QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2016 SKQB 218**

Date: **2016 06 23**
Docket: CRM 84 of 2014
Judicial Centre: Saskatoon

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent)

- and -

SEAMUS JOHN NEARY

(Applicant)

Counsel:

Wade E. McBride	for the Crown (respondent)
John Conroy, Q.C., and Christopher A. Lavier	for the accused (applicant)

JUDGMENT
June 23, 2016

R.S. SMITH J.

Introduction

[1] In March 2012, the *Safe Streets and Communities Act*, SC 2012, c 1, came into force and effected amendments to s. 742.1 of the *Criminal Code*, RSC 1985, c C-46. Specifically, it brought into force s. 742.1(c) which eliminates the availability of conditional sentences for offenders convicted of an offence for which

the maximum term of imprisonment is 14 years. Additionally, s. 742.1(e) provides that conditional sentences are unavailable if the offender is convicted of an indictable offence for which the maximum term of imprisonment is 10 years and which involves the import, export, trafficking or production of drugs.

[2] Because of the specifics of the applicant's crime, he falls into the category of an offender contemplated by s. 742.1(c) and s. 742.1(e), specifically an offender who does not have available the option of a conditional sentence.

[3] The applicant complains that removing the option of a conditional sentence from the purview of the sentencing judge is a violation of his rights under ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. Sections 7 and 12 provide:

> **Life, liberty and security of person**
> **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.
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> ...
>
> **Treatment or punishment**
> **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Background

[4] In February 2014, Seamus John Neary was charged with:

1. That on about the 6th day of February, A.D. 2014 at or near Saskatoon, in the Province of Saskatchewan, did unlawfully have in his possession a controlled substance to wit: cannabis marihuana in an amount exceeding three kilograms, for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*;

2. That on about the 5th day of February, A.D. 2014 at or near Saskatoon, in the Province of Saskatchewan, did

unlawfully traffic in a controlled substance, to wit: cannabis marihuana in an amount exceeding three kilograms, contrary to s. 5(1) of the *Controlled Drugs and Substances Act*;

3. That on about the 6th day of February, A.D. 2014 at or near Saskatoon, in the Province of Saskatchewan, did unlawfully possess a controlled substance, to wit: psilocybin, contrary to s. 4(1) of the *Controlled Drugs and Substances Act*;

4. That on or about the 6th day of February, A.D. 2014 at or near Saskatoon, in the Province of Saskatchewan did have in his possession property of [*sic*] the proceeds of property, to wit: the sum of $1,000.00, knowing that the property or those proceeds were obtained or derived directly or indirectly as a result of the commission in Canada of an offence punishable by indictment, contrary to sections 354(1) and 355(b) of the *Criminal Code*.

[5] The matter proceeded to preliminary hearing, and Mr. Neary was committed to trial. The trial was conducted before me in November 2015. When arraigned on the four counts, Mr. Neary pled guilty to Count 3, possession of psilocybin (magic mushrooms) and not guilty to the remaining three counts.

[6] On November 16, 2015, I delivered judgment convicting Mr. Neary of Counts 1, 2 and 4. The matter was adjourned to January 29, 2016, for sentencing. Before the sentencing date of January 29 was reached, counsel gave notice of their intention to apply for a remedy under the *Charter*.

[7] Mr. Neary's application under the *Charter* provided:

THE APPLICANT WILL RAISE allegations that his s. 12 rights and freedoms were infringed and denied, in being subjected to cruel and unusual treatment or punishment.

THE FACTS THAT will be relied on in argument are as follows:

1. The *Safe Streets and Communities Act*, S.C. 2012, c. 1,

amended ss. 5(1) and 5(2) of the *Controlled Drugs and Substances Act* to, among other things, limit the sentences available to the Court when sentencing individuals such as the Applicant.

2. Having regard to the personal circumstances of the Applicant, which include, *inter alia*, significant family support, meaningful educational endeavours, strong prospects for rehabilitation, and a lack of criminal record, a Court can be satisfied that the Applicant's serving a sentence in the community would *not* endanger the safety of the community.

3. The Applicant will submit that the *Safe Streets and Communities Act* limits sentencing options available to a Court, effectively requiring the Court to impose a period of incarceration when such a sentence is not founded on recognized sentencing principles. He will further submit that incarceration is not necessary to achieve a valid penal purpose when valid alternatives to incarceration exist.

