COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Lloyd,*

2014 BCCA 224

Date: 20140606
Docket: CA041594

Between:

Regina

Appellant

And

Joseph Ryan Lloyd

Respondent

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Groberman

On appeal from: An order of the Provincial Court of British Columbia, dated February 19, 2014 (*R. v. Lloyd*, 2014 BCPC 8 and 2014 BCPC 11, Vancouver No. 217586)

Oral Reasons for Judgment

Counsel for the Appellant:	W.P. Riley
Counsel for the Respondent:	D.N. Fai
Counsel for the Intervenor British Columbia Civil Liberties Association:	M.A. Nathanson
Counsel for the Intervenor, Pivot Legal Society:	A.I. Nathanson M. Tsurumi A.S. Smith
Place and Date of Hearing:	Vancouver, British Columbia June 5, 2014
Place and Date of Judgment:	Vancouver, British Columbia June 6, 2014

Summary:

The respondent was convicted of possession of drugs for the purpose of trafficking. He had a recent conviction for a similar offence and was subject to a minimum sentence of one year, which he argued constituted cruel and unusual punishment. The trial judge was of the view that, quite apart from the minimum sentence provision, the accused faced a one-year sentence. He found, however, that the provision was an "inflationary floor" for sentencing, and issued a declaration that it was unconstitutional. He sentenced the accused to one year imprisonment. The Crown appealed, arguing that the impugned provision was not unconstitutional, that the judge lacked jurisdiction to issue a declaration, and that a one-year sentence was not fit.

Held: Appeal allowed. The judge erred in assuming that the minimum sentence created an "inflationary floor". In this statutory scheme, the minimum sentence provision did not increase the length of sentence faced by a person in the position of the respondent. It was, therefore, unnecessary to consider the constitutional issue. Further, while the law requires a court to decline to apply a law that it finds to be of no force and effect, there is no power in the Provincial Court to issue a "declaration" striking down a law.

The sentence imposed by the trial judge failed to reflect aggravating features and was unfit. An effective sentence of 18 months should be substituted. The net sentence imposed must be adjusted to provide appropriate credit for time in custody prior to sentencing.

[1] **GROBERMAN J.A.**: Mr. Lloyd was convicted in Provincial Court on three counts of possession of drugs for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "*CDSA*"). He had completed a term of imprisonment for a similar offence only three weeks before being arrested on the charges. As a result of the prior conviction, Mr. Lloyd was subject to a minimum sentence of one year imprisonment under s. 5(3)(a)(i)(D) of the *CDSA*.

Overview

[2] At trial, Mr. Lloyd asserted that the minimum sentence provision authorized "cruel and unusual punishment", and successfully argued that it was unconstitutional. The judge issued a declaration that the minimum sentence provision is of no force and effect. In the end, however, he sentenced Mr. Lloyd to imprisonment for one year, a sentence that would not have been contrary to the impugned provision.

[3] The Crown seeks leave to appeal from sentence, contending that the judge: erred in finding the minimum sentence provision unconstitutional, acted beyond his jurisdiction in making a declaration, and ultimately imposed a sentence that was unfit.

[4] The question of whether s. 5(3)(a)(i)(D) of the *CDSA* authorizes "cruel and unusual punishment" and thereby violates s. 12 of the *Canadian Charter of Rights and Freedoms* is one that has aroused some interest. Both the B.C. Civil Liberties Association and the Pivot Legal Society have intervened on this appeal to support the judge's determination that the provision is unconstitutional.

[5] The ultimate issue on this appeal is, however, the fitness of the sentence imposed on Mr. Lloyd. At the outset of the hearing, we advised counsel of our tentative view that the impugned provision might be irrelevant to that ultimate issue. We invited submissions on the impact of s. 5(3)(a)(i)(D) on the sentencing of Mr. Lloyd. We also heard more general submissions on the fitness of the sentence imposed. Finally, at the urging of counsel, we heard submissions on the authority of the Provincial Court to issue a declaration. At the conclusion of those submissions, we advised counsel that we did not have to hear argument directed to the constitutionality of the impugned provision.

