# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Elliott,*
2016 BCSC 393

Date: 20160216
Docket: 78741-2
Registry: Kelowna

**Regina**

Respondent

v.

**Keith Steven Elliott**

Applicant

Before: The Honourable Madam Justice Fenlon

## Oral Ruling re: s. 7 *Charter* Application

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| Counsel for the Crown (Respondent): | A. Chan |
| Counsel for the Accused (Applicant): | J.W. Conroy, Q.C. |
| Place and Date of Hearing: | Kelowna, B.C.<br>October 7 and 8, 2015 |
| Place and Date of Judgment: | Vancouver, B.C.<br>February 16, 2016 |

## INTRODUCTION

[1] **THE COURT**: Keith Steven Elliott was charged with two offences relating to a marihuana grow operation: producing a controlled substance contrary to s. 7(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*], and possessing a controlled substance for the purpose of trafficking contrary to s. 5(2).

[2] On March 4, 2015, a *voir dire* was held to determine whether Mr. Elliott's right to be secure against unreasonable search or seizure had been breached. I concluded that the search was authorized and that the evidence obtained through it was admissible.

[3] Following that ruling, Mr. Elliott admitted a number of facts and invited convictions to production of marihuana and possession of marihuana for the purpose of trafficking. Prior to sentencing, the defence served a notice of constitutional question challenging the constitutionality of the mandatory minimum sentence applicable to the production offence under s. 7(2)(b)(i) of the *CDSA*. That is the issue now before me. I note that these reasons for judgment would have been delivered at an earlier date but defence counsel was not available.

[4] Section 7(2)(b)(i) requires the imposition of a minimum sentence of six months' imprisonment if the offence involves more than five and fewer than 201 marihuana plants and production is for the purpose of trafficking. Mr. Elliott argues this provision offends his *Charter* rights under both s. 7 (the right to life, liberty and security of the person), and s. 12 (the right not to be subjected to cruel and unusual treatment or punishment): *Canadian Charter of Rights and Freedoms*, s. 8, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

## CIRCUMSTANCES OF THE OFFENCE

[5] The marihuana grow operation was located in the basement of a home in a residential area of Kelowna, British Columbia. The home was owned by Mr. Elliott's co-accused, Anthony Rico. Mr. Rico was the principal of the operation, which

involved a total of 195 marihuana plants at various stages of maturation. Mr. Elliott became involved with the grow operation when he was out of work and accepted a temporary two- to three-day job paying $20 per hour to trim the plants. Eventually, he and Mr. Rico entered into an agreement whereby Mr. Elliott would reside with Mr. Rico in his house and receive free room and board, marihuana for personal use, and payment of his bills. In exchange, Mr. Elliott was to build a sun deck, help with household chores, and assist with trimming and planting the marihuana plants. This arrangement continued for about one-and-a-half years before these charges were laid.

[6] Mr. Elliott was 42 years old at the time of the offence, has no previous criminal record, and no substance abuse issues. He acknowledges that he made poor decisions but says he felt stuck; his actions were motivated by his poor financial situation. Since being charged in August 2014, Mr. Elliott has resided with his brother in Surrey, British Columbia. He has been steadily employed in the construction industry, working two part-time jobs pending his trial and sentencing.

## ANALYSIS

[7] I begin by noting that the scope of Mr. Elliott's constitutional challenge narrowed over the course of the hearing. Initially, defence counsel sought a personal exemption from the mandatory minimum for Mr. Elliott in the alternative to a declaration of constitutional invalidity. Counsel acknowledged that option is not available and withdrew this request before the hearing began.

[8] Defence counsel also initially argued that the removal of the option of a conditional sentence order under ss. 742.1(b) and (c) of the *Criminal Code* constituted an independent constitutional violation of s. 7. Counsel withdrew that challenge during argument. Instead, he submitted that the loss of the flexibility to impose a conditional sentence order or an intermittent sentence under s. 732(1) is a factor supporting the finding of a violation of s. 7 of the *Charter* since it makes a deprivation of liberty more likely.

