THE CHARTER CHALLENGE

Ontario Justice Education Network

CASE SCENARIO
Fall 2011

HER MAJESTY THE QUEEN

-V.-

DANIEL PELTIER

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent)

- and -

DANIEL PELTIER

(Applicant)

REASONS FOR DECISION

Toews, J.

Introduction

1. On September 30, 2012, the Applicant, Mr. Daniel Peltier, pled guilty to a single count of trafficking of a controlled substance contrary to s. 5(3)(a)(ii) of the *Controlled Drugs and Substances Act* (*CDSA*), on the basis of an agreed statement of facts.

2. The Applicant and the Crown agree that as a result of the plea, Mr. Peltier is now subject to a newly-enacted mandatory minimum sentence of two years, as he committed the offence near school grounds and involved a person under the age of 18 years in committing the offence.

3. Mr. Peltier brings this application to strike down s. 5(3)(a)(ii) of the *CDSA*, pursuant to s. 52(1) of the *Constitution Act, 1982*. Specifically, the Applicant alleges that this provision constitutes cruel and unusual punishment, and violates his equality rights under sections 12 and 15, respectively, of the *Canadian Charter of Rights in Freedoms* (*Charter*). In addition, the Applicant alleges that this provision of the *CDSA*, particularly the imposition of mandatory minimum sentences, is an unconstitutional violation of the Makwa First Nation's inherent right of self-government.

4. For the reasons that follow, I do not find that the mandatory minimum sentence in s. 5(3)(a)(ii) of the *CDSA* violates Mr. Peltier's *Charter* rights. In any event, even if the mandatory minimum sentence did violate Mr. Peltier's *Charter* rights, I would find that the infringement is a reasonable limit, justified under section 1 of the *Charter*.

5. Lastly, I do not find s. 5(3)(a)(ii) of the *CDSA* to be unconstitutional, as the right claimed by Mr. Peltier does not fall within the scope of the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

The Facts

6. The Applicant is an 18 year old Aboriginal male member of the Makwa First Nation. He resides, with his family, on the North Lake Reserve – a small and isolated community in Northern Ontario.[a]

7. On June 17, 2012,[b] the North Lake High School held its graduation ceremony. Later that evening, a number of students, many of whom were under 18 years of age, had a party in the park adjacent to the school. There was alcohol and drug use at the party.

8. The Applicant admits that he traded Oxycodone, a substance found in Schedule I of the *CDSA*, to a number of students in exchange for alcohol. Approximately half of these students ranged in age from 15 to 17 years old; the other half were 18 years of age or older. He also admits to selling two of the pills for cash to two individuals at the party who did not have any alcohol to trade; neither of these individuals were under 18 years of age.

[a] The Makwa First Nation and North Lake Reserve in this scenario are fictional. Any resemblance to a specific Aboriginal community in Northern Ontario is unintentional. Please do not rely on sources which describe the Makwa Sahgaiehcan (a Cree First Nation in Saskatchewan) or any "North Lake Reserve" which you find through a google search – they are not applicable for the purpose of this activity.
[b] The date of the offence is set in the future. Please assume that the federal government's *Safe Streets and Communities Act*, introduced in September of this year, has been passed and come into force.

9. The Applicant admits that he took the Oxycodone from his mother, who is recovering from a serious automobile accident which took place three months ago. The Oxycodone was prescribed to her by a doctor for the chronic pain which from which she suffers.

10. One of the students at the party had an adverse medical reaction to the combination of alcohol and Oxycodone and was rushed to the hospital that night. Fortunately, this young man recovered, but as a result of the incident, the party and the Applicant's activities came to the attention of the local police.

11. It is worth emphasizing that Mr. Peltier acknowledged his wrongdoing and pled guilty at an early juncture, forgoing his right to a trial.

12. The Applicant maintains – and I have no reason to disbelieve him – that he does not have a drug or alcohol problem, although he admits to drinking alcohol socially since the age of fourteen. His motivation in selling the Oxycodone was purely financial.