[6] For reasons that follow, I am of the view that the minimum sentence provision has no impact on Mr. Lloyd, and that it is unnecessary and unwise to address the question of its constitutionality on this appeal. I also consider that the judge erred in finding that he had jurisdiction to issue a declaration. Finally, I am persuaded that the one-year sentence imposed by the trial judge fails to reflect the aggravating factors present in this case, and is unfit. I would substitute an effective sentence of 18 months. As I will indicate, that sentence needs to be adjusted in order to fully account for the time Mr. Lloyd spent in custody prior to his sentence being imposed.

The Circumstances of the Offence

[7] Shortly after midnight on March 22, 2013, Mr. Lloyd was detained by the police for riding a bicycle on the sidewalk. Mr. Lloyd appeared to be agitated and nervous. The officers were familiar with him, and knew that he often carried knives, though they also understood that it was a condition of his probation that he not do so. They performed a pat-down search for weapons, and found a sheathed knife on Mr. Lloyd's belt.

[8] Once the police confirmed that possession of the knife violated one of Mr. Lloyd's conditions of probation, they arrested him. They performed a more thorough search, and found that Mr. Lloyd had in his possession what appeared to be drugs, $304 in cash, and a "score sheet" that recorded drug sales transactions. The drugs later proved to be crack cocaine (2.39 grams), methamphetamine (6.16 grams) and heroin (0.64 grams).

[9] Mr. Lloyd was charged with three counts of possession of a Schedule 1 drug for the purpose of trafficking – one in respect of each of the different drugs. After a one-day trial in Provincial Court, he was found guilty on all three counts.

The Circumstances of the Offender

[10] Mr. Lloyd is 25 years old. He grew up in Alberta, where he resided with his family until he was 16. He has a five-year old daughter in Alberta, with whom he has telephone contact.

[11] Mr. Lloyd has a grade 10 education, and a sporadic employment history in the construction industry. He was, at the time of the offence, involved in drug trafficking for the purpose of financing his own drug habits. He advised the sentencing judge that he trafficked in drugs four or five days a week when he was not employed in construction.

[12] Mr. Lloyd moved to Vancouver in 2011, and has amassed an extensive criminal record since that time. His record includes 21 convictions prior to the

offences giving rise to the current appeal. The record includes convictions for theft, use of counterfeit money, uttering forged documents, and possession of a stolen credit card – these appear to have been petty crimes, probably undertaken for the purpose of financing drug dependency. It also includes convictions for assault and for possession of a prohibited weapon. Mr. Lloyd has numerous convictions for breach of probation orders.

[13] Significantly for this appeal, Mr. Lloyd's record also included a previous conviction under the *CDSA*. In December, 2012, Mr. Lloyd was found in possession of 18 packages of methamphetamine (with a value of approximately $200), $548 in cash, and a small knife. He was convicted of possession of a Schedule 1 drug (methamphetamine) on February 8, 2013, and given a sentence of 27 days (in addition to the 53 days he had already spent in custody).

[14] At the sentencing hearing, Mr. Lloyd reported that he was taking steps to deal with his drug addiction including attending some programs available to him in prison. For the first time, he contacted a drug treatment facility which he hopes to attend when released from prison.

[15] The judge acknowledged Mr. Lloyd's efforts at rehabilitation as "a step in the right direction" but was not prepared to attach much weight to them in passing sentence, given that Mr. Lloyd had been convicted on three further charges of possessing drugs while he was on bail pending trial. The judge described those convictions as "a reflection on [Mr. Lloyd's] inability or unwillingness to purposely engage in his own rehabilitation and to cease his criminal behaviour."

The Sentencing Hearing

[16] Section 5(3)(a)(i)(D) of the *CDSA* was enacted by s. 39 of the *Safe Streets and Communities Act*, S.C. 2012, c. 1, and brought into force on November 6, 2012 by order in council (SI/2012-48). It provides that a person who is convicted of possession of a drug for the purpose of trafficking faces a minimum punishment of imprisonment for one year if the person has a previous conviction for a "designated

substance offence" that is less than ten years old. Mr. Lloyd's February 2013 conviction for possession of methamphetamine for the purpose of trafficking is for a "designated substance offence", so the minimum sentence provision applies to him.

