

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

COREY CARDINAL and
JERRY CHRISTOPHER ROGERS

RULING ON CONSTITUTIONAL CHALLENGE TO SECTION
244.2(3)(a)(i) OF THE *CRIMINAL CODE*

I) INTRODUCTION

[1] Corey Cardinal has pleaded guilty to having intentionally discharged a firearm while being reckless as to the life and safety of another person, contrary to section 244.2 of the *Criminal Code*. In an unrelated case, Tony Kakfwi pleaded guilty to the same charge.

[2] Mr. Cardinal and Mr. Kakfwi face mandatory minimum jail sentences. They have both filed Applications challenging these mandatory minimum sentences. Given the considerable overlap between the two cases, their Applications were heard together. This is my Ruling on Mr. Cardinal's Application.

II) BACKGROUND

[3] Section 244.2(1) creates two slightly different offences, both involving the intentional discharge of a firearm:

- 244.2 (1) Every person commits an offence
- (a) who intentionally discharges a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place; or
 - (b) who intentionally discharges a firearm while being reckless as to the life or safety of another person.
- (2) For the purposes of paragraph (1)(a), “place” means any building or structure – or part of one – or any motor vehicle, vessel, aircraft, railway vehicle, container or trailer.
- (...)

The penalty is the same for both offences:

244.2

(...)

- (3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and
- (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if the offence is committed for the benefit of, at the direction of, or in association with a criminal organization, is liable to imprisonment for a term of not more than 14 and to a minimum punishment of imprisonment for a term of
 - (i) five years, in the case of a first offence; an
 - (ii) seven years, in the case of a second or subsequent offence; and
 - (b) in any other case, is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years.

(...)

[4] Mr. Cardinal faces a five year mandatory minimum sentence because the firearm he used in the commission of the offence was a prohibited firearm.

[5] The specific circumstances of Mr. Cardinal’s case are not determinative of the outcome of his Application, but I will summarize them to put this Ruling in context.

[6] On the night of these events, Mr. Cardinal had been drinking alcohol and smoking salvia at his stepfather's home in Inuvik. In the early morning hours on April 6, 2016, he and his friend Jerry Rogers were in the living room. Two adult women were also in the house. They had gone upstairs and were sleeping.

[7] Mr. Cardinal broke into his stepfather's gun closet and removed a shotgun. He put the gun to his chin and fired, intending to kill himself. Mr. Rogers intervened at the moment Mr. Cardinal was pulling the trigger, pushing the gun away. This caused the shot to be fired through the front door. In anger and frustration, Mr. Cardinal fired a second shot through the door. Photographs filed at the sentencing hearing show two holes in the door of the residence, one at the top of the door and the other in the middle of the door.

[8] Mr. Cardinal left the house still holding the shotgun. Mr. Rogers followed, trying to convince him to drop the firearm. Mr. Cardinal fired a third shot into the snow on the side of the street. Eventually Mr. Rogers convinced Mr. Cardinal to drop the firearm. It was left in the snow.

[9] In the meantime, the R.C.M.P. had received a complaint about shots being fired and two men walking on the street with a gun. Police officers responded to that call. They quickly located Mr. Cardinal and Mr. Rogers on the road, and arrested them without incident. Police officers found an unused shotgun round in Mr. Cardinal's jacket pocket.

[10] The two women who were in the house when this happened told police they had gone there that evening and had consumed alcohol with Mr. Cardinal and Mr. Rogers. They had gone to sleep upstairs. They woke up to the gun shots. They stayed upstairs until Mr. Cardinal and Mr. Rogers left because they were scared.

[11] The shotgun was found in the snow, where Mr. Cardinal had dropped it. The stock had been sawed off and taped. The barrel of the shotgun had also been sawed off. The buttstock that had been sawed off and the end of the barrel were found on the kitchen table in the residence. Tape matching the tape on the stock of the shotgun was also found at the residence. The Agreed Statement of Facts does not explicitly state that Mr. Cardinal was the one who sawed off the stock and barrel of the shotgun, but the agreed facts give rise to a very strong inference that he did. In any event, whether he did or not does not make any difference to the outcome of this Application.

[12] It is an agreed fact that Mr. Cardinal did not intend to harm anyone other than himself when he fired the gun. It is also an agreed fact that he was reckless as to the safety of other people when he fired.

[13] According to the Pre-Sentence Report, Mr. Cardinal's date of birth is February 27, 1983. He was 33 years old at the time of the offence and is now

almost 35. The report notes that he has a lengthy criminal record which includes several convictions for crimes of violence.

[14] Both his parents attended residential school. Mr. Cardinal was exposed to alcoholism and domestic violence at a very early age. He developed an alcohol and substance abuse problem at the age of ten or eleven. As he got older he began using hard drugs.

