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# Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences

Allan Manson\*

## I. INTRODUCTION

The scope of mandatory minimum sentences for various offences continues to grow in Canada. Yet, challenges to their constitutionality using section 12 of the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> the guarantee against cruel and unusual punishment or treatment, have almost consistently failed. While this trend may have changed direction with the decision in *R. v. Smickle*,<sup>2</sup> discussed below, it is too soon for complacency. Distracted by the methodological problems of reasonable hypotheticals and constitutional exemptions, “cruel and unusual” jurisprudence has been distilled around the notion of gross disproportionality tied to the limited standard of outraging “standards of decency”. As a result, the discourse around section 12 has been truncated and has lost the potential richness that the various opinions in the seminal case of *R. v. Smith*<sup>3</sup> seemed to portend at the time. If the section 12 jurisprudence remains stuck in that narrow analytical mold, there is little reason to think that it will provide a useful tool for scrutinizing mandatory minimum sentences.

In this paper I want to develop the argument that the concept of arbitrariness can play a central role in assessing the constitutionality of sentencing legislation. First, if we go back to *Smith*, as Justice Malloy did in *Smickle*,<sup>4</sup> we will find dimensions within the “cruel and unusual”

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>2</sup> [2012] O.J. No. 612, 280 C.C.C. (3d) 365 (Ont. S.C.J.) [hereinafter “*Smickle*”].

<sup>3</sup> [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) [hereinafter “*Smith*”].

<sup>4</sup> *Supra*, note 2.

debate which have particular resonance to the issue of mandatory minimum sentences and may be more analytically useful than the outraging “standards of decency” test. One concept is arbitrariness. Second, if there seems to be no room to re-instate arbitrariness into section 12 jurisprudence, the same concept has made headway in recent section 7 cases dealing with a variety of public law issues. Ultimately, I argue that the constitutional validity of mandatory minimum sentences should be based on a new, carefully tailored standard, which might be called arbitrary disproportionality.

## II. THE SUPREME COURT GETS DISTRACTED

While the basic test of “gross disproportionality” has remained in place, the Supreme Court of Canada has adopted a very high standard for a section 12 declaration of invalidity, the outraging “standards of decency” test. However, we have not arrived at this place by thoughtful reflection on the purposes and scope of section 12 and the “cruel and unusual” concept. Instead, we are here essentially by default. Look, for example, at the concept of equality which had its genesis in the creative analysis offered in *Andrews v. Law Society of British Columbia*,<sup>5</sup> but then developed through a series of cases which built on the evolving appreciation of the purposes and effects of section 15, and its practical implementation as a robust constitutional norm.<sup>6</sup> Instead, section 12 cases did not build on the various *Smith* opinions, but concentrated on methodological issues to the detriment of the potential richness of the “cruel and unusual” concept. When dealing with section 12, the majority of the Supreme Court has acted like a couple who sits down to plan next summer’s driving trip. Rather than focusing on where they could go, they debate the merits of renting a vehicle over using the family car. By the time the summer comes, they have become so embroiled in the vehicular issue that they have not explored the raft of available directions and interesting destinations. Alas, they make the perfunctory decision to drive down the 401 Highway to their usual spot, Montreal — a good choice, but a simple choice. The vehicle issue distracted them from the

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<sup>5</sup> [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

<sup>6</sup> See *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.); *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.); *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.); *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.); *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.); *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396 (S.C.C.).

more intriguing, albeit complex, alternatives. So it has been with the Supreme Court, or at least most of its judges, in the cases of *R. v. Goltz*,<sup>7</sup> *R. v. Morrisey*<sup>8</sup> and *R. v. Ferguson*.<sup>9</sup> Thinking too much about how to get there, they deprived themselves of the opportunities to think about where they wanted to go.

The majority decisions in *Goltz* and *Morrisey* became mired in the question of what is a “reasonable hypothetical”, even though this issue did not flow directly from the earlier Supreme Court decision in *Smith*.<sup>10</sup> The majority of judges in *Smith* held that Edward Dewey Smith had standing to challenge the constitutionality of section 5(2) of the *Narcotic Control Act*<sup>11</sup> which imposed a minimum seven-year sentence for importing narcotics. Mr. Smith had returned to Canada from South America with “seven and a half ounces of 85 to 90 per cent pure cocaine secreted on his person”.<sup>12</sup> The trial judge found the impugned seven-year minimum sentence to be unconstitutional given the potential disproportionality of the mandatory sentence in light of “the range of offences, the variety of ways the offence may be committed, and the great disparity of the sentence with that imposed on others who have committed offences identical in gravity and nature”.<sup>13</sup> With his sentencing discretion freed from the mandatory minimum, he then sentenced Mr. Smith to eight years imprisonment. Clearly, the particular circumstances of Mr. Smith and his offence did not support a “cruel and unusual” claim. By giving Mr. Smith standing to challenge the constitutionality of section 5(2), the majority of the Supreme Court held that the case could be argued by reference to the range of conduct which section 5(2) encompassed. While hypothetical examples were used to support the reasoning, the majority did not introduce the concept of a reasonable hypothetical as the requisite platform for a section 12 challenge not based on the particular circumstances of the litigant.

Looking specifically at *Smith* and the issue of standing, we should remember that we are examining the very early years of Charter jurisprudence when the Supreme Court was understandably confronted by a number of important and difficult interpretive, definitional, methodologi-

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<sup>7</sup> [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.) [hereinafter “*Goltz*”].

<sup>8</sup> [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.) [hereinafter “*Morrisey*”].

<sup>9</sup> [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.) [hereinafter “*Ferguson*”].

<sup>10</sup> *Supra*, note 3.

<sup>11</sup> R.S.C. 1970, c. N-1.

<sup>12</sup> *Supra*, note 3, at para. 6.

<sup>13</sup> *Id.*, at para. 16.

cal and procedural Charter issues. Less than ten months before *Smith* was argued, the Supreme Court released its decision in *R. v. Big M Drug Mart Ltd.*<sup>14</sup> which held that a corporation could challenge the constitutionality of a legislative provision on the basis that it violated the Charter's guarantee of freedom of conscience and religion. In so doing, Dickson C.J.C. stated:

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the Charter and by reason of s. 52 of the *Constitution Act, 1982*, it is of no force or effect.

Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion — if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act.<sup>15</sup>

In other words, an arguable case of constitutional infirmity can be raised by a party even if the party's own factual situation does not support the claim.

The *Smith* Court included Dickson C.J.C. and three other justices who sat on *Big M*. In *Smith*, the dissenting opinion of McIntyre J. expressed great concern about Smith's standing to argue unconstitutionality. In observing that "there is an air of unreality about this appeal",<sup>16</sup> he characterized the claim in these terms:

... the imposition of "a mandatory minimum sentence of seven years" on a hypothetical "first time importer of a single marijuana cigarette" would constitute cruel and unusual punishment. In effect, the appellant is stating that while the law is not unconstitutional in its application to him, it may be unconstitutional in its application to a third party and, therefore, should be declared of no force or effect [because the question of cruel and unusual punishment, under s. 12 of the Charter, does not appear to arise on the facts of the case].<sup>17</sup>

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<sup>14</sup> [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

<sup>15</sup> *Id.*, at paras. 39-40.

<sup>16</sup> *Supra*, note 3, at para. 78.

<sup>17</sup> *Id.*

Justice McIntyre concluded that this was not a sound approach to section 12 litigation which should be restricted to cases where the punishment in question is arguably “cruel and unusual” and not extended to a claim based on “some hypothetical third party”.<sup>18</sup> Curiously, this dissenting view became the genesis of the “reasonable hypothetical” debate that arose in subsequent cases.