4. The Applicant will submit that a period of incarceration, if imposed, is grossly disproportionate to what is appropriate.

IN THE EVENT THIS HONOURABLE COURT makes a finding that the Crown has breached the Applicant's Charter-protected rights as alleged, the Applicant seeks:

1. Imposition of a community-based sentence; and

2. Any such other relief as the Court might deem just under all of the circumstances.

[8] The matter was adjourned to May 2016 for argument on the *Charter* issue and the resulting appropriate sentence. By that time, Mr. Neary's counsel were also invoking s. 7 of the *Charter*.

Applicant's Arguments

[9] Paragraphs 21 and 22 of the applicant's brief give a succinct summary

of Mr. Neary's s. 7 argument. They provide:

> 21. The requirement that a sentence of incarceration in an actual prison be imposed rather than the previously available sentence of imprisonment by way of a conditional sentence of incarceration to be served in the community conditional on compliance with specified terms, constitutes a deprivation of liberty. Section 742.1(c) deprives of liberty by depriving the offender of a sentence previously available – a conditional sentence to be served in the community – which constituted a lesser deprivation of liberty as compared to actual imprisonment. If the court has decided that a sentence of imprisonment is required as opposed to alternatives to imprisonment such as probation for example, but that a CSO would be appropriate but actual imprisonment would not, the court is then compelled to impose a sentence of actual imprisonment. See: *R v. Wu*, [2003] 3 S.C.R. 530.
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> 22. The second stage of the s. 7 analysis is to determine whether the infringements of a person's life, liberty, or security of the person interests violate a principle of fundamental justice and therefore are not in accordance with a principle of fundamental justice. If so, then s. 7 has been violated and, unless saved by s. 1 of the *Charter*, the Court must order an appropriate and just remedy for the violation.

[10] In my experience, s. 7 is frequently invoked by counsel, and by courts, to advance innovative *Charter* arguments. From time to time, I think it can be said that arguments under s. 7 are stretched to dimensions beyond which the original drafters had contemplated.

[11] More to the point, I suggested to Mr. Neary's counsel that Supreme Court authorities have been consistent in opining that where an applicant's *Charter* claim falls squarely into one of the enumerated rights in ss. 8 to 14, such claim should be analyzed under that provision and not under the more or less catchall of s. 7. See *R v Jackpine*, [2006] 1 SCR 554 (*sub nom R v Rodgers*); *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571; *R v Pearson*, [1992] 3 SCR 665; and *R v Généreux*, [1992] 1 SCR 259.

[12] In this instance, the complaint advanced by Mr. Neary falls squarely within s. 12 of the *Charter*. Upon reflection, counsel for Mr. Neary agreed that the Court's approach should be most appropriately focussed on a s. 12 analysis.

(a) Section 12 argument

[13] At paragraph 62 of the applicant's brief, he outlines the essence of his s. 12 argument by invoking the analysis of the Supreme Court in *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 [*Nur*]. The applicant's brief provides:

> 62. In *R. v. Nur*, 2015 SCC 15, the Supreme Court of Canada comprehensively set out the analysis to be employed when challenging a sentence as violating section 12 of the *Charter*:
>
> > The Test for Infringement of Section 12
> >
> > **38** Section 12 of the *Charter* states that everyone has the right not to be subjected to any cruel and unusual punishment. The question is whether the mandatory minimum sentences imposed by s. 95(2) violate this guarantee. The respondents say they do, because s. 95(2) catches conduct that falls far short of true criminal conduct - for example licensing offences. The Attorney General for Ontario responds that these examples are inadmissible hypotheticals and should not enter into the constitutional analysis, and that in any event, the Crown will choose to prosecute offences of lesser culpability by summary conviction, avoiding the mandatory minimum provisions.
> >
> > **39** This Court has set a high bar for what constitutes "cruel and unusual ... punishment" under s. 12 of the *Charter*. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. Lamer J. (as he then was) explained at p. 1072 that the test of gross disproportionality "is aimed at punishments that are more than merely excessive". He added, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation". A

prescribed sentence may be grossly disproportionate as applied to the offender before the court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional.