[15] He was sent to the Territorial Treatment Center in Yellowknife when he was nine years old and spent two years there. Shortly after his return his mother turned him over to the care of the Department of Social Services. Between the ages of 12 and 17, he lived in various group homes in Edmonton.

[16] Mr. Cardinal's girlfriend died in a car accident in 2015. This had a profound impact on him. On the night of these events he was highly intoxicated and, obviously, suicidal.

III) MANDATORY MINIMUM SENTENCES AND SECTION 12 OF THE *CHARTER*

Section 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) states that:

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

[17] The scope of the protection afforded by section 12 has been examined a number of times by the Supreme Court of Canada, including recently. *R v Smith* [1987] 1 S.C.R. 1045; *R v Goltz*, [1991] 3 S.C.R. 485; *R v Morrissey*, 2000 SCC 39; *R v Ferguson*, 2008 SCC 6; *R v Nur*, 2015 SCC 15; *R v Lloyd*, 2016 SCC 13. As a result, the legal framework to be applied when deciding whether a mandatory minimum sentence offends section 12 is well established.

[18] A mandatory minimum sentence does not offend section 12 merely because it results in the imposition of a harsh sentence. To offend section 12, a sentence must be grossly disproportionate. The threshold to establish this is very high:

To be 'grossly disproportionate', a sentence must be more than merely excessive. It must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society.

R v Lloyd, para 24.

[19] Usually, sentencing is a highly discretionary, individualized process. The task of a sentencing judge is to decide what the sentence should be after having weighed and balanced a number of competing factors and principles. Proportionality is the fundamental principle that guides this exercise. The responsibility of a sentencing judge is to impose a sentence that is proportionate having regard to the seriousness of the offence and the degree of blameworthiness of the person who committed it.

[20] This framework and the normal judicial process of sentencing are significantly altered when Parliament enacts a mandatory minimum sentence. *R v Nur*, para 44.

[21] It is beyond dispute that it is open to Parliament to enact mandatory minimum sentences that may, at times, compel sentencing judges to impose sentences that would be characterized as excessive or unfit under the normal sentencing legal framework. A mandatory minimum sentence may even result in the imposition of a sentence that would otherwise be considered demonstrably unfit. Even demonstrable unfitness does not amount to "gross disproportionality". This may lead to outcomes that judges view as unnecessarily harsh. But unless the mandatory sentence meets the threshold of gross disproportionality, the will of Parliament must prevail:

(...) If it were open to this court to review the propriety of this sentence on the usual scale of appellate review as explained in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, I would find a three to four year sentence to be demonstrably unfit. However, that is not the same as gross disproportionality and I am not convinced that having regard to the objective gravity of any offence involving the use of a firearm, even an unloaded one, that a sentence approaching four years shocks the conscience. As La Forest J. wrote in *R. v. Lyons*, [1987] 2 S.C.R. 309 at 344-45, the standard under s. 12 is not so exacting as to require the punishment to be "perfectly suited to accommodate the moral nuances of every crime and every offender."

R v McDonald, [1998] O.J. No.2990 (Ont. C.A.), para 72.

[22] In determining whether a mandatory minimum sentence meets the "gross disproportionality" threshold, the first step is to determine what would constitute a fit and proportionate sentence in the case, having regard to the objectives and

principles of sentencing set out in the *Criminal Code*. The next step is to determine whether the mandatory minimum sentence is grossly disproportionate to that fit and proportionate sentence. *R v Nur*, para 45; *R v Lloyd*, para 23.

[23] Even if the mandatory minimum sentence is found not to be grossly disproportionate in the case of the offender before the Court, it may still offend section 12 if it is reasonably foreseeable that it will result in the imposition of a grossly disproportionate sentence on other offenders. *R v Nur*, paras 58 and 65. In other words, an offender may challenge a mandatory minimum not on the basis of his or her own circumstances, but on the basis of a hypothetical situation. This is what Mr. Kakfwi has done. Mr. Cardinal also based his challenge on a hypothetical situation.

[24] If the basis of the challenge is a hypothetical situation, that hypothetical must be grounded in judicial experience and common sense. Fanciful and remote situations must be excluded. *R v Nur*, para 62.

[25] One of the features that makes a mandatory minimum sentence constitutionally vulnerable is if the offence that triggers its application is defined too broadly. The broader the scope of conduct that makes out the offence, the greater the risk that the mandatory minimum sentence will capture conduct and circumstances that do not merit the blameworthiness envisaged by the statutory scheme. If the "net is cast too wide", there is a greater risk that the mandatory minimum will potentially result in a grossly disproportionate sentence for some offenders. *R v Smith*; *R v Nur*; *R v Lloyd*, paras 27 and 35; *R v McIntyre*, 2017 ONSC 360.

