

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

TONY HOWARD KAKFWI

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

I) INTRODUCTION

[1] Tony Kakfwi has pleaded guilty to a number of charges, including 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, Corey Cardinal pleaded guilty to the same charge.

[2] Mr. Kakfwi and Mr. Cardinal 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. Kakfwi'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; and
 - (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. Kakfwi faces a four year mandatory minimum sentence. Mr. Cardinal faces a five year mandatory minimum sentence because the firearm he used in the commission of his offence was a prohibited firearm.

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

[6] On November 25, 2016, the Fort Good Hope Band was holding its annual meeting at the Band Hall. Mr. Kakfwi attended the meeting. While speaking at the meeting, he was interrupted and the microphone was taken away from him because he was intoxicated. Mr. Kakfwi left the meeting and went to a friend’s house. He retrieved a Remington model 700 rifle and ammunition, equipped with

a scope. He returned to the parking area of the Band Hall and fired five shots in the air. He then walked across the street to the local elder's complex and went inside one of the residences in the complex.

[7] The R.C.M.P. were called. As two police officers, Sgt. Sparrow and Cst. Whynot, were approaching the elders' complex to evacuate the residents, Mr. Kakfwi fired one shot as a "warning" to them. Sgt. Sparrow retreated to the R.C.M.P. vehicle for cover. Cst. Whynot hid in some nearby bushes.

[8] Mr. Kakfwi called his daughter and told her to tell police he would shoot anyone who approached the building. This was relayed to the responding officers through the R.C.M.P.'s communication system.

[9] Cst. Whynot was able to approach close enough to the building to speak to Mr. Kakfwi. Thinking he had heard Cst. Whynot approaching, Mr. Kakfwi fired another "warning" shot. Shortly before that shot was fired, a snowmobile had driven by.

[10] Mr. Kakfwi fired a third shot at a 45 degree angle through the awning of the apartment's porch. He fired that shot toward the Band Hall after some residents yelled at him.

[11] Three times during the stand-off, Cst. Whynot saw Mr. Kakfwi come out of the apartment, onto the porch. Each time Mr. Kakfwi was holding the rifle to his chin, threatening to commit suicide.

[12] Eventually Mr. Kakfwi came out of the apartment with the rifle. Cst. Whynot told him to put it down, which he did. Mr. Kakfwi told the officer he had emptied the firearm. This was true. Mr. Kakfwi was placed under arrest. In total, the stand-off lasted two and a half hours.

[13] Mr. Kakfwi gave a warned statement to police. In that statement he said that he intended all three shots he fired during the stand-off as warning shots. The first two were fired to keep the police away and the third was to get people to go back inside the Band Hall. Mr. Kakfwi said that he wanted to get people's attention and had intended to kill himself. He decided not to do so after having spoken with his daughter.

[14] The firearm that Mr. Kakfwi used fires 300 caliber Winchester Magnum ammunition. This type of ammunition is ordinarily used for long range big game

hunting. It is also used by the United States military and law enforcement as a sniper round. The firearm could realistically be expected to have an effective range of one thousand yards. The round would pass through most modern construction materials used for exterior walls. If it hit a person it would cause massive wounds. At a range of one hundred feet, it would easily pass through standard-issue body armour used by police officers.

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

[15] 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.

[16] 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.

[17] 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.

[18] 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.

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

[20] 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.

[21] 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.

[22] 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.

[23] 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.

[24] 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.

[25] 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

[26] 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.

[27] *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.

[28] 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.

[29] 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.

[30] 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. Kakfwi and Mr. Cardinal, he was charged under section 244.2(1)(a) (intentional discharge of a firearm at or into a place).

[31] 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.

[32] 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.

[33] *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.

[34] 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).

[35] 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.

[36] 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.

[37] 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).

[38] 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.

[39] 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.

[40] 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.

[41] 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.

[42] 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.

[43] 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.

[44] 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. Kakfwi 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.

[45] 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.

[46] 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.

[47] 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).

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

[49] 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.

[50] 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.

[51] 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).

[52] 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.

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

[54] 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*.

[55] *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.

[56] 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.

[57] 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.

[58] 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.

[59] 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).

[60] 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.

[61] 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. KAKFWI'S CHALLENGE TO SECTION 244.2(3)(b)

[62] As I already noted, Mr. Kakfwi concedes that a four year jail term would not be grossly disproportionate in his case. His challenge is based on a number of hypothetical situations which he argues illustrate that section 244.2 casts too wide a net to withstand constitutional scrutiny.