40 In determining an appropriate sentence for purposes of the comparison demanded by this analysis, regard must be had to the sentencing objectives in s. 718 of the *Criminal Code*, which instructs the sentencing judge as follows:

> **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (*a*) to denounce unlawful conduct;
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> (*b*) to deter the offender and other persons from committing offences;
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> (*c*) to separate offenders from society, where necessary;
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> (*d*) to assist in rehabilitating offenders;
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> (*e*) to provide reparations for harm done to victims or to the community; and
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> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

41 The sentencing judge must also have regard to the following: any aggravating and mitigating factors, including those listed in s. 718.2(*a*)(i) to (iv); the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(*b*)); the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (s. 718.2(*c*)); and the principle that courts should exercise restraint in imposing imprisonment (ss. 718.2(*d*) and (*e*)).

42 In reconciling these different goals, the fundamental principle of sentencing under s. 718.1 of the *Criminal Code* is that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

43 It is no surprise, in view of the constraints on sentencing, that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 80. "Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533, per Wilson J. As LeBel J. explained in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. [para. 37]

44 Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the

principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.

45 General deterrence -- using sentencing to send a message to discourage others from offending -- is relevant. But it cannot, without more, sanitize a sentence against gross disproportionality: "General deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual" (*R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 45, per Gonthier J.). Put simply, a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending.

46 To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.

[...]

77 **In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others**. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty. [Emphasis in original]

[14] The Supreme Court's analysis in *Nur* is singular since it clearly confirms that when considering a s. 12 *Charter* application, the court's focus must not be limited to the circumstances of the offender. In grappling with a s. 12 *Charter* argument, it is necessary for counsel and the court to conjure "reasonable hypotheticals" when testing the argument that the punishment required is "cruel and unusual". The Supreme Court opines, starting at paragraph 52:

> **52** The argument that the focus should be mainly or exclusively on the offender before the court is also inconsistent with the jurisprudence of the Court on the review of mandatory minimum sentences under s. 12 of the *Charter*. The cases have sometimes referred to this review as proceeding on "reasonable hypotheticals". The Attorney General of Ontario concedes that the cases under s. 12 support looking beyond the circumstances of the offender before the court, but asks us to overrule them. She says the cases on what constitutes a "reasonable hypothetical" are "irreconcilable". A review of the cases does not, with respect, support this contention.
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> ...
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> **57** Unfortunately, the word "hypothetical" has overwhelmed the word "reasonable" in the intervening years, leading to debate on how general or particular a hypothetical must be, and to the unfortunate suggestion that if a trial judge fails to assign a particular concatenation of characteristics to her hypothetical, the analysis is vitiated. With respect, this overcomplicates the matter. 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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> **58** I conclude that the jurisprudence on general *Charter* review and on s. 12 review of mandatory minimum sentencing provisions supports the view that a court may look not only at the offender's situation, but at other reasonably foreseeable situations where the impugned law may apply. I see no reason

to overrule this settled principle.

. . .

61 To be sure, the language of "reasonable hypotheticals" in the context of mandatory minimum sentences and the exaggerated debate that has surrounded the term has led some to fear that the potential for finding a law inconsistent with the *Charter* is limited only by the bounds of a particular judge's imagination. This fear is misplaced. Determining the reasonable reach of a law is essentially a question of statutory interpretation. At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality.

62 The inquiry into cases that the mandatory minimum provision may reasonably be expected to capture must be grounded in judicial experience and common sense. The judge may wish to start with cases that have actually arisen (I will address the usefulness of reported cases later), and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable. Fanciful or remote situations must be excluded: *Goltz*, at p. 506. To repeat, the exercise must be grounded in experience and common sense. Laws should not be set aside on the basis of mere speculation.

63 Not only is looking at the law's impact on persons whom it is reasonably foreseeable the law may catch workable – it is essential to effective constitutional review. Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order. The protection of individuals' rights demands constitutional review that looks not only to the situation of the offender before the court, but beyond that to the reasonably foreseeable reach of the law. Testing the law against reasonably foreseeable applications will prevent people from suffering cruel and unusual punishment in the interim until the mandatory minimum is found to be unconstitutional in a particular case.

