

TOP FIVE 2016

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

DANIELS v CANADA (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99

Date Released: April 14, 2016

Full decision: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do>

Facts

When Canada became a country, different areas of responsibility were given to the federal and provincial governments under the law that formed the nation, the *Constitution Act, 1867*. Under s. 91(24) of the *Act*, the federal government was assigned exclusive jurisdiction over "Indians and Land reserved for the Indians." However, no definition of who counted as an "Indian" was offered in that legislation.

Section 91 of the *Constitution Act, 1867* sets out the powers of the federal government.

Subsection 91(24) states that:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of

the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this *Act*) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say.,

(24) Indians, and Lands reserved for the Indians.

As a result, Canada often used the definition set forth in another piece of early legislation, the *Indian Act*. The *Indian Act* set out land reserves and granted different rights to Aboriginal individuals and groups on the basis of whether or not they were registered with the government. This established a legal distinction between "status Indians" (who were registered) and "non-status Indians" (who were not). Métis people were not included in the *Indian Act*.¹

¹ "Non-Status Indians" commonly refers to people who identify as indigenous but who are not entitled to registration on the Indian Register pursuant to the *Indian Act*. Some may, however, be members of a First Nation band. "Métis" refers to people and communities of mixed Aboriginal and European heritage that developed through intermarriage between these groups when Europeans colonized what is now Canada. Note, though, that the term is both evolving and contentious: for a fuller discussion of its usage, please see <http://indigenousfoundations.web.arts.ubc.ca/metis/>.

Since Confederation, there has therefore been uncertainty as to which government holds responsibility for dealing with Métis and non-status Indian issues. When it came to legislating on Métis and non-status Indian matters, each of the federal and provincial governments would assert that they had no jurisdiction to act, and that it was the responsibility of the other government. This created an inability for claimants, and those sharing their interests, to know which government to hold politically accountable.

The applicants sought clarity on how Métis and non-status Indians fit into Canada's legal framework. They brought the case to Federal Court seeking three judicial declarations (i.e. clarifications about the meaning of the law) that:

1. Métis and non-status Indians are included in s. 91(24) of the *Constitution Act, 1867*;
2. The federal Crown owes a fiduciary duty to Métis and non-status Indians²; and that
3. That Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice.

Procedural History

The trial judge in the Federal Court granted the declaration that Métis and non-status Indians are "Indians" under s. 91(24) of the

Constitution Act, 1867. The trial judge did not grant the other two declarations dealing with the fiduciary obligation of the Crown and the right to consultation. He found they were vague, redundant, and would serve no practical utility because once these groups are recognized as falling within s. 91(24), the law is already clear that the Crown has these obligations. As well, the duties associated with these obligations usually arise in connection with a specific issue, such as a land claim being disputed or a traditional right being asserted, and the judge found that it was not appropriate to issue a declaration on either without there being a practical question at hand that needed a legal resolution.³

The Crown appealed to the Federal Court of Appeal (FCA). On appeal, the decision was modified. The FCA declared that "Indians" included all Indigenous peoples generally, but excluded both non-status Indians and Métis who did not meet a previous test (set out in *R.v. Powley*, [2003] 2 S.C.R. 207).⁴ The FCA found no error in the reasons of the Federal Court judge with respect to the other declarations, and so also declined to grant the declarations regarding the fiduciary duty of the federal Crown and the right to consultation.⁵

The appellants appealed to the Supreme Court of Canada (SCC), seeking to restore the ruling of the Federal Court with respect

² A fiduciary relationship means a relationship in which one party has a special duty to look after the best interests of the other. Examples of such relationships in Canadian law include relationships between doctors and patients, parents and children, and solicitors and clients. In the context of the relationship between Canada and Aboriginal Peoples, the law recognizes the fiduciary obligations of the government because the government has assumed a great deal of control over the interests and resources of the latter.

³ See *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6

⁴ See OJEN's resource *Landmark Case: The Métis Hunting Rights Case – R. v. Powley*, available online at: <http://ojen.ca/en/resource/landmark-case-the-metis-hunting-rights-case-r-v-powley>.

⁵ See *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 101

to the first question, and to issue the second and third declarations. The Crown cross-appealed, arguing that none of the declarations should be granted.