[17] On his sentencing hearing, Mr. Lloyd filed a Notice of Application for a Constitutional Remedy, seeking a declaration that s. 5(3)(a)(i)(D) of the *CDSA* violates ss. 7, 9, and 12 of the *Charter*. His position on sentencing was that an appropriate sentence was 3 to 4 months imprisonment. The Crown sought a sentence of two years less one day.

[18] The judge approached sentencing by first considering what sentence would have been appropriate in the absence of the minimum sentence provision. On that issue, he concluded [unless otherwise stated, my references to the judge's reasons are to the reasons of January 24, 2014, 2014 BCPC 8]:

> [35] Without consideration of the mandatory minimum sentence required by s. 5(3)(a)(i)(D), the appropriate range of sentence for Mr. Lloyd is imprisonment for twelve to eighteen months and the appropriate sentence for him is twelve months.

[19] The judge recognized that, given that his proposed sentence complied with the requirements of s. 5(3)(a)(i)(D), there might not be a need to address the constitutionality of that provision:

> [36] Given my conclusion with respect to an appropriate sentence, it is clear that Mr. Lloyd may only benefit from a prospective finding that s. 5(3)(a)(i)(D) is unconstitutional if there is an inflationary effect on the sentence he would have otherwise received.

[20] The judge recognized that other courts have refrained from addressing the question of the constitutionality of a minimum sentence provision in cases where they have concluded that the provision would have no impact on the sentence imposed. In particular, he noted the judgment of the British Columbia Supreme Court in *R. v. Craig*, 2013 BCSC 2098 (a sexual interference case) and the judgment of the Ontario Court of Appeal in *R. v. Curry*, 2013 ONCA 420 (a firearms case). He considered the reasoning in those cases not to be "fulsome".

[21] The judge considered that the question of whether he would address the constitutionality of the impugned provision was an issue to be analysed as one of standing. He said:

> [37] In *R. v. Nur*, 2013 ONCA 677, Doherty, J.A. referenced the relevant Supreme Court of Canada jurisprudence and explained, at paragraph 110, that because of the potential inflationary effect of mandatory minimums, standing to challenge the constitutional validity of the law in question is "beyond doubt". I find his reasoning persuasive and accordingly, it is necessary to embark on a constitutional analysis.

[22] It appears that the judge's reference was to a footnote in the *Nur* decision referencing the minority concurring judgment of Arbour J. (McLachlin C.J.C. concurring) in *R. v. Morrisey*, 2000 SCC 39.

[23] Having concluded that Mr. Lloyd had standing to make his constitutional arguments, the judge embarked on an analysis of the argument under s. 12 of the *Charter*. He embarked on a two stage analysis, first considering whether the minimum sentence provision would result in a sentence for Mr. Lloyd that was disproportionate, and then turning to the question of whether the provision would result in disproportionate sentences in reasonable hypothetical situations. He concluded that the mandatory one year minimum sentence would not be grossly disproportionate for Mr. Lloyd.

[24] The judge then analysed a hypothetical scenario in which an addict with a previous conviction shared a small amount of a drug with a spouse or friend. He concluded:

> [54] … A one year jail sentence for this hypothetical offender goes well beyond what is justified by the legitimate penological goals and sentencing principles of the *CDSA*. It is a sentence which Canadians would find abhorrent or intolerable. Accordingly, I find that the mandatory minimum sentence of imprisonment for one year required by s. 5(3)(a)(i)(D) of the *CDSA* constitutes cruel and unusual punishment.
>
> [55] I have taken into account the factors which inform the gross disproportionality analysis but I have not given significant weight to the Crown submission that there are valid, effective alternatives to the mandatory minimum. Pursuant to s. 10(5) of the *CDSA,* the court is not required to impose the mandatory minimum where the offender successfully completes an approved drug treatment program. The only such program available in

> British Columbia, is the Drug Treatment Court in Vancouver. Up to this point in time, applicants must give up the right to have a trial and plead guilty. Mr. Lloyd would likely not have been eligible and he cannot be criticized for wanting a trial to test the admissibility of the evidence, particularly in circumstances where *Charter* breaches were found to have occurred. The primary consideration for admission is the fact of addiction. The program is not available to recreational drug users. Further there are qualification requirements for Drug Treatment Court which many applicants are unable to meet because of their background and in any event, the Crown has the discretion to disqualify an applicant.
>
> [56] Having agreed during the course of submissions to allow the Crown to address s.1 of the Charter, I will not now resile from that position but having now had the opportunity to review *Nur*, I find very persuasive the conclusion set out at paragraphs 179 to 181, that it is a practical certainty that a sentence which constitutes cruel and unusual punishment would ever qualify as a reasonable limit demonstrably justified in a free and democratic society.