64 Refusing to consider an impugned law's impact on third

> parties would also undermine the prospect of bringing certainty to the constitutionality of legislation, condemning constitutional jurisprudence to a wilderness of single instances. Citizens, the police and government are entitled – and indeed obliged – to know what the criminal law is and whether it is constitutional. Looking at whether the mandatory minimum has an unconstitutional impact on others avoids the chilling effect of unconstitutional laws remaining on the statute books.
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> **65** I conclude that a mandatory minimum sentence may be challenged on the ground that it would impose a grossly disproportionate sentence either on the offender or on other persons in reasonably foreseeable situations. The constant jurisprudence of this Court and effective constitutional review demand no less. In the result, a mandatory minimum sentencing provision may be challenged on the basis that it imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular offender before the court, or failing this, on the basis that it is reasonably foreseeable that it will impose cruel and unusual punishment on other persons.

[15] Counsel for Mr. Neary maintains that Mr. Neary's circumstances are such that I shall have no difficulty coming to the conclusion that the absence of a conditional sentence order is "cruel and unusual" punishment. In addition, in furtherance of the Supreme Court's admonition, counsel for Mr. Neary have leapt at the opportunity to contrive "reasonable hypotheticals".

[16] Mr. Neary's counsel have provided two scenarios, both involving remarkably generous marihuana cultivators who have an appetite to give their produce away. Mr. Neary's counsel assert that the Court must consider the circumstances of the conjured traffickers and conclude that, in the face of those circumstances, any type of custodial sentence would be, *ipso facto*, an affront to s. 12.

[17] The Crown categorically rejects the applicant's characterization of the impugned sections as a "*de facto*" mandatory minimum sentence. It asserts that this is wrong because the legislation at issue does not involve a mandatory minimum

penalty. A jail sentence is only one possibility. The Crown also points out that if a jail sentence might be imposed on the applicant, such a result arises not only from the impugned legislation but by reason of the Saskatchewan Court of Appeal sentencing guidelines.

[18] The Crown maintains that Parliament's objectives were clear when it introduced the *Safe Streets and Communities Act*. It wanted to bring cohesion to the conditional sentencing regime by ensuring that it was only being used for less serious offences. It was not meant to limit rights, but, rather, it was an attempt to refine the original regime so that it would be applied pursuant to Parliament's intention.

[19] It was clearly Parliament's view that the conditional sentencing regime was not particularly coherent across Canada. And it might be fairly said that if one were to examine sentences across Canada, there was arguably a disjointed approach. As noted in the House of Commons, by Shelly Glover, Parliamentary Secretary to the Minister of Finance, in the *House of Commons Debates*, 41st Parl, 1st Sess (22 September 2011) at 1305-1320:

> Over the years there has been a loss of public confidence in the appropriateness of conditional sentence orders because of the wide array of offences that received conditional sentences of imprisonment, including offences punishable by the highest maximum in the Criminal Code.
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> ...
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> Greater clarity and consistency is needed to limit the availability of conditional sentences and to protect Canadians from serious and violent offenders. In order to address these concerns, the proposed amendments contained in this bill would retain all the existing prerequisites for conditional sentences but would make it crystal clear which offences are ineligible. Specifically, the reforms would eliminate the reference to serious personal injury offences in section 742.1 and would make all offences punishable by 14 years or life ineligible for a conditional sentence.

> This would, for instance, make the offences of fraud, robbery and many other crimes clearly ineligible for a conditional sentence. It would also make offences prosecuted on indictment and punishable by a maximum term of imprisonment of 10 years ineligible for a conditional sentence if they: result in bodily harm; involve the import or export, trafficking and production of drugs; or involve the use of a weapon. It is the opinion of the government that where these circumstances are present, there is a need to emphasize the sentencing objectives of denunciation and deterrence and therefore eliminate the possibility of a conditional sentence.
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> ...
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> This government is committed to ensuring that conditional sentences are used the way they were originally intended to be used, and that is for less serious offences. I am confident the more appropriate use of conditional sentence orders will strengthen public confidence in the sanction and administration of justice.

[20] The Crown argues the amendments were required in order to ensure a higher order of consistency and probity respecting the dispensation of conditional sentence orders. The Crown maintains that s. 12 is not engaged.

Analysis

[21] Parliament and the courts both play an important role in how laws are made and implemented. Recently, on the topic of mandatory minimum sentences, the two bodies have engaged in an important dialogue about Parliament's ability to limit the discretion of sentencing judges. In both *Nur* and *R v Lloyd*, 2016 SCC 13 [*Lloyd*], the Supreme Court found that certain mandatory minimum sentences violated s. 12 of the *Charter*. The mandatory minimum sentences prescribed were found to be overreaching and, thus, resulted in cruel and unusual punishment for certain individuals.

