

S.C.C. No.: 35678

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

-and-

ATTORNEY GENERAL OF CANADA

APPELLANT
(Intervener)

- and -

HUSSEIN JAMA NUR

RESPONDENT
(Appellant)

- and -

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PART I – STATEMENT OF FACT AND OVERVIEW

1. It should be beyond question that accused persons with mental disabilities¹ have an equal right to be free from cruel and unusual treatment or punishment and from criminal sanctions that are grossly disproportionate. As accused or offenders, they are entitled to the full protection of sections 7 and 12 of the *Charter*. For sections 7 and 12 *Charter* rights to have real meaning and force for this group, however, their unique needs and circumstances must be taken into account. The constitutionality of mandatory minimum sentencing provisions, and in particular section 95 of the *Criminal Code*, must therefore be tested with explicit consideration of mental disability, particularly since this Court’s ruling in *R v. Ferguson*² clarified that constitutional exemptions are unavailable. CACL’s submissions will focus on the impact of mandatory minimum sentences on persons with a developmental disability.³ Explicit consideration of developmental disability is not only a matter of the proper analytic approach to sections 7 and 12 challenges to mandatory minimum sentences, but a constitutional imperative having regard to the over-representation of, and systemic inequalities faced by, persons with a developmental disability in the criminal justice system.

2. CACL submits that the decision of the Ontario Court of Appeal striking down sections 95 should be upheld, but for different reasons than those provided by the Court below. The Court below held that the reasonable “hypothetical offender” must not be endowed with mitigating “individual characteristics” (such as “intellectual impairment”). The Court reasoned that otherwise, “regardless of the offence, one could describe an offender for whom a mandatory minimum punishment would be grossly disproportionate” (para.137). This statement recognizes that once developmental disability is considered, sections 95 (and many other) mandatory minimums will not pass constitutional muster. The Court’s answer to this, however, was to exclude disability from the analysis. If this logic is correct, mandatory minimum sentence provisions could be upheld *notwithstanding* the fact that they breach the *Charter* and international human rights⁴ of this constitutionally protected group. Put simply, the constitutional rights of persons with a developmental disability would not count.

3. From CACL’s perspective, the categorical exclusion of persons with a developmental disability from the reasonable hypothetical analysis is a critical point in issue in this appeal. If a law is

¹ “Mental disability” is an enumerated ground under section 15 of the *Charter*. CACL will focus on developmental disabilities, which are a form of mental disability.

² [2008] 1 S.C.R. 96.

³ “Developmental disability” includes intellectual disability, Fetal Alcohol Spectrum Disorder (FASD), autism spectrum disorders, and brain injury.

⁴ Convention on the Rights of Persons with Disabilities, December 13, 2006, Can TS 2010 No 8, Arts 13, 15, 17, 26.

unconstitutional as applied to a reasonable hypothetical offender with a developmental disability, it must be struck down. The Court cannot convict offenders under an unconstitutional law⁵ while waiting for such time that a disabled applicant launches a constitutional challenge.

PART II – STATEMENT OF ISSUES

4. The mandatory minimum sentences under sections 95 of the *Criminal Code* impose grossly disproportionate custodial sentences on offenders with a developmental disability who may have significantly reduced moral culpability in relation to this offence, for whom incarceration is disproportionately severe and cruel, and for whom lengthy custodial sentences fail to serve the goals of sentencing, particularly where community-based dispositions are more effective. As such, section 95 violates section 12 of the *Charter* (and the principle of proportionality in sentencing pursuant to section 7 of the *Charter*) and cannot be saved under section 1.

PART III – STATEMENT OF ARGUMENT

Developmental Disability and the Section 12 Analysis

5. There are estimates that 10-20% of incarcerated adult offenders are persons with FASD and that youths with FASD are 19 times more likely to be in prison than youths without FASD.⁶ The CBA has described the “over-representation of FASD affected individuals” in the criminal justice system as “persistent.”⁷ FASD is but one developmental disability. While system-wide empirical data is gravely lacking, “it is generally agreed that developmentally disabled persons are over-represented in the criminal justice system.”⁸ This reality, alone, means that developmental disability is a factor in the “common example of the crime” in many *Criminal Code* offences, including under section 95.

⁵ “No one can be convicted of an offence under an unconstitutional law”, *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 38-39; see also *R. v. Ferguson*, *supra*.