[25] Having found a violation of s. 12 of the *Charter*, the judge went on to consider arguments under ss. 7 and 9. He found that Mr. Lloyd could not establish violations of those sections of the *Charter*.

[26] The sentencing hearing was then adjourned for a period of time to allow for further argument under s. 1 of the *Charter*. As the judge had foreshadowed in paragraph 56 of his reasons of January 24, 2014, he was not convinced that the legislation could be saved under s. 1. In his reasons indexed at 2014 BCPC 11, he observed:

> [18] Ultimately, the s. 1 analysis in this case results in the same observation made by Doherty, J. at paragraph 181 of *Nur*, that: "If an argument can be made that could justify sheltering a sentence that amounted to cruel and unusual punishment under s.1, I have not heard it".

[27] While the Crown acknowledged that the judge had authority, under s. 52 of the *Constitution Act*, 1982, to determine that s. 5(3)(a)(i)(D) violated the *Charter*, and was of no force and effect, it contended that such a finding did not vest the Provincial Court with authority to issue a declaration to that effect. The judge addressed the argument only briefly:

> [42] The reasoning of the Supreme Court of Canada in *Ferguson* [*R. v. Ferguson*, 2008 SCC 6] referred to by Doherty, J.A. [in *Nur*] can lead to no other conclusion but that even a court without inherent jurisdiction is

> competent to declare a law to be invalid and of no force and effect where the issue is raised in a proceeding over which it does have jurisdiction.

[28] The judge made such a declaration, and sentenced Mr. Lloyd to 1 year imprisonment, giving him 1 to 1 credit for time served up to the commencement of the sentencing hearing, and 1.5 to 1 credit for time served from the commencement of that hearing up to the date that the sentence was pronounced.

The Power to Grant a Declaration of Invalidity

[29] Before addressing issues of sentencing under the *CDSA*, I will address the ancillary question raised by the Crown on this appeal: Was the judge correct in finding that the Provincial Court has jurisdiction to grant a declaration that a law is without force and effect?

[30] In addressing this issue, the judge's reasons are sparse, consisting only of the reference to *Ferguson* and *Nur* that I have referred to. It is a bit difficult to understand the reasoning. Both *Nur* and *Ferguson* were cases originating in the superior courts, and neither in any way directly addressed the issue of the remedial jurisdiction of the Provincial Court. Some light is shed on the judge's reasons in comments that he made in the subsequent hearing. Referring to his earlier reasons, he said:

> That's what I said and what I was referring to from the *Nur* decision, in the words of Mr. Justice Doherty, was paragraph 77, which I did quote, and that reads:
>
> > If a minimum penalty fails either the particularized or reasonable hypothetical component of the gross disproportionality inquiry, the provision, assuming it cannot be "saved" by s. 1 of the *Charter*, will be found to violate s. 12. After some doubt, it is now established that if a mandatory minimum sentence violates s. 12, the remedy lies under s. 52 of the *Constitution Act, 1982*. The offending provision to the extent that it is inconsistent with s. 12 will be of "no force or effect" and will be struck down. A more narrow case-specific remedy in the form of a constitutional exemption applicable to the individual accused is not an available remedy.

[31] I do not see anything in this paragraph that suggests that, among the remedial powers in the arsenal of a Provincial Court judge is the ability to issue a

declaratory order. In saying this, I do not doubt that a Provincial Court judge may find an enactment to be of "no force or effect" under s. 52 of the *Charter*. If the judge makes such a finding, then the court must not give effect to the impugned provision in rendering its judgment.

