PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Boudreau*, 2018 NSPC 19

Date: 20180419
Docket: 2990150
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Andre Lyle Boudreau

DECISION

CORRECTED DECISION: The text of the original decision has been corrected according to the attached erratum dated June 12, 2018

JUDGE: The Honourable Frank P. Hoskins

DECISION: April 19, 2018

CHARGE: That on or about the 15th day of April, 2016 at, or near Eastern Passage, did unlawfully produce Cannabis (Marihuana), a substance included in Schedule II of the *Controlled Drugs and Substances Act*, s.c. 1996, c. 19, and did thereby commit an offence contrary to section 7(1) of the said *Act*.

COUNSEL: David Schermbrucker and Christian Girouard-Leclerc, for the Crown
Donald Murray, Q.C., for the Defence

By the Court:

Introduction

[1] Mr. Boudreau pled guilty to the offence of unlawfully producing cannabis (marihuana), contrary to s. 7(1) of the *Controlled Drugs and Substances Act* ("*CDSA"*).

[2] An agreed statement of facts was proffered to the Court as Exhibit 1, which provides the factual basis for the guilty plea. It provides:

> On April 15, 2016, at 7 p.m., police executed a *Controlled Drugs and Substances Act* warrant and made entry into the accused, Andre Boudreau's, residence located at 77 Howard Avenue, in Eastern Passage. Police located Mr. Boudreau inside the residence. The garage behind the residence had a tinfoil tray with 285.7 grams of marihuana. Inside the residence, police found a three-room marihuana grow operation. The rooms were in the basement and could be accessed via a hatch hidden in the floor of one of the main floor bedrooms. The police found the following while searching the grow operation:
>
> a. Two rooms contained a total of 29 fully mature marihuana plants;
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> b. A third room contained 21 plants approximately one foot in length;
>
> c. A tinfoil tray with 49.6 grams of marihuana;
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> d. A digital scale; and,
>
> e. A grow chart.

[3] All of the seized items were in Mr. Boudreau's possession for use in the production of marihuana. The marihuana was produced by Mr. Boudreau for a dual purpose; for his personal use and for the purpose of trafficking.

[4] Mr. Boudreau was served pursuant to s. 8 of the *Controlled Drugs and Substances Act* that the Crown's intention is to prove a factor in relation to the offence that would lead the imposition of a mandatory minimum punishment of six months' imprisonment.

The Relevant Statutory Provisions

[5] Subsection 7(1) of the *CDSA* prescribes that:

> **7(1)** Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III, IV, or V.

[6] Cannabis (marihuana) is a Schedule II substance.

[7] Subsections 7(2) and (3) of the *CDSA* provide an escalating scale of mandatory minimum sentences applicable to the production of marihuana depending on the number of plants produced and, for some of the mandatory minimum sentences, the existence of enumerated aggravating factors.

[8] Subsection 7(2)(b)(i) of the *CDSA* provides:

> Every person who contravenes subsection (1)
>
> …
>
> (b) if the subject matter of the offence is cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years, and to a minimum punishment of …
>
> (i) imprisonment for a term of six months if the number of plants produced is less than 201 and more than five, and the production is for the purpose of trafficking,
> …

[9] Subsection 7(3) of the *CDSA* describes the following *factors* that *must* be taken into account in applying paragraphs (2)(a) to (b):

> (a) the person used real property that belongs to a third party in committing the offence;
>
> (b) the production constituted a potential security, health or safety hazard to persons under the age of 18 years who were in the location where the offence was committed or in the immediate area
>
> (c) the production constituted a potential public safety hazard in a residential area; or
>
> (d) the person set or placed a trap, device or other thing that is likely to cause death or bodily harm to another person in the location where the offence was committed or in the immediate area, or permitted such a trap, device or other thing to remain or be placed in that location or area.

[10] Given that the number of marihuana plants involved in this case is between six and two hundred, and the plants were possessed for the purpose of trafficking, a mandatory minimum punishment of *six months* is applicable: s.7(2)(b)(i) of the *CDSA*.

[11] In this case, the Crown did not rely on the aggravating circumstances set out in s. 7(3) of the *CDSA* as they are not applicable.