⁶ Diane K Fast & Julianne Conry, “Fetal Alcohol Disorders and the Criminal Justice System” (2009) 15 *Developmental Disabilities Research Reviews* 250 at 251 [Book of Authorities (“BA”) Tab 16]; Svetlana Popova et al, “Fetal Alcohol Spectrum Disorder Prevalence Estimates in Correctional Systems: A Systemic Literature Review” (2011) 102:5 *Can J Public Health* 336 at 338-339 [BA Tab 23]; see also Institute of Health, *Consensus Statement of Legal Issues of Fetal Alcohol Spectrum Disorder (FASD)*, Vol 5, Sept 18-20, 2013 [“Consensus Statement”] [BA Tab 18]; see also Kent Roach & Andrea Bailey, “*The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing*” (2009) 42 *UBC L Rev* 1 [BA Tab 24].

⁷ CBA, *Resolution 13-12-A: Accommodating the Disability of FASD to Improve Access to Justice*, 2013 [“CBA Resolution”] [BA Tab 14]

⁸ Shereen Hassan & Robert M Gordon, “Developmental Disability, Crime, and Criminal Justice: A Literature Review” (May 2003) Simon Fraser University, Criminology Research Centre Occasional Paper #2003-1 at 30 [BA Tab 17]; BC Ministry of Health Services, *Mental Disorder, Substance Use and Criminal Justice Contact* (2005) at 5 [BA Tab 12]; Jessica Jones, “Persons with Intellectual Disabilities in the Criminal Justice System” (2007) 51:6 *International Journal of Offender Therapy and Comparative Criminology* 723 at 724 [BA Tab 19].

6. Developmental disability operates to disadvantage accused persons or offenders at every stage of the criminal justice process. As recently re-affirmed by the United States Supreme Court, persons with intellectual disabilities are “more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel.”⁹ Persons with a developmental disability frequently do not have the ability on their own, and without assistance, to foresee and understand the consequences of their actions and to make reasoned choices, thus putting them on a collision course with a justice system that assumes independent ability to make informed and voluntary choices and to learn from one’s experiences.¹⁰

7. For some developmental disabilities, such as FASD, the manifestations of the disability (such as inability to control behavior and to understand conduct as legally or morally wrong, as well as inability to foresee consequences or learn from past mistakes) result in frequent “conflict with the law.”¹¹ Characteristics of persons with certain intellectual disabilities, which make them more likely to copy the behaviour of others without knowing whether this behaviour is right or wrong, can also lead to criminality in circumstances of reduced moral blameworthiness. These factors are biological and social. Inadequate social supports for persons with a developmental disability significantly increase the likelihood of negative social interactions and criminal behavior.¹²

8. Persons with a developmental disability are also more likely to be preyed on by others because of a tendency to be suggestible and to want to please. This tendency, arising from the disability, often combined with social isolation and lack of personal supports, makes such individuals particularly vulnerable to those who hold out the powerful promise of inclusion and belonging. These characteristics disadvantage persons with a developmental disability in their interactions with the criminal justice system, as they are frequently compliant with authority (police and judges), agree to leading questions and make false or exaggerated confessions.¹³ They also often have limited ability on their own to understand the criminal process, including the consequences of a guilty plea.¹⁴ These barriers are exacerbated by a criminal justice system which rarely has safeguards in place to ensure

⁹ *Hall v. Florida* 572 U.S. (2014) at p.7 [BA Tab 1].

¹⁰ See authorities *supra* notes 6-8.

¹¹ CBA Resolution, *supra* note 7, *Preamble* [BA Tab 14].

¹² See authorities *supra* notes 6-8.

¹³ See authorities at notes 6-8, *supra*. For a recent example of a false confession by a person with FASD see: Shelby Thorn, “Updated: Strange twist in Surrey sex case”, *CKNW AM* (16 October 2014) online: <<http://www.cknw.com/2014/10/16/strange-twist-in-surrey-sex-case/>>.

¹⁴ See for example Consensus Statement, *supra* note 6 [BA Tab 18]; Jones, *supra* note 8 at 726 [BA Tab 19]; and authorities *supra* note 6.

that accused persons with a developmental disability are protected and appropriately accommodated.