It is important to note that McIntyre J. did recognize the utility of permitting a challenge to laws even if the claimant’s own rights are not affected in situations where leaving a matter unresolved cast a “chilling effect” on legal activities.<sup>19</sup> In essence, he was saying that there is a public interest in permitting expeditious litigation especially where people actually affected may not easily be able to litigate. Using the threshold of impact on legal activities may seem appealing but it is misleading. There are other relevant public interest values which may come into play. Importantly, Lamer J., for the majority, rejected the Crown’s claim that prosecutorial discretion kept inappropriate cases away from the mandatory minimum but added his concern that the mandatory minimum sentence “gives the Crown an unfair advantage in plea bargaining as an accused will be more likely to plead guilty to a lesser or included offence”.<sup>20</sup> In an era in which we are now familiar with the reality of wrongful convictions, we cannot dismiss the prospect that some innocent people, during the seven-year minimum sentence regime for importing, may have been induced to plead guilty to “possession for the purposes” with a short jail sentence to avoid the risk of an importing conviction and the mandatory minimum sentence. Accordingly, permitting expeditious litigation challenging a mandatory minimum sentence promotes justice and fairness values akin to McIntyre J.’s “chilling effect” argument.<sup>21</sup> Put in this context, perhaps even McIntyre J. would have re-thought his opposition.

When we look at the majority judgment in *Smith*, we see that the methodological decision to permit the claim to go forward was based on the finding that “it is inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate”.<sup>22</sup> As Lamer J. succinctly said: it is “the certainty, not

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<sup>18</sup> *Id.*, at para. 78.

<sup>19</sup> *Id.*, at para. 79.

<sup>20</sup> *Id.*, at para. 72.

<sup>21</sup> This was essentially Le Dain J.’s position on the question of standing: see *id.*, at para. 120.

<sup>22</sup> *Id.*, at para. 65.

just the potential”.<sup>23</sup> Clearly, the majority was looking at the range of conduct and culpability encompassed by the offence in question given the myriad ways in which it could be committed. This was not an exercise in imagination but a recognition of the breadth of the offence of importing a narcotic combined with the “certainty” that a seven-year sentence would be grossly disproportionate, in circumstances included in the scope of the offence, to the culpability and circumstances of the offender. This is not a conclusion based on a reasonable hypothetical.

It was only in *Goltz* where the Supreme Court deviated from this approach by focusing on the permissible use of the “reasonable hypothetical”. Recognizing that *Smith* mandated a section 12 methodology which could extend beyond the facts of the claimant’s case, Gonthier J. observed:

The question is not greeted by an immediate or obvious answer. The jurisprudence to date exhibits significant confusion about the use of hypothetical examples which may readily demonstrate that in some imaginable circumstances a minimum penalty might result in a punishment whose effects are grossly or excessively disproportionate to the particular wrongdoing in a given case.<sup>24</sup>

The reference to “confusion” was a gross exaggeration. The substantive criminal law, including Charter standards, explains and delimits the range of culpable conduct which can satisfy a given offence. As well, looking to the circumstances of the offender, it is inevitable that someone will be a young first offender. Accordingly, it was provocative hyperbole to talk about “imaginable circumstances”. With this preamble to his analysis, Gonthier J. concluded that, beyond the offender’s factual context, a section 12 challenge should only proceed “on grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases”.<sup>25</sup> In his words:

A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility. While the Court is unavoidably required to consider factual patterns other than that presented by the respondent’s case, this is not a licence to invalidate statutes on the basis of remote or extreme examples. Laws typically aim to govern a particular field generally, so that they apply to a range

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<sup>23</sup> *Id.*, at para. 66.

<sup>24</sup> *Supra*, note 7, at para. 38.

<sup>25</sup> *Id.*, at para. 42.

of persons and circumstances. It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the Charter (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life.<sup>26</sup>

In contrast, the dissenting judges, including Lamer C.J.C. and McLachlin J. (as she then was), who both sat on *Smith*, would have upheld the lower court's decision which it characterized as "simply saying that when the gravity of the offence is considered together with the potential range of situations in which offenders may find themselves, a mandatory minimum sentence may prevent the court charged with sentencing from reaching a fair result, and indeed require the judge in some cases to impose a sentence which is grossly disproportionate."<sup>27</sup> The three dissenters appreciated that *Smith* was based on a range of conduct and culpability analysis and did not instruct judges and lawyers to exercise their imaginations.

The extent of the restrictive approach to a "reasonable hypothetical" embraced by *Goltz* became apparent in *Morrisey*<sup>28</sup> in which the Gonthier-led majority rejected the use of reported decisions as "reasonable hypotheticals" because they do not represent circumstances "that could commonly arise in day-to-day life".<sup>29</sup> Manslaughter is certainly an offence of well-recognized breadth but it is this very breadth which made a four-year mandatory minimum sentence open to challenge under section 12. Instead, Gonthier J. would only consider two kinds of hypotheticals even if they arose from a reported case:

It appears to me that there are two types of situations that commonly arise and which can be gleaned from the reported cases. The first involves an individual playing around with a gun. The offender unreasonably thinks that the gun will not go off. He aims it at another person and discharges it, killing someone. This includes playing Russian roulette (*Saswirsky, supra*, and *J.C., supra*), and pretending to shoot a friend to frighten him (*Davis, supra*, and *Morehouse, supra*).

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<sup>26</sup> *Id.*, at para. 69.

<sup>27</sup> *Id.*, at para. 109.

<sup>28</sup> *Supra*, note 8.

<sup>29</sup> *Id.*, at paras. 31-33.

The second hypothetical situation that arises from the reported cases involves a hunting trip gone awry.<sup>30</sup>

This must be read in context; Gonthier J. had already made the curious remark that a reported case might be “one of the ‘marginal’ cases, not contemplated by the approach set out in *Goltz*”.<sup>31</sup> Obviously, the “marginal case” would use its own facts to support the claim of “gross disproportionality” and, if successful, the result would be a section 52 declaration of invalidity. So why is it that the “marginal case” cannot support a claim by someone whose own facts do not lead to a “gross disproportionality” conclusion? It must have been this recognition which led the two dissenters, Arbour and McLachlin JJ., to conclude that “there will unavoidably be a case in which a four-year minimum sentence for this offence will be grossly disproportionate”.<sup>32</sup> This was consistent with the real *Smith* rationale based on looking at the scope of the offence, not reasonable hypotheticals. Justice Arbour offered as a potential example a case of unlawful act manslaughter where an abused spouse responds to her abuser causing his death. Notwithstanding the substantive requirement that the act must convey reasonable foresight of bodily harm, it is inevitable that there will be other mitigating circumstances which will make the four-year mandatory minimum sentence grossly disproportionate. Justice Arbour appreciated the inadequacy of Gonthier J.’s methodology and concluded that it will make the question of constitutionality of a punishment provision “dependent essentially on timing”:

It will be upheld until it is challenged in a “marginal” case, or at least one that was viewed as too marginal to constitute a reasonable hypothetical, but when that case arises, the section will be struck down under the first branch of the test in *Smith* and *Goltz*, for the benefit, presumably, of all subsequent cases.<sup>33</sup>

Still, in the end, both Arbour and McLachlin JJ. would have dismissed the appeal advocating that, in future criminal negligence manslaughter cases, the mandatory minimum would be “applicable in all cases save those in which it would be unconstitutional to do so”.<sup>34</sup> This sounds very close to supporting a constitutional exemption, which leads us directly to

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<sup>30</sup> *Id.*, at paras. 51-52.

<sup>31</sup> *Id.*, at para. 32.

<sup>32</sup> *Id.*, at para. 82.

<sup>33</sup> *Id.*, at para. 89.

<sup>34</sup> *Id.*, at para. 94.

the last methodological case which distracted the Supreme Court's "cruel and unusual" attention.