[22] In *Nur* and *Lloyd*, the Supreme Court was obligated to check the powers

of Parliament. However, the Court also recognized that it owed due deference to the policy decisions of Parliament. This was acknowledged by the Supreme Court in *Lloyd* at paragraph 45:

> **45** Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society. Courts owe Parliament deference in a s. 12 analysis. As Borins Dist. Ct. J. stated in an oft-approved passage:
>
> > It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.
> >
> > (*R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont.), at p. 238)

[23] Flowing from the Supreme Court's direction, I understand that my task is to approach the debate in a common-sense way with a view to determining if the sentencing regime created by Parliament manifests itself in a grossly disproportionate punishment.

[24] The gross disproportionality standard has been described by the Supreme Court as beyond "merely excessive" (see *R v Smith*, [1987] 1 SCR 1045 at 1072 [*Smith*]). The Court in *Smith* lays out the following caution when undertaking the analysis (at page 1072):

> ... We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.

[25] When divining the disputed legal landscape, I must not employ an over-academic sense of nicety in examining the results of Parliament's handiwork. "Merely excessive" is tolerable. It is only when the sentencing result reaches the frontier of "cruel and unusual" or "grossly disproportional" that the *Charter* remedy is triggered.

Conclusion

[26] It is important to remind ourselves that in this instance we are not addressing a situation where there is a minimum sentence. All the impugned sections have done is to remove from the judicial quiver the arrow of a conditional sentence order. There is no minimum jail sentence – a fine is still available, a suspended sentence is still available.

[27] I remind counsel that the facts in Mr. Neary's convictions did not involve some trifling amount of marihuana. Mr. Neary was convicted of possession and trafficking in what was, in essence, commercial weight, namely, 20 pounds (9 kilograms) of marihuana.

[28] The full range of sentencing options are available to me, save for a conditional sentence order. I respectfully suggest that no reasonable legal observer would conclude that having that set of options available to me was somehow grossly disproportional to Mr. Neary's crimes.

[29] In my view, this conclusion is reached whether focusing on the

circumstances of Mr. Neary's offences or in the face of a conjured-up scenario where I was met with the most genial and altruistic purveyor of marihuana.

[30] Accordingly, I dismiss the applicant's *Charter* application. There is no violation of s. 12 of the *Charter*.

Offender's Personal Circumstances

[31] Mr. Neary does not present as the usual offender in charges such as these:

1. Criminal record

   (a) The applicant is a first-time offender with no criminal record and no history of violence.

2. Community involvement

   (a) Mr. Neary is community-minded and, for several years, has volunteered his time to numerous charitable and community organizations.

   (b) From 2006 to 2008, Mr. Neary volunteered at Souls Harbour Rescue Mission in Regina. The organization provides a meal program, emergency shelter, free clothing, a daycare, youth programming, and other services. Mr. Neary performed numerous roles throughout his time at Souls Harbour, including various roles with the meal program as well as the childcare program on Saturday afternoons.

   (c) From 2008 to 2009, Mr. Neary volunteered as Peer Buddy

with Best Buddies of Canada, an organization for people with intellectual and developmental disabilities.

(d) In 2009, Mr. Neary was a volunteer football coach for Regina Youth Football.

(e) From 2009 to 2013, Mr. Neary volunteered with Athletes in Action, a Christian-based organization providing young athletes the opportunity to improve their skills from top college/university players and coaches.

(f) Mr. Neary was a group volunteer with Big Brothers and Sisters of Saskatoon from 2011 to 2013.

(g) Starting in 2013, Mr. Neary set up and managed the "Body Blast" program at the White Buffalo Youth Lodge, a community-based fitness program available in Saskatoon's core neighbourhoods. In addition to running the program himself twice a week, Mr. Neary was responsible for all aspects of the program, including the development of the program, implementation, advertising and promotion.

(h) From 2013 to 2014, Mr. Neary also participated in the non-credit course, wâhkôhtowin, which means "kinship" in Cree. Neary co-taught the course with colleagues in Law and Indigenous Studies at the University of Saskatchewan [U of S], a class which brings together university students, Indigenous high school students from Oskayak High School and members from Str8Up.

Together, students learn about the topic of justice from legal and literary perspectives.