[12] It should be noted that the provision in issue was enacted as part of Bill C-10, the *Safe Streets and Communities Act*, S.C. 2012, c. 1 (*SSCA*). The *SSCA* doubled the maximum sentence for producing marihuana from 7 to 14 years and introduced the graduated scale of mandatory minimum terms of imprisonment applicable to this offence. The effect of this legislation was to eliminate the availability of *conditional sentence orders* for the offence of producing marihuana: *R. v. Elliott*, 2017 BCCA 214 at para. 17.

Section 8 of the *CDSA :* Notice to Seek Minimum Punishment

[13] Section 8 of the *CDSA* provides that the Court is not required to impose a minimum punishment *unless* it is satisfied that the offender, before entering a plea, was notified of the possible imposition of a minimum punishment for the offence in question and of the Attorney General's intention to prove any factors in relation to the offence that would lead to the imposition of a minimum punishment.

[14] As stated, Mr. Boudreau was notified before he pled guilty to the offence of the possibility of a minimum punishment of six months' imprisonment.

The Jurisdiction of the Provincial Court

[15] The Provincial Court is not empowered to make a formal declaration that a law is of no force and effect under s. 52(1) of the *Constitution Act*, 1982; only superior court judges of inherent jurisdiction and courts with statutory authority possess this power: *R. v. Lloyd*, 2016 SCC 13, at para. 15. However, the Provincial Court does have the authority to consider the constitutionality of laws. As observed in *Lloyd*, at para. 19:

> [19] The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.

[16] Thus, this Court has the authority or power to consider the constitutional validity of s.7(2)(b)(i) of the *CDSA.*

The Constitutionality of the Mandatory Minimum Sentence: s. 7(2)(b)(i)

[17] The *Canadian Charter of Rights and Freedoms* (*Charter*), being Part 1 of *The Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c.11, provides under the heading "Legal Right" that:

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

That right is subject to s. 1 of the *Charter*, which 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.

Notice of Constitutional Issue

[18] A *Notice of Constitutional Question* was submitted by Mr. Boudreau. Mr. Boudreau challenges the mandatory minimum punishment pursuant to s. 7(2)(b)(i) of the *CDSA.* Because the Attorney General of Canada is a party to these proceedings through the Public Prosecution Service Canada, formal notice of Mr. Boudreau's request to contest the validity or applicability of a law is not required to be served on the Provincial Attorney General: *Constitutional Questions Act,* R.S.N.S. 1989, c. 89, s. 10(2). Notice in a format similar to what is required by the *Nova Scotia Civil Procedure Rule* 31.19(4) has been provided to the Public Prosecution Service Canada, and is part of the record in these proceedings. Notice of the constitutional issue was given on May 9, 2017.

[19] The Crown has reserved the right to call evidence and/or make submissions on the effect of s. 1 of the *Charter* in the event that a finding of a s.12 *Charter* violation is made.

The Constitutional Question:

This case raises the following constitutional issue:

(a) Does s. 7(2)(b)(i) of the *CDSA* contravene s. 12 of the *Charter*?

The Test for Infringement of S. 12

[20] The principles governing a s. 12 *Charter* challenge to legislation are now well-established. Those principles were comprehensively restated by the Supreme Court of Canada in *R. v. Nur*, 2015 SCC 15, and *R. v. Lloyd,* 2016 SCC 13.

[21] The Supreme Court has set a "high bar" for finding that a sentence represents a *cruel and unusual punishment* under s. 12 of the *Charter*: *Nur* at para. 39. Indeed, establishing that a sentencing provision constitutes cruel and unusual punishment requires a *Charter* applicant to demonstrate that the sentence - in this case, the mandatory minimum six month term of imprisonment - is "grossly disproportionate" to the appropriate punishment. To be "grossly disproportionate" a sentence must be more than merely excessive. It must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society: *R. v. Smith*, [1987] 1 S.C.R. 1045 at p. 1072. The wider the range of conduct and circumstances captured by the mandatory minimum sentence, the more likely it is that the mandatory minimum sentence will apply to offenders for whom the sentence would be grossly disproportionate: *Lloyd* at para. 24.

[22] The analytical framework to determine whether a sentence constitutes a "cruel and unusual" punishment under s. 12 of the *Charter* was clearly set out in *Nur* and in *Lloyd*. A sentence will infringe s. 12 if it is "grossly disproportionate" to the appropriate punishment, having regard to the nature of the offence and the circumstances of the offender: *Lloyd* at para. 22; *Nur* at para. 39; *Smith* at p. 1073. A law will violate s. 12 if it imposes a grossly disproportionate sentence on the particular accused, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others: *Lloyd* at para. 23; *Nur* at para. 77.