[32] Counsel for Mr. Lloyd cites *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 at 315-16 for the proposition that a Provincial Court has the jurisdiction to grant declaratory relief:

> [T]he Crown argues that Big M should not have been able to bring a s. 52 application in a provincial court because it does not have prerogative powers. Even under the Crown's interpretation of "court of competent jurisdiction" the majority of the Alberta Court of Appeal held that the Provincial Court has independent jurisdiction, aside from the *Charter* in the case at bar.
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> The appellant overlooks the fact that *it has always been open to provincial courts to declare legislation invalid in criminal cases*. No one may be convicted of an offence under an invalid statute.
>
> [Emphasis added]

[33] In *Big M Drug Mart*, Dickson J. (as he then was), was addressing the question of whether a provincial court was a court capable of determining whether an enactment was of no force and effect under s. 52 of the *Constitution Act, 1982*. While he refers to "declaring" legislation invalid, I am not convinced that he was referring to a formal power to issue a declaratory judgment.

[34] That issue was considered by this Court in *Re Shewchuk and Ricard* (1986), 28 D.L.R.(4th) 429, which clarified that the word "declaration" can be used in both a strict and an extended sense. At 439-440, Macfarlane J.A. for the majority, said:

> It is clear that the power to make general declarations that enactments of Parliament or of the Legislature are invalid is a high constitutional power which flows from the inherent jurisdiction of the superior courts.
>
> But it is equally clear that if a person is before a court upon a charge, complaint, or other proceeding properly within the jurisdiction of that court then the court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force and effect by reason of the provisions of the *Canadian Charter of Rights and Freedoms*, and to dismiss the charge, complaint or proceeding. The making of a declaration that the law in question is of no force and effect, *in that context, is nothing more than a decision of a legal question properly before the court.* It does not trench upon

> the exclusive right of the superior courts to grant prerogative relief including general declarations.
>
> [Emphasis added]

[35] Professor Roach explains the situation as follows:

> A provincial criminal court has jurisdiction under s. 52 of the *Constitution Act, 1982* to determine whether the offence charged violates the Constitution. … This does not, however, mean that provincial courts can make a formal declaration that a law is of no force or effect, this being within the inherent powers of provincial superior courts.
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> Kent Roach, *Constitutional Remedies in Canada* (2nd ed.) (looseleaf) Toronto: Canada Law Book/Thomson Reuters, 2013, ¶6.460, p. 6-25

[36] A similar conclusion was reached in *R. v. Jaycox,* 2011 BCSC 662 at paras. 20-22.

[37] Quite apart from jurisdictional impediments to a Provincial Court judge granting a formal declaration, it is difficult to understand the utility of such a remedy. A judgment of the Provincial Court is not binding on other courts. Indeed, because the doctrine of comity is weaker in the Provincial Court than in the superior courts, judges in that court do not always follow the decisions of their colleagues (it is noteworthy that the judge's decision in this case that he had jurisdiction to grant a declaration was contrary to an earlier decision of that court: *R. v. Shymanski*, 2013 BCPC 130 paras. 30-35). Thus, it would seem that a "declaration" of that court would only have effect within the litigation in which it is made. In the circumstances, it strikes me as potentially misleading, and perhaps, overreaching, to describe a finding under s. 52 of the *Constitution Act, 1982* as a "declaration" except in a loose sense.

[38] Counsel for the Crown and the offender both take the position that the judge purported to make a formal declaration of invalidity, and he did not use the word "declare" in a more casual sense. Reading the judgment, I share the impression that the judge in this case did, indeed, intend to make a formal declaration that the impugned provision was of no force and effect. He had no jurisdiction to make such a declaration, and, assuming that he was right to have found the impugned provision

to be unconstitutional, ought to have confined himself to refusing to apply it in the case before him. I would set aside the declaration.

Is there a Standing Issue?

[39] I turn, then, to the issue of the sentence.

[40] As I have indicated, the judge decided that the question of whether he should consider the *Charter* arguments resolved itself into a question of standing.

[41] The Crown does not challenge the accused's standing to make the arguments, and it does not appear to me that there is any doubt on the issue. Mr. Lloyd was, at trial, seeking a sentence that would have been less than the minimum sentence mandated by s. s. 5(3)(a)(i)(D). Under the circumstances, he clearly had standing to challenge the constitutional validity of that provision.