3. Athletics

(a) Mr. Neary has excelled in athletics, particularly football, throughout his attendance at Dr. Martin LeBoldus Catholic High School starting in Grade 11 and his attendance at post-secondary education.

(b) In Grade 12, Mr. Neary was invited to participate in the Senior Bowl All-Star Game. Mr. Neary went on to play in the Canada Cup in 2009, receiving the Defensive MVP award. He is recognized on the Canada Cup website as "Notable Alumni" as linebacker for Team Saskatchewan.

(c) At the commencement of university, Head Coach Brian Towress invited Mr. Neary to play with the U of S Huskies, and he accepted a U of S Huskies Football Foundation four-year scholarship.

(d) Mr. Neary was a recipient of the Saskatchewan Sport University Award in 2011. The award recognizes student athletes for competing in Canadian Interuniversity Sport [CIS] sport competition while pursuing their university education in Saskatchewan, and to benefit from their contributions to the community.

(e) In 2013, Mr. Neary received the "Most Inspirational Player" award from the U of S Huskies Football Program for his efforts on and off the football field. Then, in 2014,

Mr. Neary received the Windsor AKO Fratmen Most Valuable Player Award.

(f) Mr. Neary has also received accolades for his performance as a player with the U of S Huskies, including recognition and national interest for his technical abilities. In 2015, Mr. Neary was one of five players in Western Canada to receive an invitation to the Canadian Football League [CFL] Combine, where Canada's top amateur football prospects perform physical and skills testing in front of CFL coaches, general managers and scouts. Mr. Neary was also invited to try out for the B.C. Lions and the Saskatchewan Roughriders. Unfortunately, these invitations were revoked as a result of current matters before the courts. Mr. Neary's counsel submits that this loss of opportunity, in and of itself, has had a significant punitive aspect on Mr. Neary.

4. Academic pursuits

(a) Throughout the same time that Mr. Neary was excelling in athletics, he remained devoted to his education. In 2009, he received the Honourable John McIntyre Graduation Scholarship.

(b) Mr. Neary graduated as his class valedictorian.

(c) Later that same year, he received a U of S Academic Entrance Scholarship.

(d) From 2010 to 2013, he was recognized as a member of the

CIS All-Academic Second Team.

(e) In 2014, he received an invitation to join the Golden Key Academic Society. This opportunity was based on his academic performance.

(f) Mr. Neary has completed one year in the College of Kinesiology and a further three years majoring in International Studies and Economics.

(g) On May 14, 2015, the U of S Chair of Undergraduate Programs from the Department of Economics invited Mr. Neary to consider an honours degree in Business Economics. He is also considering an offer to attend at the University of British Columbia, Okanagan Campus, where he has qualified for a combined degree in Philosophy, Politics and Economics.

(h) Mr. Neary is currently studying for the LSAT. The end goal of this pursuit is admittance into a dual JD/MBA program at the University of Victoria, University of British Columbia, University of Calgary, University of Toronto or Dalhousie University in Halifax.

5. Employment

(a) In 2007, Mr. Neary was hired as a research assistant for the University of Regina. Responsibilities included organizing and analyzing research data and conducting literature research.

(b) In the off-season, starting in 2010, Mr. Neary was employed in the construction industry, completing basement repairs and waterproofing foundations. In the 2011 off-season, he worked as an arborist for a local tree service.

(c) Mr. Neary has also held numerous positions relating to his strengths as an athlete. From April 2012 to September 2013, Mr. Neary was hired as the assistant strength and conditioning coach for the University of Saskatchewan Huskies Football Team. He excelled in this role, which parlayed into employment with Ignite Athletic Conditioning as a trainer.

(d) He is currently employed at Motion Fitness as a personal trainer and sales consultant.

(e) More recently, Mr. Neary has partnered with a high-school friend in a software consulting business, which focusses on the development of custom business applications and platforms. The business has contracts with information technology companies in Kelowna and Vancouver and has experienced rapid growth to the point that he and his partner are now managing a development team to further expand the business. He plans to continue to build this business while completing his university education.

6. Family and community support

   (a) Mr. Neary enjoys strong support from a network of family, friends and members of our community.

   (b) Mr. Neary's community and family support network was evidenced by numerous letters from professors, coaches, employers, family and notable citizens of Saskatoon.