Issues

1. Are Métis and non-status Indians “Indians” under s. 91(24) of the *Constitution Act, 1867*?
2. Does the federal Crown owe a fiduciary duty to Métis and non-status Indians?
3. Do Métis and non-status Indians have the right to be consulted and negotiated with?

Decision

The appeal was allowed in part. The SCC granted the declaration that Métis and non-status Indians are “Indians” for the purposes of s. 91(24) of the *Constitution Act, 1867*. The SCC declined to grant the other two requested declarations.

Ratio

A declaration can only be granted if it will have practical utility, meaning it will settle a real controversy between the parties. Métis and non-status Indians are “Indians” for the purposes of s. 91(24) of the *Constitution Act, 1867*.

Reasons

The SCC granted the first declaration because it would have enormous practicality for the two groups. The declaration would guarantee both certainty and accountability regarding which government had the power to legislate regarding Métis and non-status

Indians. On this point, Abella, J. wrote, “It is true that finding Métis and non-status Indians to be “Indians” under s. 91(24) does not create a duty to legislate, but it has the undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress.”⁶

In other words, she indicated that the inclusion of these groups does not force the government to make any specific new laws, but creates certainty and accountability about where they should go for better programs, services and other policies in their interests – the federal government.

The SCC added that although the federal Crown was now responsible for Métis and non-status Indians, this does not mean that all provincial laws pertaining to them are beyond the power of the Province to make, and therefore of no effect. Instead, the SCC reminded the parties that federal and provincial laws will be read as complementary as much as possible.

The Court noted that historically the term “Indians” has been used as a short form referring to all Aboriginal Peoples, including Métis. Many programs, policies, and laws administered by the government, both before and after Confederation, did not distinguish between these groups – examples noted by the SCC included laws prohibiting the sale of alcohol, residential schooling programs, and negotiating the support of status Indians, non-status Indians and Métis people alike to ensure success in constructing the national

⁶ *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 15.

railway. The Court found that in such actions, the Crown was treating all Aboriginal people in essentially the same way, and that the meaning of “Indians” under s. 91(24) was therefore intended to include all Aboriginal Peoples of Canada. The Court held that it was in this historical context that s. 91(24) of the *Constitution Act, 1867* must be viewed.

The SCC also found a rationale for Métis and non-status Indians being “Indians” for the purposes of s. 91(24) of the *Constitution Act, 1867* by reading it together with the *Constitution Act, 1982*. The 1982 Act includes the *Canadian Charter of Rights and Freedoms*, which sets out the most fundamental rights and freedoms of people in Canada. Section 35 of the *Charter* lays out the rights of the Aboriginal Peoples of Canada. The SCC pointed out that s. 35 states that Indian, Inuit, and Métis people are Aboriginal Peoples for the purposes of the *Constitution*. Since ss. 35 and 91(24) should be read together, it would be in contradiction of s. 35 to exclude Métis from being considered “Indians” under s. 91(24).

Existing jurisprudence also supported the conclusion that Métis are “Indians” under s. 91(24). For example, in *Re Eskimo*, the SCC determined that Inuit were considered “Indians” under s. 91(24) of the *Constitution Act, 1867*.⁷ This finding was made despite Inuit having separate language, culture, and identities from the “Indian tribes” in other parts of the country. The SCC reasoned that if Inuit could be considered “Indians” under s. 91(24), so too could other groups such as Métis and non-status Indians.

After having decided that Métis and non-status Indians are “Indians” for the purposes of s. 91(24) of the *Constitution Act, 1867*, the SCC found that the other two declarations would merely be a restatement of existing law, and would therefore serve no useful purpose.

⁷ Reference as to whether “Indians” in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec, [1939] S.C.R. 104

DISCUSSION

1. Why did the appellants want a declaration on these issues?
2. What was the SCC's decision and what was the rationale?
3. What do Métis and non-status Indians have to gain by being considered "Indians" under the s. 91(24) of the *Constitution Act, 1867*?
4. How much do you think the historical usage of language or particular words (in this case, "Indians") should factor into present day decisions?

