Supreme Court Upholds Mandatory Minimum Sentence and Refuses to Grant Constitutional Exemption

In decision dated February 29, 2008, the Supreme Court of Canada upheld the constitutionality of a four year mandatory minimum sentence (MMS), and commented on the availability of "constitutional exemptions" as a remedy for *Charter* violations.

The case arose when Constable Ferguson, an RCMP officer, fatally shot a man (Darren Varley) being held in a cell at an RCMP detachment in Pincher Creek, Alberta. Ferguson gave conflicting testimony as to whether he was in control of his firearm when the shots were fired. At trial, the jury convicted Ferguson of manslaughter. The trial judge imposed a conditional sentence of two years less a day. Section 236(a) of the *Criminal Code* establishes a MMS of four years for manslaughter when a firearm is used the commission of the offence.

The Court of Appeal of Alberta overturned the trial judge's sentence and held that the MMS of four years must be imposed. For more information on the Alberta Court of Appeal judgement, see *R. v. Ferguson: Cruel and Unusual Punishment, and Constitutional Exemptions Centre for Constitutional Studies*.

Ferguson's appeal to the SCC was decided by a unanimous court. The judgement, delivered by Chief Justice Beverly McLachlin, addressed the two questions Ferguson advanced:

1. (1) In the circumstances of this case does section 236(a) of the *Criminal Code*, which imposes a four year MMS for the offence of manslaughter with a firearm, amount to cruel and unusual punishment contrary to section 12 of the *Charter*?
2. (2) If an offender is able to demonstrate that a MMS would amount to cruel and unusual punishment in the circumstances of his/her case, is constitutional exemption available as a remedy?
3. The Court answered both questions in the negative.

Cruel and Unusual Punishment

Section 12 of the *Canadian Charter of Rights and Freedoms* provides that, "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." In order to determine whether Ferguson's section 12 rights were violated, the Court applied the test

set out in *R. v. Smith* and considered whether the sentence was grossly disproportional.

The Court held that, although the trial judge made errors in the sentencing process [i], the MMS prescribed in this case did not amount to cruel and unusual punishment. The mitigating factors of Constable Ferguson's case (his actions were not planned, the victim initiated the altercation in the cell, Ferguson has little time to plan his response) did not reduce the offender's moral blameworthiness to the extent that the MMS was grossly disproportionate. The Court considered aggravating factors surrounding the offence in reaching this conclusion: Ferguson was well trained in the used of firearms, he stood in a position of trust with respect to the victim, and the standard of care expected of him was higher than that of a normal citizen. Constable Ferguson did not advance any hypothetical situation in which the imposition of the MMS would amount to a section 12 violation.

Although Ferguson was unable to establish a violation of section 12, the Court went on to consider the issues of constitutional exemptions in order to bring clarity to a notoriously unsettled area of the law. [iii]

Constitutional Exemptions

In the 2000 case of *R. v. Morrisey* the Supreme Court of Canada upheld the constitutionality of section 220(a) of the *Criminal Code,* which imposes a MSS for criminal negligence causing death when a firearm is used in the commission of the offence. In a concurring judgement Justice Arbour stated that, due to the wide range of circumstances in which the offence could be committed, "it is not possible to conclude… that the mandatory minimum sentence will be constitutional in every possible application." [ii]

Ferguson argued that in cases where applying a MSS leads to unconstitutional results the appropriate remedy is a constitutional exemption; the remedy would have the effect of allowing the law to remain in effect, but exempt the individual before the court from the application of the law.

Two main arguments were advanced in favour of constitutional exemptions:

1. It is better to allow a normally constitutional law to stand and grant an individual remedy in the rare circumstance where the law offends the *Charter.*
2. Constitutional exemptions are available according to the wording of the *Charter* and case law on the issue.

The Court held that, although persuasive, the arguments were outweighed by four considerations.

a. *Case Law on Constitutional Exemptions*: After surveying the cases on the matter the Court concluded that, "while the availability of constitutional exemptions for mandatory minimum sentencing laws has not been

conclusively decided, the weight of the authority thus far is against them." [iv] >

b. *The Need to Avoid Intruding on Parliament's Role*: The Court found that the effect of granting a constitutional exemption would be to fundamentally change the legislation in question, and that this would be more intrusive than simply striking down the legislation.
c. *The Remedial Scheme of the Charter*: The Court held that, when dealing with laws that violate the*Charter*, the appropriate remedy is generally to declare the law of no force and effect pursuant to section 52(1) of the *Constitution Act, 1982*. Section 24(1) of the *Charter* "function[s] primarily as a remedy for unconstitutional government acts." [v]
d. *The Rule of Law*: The rule of law is one of the four organizing principles of the Constitution, and requires that laws have a certain degree of accessibility, intelligibility, clarity, and predictability. [vi] The Court eloquently stated that, "constitutional exemptions buy flexibility at the cost of undermining the rule of law." [vii]

The Court concluded that constitutional exemptions are not an appropriate remedy for MMS laws which violate section 12 of the *Charter*. The appropriate response would be to declare the law of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982.*

Sources:

1. *Criminal Code*, R.S.C. 1985 c. C-46.
2. *R. v. Ferguson*, 2008 SCC 6 (CanLII).
3. *R. v. Ferguson*, 2006 ABCA 261 (CanLII).
4. *R. v. Ferguson*, 2004 ABQB 928 (CanLII)
5. *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 30
6. *R. v. Smith*, [1987] 1 S.C.R. 1045.

[i] *R. v. Ferguson*, 2008 SCC 6 (CanLII at para. 21.
[ii] *Ibid* at para. 12.
[iii] *Ibid.* at para. 33.
[iv] *Ibid.* at para. 48.
[v] *Ibid.* at para. 63 (emphasis added).
[vi] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.
[vii] *Ibid.* at para. 67.