[32] I also observe that Mr. Neary has performed under the strict conditions of his release, not incurring any breaches for well over two years. He has further demonstrated his intention to conduct himself appropriately under the Court's order by applying to the Court for exceptions to his release conditions.

[33] I inquired of Crown counsel whether he was of the view that if Mr. Neary was being sentenced for his crimes prior to the impugned amendments brought in under the *Safe Streets and Communities Act* whether he would be a solid candidate for a conditional sentence order. Crown counsel conceded that he would.

[34] Crown counsel, nonetheless, reminds me that the sentencing regime for this particular crime from the Court of Appeal would be in the range of 15 to 18 months. Typically, I would not hesitate to follow the guidance of the Court of Appeal. However, in this instance, at this moment, we find ourselves in a curious circumstance; we are in an *interregnum*, a time that exists between two governing regimes.

[35] It is the declared intention (complete with letters of direction to the Minister of Justice and other ministers from the Prime Minister) that steps are to be taken to legalize marihuana. I concede that the precise dimensions of the new regime dealing with wholesale and retail distribution of marihuana are unclear at this juncture. Nonetheless, it can be fairly said that we all know it will arrive.

[36] Counsel for Mr. Neary strongly argues that the usual concerns about denunciation and deterrence are not now applicable knowing that the prohibition against marihuana will become a thing of the past. Accordingly, to blindly follow the current sentencing regime of 15 to 18 months would not be an intellectually honest act in the face of the coming change.

Sentence Imposed

[37] No larger good is served sentencing Seamus John Neary to jail. He poses no danger to the community. He has conducted himself well as a citizen but for this single unfortunate foray in the mire of the drug world. To be certain, as he attempted to engage in a criminal enterprise, his crimes are deserving of denunciation and deterrence. However, facing the reality that the product in which he dealt is to become legal, it should be said that the decibel level of such denunciation and deterrence may be less than it otherwise would be.

[38] After reflecting upon the excellent insights of both Crown and defence counsel, I conclude that it is appropriate to suspend the passing of sentence upon Seamus John Neary for two years. During that two years, Mr. Neary shall be subject to and must comply with the following conditions:

1. He shall keep the peace and be of good behaviour.
2. He shall appear before the Court whenever required to do so by the Court.
3. He shall notify his probation officer of any change in his name or address.
4. He shall notify his probation officer of any change in his employment.

5. He is to report to the Chief Probation Officer of Saskatchewan or his designate at 122 Third Avenue North, Saskatoon, within three business days and at such other times and places as the said probation officer or his designate may require and to follow the lawful instructions of the said probation officer or his designate for the purpose of direct supervision.

6. He shall refrain absolutely from the use, possession or consumption of alcohol or other intoxicants or drugs except in accordance with a medical prescription from the date hereof until August 31, 2016.

7. He shall not enter any place or establishment where the primary function is the sale or consumption of beverage alcohol as defined in *The Alcohol and Gaming Regulation Act, 1997*, SS 1997, c A-18.011, until August 31, 2016.

8. He shall refrain absolutely from the use, possession or consumption of any non-prescription or illicit drugs.

9. He shall not remove himself from Saskatchewan or change his place of residence without the express permission of his probation officer.

10. He shall remain in his residence between the hours of 9:00 p.m. and 7:00 a.m. every day, and he shall not leave his residence during the time of his curfew until August 31, 2016 (except for the purposes of employment where he has received permission of his probation officer to do so).

11. He shall present himself at the door of his approved residence to

any peace officer checking on his curfew.

12. He shall not possess any weapon, firearm, ammunition or explosive substance.

[39] I also make the following incidental orders:

1. He is to, during the hours of 10:00 a.m. and 3:00 p.m. on Wednesday, June 29, 2016, present himself to police authorities for the purposes of them obtaining samples of his bodily fluids for the purposes of DNA analysis as contemplated under s. 487.051 of the *Criminal Code*.

2. I order pursuant to s. 109 of the *Criminal Code* a ten-year prohibition with respect to firearms as defined in the said *Criminal Code*.

3. I order pursuant to s. 462.37 of the *Criminal Code* the forfeiture of the $1,000.00 cash seized from Mr. Neary's apartment as proceeds of crime.

4. There are four indictable charges and, therefore, the mandatory victim's surcharge is $200.00 per indictable offence, for a total of $800.00. I order that the $800.00 be paid within 30 days.

"R.S. Smith" J.
R.S. Smith