### *1. Does the mandatory minimum sentence imposed by s. 7(2)(b)(i) of the CDSA contravene s. 7 of the Charter?*

[9] I turn first to s. 7 of the *Charter*. Mr. Elliott argues that the mandatory minimum sentence of six months engages and infringes upon his right to life, liberty, and security of the person, and thus meets the first stage of the s. 7 analysis. The Crown does not dispute that assertion.

[10] The second stage of the s. 7 analysis involves determining whether the infringement also violates a principle of fundamental justice. Mr. Elliott asserts that three central principles have been identified as "fundamental in recent s. 7 jurisprudence": arbitrariness, overbreadth, and gross disproportionality in effects: Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law Inc., 2012).

[11] Mr. Elliott further submits that the provision of the *CDSA* in issue offends the principles of sentencing contained in ss. 718.1 and 718.2 of the *Criminal Code.* Section 718.1 requires that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 provides that: (1) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; (2) an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and (3) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

[12] Mr. Elliott argues that each of these principles are aspects of fundamental justice. He submits that these fundamental principles of sentencing (in addition to the principles identified as fundamental under s. 7 jurisprudence relating to arbitrariness, overbreadth, and gross disproportionality in effects), should be seen as a compendium of sentencing principles constituting what his counsel described as a “fourth principle of fundamental justice.”

[13] Mr. Elliott submits that these principles, in the context of criminal sentencing, require offenders convicted of the same crime, who have the same or similar levels

of culpability and moral blameworthiness, to receive a similar sentence. He argues that these principles are violated when an offender receives the same sentence as another offender but has greater or lesser culpability and a greater or lesser level of moral blameworthiness.

[14] In the circumstances of this case, Mr. Elliott submits that it would be irrational and unfair for the court to impose on him the same sentence that the more culpable and morally blameworthy co-accused Mr. Rico received.

[15] Mr. Elliott's submission relied on the assumption that Mr. Rico was also convicted of production of marihuana and sentenced to the six-month mandatory minimum. However, upon further inquiry it was determined that in fact, Mr. Rico was convicted of possession for the purpose of trafficking which does not attract a mandatory minimum sentence. He pleaded guilty to that offence and was sentenced to six months' incarceration. In supplementary written argument defence counsel argued that even though different offences were involved, the charges all arise out of the same circumstances and therefore proportionality and parity must still govern.

[16] I conclude that Mr. Elliott cannot succeed in establishing that the provision of the *CDSA* in issue contravenes s. 7 of the *Charter*.

[17] First, although the s. 7 argument focuses on the principles underlying sentencing, the challenge to the six-month mandatory minimum sentence is grounded in the argument that it results in a grossly disproportionate sentence for Mr. Elliott. I agree with the Crown that a challenge of this kind is an assertion of the right enshrined in s. 12 of the *Charter* and should be addressed under that section, rather than under s. 7.

[18] The Supreme Court of Canada has consistently held that when an applicant's *Charter* claim falls squarely into one of the enumerated rights in ss. 8-14 of the *Charter*, the claim should be analyzed under that provision and not under s. 7. Although s. 7 of the *Charter* may in some circumstances contain residual protection not found within the specifically enumerated rights in ss. 8-14, to consider and

analyze all constitutional arguments under s. 7 would render the other legal rights in the *Charter* redundant. An applicant whose constitutional claim falls squarely within a particular provision of the *Charter* cannot strengthen his argument by "pleading the more open language of s. 7": *R. v. Pearson*, [1992] 3 S.C.R. 665 at 129; *R. v. Rogers*, 2006 SCC 15 (*sub nom R. v. Jackpine* at para. 12; *R. v. Généreux*, [1992] 1 S.C.R. 259 at 310.

[19] Second, even if the principles of sentencing could be characterized as constitutional imperatives under s. 7, I do not agree that a mandatory sentence which lacks parity with a sentence imposed on a co-accused would render the mandatory sentencing provision unconstitutional. Sentencing is a finely tuned exercise of discretion that requires a trial judge to balance a number of factors taking into account the particular circumstances of the offence and the offender. Although Mr. Rico and Mr. Elliott were charged in relation to the same grow operation, Mr. Elliott proceeded to trial on both counts while Mr. Rico pleaded guilty to possession for the purpose of trafficking. Crown and defence made a joint submission in Mr. Rico's case, supporting a sentence of six months. The production charge was stayed.