9. Further, prisons are not designed for persons with a developmental disability. As noted recently by this Court, “fewer than one-third of Ontario provincial jails have special units for inmates with mental illness or developmental disability.” The Court further acknowledged in relation to offenders with mental disorders, that these offenders “do not typically fare well as inmates.”¹⁵ The same is true for inmates with intellectual and other developmental disabilities – the potential for their sexual, physical and emotional victimization in correctional facilities is high. As one Ontario provincial court judge recently stated, offenders with intellectual disabilities are “an easy target for the unsavoury members of the inmate population.”¹⁶ Similarly, the BCCA has acknowledged that “persons with a condition such as FASD generally do poorly in prison and are often victimized by other inmates.”¹⁷ This Court has repeatedly stated that all contextual factors must be considered in the section 12 analysis. Attention to the particularly severe and harsh “effects of the punishment”¹⁸ on individuals with a developmental disability must not be overlooked.

10. The “penological goals and sentencing principles upon which the sentence is fashioned” and the “existence of valid alternatives to the punishment imposed”¹⁹ must also be considered in the section 12 (as well as section 1) analysis having regard to the specific realities of developmentally disabled offenders. Community-based alternatives to incarceration are frequently more effective and likely to rehabilitate persons with a developmental disability. The opposite is also true: without protection and programming specific to their needs, persons with a developmental disability are more likely to emerge from prison with criminal associations and with any anti-social behavior reinforced. Moreover, these offenders, when incarcerated months or years after conviction, are unlikely to make any connection between the punishment and the original offending acts. The penological goals of specific deterrence, rehabilitation and protection of the community in the short and longer term, therefore, are often better achieved through non-custodial sentences.

¹⁵ *R v Conception*, 2014 SCC 60 at para 77 [BA Tab 5]; see also *R v Adamo* 2013 MBQB 225 at paras. 48, 58, 62, 63 and 139 [BA Tab 3]: “the mandatory minimum sentence in s.95(2)(a)(i) has a much greater impact on mentally disabled persons because it does not take into account their reduced moral blameworthiness.” *R v Dayfoot*, 2007 ONCJ 332 at para 13 [BA Tab 6] and authorities *supra* notes 6-8.

¹⁶ *R v Stapley*, 2014 ONCJ 184 (CanLII) at 19 [BA Tab 10].

¹⁷ *R v JMR*, 2004 BCCA 617 at para 7 [BA Tab 8].

¹⁸ *R v Morrissey*, 2000 SCC 90 [*Morrissey*] at para 28.

¹⁹ *Morrissey* at para 98.

11. Moreover, grossly disproportionate and unjust sentences imposed on offenders with disabilities cannot be justified by, nor serve the goals of, general deterrence. As noted by the Court in *R. v. Abou*, “it is simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person.”²⁰ In *R. v. Harper*²¹ the Court cited *Abou* with approval and noted in relation to an offender with FASD:

The calculus of sentencing the average offender simply does not apply to an offender with FASD. Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD... In this case should we use Mr. Harper as a whipping boy by imposing a gaol sentence of greater length on him in order to deter others who should and are capable of knowing better? I think not.

12. CACL submits that reasonable hypotheticals which capture the lived experience of persons with a developmental disability produce “common” and “reasonable” examples for the purposes of testing the constitutionality of section 95 of the *Code*. That said, since *R. v. Ferguson*, the “exceptional” case must be considered alongside the “common.” Persons with disabilities should not be subjected to grossly disproportionate sentences in their individual cases, whether the circumstances are common or exceptional. Nor, with well over fifty mandatory minimum sentences on the books, should they bear the burden of litigating each and every exceptionality on a case-by-case basis.

Reasonable Hypothetical Under section 95

13. The *actus reus* of section 95 is made out where an accused “in any place” is in possession of a prohibited or restricted firearm which is loaded or for which the ammunition is readily accessible. The *mens rea* requires only that the accused know that he or she possesses the firearm and that he or she does not have a license or certificate to possess it. The offence, therefore, would be properly made out in circumstances where an adult with a developmentally disability (with no criminal record) is asked by a person on whom he relies (for example to bring him groceries, for protection or for much-needed companionship) to hold or store a backpack with a loaded gun in the closet of his basement apartment. Aggravating factors could make the offence potentially more dangerous to others, but the mandatory minimum sentence would still be grossly disproportionate in terms of an automatic three year custodial sentence for this accused. For example, where the disabled adult were persuaded or pressured (but not in a manner to amount to duress) to help the “friend” transport the backpack to someone else’s house and was stopped on the sidewalk by police.

²⁰ *R v Abou*, [1995] BCJ No 1096 (Prov Ct) at para 23 [BA Tab 2].

²¹ *R v Harper*, 2009 YKTC 18 at paras 39 and 47 [BA Tab 7].