[26] The Supreme Court of Canada has identified a number of factors to be considered in assessing whether a mandatory minimum penalty amounts to a violation of section 12. These include: the gravity of the offence; the particular circumstances of the case and the offender; the actual effects of the punishment on the offender; the penological goals and sentencing principles that underlie the mandatory minimum; the existence of valid alternatives to the mandatory minimum; and a comparison of punishments imposed for other similar crimes. *R v Morrissey*, 2000 SCC 39, paras 35-49.

IV) EARLIER CHALLENGES TO SECTION 244.2

[27] This is the first time that section 244.2(3) is the subject of a constitutional challenge in this jurisdiction. It has been challenged in other jurisdictions. *R v*

Oud, 2016 BCCA 332; *R v Abdullahi*, 2016 ONSC 272; *R v Mohamed* 2016 ONCJ 492; *R v Crockwell*, 2013 CanLII 8675 (NL SCTD); *R v Vézina*, 2017 QCCQ 7785, 2017 CarswellQue 10391; *R v Gunner*, 2017 QCCQ 12563, 2017 CarswellQue 9843.

[28] *R v Vézina* was rendered on July 13, 2017, just a few weeks before the hearing of this Application. *R v Gunner* was released several months later, on October 25, 2017. Both came to my attention after the hearing. As far as I am aware, they are the only two cases where a challenge to section 244.2(3) was successful.

[29] None of these decisions are binding on this Court. In addition, the unique legal framework that applies to section 12 challenges is such that even a binding or highly persuasive decision upholding the validity of the mandatory minimum is not necessarily determinative:

This brings us to (...) the effect of a ruling that a particular mandatory minimum does not violate s.12. Two questions arise. First, can a particular offender argue in a future case that the provision violates s. 12 because it imposes cruel and unusual punishment on him or her? The answer, all agree, must be yes. (...) Second, can the offender in a future case argue that the provision as applied to others violates s.12? The answer to this question is that it depends. Once a law is held not to violate s.12, *stare decisis* prevents an offender in a later case from simply rearguing what constitutes a reasonable foreseeable range of the law. But *stare decisis* does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case. A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future for different reasonable applications. That said, the threshold for revisiting the constitutionality of a mandatory minimum is high and requires a significant change in the reasonably foreseeable applications of the law.

R v Nur, para 71.

[30] This said, examining how other courts have dealt with challenges to this provision is a logical and helpful starting point for the purposes of my analysis.

[31] In *Oud*, the offender, in search of crack cocaine, drove to a neighborhood well known to cocaine users and sellers. He encountered a woman and gave her money, expecting her to buy him crack cocaine at a nearby drug house. She went into the drug house but did not return. Realizing that he had been "ripped off", *Oud* became agitated and angry. He knocked on the door of the drug house. The person who opened the door threatened him and told him to leave. *Oud* returned to his vehicle, retrieved a rifle that he had left there the previous day after target

shooting and fired seven times at the door of the residence. Unlike Mr. Cardinal, he was charged under section 244.2(1)(a) (intentional discharge of a firearm at or into a place).

[32] The trial Judge concluded that in these circumstances the mandatory minimum four year sentence would not be grossly disproportionate, but struck down the provision, on the basis of the hypothetical situation of a young adult without any criminal record who fires once at a residence, believing it is unoccupied but reckless as to whether anyone is inside, in an attempt to ward off or intimidate people who have been bullying him. The trial judge found that under those circumstances, the mandatory minimum sentence would be grossly disproportionate.

[33] That decision was overturned on appeal. The British Columbia Court of Appeal disagreed with the trial judge's conclusion that Parliament's objective in enacting section 244.2 was primarily to address urban gang activity. It found that the behaviour contemplated in the hypothetical situation could not be distinguished from the central premise of this offence. The Court of Appeal also rejected the trial judge's conclusion that the "puerile thrill of vandalism" or warding off bullying would not warrant the imposition of the mandatory minimum sentence. It concluded that section 244.2 only captures conduct that in all circumstances will be highly blameworthy and antithetical to the peace of the community. *R v Oud*, paras 38, 39 and 44.

[34] *R v McMillan*, 2016 MBCA 12, is the case that had inspired the hypothetical situation formulated by the trial judge in *Oud*. In that case the offender had been the subject of ongoing harassment for some time in his community, because he had, a few years earlier, broken into a house and stolen a pair of girl's panties. He had been the subject of ridicule and bullying in the community after this was made public.

[35] On the day of the offence, McMillan was driving home and saw graffiti on a wall that identified him by name and called him a "panty thief". He believed he knew who was responsible for this graffiti. He decided it was time to retaliate. He walked through town armed with a loaded rifle. When he arrived at the complainant's house he fired six times at the house. Four of the bullets went through the front window, narrowly missing two people who were lying on the couch just below the window. McMillan had eighteen live rounds on him. He only stopped shooting because the firearm jammed. Like Oud, he was charged under section 244.2(1)(a).