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TRINITY WESTERN UNIVERSITY v THE LAW SOCIETY OF UPPER CANADA, 2016 ONCA 518

Date Released: June 26, 2016

Full decision: <http://www.ontariocourts.ca/decisions/2016/2016ONCA0518.pdf>

Facts

Trinity Western University (TWU), the appellant, is a private evangelical Christian university in Langley, British Columbia. All students who attend TWU are required to sign a "community covenant" to pledge that their lifestyle aligns with biblical teachings. The covenant requires students to abstain from things like using obscene language, stealing, watching pornography, and engaging in sexual intimacy "that violates the sacredness of marriage between a man and a woman".

TWU planned to establish a law school and applied to the Law Society of Upper Canada (LSUC) for accreditation. If accredited, this would mean that TWU Law School graduates would be able to work as lawyers in Ontario. LSUC, however, refused to approve the school's request for accreditation on the basis that the "community covenant" was discriminatory to members of the LGBTQ community.

Procedural History

The Law Society of Upper Canada, the respondent, refused to accredit the university's proposed law school. The effect of the refusal was that the university's future graduates would be ineligible to practice law in Ontario.

The university appealed the decision of the Law Society through a legal process called judicial review. Judicial review is the process where a judge reviews the decision of an administrative body (like the Law Society of Upper Canada) to make sure that the administrative body is acting within the law.

A unanimous panel of the Ontario Divisional Court upheld the Law Society's decision that Trinity Western's law school should not be accredited.¹ The decision was appealed to the Court of Appeal for Ontario.

¹ See *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250

Issues

1. Did the Law Society of Upper Canada act reasonably by refusing to accredit Trinity Western University's proposed law school?
2. Did the Law Society of Upper Canada engage in a proportionate balancing of freedom of religion and equality?

Decision

The Ontario Court of Appeal unanimously upheld the decision of the Ontario Divisional Court. It found that the Law Society acted reasonably, and balanced freedom of religion and equality.

The Court of Appeal found that although the decision did infringe on the University's freedom of religion, the decision to not accredit TWU represented a reasonable balance between TWU's freedom of religion under s. 2(a) of the *Charter* and the LSUC's statutory objective to ensure that everyone who is qualified has an equal opportunity to a legal education. The LSUC successfully argued that no one is denied access to an accredited law school on discriminatory grounds.

Ratio

The Law Society reasonably balanced the religious freedom of the university against the need for equality in the legal profession as a matter of public interest.

Reasons

The Court of Appeal reasoned that Law Societies play an important role in ensuring equality of admission to the legal profession. The Court found there was nothing wrong with a Law Society scrutinizing the admissions process of a law school in deciding whether to accredit the law school. In doing so, the Law Society is permitted to, for example, take into account the impact of a community covenant on LGBTQ students.

The Law Society was also entitled to consider that TWU is unique among faith-based universities in imposing formal policies that discriminate on the basis of sexual orientation. The Court balanced freedom of religion with equality rights by finding that the Law Society was not preventing the practice of a religious belief but rather denying a public benefit (i.e. accreditation) because of the impact of the religious belief on others (i.e. specifically members of the LGBTQ community).

The Court of Appeal commented on the role of human rights in the Law Society's decision. It noted that while the university does not have to comply with the Ontario *Human Rights Code*, the Law Society does. In making its decision, the Law Society was acting in accordance with its obligation under s. 6 of the *Human Rights Code*, which states that:

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.²

Follow Up

In February 2017, the Supreme Court of Canada announced that it would hear the appeal from Trinity Western University. The case is scheduled to be heard at the SCC in late 2017.⁴

The Court then considered the role of international law and found that the decision of the Law Society complies with the *International Covenant on Civil and Political Rights*, which says that religious freedom should only be limited in certain instances, including where necessary to protect the fundamental rights and freedoms of others.³

The Court found that the Law Society did not violate any rule of state neutrality on religious freedom. That is, just because the subject matter of the Law Society's decision had a religious dimension does not mean that the Law Society could not take a position on it.

² Human Rights Code, R.S.O. 1990, c. H.19 at s. 6.

³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 18 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁴ See <https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/16424/index.do>

DISCUSSION

1. What is the role of the Law Society of Upper Canada (LSUC)? What is its importance in this case?
2. What group did Trinity Western University's "community covenant" target and how?
3. What reasons did the Court of Appeal provide for supporting the LSUC's decision?
4. Why do you think the courts referred to international law to show that the LSUC's decision was reasonable?
5. Why do you think the Supreme Court of Canada agreed to hear the appeal from TWU? What do you think the Court will decide?

