
CANADA / JUDGMENT

R. v. Serov

2016 BCSC 636

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2016 BCSC 636 R. v. Serov

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Serov,

2016 BCSC 636

Date: 20160408

Docket: X077721

Registry: New Westminster

Regina

v.

Mikhail Serov

Before: The Honourable Madam Justice Duncan

Oral Reasons for Judgment

Counsel for the Crown:

E. Laurie

Counsel for the Accused:

D.H. Silverman

Place and Date of Hearing:

New Westminster, B.C.

March 14, 2016

Place and Date of Judgment:

New Westminster, B.C.

April 8, 2016

- [1] In reasons for judgment indexed as 2015 BCSC 939 I found Mr. Serov guilty of possession of marijuana for the purpose of trafficking and production of marijuana, contrary to ss. 5(2) and 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. The circumstances involved an indoor marijuana grow operation located in a unit Mr. Serov rented in a commercial warehouse complex in Port Coquitlam. When police searched the rental unit on July 4, 2013 they found 248 marijuana plants growing in one of two commercial trailers parked inside the rental unit. The value of the crop was estimated at between \$27,900 and \$102,300. Mr. Serov is now before the court for sentencing.
- [2] As a result of amendments to the CDSA by the Safe Streets and Communities Act, S.C. 2012, c. 1, ss. 39-46, upon proof of certain aggravating factors, mandatory minimum sentences are triggered for the offence of production of marijuana. The mandatory minimum sentences are graduated in length, depending on the number of plants involved and the existence of various aggravating factors. This tailoring appears to be at least in part a response to the judgment in *R. v. Smith*, [1987] 1 S.C.R. 1045, 34 C.C.C. (3d) 97 where a mandatory minimum sentence of seven years for the importation of any drug, regardless of the nature or quantity, was struck down as contrary to the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter].
- [3] The aggravating factors in Mr. Serov's case are the number of plants and the fact that real property belonging to a third party was used for the production of marijuana, as set out in the following sections of the CDSA:
- 7 (1) Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III or IV.
- (2) Every person who contravenes subsection (1)
- (b) if the subject matter of the offence is cannabis (marijuana), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years, and to a minimum punishment of
- (iv) imprisonment for a term of 18 months if the number of plants produced is more than 200 and less than 501 and any of the factors set out in subsection (3) apply,
- (3) The following factors must be taken into account in applying paragraphs (2)(a) to (b):
- (a) the person used real property that belongs to a third party in committing the offence.
- [4] A mandatory minimum sentence of imprisonment precludes the availability of a conditional sentence of imprisonment: s. 742.1(b) of the Criminal Code.

- [5] Mr. Serov's sentencing was scheduled to take place in September 2015; however, on August 12, 2015 Mr. Silverman, counsel for Mr. Serov, provided the Crown with a Notice of Constitutional Challenge concerning the mandatory minimum sentences. This necessitated an adjournment. Argument was set to be heard in December 2015 but I was unavailable. The matter was finally heard on March 14, 2016.
- [6] In the Notice of Constitutional Challenge, Mr. Silverman states that the mandatory minimum sentencing provisions which apply in Mr. Serov's circumstances are inconsistent with ss. 7 and 12 of the Charter. As an alternative he seeks a constitutional exemption for Mr. Serov. Mr. Silverman did not press the application of s. 7 or the constitutional exemption in either his written or oral submissions.
- [7] The Crown submits that where an applicant's Charter claim falls within one of the enumerated rights in ss. 8 to 14 of the Charter, the Supreme Court of Canada has consistently held that the claim should be analyzed under the enumerated right rather than s. 7. The exception to this is where, in rare circumstances, s. 7 offers residual protection not found in one of the enumerated rights.
- [8] I agree this is the correct approach and in these reasons I will focus on Mr. Serov's s. 12 rights.
- [9] Section 12 of the Charter gives everyone "the right not to be subjected to any cruel and unusual treatment or punishment". The phrase "cruel and unusual" has been interpreted to mean a "compendious expression of a norm" that guards against punishments shown to be "abhorrent and intolerable"; so harsh or excessive as to outrage standards of decency; or disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable", per *R. v. Smith*, supra, at 139 (C.C.C.); *R. v. Ferguson*, 2008 SCC 6 at para. 14.
- [10] In *R. v. Nur*, 2015 SCC, 15 Chief Justice McLachlin summarized the Court's approach to s. 12 challenges:
- [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.
- [11] Establishing sentencing policy is a Parliamentary prerogative. Measuring particular sentences against Charter limits is the responsibility of the judiciary, with reference to the analytical touchstones of gross disproportionality and standards of decency.

