

ONTARIO COURT OF JUSTICE

B E T W E E N :)
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HER MAJESTY THE QUEEN) Dana Peterson,
) for the Crown
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— AND —)
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WILFRED T. BOISSONEAU) Stephen Ford,
) for the accused
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) HEARD: March 7 & May 12,
) 2006
)

BIGNELL J.:

[1] Wilfred T. Boissoneau has been convicted of two charges under section 253(a) and one charge under section 259(4) of the Criminal Code of Canada. He initially entered a plea of guilt to count one on information 3452 on July 26, 2004. A ten year driving prohibition was ordered at that time. Sentencing was put over at the request of the accused a number of times and for various reasons. These included:

1. to await transfer in of other outstanding charges;
2. to order a pre-sentence report;
3. to accommodate the transfer of the file to new counsel;
4. to allow defence counsel to serve the required notices regarding a constitutional question on both the Federal and Provincial Attorneys General.

[2] The matter eventually came back before me on March 7, 2006 when Mr. Boissoneau entered pleas of guilt to information 3310 and count one of information 3309. Mr. Ford on behalf of Mr. Boissoneau made his submissions with regard to the constitutional issues before the court. There was insufficient time on that day for the Crown to respond so the matters were adjourned to May 12, 2006 for that purpose. Ms. Peterson presented the Crown position and Mr. Ford responded briefly to that position. The matters were then adjourned for my decision on the constitutional issues. Further submissions as to sentence are to be made September 11, 2006 at 2 p.m.

THE FACTS

[3] On August 27, 1993, members of the Ontario Provincial Police observed a grey Ford LTD being driven in Little Current, Ontario in a slow and erratic manner. The vehicle was stopped. Mr. Boissoneau was the driver. At the time, he was subject to a driving prohibition order which was in effect from January 17, 1992 until January 16, 1994. Initially, officers noted an odour of alcohol coming from the vehicle. Mr. Boissoneau's motor skills were poor and an order of alcohol was then detected coming from his breath. He was arrested and provided with his rights to counsel. A demand for breath samples was made and he was taken to the police station where two breath samples were taken. The result on each was 254 milligrams of alcohol in 100 millilitres of blood.

[4] The Crown proceeded by way of indictment but did not file notice to seek increased penalty. It would seem that the Crown did not file the notice as it was not in her file on the date of plea although it is my view that verbal notice could have been given prior to plea. *R. v. Bolley* [1996] 3 C.C.C. 57, 47 C.R. 247 (B.C.S.C.); *R. v. Collini* (1979), 3 M.V.R. 218 (Ont.H.C.J.)

[5] Constables Nolan and Lesage of the Anishinabek police force were on duty November 14, 2003 in the area of the Echo River Road on the Garden River First Nation. At 18:30 hours, they observed a black Chevy Blazer being driven at a slow speed. The vehicle was stopped and the driver, Wilfred T. Boissoneau, was observed to be visibly intoxicated. He had an odour of alcoholic beverage on his breath and his speech was slurred. He had to lean on the truck for balance and he staggered, requiring assistance. He admitted having consumed four or five drinks. He was arrested, given the breath demand and provided two breath samples. The result on the first was 200 milligrams in 100 millilitres of blood and the result on the second was 210 milligrams of alcohol in 100 millilitres of blood.

[6] The Crown proceeded by way of summary conviction and filed the notice to seek increased penalty.

[7] Mr. Boissoneau has on his criminal record a number a drinking/driving related convictions. These include:

1. September 16, 1988 drive while ability impaired contrary to section 237(a) for which he received a sentence of 14 days intermittent;
2. November 10, 1988 driving with more than 80 milligrams of alcohol in his blood contrary to section 237(b) for which he received a sentence of 30 days consecutive;
3. September 7, 1990 care or control over 80 milligrams contrary to section 253(b) and two counts of drive while disqualified contrary to section 259(4) for which he received 40 days consecutive on each charge,
4. January 17, 1992 driving with more than 80 milligrams of alcohol in his blood contrary to section 253(b) for which he received a sentence of six months and drive while disqualified contrary to section 259(4) for which he received a sentence of two months consecutive;

5. November 23, 1998 drive while ability impaired contrary to section 253(a) and drive while disqualified contrary to section 259(4) for which he received sentences of 90 days concurrent on each charge.