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***R v TATTON*, 2015 SCC 33, [2015] 2 S.C.R. 574**

Date Released: June 4, 2015

Full decision: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15397/index.do>

Facts

Mr. Tatton was an alcoholic. He experienced blackouts and sometimes had no recollection of events that took place when he was under the influence.

In 2010, Mr. Tatton was living in his ex-girlfriend's home. On September 24, she left town to visit friends. Mr. Tatton was not happy about this and drank heavily throughout the day and evening, consuming approximately 52 ounces of alcohol. He eventually passed out. When he woke up, he decided to cook some bacon and put the stove temperature on "high". He then drove to a nearby coffee shop. Fifteen to twenty minutes later, he returned to find the house on fire. He called 911. Firefighters were able to save the home, but not any of its contents. The firefighters determined that the cause of the fire was the oil that was left burning on the stove. Mr. Tatton was charged with arson, contrary to s. 434 of the *Criminal Code*. The section reads:

434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.¹

Mr. Tatton argued at trial that he thought he left the stove on "low", and that the fire was an accident. He argued that he did not intend nor foresee the consequences of leaving the stove unattended.

A central question at trial was whether Mr. Tatton had the requisite intent (meaning the crime was planned and on purpose) to commit the offence of arson under s. 434. Another key issue was whether the court could take his state of intoxication into account in making its assessment.

Procedural History

The trial judge acquitted Mr. Tatton. The judge considered whether s. 434 was a specific intent offence (meaning that the Crown had to prove that Mr. Tatton intentionally or

¹ *Criminal Code*, R.S.C., 1985, c. C-46 at s. 434.

knowingly started the fire) or a general intent offence (where the Crown only had to prove that Mr. Tatton committed an illegal act, and whether or not he *intended* to start the fire would be irrelevant). The trial judge found that the facts and circumstances of a case are relevant to deciding whether an offence involves general or specific intent, and that in this case, arson should be considered a specific intent offence. The trial judge was not satisfied that Mr. Tatton “intentionally or recklessly” left the stove on high. Mr. Tatton was acquitted.

The Ontario Court of Appeal rejected the trial judge’s determination that the facts and circumstances of a case are relevant to whether an offence requires specific or general intent. However, the majority agreed with the lower court that s. 434 is a specific intent offence. The Court held that it requires a voluntary act, coupled with an awareness of the more distant consequences of that act and a decision to proceed in the face of those consequences. In the Court’s view, the words “intentionally or recklessly” require consideration of an accused’s subjective state of mind, to which intoxication is relevant. Consequently, the Court of Appeal upheld Mr. Tatton’s acquittal.²

The Crown appealed to the Supreme Court of Canada (SCC).

Issues

1. Is arson a general or specific intent offence?
2. If arson is a general intent offence, can intoxication be used as a defence?

Decision

The SCC concluded that arson is a general intent offence. Since it is a general intent offence, Mr. Tatton was unable to rely on intoxication as a defence. The Court ordered a new trial.

Ratio

Section 434 of the *Criminal Code* is a general intent offence, for which intoxication is not a valid defence.

Reasons

The Supreme Court of Canada held that the analysis of whether an offence is one of specific or general intent must start with a determination of the mental element in question. Specific intent offences involve a heightened mental element and engage more complex thought and reasoning processes. General intent offences, on the other hand, do not require a high level of mental acuity.

The SCC concluded that even if a person is intoxicated, they could still foresee the risk to someone else’s property by fire. The Court held that complex reasoning is not required to recognize such danger. As a result, it concluded that intoxication is not a valid defence for s. 434 charges.

The SCC ordered a new trial. Even though the trial judge determined that Mr. Tatton accidentally left the stove on, the SCC was convinced that the trial judge’s decision was influenced by Mr. Tatton’s intoxication, which could not be used as a defence.

² See *R. v. Tatton*, 2014 ONCA 273

DISCUSSION

1. What is specific intent? What is general intent?

2. What are some examples of specific intent crimes and general intent crimes?

3. Why does the difference between specific and general intent matter in this case?



4. Do you agree with the SCC that the defence of intoxication should not be allowed in a general intent offence such as arson? Why or why not?