[23] The Supreme Court has acknowledged that mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing because they focus on denunciation and deterrence at the expense of more personalized factors: *Nur* at para. 44. This result may leave courts unable to craft appropriate sentences for offenders at the lower end of the sentencing range. Where a minimum sentence provision captures conduct that is less blameworthy, it becomes constitutionality vulnerable: *Lloyd* at para. 27. Deterrence to others cannot justify a grossly disproportionate sentence: *Nur* at para. 45.

[24] It should also be noted that the deferential standard embedded in the analysis under s. 12 recognizes that, in fixing the punishment for particular offences, Parliament has the power to make policy choices with respect to the imposition of punishment for criminal conduct and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society: *Lloyd* at para. 45. In *Lloyd* at para. 45, the majority cited with approval the following passage from *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.) at p. 238:

> [24] It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.

[25] The importance of restraint in assessing constitutionally was confirmed by the Supreme Court of Canada in *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385 at para. 90, where Corey, J. cautioned:

> [90] It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the Charter. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the Charter.

[26] As pointed out in *Nur* at para. 77, when a mandatory minimum sentence provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If it does not, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others. Thus, a challenge to a mandatory minimum sentencing provision under s. 12 of the *Charter* involves a two-stage analysis: *Lloyd* at para. 23; *Nur* at para. 46.

The First Stage of the Analysis

[27] The court must determine what constitutes a *proportionate sentence* for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. In other words, the court must view the provision from the perspective of the circumstances surrounding the offence and offender; sometimes referred to as a *particularized inquiry*. In doing so, the court must balance the gravity of the offence, the particular circumstances of the offence, and the personal characteristics of the offender. As stated in *Smith* at para. 56:

> [56] In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would

> have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. …

[28] The Ontario Court of Appeal in *R. v. Nur*, 2013 ONCA 677, aff'd 2015 SCC 15, identified a number of factors that may inform the analysis of whether a mandatory minimum sentence is grossly disproportionate. Doherty, J.A. at para. 78 wrote:

> [78] A number of factors may inform the gross disproportionality analysis, both as it applies to the particular accused and to reasonable hypotheticals: see *Smith*, at p. 1073; *Goltz*, at paras. 25-27; and *Morrisey*, at paras. 27-28. The factors identified in the case law are:
>
> (a) the gravity of the offence;
>
> (b) the personal characteristics of the offender;
>
> (c) the particular circumstances of the case;
>
> (d) the actual effect of the punishment on the individual;
>
> (e) the penological goals and sentencing principles reflected in the challenged minimum;
>
> (f) the existence of valid effective alternatives to the mandatory minimum, and
>
> (g) a comparison of punishments imposed for other similar crimes.

[29] Doherty J.A. recognized that there is no formula to be applied in weighing and assessing these various factors: *Nur* at par. 79.

[30] At this stage of the inquiry, the Court must consider the effect of the sentence, which includes its nature and conditions under which it is applied.

[31] The Court need not fix the sentence or sentencing range at a specific point; rather, the Court should consider the "rough scale" of the appropriate sentence. The Court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances: *Lloyd*, at para. 23; *Smith*, at p. 1073; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 498; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at paras. 26-29; *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 337-38.

[32] The Supreme Court of Canada has referred to proportionality as the relationship between the sentence to be imposed and the sentence that is fit and proportionate: See e.g. *Nur*, at para. 46; *Smith*, at pp. 1072-73. Simply, the question is this: In view of the fit and proportionate sentence, is the mandatory

minimum sentence grossly disproportionate to the offence and its circumstances? If so, the provision violates s. 12 of the *Charter: Lloyd*, at para. 23.

[33] If the Court concludes that the challenged provision provides for and would actually impose on the offender a sanction so excessive or grossly disproportionate as to outrage decency in those real and particular circumstances, then it will amount to a *prima facie* violation of s. 12 and will be examined for justifiability under s. 1 of the *Charter*.

[34] If the particular facts of the case do not warrant a finding of gross disproportionately, the Court must move to the second stage of the analysis.

The Second Stage of the Analysis

[35] At the second stage of the analysis, the Court must consider whether the impugned provision would impose a grossly disproportionate punishment in *reasonably hypothetical* circumstances, as opposed to far-fetched or marginally imaginable cases. *Goltz* at para. 42.