[36] The trial judge concluded that under these circumstances, in particular because of the element of bullying, an appropriate sentence would be one year imprisonment. He went on to conclude that the four year minimum was grossly disproportionate to that sentence. He did not consider any hypothetical situation as part of his analysis.

[37] That decision was also reversed on appeal. However, it is not entirely accurate to suggest, as the Crown does at Paragraph 36 of its Factum, that section 244.2 was upheld by the appellate court. The Manitoba Court of Appeal allowed the appeal on the basis that a fit sentence for the offence would not fall below the mandatory minimum. Because of that conclusion it did not need to engage in any constitutional analysis of the provision. The majority decision simply states that it does not endorse the trial judge's section 12 analysis. *R v McMillan*, para 34. In a separate opinion concurring in the result, the minority judge notes that there may well be another case where arguments could be raised as to the constitutionality of this mandatory minimum using hypothetical situations. *R v McMillan*, para 47.

[38] In *Abdullahi*, the offender was involved in a confrontation with another man and they ended up shooting at each other. Yet another man was shot in the leg during this exchange. The offender then fired three shots in the air. This was in the middle of the day, in a housing complex, with several people nearby. The offender was arrested shortly thereafter and found in possession of a handgun. The decision does not specify whether Abdullahi was charged under paragraphs 244.2(1)(a) or 244.2(1)(b).

[39] The trial judge found that the mandatory minimum sentence was not grossly disproportionate under those circumstances. The judge also found that the hypothetical situation that was put forward in that case did not necessarily make out the offence and as such, was not a reasonable hypothetical upon which to assess the possible gross disproportionality of the mandatory minimum.

[40] Similarly, in *Mohamed*, the offender fired a handgun at least four times in the air in the middle of a residential street in Ottawa. There were people on the street, in the immediate vicinity, at the time he fired those shots. There were also people in a low rise building immediately adjacent to where he fired. It appears he fired the shots after he and his friends had attempted, unsuccessfully, to get into a building. Mohamed faced several charges as a result, including a charge under section 244.2. Again, it is not clear under which paragraph he was charged.

Because he had a previous conviction for a firearms related offence, he faced a mandatory minimum sentence of seven years.

[41] The sentencing judge concluded that the mandatory minimum sentence was not grossly disproportionate under the circumstances. With respect to consideration of reasonable hypotheticals, the sentencing judge said:

Given that the mandatory minimum sentence would not be disproportionate for Mr. Mohamed, no purpose would be served in proceeding to the stage of examining hypothetical situations.

R v Mohamed, para 16.

[42] This approach seems difficult to reconcile with the legal framework adopted by the Supreme Court of Canada, set out above at Paragraphs 21 to 25. In any event, the net result is that reasonable hypotheticals were not considered in that case.

[43] In *R v Crockwell*, the offender had exhibited strange behaviour in the days preceding the offence. Among other things, he had shot a firearm inside his residence while no one else was there. One morning, his mother found him sitting in the kitchen with a gun on his lap. He had moved furniture to create a barricade of sorts. He appeared to be under the delusion that there was a man in the house who presented a threat.

[44] His mother became concerned for her safety and tried to leave. He followed her, pushed her, and held the gun to her neck. She was able to move it but he then began hitting and kicking her. She and her daughter, who was also in the house, were eventually able to leave.

[45] The matter was reported to police and an Emergency Response Team attended. A stand-off ensued that lasted several days. During the stand-off, while police were using various techniques to try to persuade Crockwell to come out of the house, he fired his gun several times. He fired four times in the direction of a robot that police were using to attempt to initiate communication with him. He later fired at the door as police were attempting to enter using a battering ram. The shot narrowly missed the officers. He fired another time at the door as police were attempting to open an outside screen door, using a robot. Eventually, he left the house, undetected, under the cover of darkness. He was arrested the next day, without incident, in another community. He was charged with a number of offences, including one under section 244.2(1)(b), which is also the charge that Mr.

Cardinal faces. Crockwell was convicted by a jury. The trial judge found that the conviction on the section 244.2(1)(b) charge was based on the shots that were fired during the stand-off, and not the shot fired into the archway some days before that.

[46] Crockwell was 57 years old and had no prior criminal record. While there were obvious concerns about his mental health, there was no evidence available to the sentencing judge about the exact nature of his issues. Crockwell had always refused to be assessed and was apparently in denial that he had any mental health issues.

[47] Crockwell argued at his sentencing hearing that the mandatory minimum sentence set out at section 244.2(3) would be grossly disproportionate given his personal circumstances and lack of criminal record. The sentencing judge concluded that while he may have imposed a sentence of less than four years in light of the absence of a criminal record and the mental distress Crockwell seemed to be under at the time of the events, the mandatory minimum was not grossly disproportionate.