POSITION OF THE APPLICANT

[8] Mr. Ford on behalf of Mr. Boissoneau argues that section 255(1)(a)(ii) and (iii) of the Criminal Code of Canada operating with section 727(1) has the effect of transferring to the prosecution a significant part of the discretion reserved to the sentencing judge such that it is contrary to the principles of fundamental justice and violates section 7 of the *Canadian Charter of Rights and Freedoms*. He says that the operation of those two sections of the Code requiring a mandatory term of incarceration makes such imprisonment arbitrary and is in violation of section 7 and section 9 of the *Charter*. In addition, it is the defence position that the two sections operating together preclude the sentencing judge from considering all available sanctions other than imprisonment and from paying particular attention to the circumstances of Aboriginal offenders as required by section 718.2(e) of the Code. This, he argues, denies the Aboriginal accused equal benefit to the law in violation of section 15 of the *Charter*. He states that the effect of the operation of section 255(1)(a)(ii) and (iii) along with section 727(1) precludes the sentencing judge from exercising his judicial duty to give real force to the remedial purpose of section 718.2(e) of the Code thus violating sections 7 and 15 of the *Charter*.

[9] The remedies sought are:

1. A declaration that section 255(1)(a)(ii) and (iii) of the Criminal Code in operation with section 727(1) of the Code, in its effect violates sections 7, 9 and 15 of the *Charter* rights of the Applicant and cannot be saved by section 1; and
2. An order that the Applicant who is an Aboriginal person is constitutionally exempt from the effect of section 255(1)(a)(ii) and (iii) of the Criminal Code of Canada in operation with section 727(1) of the Code pursuant to section 24(1) of the *Charter*.

[10] The issues to be decided are:

1. Does section 727(1) in combination with section 255 of the Criminal Code violate Mr. Boissoneau's right not to be deprived of his right to liberty except in accordance with the principles of fundamental justice?
2. Does section 727(1) in combination with section 255 of the Criminal Code violate Mr. Boissoneau's right not to be arbitrarily detained or imprisoned?
3. Does section 727(1) in combination with section 255 of the Criminal Code preclude the sentencing judge from considering all available sanctions other than imprisonment and from paying particular attention to the circumstances of the Aboriginal offenders as required by section 718.2(e) of the Code thus breaching Mr. Boissoneau's section 15 *Charter* rights.
4. If section 727(1) in combination with section 255 does breach section 7, section 9 or section 15 of the *Charter* can it be saved by section 1 of the *Charter*?

DISCRETION IN SECTION 727

[11] The mandatory minimum sentencing schemes in the Criminal Code of Canada have been subjected to and survived numerous challenges under the *Canadian Charter of Rights and Freedoms*. However, it is not the mandatory minimum sentencing scheme related to drinking/driving offences i.e. section 255(1) which has attracted the scrutiny of defence in this case. Rather, it is the operation of that scheme in combination with section 727 which is being challenged.

[12] Section 255(1) states:

255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

(a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than six hundred dollars,

(ii) for a second offence, to imprisonment for not less than fourteen days, and

(iii) for each subsequent offence, to imprisonment for not less than ninety days;

(b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and

(c) where the offence is punishable on summary conviction, to imprisonment for a term not exceeding six months.

[13] Section 727(1) and (2) state:

727. (1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

(2) Where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, the court shall, on application by the prosecutor and on being satisfied that the offender was notified in accordance with subsection (1), ask whether the offender was previously convicted and, if the offender does not admit to any previous convictions, evidence of previous convictions may be adduced.

[14] It has been argued that the effect of these two sections operating together is that discretion is taken from the sentencing judge and placed with the prosecuting attorney. If the prosecutor chooses to file notice to seek increased penalty, the judge is precluded from considering the whole range of sentencing options with regard to the particular accused before the court. The judge must sentence the accused to a minimum jail term. The defence argues that this is arbitrary in its application and is not in accordance with the principles of fundamental justice.

[15] What is the purpose of section 727? *R. v. Norris* (1998), 41 C.C.C. (3d) 441, a decision of the Northwest Territories Court of Appeal is helpful in that it sets out the history of the legislation. *R. v. Kumar* (1993), 85 C.C.C. (3d) 417 (B.C.C.A.) further analyses the legislative history. It would appear that section 727 and its predecessors were enacted to provide a procedural safeguard for the accused so that he would know before plea the extent of the jeopardy facing him. Section 727 employs the words “an offence for which a greater punishment may be imposed by reason of previous convictions.” The defence submits that the use of the word “may” denotes discretion in the sentencing judge whether to impose a greater sentence. Mr. Ford in his argument quoted extensively from Lambert J.’s dissent in *Kumar*. Lambert J. sets out in his reasons the legislative history and appears to conclude that the word “may” in section 727 became inappropriate once increasing maximum sentences were removed from the Code although he agreed that the word “may” was appropriate while increased maximums were present in the Code. It is obvious that section 727 applies to all offences in the Criminal Code for which a greater punishment may be imposed by reason of previous convictions. What seems to have been forgotten in the case presented to me and the submissions made before me is that a conviction under section 253 has consequences as set out under two sections of the code – section 255 and section 259.