14. In this example, the offender's moral culpability is significantly diminished. He is not the type of offender truly intended to be caught by the legislation, the aim of which is to stop the evils of gun violence. As an offender with no criminal record and limited ability to understand the offence or to have prevented or avoided its commission, a three year automatic custodial sentence is grossly disproportionate and offends the community sense of decency.²² The manifest injustice of the sentence is exacerbated by the futility of incarceration in rehabilitating the offender. Worse, the offender faces virtually certain traumatization in jail.

15. A second reasonable hypothetical involves a person whose vulnerabilities include, but may not be limited to, developmental disability. For example a mother with an intellectual disability who has an abusive spouse and who hides the spouse's (illegal) prohibited weapon in her purse in order to prevent him from using it against her. Or who is forced by him to do so. The gun is found when she is stopped in the lobby of her building by police who are investigating an unrelated matter. Given the socio-economic consequences of disability, and other incidents of discrimination, it may be particularly difficult for her to leave her abuser. Yet "it wasn't my gun" or "he told me to do it" would not be sufficient to avoid criminal liability or the 3-year custodial sentence under section 95.

16. As with the first scenario above, no consideration can be given under section 95 to the woman's reduced moral blameworthiness, including her extremely limited capacity to act independently upon options that might be available to other persons who have greater independence and cognitive ability (for example to turn the gun over to the police). Other mitigating factors, including the potentially devastating impact of incarceration on her and her children, are also excluded. In *R v TAP*²³, in circumstances somewhat analogous to the scenario above, the offending mother received a 90 day intermittent plus 21-month consecutive conditional sentence for section 95 and other offences (as a result of the findings of unconstitutionality in *R v Smickle*²⁴ applied by the sentencing judge, and *R v Nur* by the time *TAP* was appealed). It is noteworthy that both the trial and appellate courts did not think a fit and just (i.e. proportionate) sentence in the case was anywhere near 3 years incarceration.

17. Finally, developmental disability may intersect with other factors directly relevant to the reasonable hypothetical analysis. Other intervenor groups have addressed the fundamental

²² As set out at paragraphs 19-21 below, Crown election does not offer a constitutional response to avoid the grossly disproportionate injustice in this case

²³ *R v. T.A.P.* [2013] O.J. No. 698 (S.C.J.); varied [2014] ONCA 141 [BA Tab 11].

²⁴ 2012 ONSC 602; varied 2013 ONCA 678.

inconsistency between mandatory minimum sentences and the statutory and constitutional requirements to redress the over-representation of Aboriginal persons in the Canadian criminal justice system. For reasons almost certainly related to their historical treatment in Canada, “it is generally assumed, whether accurately or not, that Aboriginal people who are disproportionately represented in the criminal justice system are also likely overrepresented among the populations that have neurological impairments associated with FASD.²⁵” The accused in the scenarios above could well be Aboriginal offenders with FASD or other developmental disability. The unjust and disproportionate effect of the mandatory sentences in the hypothetical scenarios would be further exacerbated when imposed on Aboriginal persons whose disability may be directly or indirectly caused by the very colonial structure that is now subjecting them to long periods of incarceration.

Possible Exercise of Crown Discretion Doesn’t Cure Gross Disproportionality

18. The federal Crown acknowledges that the Crown election is not a constitutional “safety valve”²⁶ but nevertheless attempts to portray the election as a way to mitigate the possibility of manifestly unjust sentences. The Crown suggests that any errors it makes in triggering the mandatory minimum are reviewable under section 12 of the *Charter*.

19. From the perspective of the systemic inequalities faced by persons with a developmental disability, the Crown election provides no comfort. These inequalities would tend to increase, rather than decrease, the likelihood of the Crown proceeding by way of indictment, including: failure by justice system officials (police, Crown attorneys or others) to identify developmental disability at an early stage if at all; likelihood of the Crown election being based on inculpatory statements (whether true or untrue); the tendency of many accused with a developmental disability to plead guilty at an early stage as a matter of compliant behavior or to “get it over with”; and, in some cases, the disability itself being characterized as an aggravating factor. Further, many Crown policies recommend strong denunciatory and deterrent penalties in firearms cases, including BC’s direction to proceed by indictment under section 95 except in “exceptional circumstances” and only after consultation with Regional Crown Counsel.²⁷

²⁵ Consensus Statement, at p.2 [BA Tab 18]. See also: Michelle M Mann, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections*, Office of the Correctional Investigator, Correctional Services Canada (Ottawa: Office of the Correctional Investigator Canada, 2009) [BA Tab 21]; Roach & Bailey, *supra* note 6 [BA Tab 24]; Larry N Chartrand & Ella M Forbes-Chilibeck, “The Sentencing of Offenders with Fetal Alcohol Syndrome”, (2003) 11 Health L J 35 [BA Tab 15].