- [12] The usual procedure in Charter applications of this nature is to first determine whether the sentencing provision in question is grossly disproportionate as it applies to the individual offender. This is generally referred to as the particularized inquiry. If the provision is not found to be grossly disproportionate in the circumstances of the particular offender, the inquiry shifts to whether it is grossly disproportionate in reasonable hypothetical scenarios: *R. v. Brown*, [1994] 3 S.C.R. 749 at 751; *R. v. Goltz*, [1991] 3 S.C.R. 495 at 505.

The Particularized Inquiry

- [13] The particularized inquiry requires consideration of several factors in assessing whether the impugned sentencing provision is grossly disproportionate vis-à-vis Mr. Serov. Those factors include:
1. the gravity of the offence;
 2. the personal characteristics of the offender;
 3. the circumstances of the offence;
 4. the actual effect of the punishment of the offender;
 5. the penological goals and sentencing principles reflected in the challenged minimum;
 6. the existence of valid effective alternatives to the mandatory minimum; and
 7. a comparison of punishments imposed for other similar crimes.

The Defence Submissions on the Particularized Inquiry

- [14] Mr. Serov was born in Russia but immigrated to Canada at the age of 14. He is a Canadian citizen and has no previous criminal record. He is 28 years old and resides in Burnaby with his parents. Until his conviction, Mr. Serov was working full time as an independent insurance adjuster. Since then he has attempted to start up a business, with limited success so far.
- [15] Mr. Serov's precise role in the marijuana grow operation was not delineated in my reasons for judgment at conviction. For present purposes of comparison with other cases it is sufficient to say that he was not in a caretaker or mere gardener role. He rented the warehouse and purchased the two commercial trailers located within. Mr. Serov's role is best described as a principal or co-principal based on the evidence he facilitated the offences by providing the premises and the trailers for the grow operation.
- [16] The grow operation falls into the category of a mid-size operation, both in terms of how the sentencing authorities categorize offences by the number of plants involved and how the sentencing provisions in the CDSA separate out various categories of offences based in part on the number of plants (in this case over 200 but less than 500).

[17] Mr. Silverman submits that until the amendments to the CDSA, an offender like Mr. Serov could expect a conditional sentence of up to two years less one day or a custodial sentence of up to 12 months. He acknowledged that conditional sentences were rare for offenders who were found to be principals or co-principals, but not unheard of. Principals or co-principals generally received sentences of between 9 and 12 months in custody, based on a range of authorities including:

- R. v Su, 2000 BCCA 480 - two years less a day reduced to 12 months imprisonment on appeal for a first offender involved in a mid-size marijuana grow operation at a home in a residential area of Vancouver;
- R. v. Munro and McLennan, 2001 BCCA 299 - sentences of two years less a day jail converted to conditional sentences for two offenders in their fifties who ran a grow operation of over 2,000 plants;
- R. v. Van Santvoord, 2007 BCCA 23 - \$20,000 fine overturned on appeal and a 12 month jail sentence imposed in its place for a 41 year old offender with no previous record who grew marijuana for personal use and sale, including some sales through a compassion club;
- R. v. Budd, 2010 BCCA 214 - one year sentence upheld for 29 year old man with no prior record who turned to the marijuana trade after setbacks in his employment as a fisherman;
- R. v. Au-Yeung, 2010 BCCA 433 - 12 month sentence for principal in a mid-size marijuana grow operation upheld on appeal;
- R. v. Lee, 2011 BCCA 73 - 9 month sentence for caretaker of a mid-size marijuana grow operation upheld on appeal.