[16] Section 259(1) states:

259. (1) When an offender is convicted of an offence committed under section 253 or 254 or discharged under section 730 of an offence committed under section 253 and, at the time the offence was committed or, in the case of an offence committed under section 254, within the three hours preceding that time, was operating or had the care or control of a motor vehicle, vessel or aircraft or of railway equipment or was assisting in the operation of an aircraft or of railway equipment, the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel or an aircraft or railway equipment, as the case may be,

(a) for a first offence, during a period of not more than three years plus any period to which the offender is sentenced to imprisonment, and not less than one year;

(b) for a second offence, during a period of not more than five years plus any period to which the offender is sentenced to imprisonment, and not less than two years; and

(c) for each subsequent offence, during a period of not less than three years plus any period to which the offender is sentenced to imprisonment.

[17] I have emphasized the words “in addition to any other punishment”. That indicates to me that those who drafted this legislation viewed section 259 as “punishment”. Indeed, the British Columbia Supreme Court held in *R. v. Keldsen* [1987] BJC No. 25, 46 MVR 242 that “punishment includes the order prohibiting the offender from driving”. It follows then that the use of the word “may” is still appropriate as section 259 sets out both increasing minimums and increasing maximums.

[18] Taylor J. considered this issue in the majority decision in *Kumar* supra stating when speaking of the significance of the former section 665:

On a strict reading of the section it seems to apply only to cases in which a higher maximum sentence is provided for on second or subsequent convictions for the same offence. It requires that notice be given where the offence is one 'for which a greater punishment may be imposed by reason of previous convictions'. Because of the unfairness which would otherwise result, it makes sense that an extended meaning be given to these words so as to encompass cases also in which not less than a minimum sentence must be imposed.

[19] In my view, parliament by enacting section 255 limited the discretion of the trial judge. The intention of parliament was that there be a graduated sentencing scheme for recidivist offenders found guilty of drinking/driving offences. The effect of the section 727 notice requirements is that at times the intention of parliament will be frustrated when the Crown chooses not to file the notice to seek increased penalty. The defence argues that it was never the intention of parliament to pass this discretion to the Crown and that it is outside the core powers of the Attorney General's office. The defence seems to be arguing that complete discretion rests with the trial judge.

[20] A perusal of the legislative history of statutes prescribing greater punishments for repeat offenders shows that at one time the indictment was to allege both the previous conviction and the new offence, *R. v. Norris* (supra). It would normally be the Crown who drafted the indictment. At that point in our history then it would have been within the Crown's discretion whether or not to allege prior convictions as part of the charging document. This method would have an obvious potential for prejudice to the accused and was eventually removed from the Criminal Code. A possible new prejudice became evident, i.e. prejudice to an accused who might not know that the Crown would seek to allege prior convictions. This difficulty was addressed by the inclusion of notice provisions (predecessors of the present section 727). The defence in the case at bar has argued that the discretion in section 727 is more properly that of the judge and not the Crown. However, if one considers that the drafting of the charging document is within the Crown's discretion and it traditionally was within the discretion of the Crown whether or not to allege prior convictions on that charging document, then it follows that the discretion in section 727 is that of the Crown.

SECTION 7 ANALYSIS

[21] Section 7 of the Canadian Charter of Rights and Freedoms states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[22] It must first be determined whether there has been or will be deprivation of the right to life, liberty or security of the person. The Crown has filed notice under section 727 with regard to one of the charges before the court. If the Crown's position on this application is correct, the filing of notice will force the court to sentence the accused to a period of incarceration. The accused would be deprived of his liberty.

[23] The next step in the analysis is to determine whether that deprivation is in accordance with the principles of fundamental justice.

[24] The British Columbia Court of Appeal in *Kumar* (supra) considered the interplay of section 255 and section 665 (now 727) and held that this resulted in a breach of section 7 of the *Charter*. Taylor J. writing for the majority concluded:

Where a statutory minimum sentence is provided by the Criminal Code for a second or subsequent conviction, questions of “fundamental justice” arise under section 7, because it will be open to the prosecutor to invoke the sentence, or not, as a matter of uncontrolled “prosecutorial discretion”.

[25] Taylor J.’s reasoning was that a mandatory sentence applies only if the prosecutor chooses that it shall. The result of this action by the prosecutor is that there is a loss of liberty. That loss of liberty has been brought about otherwise than “in accordance with the principles of fundamental justice”.