[48] The sentencing judge said the following about reasonable hypotheticals:

No hypotheticals have been put before me to suggest that there may be cases caught by this section that would make the mandatory minimum sentence grossly disproportionate. I am also unable to come up with any hypotheticals, at least on the basis of how the Supreme Court of Canada has indicated hypotheticals should be set out, which would cause me to conclude that it is grossly disproportionate. (...) Again, it is to be remembered here that the behaviour being punished involves an intentional discharge of a firearm while being reckless as to the lives and safety of others.

R v Crockwell, para 39 (citations omitted).

[49] The two cases from Québec where section 244.2(3) was struck down as contravening section 12, interestingly, were both situations involving suicidal offenders.

[50] In *Vézina*, the offender was intoxicated and suicidal. His girlfriend, her son and some of her son's friends were in the house. Vézina told his girlfriend that they had 60 minutes to leave, that he did not want to harm anyone, and that he wanted to kill himself. He retrieved a firearm from his bedroom. He fired shots inside the house. The girlfriend and the others left the house.

[51] Police arrived at the scene. They made contact with Vézina on a few occasions by telephone. During those conversations, he reiterated that he wanted

to shoot himself and did not want to hurt anyone. Over the next few hours, he fired several shots inside the house.

[52] Several hours later, after unsuccessful attempts to speak with Vézina, and as an operation was being put in place to have a tactical intervention group enter the house, Vézina contacted police and said he had fallen asleep and just woken up. He came out of the residence voluntarily and without further incident. By then the stand-off had lasted just over seven hours in total. Vézina was charged with careless storage of a firearm as well as with the offence set out at paragraph 244.2(1)(a).

[53] Vézina was 55 years old and did not have a criminal record. By the time of the sentencing hearing, he had successfully completed in-patient therapy to overcome his drinking problem. He had been sober and complied with his release terms for three years. He was working full time. His girlfriend testified at the sentencing hearing. She confirmed that his behaviour had completely changed and that harmony had been restored in the family. She and her family fully supported Vézina.

[54] Vézina challenged the mandatory minimum on the basis of his own circumstances. He did not put forward any hypotheticals.

[55] The sentencing judge concluded that a fit sentence for Vézina would be an intermittent jail sentence of 90 days. Not surprisingly, he found that the mandatory minimum of four years was grossly disproportionate to that sentence. He also found that section 244.2(3) was not saved by section 1 of the *Charter*.

[56] *Gunner* also involved a suicidal offender. His spouse contacted the police, seeking assistance to have him removed from their apartment. Police attended the scene and found her outside the apartment, crying. She told the officers Gunner was inside, intoxicated, and suicidal.

[57] One officer entered the apartment and as he was near the kitchen, saw Gunner. Gunner's body was partially behind a wall. The officer asked him what he was doing. Gunner responded by telling him to leave, pointing a firearm at the officer.

[58] The officer hid behind a refrigerator, drawing his sidearm, pointing it at Gunner. Gunner shot in the direction of the officer, just above his head, narrowly missing him.

[59] Police evacuated the apartment building. There were concerns that shots fired inside the apartment could go through the walls and injure someone. Attempts were made to convince Gunner to come out of the apartment.

[60] A few hours later, Gunner was seen walking in the direction of the bedrooms, holding the firearm "as a cane" and in a manner that was felt to be "non-threatening". He came out holding his daughter in his arms, and without the firearm. He surrendered himself without further incident. He too was charged under section 244.2(1)(a).

[61] Gunner was aboriginal and 27 years old. He had struggled with substance abuse issues for several years. He had been suicidal for a few years preceding these events. A Pre-Sentence Report and a "*Gladue*" report were prepared for the sentencing hearing. These reports provided details about his background and traumatic events he had been exposed to.

[62] The sentencing judge concluded that an appropriate sentence would be two and a half years and found that the four year mandatory minimum sentence was grossly disproportionate. He adopted the analysis from *Vézina* and found that the mandatory minimum sentence could not be justified under section 1 of the *Charter*.

V) MR. CARDINAL'S CHALLENGE TO SECTION 244(3)(a)(i)

1. General comments

[63] As I already noted, Mr. Cardinal concedes that a five year mandatory jail term would not be grossly disproportionate in his case. He relies, instead, on a hypothetical situation to argue that the mandatory minimum would be grossly disproportionate for other offenders in foreseeable cases.

[64] Before I turn to the analysis of the hypothetical put forward by Mr. Cardinal, I want to make certain things clear. First, I reject the notion that the offenses set out at section 244.2 are defined in such a broad way as to capture conduct that is not particularly serious. I find that the requirement for recklessness combined with the requirement that a firearm be intentionally discharged makes both of these offenses very serious. As was noted by the Supreme Court of Canada more than two decades ago, a firearm "presents the ultimate threat of death to those in its presence". *R v Morrissey*, para 43, quoting from *R v Felawka*, [1993] 4 S.C.R. 199.