[36] With respect to the test of reasonable foreseeability, it is not confined to situations that are likely to arise in the day-to-day application of the law. It includes consideration of hypothetical circumstances that are foreseeably captured by the least morally culpable conduct caught by the provision: *Nur* at para. 68.

[37] The second stage of the analysis necessarily engages an interpretive inquiry into the scope of the law in question. In order to determine the reasonably foreseeable impact of a law, it is necessary to first understand the law's reach: *Nur* at para. 61.

[38] The conduct imagined in the hypothetical must bring into play the sentencing provision in issue. If it does not, the hypothetical is irrelevant and must be disregarded. This approach is consistent with the principle that the focus of the inquiry is on the reasonably foreseeable impact of the precise provision being challenged: *Goltz* at para. 76-77.

[39] In positing hypothetical applications of the law, only situations that are "remote" or "far-fetched" are excluded from the analysis: *Nur* at para. 61.

[40] It is permissible to take account of the personal circumstances of hypothetical offenders at the second stage of the analysis with the *caveat* that particularization of a hypothetical cannot be used to construct the most innocent

and sympathetic case imaginable; the inquiry must be grounded in common sense and experience: *Nur* at para. 75.

[41] Mandatory minimum sentences for offences that can be committed in many ways by offenders who are not similarly situated and whose conduct spans a wide spectrum of moral culpability are constitutionally vulnerable. This occurs because they will almost inevitably catch reasonable hypotheticals where the prescribed mandatory minimum would require the imposition of an unconstitutional sentence: *Nur* at para. 46; *Lloyd* at para. 3.

[42] Thus, the wider the range of conduct and circumstances captured by the mandatory minimum sentence, the more likely it is that the minimum will extend to offenders for whom the sentence would be grossly disproportionate: *Lloyd* at para. 24.

The Sentence Range Appropriate for Mr. Boudreau and the Offence

[43] The task of a sentencing judge is the same in every case. In *R. v. Wust*, 2000 SCC 18, Arbour J. aptly summarized the directions a sentencing judge must follow in fashioning a fit and proportionate sentence at para. 23:

> [23] … In deciding on the appropriate sentence, the court is directed by Part XXIII of the *Code* to consider various purposes and principles of sentencing, such as denunciation, general and specific deterrence, public safety, rehabilitation, restoration, proportionality, disparity, totality and restraint, and to take into account both aggravating and mitigating factors. The case law provides additional guidelines, often in illustrating what an appropriate range of sentence might be in the circumstances of a particular case.

[44] In assessing the issue of what is a fit and proportionate sentence for this offence and Mr. Boudreau, I have carefully considered and reflected on the following: the circumstances surrounding the commission of the offence and the offender, Mr. Boudreau, the relevant statutory provisions, including s. 10 of the *CDSA* and s. 718 of the *Criminal Code*; the case law regarding sentences for production in Schedule II offences; the Pre-Sentence Report ("PSR") dated September 12, 2017, and the submissions of counsel.

Circumstances Surrounding the Commission of the Offence

[45] As previously stated, the circumstances surrounding the offence are not in dispute.

[46] Mr. Boudreau operated a three-room marihuana grow operation in his basement. The access to these rooms was hidden via a floor hatch. The grow operation had marihuana plants in two different stages of growth and utilized fans and light-bulbs. While not a professional setup, it was more sophisticated than an amateurish attempt to grow a few marihuana plants in a single room. Mr. Boudreau had 29 fully mature plants split in two grow rooms with a further 21 plants approximately one foot in height in a third room. He also was in possession of 335. 3 grams of marihuana bud split in two foil trays (one tray of 287.7 g in his garage).

Aggravating and Mitigating Factors: s. 718. 2(a) of the *Criminal Code*

[47] In any sentencing case, the Court imposing the sentence must assess the seriousness of the offence in light of the aggravating and mitigating circumstances of both the offence and the offender. The assessment will largely determine which objectives the sentence should reflect and assist the sentencing judge in determining, from an examination of the case law, the general range of sentence that has been imposed in such cases. Once that range is found, the sentencing judge, guided by principles of proportionality, totality, disparity and restraint, will assist in arriving at the appropriate actual sentence.