[26] A different conclusion was reached in two Manitoba decisions: *R. v. Martin* [2005] M.J. No. 300 (Man.Q.B.) and *R. v. Gerardy* [2004] M.J. No. 277 (Man.Prov.Ct.). In both decisions, it was held that section 255 and section 727, acting together, were not in violation of the principles of fundamental justice. In *Gerardy*, Swail J. found after a review of the legislative history of the sections that the notice requirement is consistent with the principles of fundamental justice. McCauley J. in *Martin* set out in some detail her reasons for finding that section 255 and section 727 did not contravene section 7 of the *Charter*. Her reasoning as set out in paragraphs 43 to 47 and 49 to 51 is most compelling.

[43] In its argument, the Crown noted that the appellant was not suggesting that the imposition of a mandatory minimum term of imprisonment that survives s. 12 scrutiny nevertheless violates s. 7 where the notice requirement concerning the applicability of the mandatory minimum does not apply. This is in keeping with the decisions of Morrissey, Golz, and Latimer. However, if the position of the appellant is that the imposition of the notice obligation on the Crown as a condition precedent to the application of the mandatory minimum violates s. 7 of the *Charter*, the result would be illogical. Put another way, if imposing a mandatory minimum sentence upon an accused without notice is constitutionally acceptable, how can imposing a mandatory minimum sentence upon an accused with notice not be?

[44] In a s. 7 analysis it is necessary to consider the meaning of “principles of fundamental justice” as well as the roles of Parliament and the courts with respect to sentencing. As noted by Lamer J. in *Reference re Motor Vehicle Act (British Columbia)* S 94(2), [1985] 2 S.C.R. 486:

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves. (&64)

[45] It is well established that the legal rights contained in sections 8 to 14 of the *Charter* are illustrative of the principles of fundamental justice. Underlining them are the principles of presumption of innocence and the right to a fair trial. It is difficult to see how either of the latter are compromised when the mandatory minimum sentence is engaged because it is of no effect

unless an accused pleads guilty or is convicted after a fair trial.

[46] The placement of s. 727 in the “Procedure and Evidence” section of the Criminal Code strongly suggests it is a procedural safeguard designed to protect an accused by ensuring that he or she knows the full extent of his or her jeopardy before entering a plea. Not insignificantly, its application extends beyond s. 255 of the Criminal Code to every offence for which a greater punishment is imposed by virtue of a previous conviction. On this basis as well, the notice requirement cannot be said to violate the principles of fundamental justice. To the contrary, it is consistent with them.

[47] The real issue is whether Parliament, by enacting a procedural safeguard that gives the Crown discretion whether to bring the mandatory minimum into play, offends the principles of fundamental justice. Clearly Parliament is entitled to vest discretion in the Crown and has done so throughout the Criminal Code. The two notable examples are the Crown’s discretion whether to lay a charge, and whether to proceed by summary conviction or by indictment. The end result of the exercise of this discretion in any case may well be the deprivation of an accused’s liberty but only after a fair trial, in accordance with the principles of fundamental justice. While addressing a different issue than the one here, the decision in *Power* is authority for the proposition that there is nothing inherently wrong with the delegation of, or exercise of, prosecutorial discretion per se and further the courts should be very slow to review the exercise of that discretion.

[49] A sentencing judge is required to determine a fit and proper sentence within the parameters set by Parliament. As such no sentencing judge has an unfettered discretion. Parliament has the unquestioned authority to determine the sentence for every Criminal Code offence and has done so in a number of ways, subject always to the constraints of s. 12 of the Charter. Although Parliament’s right to impose minimum sentences is also unquestioned, such instances are relatively rare. Whereas Parliament has chosen to give considerable discretion to judges to fashion an appropriate sentence in keeping with the purpose and principles of sentencing articulated in the Criminal Code, the fact that judicial discretion is limited, either directly from a mandatory minimum provision or indirectly from the notice requirement, does not offend the principles of fundamental justice (*Power*).

[50] Similarly, I do not accept the portrayal of the Crown as both prosecutor and ultimate decision maker in invoking the notice provision of s. 727 of the Criminal Code as accurate. Because it is Parliament that fixed the 14 day mandatory minimum sentence which is brought into play with exercise of Crown discretion under s. 727 of the Criminal Code, and it is the minimum sentence only, it is incorrect to say that the Crown both prosecutes and determines the sentence. Obviously, it is open to the sentencing judge in any given case to increase the minimum in accordance with the purpose and principles of sentencing.