[42] The fact that a party has standing to make a constitutional argument, however, does not compel a court to rule on that argument. There is a general (though not invariable) principle that courts avoid making constitutional pronouncements when cases can be decided on less esoteric bases. Professor Hogg puts it this way:

> A case that is properly before a court may be capable of decision on a non-constitutional ground or a constitutional ground or both. The course of judicial restraint is to decide the case on the non-constitutional ground. That way, the dispute between the litigants is resolved, but the impact of a constitutional decision on the powers of the legislative or executive branches of government is avoided. For the same reason, if a case can be decided on a narrow constitutional ground or a wide ground, the narrow ground is to be preferred. If a case can be decided on a rule of federalism or under the *Charter*, the federalism ground is the narrower one, because it leaves the other level of government free to act, whereas a *Charter* decision striking down a law does not. The general idea is that a proper deference to the other branches of government makes it wise for the courts, as far as possible, to frame their decisions in ways that do not intrude gratuitously on the powers of the other branches.
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> Peter W. Hogg, *Constitutional Law of Canada* (5th ed. supplemented) (looseleaf) Toronto: Thomson Carswell, 2007 (updated to 2013), §59.5, p. 59-22

[43] In short, while Mr. Lloyd clearly had standing to challenge the validity of s. 5(3)(a)(i)(D) of the *CDSA*, the court was not obliged to determine that issue unless that section would have an impact on the appropriate sentence for Mr. Lloyd.

[44] Mr. Lloyd contends that the court is required to determine the constitutionality of s. 5(3)(a)(i)(D), because "no one may be sentenced under an unconstitutional law". While there is some merit in that contention, I do not think that it can be said that Mr. Lloyd would be "sentenced under an unconstitutional law" unless that law in some way affects his sentence. Before embarking on the constitutional inquiry, therefore, the court should consider whether the impugned provision would have any effect on the sentence to be imposed.

[45] Before leaving this issue, I will address one more consideration. Mr. M. Nathanson has argued that even if Mr. Lloyd's sentence would not be affected by s. 5(3)(a)(i)(D), the court should still consider its constitutionality, because others whose sentences might be affected may ultimately not have the wherewithal to bring constitutional challenges to the section. He says we should proceed to hear the case for their benefit.

[46] This sort of argument is sometimes advanced in favour of free-standing challenges to legislative regimes outside of criminal prosecutions. It may have some force in that context (see, for example *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45). It is much less forceful within the context of a criminal prosecution against a person who is not affected by the impugned legislation.

[47] I would add that determining the constitutional issue in this case would be an advantage to the people Mr. Nathanson refers to only if the position that he espouses prevails. If this court were to find for the Crown on the s. 12 issue, it would mean that people who are potentially much more directly affected by the issue than is Mr. Lloyd would be effectively precluded from raising challenges to the legislation short of an appeal to the Supreme Court of Canada.

Is Mr. Lloyd Affected by the Impugned Legislation?

[48] I agree with the trial judge's assessment that, quite apart from the effect of s. 5(3)(a)(i)(D) of the *CDSA*, Mr. Lloyd would not have received a sentence of less than one year in prison. Any lower sentence would have been manifestly unfit.

[49] Counsel have argued, however, that the minimum sentence creates an "inflationary floor" that will affect the sentences not only of those who might have received sentences of less than one year had s. 5(3)(a)(i)(D) not been enacted, but also those who would have received higher sentences.

[50] The theory of an "inflationary floor" was most clearly expressed by Arbour J. (McLachlin C.J.C. concurring) in her minority concurring judgment in *Morrisey*. She said:

> [75] By fixing a minimum sentence, particularly when the minimum is still just a fraction of the maximum penalty applicable to the offence, Parliament has not repudiated completely the principle of proportionality and the requirement, expressed in s. 718.2(b), that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Therefore, in my view, the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called "best" offender whose conduct is caught by these provisions. The mandatory minimum must not become the standard sentence imposed on all but the very worst offender who has committed the offence in the very worst circumstances. The latter approach would not only defeat the intention of Parliament in enacting this particular legislation, but also offend against the general principles of sentencing designed to promote a just and fair sentencing regime and thereby advance the purposes of imposing criminal sanctions.