[63] Mr. Kakfwi argues that the concept of "recklessness" is itself very broad. He adds that paragraph 244.2(1)(b) is rendered even more broad because of the inclusion of the notion of "safety" in the definition of the offence. He argues that as a result, this offence captures a potentially very broad range of situations.

[64] To the extent that Mr. Kakfwi suggests that the offences set out at section 244.2 can capture behaviour that is not inherently very serious, I disagree. I agree with the Crown that the requirement for recklessness combined with the requirement that a firearm be intentionally discharged necessarily makes these offences 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] To bolster his argument that section 244.2 prescribes mandatory minimum sentences that will be grossly disproportionate for certain offenders, Mr. Kakfwi relies on the potential overlap between 244.2 and the offence of Careless use of a

firearm, set out at section 86(2) of the *Criminal Code* (“Careless use”). He points to sentences imposed in Careless use cases that could have been prosecuted as section 244.2 offences. He argues that the gap between those sentences and the mandatory minimum sentences prescribed by section 244.2 demonstrates the gross disproportionality of the mandatory minimums.

[66] The Supreme Court of Canada said in *Morrissey* that one of the factors to be considered when deciding whether a mandatory minimum sentence is grossly disproportionate is how it compares to sentences imposed for similar crimes. That comparison is much easier to make where Parliament introduces a mandatory minimum sentence for a pre-existing offence. For example, the four year mandatory minimum sentence that applies to a manslaughter committed with a firearm can be compared to sentences that were imposed in such cases before the mandatory minimum sentence was enacted.

[67] It is different when the mandatory minimum is triggered by an offence that did not exist previously, as is the case for section 244.2. This makes the comparison more difficult and raises the question of what type of cases can be considered to be “similar offences” for the purpose of comparison.

[68] I do not find the comparison with sentences imposed in Careless use cases particularly convincing. There are significant differences between the essential elements of these two offences. The mental element required to make out the offence of “Careless use” falls well short of recklessness. Moreover, the offence of “Careless use” is very broad and does not require the firearm to be discharged.

[69] There is definitely an overlap between these two offences. Facts that support a conviction under section 244.2 will also make out the offence of Careless use: anyone who is “reckless” is necessarily “careless”, and anyone who “discharges” a firearm “uses” it. Section 244.2 captures cases that would be at the most serious end of the spectrum of Careless use but still fall short of the other, more serious firearms offence that existed before section 244.2 was enacted.

[70] It is of course conceivable that a person who has done something that makes out a section 244.2 offence may be charged only with Careless use and receive a much lighter sentence. Lucky as that person might be, this does not detract from the objective seriousness of the offences created by section 244.2. That seriousness is not undermined by decisions made by police officers or Crown prosecutors to proceed on a less serious charge than they could have.

[71] 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.

[72] 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

[73] 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.

[74] Given this, I do not find that any of the hypotheticals put forward by Mr. Kakfwi, or any of the cases that he has referred to, demonstrate that the mandatory minimum sentences prescribed by section 244.2(3) could lead to grossly disproportionate sentences.

[75] For example, the first hypothetical he puts forward is the following:

An immature 18 year old of otherwise exceptionally positive background character who, in a fit of pique, shoots a single round from a "low end"(ie: non-powerful) firearm into or over a forested area where persons are known to sometimes be present (whether or not any persons are actually in the vicinity at the time).

[76] I find that the conduct described in this hypothetical entails a very high level of blameworthiness because of the obvious risk it would create for anyone frequenting this forested area. A significant jail term would be required to reflect the seriousness of this conduct and the disregard it shows for the lives of others. Even for a youthful first offender, in my view, the mandatory minimum prescribed by section 244.2 would not be grossly disproportionate. It would certainly be harsh, but that is the point of a mandatory minimum sentence: to discourage anyone from behaving in this reckless fashion when discharging a firearm.

[77] The second hypothetical is taken from the facts in *R v D.K.D.B.*, 2013 BCSC 2321. In that case, the accused fired several shots into a dump truck that was parked near a playing field where young people were known to gather at night. He had taken no steps to ensure that no one was in the playing field. He faced a number of charges in relation to the shooting (Careless use, possession of a prohibited weapon, possession of a weapon for a purpose dangerous to public peace), as well as drug charges. He received a global jail term of four years and one month.