13. Mr. Peltier lives in North Lake with his mother and two younger brothers. His father died when he was 3 years old. Until two years ago, Mr. Peltier was his mother's second oldest son; her oldest son – and Mr. Peltier's older brother by two years – committed suicide at the age of 18. Tragically, suicide, especially among teens, is not uncommon for this under-served community which suffers from chronic unemployment and a general lack of resources. Many of the middle-aged adults who live on this reserve attended residential schools, and the intergenerational impact stemming from this has been noted by several of my colleagues on the bench in previous sentencing decisions involving offenders from this community.

14. At the time of this sentencing hearing, the Applicant was not enrolled in school and had no prospects for employment. He does not have a criminal record.

Relevant Legislation

15. The legislation at issue in this application is s. 5(3)(a)(ii) of the *CDSA*. As this law only recently came into effect, I have reproduced the text of the legislation here:

> *Trafficking in substance*
>
> 5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.
>
> *Possession for purpose of trafficking*
>
> (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.
>
> *Punishment*
>
> (3) Every person who contravenes subsection (1) or (2)
>
> (a) subject to paragraph (a.1), if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and
>
> […]
>
> (ii) to a minimum punishment of imprisonment for a term of two years if
>
> (A) the person committed the offence in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years,
>
> (B) the person committed the offence in a prison, as defined in section 2 of the Criminal Code, or on its grounds, or
>
> (C) the person used the services of a person under the age of 18 years, or involved such a person, in committing the offence;

Legal Issues

16. The parties agree that there are four legal issues that I need to decide:

i. Does s. 5(3)(a)(ii) of the *CDSA* violate the Applicant's s. 12 *Charter* right to be free from cruel and unusual treatment or punishment?

ii. Does s. 5(3)(a)(ii) of the *CDSA* violate the Applicant's s. 15 *Charter* right to equality?

iii. If the impugned provision does violate one or more of the Applicant's *Charter* rights, is the infringement justified by section 1 of the *Charter*?

iv. Is s. 5(3)(a)(ii) of the *CDSA* invalid on the basis that it violates s. 35(1) of the *Constitution Act, 1982*, by infringing an aboriginal right to self-government?

Issue One: Section 12 – Cruel and Unusual Treatment or Punishment

17. Section 12 of the *Charter* provides:

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

18. Challenging the constitutionality of mandatory minimum sentences on the basis of section 12 of the *Charter* is not novel. Canadian courts, at various levels, have clearly indicated that mandatory minimum sentences *per se* do not violate the *Charter*; however, some minimum penalties may be found unconstitutional if the sentence is grossly disproportionate: *R. v. Smith*, [1987] 1 S.C.R. 1045.

19. To be considered grossly disproportionate, the sentence must be more than "merely excessive". The sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable": *R. v. Wiles*, [2005] 3 S.C.R. 895, at para. 4.

20. The question in this case is whether a two year mandatory minimum sentence of imprisonment is grossly disproportionate to the offence of trafficking as committed by Daniel Peltier?

21. In making this determination, one must have regard to all contextual factors. The Supreme Court in *R. v. Wiles* has indicated that relevant factors may include:

> …the gravity of the offence, the personal characteristics of the offender, the particular circumstances of the case, the actual effect of the treatment or punishment on the individual, relevant penological goals and sentencing principles, the existence of valid alternatives to the treatment or punishment imposed, and a comparison of punishments imposed for other crimes in the same jurisdiction.

22. The Applicant has urged me to consider that he is a first-time offender who just recently turned 18. He has also submitted that the provision was intended to capture drug dealers who target young people – not barely-adult offenders who "trade pills for beers with their peers". The crux of the Applicant's submissions on this argument focused on the incompatibility of this mandatory minimum sentence with the sentencing principle outlined in s. 718.(e) of the *Criminal Code*:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> […]
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

23. This sentencing principle, first interpreted by the Supreme Court in *R. v. Gladue*, [1999] 1 SCR 688, requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders. In *Gladue*, the Supreme Court held that the provision was remedial in nature, designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.