²⁶ Factum, Attorney General Canada, *R v Nur*, para 98.

²⁷ BC Ministry of Justice, Crown Counsel Policy Manual, *Firearms – Mandatory Minimum Sentences* (October 2012) [BA Tab 13]; Ministry of Attorney General Ontario, Crown Policy Manual, *Firearms* (March 2005) [BA Tab 22];

20. Moreover, the Crown’s submission that any error in election can be addressed by way of constitutional litigation improperly puts the onus of rectifying manifestly unjust criminal legislation on the shoulders of those most vulnerable and disempowered, rather than on the state.

21. The effectively unreviewable exercise of Crown discretion is not and cannot be the mechanism for protecting the constitutional rights of persons with a developmental disability. As stated by this Court in *R. v. Bain*: “the protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.”²⁸

Alternative Measures under sections 12 and 1: Disability-Specific Exemption Clauses

22. The CBA addresses statutory exemptions as an alternative measure which could have ensured the general application of the mandatory minimum sentences while avoiding manifestly unjust results in appropriate and deserving cases. CACL wishes to add that comparative jurisdictions have adverted to disability as a ground for exemption or discretionary relief from the application of mandatory minimum sentences. For example, “mental condition”, “cognitive impairment” (that was not self-induced) and “impaired mental functioning” (including “mental illness”, “intellectual disability”, “acquired brain injury”, “autism spectrum disorder” and “neurological impairment”) are found in statutes in Australia as a basis for exemption from mandatory minimum penalties, in recognition of the reduced moral blameworthiness of the offender.²⁹

23. These comparative examples are relevant in three respects: (i) they underscore CACL’s submission that Courts must have the discretion to consider developmental disability in sentencing to respect these offenders’ constitutional rights; (ii) under section 12, a valid alternative exists to imposing a mandatory minimum penalty on accused persons with a developmental disability; and (iii) this alternative demonstrates that the mandatory minimum does not minimally impair the rights of disabled offenders under section 1 of the *Charter*. CACL does not necessarily endorse a statutory exemption as the best method of avoiding constitutional violations, but submits that this experience from Australia should inform the Court’s analysis of this issue.

Manitoba Department of Justice, Policy Directive, *Prosecution of Offences Involving Firearms* (May 2005) [BA Tab 20].

²⁸ *R v Bain*, [1992] 1 SCR 91 at 8 (per Cory J, concurring). *R v Smith*, [1987] 1 SCR 1045 at para 69, which held the Court cannot: “delegate the avoidance of a [*Charter*] violation to the prosecution or anyone else for that matter.”

²⁹ *Criminal Law Sentencing Act 1988* [SA], s.17; *Crimes Act 1900 No 40* [NSW], ss 19B(3)(b), 25A(5)(b) and 25A(10); *Crimes Amendment (Intoxication) Bill 2014* [NSW], Schedule 1, s 2, s 8B(4) (proposed); *Sentencing Act, 1991* [Vic], ss 10 and 10A.

24. There is nothing in the evidentiary record in this appeal to suggest that Parliament considered the mitigating circumstances of persons with a developmental disability when the mandatory minimum sentences under section 95 were enacted. Parliament left that work for the courts. This Court cannot now shy away from this analysis as a matter of deference. Parliament could have protected the constitutionality of its legislation in any number of ways, whether by ensuring at the outset that legislation is constitutional as applied to persons with a developmental disability or through the enactment of a defined statutory exemption or other means. It chose not to do so at its peril.

Gross Disproportionality and Proportionality as Principles of Fundamental Justice

25. In *R v. Anderson* (at para 21), this Court reiterated the foundational principle of proportionality in sentencing:

“[p]roportionality is the *sine qua non* of a just sanction” and a principle of fundamental justice: paras. 36-37. Proportionality means that the sentence must be “proportionate to both the gravity of the offence and the degree of responsibility of the offender” (*Ipeelee*, at para. 39 (emphasis deleted); see also s. 718.1 of the *Code*). “[S]ystemic and background factors [which include Aboriginal status] may bear on the culpability of the offender, [that is, the degree of responsibility of the offender,] to the extent that they shed light on his or her level of moral blameworthiness”: *Ipeelee*, at para. 73. (emphasis added).