[20] The sentence received by a co-accused may be relevant to the fitness of a sentence imposed for a related offence, but it has no bearing on the constitutionality of the sentencing provision itself. Even if Mr. Rico had received the mandatory minimum sentence of six months for the same production offence, that result could represent nothing more than a decision by the sentencing judge in Mr. Rico's case to exercise his discretion to impose a sentence at the low end of the range for Mr. Rico in light of a guilty plea. It does not follow that an equivalent sentence for Mr. Elliott is necessarily unfit or inconsistent with the principles of sentencing set out in ss. 718.1 and 718.2. Moreover, it would trivialize the constitutional protection afforded by s. 7 of the *Charter* to characterize a minor difference in the sentences received by two co-accused as a constitutional breach.

### *2. Does s. 7(2)(b)(i) of the CDSA contravene s. 12 of the Charter?*

[21] I come now to the main issue on this application. Section 12 provides:

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

[22] 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. To be considered grossly disproportionate, a sentence must be more than merely excessive. It 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 SCC 84 at para. 4, citing *Smith* at 1072; *R. v. Morrisey*, 2000 SCC 39 at para. 26; and *R. v. Ferguson*, 2008 SCC 6 at para. 14.

[23] A two-stage test is employed to evaluate the constitutionality of a legislative sentencing provision under s. 12. In *R. v. Brown*, [1994] 3 S.C.R. 749 at 751, Mr. Justice Iacobucci for the Court described the two-stage test articulated in *R. v. Goltz*, [1991] 3 S.C.R. 485 at 505. The first stage involves viewing the provision in question from the perspective of the particular accused and on the facts of the case before the court. The second stage involves considering reasonable hypotheticals involving the same offence underlying the sentence in the case before the court.

[24] Because s. 12 of the *Charter* imposes a constitutional baseline, the threshold for demonstrating that a particular sentence is grossly disproportionate is “stringent”: *Goltz* at 502, citing *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385 at 1417, and *Morrisey* at para. 70. To hold otherwise would trivialize the constitutional protection afforded by s. 12 of the *Charter*: *R. v. Latimer*, 2001 SCC 1 at para. 76, citing *Steele* at 1417. Thus a sentence which is shown to be merely excessive or disproportionate will not offend the threshold of gross disproportionality: *R. v. Ferguson* at para. 14.

[25] Further, the court must approach the analysis with awareness that sentencing policy is a matter within the competence of Parliament. Courts must therefore

"consider and defer to the valid legislative objectives underlying the criminal law responsibilities of Parliament": *Latimer* at para. 76. While the courts are responsible for determining whether a particular punishment "exceeds constitutional limits set by the *Charter*", courts should nevertheless be "reluctant to interfere with the considered views of Parliament", and should only do so "in the clearest of cases" where the punishment is so excessive as to "outrage standards of decency": *Latimer* at para. 77, citing *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.) at 238.

### *(a) Stage One*

[26] At the first stage of the analysis, the question is whether a six-month sentence of imprisonment is grossly disproportionate, given the circumstances of this offence and this offender. As the Court stated in *Ferguson* at para. 15:

> The appropriateness of a sentence is a function of the purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code* as applied to the facts that led to the conviction.

[27] The Ontario Court of Appeal in *R. v. Nur*, 2013 ONCA 677 at para. 78 [*Nur CA*], identified a number of factors that inform the gross disproportionality analysis, both as it applies to the particular accused and to reasonable hypotheticals:

- the gravity of the offence;
- the personal characteristics of the offender;
- the particular circumstances of the case;
- the actual effect of the punishment on the individual;
- the penological goals and sentencing principles reflected in the challenged minimum;
- the existence of valid effective alternatives to the mandatory minimum; and
- a comparison of punishments imposed for other similar crimes.

[28] Once again Mr. Elliott relies on the six-month sentence received by "the more culpable and morally blameworthy co-accused" Mr. Rico in support of his argument that a six-month sentence for Mr. Elliott is grossly disproportionate. As I have already observed, the particular sentence imposed on a co-accused is of little

assistance in gauging gross disproportionality. The issue under s. 12 is not whether the sentence imposed on Mr. Elliott is unfit because it lacks parity with a sentence imposed on a co-accused. Rather, the issue is whether the sentence reaches the constitutional threshold of gross disproportionality.