5. The defence of intoxication is not frequently used in criminal trials. Why do you think that is?

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***R v LLOYD*, 2016 SCC 13, [2016] 1 SCR 130**

Date Released: April 15, 2016

Full decision: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15859/index.do>

Facts

Joseph Ryan Lloyd was a drug addict and dealer in Vancouver's downtown east side. He was addicted to cocaine, methamphetamine, and heroin, and sold drugs to support his habit. In February 2013, he was convicted of possession of methamphetamine for the purpose of trafficking. One month after his release, he was charged with and convicted of three additional counts of possession for the purpose of trafficking.

Section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* (CDSA) required a one year minimum sentence for any person that traffics or possesses a substance if that person was convicted of a substance offence in the previous 10 years. Since Mr. Lloyd had been convicted of an earlier drug offence, the judge was required to give him a jail sentence of at least 12 months. His lawyers tried to argue that he only had small amount of drugs when he was charged and the sentence therefore amounted to cruel and unusual punishment in violation of s. 12 of *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

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

Procedural History

Galati J. of the British Columbia Provincial Court of Justice found Mr. Lloyd guilty. Justice Galati acknowledged that lower sentences have occasionally been imposed on repeat offender, drug-addicted traffickers; however, based on the particular facts of Mr. Lloyd's case, he found that the appropriate sentence for Mr. Lloyd was 12 months. On the constitutional issue, Justice Galati concluded that s. 5(3)(a)(i)(D) of the CDSA violated s. 12 of the *Charter* because the one-year mandatory minimum sentence would amount to cruel and unusual punishment in some circumstances (although not in Mr. Lloyd's particular case) – for example, where an addict possesses a small amount of drugs to share with a spouse or a friend. A one-year sentence for such an offender, the Court

held, would be grossly disproportionate to what is justified by sentencing principles. Justice Galati found that the violation of s. 12 could not be justified under s. 1 of the *Charter*, and sentenced Mr. Lloyd to one year of imprisonment.¹

The British Columbia Court of Appeal held that provincial court judges do not have the power to declare laws constitutionally invalid; only superior courts have such a power. The Court of Appeal therefore set aside the provincial court judge's declaration of unconstitutionality and declined to consider the constitutional challenge to the mandatory minimum provision itself. The Court of Appeal also allowed the Crown's sentence appeal and increased Mr. Lloyd's sentence to 18 months imprisonment concurrent for the three offences. The Court held that a higher sentence was justified because (1) Mr. Lloyd possessed three different substances for street-level distribution; (2) the substances are dangerous, highly addictive, and socially destructive; (3) he committed the offences while on probation; (4) he was carrying a knife in a sheath, contrary to the terms of his probation; (5) he had a lengthy criminal record, with 21 prior convictions; and (6) his attempts at rehabilitation were minimal, and he showed little insight into the harm caused to others.²

Mr. Lloyd appealed to the Supreme Court of Canada (SCC).

Issues

1. Did the provincial court judge have the power to decide the constitutionality of the mandatory minimum sentence?
2. Is the mandatory minimum sentence law at issue unconstitutional?
3. Did the Court of Appeal make an error in increasing Mr. Lloyd's sentence to 18 months?

Decision

The appeal was allowed. Section 5(3)(a)(i)(D) of the *CDSA* was declared to be inconsistent with s. 12 of the *Charter* and the violation was not justified under s. 1. The SCC therefore declared it of no force or effect. It also set aside the sentence of the Court of Appeal and restored the sentence of one year imprisonment that was imposed by the provincial court judge.

Ratio

The minimum mandatory sentence imposed by s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* violates s. 12 of the *Charter* because it imposes a penalty that is grossly disproportionate to the offence and the broad array of potential circumstances under which it may arise.