26. Following *Anderson*, in *R. v. Safarzadeh-Markhali*³⁰, a case involving a section 7 challenge to subsection 719(3.1) of the *Code* which limits credit for pre-sentence custody, the Ontario Court of Appeal ruled that “the principle of proportionality in sentencing – a principle expressed in the *Code* itself and rooted in Canada’s legal tradition – is a principle of fundamental justice.” The Court noted that the principle of proportionality “is integral to a just sentence and to public confidence in the sentencing process.”³¹

27. Whether under common law principles, section 718.1 of the *Code* (which is the only “fundamental principle” in the statute), or section 7 of the *Charter* (which informs all of the section 8-14 *Charter* rights), proportionality is and has *always* been about weighing the “gravity of the offence and the degree of responsibility of the offender.” Proportionality is concerned with the particularities as stated in *Anderson* (para 21): “proportionality ensures that a sentence does not exceed what is

³⁰ 2014 ONCA 627 [*Safarzadeh-Markhali*] at para 73 [BA Tab 9].

³¹ *Safarzadeh-Markhali* at para 80 [BA Tab 9]. In an apparent attempt to avoid making a ruling in direct conflict with the “gross disproportionality” standard under section 12, however, the Court distinguished between section 7 *Charter* challenges to the sentencing process as opposed to section 12 *Charter* challenges to the result (i.e. the sentence imposed).

appropriate given the moral blameworthiness of the offender”, it ensures “justice for the offender” (emphasis added). There is no principled basis to redefine the concept of proportionality for the purposes of *Charter* section 12. Proportionality in sentencing is, at its core, an examination of individual circumstances. It is not, and can never be, abstract and decontextualized. Proportionality under section 12 can mean no less than this individualized balancing exercise. A grossly disproportionate sentence may be distinguished from a disproportionate sentence as a matter of degree, but that is all. If the hypothetical analysis for the purposes of gross disproportionality categorically excludes disability or other common mitigating factors, it has ceased to be a proportionality inquiry in anything other than name.

Conclusion

28. CACL’s position is that every person should be constitutionally entitled to a proportionate sentence and that judges should be trusted to craft proportionate sentences in light of all the circumstances of the offence and the offender. Where judges have discretion in sentencing, this right is protected by the codified principles of sentencing and by statutory appeal of “unfit” sentences. Where that discretion is removed, proportionality as a principle of fundamental justice at a minimum must ensure that the *Criminal Code* does not impose “grossly disproportionate” sentences on individual accused. If a three year minimum sentence cannot be constitutionally justified when applied to a range of reasonably possible individualized offenders, including the potentially over 20% of incarcerated adults with a developmental disability, the law must be struck down. To hold otherwise is to render section 12 *Charter* rights meaningless for this constitutionally protected group.

PARTS IV and V – SUBMISSION ON COSTS AND ORDER SOUGHT

29. CACL requests that no costs be awarded against it and that it be permitted to present oral argument at the Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS day of October, 2014

Joanna Birenbaum and Susan Chapman

Counsel for the Intervener, Canadian Association for Community Living (CACL)

PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTORY PROVISIONS

Canada

Charter of Rights and Freedoms, ss. 7-14

Criminal Code, RSC 1985, c C-46, ss. 95, 718.1, 719(3.1)

International

Criminal Law Sentencing Act 1988 [SA], s.17;

Crimes Act 1900 No 40 [NSW], ss.19B(3)(b), 25A(5)(b) and 25A(10)

Crimes Amendment (Intoxication) Bill 2014[NSW], Schedule 1, s. 2, s.8B(4) (proposed);

Sentencing Act, 1991 [Vic], ss. 10 and 10A.

UN General Assembly, *Convention on the Rights of Persons with Disabilities*: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

Charter of Rights and Freedoms, ss. 7-14

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.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

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

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

10. Chacun a le droit, en cas d'arrestation ou de détention :

- a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;
- b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;
- c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

11. Tout inculpé a le droit :

- a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;
- b) d'être jugé dans un délai raisonnable;
- c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;
- d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;
- e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;
- f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;
- g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;
- h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;
- i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

Criminal Code, RSC 1985, c C-46, ss. 95, 718.1, 719(3.1)

95. (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

(a) an authorization or a licence under which the person may possess the firearm in that place; and

(b) the registration certificate for the firearm.