In *Ferguson*,<sup>35</sup> the Supreme Court unanimously held that constitutional exemptions should not be an available remedy in section 12 cases. Courts have only two options: strike down the legislation or uphold its constitutionality. For the Court, McLachlin C.J.C. based the rejection of exemptions on four considerations: (1) the weight of lower court authorities; (2) the availability of a constitutional exemption contradicted Parliament's intention to limit sentencing discretion; (3) distinctions in the intended remedial scope of section 24(1) and section 24(2) of the Charter; and (4) exemptions undermine the rule of law and its intrinsic values of certainty, accessibility, intelligibility, clarity and predictability. Without commenting on this reasoning which was developed in detail, it is clear that *Ferguson* put to rest the constitutional exemption option in section 12 cases. However, on the "cruel and unusual" issue, the decision in this case illustrates how arid that analysis had become:

The test for whether a particular sentence constitutes cruel and unusual punishment is whether the sentence is grossly disproportionate: *R. v. Smith*, [1987] 1 S.C.R. 1045. As this Court has repeatedly held, to be considered grossly disproportionate, the sentence must be more than merely excessive. The sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable": *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84, at para. 4, citing *Smith*, at p. 1072 and *Morrisey*, at para. 26.<sup>36</sup>

This is the distillation of "cruel and unusual" analysis after *Goltz*, *Morrisey* and *Ferguson*. The broader dimensions of "gross disproportionality" have been reduced to the high threshold of outraging standards of decency and its rhetorical siblings, abhorrent or intolerable punishment or treatment. Even the intervening cases of *R. v. Lyons*<sup>37</sup> and *R. v. Luxton*,<sup>38</sup> neither of which raised methodological issues, did not address the concept of arbitrariness but restricted their analysis to the effects of the punishment within a "rational" sentencing system. But has the Supreme Court rejected the richness of *Smith*, including its discussions of arbitrariness, or simply neglected it?

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<sup>35</sup> *Supra*, note 9.

<sup>36</sup> *Id.*, at para. 14.

<sup>37</sup> [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.) [hereinafter "*Lyons*"].

<sup>38</sup> [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.) [hereinafter "*Luxton*"].

### III. *SMITH* AND THE CONCEPT OF ARBITRARINESS

Consistently, the Supreme Court has recognized the seminal nature of the *Smith* decision and the depth of its historical, contextual and comparative analysis. Accordingly, it is necessary to mine the various opinions for those concepts or factors which may remain relevant and worthy of attention. The judgment of Dickson C.J.C. and Lamer J., (written by Lamer J.) was the longest and most careful of the five opinions. It makes some important preliminary points about section 12 which have remained uncontroverted. First, the phrase “cruel and unusual” is a “compendious expression of a norm”.<sup>39</sup> Second, the constitutionality analysis starts with an inquiry into the validity of the purpose of the legislative provision but extends into the question of whether the means chosen by Parliament have produced effects which violate the guarantee.<sup>40</sup> Third, the issue is whether the punishment is “grossly disproportionate”, and not merely excessive, which can be corrected on appeal.<sup>41</sup> Fourth, Lamer J. adopted the basic standard articulated by Laskin C.J.C. in the *Canadian Bill of Rights*<sup>42</sup> case, *R. v. Miller*:<sup>43</sup> “whether the punishment prescribed is so excessive as to outrage standards of decency”.<sup>44</sup> But the opinion then moved into richer territory when it canvassed those factors which may be relevant to that assessment. He said:

... the determination of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed, are all guidelines which, without being determinative in themselves, help to assess whether the punishment is grossly disproportionate.<sup>45</sup>

Then, he moved on to consider arbitrariness.

Although he accepted that whether a punishment was arbitrarily imposed was one of the factors which Professor Tarnopolsky (as he then was) synthesized from various *Canadian Bill of Rights* cases, Lamer J. ultimately reached the influential conclusion that arbitrariness should

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<sup>39</sup> *Supra*, note 3, at para. 40.

<sup>40</sup> *Id.*, at paras. 48-50.

<sup>41</sup> *Id.*, at paras. 53-54.

<sup>42</sup> S.C. 1960, c. 44.

<sup>43</sup> [1976] S.C.J. No. 91, [1977] 2 S.C.R. 680 (S.C.C.).

<sup>44</sup> *Smith*, *supra*, note 3, at para. 40.

<sup>45</sup> *Id.*, at para. 57.

only be “a minimal factor in the determination of whether a punishment or treatment is cruel and unusual”.<sup>46</sup> However, this observation needs to be put in context. As was common at the time, many American constitutional cases were submitted to the court. Justice Lamer was building on the important views that he expressed in *Reference re Motor Vehicle Act (British Columbia)*, s. 94(2)<sup>47</sup> that Canadian courts should not follow American constitutional jurisprudence when defining Charter rights. In *Smith*, he extended this approach to arbitrariness:

This reference to the arbitrary nature of the punishment as a factor is a direct import into Canada of one of the tests elaborated upon by the American judiciary in dealing with the Eighth Amendment of their Constitution. Although the tests developed by the Americans provide useful guidance, they stem from the analysis of a constitution which is different in many respects from the *Canadian Charter of Rights and Freedoms*.<sup>48</sup>

Here, it is important to note two things. First, Lamer J. recognized that the American jurisprudence stemmed from death penalty cases and was skewed by the fact that criminal law is within state jurisdiction.

Arbitrariness was a central feature in the two major U.S. death penalty cases, the first of which held the death penalty unconstitutional as applied, due to its arbitrary imposition. In that case, *Furman v. Georgia*,<sup>49</sup> the reasoning was spread diffusely over nine separate opinions in a 5-4 decision. In explaining his view, Stewart J. concluded that those selected for execution represented “a capriciously selected random handful” out of the eligible set.<sup>50</sup> Accordingly, the criteria actually employed must have been arbitrary or discriminatory. Subsequently Georgia responded by creating aggravating criteria which could justify the death penalty. Other states revised their statutes to provide either for mandatory schemes or some form of “guided discretion”. In 1976, the U.S. Supreme Court held that the revised Georgia statute was constitutional since it provided adequate guidance for a jury to determine whether there was justification for imposing the death penalty, thus avoiding the “wanton and freakish” application that had existed before.<sup>51</sup> Given the proliferation of new state death penalty laws involving stipulated aggravating

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<sup>46</sup> *Id.*, at para. 62.

<sup>47</sup> [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 17 (S.C.C.).

<sup>48</sup> *Smith*, *supra*, note 3, at para. 60.

<sup>49</sup> 408 U.S. 238 (1972).

<sup>50</sup> *Id.*, at 309-10.

<sup>51</sup> *Gregg v. Georgia*, 462 U.S. 153 (1976), especially at 206-207.

factors, it was inevitable that the U.S. Supreme Court would face claims of unconstitutionality directed at specific factors. In *Zant v. Stephens*,<sup>52</sup> a unanimous Court concluded that an aggravating factor needed to perform a “constitutionally necessary function” which has been described as limiting “the death-eligible class to the most culpable offenders, for whom jurors will more consistently deem death sentences to be justified”.<sup>53</sup> While a concern about arbitrariness was at the heart of these decisions, Lamer J. was correct that the constitutional analysis was not a fruitful ground for our Supreme Court to follow. In American capital cases, arbitrariness only related to the imposition of the sentence in order to ensure equality under the law.<sup>54</sup>

Second, after explaining the distinction between the Charter and U.S. constitutional guarantees, in *Smith* Lamer J. specifically commented on arbitrariness by stating that:

As regards this factor, some comments should be made, because arbitrariness of detention and imprisonment is addressed by s. 9, and, to the extent that the arbitrariness, given the proper context, could be in breach of a principle of fundamental justice, it could trigger a prima facie violation under section 7. As indicated above, s. 12 is concerned with the effect of a punishment, and, as such, the process by which the punishment is imposed is not, in my respectful view, of any great relevance to a determination under s. 12.<sup>55</sup>

These remarks show that he was addressing arbitrariness only in the limited imposition sense but that a broader conception might be developed under section 7. As discussed later in this paper, he was prescient although he did not foresee the potential link between legislative objectives and the effect of a punishment.