[51] While not fully articulated, a similar idea may have underlain the decision of the majority of Supreme Court of Canada in *R. v. Smith*, [1987] 1 S.C.R. 1045 to remit a sentence of reconsideration. At 1082 Lamer J. (as he then was) said:

> The majority of the Court of Appeal upheld the eight year sentence imposed by the trial judge. Because this is not a sentence appeal and because there was no suggestion that the sentence of eight years imposed on the appellant was cruel and unusual, I would normally dismiss this appeal. However, the Court of Appeal considered the fitness of the sentence in the context of a seven year minimum, and we cannot ascertain whether or not they were influenced by that minimum, though I am inclined to think that they were not as they held that an eight year sentence was not inappropriate. Counsel for

> the Crown, however, stated at the hearing that, were we to declare the minimum of no force or effect, the disposition preferable in his view of the appeal would be to allow the appeal and remit the matter to the Court of Appeal for a reconsideration of the sentence appeal in that court. Given this concession and my conclusion that the minimum is of no force or effect, I would so order.

[52] While the "inflationary floor" idea articulated in the concurring judgment in *Morissey* has not been endorsed by a majority of the Supreme Court of Canada, it has enjoyed some support in other courts. The judge in this case referred to a footnote in *Nur* that, in turn, referred to Arbour J.'s reasons in *Morissey*. The idea of an inflationary floor has also been given a degree of approval in *R. v. B.C.M.*, 2008 BCCA 365 at paras. 25-36 and *R. v. Guha*, 2012 BCCA 423 at paras. 32 to 35.

[53] There is, I think, a need for some caution in accepting the "inflationary floor" principle as an invariable rule of interpretation. In light of the Supreme Court of Canada's view in *R. v. L.M.*, 2008 SCC 31 that the maximum sentence is not reserved for "the worst offender and the worst offence", it may be doubted that the minimum sentence should be reserved for the "'best' offender'", as Arbour J. suggested.

[54] That said, where Parliament enacts a minimum sentence provision that dramatically increases the severity of sentences at the low end of the sentencing range, I do not doubt that it is an indication that that the offence is to be considered to be more serious than it was previously.

[55] There will, it seems to me, often be a "ripple effect" of a minimum sentence provision, such that it is not just people who are at the lowest end of the sentencing range who will be affected. *B.C.M.* and *Guha* are cases that illustrate that principle.

[56] On the other hand, where a minimum sentence provision does not serve to dramatically increase the severity of sentences that are actually handed out, I see no reason to accept that the provision will have any necessary inflationary effect on sentencing. Apart from the exceptional situation of an offender who would, but for

the minimum sentence, have received a sentence well below the normal range, the new minimum should have no effect at all.

[57] To use the analogy of a physical floor, it is true that if the level of a floor is raised dramatically, it may be necessary to alter other aspects of the edifice. On the other hand, where the floor is merely reinforced, or slightly altered, no other structural changes are necessary.

[58] In determining whether Mr. Lloyd is affected by the minimum sentence provision, then, it is necessary to analyse the case law, to determine what the range of sentence was prior to the enactment of s. 5(3)(a)(i)(D), and to determine whether the enactment has any appreciable effect on that range.

Range of Sentences for Trafficking by Offenders with a Relevant Record

[59] The judge noted the decisions of this Court in *R. v. Furey*, 2007 BCCA 395 and *R. v. Kukelka*, 2010 BCCA 180. He acknowledged that those cases – cases in which this court overturned sentences imposed by trial courts – support a range of sentence of 12 to 18 months for low-level drug dealers with relevant prior convictions who have been found guilty of trafficking (or possession for the purpose of trafficking) where they have sold drugs in order to support their own addictions.

[60] The judge indicated that, notwithstanding the range indicated by this court, Provincial Court judges in Vancouver often impose much lower sentences:

> [33] Provincial Court Judges in the City of Vancouver deal constantly with drug addicts who resort to crime to feed their addictions. I am aware of and have imposed sentences for repeat offender, addicted traffickers as low as the three to four month range submitted as appropriate for Mr. Lloyd. Those sentences are generally imposed with an awareness on all sides that the particular offenders are, for some good reason, deserving of a sentence which falls under the appropriate range. Those reasons include the health or personal circumstances of a particular offender, a desire not to negatively impact significant presentence efforts at rehabilitation and a recognition of the deleterious effects of a lengthy sentence on the dependant family of an employed offender.

