific amount of contraband tobacco involved, and although the fines are large, I do not find that they are disproportionate, in fact they are directly proportionate to the quantity of contraband in question.

[104] There is no question that the fines are extremely large, but I am not persuaded by the evidence that the fine provisions meet the test of gross disproportionality.

[105] Accordingly, I find that the applicants have not proven on a balance of probabilities that their *Charter* rights under sections 7 or 12 have been infringed, and accordingly their application is dismissed.

2. What is the appropriate Sentence?

s.121.1(1) *Criminal Code*

Applicable Sentencing Principles

[106] The sentencing principles applicable to s.121.1(1) are set out in ss.718-718.2 of the *Criminal Code*. I will reproduce the relevant sections:

> *718 The fundamental purpose of sentencing is to protect society and 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 and the harm done to victims or to the community that is caused by 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 acknowledgement of the harm done to victims or 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*
>
> *(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization*
>
> *shall be deemed to be aggravating circumstances;*
>
> *(b) a sentence should be similar to sentences imposed on similar offenders for similar fences committed in similar circumstances;*

> *(c) where consecutive sentences are imposed, the combined sentence should not be unduly longer 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 and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.*
>
> *730 (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be **discharged** absolutely or on the conditions prescribed in a probation order made under section 731(2). (Emphasis added)*

[107] Mr. Chongatera asks this Court to impose an absolute discharge on the two offenders in relation to the convictions under s.121.1 (1) of the *Criminal Code*. Defence counsel submits that a discharge will assist in the offenders' rehabilitation and would assist them in moving forward with their lives, and that a criminal conviction would have an adverse impact on his clients' future employment prospects.

[108] The leading case interpreting the principles of s.731 is *R. v. Fallofield*, 1973 CanLII 1412 (BCCA), wherein the Court set out in paragraph 21 the parameters for the consideration of the conditional discharge:

> *21 From this review of the authorities and my own view of the meaning of s.662.1…*
>
> [Now s.730(1)]
>
> *…I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion:*
>
> *(1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offensive punishable by imprisonment for 14 years or for life or by death.*
>
> *(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.*
>
> *(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interest of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.*
>
> *(4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.*
>
> *(5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.*

> *(6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.*
>
> *(7) The powers given by s.662.1 should not be exercised as an alternative to probation or suspended sentence.*
>
> *(8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.*

I. The Offenders' Best Interests

[109] As per *R. v. Fallofield,* for the purpose of granting a conditional discharge the best interests of the accused includes considerations such as:

> a. Whether it is necessary to enter a conviction against the accused to specifically deter him;
>
> b. Whether by not entering a conviction against the accused, he will be assisted in his rehabilitation; and,
>
> c. Whether a conviction would present "significant adverse repercussions" for the accused.

[110] The Court cannot simply accept, without receiving evidence that any of the previous considerations have been met. In *R. v. Elmazini*, 2019 BCSC 41, the Court noted that if an offender is alleging that a conviction would impact his ability to earn income and would affect future employment prospects, when the Court is considering whether the two prongs of the *Fallofield* test have been met, the Court

cannot simply merely accept these propositions without evidence. A proper evidentiary foundation must be presented to the Court for due consideration. The Court in *Elmazini* quoted the trial judge in *R. v. R.A.R.*, 2016 BCPC 276 at paragraph 29:

> *A criminal record will almost always impair the employment prospects of the offender. A general inference to that effect may be drawn without evidence. However, where specific prejudice is alleged, evidence is required to support the inference.*

[111] In the *Elmazini* case, the offender was also an immigrant to Canada who alleged that a conviction would impact his ability to travel with his spouse, to travel to meet his family and to sponsor other family members to come to Canada as immigrants. The accused was charged and convicted of sexual assault, and a conditional discharge was granted, which was appealed by the Crown. The Court noted at paragraph 17 that "All collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. (*R. v. Pham*, 2013 SCC 1 at paragraph 11)".

[112] The Court found that it was only appropriate to consider collateral consequences when determining an appropriate sentence when there is a proper evidentiary foundation presented upon which such a determination can be made, and

that the significance of such collateral consequences are to be made on a case-by-case basis.