[65] I am in substantial agreement with most of what the appellate courts said in *R v Oud* and *R v McMillan* about the legislative scheme that addresses firearms offences, its objectives, and where section 244.2 fits within that framework. Specifically I agree with the following comments in *Oud*:

Considerable legislative attention has been directed to offenses involving firearms. This attention was a response to instances of misuse of guns, some resulting in great harm. This legislative scrutiny has resulted in various prohibitions on the use of firearms, as well as a highly regulated system in which some firearms are prohibited, some are restricted, and some, such as the one involved in this case, are subject to a less strict regulatory regime. This categorization and regulatory scheme is at the centre of s. 95 discussed in *Nur*. On the other hand, s.244.2 addresses the use of firearms, which I take to be qualitatively different, and of elevated concern to the public and Parliament. It addresses the physical employment of a firearm with a double *mens rea* requirement - intentional discharge of a firearm and knowledge or recklessness as to the presence of a person in the place fired upon.

(...)

Gun violence is not reserved to urban gangland activity. Indeed the terrible events at École Polytechnique in December 1989, which may be seen as the beginning of rethinking Canada's approach to gun offenses, were unrelated to gang activity. Surely landscapes unrelated to gangs are intended to be fully protected by this provision.

R v Oud, paras 33 and 36.

[66] I would add that the concerns about the misuse of firearms are every bit as pressing in the communities of northern Canada as they are in urban areas. Firearms are prevalent in northern communities. They are essential tools for those who spend time out on the land hunting, fishing and trapping. They are often readily accessible in our communities. The criminal justice system's response to the misuse of firearms in this jurisdiction must be stern. As pointed out by the Nunavut Court of Justice a few years ago in the context of a sentencing on a manslaughter case where a firearm was used:

(...) the judges of this Court are well aware of the ever increasing, and disturbing, incidence of firearm crime in Nunavut.

(...)

It is a sad observation that firearms, once used only as a tool in the not too distant past, are now the first resort of choice as a weapon for a small but significant minority of frustrated and dysfunctional young men – young men unable to deal with jealousy, anger, or suicidal thoughts, often driven by alcohol.

R v Geeta, 2015 NUCJ 10, paras 133 and 135

[67] The same is true in the Northwest Territories. Deterrence and denunciation must be emphasized when firearms are misused. And those objectives are at the heart of Parliament's choice to establish mandatory minimum sentences.

2. The hypothetical put forward by Mr. Cardinal

[68] I now turn to the hypothetical situation put forward by Mr. Cardinal, which is the following:

(...) a young Aboriginal person, suffering from lived and inter-generational trauma, is intoxicated and distressed and attempts to take his own life. He takes a gun from his stepfather's gun closet. The individual puts the gun to his own chin and fires, but in the moment of pulling the trigger the gun is pushed away by a friend or family member in the room. No one is harmed by the bullet, which exits through an exterior wall in the home.

[69] For the purposes of Mr. Cardinal's challenge, the hypothetical must also assume that the offender uses a prohibited firearm and faces a mandatory minimum sentence of five years imprisonment. The hypothetical could also easily arise with an offender who uses a restricted firearm in his suicide attempt.

[70] The Crown did not attempt to argue that this hypothetical is far-fetched, fanciful or remote, and rightfully so. Sadly, there is nothing remote about young men in northern Canada struggling with suicidal ideations and arming themselves with firearms in times of distress. There is also nothing remote about young aboriginal people suffering from lived and inter-generational trauma. Courts hear about such circumstances on a routine basis during sentencing hearings. This hypothetical, tragically, is actually very realistic.

[71] The Crown acknowledges that the blameworthiness of the offender who is suicidal or suffers from mental illness may be reduced to a point, but argues that it could never be reduced to the point of rendering the mandatory minimum sentence grossly disproportionate in circumstances where the offence contemplated by section 244.2 has been committed. The Crown says that in all such cases, the level of risk to others is such that the level of blameworthiness of the offender necessarily remains very high.

[72] I agree with the basic proposition that the circumstances of the offender do not diminish the risk inherent in discharging a firearm while being reckless as to the life or safety of another person: as aptly noted at Paragraph 81 of the Crown's Factum, "a bullet discharged from the barrel of a gun is indifferent to the circumstances of the person pulling the trigger".

[73] In fact, a firearm in the hands of a suicidal person may well represent an enhanced risk: a suicidal person may well reach a state of desperation that leads to extremely reckless acts that place others in grave danger. *R v Lyta*, 2013 NUCJ 1; 2013 NUCA 10 and *R v Mikijuk*, 2017 NUCJ 2; 2017 NUCA 5 are striking examples of this.