[61] The judge noted two other decisions of this court – *R. v. Awasis*, 2009 BCCA 134 and *R. v. Patterson*, 2006 BCCA 201, which he described as reflecting "approval of sentences well below the range identified in *Furey* and *Kukelka*."

[62] That description is not entirely accurate. In *Awasis*, the length of sentence was not an issue on the appeal – the question was whether the judge had erred in law in making the sentence concurrent with an existing sentence. Similarly, in *Patterson*, the court was not called upon to consider the length of the sentence, but only the appropriateness of the probation conditions.

[63] As the Crown has pointed out on this appeal, this Court has, on numerous occasions, dealt with sentences for drug traffickers with relevant records whose conduct was motivated by the need to support an addiction: In addition to *Furey* and *Kukelka*, the Crown cites *R. v. Aitkens*, 2004 BCCA 411; *R. v. Kirwin* 2006 BCCA 78; *R. v. Gibbon*, 2006 BCCA 219 at para. 20; and *R. v Scheonhals*, 2008 BCCA 380. The cases are all consistent with a range of sentence of 12 to 18 months (though in *Gibbon*, counsel apparently suggested a somewhat broader range of nine months to three years).

[64] The case law supports the proposition that the minimum sentence provision did not result in any significant change to the low end of the sentencing range in this particular regime. Accordingly, this is not a situation in which the concept of an "inflationary floor" is applicable.

The Sentence Imposed

[65] The sentencing judge, in the passages I have quoted, seems to have taken the view that the ordinary sentencing range for the offence might start as low as three to four months, based on his own sentencing pattern, and on an over-reading of what was decided in *Awasis* and *Patterson*. While sentencing ranges are merely guidelines, they do suggest norms, and a misapprehension of the range can lead to an unfit sentence.

[66] In the case before us, the usual range of sentence appears to be rather narrow – a year to 18 months. The judge, taking into account that range, had to determine where the offender fit into it, or, in exceptional circumstances, why the offender fell outside of it.

[67] The judge recognized that Mr. Lloyd was not deserving of a sentence at the lowest end of the sentencing range. As the Crown points out, there were a number of aspects of this case that demanded a sentence beyond the low end of the range: (a) Mr. Lloyd possessed three different controlled substances packages for street level distribution; (b) all three substances (cocaine, heroin and methamphetamine) are dangerous, highly addictive, socially destructive drugs; (c) Mr. Lloyd committed the offences while on probation; (d) Mr. Lloyd was also in possession of a knife in a sheath, contrary to the terms of his probation; (e) Mr. Lloyd had a lengthy criminal record with 21 previous convictions, including a very recent conviction for a drug trafficking offence.

[68] The case is not one in which there were many mitigating factors that would call for a particularly light sentence – as the judge indicated, Mr. Lloyd's attempts at rehabilitation are nascent, and not entirely credible. He showed little insight into the harm that he caused others in furnishing them with drugs.

[69] In all of the circumstances, while Mr. Lloyd's situation did not call out for a sentence above the usual range, a sentence at the high end of the normal range was justified. Had the sentencing judge not misapprehended the normal range for sentences, he would not have imposed a one-year sentence.

[70] I would, in the circumstances, grant leave to appeal sentence and substitute an effective sentence of 18 months for each of the one year concurrent sentences imposed.

[71] The Crown agrees that, based on the recent decision of the Supreme Court of Canada in *R. v. Summers*, 2014 SCC 26, Mr. Lloyd should receive additional credit

for time served in pre-sentence custody. Rather than 191 days credit, he should receive 258 days credit.

[72] In the result, the sentence on each count will be an effective sentence of 18 months with a credit of 258 days. The sentences remain concurrent.

[73] **NEWBURY J.A.**: I agree.

[74] **KIRKPATRICK J.A.**: I agree.

[75] **NEWBURY J.A.**: Leave is granted. The appeal is allowed. The declaration is set aside and the sentence is increased 18 months subject to the credit for 258 days.

"The Honourable Mr. Justice Groberman"