¹ See *R. v. Lloyd*, 2014 BCPC 8 and *R. v. Lloyd*, 2014 BCPC 11

² See *R. v. Lloyd*, 2014 BCCA 224

Reasons

A. Did the provincial court judge have the power to decide the constitutionality of the mandatory minimum sentence?

Writing for the majority, McLachlin C.J. held that existing law is clear that provincial court judges are not empowered to make formal declarations that a law is of no force or effect under the Constitution; only superior court judges of inherent jurisdiction and courts with statutory authority have such power. However, provincial court judges do have the power to determine the constitutionality of a law where “it is properly before them”. That is, when the issue arises in a case the judge is hearing, they have the power to determine its constitutional validity. Since Mr. Lloyd had challenged the mandatory minimum that formed part of the sentencing regime that applied to him, the provincial court judge was entitled to determine the constitutionality of the provision put before him. Justice Galati ultimately concluded that the mandatory minimum sentence was not grossly disproportionate.

The SCC confirmed that the effect of such a finding by a provincial court judge is that it permits the judge to refuse to apply the mandatory in the specific case before it. The law itself remains in full force or effect, unless a formal declaration of invalidity is made by a court with the power to do so. The SCC concluded that the provincial court judge was within his power to consider the constitutional validity of the sentencing

provision in the course of making his decision in Mr. Lloyd’s case.

B. Is the mandatory minimum sentence law at issue unconstitutional?

The SCC outlined the legal test that needs to be met in order to find a violation of s. 12 of the *Charter*. A sentence will infringe s. 12 if it is “grossly disproportionate” to the punishment that is appropriate, considering the nature of the offence and the specific circumstances of the offender.³ To be “grossly disproportionate”, a sentence must be so excessive that it is an outrage to society’s standards of decency and would be considered abhorrent or intolerable to most people.

The SCC held that mandatory minimum provisions that cast a net over a wide range of potential conduct are more “constitutionally vulnerable”. For instance, in the case of s. 5(3)(a)(i)(D) of the *CDSA*, at one end of the range of conduct caught by the provision is a professional drug dealer selling dangerous drugs for profit. At the other end of the range stands a drug addict who is charged for sharing a small amount of drugs with a friend of spouse. Under the mandatory minimum provision, a judge would be required to sentence both individuals to one year in prison.

The SCC concluded that such a sentence would be grossly disproportionate to what would be fit in certain circumstances and therefore held that the provision violated s. 12 of the *Charter*. The Court found that

³ The analytical framework to determine whether a sentence constitutes a cruel and unusual punishment under s. 12 of the *Charter* was clarified in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773. For a case summary of *R. v. Nur*, see OJEN’s resource *Top Five 2015*, available online at: <http://ojen.ca/en/resource/top-five-2015>.

the infringement was not justified under s. 1. Although parliament's objective of combatting the distribution of illicit drugs is important and the objective is rationally connected to imposing a one-year mandatory minimum sentence, the provision did not minimally impair the s. 12 right.⁴

C. Did the Court of Appeal make an error in increasing Mr. Lloyd's sentence to 18 months?

The SCC held that a trial judge's determination about what is an appropriate sentence is entitled to deference from higher courts. Appellate courts cannot alter a trial judge's sentence unless there is evidence that the trial judge made a legal error or imposed a sentence that was clearly unfit. The SCC held that this was not the case with respect to Mr. Lloyd. It held that the Court of Appeal could not intervene and alter the sentence imposed by the provincial court judge just because it would have weighed the relevant factors differently and come up with a different sentence. Accordingly, the SCC restored the one-year sentence imposed by the provincial court judge on Mr. Lloyd.

DISCUSSION

1. What do you think are the benefits and disadvantages of mandatory minimum sentences?
2. Do you think that 12 months was an appropriate sentence for Mr. Lloyd in the circumstances? Why or why not?

⁴ For a more detailed explanation of s. 1 of the *Charter*, see the OJEN resource *In Brief: Section 1 of the Charter & the Oakes Test*, available online at: <http://ojen.ca/en/resource/in-brief-section-1-of-the-charter-the-oakes-test>.

3. Chief Justice McLachlin stated:

[M]andatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.⁵

Do you think it is possible for parliament to design mandatory minimum sentences that catch only the intended offenders? Why or why not?

4. Chief Justice McLachlin stated:

Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries. It allows the legislature to impose severe sentences for offences deemed abhorrent, while avoiding unconstitutionally disproportionate sentences in exceptional cases. The residual judicial discretion is usually confined to exceptional cases and may require the judge to give reasons justifying departing from the mandatory minimum sentence prescribed by the law.⁶

Do you think it is a good idea to all judges to have “residual judicial discretion” to decide whether or not to impose mandatory minimum sentences in exceptional circumstances? Why or why not? What are the advantages and disadvantages of this approach?