[29] The defence reviewed a number of sentences imposed for similarly placed offenders, all of which resulted in a conditional sentence order: *R. v. Shah*, 2003 BCCA 294; *R. v. Moldavan*, 2009 BCPC 208; *R. v. Gan*, 2007 BCCA 59; *R. v. Buckle*, 2012 BCSC 2073; *R. v. Vo*, 2009 BCCA 471; *R. v. Giang*, 2010 BCSC 1016; *R. v. Daniels*, 2015 BCPC 146; *R. v. Lee*, 2013 BCSC 61.

[30] Relying on these cases, the defence argues that prior to the imposition of mandatory minimum sentences in 2012, a proportionate sentence for a principal operator convicted of growing between 200 and 700 plants was in the range of a nine- to 12-month conditional sentence order.

[31] The defence argues that since Mr. Elliott is a first-time offender and a party to the offence rather than the principal offender, the principles of proportionality, parity, and restraint require that a conditional sentence well below the 10- to 15-month range would be fit. Mr. Elliott submits that a jail sentence of any length, even one month, would be disproportionate on the facts and circumstances of this case. It follows all the more, he says, that a six-month sentence would be grossly disproportionate.

[32] The Crown submits that a six-month sentence is not grossly disproportionate in Mr. Elliott's case. The Crown points out that Mr. Elliott is a mature offender who chose to become involved in the commercial production of marihuana for personal gain: free room and board, payment of credit card bills, and access to marihuana product. Further, Mr. Elliott knew the marihuana was produced for the purpose of trafficking and that it was being sold to criminal groups. His conduct exposed the community to the well-known risks associated with indoor marihuana production and contributed to the socially destructive forces of the commercial drug trade.

[33] The Crown points to the moderate sophistication of the grow operation and the risks that indoor grow operations pose to first responders and to the community at large: a risk of fire and combustion, mould in the residence which can cause illness to present and future occupants, poorly ventilated spaces which can create dangers for first responders due to the lack of airflow, and the risk of violence in the community due to robberies and home invasions.

[34] The Crown further contends that commercial marihuana production is not a crime of impulse that occurs as a result of a momentary lapse in judgment. Rather, Mr. Elliott's involvement was an ongoing crime requiring daily effort which demonstrates that he made a deliberate choice to break the law for personal gain. Mr. Elliott had been helping with the operation for one to two years through five harvests.

[35] The Crown acknowledges that the owner or operator of a commercial grow operation is more blameworthy and deserving of a significant punishment than a mere caretaker, but submits that even a caretaker must bear considerable moral culpability for his or her role in producing large quantities of marihuana destined for the illicit marihuana trade and all the harm that this illegal activity causes to the community.

[36] The Crown submits that given the nature of Mr. Elliott's offence and his personal circumstances, a conditional sentence would not have been appropriate prior to the mandatory minimum jail term now provided for in s. 7(2)(b)(i). The Crown relies on the following cases:

> *R. v. Nguyen*, 2002 BCCA 12: in which eight months' imprisonment was determined to be fit;
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> *R. v. Wong*, 2008 BCCA 219: in which a six-month term of imprisonment was fit;
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> *R. v. Su*, 2000 BCCA 480: in which the offender received 12 months in prison; and

*R. v. Koenders*, 2007 BCCA 378: in which the Court of Appeal set out the range generally.

[37] Taking into account the cases referenced by both sides, I conclude that under pre-amendment sentencing jurisprudence a first-time offender involved in a commercial indoor marihuana grow operation of about 200 plants could expect to receive a sentence ranging from four to 12 months in jail or a conditional sentence of 10 to 18 months.

[38] Quite apart from the mandatory minimum in issue, a conditional sentence is no longer available for production of marihuana in light of the recent amendments to s. 742.1 of the *Criminal Code*. However, even based on pre-amendment sentencing, a conditional sentence of 10 to 18 months imposed significant restrictions on the offender's liberty. A conditional sentence order often contains strict conditions, the breach of which can lead to the offender serving the remainder of the time in jail. A custodial sentence of six months cannot be said to be grossly disproportionate to a conditional sentence of 10 to 18 months, nor one that constitutes cruel and unusual punishment.