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, three years, and

(ii) in the case of a second or subsequent offence, five years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

(3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

719 (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

Code criminel, L.R.C. (1985), ch. C-46, ss. 95, 718.1, 719(3.1)

95. (1) Sous réserve du paragraphe (3), commet une infraction quiconque a en sa possession dans un lieu quelconque soit une arme à feu prohibée ou une arme à feu à autorisation restreinte chargées, soit une telle arme non chargée avec des munitions facilement accessibles qui peuvent être utilisées avec celle-ci, sans être titulaire à la fois :

- a) d'une autorisation ou d'un permis qui l'y autorise dans ce lieu;
- b) du certificat d'enregistrement de l'arme.

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :

- (i) de trois ans, dans le cas d'une première infraction,
- (ii) de cinq ans, en cas de récidive;

b) soit d'une infraction punissable, sur déclaration de culpabilité par procédure sommaire, d'un emprisonnement maximal de un an.

(3) Le paragraphe (1) ne s'applique pas à quiconque utilise une arme à feu sous la surveillance directe d'une personne qui en a la possession légale, de la manière dont celle-ci peut légalement s'en servir.

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

719 (3.1) Malgré le paragraphe (3), si les circonstances le justifient, le maximum est d'un jour et demi pour chaque jour passé sous garde, sauf dans le cas où la personne a été détenue pour le motif inscrit au dossier de l'instance en application du paragraphe 515(9.1) ou au titre de l'ordonnance rendue en application des paragraphes 524(4) ou (8).

Criminal Law (Sentencing) Act 1988 (South Australia), s.17

Reduction of Minimum Penalty

Where a special Act fixes a minimum penalty in respect of an offence and the court, having regard to –

- (a) the character, antecedents, age or physical or mental condition of the defendant; or
- (b) the fact that the offence was trifling; or
- (c) any other extenuating circumstances,

is of the opinion that good reason exists for reducing the penalty below the minimum, the court may so reduce the penalty.

Crimes Act 1900 No 40 [NSW], s.19B(3)(b)

Mandatory life sentence for murder of police officers

(3) This section does not apply to a person convicted of murder:

- (b) if the person had a significant cognitive impairment at that time (not being a temporary self-induced impairment).

25A Assault causing death

(1) A person is guilty of an offence under this subsection if:

- (a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
- (b) the assault is not authorised or excused by law, and
- (c) the assault causes the death of the other person.

Maximum penalty: Imprisonment for 20 years.

(5) It is a defence in proceedings for an offence under subsection (2):

- (a) if the intoxication of the accused was not self-induced (within the meaning of Part 11A), or
- (b) if the accused had a significant cognitive impairment at the time the offence was alleged to have been committed (not being a temporary self-induced impairment).

(10) In this section, *cognitive impairment* includes an intellectual disability, a developmental disorder (including an autism spectrum disorder), a neurological disorder, dementia, a mental illness or a brain injury.

Crimes Amendment (Intoxication) Bill 2014(NSW), s.8B (4) (proposed)

8B Minimum sentences of imprisonment, and non-parole period, for certain aggravated intoxication offences

(4) This section does not apply to the sentencing of a person who had a significant cognitive impairment at the time the offence was committed (not being a temporary self-induced impairment). A cognitive impairment includes an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia, a mental illness or a brain injury.

Sentencing Act, 1991 [Vic], ss. 10 and 10A.

10 Custodial sentence must be imposed for gross violence offences

(1) In sentencing an offender for an offence against section 15A or 15B of the **Crimes Act 1958** (whether on appeal or otherwise), a court must impose a term of imprisonment and fix under section 11 a non-parole period of not less than 4 years unless the court finds under section 10A that a special reason exists.

Note

Section 11(3) requires that a non-parole period must be at least 6 months less than the term of the sentence.

(2) Subsection (1) does not apply to—

(a) a person who aids, abets, counsels or procures the commission of the offence; or

Note

See section 323 of the **Crimes Act 1958**.

(b) a person who is under the age of 18 years at the time of the commission of the offence.

10A Special reasons relevant to sentencing for gross violence offences

(1) In this section—

impaired mental functioning means—

(a) a mental illness within the meaning of the **Mental Health Act 1986**; or

(b) an intellectual disability within the meaning of the **Disability Act 2006**; or

(c) an acquired brain injury; or

(d) an autism spectrum disorder; or

(e) a neurological impairment, including but not limited to dementia.