[74] This is not so in the hypothetical put forward by Mr. Cardinal. In my view, that hypothetical is fundamentally different and distinguishable from any of the facts or hypotheticals examined in other cases where the constitutionality of these mandatory minimum sentences has been challenged. As demonstrated by the review of those cases at Paragraphs 26 to 61 of this Ruling, in all of them, even those involving suicidal offenders, the offenders discharged firearms in the direction of other people or at places. They did so in anger, retaliation, to scare others, or to stop police officers from putting an end to a dangerous situation. The hypothetical put forward by Mr. Cardinal supposes a very different scenario.

[75] As noted above at Paragraph 25, the Supreme Court of Canada outlined, in *Morrisey*, the factors that must be considered in assessing whether a mandatory minimum sentence will result in a sentence that is grossly disproportionate. I turn to an analysis of the hypothetical scenario against those factors. Some features of the hypothetical are relevant to more than one factor.

[76] The first factor is the gravity of the offence, which requires an examination of both the character of the offender's actions and its consequences. *R v Morrisey*, para 35. Given the inherent danger that firearms pose, any conduct that makes out this offence is serious. There is, however, neither a requirement that harm be caused nor that it be intended by the offender. This is a fundamental difference between this offence and others that trigger comparable mandatory minimum sentences. The mandatory minimum sentence that applies to a manslaughter committed with a firearm, which was at issue in *Morrisey*, is a case on point. The worst of harms, death, is an essential element of that offence. Other examples include offences where great harm is intended, although not achieved (attempted murder using a firearm, or discharging a firearm with intent to cause bodily harm

or endanger life). Finally, mandatory minimum sentences apply when firearms are used in the commission of another offence. In all those situations, either because of the harm caused or because of the intent underlying the offence, the conduct captured by these offences is more egregious than conduct that can make out the offence prescribed by section 244.2.

[77] Next, consideration must be given to the particular circumstances of the case and of the offender. As is the case for most offences, there is a range of seriousness within circumstances that make out a section 244.2 offence. In my view, the hypothetical is at the lowest end of the spectrum of seriousness for this offence for several reasons: only one shot is fired; the firearm is never aimed at anyone or anything aside from the offender himself; after the shot is fired the offender drops the firearm and the incident comes to an end immediately; beyond the risk inherent in any such act and the emotional impact on anyone frightened by the offender's actions, no harm is caused.

[78] As for the circumstances of the offender, in the hypothetical, the offender is suicidal and distressed. This may not reduce his blameworthiness significantly if that distress led to a rampage akin to what the offenders did in cases like *Lyta*, *Mikkijuk*, or *Gunner*. But this hypothetical offender does no such thing. His degree of blameworthiness pales in comparison to the level of blameworthiness of an offender who fires multiple shots at a house, reckless as to whether people are inside; who fires out of anger towards another person; who fires in retaliation for some perceived or actual wrong; who fires randomly in a residential area; who fires during a stand-off with police; or even one who, in a state of distress, fires at police officers hoping that they will eventually kill him.

[79] A further consideration is that the offender in the hypothetical is a young aboriginal man, with no prior criminal record. Age and lack of criminal record are always important considerations on sentencing. In addition, in this hypothetical, the principles outlined in *R v Gladue* [1999] 1 S.C.R. 688 and *R v Ipeelee*, 2012 SCC 13 would be engaged. The sentencing court would be required to consider whether systemic and background factors, as well as the lived and inter-generational trauma that the offender has suffered, reduce his blameworthiness. The offence set out at section 244.2 is serious, but it is beyond dispute that consideration of the circumstances of aboriginal offenders is mandated even when dealing with serious offences. *R v Gladue*, para 79; *R v Ipeelee*, paras 84-86. On the whole, in this hypothetical, several things would be mitigating and operate to reduce the offender's level of blameworthiness.

[80] The next factor to be considered is the actual effect of the punishment on the offender. The offender's age and lack of record are relevant considerations when assessing this factor. So is the fact that the mandatory minimum sentence is in the penitentiary range. There are no penitentiaries in the Northwest Territories. By virtue of an agreement between the federal and territorial authorities, some offenders are permitted to serve a penitentiary sentence in a territorial facility, but this cannot be ordered by the courts. It is at the discretion of the correctional authorities. The potential for the offender in the hypothetical to be sent to a penitentiary in southern Canada cannot be discounted, nor the effect that this would have on him.

[81] Similar considerations were evoked by the sentencing judge in *R v Gunner*:

[Unofficial translation]

The cruel and unusual nature of this minimum punishment also flows from its impact on the accused as a member of the Aboriginal community that is, in addition, very distant from the urban environment where penitentiaries are located. Sentenced to such a minimum, he would suffer much more serious consequences owing to the isolation resulting from the imprisonment. In addition, a minimum punishment of a term of four years perpetuates and adds to the very serious problem of over-representation of Aboriginal people in the penitentiaries

R v Gunner, para 112

[82] While I do not endorse the totality of the sentencing judge's analysis in that case, I do agree with these observations about the additional hardships that aboriginal people from northern communities face when they are sent to penitentiaries in southern Canada.