[51] An argument was also put forth that the Crown could improperly use the ability to invoke s. 727 of the Criminal Code with the possible consequence of a mandatory jail sentence in the plea bargaining process. For the reasons I rejected a similar argument of potential bad faith with respect to the s. 12 analysis, I do so with respect to s. 7.

[27] I agree with and adopt the views expressed by McCauley J. in the above paragraphs.

[28] However, in paragraph 48 of her decision, Her Honour dealt with what she characterized as an interference with judicial independence argument as put forward in *Kumar* (supra). In my view, the argument in *Kumar* was described as an interference with judicial discretion rather than an inference with judicial independence.

[29] After considering all of the case law and arguments presented by both Crown and defence, I find that section 255 in conjunction with section 727 of the Criminal Code of Canada does not breach section 7 of the *Canadian Charter of Rights and Freedoms*.

SECTION 9 ANALYSIS

[30] Section 9 of the *Canadian Charter of Rights and Freedoms* states, “Everyone has the right not to be arbitrarily detained or imprisoned.”

[31] Mr. Ford on behalf of Mr. Boissoneau has argued that imprisonment as a result of a combination of a statute requiring a mandatory minimum sentence and some state action (as in this case the serving of notice to seek increased penalty) could be arbitrary. Indeed, in discussing the s. 7 issue in *Kumar* (supra), Taylor J. referred briefly to a potential s. 9 issue stating, “It seems possible also that a violation of the section 9 guarantee against “arbitrary” imprisonment is involved, but that is not before us.”

[32] Counsel agree that section 727 of the Criminal Code is a procedural safeguard for the benefit of the accused. Before the Crown would be in a position to file notice under section 727, the accused must either have entered a plea of guilt to the charge before the court or have been found guilty after trial. In addition, the Crown must be able to prove any prior convictions and must have given notice to the accused that the Crown will rely upon these convictions. The Crown’s choice not to file section 727 notice may at times result in an advantage to the accused.

[33] Scime J. in *R. v. Skedden* [2000] O.J. No. 3545 (S.C.J.) dealt with a section 9 *Charter* challenge in the context of a dangerous offender application and referred to Laforest J.’s decision in *R. v. Lyons* (1987), 37 C.C.C. (3d) 1 (S.C.C.). In dealing with the issue of Crown discretion and the dangerous offender provisions of the Code, Laforest J. said at page 36 of that decision:

... it is the absence of discretion which would, in many cases, render arbitrary the law’s application.

Laforest J. went further and quoted from Ewaschuk J. in *Re Moore v. the Queen* (1984), 10 C.C.C. (3d) 306, 6 D.L.R. (4th) 294, 45 O.R. (2d) 3 (Ont.H.C.) at p. 310 C.C.C., p. 298 D.L.R.:

... the offender cannot be heard to complain of a discretion that can only operate to the offender’s benefit.

[34] Section 255(1) describes which class of offenders is subject to increased penalty. Section 727 describes what the Crown must do before it can rely upon previous convictions.

Section 727 is for the offender's benefit. Prosecutorial discretion under section 727 gives the necessary flexibility to deal with situations such as a recidivist offender with very dated prior convictions. I find that the combination of section 255 and section 727 does not result in a breach of section 9 of the *Charter*. In addition, there has been no allegation of any inappropriate action by the Crown or that there was no basis for the Crown's decision to file notice with regard to information number 3452.

SECTION 15 ANALYSIS

[35] Section 15(1) states:

Every individual is equal before and under the law and has the right to 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.

[36] The defence in this case argues that the combination of section 255 and section 727 requiring a mandatory sentence of incarceration cannot be reconciled with section 718.2(e) and its requirements as articulated in *R. v. Gladue* [1999], 1 S.C.R. 688 (S.C.C.). Mr. Ford submits that the failure to take into account the aboriginal persons' unique and systemic background runs right to the core of human dignity. He asks this court to take judicial notice of the circumstances of aboriginal people, the fact that they are a marginalized group and that there are stereotypes, biases and racism against aboriginal people in this country. Section 15(1) he notes, requires substantive rather than merely formal inequality in order to make out an infringement of that section of the *Charter*. Thus, failure to take account of the disadvantaged position of groups in Canadian society would amount to discrimination. Under mandatory minimum provisions, aboriginal offenders will be unable to benefit from section 718.2 of the *Code* and thus section 15(1) of the *Charter* would be breached.