The other opinions in *Smith* are also informative on the issue of arbitrariness. The dissenter, McIntyre J., devoted substantial attention to arbitrariness and Le Dain J. concurred with this part of his judgment. Justice McIntyre accepted that there are various definitions including

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<sup>52</sup> 462 U.S. 862 (1983).

<sup>53</sup> See the discussion of this case in C.C. Sharon, “The ‘Most Deserving’ of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing” (2011) 46 Harv. C.R.-C.L. L. Rev. 223, at 230-32.

<sup>54</sup> It is also important to note that American “cruel and unusual” jurisprudence has evolved to provide an analytical framework for categorical challenges to both capital and non-capital sentences: see, for example, *Graham v. Florida*, 130 S.Ct. 2011 (2010), in which a majority held that it was unconstitutional to sentence a juvenile to life without parole in a non-capital case. For a useful critique, see “The Supreme Court, 2009 Term” (2010) 124:1 Harv. L. Rev. 209-19.

<sup>55</sup> *Supra*, note 3, at para. 59.

“capricious”, “frivolous”, “unreasonable”, “unjustified” and “not governed by rules or principles”.<sup>56</sup> He accepted that arbitrariness would be relevant to a section 12 challenge in situations where “the legislation on its face could impose punishment in an arbitrary manner” or “a body empowered to impose punishment could, in practice, impose the punishment arbitrarily”.<sup>57</sup> However, he rejected entirely any inquiry into legislative rationale. In his view, courts needed to defer to the reasoning of Parliament and concluded:

I agree with Lambert J. [*sic*] in the Court of Appeal that this is not a matter which can properly be considered by the courts. As he stated, “it is not for the courts to consider whether political decisions are wise or rational, or to sit in judgment on the wisdom of legislation or the rationality of the process by which it is enacted. That is for Parliament and the Legislatures ... The courts are confined to deciding whether the legislation enacted by the parliamentary process is constitutional.”<sup>58</sup>

While this may have been an attractive posture for some judges in 1987, it no longer holds water in modern Charter analysis. The wisdom of legislation may be beyond Charter scrutiny but statutes which impose burdens or create distinctions must conform with Charter norms.

Like Lamer J., Wilson J. also looked at arbitrariness as it related to the imposition of the punishment but took a more expansive view of when imposition would be arbitrary:

I disagree, however, with Lamer J. that the arbitrary nature of the minimum sentence under s. 5(2) of the Act is irrelevant to its designation as “cruel and unusual” under s. 12. On the contrary, I believe it is quite fundamental. A seven-year sentence for drug importation is not per se cruel and unusual. It may be very well deserved and completely appropriate. It is the fact that the seven-year sentence must be imposed regardless of the circumstances of the offence or the circumstances of the offender that results in its being grossly disproportionate in some cases and therefore cruel and unusual in those particular cases. The concept of “the fit sentence” to which I made reference in my concurring reasons in the *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, as basic to modern day theories of punishment is effectively, precluded by the mandatory minimum in s. 5(2). Judicial discretion to impose a shorter sentence if circumstances

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<sup>56</sup> *Id.*, at para. 100.

<sup>57</sup> *Id.*, at para. 101.

<sup>58</sup> *Id.*

warrant is foreclosed and the inevitable result is a legislatively ordained grossly disproportionate sentence in some cases.<sup>59</sup>

This remark shows her concern that a mandatory minimum sentence may compel an unconstitutional sentence and, accordingly, violate section 12 by producing a “legislatively ordained grossly disproportionate sentence”. Justice La Forest concurred with Lamer J. but, in a brief opinion, indicated that he preferred “not to say anything about the role of arbitrariness in determining whether there has been cruel and unusual treatment or punishment”.<sup>60</sup>

To summarize, in *Smith*, we see that McIntyre, Le Dain and Wilson JJ. supported a robust role for arbitrariness in section 12 litigation although their views were incipient and in need of development. Justice La Forest expressly declined from commenting on the issue. While Lamer J. and Dickson C.J.C. would only give arbitrariness a “minimal” role, they were dealing with a limited conception of arbitrariness and also remarked that a better home for the concept might be within section 7. After *Smith*, the concept of arbitrariness within section 12 was dispatched by Gonthier J. in one sentence in *Goltz* by referring to Lamer J.’s “minimal factor” comment.<sup>61</sup> Consequently, the concept of arbitrariness did not appear in *Morrisey* or *Ferguson*. So much for the potential richness of arbitrariness as a constitutional factor within section 12.

#### IV. ARBITRARINESS UNDER SECTION 7

Of course, arbitrariness plays a role in the rational connection aspect of the *R. v. Oakes*<sup>62</sup> test, but this is part of the section 1 justificatory stage. The question is whether arbitrariness can also play a role in the Charter violation analysis, before getting to section 1. With very little discussion, there are brief passages in *Smith*, *Lyons* and *Luxton* which allude to a potential claim under section 7 that could be pursued on the basis that the legislative provision in question did not pursue a legitimate penological objective or, at least, did not do so rationally.<sup>63</sup> But these were only hints. The emergence of arbitrariness as part of the “principles of fundamental justice” under section 7 can be traced back to *R. v.*

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<sup>59</sup> *Id.*, at para. 113.

<sup>60</sup> *Id.*, at 123.

<sup>61</sup> *Supra*, note 7, at para. 27.

<sup>62</sup> [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter “*Oakes*”].

<sup>63</sup> See *Smith*, *supra*, note 3, at paras. 58-59; *Lyons*, *supra*, note 37, at paras. 26, 36; *Luxton*, *supra*, note 38, at paras. 9-10.

*Morgentaler*<sup>64</sup> and *Rodriguez v. British Columbia (Attorney General)*,<sup>65</sup> two cases dealing with the constitutionality of controversial *Criminal Code*<sup>66</sup> offences, abortion and assisted suicide respectively. In *Rodriguez*, both the majority decision written by Sopinka J. and the dissent of McLachlin and L'Heureux-Dube JJ. addressed this issue. In dissent, McLachlin J. said:

Without defining the entire content of the phrase “principles of fundamental justice”, it is sufficient for the purposes of this case to note that a legislative scheme which limits the right of a person to deal with her body as she chooses may violate the principles of fundamental justice under section 7 of the Charter if the limit is arbitrary. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation. This was the foundation of the decision of the majority of this Court in *Morgentaler* ...<sup>67</sup>

Responding to this proposition, Sopinka J., who found no section 7 violation, also referred to *Morgentaler* and held:

Where the deprivation of the right in question does little or nothing to enhance the state’s interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual’s rights will have been deprived for no valid purpose ... It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered. One cannot conclude that a particular limit is arbitrary because (in the words of my colleague, McLachlin J. at pp. 619-20) “it bears no relation to, or is inconsistent with, the objective that lies behind the legislation” without considering the state interest and the societal concerns which it reflects.<sup>68</sup>

Justice McLachlin concluded that the distinction which the law draws between suicide and assisted suicide, making one legal and the other a criminal offence, rendered the legislative scheme arbitrary in violation of section 7. An able-bodied person can legally take their own life but one who is not physically able must enlist help to end their life, thereby engaging an illegal act. In her view, no societal interest was offered which could justify this distinction.

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<sup>64</sup> [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter “*Morgentaler*”].

<sup>65</sup> [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.) [hereinafter “*Rodriguez*”].

<sup>66</sup> R.S.C. 1985, c. C-46.

<sup>67</sup> *Rodriguez*, *supra*, note 65, at para. 203.