24. The Applicant submits that the mandatory minimum sentence, in his case, is grossly disproportionate, given the range of sentencing options available to an offender from his community. Sentencing circles and other forms of restorative justice are typically employed, to

great success in his community of North Lake. The Applicant has also drawn my attention to the fact that the mandatory minimum punishment of two years imprisonment prevents his eligibility for a conditional sentencing order; the Applicant is unable to serve his sentence in the community and must be incarcerated.

25. The Respondent, on the other hand, submits that selling drugs to high school students is a serious offence and is exactly the kind of activity intended to be punished by s. 5(3)(a)(ii). I agree that the circumstances of this case demonstrate the extreme danger that can result from this activity; a young man was rushed to hospital and perhaps could have even died.

26. The Respondent also submits that Mr. Peltier is, as a matter of law, "old enough" and that he must take full responsibility for his decisions, despite the fact that he had only just turned 18 when the offence occurred.

27. The Respondent also urged me to consider the sentencing objectives of denouncing unlawful conduct and deterring others from committing this offence.

28. In my opinion, the mitigating factors put forth by the Applicant do not convince me that the mandatory minimum sentence is grossly disproportionate in his case. I find that the two-year minimum sentence prescribed by Parliament does not amount to cruel and unusual punishment on the facts of this case.

29. Ordinarily, a s. 12 analysis for a mandatory minimum sentence requires both an analysis of the facts of the accused's case and an analysis of reasonable hypothetical cases. Mr. Peltier has chosen not to rely on reasonable hypotheticals to contest the constitutionality of the impugned provision. There is no reason to continue with an analysis of a reasonable hypothetical.

Issue Two: Section 15 – Equality Rights

30. Subsection 15(1) of the *Charter* states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

31. The Applicant argues that s. 5(3)(a)(ii) of the *CDSA*, and mandatory minimum sentencing in general, prevents the realization of equality for Aboriginal peoples in the sentencing process. Put another way, the over-incarceration of Aboriginal people in the criminal justice system and the systemic discrimination faced by Aboriginal peoples mandates a different approach to sentencing; imposition of a mandatory minimum sentence – which does not allow for a differentiated approach – infringes the Applicant's equality rights.

32. The Respondent, on the other hand, submits that the legislation is neutral and makes no distinction between Aboriginal and non-Aboriginal people; everyone is subject to the mandatory minimum sentence of 2 years.

33. The Supreme Court of Canada has held that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

34. In *Lovelace v. Ontario*, [2000] 1 SCR 950, the Supreme Court described the test to determine a s. 15 violation as follows:

> First, we must examine whether the law, program or activity imposes differential treatment between the claimant and others. Secondly, we must establish whether this differential treatment is based on one or more enumerated or analogous grounds. And

> finally, we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory.

35. The Respondent has provided a very thorough analysis of the s. 15 test, arguing persuasively that there is no differential treatment between the Applicant and others. The Respondent also contends that the mandatory minimum sentence does not have a discriminatory purpose.

36. The Applicant argues that over-incarceration of Aboriginal people is partially a result of the justice system's institutional approach. Statistically, more Aboriginal offenders are refused bail and given longer prison sentences. Aboriginal people are more adversely affected by incarceration and less likely to be rehabilitated in prison. Subsection 718.2(e) is designed to achieve substantive equality in the sentencing of Aboriginal offenders. He urges me to avoid a formulaic approach to the s. 15(1) test.

37. I find the Respondent's arguments more compelling in this matter. The Supreme Court has clearly laid out a test which I am bound to follow. An application of the facts of this case to the test does not result in an infringement of the Applicant's s. 15(1) rights. The law applies to all offenders and any disproportionate impact it may have on Aboriginal offenders is unfortunate; however, I do not accept that it is caused by the imposition of a mandatory minimum that is universal in its application.