[48] Notwithstanding all of these factors, there cannot be one fit sentence that applies to all persons who engage in the production of marihuana. There is a necessary element of fluidity in the sentencing calculus. Nonetheless, it is possible to state general ranges of sentences for this type of offence based on a similar combination of factors: *R. v. Koenders*, 2007 BCCA 378 at para. 17.

The Aggravating Circumstances Surrounding the Offence

[49] There are no aggravating factors as contemplated under ss. 7 and 10 of the *CDSA*, nor are there any overt aggravating factors, such as, the presence of firearms or weapons, or the selling for profit. Nor was Mr. Boudreau preying upon the vulnerabilities of others.

[50] The inherent nature of this offence, however, is aggravating because it requires a degree of planning and forethought. Based on the undisputed facts Mr. Boudreau made a conscious and deliberate choice to engage in the production of marihuana for a dual purpose: personal use and for purposes of trafficking. The trafficking involved is this case is the re-distribution of marihuana to friends. Although there is no suggestion in this case that Mr. Boudreau's grow operation

was a commercial operation, he was nonetheless in possession of the illicit substances for the purpose of providing it to others.

[51] Again, it should be noted that none of the aggravating factors set out in s. 7(3) of the *CDSA* and/or s. 10(2) of the *CDSA* are applicable to the sentencing of Mr. Boudreau, including such things as excessive use of electricity, the presence of firearms and/or weapons, and using the services of a person under the age of 18 to commit the offence.

Mitigating Factors Surrounding the Offence and Mr. Boudreau

[52] Mr. Boudreau has pleaded guilty and has accepted responsibility for the offence, thereby saving substantial resources to the justice system. He has also expressed genuine remorse.

[53] There is no commercial aspect to this case. He was operating a residential marihuana operation consisting of approximately 29 fully mature marihuana plants, and 21 plants approximately one foot in height. Mr. Boudreau was cultivating the marihuana for personal use and for the purpose of re-distributing it to friends. Thus, his level of *moral blameworthiness* is not as high as it would be for a trafficker producing and selling marihuana for profit and preying upon the vulnerabilities of others. Therefore, it should be stressed that it is a mitigating factor that Mr. Boudreau's home grow operation did not involve any commercial features and that he was accommodating his friends; consensual users. Indeed, the Crown conceded that there was no indication of any paraphernalia that might suggest that his home grow operation was an active commercial operation. The Crown also accepted that he was re-distributing to his friends.

[54] The PSR is positive, as it suggests that Mr. Boudreau has learned his lesson. He stressed to the author of the report that he accepts full responsibility for the offence. He rationalized the offence by stating that it was to save money for personal use. He also stated that he was remorseful for his behaviour . He stated, "I learned my lesson, it is stressful".

[55] While Mr. Boudreau is not a first offender, this offence is his first *CDSA* conviction. He has three dated and unrelated previous convictions. They are offences, for assault, uttering threats, and failing to comply with a recognizance. He was sentenced on October 6, 2009, approximately nine years ago. He received a fine for breaching s. 145(5.1) of the *Criminal Code,* and a suspended sentence with probation for 12 months for breaching ss. 266 and 264.1(1)(a) of the *Criminal*

Code. He successfully completed his sentence. Given that Mr. Boudreau's previous convictions are dated and unrelated, the gap principle should be applied: *R. v. Bernard*, 2011 NSCA 53 at para.42.

[56] Mr. Boudreau is 32 years of age, and is gainfully employed and owns his home.

[57] According to the PSR, Mr. Boudreau has had the benefit of a good upbringing. He lived in the family home in Eastern Passage until the age of 18 and began working as a floor installer.

[58] Mr. Boudreau has never been married. He has no dependents. He is currently in a relationship with Ms. Crane that has lasted for approximately 12 months. Mr. Boudreau informed the author of the PSR that he and Ms. Crane get along well.

[59] According to the PSR, Mr. Boudreau left high school when in was in grade 11 to enter the work force. He became a skilled cabinet installer and honed other carpentry skills.

[60] Mr. Boudreau is currently employed at Millwright Woodworking as a cabinet installer. He has been working there for approximately seven months. The author of the PSR noted that Mr. Boudreau had been employed with Rodney Enterprise for six years prior to his employment with Millwright Woodworking.