[39] Further, the six-month mandatory sentence falls squarely within the four- to 12-month custodial range that preceded the enactment of s. 7(2)(b)(i). A sentence that is two months longer than the low end of that range cannot be considered grossly disproportionate. In this regard, in *R. v. Hanna*, 2015 BCSC 986, a decision of this Court, Madam Justice Beames found an increase of nine months over the previous range did not amount to a grossly disproportionate sentence and therefore upheld the constitutionality of s. 7(2)(b)(v) of the *CDSA*.

[40] In summary on this first stage of the analysis, I conclude that the six-month minimum jail sentence mandated by the challenged section of the *CDSA* is not grossly disproportionate in Mr. Elliott's case.

### *(b) Stage Two*

[41] I turn now to Stage 2 of the analysis under s. 12. At this stage, the burden is on the offender to identify reasonable hypothetical scenarios in which the impugned law would give rise to a punishment that is not just harsh or excessive, but so grossly disproportionate that it warrants a finding that the law is unconstitutional: *Goltz* at 506.

[42] The applicant must "marshal a reasonable example pertaining to the precise provision being challenged": *Goltz* at 519. Mr. Elliott must therefore identify some reasonable hypothetical scenario in which it would be grossly disproportionate for an individual involved in production of between six and 200 marihuana plants for the purpose of trafficking to be sentenced to six months in jail.

[43] As the Supreme Court of Canada has repeatedly cautioned, courts should not test the constitutionality of a particular legislative provision under s. 12 of the *Charter* on the basis of "marginal", "far-fetched", or "remote or extreme" examples: *Goltz* at 506 and 515, and *Morrisey* at paras. 30 and 32. Reasonable hypotheticals are ones which "could commonly arise in day-to-day life": *Goltz* at 516, and *Morrisey* at para. 31. The Supreme Court of Canada has reiterated these principles in *R. v. Nur*, 2015 SCC 15 [*Nur SCC*].

[44] I begin by addressing *R. v. Vu*, 2015 ONSC 5834, a decision of the Ontario Superior Court of Justice. In that case, it was held that ss. 7(2)(b)(i) and (ii) (the provision now challenged before me), and s. 7(3)(c) of the *CDSA* are all contrary to s. 12 of the *Charter*, and are not saved by s. 1. Both defence and Crown agree that this decision should not be followed in British Columbia, and should not be persuasive, for the following reasons.

[45] First, the Court considered reasonable hypotheticals in that case under sections of the *CDSA* which were not engaged by the sentencing provision before it. This goes against established jurisprudence from the Supreme Court of Canada that the s. 12 *Charter* analysis must focus on the particular provision under which the

offender is to be sentenced, not all of the sentencing provisions in the legislation: *Goltz* and *Brown*. In *Vu*, the offender was involved in a grow operation with more than 1,000 plants, yet the Court entertained a reasonable hypothetical under the section now before me, s. 7(2)(b)(i) of the *CDSA*, which deals with between six and 200 plants.

[46] Second, in *Vu* the Court did not address the unique aspect of the challenged provision of the *CDSA*, which the Crown describes as a "safety valve". The section differs from the other sentencing sections because it imposes the minimum sentence only when the Crown proves that the plants were grown for the purpose of trafficking.

[47] Mr. Elliott puts forward two hypotheticals for consideration:

> Hypothetical A
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> a. A retired gentleman of the hippy generation, who lives an otherwise law-abiding life at his retirement property in the countryside, grows 6 marihuana plants in his outdoor garden with the intention of using some of the product himself and giving some to his family and friends, and in fact does give some of the product to this family and friends.
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> Hypothetical B
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> b. A disabled man suffering from severe arthritis, living in poverty on income assistance in a house with his adult disabled son who suffers from muscular dystrophy, both of whom need and use marihuana for medical treatment of their ailments, and who would otherwise experience serious pain and suffering without access to medical cannabis, grows 20 marihuana plants in his garage (without a licence and after the repeal of the MMAR), in an entirely safe manner with proper electrical, venting, and fire safety equipment installed in accordance with all applicable safety laws, for the purpose of providing medicinal cannabis for himself, his son, and for other sick friends who also live in poverty, and in fact does provide cannabis to his son and sick friends. The disabled man, his disabled son, and his sick friends all cannot afford to purchase the medical cannabis in quantities they need to effectively treat their symptoms from “licensed producers” under the MMPR or from the black market.