Issue Three: Reasonable Limits on the Rights of the Applicant (s. 1)

38. The third issue revolves around whether the violations of the Applicant's s. 12 and s. 15(1) rights are reasonable limits, demonstrably justified in a free and democratic society. I have found no breaches of the *Charter*, so it is strictly unnecessary to address this point; however, if I am wrong in what I have found so far, I will address the issue of reasonable limits.

39. Section 1 of the *Charter* indicates:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

40. In this case, there is no argument as to whether the limit is prescribed by law – the impugned provision of the *CDSA* is a duly enacted legislative provision.

41. The test for "reasonable limits" was established in *R. v. Oakes*, [1986] 1 S.C.R. 103, at para 69:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test"... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

42. Had I found a violation of the Applicant's s. 12 or s. 15 rights, I would have determined that these infringements were justified. The government objective in this case is of sufficient importance – deterrence and denunciation are age-old sentencing objectives. The Applicant

argues that the mandatory minimum sentences crafted by Parliament are not rationally connected to this objective and the negative effects of mandatory minimum sentences on Aboriginal peoples do not outweigh the overall benefits of this legislation. To support these propositions, the Applicant has brought to my attention a number of studies, both Canadian and international, which call into question the value and efficacy of mandatory minimum sentences – especially as applied to Aboriginal offenders.

43. It is not my place to take this evidence into consideration; parliament debated these amendments at length and received extensive evidence on these points. While the evidence is compelling, it is not for this court to second guess the will of Parliament. The federal government has determined that there is a strong need for consistency in sentencing and mandatory minimum sentences are instrumental in achieving this.

Issue Four: Section 35 – Existing Aboriginal and Treaty Rights

44. Unlike the three previous issues, the last issue raised by the Applicant falls outside of the *Charter of Rights and Freedoms* – although it remains a constitutional issue – grounded in s. 35 of the *Constitution Act, 1982*.

45. Subsection 35(1) of the *Constitution Act, 1982* states that:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

46. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Supreme Court outlined the framework for analyzing s. 35(1) claims. First, one must determine whether the Applicant has demonstrated an aboriginal right. Secondly, it must be decided whether that right has been extinguished. Thirdly, one must determine whether that right has been infringed. Finally, it must be examined whether the infringement is justified.

47. In *Sparrow*, the aboriginal right involved a right to fish for food – a right which was not seriously disputed. It was not until *R. v. Van der Peet*, [1996] 2 S.C.R. 507, the Supreme Court of Canada laid out the test for determining the practices, customs and traditions which fall within s. 35(1) as an aboriginal right:

> . . . in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

48. The Applicant asserts that s. 35(1) encompasses the right of self-government, and that this right includes the use of alternative dispute resolution in the form of sentencing circles.

49. The Applicant submits that Aboriginal concepts of justice and dispute resolution (emphasizing rehabilitation and healing, instead of punishment) are primary, fundamental and integral to how Aboriginal people structure their relations with one another. The Applicant tendered evidence of the Makwa First Nation's use of restorative practices to deal with conflict within the community, which dates back to pre-European contact.

50. While I accept the evidence of the Applicant on the Makwa First Nation's use of restorative justice pre-contact, I do not find that this "right" is one which Canadian courts have yet recognized as an "aboriginal right" within the context of s. 35(1). Furthermore, even if it was found to be the kind of right encompassed by s. 35(1), I find that it is not an "exisiting" right, in that it was extinguished when Parliament passed the sentencing provisions contained within the *Criminal Code*.

CONCLUSION

51. For the above reasons, the application is denied. Parliament has clearly expressed its desire to punish drug offences in the context of trafficking to youth more severely and I am compelled and bound to give effect to democratic will. I find that Mr. Peltier is subject to the mandatory minimum sentencing provisions.

52. The Crown and Mr. Peltier both agreed prior to releasing my decision that if I dismissed the application, an appropriate sentence would be the minimum sentence of two years incarceration. I agree with this position and give effect to the parties' joint submissions on sentencing.

53. Mr. Peltier will therefore serve two years in a correctional facility, followed by a year's probation. I will hear from the parties as to the appropriate terms of the probation order.

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TOEWS, J.