[18] Mr. Silverman submits that in analyzing whether a sentence of 18 months imprisonment would be grossly disproportionate for Mr. Serov, it must be borne in mind that the public's attitude towards marijuana use and its production is softening. Marijuana is not a hard drug, like heroin or cocaine, and courts have recognized this in the sentences imposed.

[19] Additionally, counsel observed that the legal framework of marijuana production in Canada is in a state of flux as a result of changes to laws and regulations concerning medical marijuana. In light of those developments, and the personal circumstances of Mr. Serov, defence counsel maintains the mandatory minimum sentence of 18 months is grossly disproportionate as it applies to Mr. Serov.

[20] While Mr. Silverman is correct to observe that in recent years media reports and even political campaigns indicate a softening of attitudes concerning marijuana use, I am not persuaded that this extends beyond the medicinal marijuana debate or the possession of very small amounts of marijuana for personal use. I must bear in mind when assessing the particularized inquiry that Mr. Serov was involved in a mid-level, unlicensed, for profit commercial marijuana grow operation.

The Crown's Position on the Particularized Inquiry

[21] The Crown submits the offences before the court are serious, cause harm to the community and the third party real property owner and carry a high degree of moral blameworthiness. The jurisprudence from our Court of Appeal highlights the pressing problem posed by commercial marijuana grow operations, an industry permeated by organized crime, often accompanied by violence and other destructive consequences: *R. v. Innes*, 2001 BCCA 478 at para 10; *R. v. Vu*, 2003 BCCA 339 at paras. 21-22; *R. v. Hill*, 2007 BCCA 309 at para. 21.

[22] The Crown also tendered excerpts from debates in the House of Commons prior to the enactment of the CDSA amendments at issue in this case which emphasized similar concerns to those in the jurisprudence: Hansard, 41st Parliament, Second Session (2011), No. 19 (21 September 2011), at 1299-1300. The Parliamentary Secretary to the Minister of Justice said:

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.

A mandatory minimum sentence is the starting point for the judge's consideration of the appropriate jail term. Where a minimum sentence applies, the sentence imposed by the judge cannot be less. Presently there are no mandatory minimum penalties in the Controlled Drugs and Substances Act, or CDSA. The CDSA provides for maximum penalties based on the prohibited activity involved as well as on the substances involved. The maximum penalty for the most serious offences involving the most dangerous drugs is life imprisonment.

Marijuana cultivation offences have increased significantly in the past several years. According to a study on marijuana grow operations in British Columbia, my home province, in 2003 approximately 39% of all reported marijuana cultivation cases, or 4,514, were located in B.C. Between 1997 and 2000, the total number of these cases increased by over 220%. Although the number of individual operations in B.C. levelled off between 2000 to 2003, the estimated quantity of marijuana produced has increased from 19,729 kilos in 1997 to a seven year high of 79,817 kilos in 2003, due to the size and sophistication of individual operations.

Investigations by BC Hydro indicate the existence of thousands of possible marijuana grow operations. The increase in the illicit production of marijuana has occurred not just in B.C., of course, but across all of Canada.

[23] Staff Sergeant Patrick Murphy, a member of the RCMP who has spent much of his career investigating marijuana production, testified at the sentencing hearing about his experience with health and safety concerns arising from marijuana grow operations, such as:

- unsafe structural modifications;
- unsafe electrical wiring;

- toxic molds and chemicals from fertilizers;
- violence from "grow rips";
- risk of fire; and
- traps or devices to protect the grow operation.