I will address each hypothetical in turn.

[48] In relation to Hypothetical A, the Crown submits that the scenario would not necessarily lead to a finding that the production was for the purpose of trafficking.

That finding will necessarily depend on the particular circumstances of the case. In *R. v. Harrington*, [1964] 1 C.C.C. 189 (B.C.C.A.) (*sub nom. R. v. MacDonald*), the Court held that two individuals who removed a package of drugs from a stash and took it from one place to another for their own use were effectively in joint possession of the drugs for personal use and therefore not guilty of trafficking.

[49] The Crown argues that the requirement under s. 7(2)(b)(i) of the *CDSA* – that the Crown must prove beyond a reasonable doubt at sentencing that the number of plants being produced was for the purpose of trafficking – will ensure that those who are not morally blameworthy are not subjected to a minimum six-month jail sentence. The Crown points out that on the facts of Hypothetical A, it will be met with arguments about the quantity being consistent with personal use, as well as arguments relating to joint possession, and that ultimately the sentencing court will make a determination as to whether the mandatory minimum penalty applies.

[50] The difficulty with this submission is the breadth of the definition of trafficking in the *CDSA*.

> *traffic* means, in respect of a substance included in any of Schedules I to IV of the Act:
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> > (a) to sell, administer, give, transfer, transport, send or deliver the substance;
> >
> > (b) to sell an authorization to obtain the substance; or
> >
> > (c) to offer to do anything mentioned in paragraph (a) or (b),
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> otherwise than under the authority of the regulations.

[51] Regardless of whether money is exchanged, a person need only commit one of the acts that is defined as trafficking, such as giving a substance to another person, for the offence to be made out. Joint possession may or may not be established on the facts of Hypothetical A. In *R. v. Taylor* (1974) 17 C.C.C. (2d) 36 (B.C.C.A.), that court held that a man who had used pooled funds to acquire a bulk quantity of drugs and stash it somewhere with the intention of allowing others to share it, was guilty of trafficking.

[52] In *Taylor*, the Court of Appeal described the scope of trafficking at 40-41:

> In each case the word contemplates a physical act involving two or more persons and it is important to note that these verbs can operate independently of and without reference to the ownership or change of ownership of the object given, delivered or distributed. In other words, one can "give", "deliver" or "distribute" an object to another or others regardless of whether that object is owned by the one, another or others or all or none of them. Here there was ample evidence, including the testimony of the appellant, that the appellant's purpose in bringing the hashish to his home on the day in question was to "give", "deliver" or "distribute" it to some or all of the others, as well as to take some for his own use.
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> The gravamen of the charge of trafficking is possession plus the intent or purpose of physically making the [narcotic] available to others, regardless of ownership. The simple fact that it was economic for the purchase price to be collected in advance from the potential users of the narcotic and a bulk purchase made, thereby vesting in such users some claim to ownership and title and even a deemed joint possession by them, does not alter the nature of the physical act of giving, delivering or distributing the narcotic to another or others, which in itself constitutes the offence.
>
> [Emphasis added.]

[53] I turn now to Hypothetical B. I agree with the Crown that this hypothetical turns too much on the particular characteristics of the individuals described, which is contrary to the admonition in *Nur SCC* at para. 75 that: "far-fetched or remotely imaginable examples… [involving] personal features to construct the most innocent and sympathetic case imaginable" should not be included in the consideration. This hypothetical also raises the potential defence of necessity.

[54] I will therefore focus on Hypothetical A and a modified Hypothetical B.

[55] In *Nur SCC*, the Supreme Court of Canada provided guidance as to what constitutes a reasonable hypothetical for the purposes of s. 12 of the *Charter*. The Court said at paras. 56, 57 and 60:

> [56] . . . When Gonthier J. in *Goltz* speaks of the “reasonable hypothetical” he is speaking of *a situation that may reasonably be expected to arise* — not “marginally imaginable”, not “far-fetched”, but “reasonable”. The early case of *Smith* is not inconsistent in words or result with the theme developed in *Goltz* and *Morrisey* — in determining whether mandatory minimum sentencing laws violate s. 12, it is appropriate to consider how the law may impact on third parties in reasonably foreseeable situations.