[61] The author of the PSR noted that Mr. Boudreau does not suffer from any physical ailments or mental health conditions. He is not under the care of a physician nor is he required to take any prescription medication. However, the author of the report noted that Mr. Boudreau consumes marihuana three times per day to manage his arthritis symptoms. Mr. Boudreau informed the author of the PSR that he had approval to use marihuana for medicinal purposes.

[62] According to the PSR, Mr. Boudreau has successfully completed counselling for domestic violence.

[63] He is not presently involved in any organized community activity or groups. He does not participate in any extra-curricular activity other than spending his free time building cabinets and other wood products.

[64] Mr. Boudreau has been characterized, by a friend, as a good person with an exemplary work ethic. Mr. Boudreau's friend, Mr. Carew, was surprise to learn about the charge against Mr. Boudreau.

[65] The author of the PSR completed his report by noting that Mr. Boudreau was polite and cooperative during the interview process in preparation for the PSR.

[66] The author of the report noted that Mr. Boudreau may benefit from reporting to a probation officer, as directed. The author, a Probation Officer, also added that Mr. Boudreau may also benefit from the condition to maintain employment and upgrade his education as required and the condition to attend treatment and programs as directed.

The Applicable Legislation and Common Law

[67] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M.* (C.A.) (1996), 105 C.C.C. (3d) 327 and Parliament has enacted legislation which specifically sets out the purpose and principles of sentencing. Thus, it is to these sources, and the common-law jurisprudence that courts must turn in determining the proper sentence to impose.

[68] The Court aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Sentencing is not based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings. Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[69] Although the sentencing process is highly contextual and necessarily an individualized process, the judge must also take into account the nature of the offence, the victims, and the community. As Lamer C.J. (as he then was) noted in *M.* (C.A.), sentencing requires an individualized focus not only on the offender, but also on the victim and community.

[70] As mentioned, the sentencing of drug offenders is governed by the specific sentencing principles enunciated in the *CDSA* in conjunction with the more general principles of sentencing provided for in s. 718 of the *Criminal Code*.

[71] The fundamental purpose to be pursued in sentencing drug offenders is to contribute to respect for the law and the maintenance of a just, peaceful and safe

society, taking into account the rehabilitation and, where appropriate, the treatment of offenders, and acknowledging the harm done to victims and the community.

[72] In addition to complying with these principles of sentencing, dispositions or sentences must promote one or more of the six objectives identified in s. 718(a) to (f), inclusive.

[73] The purpose of sentencing is achieved by blending the various objectives identified in s. 718(a) to (f). The proper blending of these objectives depends on the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective, or combination of objectives, deserves priority. Section 718.1 directs that the sentence imposed must fit the offence and offender. Section 718.1 is the codification of the fundamental principle of sentencing which is the principle of proportionality. This principle is deeply rooted in notions of fairness and justice.

[74] In addition to the specific sentencing principles articulated in s. 10(1) of the *CDSA*, s. 10(2) of the *CDSA* identifies a number of aggravating factors that must be considered by the Court when sentencing drug offenders. None of these factors are applicable to the case at bar.

[75] I am also mindful of the principle of *restraint* that underlies the provisions of s. 718 of the *Code*.

[76] Before I address the constitutional question raised in this case, I will first determine what would be a proportionate sentence for Mr. Boudreau and this offence, absent the mandatory minimum sentence pursuant to s. 7 (1)(b)(i) of the *CDSA.*

Positions of the Parties: Without the Mandatory Minimum

Position of the Crown

[77] The Crown submits that the appropriate sentence for Mr. Boudreau, without the mandatory minimum sentence of six months under s. 7(1)(b)(i) of the *CDSA*, would be in the range of a conditional discharge to an intermittent sentence of 60 to 90 days' imprisonment. The Crown stressed that a custodial sentence in this range is warranted because of the existence of the element of re-distribution, which is an aggravating feature. While the Crown acknowledges that Mr. Boudreau was

not operating a commercial grow operation, it contends that he was still in possession of the illicit substances for the purpose of trafficking: he was re-distributing to others.

[78] The Crown contends that production of drugs for the purpose of trafficking is a more serious offence than possession of drugs for the purpose of trafficking and is thus deserving of a more serious sanction. Moreover, the Crown asserts that Mr. Boudreau is not simply one among many other "middlemen" that generally exist between the producer of a drug and its ultimate user. He is one who "creates" the supply of the drug Parliament has sought to control. In support of this proposition, the Crown relies on the comments by the Court in *R. v. MacDonald,* 2013 NSSC 255, at paras. 14, where Justice Scaravelli observed:

> [14] Absent unusual circumstances sentences imposed even for first offenders usually result in conventional jail sentence or conditional sentence orders which, as indicated is no longer available.