[37] The Crown argues that the Crown would not be seeking the mandatory minimum in this case as there are a number of aggravating factors. In the result, Ms. Peterson submits that section 718.2(e) will only be part of the analysis and the determination of a fit sentence requires a consideration of all the principles and objectives set out in Part XXIII of the *Code*. The Crown's position is that parliament implemented legislation to try to address the over-representation of aboriginal people in jails but that there are limits to this affirmative action that being mandatory minimum sentences which address the principles of denunciation and deterrence. She sees section 727 as a potential loophole for offenders avoiding the mandatory minimum and says that if mandatory minimum sentences are constitutional without filing section 727 notice then they cannot be unconstitutional because the accused receives notice.

[38] The Crown presented *viva voce* evidence from Sergeant Syrette of the Anishinabek Police Force who told of the circumstances of the Garden River First nation (the home of the accused) and the zero tolerance policy regarding drinking and driving.

[39] It is the position of the Crown that the members of the community have section 15 rights and are entitled to equal protection and benefit of the law and that the section 15 rights of a recidivist drunk driving offender cannot outweigh the section 15 rights of community members.

[40] Section 718.2(e) states:

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.

[41] In *R. v. Gladue* (supra), the Supreme Court of Canada interpreted section 718.2(e). The court noted that section 718.2(e) is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons.

[42] Iacobucci J. in *Law v. Canada*, [1999] 1 S.C.R. 497 set out guidelines to assist the court in the analysis of section 15 *Charter* issue and inquiries to be conducted.

[43] First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

[44] There is no indication before the court that the Crown's decision whether to file notice was based on one of the grounds in section 15 of the *Charter* and the defence does not allege any formal inequality. Rather, the defence position is that section 718.2(e) of the Criminal Code is designed to address substantive equality in the sentencing of Aboriginal offenders. The filing of notice under section 727 by the Crown forces the judge to incarcerate recidivist offenders. This, the defence argues, prevents the judge from considering "*all available sanctions other than imprisonment*" and prevents the judge from paying particular attention to the circumstances of aboriginal offenders.

[45] The words "*all available sanctions other than imprisonment*" are modified by the words "*that are reasonable in the circumstances*". It could be argued that non-custodial sentences would not be reasonable in the circumstances where an offence is subject to a mandatory minimum sentence. This would especially be so when it is obvious that our legislators and jurists have consistently viewed drinking/driving offences as serious offences. In addition, the courts have repeatedly held that the principles of denunciation and deterrence are most important when sentencing for this type of offence. One could also argue that the circumstances of aboriginal offenders would still be considered albeit in the context of the "inflationary floor" of the mandatory minimum sentence. My answers to the questions then are: (a) no and (b) possibly.

[46] Second, is the claimant subject to differential treatment based on one or more enumerated grounds?

[47] The claimant is an aboriginal offender. The Crown has filed notice to seek increased penalty. This will prevent the court from sentencing him to a non-custodial sentence whereas

if the Crown had not filed notice the court could consider a full range of sentencing options. When compared to an aboriginal offender found guilty of offences not subject to a mandatory minimum sentence or an aboriginal offender charged with the same offences as the accused but where the Crown did not file notice, the claimant would be subject to differential treatment. However, that differential treatment would not be based on race. It would be based in the first case on the type of offence with which the offender is charged. In the second case, it would be based on considerations the Crown had when deciding whether to file notice such as the number and date of any prior convictions. If the comparator group is non-aboriginal offenders, there is no differential treatment although it may be argued because of section 718.2(e) that there is substantive inequality because of the disadvantaged position that aboriginal offenders have had in our society. My answer to this question is again: possibly.

[48] Third, does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[49] The result of the Crown's filing of the section 727 notice is that the applicant is precluded from the benefit of a non-custodial sentence. The judge in this case would not be able to consider all available sanctions other than imprisonment. The courts have recognized that the circumstances of aboriginal offenders are unique and that a judge should consider the unique and systemic or background factors which have brought the offender before the courts as well as the sentencing options which may be appropriate for that offender, *R. v. Gladue* (supra). The aboriginal offender then has a pre-existing disadvantage and to some degree will not fully be able to take advantage of his rights under section 718.2(e). It would be argued then that the effect would be a promotion of the view that aboriginal drinking/driving recidivist offenders are less worthy of recognition or value. So, again the answer to this question is possibly.

[50] The onus on this application is on the applicant on a balance of probabilities. I find that it has not been clearly shown that there is a breach of the applicant's section 15 *Charter Rights*. However, if I am in error then I find that the breach (if any) is justified under section 1 of the *Charter* for the following reasons.

SECTION 1 ANALYSIS

[51] Section 1 of the *Canadian Charter of Rights and Freedoms* states:

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.