- [24] On cross-examination, Staff Sergeant Murphy agreed that some of these dangers, such as unsafe wiring and chemical issues, also arise with licensed grow operations.
- [25] The Crown's position is that unlicensed commercial marijuana production involves morally blameworthy conduct. It is not an impulsive crime, but one of planning and organization with the goal of personal gain. The organizers generally receive more significant punishments than mere caretakers, but those who fall into the latter category are still motivated by personal gain and share in the moral blameworthiness, per Prowse J.A. in *R. v. Kwiatkowski*, 2010 BCCA 238 at para. 11.
- [26] The Crown emphasized that my analysis must be on the particular sections in question before me, but cited *R. v. Hanna*, 2015 BCSC 986, where Madam Justice Beames considered the constitutionality of the two-year mandatory minimum sentence under s. 7(2)(b)(v) of the CDSA. That minimum applies in circumstances where the number of marijuana plants exceeds 500, a step above the circumstances in which Mr. Serov finds himself.
- [27] The accused was the caretaker of a large scale marijuana grow operation involving over 1,200 plants. He was 38 years old and had no criminal record. He pleaded guilty to the offence of production. Beames J. noted the range of sentence for the accused's level of involvement was 9 to 15 months in jail and found that he would fit in the mid to upper end of that range. She was not persuaded the defence had satisfied its burden either under the particular or generalized inquiry, stating at para. 28 "While the moral culpability of a caretaker is less than that of an owner, many commercial marihuana grow operations would likely not exist without a caretaker."
- [28] People who knowingly allow their property to be used for a grow operation, without actually tending to the plants, may be less morally blameworthy than a principal offender but are still an essential part of the operation, per *R. v. Leech*, 2013 BCSC 1157 at para. 9.
- [29] In this case, the property owner was not involved in the operation and had to pay for remediation to the unit Mr. Serov had rented in the amount of \$11,256.71. The City of Port Coquitlam required the remediation under Bylaw 3602 and Onni Property Management had to complete it before the unit could be occupied or leased. This illustrates the harm that third parties suffer when their premises are used for illegal marijuana grow operations and part of the underlying rationale for this aggravating circumstances in the CDSA. Mr. Serov reached an agreement with Onni to reimburse it for remediation costs shortly before the sentencing hearing began.

[30] The Crown submits Mr. Serov was essential to the marijuana production in this case. He rented the space, communicated with Onni and located and paid for the two commercial trailers. One of the trailers contained 248 plants; the other contained the necessary equipment and materials to grow a similar number. In light of those circumstances, the Crown's position is that absent the mandatory minimum sentence in the CDSA, Mr. Serov could expect to receive between 9 and 15 months in jail, or a conditional sentence of 12 months to two years less one day, based on a range of authorities including:

- R. v. Su, *supra*
- R. v. Innes, *supra* - nine month sentence of imprisonment upheld for offender who entered plea of guilty to production of marijuana involving 374 plants;
- R. v. Vu, *supra* - sentence of one year imprisonment and probation after trial for possession of marijuana for the purpose of trafficking upheld on appeal;
- R. v. Wallis, 2007 BCCA 377 - 15 months jail and one year probation upheld for production of marijuana in circumstances where the offender quit his well-paying job to undertake a criminal enterprise involving 638 marijuana plants powered by stolen electricity;
- R. v. Nguyen, 2011 BCSC 1596 - 15 month conditional sentence;
- R. v. Therrien, 2014 BCSC 946 - 18 month conditional sentence.

[31] The only impact of the mandatory minimum sentence of 18 months, in the Crown's submission, is to add as little as three months or perhaps as much as six months to the sentence Mr. Serov would otherwise have received.

[32] The Crown submits that Parliament has chosen, with the introduction of the minimum jail term in ss. 7(2)(b)(iv) and 7(3)(a) of the CDSA, to prioritize denunciation and deterrence for offenders who are sentenced for the commercial production of marijuana. The CDSA scheme as a whole is a sliding scale of penalties, where offences involving fewer than 201 plants attract the lowest penalty and offences involving more than 500 plants attract the highest minimum penalty. Putting denunciation and deterrence at the forefront of sentencing for these types of offences is consistent with the approach in the jurisprudence and with Parliamentary prerogative to emphasize some sentencing principles over others. Parliament is free to specify a narrow and well-defined group of offenders to which mandatory minimum sentences will apply and for whom conditional sentences of imprisonment are no longer available. The Crown also submits the mandatory minimum regime will serve to minimize disparities in sentence between the provinces.