<sup>68</sup> *Id.*, at para. 147.

Subsequently, in non-criminal cases, the concept of arbitrariness has been given more attention, and more depth. In *Chaoulli v. Quebec (Attorney General)*,<sup>69</sup> the Supreme Court was confronted with a complex record, a controversial issue and a multi-layered constitutional analysis. The issue was the constitutionality of the Quebec legislation prohibiting private health-care delivery. Four justices held that the prohibition violated the Quebec *Charter of Human Rights and Freedoms*<sup>70</sup> and three (McLachlin C.J.C., Major and Bastarache JJ.) also held that it violated section 7 of the *Canadian Charter of Rights and Freedoms* on arbitrariness grounds. The dissenting judgment, representing the views of Binnie, LeBel and Fish JJ. rejected the finding of a section 7 violation arguing that in so doing their colleagues had expanded the net of arbitrariness by changing the test from “inconsistent” to “unnecessary”.<sup>71</sup> Accordingly, on the arbitrariness issue there is no clear majority. Moreover, an assessment of the disagreement requires a careful parsing of the McLachlin C.J.C. decision and an examination of the record to determine whether an expansion actually occurred.

However, the discussions of “arbitrariness” are worthy of note. Chief Justice McLachlin observed that a respondent to a claim of arbitrariness must show more than a theoretical connection to the relevant state objective, but must show a “real connection on the facts”.<sup>72</sup> With respect to the actual test, she said:

... whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person’s liberty and security, the more clear must be the connection.<sup>73</sup>

She observed that “common sense” arguments can amount to no more than assertions of belief and, in order to defeat claims of arbitrariness, the connection must be grounded in fact.<sup>74</sup> Here, she proceeded to look at evidence of the practises in other western democracies and concluded that this refuted “the government’s theoretical contention that a prohibition on private insurance is linked to maintaining quality public health

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<sup>69</sup> [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter “*Chaoulli*”].

<sup>70</sup> R.S.Q., c. C-12.

<sup>71</sup> *Chaoulli*, *supra*, note 69, at paras. 233-234.

<sup>72</sup> *Id.*, at para. 131.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, at paras. 131, 138.

care”.<sup>75</sup> For Binnie and LeBel JJ. (with Fish J. concurring) the test for arbitrariness should be approached in three steps:

- (i) what is the “state interest” to be protected?
- (ii) what is the relationship between the “state interest” thus identified and the prohibition against private health insurance?
- (iii) have the appellants established that the prohibition bears no relation to, or is inconsistent with, the state interest?<sup>76</sup>

This might be described as the narrow view of arbitrariness.

More recently, the concept of arbitrariness was relevant to the unanimous 2011 decision of the Supreme Court in the *Canada (Attorney General) v. PHS Community Services Society* case, commonly known as the *Insite* case.<sup>77</sup> Insite is a safe injection clinic where medical help is provided to intravenous drug users. When it opened in 2003, it had an exemption from the federal Minister of Health which insulated it from the prohibitions in the *Controlled Drugs and Substances Act*.<sup>78</sup> In 2008, the Minister refused to renew the exemption. A number of constitutional issues and arguments arose in this case. I will only look at the treatment of arbitrariness as an element of the analysis under section 7 of the Charter. Here, the Court needed to address the purposes of the CDSA and held that they were twofold: the protection of public health and the maintenance of public safety. Chief Justice McLachlin stated that the “Minister cannot simply deny an application for a s. 56 exemption on the basis of policy *simpliciter*; insofar as it affects Charter rights, his decision must accord with the principles of fundamental justice.”<sup>79</sup> The Court accepted the trial judge’s findings that exempting Insite from the prohibition against possessing narcotics not only “does not undermine the objectives of public health and safety, but furthers them”.<sup>80</sup> In applying the concept of arbitrariness, she concluded:

The jurisprudence on arbitrariness is not entirely settled. In *Chaoulli*, three justices (*per* McLachlin C.J. and Major J.) preferred an approach that asked whether a limit was “necessary” to further the state objective: paras. 131-32. Conversely, three other justices (*per* Binnie and LeBel JJ.), preferred to avoid the language of necessity and instead

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<sup>75</sup> *Id.*, at para. 149.

<sup>76</sup> *Id.*, at para. 235.

<sup>77</sup> [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter “*Insite*”].

<sup>78</sup> S.C. 1996, c. 19 [hereinafter “CDSA”].

<sup>79</sup> *Insite*, *supra*, note 77, at para. 128.

<sup>80</sup> *Id.*, at para. 131.

approved of the prior articulation of arbitrariness as where “[a] deprivation of a right ... bears no relation to, or is inconsistent with, the state interest that lies behind the legislation”: para. 232. It is unnecessary to determine which approach should prevail, because the government action at issue in this case qualifies as arbitrary under both definitions.<sup>81</sup>

This statement is significant in two ways. First, it represents the views of a unanimous court. Second, it leaves open for another day the resolution of a divide on the basic conception of the arbitrariness test.

Another important arbitrariness decision was the 2012 Ontario Court of Appeal decision in *Bedford v. Canada (Attorney General)*<sup>82</sup> which resulted in the holding that two prostitution-related offences in the *Criminal Code* were unconstitutional. The case was heard by a five-judge panel. All five found that sections 210 and 212(1)(j) were unconstitutional but the two dissenting judges would also have found section 213(1)(c) constitutionally invalid. Here, we are only interested in the application of the arbitrariness concept. Quite appropriately, the majority of the Court recognized that the section 7 jurisprudence dealing with the distinct concepts of arbitrariness, overbreadth and gross disproportionality is in an evolving state. The majority, noting that the “jurisprudence on arbitrariness is not entirely settled”<sup>83</sup> after *Chaoulli*, applied the conservative test and posed the basic question as follows:

When the court considers arbitrariness, it asks whether the challenged law bears no relation to, or is inconsistent with, its legislative objective. Put another way, arbitrariness is established where a law deprives a person of his or her section 7 rights for no valid purpose: *Rodriguez*, at pp. 594-595.<sup>84</sup>

Using “inconsistency” as the test, the Court agreed with the lower court decision of Himel J. that the bawdy house provisions could not be characterized as arbitrary since they were directed to some legitimate social harms and, accordingly, were consistent with the legislative objectives.<sup>85</sup> With respect to living off the avails, the Court concluded that the provision was not arbitrary:

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<sup>81</sup> *Id.*, at para. 132.

<sup>82</sup> [2012] O.J. No. 1296, 91 C.R. (6th) 257 (Ont. C.A.) [hereinafter “*Bedford*”].

<sup>83</sup> *Id.*, at para. 146.

<sup>84</sup> *Id.*, at para. 145.

<sup>85</sup> *Id.*, at para. 172.

In prohibiting persons from living on the earnings of prostitutes, the legislation prevents the exploitation of prostitutes and, in particular, prevents pimps from profiting from prostitution. The legislation may be overbroad, a matter to which we will turn shortly, because it captures activity that is not exploitative, but that is not the same as arbitrariness.<sup>86</sup>

This thoughtful yet controversial decision, obviously headed to the Supreme Court of Canada, permits us to make two observations about arbitrariness. First, the Supreme Court jurisprudence compels a more refined look at this important standard, especially in terms of distinguishing it from other related section 7 concepts. Second, like other section 7 arguments, in any case where it is raised, arbitrariness requires a thorough examination of legislative history, judicial interpretations and appropriate social science evidence to properly understand the legislative objectives which lie behind a statutory provision.