[78] That hypothetical is also of little assistance to Mr. Kakfwi, given the overall sentence imposed. It is somewhat artificial to isolate the seven month sentence

imposed on the Careless use charge, given that the offender was sentenced on a number of other charges. The global sentence he received is more instructive. I find that it tends to show that had D.K.D.B. faced a charge of reckless discharge and been subject to the mandatory minimum sentence, that minimum sentence would not have been grossly disproportionate.

[79] The third hypothetical that Mr. Kakfwi puts forward is modelled after the facts of a case where the offence charged was Careless use. *R v McLeod* 2013 SKPC 67. McLeod fired shots into each side of a river bank in front of and behind a canoe where two people were seated, and a third shot in the water nearby. The shots struck anywhere from twenty to thirty feet, possibly as close as ten to fifteen feet, from the boaters. McLeod was convicted of Careless use because of his lack of precaution for the safety of the canoeists.

[80] This hypothetical is a good illustration of how conduct that makes out the offence of Careless use may also make out the offence of reckless discharge of a firearm. As the Crown points out, it appears that McLeod was “under-charged”. Had he been charged under section 244.2, the mandatory minimum sentence would not have been grossly disproportionate. Firing in the general direction of people in this fashion is highly blameworthy conduct and would call for a significant term of imprisonment. Again, the alleged disproportionality of a mandatory minimum sentence should not be assessed using sentences imposed in cases where offenders were under-charged.

[81] Mr. Kakfwi submitted hypotheticals based on other cases, including hypotheticals where a person fires shots in the air for “celebratory reasons” (*R v Strang*, [2013] N.J. No.178); to get the authorities to pay attention to a complaint (*R v McNeill* 1977 CarswellYukon 2); or to frighten others (*R v Kendi*, 2014 YKTC 40; *R v Edwards*, [2013] YKTC 89).

[82] As was discussed at the hearing, there may be some question as to whether the facts in some of these cases would support a conviction under section 244.2. But assuming overall circumstances that make out the elements of the offence, the mandatory minimum sentences prescribed in section 244.2 would not, in my view, be grossly disproportionate in any of those cases.

[83] This does not end matters on this Application, however. I am not, in my assessment, limited to the hypotheticals put forward by Mr. Kakfwi. It is open to me to consider other hypothetical situations.

[84] I cannot ignore the hypothetical put forward by Mr. Cardinal. I understood the Crown to concede, at the hearing, that if I were to conclude that section 244.2 would result in a grossly disproportionate sentence in any of the hypotheticals put forward by either Mr. Cardinal or Mr. Kakfwi, both Applications should succeed.

[85] My analysis of Mr. Cardinal's hypothetical is set out in my Ruling on his Application. *R v Cardinal*, paras 68 to 87. I repeat that analysis in the present Ruling for ease of reference.

[86] The hypothetical put forward by Mr. Cardinal 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.

[87] This hypothetical could arise just as easily with an offender using a prohibited or restricted firearm as it could with an offender using another type of firearm.

[88] 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.

[89] 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.

[90] 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".

[91] 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. To a somewhat lesser extent, so is Mr. Kakfwi's case.

[92] 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.

[93] 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.

[94] 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 some of the conduct that can make out the offence prescribed by section 244.2.

[95] 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 people frightened by the offender's actions, no harm is caused.

[96] 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.

[97] 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.

[98] 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 this hypothetical to be sent to a penitentiary in southern Canada cannot be discounted, nor the effect that this would have on him.

[99] 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

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.

[100] 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.

[101] 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.

[102] 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 larger role for the hypothetical offender than it would for a more mature offender or a seasoned criminal. For the hypothetical offender, the mandatory minimum sentence, effectively, obliterates these principles.

[103] 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.

[104] 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 four year penitentiary term, in those circumstances, would be grossly disproportionate. It would outrage standards of decency and be intolerable to society.

V) CONCLUSION

[105] I conclude that although section 244.2(3)(b) would not result in a grossly disproportionate sentence for Mr. Kakfwi, 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*.

[106] 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.

[107] An issue arises with respect to the scope of the remedy that I should grant. The hypothetical put forward by Mr. Cardinal could not give rise to a charge under paragraph 244.2(1)(a) (intentionally discharging a firearm into or at a place knowing that or being reckless as to whether another person is present in that 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).

[108] For those reasons, I declare that those parts of paragraph 244.2(3)(b) of the *Criminal Code* that impose a mandatory minimum punishment of four years for 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 Tony Howard Kakfwi:	Charles Davison

S-1-CR-2017-000 022

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

BETWEEN:

HER MAJESTY THE QUEEN

-and-

TONY HOWARD KAKFWI

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