Conclusion on the Particularized Inquiry

- [33] Based on the range of authorities placed before me, I am satisfied that a sentence of 12 months imprisonment would likely be the result for Mr. Serov, absent the mandatory minimum sentence at issue. While some individuals have received slightly lower (nine months) or slightly higher terms of imprisonment (15 months), 12 months appears to be the norm for similar offenders in similar circumstances.
- [34] Some individuals received conditional sentences, but those sentencing precedents are either somewhat dated, as in the case of Munro and McLennan, *supra*, or involve exceptional circumstances. Furthermore, in accordance with *R. v. Proulx*, [2000] 1 S.C.R. 61, conditional sentences are generally longer than a jail sentence would be for the same offence. There is no fixed tariff to indicate what 12 months jail time would translate to as a conditional sentence, but it would likely be at least 15 months or higher in the circumstances before me. There is no remission to shorten the sentence as occurs with incarceration. A proven breach can result in the conversion of the balance of the sentence into a jail sentence.
- [35] There is no constitutional right to a conditional sentence. Parliament has specifically carved out offences involving serious personal injury or abuse of children from the conditional sentence regime. And, by enacting a mandatory minimum sentence for production of marijuana in the circumstances before me, a conditional sentence is no longer available. I am not persuaded on the materials before me that this informs the gross disproportionality analysis in Mr. Serov's case.
- [36] The question is whether a sentence of 18 months is grossly disproportionate in Mr. Serov's case. As noted earlier in my reasons, Mr. Serov was involved in a mid-size commercial marijuana grow operation of some sophistication. He rented the premises, obtained and paid for the trailers where the crop was grown and dealt with the landlord's representative. The potential profit involved from the illegal crop discovered at the time of the search could have exceeded \$100,000. I cannot conclude a sentence of 18 months is grossly disproportionate in those circumstances.

Reasonable Hypothetical Scenarios

- [37] The defence bears the burden of identifying reasonable hypothetical scenarios where the law in question would give rise to a punishment so grossly disproportionate that it fails constitutional muster.
- [38] In *R. v. Nur*, McLachlin CJC reviewed the jurisprudence concerning reasonable hypotheticals and said:
- [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.

And further:

- [68] The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are "remote" or "far-fetched" are excluded: Goltz, at p. 515. Contrary to what the Attorney General of Ontario suggests there is a difference between what is foreseeable although "unlikely to arise" and what is "remote [and] far-fetched": A.F. (Nur), at para. 66. Moreover, adoption of the likelihood standard would constitute a new and radically narrower approach to constitutional review of legislation than that consistently adhered to since Big M. The Court has never asked itself whether a projected application of an impugned law is common or "likely" in deciding whether a law violates a provision of the Charter. To set the threshold for constitutional review at common or likely instances would be to allow bad laws to stay on the books.

The Reasonable Hypotheticals in this Case

Hypothetical No. 1

- [39] Two people are caught growing more than 200 but less than 500 marijuana plants on real property. Person A is the principal who rented the property from a third party. Person B is a gardener who is told by Person A that he is the owner of the property.
- [40] Mr. Silverman submits there is a clear distinction between A and B in terms of their moral blameworthiness. Prior to the amendments to the CDSA, principals were always considered to bear greater moral blameworthiness than gardeners, and the latter would likely receive a conditional sentence. The new mandatory minimum regime elevates the gardener's moral blameworthiness to the same level as that of a principal.
- [41] While the Crown acknowledges there may be a slight difference in the moral blameworthiness as between a principal and a gardener, there is no gross distinction in the sentencing range prior to and after the enactment of the mandatory minimum. A gardener or caretaker with no prior record would generally receive a 9 to 12 month jail sentence. Furthermore, both the principal and the gardener are involved in producing marijuana for commercial distribution, formed the intent to commit the offence and did so for financial gain. There is little difference in principle between an offender who knowingly grows

commercial marijuana on the property of a third party and one who does not know the property is owned by a third party.

[42] The Crown notes that it need not prove an offender's knowledge of statutory aggravating factors. In *R. v. DeSousa*, [1992] 2 S.C.R. 944 at 967 Mr. Justice Sopinka said:

There appears to be a general principle in Canada and elsewhere that, in the absence of an express legislative direction, the mental element of an offence attaches only to the underlying offence and not to the aggravating circumstances. To require fault in regard to each consequence of an action would substantially restructure current notions of criminal responsibility. Such a result cannot be founded on the constitutional aversion to punishing the morally innocent. One is not morally innocent simply because a particular consequence of an unlawful act was unforeseen by that actor. In punishing for unforeseen consequences the law is not punishing the morally innocent but those who cause injury through avoidable unlawful action. Neither basic principles of criminal law, nor the dictates of fundamental justice require, by necessity, intention in relation to the consequences of an otherwise blameworthy act.