A different approach to arbitrariness, still relying on the same precedents, can be seen in the dissent of Binnie J. in *C. (A.) v. Manitoba (Director of Child and Family Services)*.<sup>87</sup> The case involved a 15-year-old Jehovah's Witness who had been taken into care after objecting to a blood transfusion as part of her treatment for Crohn's Disease. The Director applied for a treatment order that would authorize the medical procedure. The presiding judge invoked the statutory "best interests of the child" test and granted the order. On appeal, it was argued that the statutory scheme was unconstitutional since, if the child had been over the age of 16, no treatment order could be made unless the child was incapable of understanding relevant information or reasonably appreciating the foreseeable consequences of the consent decision. On the facts, it seemed clear that the child had that capacity. The trial judge concluded that capacity was irrelevant. The Court of Appeal considered that, while relevant, it was not determinative of the "best interests of the child" test. Sitting as a five-judge panel, Abella J. for the majority four justices held that the legislative scheme created by the *Child and Family Services Act*<sup>88</sup> was "neither arbitrary, discriminatory, nor violative of religious freedom".<sup>89</sup> After looking at the objectives of the legislation, the common law and other jurisdictions, she concluded that the scheme struck an

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<sup>86</sup> *Id.*, at para. 241.

<sup>87</sup> [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181, 309 D.L.R. (4th) 581 (S.C.C.) [hereinafter "*A.C. v. Manitoba*"].

<sup>88</sup> C.C.S.M., c. C80.

<sup>89</sup> *Supra*, note 87, at para. 98.

“appropriate balance between achieving the legislative protective goal while at the same time respecting the right of mature adolescents to participate meaningfully in decisions relating to their medical treatment”<sup>90</sup>. This balance “between autonomy and protection” ensured that the scheme was not arbitrary.<sup>91</sup> In a separate concurring opinion, McLachlin C.J.C. and Rothstein J. held that age “in this context, is a reasonable proxy for independence”.<sup>92</sup> As a result, they concluded that the scheme “reflects the societal reality of how children mature, and the dependence of children under 16 on their parents, as well as the difficulty of carrying out a comprehensive analysis of maturity and voluntariness ...”.<sup>93</sup>

In dissent, Binnie J. posed the questions differently by focusing on the class of “mature minors”. His approach flows from his observation about the applicable state interest:

Children may generally (and correctly) be assumed to lack the requisite degree of capacity and maturity to make potentially life-defining decisions. It is this *lack* of capacity and maturity that provides the state with a legitimate interest in taking the decision-making power away from the young person and vesting it in a judge under the *CFSA*.<sup>94</sup>

This led to his conclusion that “s. 25 of the *CFSA* is unconstitutional because it prevents a person under 16 from establishing that she or he understands the medical condition and the consequences of refusing treatment, and should therefore have the right to refuse treatment whether or not the applications judge considers such refusal to be in the young person’s best interests”.<sup>95</sup>

After a long discussion of personal autonomy, Binnie J. returned to the constitutional issue and characterized the legislative scheme as creating an irrebuttable presumption of incapacity for a child under 16 for no valid state purpose. In his analysis, if “the legislative net is cast so widely as to impose a legal disability on a class of people in respect of an assumed developmental deficiency that demonstrably does not exist in their case, it falls afoul of the ‘no valid purpose’ principle referred to by Sopinka J. in *Rodriguez*”.<sup>96</sup> On the arbitrariness point, he went back to basic principles and reasoned:

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<sup>90</sup> *Id.*, at para. 108.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, at para. 145.

<sup>93</sup> *Id.*, at para. 147.

<sup>94</sup> *Id.*, at para. 176.

<sup>95</sup> *Id.*, at para. 177.

<sup>96</sup> *Id.*, at para. 222.

Arbitrariness is a breach of fundamental justice, and arises where a law “bears no relation to, or is inconsistent with, the objective that lies behind [it]”. The *no valid state purpose* principle requires the identification of a public interest said to be advanced by the challenged law. The *no arbitrariness* principle looks at what valid state interests are said to be advanced and examines the relationship (if any) between the state purpose(s) and the impugned measure.<sup>97</sup>

After quoting from *Chaouilli*, he rephrased his conclusion by explaining that in the case at bar the irrebuttable presumption “when applied to young persons of capacity has ‘no real relation’ to the legislative goal of protecting children who *lack* such capacity” and, hence, is arbitrary.<sup>98</sup> This illustrates the importance of understanding state interests not just in theoretical terms but on the facts of the case, as the majority argued in *Chaouilli*.

What is especially interesting about this approach is that it flowed from Binnie J.’s argument that the presumption of incapacity cannot legally be refuted. Whether he was right or wrong on this point, what matters is that, in his appreciation of how the scheme operated, a person is precluded from showing that, on the facts, the ostensible purpose of the scheme does not apply. Here lies the similarity to mandatory minimum sentences. In a particular case, faced with a mandatory minimum sentence, an offender is precluded from arguing that the ostensible penological objectives have no relevance. In other words, the state interest which ostensibly underpins a mandatory minimum sentence is premised on a contextual presumption but the offender cannot show that the presumption does not apply to her.

## V. RECENT SENTENCING CASES, *NUR* AND *SMICKLE*

Both of these important 2011 trial level decisions paid attention to section 12 and arbitrariness as an element of section 7. In *R. v. Nur*,<sup>99</sup> the accused pleaded guilty to the offence of carrying a loaded firearm which, according to section 95(2)(a)(i) of the *Criminal Code*, carried a mandatory minimum sentence of three years because the Crown proceeded by indictment. Curiously, had the Crown proceeded summarily, section 95(2)(b) provided for a maximum sentence of one year. The sentencing

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<sup>97</sup> *Id.*, at para. 223 (emphasis in original).

<sup>98</sup> *Id.*, at paras. 223-225.

<sup>99</sup> [2011] O.J. No. 3878, 275 C.C.C. (3d) 330 (Ont. S.C.J.) [hereinafter “*Nur*”].

scheme has a gap between one and three years and this gap was the focus of various constitutional challenges under section 15 (equality), section 12 (cruel and unusual punishment) and section 7 (arbitrariness). The discrimination claim under section 15, supported by the intervener African Canadian Legal Clinic, may have been the most interesting and refined argument, but Code J. dismissed it with the conclusion that the “fundamental flaw in the s. 15 argument is that the Applicant and the Intervener have not established that the discriminatory effect of over-representation and over-incarceration of blacks, amongst those charged with s. 95 offences, is caused by the law itself.”<sup>100</sup> Under section 12, Code J. applied the *Ferguson* formulation, whether a punishment is “so excessive as to outrage standards of decency” and disproportionate to the extent that Canadians “would find the punishment abhorrent or intolerable”.<sup>101</sup> Looking at the circumstances of the offender and the offence in light of sentencing practises for gun-related offences, Code J. was not persuaded that “gross disproportionality” could be sustained. At the “reasonable hypothetical” stage of the analysis, a number of situations were submitted all of which involved a “first offender of good character who pleads guilty, who fully admits his mistake and who has no possible criminal purpose associated with his possession”.<sup>102</sup>

Justice Code accepted the Crown’s argument that the answer to the gross disproportionality claim premised on the “reasonable hypotheticals” was the availability of the summary conviction option which would preclude the three-year mandatory minimum. He advanced a number of reasons for this conclusion.<sup>103</sup> However, he cautioned that if in the future, “the Crown elects to proceed by indictment in a s. 95 case, based on incomplete knowledge of the facts, and a very different case later emerges at trial, a s. 12 Charter motion may well succeed at the sentencing stage of proceedings”.<sup>104</sup>

While the reasoning of Code J. on this point reflects his usual attention to detail and his scrupulous treatment of precedents, it is important to pause and consider his conclusion. By saying that the hybrid nature of the offence nullifies the hypothetical arguments is he not saying Crown

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<sup>100</sup> *Id.*, at para. 79.

<sup>101</sup> *Id.*, at para. 84.

<sup>102</sup> *Id.*, at para. 97.