⁵ R. v. Lloyd, 2016 SCC 13, [2016] 1 SCR 130 at para. 35.

⁶ Ibid at para. 36.



5. Do you think we should ever have minimum mandatory sentences or do away with them completely? Why or why not? If so, when would they be appropriate?

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CARTER v CANADA (ATTORNEY GENERAL), 2016 SCC 4, [2016] 1 SCR 13

Date Released: January 15, 2016

Full decision: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15696/index.do>

Facts

Prior to the decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, providing medical assistance in dying was illegal.¹ Section 241(b) of the *Criminal Code* says that everyone who aids or abets a person in committing suicide commits an indictable offence. Section 14 says that no person may consent to death being inflicted on them. Together, these provisions prohibit the provision of assistance in dying in Canada. In its 2015 *Carter* decision, the Supreme Court of Canada (SCC) declared these provisions invalid to the extent that they prohibit physician-assisted death for a competent adult person who:

1. clearly consents to the termination of life; and
2. (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. In order to allow the government time to write

new legislation to comply with its decision, the SCC suspended the declaration of invalidity for 12 months. During the 12-month period there was a federal election and the Attorney General requested an extension of the declaration of invalidity.

Procedural History

In 2012, the British Columbia Supreme Court (the equivalent of the Ontario Superior Court) found that the prohibition against physician-assisted dying violated s. 7 of the *Charter of Rights and Freedoms* for competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition. Smith J. concluded that the infringement was not justified under s. 1 of the *Charter*.²

The Attorney General of British Columbia appealed the decision. The majority of the British Columbia Court of Appeal allowed the appeal on the ground that the trial judge was bound to follow the earlier SCC decision in *Rodriguez v. British Columbia (Attorney General)*, which upheld the validity of the provision.³

¹ For a case summary of *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, see OJEN's resource *Top Five 2015*, available online at: <http://ojen.ca/en/resource/top-five-2015>.

² See *Carter v. Canada (Attorney General)*, 2012 BCSC 886 and *Carter v. Canada (Attorney General)*, 2012 BCSC 1587.

³ See *Carter v. Canada (Attorney General)*, 2013 BCCA 435.

In 2015, the SCC concluded that ss. 241(b) and 14 of the *Criminal Code* unjustifiably infringed s. 7 of the *Charter*.

Issues

1. Should the Court order an extension of the suspension of the declaration of invalidity?
2. If the extension is granted, should Quebec be exempted from the four-month extension of the suspension of the declaration of invalidity?
3. If the extension is granted, should the court grant an exemption to those individuals who wish to seek assistance in ending their life on the bases articulated in the reasons in *Carter v. Canada (Attorney General)*, 2015 SCC 5.

Decision

The extension of the suspension of the declaration of invalidity was granted. An exemption was also ordered for Quebec, and for those individuals seeking assistance from a physician in accordance with the criteria set out in the 2015 SCC *Carter* decision. Those individuals were instructed to apply to the Superior Court of their jurisdiction for relief during the extended period of suspension.

Reasons

The SCC held that to suspend a declaration of the constitutional validity of a law is an extraordinary step, since its effect is to maintain an unconstitutional law in breach of the constitutional rights of the members of Canadian society. Extraordinary circumstances must be shown in order for an extension to be given. The SCC ruled that the interruption of work on a legislative response to the Court's 2015 decision which was due to a federal election amounted to extraordinary circumstances. Parliament was dissolved on August 2, 2015 and officially resumed on December 3, 2015. The Court acknowledged that this four-month delay justified granting an extension of the suspension of the declaration of invalidity, but only for four months.

DISCUSSION

1. In its 2015 *Carter v. Canada* decision, the SCC found the provisions of the Criminal Code which prohibited physician-assisted suicide to be invalid. Do you agree with that decision? Why or why not?
2. Following the 2015 decision, the SCC gave parliament 12 months to rewrite the law instead of immediately striking it down. Why do you think the Court did that? Do you agree with this approach?
3. In this case, the federal government was seeking an extension of the suspension of the declaration of invalidity. What does this mean?