[79] In that case, the accused, Mr. MacDonald, was in possession of 46 cannabis marihuana plants. Interestingly, the Crown and Defence, in that case, agreed that the appropriate range for the offence and Mr. MacDonald was somewhere between a 30-day period of incarceration to a fine with probation.

[80] Mr. MacDonald was 25 years old and afflicted with Crohn's disease. He had no criminal record and was extensively involved in community volunteer work. He entered an early guilty plea. He was a caretaker of the grow operation rather than a principle, and had participated in the offence to pay for a double mastectomy as part of his transitioning to the male gender from the female gender. He fully cooperated with the police and immediately disclosed the name of the grow operation's true owner, who was subsequently charged. In those circumstances, Justice Scaravelli imposed a $1,000 fine, coupled with probation for 12 months, as a fit and proportionate sentence.

Position of the Defence

[81] The Defence contends that, prior to the enactment of the six-month mandatory minimum sentence, the fit and proportionate sentence for the offence and Mr. Boudreau would range between a conditional sentence and an intermittent sentence of 60 days. The Defence recognizes that a conditional sentence is not available under s. 742.1(c) of the *Criminal Code,* which provides that an offence under s. 7(1)(b) of the *CDSA,* prosecuted by indictment, imposes a maximum sentence of 14 years' imprisonment.

[82] The Defence argues that the case law suggests a wide range of sentences that could be imposed for this offence and Mr. Boudreau. The Defence submits that prior to the time when the mandatory sentences were required, small marihuana grow operation offenders were penalized within a range that went from:

- a conditional discharge after 18 months: *R. v. Riley*, 2011 NSCA 52;

- a fine and a single day in jail: *R. v. Simpson*, 2008 NSSC 57;

- a fine and probation: *R. v. Baillie*, 2016 NSPC 11; and

- a 60-day sentence with 12 months' probation: *R. v. MacDonald*, 2016 NSPC 27

[83] The Defence also contends that in *commercial grow operations* sentences range from a 14-month community based sentence: *R. v. Frenette*, 1997 NSCA 92, to a sentence of 18 months in custody: *R. v. Shacklock*, 2000 NSCA 120.

[84] The Defence further submits that cases at the higher end of the range tend to have commercial features which demonstrate a continuing or regular and substantial contribution to the accused's household income - if there is a household.

[85] The Defence contends, in its written brief, that "a review of the cases would suggest that the usual range of penalty for cultivating fewer than 60 productive cannabis plants would range between a conditional discharge and 60 days' imprisonment," as a fit and proportionate sentence for the offence and Mr. Boudreau.

[86] In this case, the Defence argues that a fine in the amount of $1,000 would be a fit and proportionate punishment for Mr. Boudreau, as it would strike a just proportion between the circumstances surrounding the offence and offender.

The Wide Range of Sentence for the Offence of Production of Marihuana Without the Mandatory Minimum Sentences

[87] While sentencing ranges are important because they encourage greater consistency between sentences and respect for the principle of *parity*, they are only guidelines: *R. v. Nasogaluak*, 2010 SCC 6 at para. 44.

[88] In *R. v. A.N.*, 2011 NSCA 21 at para. 34, Justice Farrar makes this important point in these terms:

> [34] Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: [Authorities omitted]. The range moves sympathetically with the circumstances, and is proportionate to the *Code*'s sentencing principles that include fundamentally the offence's gravity and the offender's culpability. ...

[89] As counsel have acknowledged, there is a wide range of sentences for the offence of production of marihuana for the purpose of trafficking, contrary to s. 7(2)(b)(i) of the *CDSA.* Indeed, a review of the cases suggest that deterrence and denunciation may reasonably involve a custodial disposition when crafting sentences for offences related to *commercial production* of marihuana: *Shacklock.*

[90] I agree with counsel that a review of the cases in Nova Scotia suggests that the usual range of punishment for cultivating a home-grown operation with fewer than 60 productive cannabis plants would range between a *conditional discharge* and an *intermittent sentence* of imprisonment. Cases at the lower end of the range tend to have the following mitigating factors present:

- the offenders have no criminal record, or their record consist of unrelated and dated convictions: *Simpson* & *Baillie*;
- the offender has pled guilty and accepted full responsibility for the offence;
- the offender has expressed genuine remorse;
- the offender was engaged in the production of marihuana for only personal use, or for altruistic reasons, not for profit;
- the grow operation is not very sophisticated and has no features of commercial use and are home grown;
- there is no evidence of trafficking for the purpose of profit;
- there are no firearms or weapons involved; and
- none of the statutory aggravating factors in sub-s. 7(3) and s. 10 of the *CDSA* are present.