<sup>103</sup> *Id.*, at paras. 109-112, where he argued that: (1) *Smith* was a straight indictable offence; (2) none of the reasonable hypothetical cases dealt with a hybrid situation; (3) after *Ferguson*, a discretionary constitutional exemption has been placed in the hands of the Crown; and (4) the Crown’s election as to how to proceed is an “essential feature of the criminal justice system”.

<sup>104</sup> *Id.*, at para. 117.

discretion on the election question will usually do the right thing? Can reliance on discretion, especially a discretion that is for the most part unreviewable, ever be an answer? A similar point was argued by the Crown in *Smith*, where it was submitted that facts that did not warrant a seven-year minimum sentence would result in a prosecutor pursuing a lesser charge. Justice Lamer rejected this argument by stating:

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.<sup>105</sup>

While one might argue that Lamer J. in *Smith* was writing only for himself and Dickson C.J.C., this would not be an accurate reading. Only six justices participated in the *Smith* decision.<sup>106</sup> In the three concurring judgments,<sup>107</sup> all justices agreed with Lamer J.'s conclusion that the impugned provision violated section 12, including his reasoning on gross disproportionality.<sup>108</sup> Accordingly, it can fairly be said that a majority of the Supreme Court of Canada has already rejected the use of prosecutorial discretion to rebut an alleged section 12 violation.

With respect to arbitrariness, Code J. described the claim as turning “on the fact that there is a two year sentencing ‘gap’ between cases where the Crown elects to proceed summarily (which carry a one year maximum sentence) and cases where the Crown elects to proceed by indictment (which carry a three year minimum sentence)”.<sup>109</sup> In section 7 terms, the claim was that the Crown’s “discretion is arbitrarily constrained by the absence of sentences between one year and three years which will force the Crown to elect to proceed by indictment in those cases where, for example, two years would have been an appropriate sentence”.<sup>110</sup> To assess this claim, he relied on *Rodriguez, R. v. Malmo-*

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<sup>105</sup> *Smith, supra*, note 3, at para. 68.

<sup>106</sup> Justice Chouinard was the seventh member of the hearing panel but took no part in the decision.

<sup>107</sup> See the opinions of Wilson J., Le Dain J. and La Forest J.

<sup>108</sup> Justice Wilson disagreed with his treatment of arbitrariness and La Forest J. demurred from addressing arbitrariness.

<sup>109</sup> *Nur, supra*, note 99, at para. 122.

<sup>110</sup> *Id.*, at para. 123.

*Levine*,<sup>111</sup> *Chaoulli* and *A.C. v. Manitoba*. As a result, he concluded that there was “no valid legislative purpose” behind the two-year gap since there inevitably will be cases in which the offender’s culpability falls between the two options. He concluded:

... the two year “gap” is inconsistent with the true legislative purposes that underlie s. 95. It severely restricts the flexibility of hybrid procedures, it will inevitably lead to unfit sentences in the low and mid-range of s. 95 cases, and it puts the three year mandatory minimum sentence, when proceeding by indictment, at constitutional risk. These are all irrational purposes and effects. There is simply no clear connection between the legislative goals of the 2008 reforms and the two year “gap” in the sentencing scheme. It appears to have been a mere legislative oversight, which Parliament would quickly have corrected by raising the summary conviction maximum sentence to three years, had the oversight been pointed out.<sup>112</sup>

While the gap problem may be an anomaly, Code J.’s analysis shows the importance of looking at a sentencing issue in terms of the overall goals of a sentencing scheme. However, notwithstanding his finding of arbitrariness, he denied a remedy on the basis that the constitutional defect lay in section 95(2)(b) whereas Mr. Nur was sentenced under section 95(2)(a)(i). While this is certainly correct, one might question whether, after finding the gap to be arbitrary, it was appropriate to put the blame on one end of the spectrum and not both. Every line has two ends and if the line between one and three can be characterized as arbitrary this is because of the gulf that the line spans and not just one of the end points. Nevertheless, *Nur* is an example of section 7 “arbitrariness” in action.

The decision of Malloy J. in *R. v. Smickle*<sup>113</sup> has deservedly received much attention for its careful reasoning and bold stance. The facts are unusual. On the day in question, a group of police officers executed a search warrant on the apartment of Mr. Smickle’s cousin by breaking in the door with a battering ram. The warrant related to the cousin and firearms allegations. When the police entered the apartment, instead of the cousin, they found Mr. Smickle posing with a loaded handgun for a webcam photograph that he posted on his Facebook page. He was wearing boxer shorts, a white tank top and sunglasses. He dropped the

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<sup>111</sup> [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, 179 C.C.C. (3d) 417, at 471 (S.C.C.).

<sup>112</sup> *Nur*, *supra*, note 99, at para. 131.

<sup>113</sup> *Supra*, note 2.

gun and the laptop and was arrested. He was charged with various offences in relation to possession of the handgun. Based on available information, the Crown elected to proceed by indictment. At Smickle's trial, he denied possessing the firearm but, nonetheless, was convicted of possession of a loaded firearm contrary to section 95(1) of the *Criminal Code*, which carries with it a mandatory minimum sentence of three years imprisonment for a first offence under section 95(2)(a). The sentencing proceeded on the factual basis that Mr. Smickle's use of the gun was as a prop for his photograph which, along with the sunglasses, would make him look "cool". At the time of the offence, Smickle was 27 years old with no criminal record. He was employed and living in a stable relationship with a woman. Like *Nur*, this case also implicated the two-year gap created by section 95(2)(a) and (b). Counsel challenged the constitutionality of section 95(2) on both section 12 and section 7 grounds.

Justice Malloy's section 12 analysis represents one of the rare occasions in which a judge goes beyond the "cruel and unusual" platitudes and delves into the deeper dimensions of the jurisprudence. She begins by looking for those factors that have been recognized as relevant to the analysis. From *Smith*, she finds (1) the gravity of the offence; (2) the personal characteristics of the offender; (3) the particular circumstances of the case; and (4) the actual effect of the punishment on the offender. From *Goltz*, she adds (5) whether the punishment is necessary to achieve a valid penal purpose; (6) whether it is founded on recognized sentencing principles; (7) whether there exist valid alternatives to the punishment imposed; and (8) whether a comparison with punishments imposed for other crimes in the same jurisdiction reveals great disproportion.<sup>114</sup> This is followed by a curious statement: "It is not entirely clear whether the 'grossly disproportionate' test formulated in *Smith* was meant to create an objective standard for cruel and unusual punishment in place of a subjective test based on community values."<sup>115</sup> One would have thought that any question of disproportionality, regardless of the degree, must be measured by an objective standard. Nonetheless, while it may be difficult to understand exactly what she means by using the objective/subjective distinction, it is clear that she is attempting to come to grips with the community standards concept which often appears as a synonym for standards of decency. Perhaps she is suggesting that there are two routes

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<sup>114</sup> *Id.*, at para. 39.

<sup>115</sup> *Id.*, at para. 42.

to gross disproportionality: one that looks to community standards (or standards of decency) and the other in which the punishment is placed in the lens of sentencing principles and practises? Ultimately, she accepts the role of community standards but defines it in a way that integrates both types of factors:

Notwithstanding these occasional references in the case law to community standards of decency and what would shock the public conscience, I remain of the view that the analysis of what constitutes cruel and unusual punishment is essentially an objective test. *To the extent that community tolerance is part of that test, it can only be with reference to a community fully informed about the philosophy, principles and purposes of sentencing as set out in the Criminal Code, the rights enshrined in the Charter, and the particular circumstances of the case before the court.*<sup>116</sup>

In so doing, Malloy J. has maintained jurisprudential consistency but also refined the role of community standards or standards of decency in a way that more meaningfully captures the sentencing question which, beyond issues of torture and barbarism, section 12 must encompass.