(2) For the purposes of section 10, a court may make a finding that a special reason exists if—

(a) the offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence; or

Notes

1 Section 5(2AB) also applies.

2 If an offender fails to fulfil an undertaking, the Director of Public Prosecutions has a right under section 291 of the **Criminal Procedure Act 2009** to appeal against the less severe sentence imposed.

(b) the offender—

(i) is of or over the age of 18 years but under 21 years at the time of the commission of the offence; and

(ii) proves on the balance of probabilities that he or she has a particular psychosocial immaturity that has resulted in a substantially diminished ability to regulate his or her behaviour in comparison with the norm for persons of that age; or

(c) the offender proves on the balance of probabilities that—

- (i) at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially reduces the offender's culpability; or
 - (ii) he or she has impaired mental functioning that would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment; or
 - (d) the court proposes to make a hospital security order or a residential treatment order in respect of the offender; or
 - (e) there are substantial and compelling circumstances that justify doing so.
- (3) In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court must have regard to—
- (a) the Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that a non-parole period of not less than 4 years should ordinarily be fixed for an offence against section 15A or 15B of the **Crimes Act 1958**; and
 - (b) whether the cumulative impact of the circumstances of the case would justify a departure from that sentence and minimum non-parole period.
- (4) If a court makes a finding under subsection (2), it must—
- (a) state in writing the special reason; and
 - (b) cause that reason to be entered in the records of the court.
- (5) The failure of a court to comply with subsection (4) does not invalidate any order made by it.

Convention on the Rights of Persons with Disabilities, Articles 13, 15, 17, 26

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 17 - Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 26 - Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

- a. Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
- b. Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Convention relative aux droits des personnes handicapées, Articles 13, 15, 17, 26

Article 13

Accès à la justice

1. Les États Parties assurent l'accès effectif des personnes handicapées à la justice, sur la base de l'égalité avec les autres, y compris par le biais d'aménagements procéduraux et d'aménagements en fonction de l'âge, afin de faciliter leur participation effective, directe ou indirecte, notamment en tant que témoins, à toutes les procédures judiciaires, y compris au stade de l'enquête et aux autres stades préliminaires. 2. Afin d'aider à assurer l'accès effectif des personnes handicapées à la justice, les États Parties favorisent une formation appropriée des personnels concourant à l'administration de la justice, y compris les personnels de police et les personnels pénitentiaires

Article 15

Droit de ne pas être soumis à la torture ni à des peines ou traitements cruels, inhumains ou dégradants

1. Nul ne sera soumis à la torture, ni à des peines ou traitements cruels, inhumains ou dégradants. En particulier, il est interdit de soumettre une personne sans son libre consentement à une expérience médicale ou scientifique.

2. Les États Parties prennent toutes mesures législatives, administratives, judiciaires et autres mesures efficaces pour empêcher, sur la base de l'égalité avec les autres, que des personnes handicapées ne soient soumises à la torture ou à des peines ou traitements cruels, inhumains ou dégradants.

Article 17

Protection de l'intégrité de la personne

Toute personne handicapée a droit au respect de son intégrité physique et mentale sur la base de l'égalité avec les autres.

Article 26

Adaptation et réadaptation

1. Les États Parties prennent des mesures efficaces et appropriées, faisant notamment intervenir l'entraide entre pairs, pour permettre aux personnes handicapées d'atteindre et de conserver le maximum d'autonomie, de réaliser pleinement leur potentiel physique, mental, social et professionnel, et de parvenir à la pleine intégration et à la pleine participation à tous les aspects de la vie. À cette fin, les États Parties organisent, renforcent et développent des services et programmes diversifiés d'adaptation et de réadaptation, en particulier dans les domaines de la santé, de l'emploi, de l'éducation et des services sociaux, de telle sorte que ces services et programmes :

a) Commencent au stade le plus précoce possible et soient fondés sur une évaluation pluridisciplinaire des besoins et des atouts de chacun ;

b) Facilitent la participation et l'intégration à la communauté et à tous les aspects de la société, soient librement acceptés et soient mis à la disposition des personnes handicapées aussi près que possible de leur communauté, y compris dans les zones rurales.

2. Les États Parties favorisent le développement de la formation initiale et continue des professionnels et personnels qui travaillent dans les services d'adaptation et de réadaptation.
3. Les États Parties favorisent l'offre, la connaissance et l'utilisation d'appareils et de technologies d'aide, conçus pour les personnes handicapées, qui facilitent l'adaptation et la réadaptation.