[52] The applicant is not challenging the constitutionality of the mandatory minimum sentencing scheme itself. Indeed, Hill J. in *R. v. Garcia* [2004], O.J. No. 1714 (S.C.J.) has thoroughly reviewed the penological goals and sentencing principles/valid alternatives with

regard to repeat drinking/driving offenders and the mandatory minimum sentencing scheme. Although he was dealing with a section 12 *Charter* argument this part of his decision would also apply to a section 15 issue. He states at paragraph 103 through 114:

¶ 103 The scourge on society of drinking/driving crimes is a notorious fact: *R. v. Bernshaw* (1995), 95 C.C.C. (3d) 193(S.C.C.) at 204-5; *R. v. Hufsky* (1988), 40 C.C.C. (3d) 398 (S.C.C.) at 408-410; *R. v. Seo* (1986), 25 C.C.C. (3d) 385 (Ont. C.A.) at 398-407.

¶ 104 While mandatory minimum terms of imprisonment may constitute a blunt sanction, and, given their "unusual" character, have been viewed "with constitutional suspicion" (*R. v. M.*(C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.) at 347), they are not per se violative of s. 12 of the Charter: *R. v. Goltz*, supra at 493; *R. v. Smith*, supra at 143; *R. v. Wust*, supra at 140; *R. v. McDonald*, supra at 84; *R. v. Tardif* (1983), 9 C.C.C. (3d) 223 (Sask. C.A.) at 223-4; *R. v. Slaney* (1985), 22 C.C.C. (3d) 240 (Nfld. C.A.) at 242. Similarly, in the United States, it has been observed that: "There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is mandatory".

¶ 105 The Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (the Archambault Report) in 1987 at page 179 observed:

In spite of the recommendations that no minima should survive the 1953-54 Code revision, a few were retained on the grounds that, "... while there may be some merit in the recommendation of the Commission, we think that because of their deterrent effect minimum penalties should not be entirely abolished". (Senate of Canada, 1952; 210).

¶ 106 Parliament selected, in its considered wisdom, to constrain the sentencing discretion of the courts in instances of repeat drinking/driving offenders. Indeed, the existence of a mandatory minimum imprisonment scheme in these circumstances has, since 1951, been an integral part of society's arsenal to combat the evil of impaired operation and control of motor vehicles.

¶ 107 As codified in s. 718.1, the fundamental principle of sentencing is proportionality - "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" - and accordingly, "Parliament has made the idea of proportionality central to the principles of sentencing": *R. v. Malmo-Levine*; *R. v. Caine*, supra at 478.

¶ 108 The mandated sentence is consistent with a number of valid penological goals and sentencing principles. In saying this, and recognizing what I consider to be a flaw in the reasoning of the trial court, s. 255(1)(a)(ii) and (iii) of the Code is, at heart, a recidivist punishment regime. Yet the trial court in *Middlebrook* and *Garcia* never mentions or otherwise appears to advert to the specific deterrence principle, and in the *Middlebrook* case, uses the denunciatory factor to favour leniency in the face of historical commitment to drinking/driving lawlessness.

¶ 109 Of the almost three dozen mandatory minimum sentences of imprisonment in the Code, the s. 255(1)(a)(ii)(iii) terms of imprisonment are not only the shortest in duration but also reside amongst a small population

of recidivist sentencing enactments (including ss. 85(3)(a)(b)(c), 92(3)(b)(c), 202(2)(b)(c), 203(e)(f)). There is no mandatory minimum sentence of imprisonment for the first offender found guilty of a drinking/driving/refuse breath test crime.

¶ 110 While punitive in nature, the sentencing approach under review is meant to protect the public. Apart from the value of generally deterrent sentences to curb drinking and driving, the primacy of denunciation, retributive justice and specific deterrence in mandatory minimum sentences in instances of repeat offenders is a reasonable response by the government. The logic of progressive punishment in instances where prior, more lenient dispositions have failed to get the offender's attention is well-recognized.

¶ 111 The "presence or absence of any one sentencing principle should never be determinative at this stage of the analysis under s. 12" and "while it may be ideal to craft a minimum sentencing regime for this crime that would simultaneously pursue all of the traditional sentencing principles, this is not necessary for s. 12 purposes" (emphasis of original): *R. v. Morrissey*, supra at 23.

¶ 112 Through a scale of escalating mandatory minimum penalties, a recidivist offender receives clear notice of the certain consequences of repeat offending and failure to reform: *Rummel v. Estelle*, 445 U.S. 263 (1990) at 278. While the Archambault Report, supra, generally disfavoured mandatory minimum punishments, at page 189, the Sentencing Commission too recognized that such penalties have the advantage of being "both certain and simple". Indeed, this was the essence of the submission of the Attorney General of Ontario himself as quoted in *R. v. Hamilton*; *R. v. Asselin*; *R. v. McCallagh* (1986), 54 C.R. (3d) 193 (Ont. C.A.) at 200: "It is my view that effective impaired driving enforcement requires a very real prospect of non-discretionary incarceration if our drinking and driving legislation is to remain effective".