[113] The Court noted at paragraph 23:

> *I consider, as found by the trial judge in R.A.R., that travel restrictions of foreign countries arising from criminal convictions elsewhere are not matters of such common knowledge that they can be determined without evidence. The impact of an individual to sponsor a family member to immigrate to Canada as a result of a criminal conviction for sexual assault is also a matter that can not be determined without evidence.*

[114] Neither Mr. Adwan nor Mr. Alharoun have provided evidence to this Court that they meet the preconditions required to consider whether the imposition of a discharge would be in their best interests. There are bare assertions by both parties that a criminal conviction would hinder their ability to travel or to sponsor a family member to immigrate to Canada, but the Court heard no evidence in support of those assertions.

[115] I find that I can accept that both defendants come before the Court to be sentenced without prior criminal convictions. I accept the following information about their stated ages and current circumstances surrounding their family and employment status, which includes the following:

[116] Mr. Alharoun is a 36-year-old offender, who was 33 at the time of the events. He enjoys the support of a stable and healthy family and is a permanent resident of Canada which makes him and his family Syrian nationals.

[117] Mr. Alharoun lives with his wife and five children, four of whom suffer from a genetic condition which has caused much emotional and financial strain. Mr. Alharoun is actively seeking work.

[118] Mr. Alharoun moved to Canada in 2016 with his family as government-assisted refugees, and he has had a difficult time acclimating to life in Canada and finding proper living arrangements for his family. Mr. Alharoun also has difficulty communicating in English.

[119] Mr. Adwan is 30 years old and was 27 at the time of the offence. He is also a Syrian immigrant who came to Canada at the age of 20 with his fiancée. They have three children together.

[120] Mr. Adwan reported that he is self-employed.

[121] I find that the defendants have not provided evidence to this Court that they meet the preconditions required to consider whether the imposition of a discharge would be in their best interests. There is no evidence before this Court that a criminal

conviction would impair the ability of Mr. Adwan, who is self-employed, from continuing to work, or that it would hinder Mr. Alharoun from gaining future employment. Accordingly, I find that the first part of the test for a discharge has not been met.

II. Not Contrary to the Public Interest

[122] The second branch of the *Fallofield* test sets out that a discharge is "not contrary to the public interest". In particular, the consideration here is what the impact of the decision not to impose a criminal record on the accused would have on the public interest.

[123] The Crown submitted that there is a strong public interest in the sentencing of tobacco smuggling offences and emphasizes consideration of the principles of general and specific deterrence along with considerations of the gravity of the offence, its prevalence in the community and public attitudes and public confidence in the proper administration of justice.

[124] As discussed earlier in this decision, the harm done by tobacco smuggling offences has several components.

[125] First is the substantial loss of tax revenue due to the provincial government on the sale of tobacco. That revenue is no longer available to fund social programs which benefit everyone in the province.

[126] Contraband tobacco also hurts legitimate businesses attempting to make a living from the legitimate sale of tobacco products. The deleterious effects of tobacco use are well documented, including the effects on individual health and the economic toll that tobacco use causes.

[127] In short, there is a strong public interest that tobacco smuggling offences should result in a criminal record. This is the need for general deterrence.

[128] The need for specific deterrence is equally important, as reflected in the increased penalties for subsequent convictions set out in s.121.1(4) of the *Criminal Code*.

Accordingly, I find that a conditional discharge would not be an appropriate sentence as both offenders have not met the first or second prongs of the *Fallofield* test.

Conclusion

[129] For the reasons provided, I do not find that the sentencing provisions contained in either the *Excise Act, 2001,* or the *Revenue Act* offend sections 7 or 12

of the *Charter* for either of the offenders on these facts. Although the penalties in this case are harsh, they do not constitute cruel and unusual punishment.

[130] The following sentences are imposed upon the defendants:

[131] In relation to the charge under s.121.1(1) of the *Criminal Code*, I impose a suspended sentence, with 12 months probation for both accused. The conditions will include the statutory conditions along with conditions to report to a probation officer within 48 hours, and thereafter as required; to engage in and successfully complete any and all counselling as may be directed by the probation officer, especially with respect to English language training and employment counselling.

[132] With respect to s. 39(1)(a) of the *Revenue Act*, for each accused I impose the minimum fine of $134, 956.00 with 180 days to be served in default of payment, and I grant three years to pay this fine as a starting point. More time can be requested if required.

[133] The charges contrary to ss.39(1)(b) and 40 of the *Revenue Act* will be stayed pursuant to the *Kienapple* principle.

[134] With respect to s.32(1) of the *Excise Act*, I impose the minimum penalty in the amount of $38,404.80 with 30 days to be served in default of payment, and three years shall be given to pay that fine, with further time to pay as needed.

[135] I further order the forfeiture of the $2600.00 seized from the offenders at the time of the offence.

Judge Rosalind N. Michie