> [57] . . . The question is simply whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples' situations, resulting in a violation of s. 12. The terminology of "reasonable hypothetical" may be helpful in this regard, but the focus remains squarely on whether the sentence would be grossly disproportionate in reasonably foreseeable cases. At its core, the process is simply an application of well established principles of legal and constitutional interpretation.
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> . . .
>
> [60] . . . It is an inquiry into the range or scope of the law — into what Dickson J. in *Big M* referred to as the "nature of the law".
>
> [Underlined emphasis added.]

[56] In my view, there are a number of reasonably foreseeable situations that the law could capture relating to a number of plants at the lower end of the range. On a fact pattern similar to Hypothetical A, a 19-year-old university student could grow six marihuana plants in his basement apartment intending to use some of it for himself and to share the rest with his friends.

[57] In a scenario less extreme than Hypothetical B, a 65-year-old woman who experiences severe migraines, and finds that marihuana assists in relieving her symptoms, grows six plants in her suburban vegetable garden and gives some of the product to two other friends who also suffer from migraines. In either of these modified hypotheticals, the growers meet the definition of trafficking and would be subject to six months' incarceration. Although the Crown in these circumstances could exercise its discretion not to proceed under s. 7(2)(b)(i), the exercise of Crown discretion does not save a section that on its face breaches the *Charter*: *Smith* at 1078; *Nur SCC* at paras. 85, 88, and 89; and also *R. v. Appulonappa*, 2015 SCC 59 at para. 74.

[58] Prior to the 2012 amendments to the sentencing provisions of the *CDSA*, offenders of this kind typically received conditional discharges, suspended sentences, periods of probation, fines, community service, and combinations thereof.

[59] For example, in *R. v. Smillie*, 2000 BCPC 49, the accused was 68 years old. He had 323 marihuana plants. He produced the plants for himself and his wife to use for their epilepsy, and also to sell at a profit. Due to the quantity and his prior *Criminal Code* conviction, the Court imposed a suspended sentence for one year, during which the offender would be on probation and would perform 50 hours of community service.

[60] In *R. v. Lange,* 2002 BCPC 483, the accused possessed 230 marihuana plants to supply a compassion club. He had a previous record for drug offences. He was given a conditional discharge and 12 months' probation. He was 36 years old.

[61] In *R. v. Czolowski* (14 July 1998), Vancouver 337-01-D (B.C.P.C.), the sentencing judge imposed a conditional discharge with a period of probation for one year, with only statutory terms, on a 44-year-old man with no previous criminal record, who, suffering from glaucoma, grew a large amount of marihuana for his personal medical use. The offender also sold some of it to the Compassion Club Society.

[62] In *R. v. Small*, [2001] B.C.J. No. 248 (QL) (C.A.), the accused had no previous record, using marihuana for medical reasons, and grew it for himself and the B.C. Compassion Club Society, which paid him $1,500 per pound. The offender was found with 31 pounds of marihuana with a street value of about $100,000. He intended to continue to produce marihuana for the Compassion Club. The trial judge found that the accused had a medical need for marihuana and that he had produced it for the Compassion Club out of compassion, but imposed a $3,000 fine and 12 months' probation for production. By the time the appeal was heard, the offender had received an absolute discharge on a previous production charge. On appeal, a conditional discharge was substituted by the Court of Appeal.

[63] In *R. v. Messervey*, 2012 NLTD(G) 13, the accused pleaded guilty to possession of marihuana. He had a small grow operation in a greenhouse outside his home containing 11 plants. A joint submission seeking a $2,000 fine was presented. That joint submission was accepted. The offender was 50 years old.