[43] While the gardener in this scenario would receive a higher sentence than before the change in legislation, I cannot conclude that 18 months is grossly disproportionate to his moral blameworthiness. He knowingly engaged in serious criminal conduct. The sentence is heavily weighted towards denunciation and deterrence, but not so out of proportion to previous jurisprudence in the area that it would constitute abhorrent or intolerable punishment.

Hypothetical No. 2

[44] A person who is the principal of a grow operation in excess of 201 plants but less than 500 plants conducts her operation on property owned by a corporate entity in which she is the director, but not a shareholder, and thus not an owner.

[45] Mr. Silverman submits the difference between personal ownership of the real property versus corporate ownership results in a threefold increase to the minimum sentence. It seems to me, however, that the principal of a grow operation in excess of 201 plants on his or her own property could expect to receive a sentence in the range of 9 to 12 months, as reflected in the cases discussed earlier in these reasons. An increase to 18 months as a minimum sentence is not grossly disproportionate for someone who knowingly runs a mid-size grow operation.

Hypothetical No. 3

[46] A licensed producer of marijuana who rents a warehouse owned by a third party accidentally miscounts her crop and is found to be growing 201 plants when she was only licensed to grow 200 plants.

- [47] Mr. Silverman submits the honest but mistaken grower in this hypothetical has no moral blameworthiness, but her mistake makes the difference between legality and an 18 month jail sentence. He cites *R. v. Carlson*, 2015 BCPC 287 as a real life illustration of this hypothetical. The offender in that case was prosecuted for breach of the Marihuana Medical Access Regulations. She was permitted to grow 122 plants. She applied to grow 490 plants but the application had not been processed at the time the police executed the search warrant. The sentencing judge granted an absolute discharge upon her guilty plea to the regulatory offence.
- [48] Mr. Silverman also relies on hypotheticals based on cases cited by Madam Justice Fenlon, now J.A., in *R. v. Elliott*, 2016 BCSC 393. At issue there was the mandatory minimum sentence of six months under s. 7(2)(b)(i) of the CDSA for the production of more than five and fewer than 201 plants. Fenlon J. found the mandatory minimum sentence offended s. 12 of the Charter because a migraine sufferer with no criminal record who grew six plants in her garden and shared them with friends, or a 19 year old university student who grew plants to use and share with friends, could be guilty of trafficking and caught by the mandatory minimum.
- [49] These types of hypotheticals were not developed in argument and in my view the number of plants in the matter before me, over 200, distinguishes them from hypotheticals that are reasonably foreseeable with a mid-size grow operation.
- [50] In response to Hypothetical 3, as framed, the Crown submits that a licensed producer under the Medical Marihuana Access Regulations would have a full defence at trial to production of 200 of the plants, if a charge actually ensued (though the existence of Crown discretion does not save legislation that breaches the Charter, per *R. v. Appulonappa*, 2015 SCC 59 at para. 74). The Crown also references the decision in *R. v. Allard et al.*, 2014 FC 280, as a result of which Health Canada continues to recognize a s. 56 CDSA exemption for personal use production licenses and designated person production licenses until a final decision is rendered in the case.
- [51] For the reasons advanced by the Crown I am not persuaded that Hypothetical 3 is reasonably foreseeable. The licensed grower who innocently miscounts would not face the mandatory minimum sentence at issue before me.

Conclusion

- [52] In conclusion, I cannot find that Hypotheticals 1 and 2 present reasonable circumstances where the mandatory minimum sentence would result in a grossly disproportionate sentence and Hypothetical 3 is not reasonably foreseeable.
- [53] The defence has not met its burden on either the particularized inquiry or the reasonable hypothetical scenarios that the mandatory minimum sentence in this case offends s. 12 of the Charter. A date for the imposition of sentence and ancillary orders should be arranged.

"Duncan J."

The Honourable Madam Justice Duncan

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