[83] Even leaving aside the geographical location of penitentiaries, the Northwest Territories is an immense jurisdiction, with communities scattered over large distances, many of them without year round road access, and some with no road access at all. For offenders who are from those communities, even serving a sentence in Yellowknife may result in significant isolation from family and community supports. While this will rarely be determinative of the sentence to be imposed, it is relevant in assessing what a fit sentence would be in a given case and, by implication, to whether a mandatory minimum sentence would result in a punishment that is grossly disproportionate, particularly for a youthful first offender.

[84] The penological goals and sentencing principles that underlie the mandatory minimum sentence must also be considered. These factors are analyzed to determine whether Parliament was responding to a pressing problem in enacting the mandatory minimum sentence, and whether its response is founded on recognized sentencing principles. With respect to the first question, as noted above at Paragraph 71, I agree entirely with the comments in *Oud* that the enactment of section 244.2 represents Parliament's response to a serious and pressing problem. In addressing that problem it was entirely legitimate for Parliament to emphasize deterrence and denunciation above all other sentencing principles, including rehabilitation and restraint.

[85] That said, in examining the potential grossly disproportionate effect of the mandatory minimum in the hypothetical situation I am asked to consider, the method chosen by Parliament to achieve its goal has to be assessed taking into account the age, circumstances and lack of record of the offender. In other words, even accepting the legitimacy, and even wisdom, of Parliament's decision to elevate deterrence and denunciation as the primary sentencing objectives in cases like this, the fact remains that rehabilitation and restraint should play a much larger role for the hypothetical offender than it would for a more mature offender or a seasoned criminal. For this hypothetical offender, the mandatory minimum sentence, effectively, obliterates these principles.

[86] Another factor to consider is the existence of an alternative to the mandatory minimum sentence. While a non-custodial sentence may not be appropriate in the hypothetical situation, there is an enormous range of possibilities between a non-custodial sentence and a four year penitentiary term. I would think that for a young aboriginal first offender with the type of background contemplated in the hypothetical, Parliament's legitimate deterrent and denunciatory objectives would be achieved by a jail sentence below the penitentiary range.

[87] Taking all these factors into account, in my view, a fit sentence in this hypothetical situation may well include a term of imprisonment, but one that would be well below the penitentiary range, likely coupled with rehabilitative measures such as a period of Probation. In my view, a five year penitentiary term, in those circumstances, would be grossly disproportionate. It would outrage standards of decency and be intolerable to society.

V) CONCLUSION

[88] I conclude that although section 244.2(3)(a)(i) would not result in a grossly disproportionate sentence for Mr. Cardinal, it is reasonably foreseeable that it will result in a grossly disproportionate sentence for other offenders. As such, it contravenes section 12 of the *Charter*.

[89] The Crown has not attempted to justify the breach pursuant to section 1 of the *Charter*. That is not surprising, considering that the Supreme Court of Canada has said that it will be difficult to show that a mandatory minimum sentence that has been found to be grossly disproportionate could survive the proportionality analysis that is part of the section 1 analytical framework. *R v Nur*, para 111.

[90] A few issues arise with respect to the scope of the remedy that I should grant. The first is that the hypothetical that Mr. Cardinal has put forward could not give rise to a charge pursuant to paragraph 244.2(1)(a) (intentionally discharging a firearm into or at a place). That being the case, in my view, it is only proper for me to grant a remedy that will apply to persons facing the charge set out at paragraph 244.2(1)(b).

[91] Second, the mandatory minimum sentences set out at paragraph 244.2(3)(a)(i) can be triggered in two broad categories of situations. One trigger is the type of firearm used in the commission of the offence. The other is if the offence is committed “for the benefit of, at the direction of or in association with a criminal organization”. The second trigger would never arise in the context of a suicide attempt. The issues that arise in cases that would engage that second trigger are completely different than those that were the subject of submissions in this case. The remedy that I grant in Mr. Cardinal’s case must be limited accordingly.

[92] For those reasons, I declare that those parts of paragraph 244.2(3)(a)(i) of the *Criminal Code* that impose a mandatory minimum punishment of five years when a restricted or prohibited firearm is used in the commission of the offence prescribed at section 244.2(1)(b), are of no force and effect under section 52 of the *Constitution Act, 1982*.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this

14th day of February, 2018

Counsel for the Crown:

Brendan Green

Counsel for Corey Cardinal:

Kate Oja

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

-and-

COREY CARDINAL and
JERRY CHRISTOPHER ROGERS

RULING ON CONSTITUTIONAL CHALLENGE TO
SECTION 244.2(3)(a)(i) OF THE *CRIMINAL CODE*
OF
THE HONOURABLE JUSTICE
L.A. CHARBONNEAU