[64] In my view, s. 7(2)(b)(i) casts its net too broadly and catches offenders and offences involving little moral fault and little or no danger to the public. The hypothetical offences do not amount to the "serious drug crimes" contemplated and described in the House of Commons by the Minister of Justice at the second reading of the bill implementing the mandatory minimums of which this provision is one. The Parliamentary Secretary to the Minister of Justice explained the rationale for the amendments to the *CDSA* sentencing regime:

> These amendments are not about imposing mandatory minimum sentences for all drug crimes. These amendments propose targeted, mandatory minimum sentences for serious drug crimes and ensure that those who carry out these crimes will be penalized. These amendments clearly send the message that Canadians find this type of criminal behaviour unacceptable.
>
> . . .
>
> The drug-related mandatory minimum penalty scheme proposed in the bill is based on the presence of specific aggravating factors, most of which are commonly present in serious drug crimes. The scheme would not apply to possession offences or to offences involving drugs such as diazepam or valium.
>
> . . .
>
> For schedule II drugs, such as marijuana, cannabis resin, et cetera, the proposed mandatory minimum sentence for trafficking, possession for the purposes of trafficking, importing or exporting and possession for the purpose of exporting is one year if certain aggravating factors such as violence, recidivism or organized crime are present. If factors such as trafficking to youth are present, the minimum is increased to two years.
>
> For the offence of marijuana production, the bill proposes mandatory penalties based on the number of plants involved: production of six to two hundred plants and if the plants are cultivated for the purpose of trafficking, six months; production of 201 to 500 plants, the penalty, one year; production of more than 500 plants, two years; and production of cannabis resin for the purpose of trafficking, one year. The minimum sentences for the production of schedule II drugs increased by 50% where any of the aggravating factors relating to health and safety, which I have just described, are present.
>
> [Emphasis added.]

[65] I acknowledge that, unlike the hypotheticals provided in *Nur*, where inadvertently storing an otherwise compliant weapon in the wrong place could result in a mandatory three-year minimum sentence in prison, the hypothetical offenders under consideration intentionally grow an illegal substance and intend to share the

marihuana they grow. While that intentional conduct increases the moral culpability and moral blameworthiness of the hypothetical offenders, they are nonetheless far removed from the offender who produces a number of harvests every year for sale on the black market for commercial gain.

[66] *Nur* and *Smith* involved mandatory minimum sentences of three years and seven years respectively; a six-month sentence is far less serious than the minimums involved in those cases. It is nonetheless extremely significant for the young person or the mature adult in the two hypotheticals I have considered – offenders who have had no experience with the criminal justice system, and who would otherwise have been subject to a fine, a suspended sentence, probation, conditional discharge, or community work.

[67] Determining whether a sentence has crossed the threshold from merely excessive to "grossly disproportionate" is more than a simple exercise in comparing the number of months an offender would receive pre- and post-imposition of a minimum sentence. Parliament has the right to "raise the floor".

[68] However, a six-month mandatory jail sentence for a student or migraine sufferer in these circumstances without a prior criminal record would, in my view, be grossly disproportionate to the offence, even taking into account the penological goals of Parliament and the moral gravity of using and sharing illicit drugs. Since trafficking includes giving even without commercial profit, the addition of the requirement that the Crown prove trafficking before triggering the mandatory minimum does not, in my view, sufficiently restrict the type of offender and offence falling within the reach of s. 7(2)(b)(i) of the *CDSA*.

[69] The effect of the mandatory minimum in the section in issue is to incarcerate for six months small offenders for whom such a sentence is grossly disproportionate. I note that a six-month sentence is typical for a first-time trafficker involved in a relatively sophisticated commercial dial-a-dope operation. Imposing that sentence on a 19-year-old student or a migraine sufferer who is growing six plants intending to share them with friends would, in my view, be abhorrent to most Canadians.

[70] In the result, I find that s. 7(2)(b)(i) of the *Controlled Drugs and Substances Act* violates s. 12 of the *Charter*.

[71] Both Crown and defence requested an opportunity to make submissions in relation to the s. 1 analysis which must now be addressed. Unless counsel are prepared to suggest dates at this point, I would ask that they arrange a date for submissions on that issue. The hearing should take place within three months of today's date. I would ask counsel to consider whether, given the test that would be applied under the s. 1 analysis and its similarity to the test under s. 12, a hearing is necessary. If it is, we will proceed with it.

[72] Counsel should be prepared to address sentencing submissions as well at that hearing.

The Honourable Madam Justice L.A. Fenlon