After concluding that, absent the mandatory minimum sentence, a one-year sentence would be fit and appropriate, she then examined the three-year mandatory term from a perspective that integrated the accepted principles and objectives of sentencing. In the end, she concluded that the mandatory minimum would be grossly disproportionate both viewed through an “objective test” and whether the public conscience would be shocked. She adopted the approach employed by Green J. in *R. v. Johnson*<sup>117</sup> and asked whether “a reasonable person knowing the circumstances of this case, and the principles underlying both the Charter and the general sentencing provisions of the *Criminal Code*, would consider a three-year sentence to be fundamentally unfair, outrageous, abhorrent and intolerable”.<sup>118</sup> Following this approach was a significant development. The reasonably informed standard, used in other legal tests,<sup>119</sup> is far superior to simply asking judges to imagine an artificial public consensus.

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<sup>116</sup> *Id.*, at para. 47 (emphasis added).

<sup>117</sup> [2011] O.J. No. 822, 268 C.C.C. (3d) 423 (Ont. C.J.).

<sup>118</sup> *Smickle, supra*, note 2, at para. 89.

<sup>119</sup> For example, the test for a “reasonable apprehension of bias” uses the lens of “an informed person, viewing the matter realistically and practically”: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1976] S.C.J. No. 118, [1978] 1 S.C.R. 369 (S.C.C.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] S.C.J. No. 1, [1995] 1 S.C.R. 3 (S.C.C.).

It is informative to list the various factors which led to this conclusion:

- The mandatory sentence would be 300 per cent greater than what is appropriate.
- A three-year sentence would put Mr. Smickle directly into the federal penitentiary system, usually reserved for seasoned criminals. These would be harsh conditions for anyone, but even more so for an individual such as Mr. Smickle who had no familiarity or experience with the penal system.
- The three-year sentence would jeopardize his personal relationships and job prospects.
- There was no issue of rehabilitation or individual deterrence.
- The mandatory sentence does comply with recognized sentencing principles but is inconsistent with many of the purposes and principles of sentencing, notably the goal of rehabilitation and the requirement that an individual not be deprived of his liberty if other sanctions are available which satisfy the other goals of sentencing.
- Even if it can be argued that general deterrence is served by the mandatory sentence, this cannot justify the imposition of a sentence that is otherwise grossly disproportionate to what an offender deserves.

Looking at this analysis, it is clear that Malloy J. has returned the section 12 issue to its proper home within the matrix of sentencing principles, objectives and factors. This is more appropriate for the assessment of mandatory minimum sentences especially those of relatively short length, miles away from the extremes of life and indeterminate sentences but also a considerable distance from a proportionate sentence. At the same time, she has refined the role of “outraging standards of decency” to ensure that it is reflective of informed observers who are knowledgeable about sentencing.

With respect to the arbitrariness issue, she agreed with the reasoning of Code J. in *Nur* and concluded that “the mandatory minimum, when coupled with the one year ceiling for summary conviction proceedings, is arbitrary and violates Mr. Smickle’s rights under section 7 of the *Charter*.”<sup>120</sup> The major distinction between *Nur* and *Smickle* is that in the latter case there was no need to move to a “reasonable hypothetical” analysis with all its intrinsic obstacles. Devoid of that distraction, Malloy J. was able to re-invest the section 12 analysis with the gravity and

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<sup>120</sup> *Smickle, supra*, note 2, at para. 96.

richness that it deserves. One can only speculate about how her thoughtful reasoning will be received by other courts.

## VI. CONCLUSION: ARBITRARY DISPROPORTIONALITY

From all of the section 12 jurisprudence, it is clear that a successful claim must rise to the standard of “gross disproportionality”. The courts have consistently said that simple disproportionality is a matter to be rectified by appellate courts. However, this does not accommodate the case of mandatory minimum sentences where both trial and appellate judges are confronted with stipulated mandatory sentences which, in their view, might be disproportionate to the culpability and circumstances of the offender. Here is where the concept of an “irrebuttable presumption” discussed by Binnie J. in *A.C. v. Manitoba*<sup>121</sup> strikes a chord and leads to the concept of arbitrary disproportionality that may be encompassed by section 7.

Going back to *Smith*, let me address a comment by Lamer J. which may be read as precluding this role for section 7. He said:

While section 7 sets out broad and general rights which often extend over the same ground as other rights set out in the Charter, it cannot be read so broadly as to render other rights nugatory. If section 7 were found to impose greater restrictions on punishment than s. 12 — for example by prohibiting punishments which were merely excessive — it would entirely subsume s. 12 and render it otiose. For this reason, I cannot find that s. 7 raises any rights or issues not already considered under s. 12.<sup>122</sup>

First, as noted by the Ontario Court of Appeal in *Bedford*,<sup>123</sup> arbitrariness was only recognized as a principle of fundamental justice in 1993 in *Rodriguez* and, accordingly, earlier cases ought not to play a role in understanding its application. Second, throughout *Smith*, Lamer J. was concerned with the effects of punishment and disavowed the relevance of looking to the legislative process. In subsequent years, especially with the acceptance of arbitrariness, we have seen the recognition of the need for a rational connection between purpose and effect when the right to life, liberty and security of the person is engaged. Third, and most importantly, the argument I am trying to make is not simply about excessive or

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<sup>121</sup> See the discussion following note 86.

<sup>122</sup> *Smith, supra*, note 3, at para. 167.

<sup>123</sup> See *Bedford, supra*, note 82, at para. 68.

disproportionate punishments. It is about excessive or disproportionate punishments compelled by arbitrary statutory provisions.

Essentially, the mandatory minimum sentence is an irrebuttable presumption. It mandates punishment on a presumption of culpability and deservedness which cannot be refuted by reference to the actual circumstances of the offence and the offender. In a case like *Smickle*, where the distance between a proportionate fit sentence and the mandatory minimum sentence can be characterized as “gross disproportionality”, section 12 comes into play. But is there no remedy where the distance is shorter? Can courts be compelled to impose sentences which they know are not appropriate unless they can meet the high threshold of “gross disproportionality”?

In these cases, I would argue that the mandatory minimum sentence and the irrebuttable presumption that it implies should be subject to an arbitrariness analysis under section 7 of the Charter. In other words, the question ought to be whether the mandatory minimum sentence creates a class of people who will be subjected to a sentence that cannot be justified by any sentencing principle or objective. This requires looking at the scope of conduct encompassed by the offence and then measuring the lower limits of culpability against the ostensible sentencing principles and objectives which underpin the legislation. I would return to *Chaoulli* and the holding that a justification cannot be merely theoretical but must be grounded in the facts of the case. It is not sufficient to simply refer to deterrence or denunciation or incapacitation without showing how and why they are relevant to a particular class of offenders. And here, the methodology need not be encumbered by any question of a “reasonable hypothetical”. So long as the legislated provision carves out a class of people for whom the sentence cannot be justified on principled grounds then the provision is arbitrary.

It is important to remember the approach of Lamer J. in *Smith*. What needs to be done is to contemplate the range of conduct and culpability which the offence encompasses. For every offence, it is inevitable that there will be a young first offender. It is inevitable that an offence will be committed at the lowest rung of culpability. The issue is whether, with this class in mind, can the mandatory sentence be justified by reference to accepted sentencing principles and penological objectives, as found in fact and not by a speculative theoretical assertion. Under the rubric of “arbitrary disproportionality”, it may be necessary to hear expert evidence about the scope and relevance of various sentencing and penologi-

cal objectives. But this may be the only way to move from rhetoric to fact.

Longer sentences simply for the sake of longer sentences are antithetical to the principles of fundamental justice. The inability of an offender to argue on facts and principled grounds that a punishment is undeserved does not conform with basic fairness which is intrinsic to our common law tradition. Without a Charter concept like “arbitrary disproportionality” we not only place sentencing judges in difficult positions of conscience, we also risk eroding public confidence in the criminal justice system.