¶ 113 On review of these contextual factors, borrowing the words of the court in *R. v. Latimer*, supra at 161, "although not free of debate, the sentence is not out of step with valid penological goals or sentencing principles".

¶ 114 In assessing valid alternatives to the enactment of a mandatory minimum sentence, Parliament can be taken to have considered and rejected the application of conditional imprisonment for a repeat drinking driver. Borrowing from the s. 1 Charter jurisprudence, "A limit prescribed by law should not be struck out merely because the court can conceive of an alternative which seems to it to be less restrictive": *Commonwealth of Canada v. Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.) at 463. Further, an ill offender with alcohol addiction is not necessarily subject to a mandatory minimum penalty - despite the non-proclamation in Ontario of s. 255(4) of the Code allowing a curative treatment sentencing option to the court in lieu of convicting and sentencing under s. 255(1)(a), an offender who establishes, on evidence, his or her need of curative treatment, may nevertheless be entitled to such a disposition based on an application of s. 15 of the Charter: *R. v. Hamilton*; *R. v. Asselin*; *R. v. McCullagh*, supra.

[53] The purpose of section 727 would appear to be the provision of notice to an offender prior to plea of the penalty he or she may face upon conviction. Deletion of section

727 would result in the court sentencing the mandatory minimum in every case with no opportunity for the Crown to exercise any discretion in the appropriate case. That cannot be a satisfactory result. Again, it was the Parliament of Canada's decision to implement mandatory minimum sentences.

[54] With regard to section 255, incarceration only becomes mandatory upon a second or additional conviction. Although an offender being sentenced for a first conviction does face a minimum fine, he or she could also be considered for a whole range of other sentencing options in order to address the rehabilitative aspects of sentencing.

[55] Section 718(2)(e) is only one of many factors to be considered when deciding a fit sentence. When describing mandatory minimum sentences in the context of firearms offences, Arbour J. in *R. v. Morrissey* (2000), 148 C.C.C. (3d) 1 (S.C.C.) used the term "inflationary floor". In the context of section 255, the inflationary floor would be 14 days incarceration for a second conviction and 90 days incarceration for further convictions. It will still be necessary to consider all of the sentencing principles as set out in Part XXIII of the Code to determine an appropriate sentence.

[56] Sergeant Syrette of the Anishinabek Police Force gave evidence on the hearing of this application. He is an officer assigned to the detachment of the Garden River First nation. Mr. Boissoneau is a member of the Garden River First Nation and resides in that community. Sergeant Syrette testified that drinking/driving offences are taken very seriously in the community and there is a 'zero tolerance level for those offences. Canadian courts have consistently held that denunciation and deterrence are important principles when dealing with recidivist offenders. Our legislative bodies obviously feel the same as they have instituted the mandatory minimum sentencing scheme. Aboriginal communities deserve the same level of protection as all communities in our society. Members of those communities have the right to the equal protection and equal benefit of the law pursuant to section 15 of the *Charter*.


[57] In the result I find that the combination of section 255 and 727 does not breach either section 7 or section 9 of the *Charter*. Section 15 may possibly be breached but any such breach would be saved by section 1.

CONSTITUTIONAL EXEMPTION

[58] Mr. Boissoneau is an aboriginal offender with convictions for drinking/driving offences on September 16, 1988; November 10, 1988; September 7, 1990; June 17, 1992 and November 23, 1998. The offences now before the court date from August 27, 1993 and November 14, 2003. The last three convictions under section 253 were accompanied by convictions under section 259(4). There has been a stream of convictions at regular intervals. Mr. Boissoneau has been a member of the Garden River First Nation where facilities exist to assist him. I have not been made aware whether he has made any attempts to access these facilities or services. There has been no indication of any attempts at rehabilitation. There have been no significant gaps between occurrences. The facts are serious with Mr. Boissoneau being obviously intoxicated. The readings were high. The occurrence from 1993 is now only being dealt with as he failed to attend court on that set of charges. Finally, there is no allegation of any inappropriate action or wrongdoing on the part of the Crown. Based on the evi-

dence and submissions to date there would appear to be no basis for a constitutional exemption.

Released: August 31, 2006

A handwritten signature in cursive script that reads "E. Kristine Bignell". The signature is written in black ink and is positioned above the typed name.

Signed: "Justice E. Kristine Bignell"