[91] At the higher end of the sentence range, residential grow operations tend to be more sophisticated and have obvious commercial features which demonstrate a continuing or regular and substantial contribution to the accused's household income.

[92] It stands to reason that sentences for *commercial production* will be more severe than those for non-commercial production. The reasons for this distinction were aptly described by Lamer C.J.C. (as he then was) in *R. v. Person*, [1992] 3 S.C.R. 665 at para. 61:

> [61] The unique characteristics of the offences subject to s. 515(6)(d) suggest that those offences are committed in a very different context than most other crimes. Most offences are not committed systematically. By contrast, trafficking in narcotics occurs systematically, usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail. …

[93] For the same reasons, there must be an emphasis on the principles of denunciation and deterrence in offences related to *commercial production* of marihuana. The person who becomes involved in the commercial production of marihuana, solely for profit, makes a deliberate decision to engage in a criminal enterprise.

[94] I should add that I am mindful that unlike most other offences, the production of marihuana imports a significant amount of planning, deliberation and organization.

Nova Scotia Cases

[95] Obviously, when applying the principle of parity pursuant to s. 718.2(b) of the *Criminal Code*, sentences imposed for other similar offences in the same jurisdiction are of significance in determining a fit and proportionate sentence for an offender.

[96] In this case, I have considered the Nova Scotia cases, including the cases referenced earlier in these reasons. I am mindful that no two cases are alike, as the circumstances surrounding the offence and/or offender are often distinguishable. For example, the *Riley* case is similar to this case except to the extent that Mr.

Riley was a first-time offender, and was not in possession for the purpose of trafficking. He was growing for only personal use, as he was suffering from chronic pain from an accident and used the marihuana as pain medication. His grow operation was characterized as small and unconnected to any commerce in the drug.

[97] Although Mr. Boudreau is not a first offender, his record is dated and unrelated. And like Mr. Riley, Mr. Boudreau's grow operation was unconnected to any commerce related to the drug. There are no commercial features. He did, however, re-distribute the illicit substance to friends, which imports the element of trafficking.

[98] The *Simpson* case is also distinguishable. In that case, Mr. Simpson's motivation was purely altruistic. He wanted to help others. He grew the marihuana for medicinal purposes. Justice Cacchione considered the circumstances surrounding the offence and Mr. Simpson as not only unique, but exceptional. Having concluded that the principles of specific and general deterrence were not applicable, he imposed a one day in jail, considered time served, coupled with a $2,000 fine.

[99] Mr. Simpson was a 58-year-old man with a prior criminal record that was dated and unrelated. He was convicted by a jury for charges of possession for the purpose of trafficking, and cultivation of 1100 plants. As in this case, there was no evidence any of the aggravating factors set out in s. 10(2) of the *CDSA*. Mr. Simpson was, however, an unrepentant producer and advocate of the marihuana oil which he provided to other individuals to assist with their various medical ailments. He promoted his activities at various public meetings and achieved a degree of notoriety in his community for his beliefs about the medicinal effects of his oil.

[100] The Crown conceded that there was no evidence that this enterprise was a commercial grow operation for profit and that Mr. Simpson should be treated by the Court as effectively a first offender. Nonetheless, the Crown sought a penitentiary sentence because of Mr. Simpson's lack of remorse and his refusal to acknowledge that his behaviour was criminal or to desist from the behaviour. For reasons of specific and general deterrence and denunciation of the conduct, the Crown maintained that a sentence of at least two years was required.

[101] The Defence sought a discharge, citing the range of sentences for these types of offences, the fact that this was not a commercial operation, the fact that this

gentleman was otherwise a productive citizen and neighbor, and the fact that his motives were altruistic.

[102] Justice Cacchione described this case as one of the most difficult he had encountered in his years on the bench. He noted that Mr. Simpson had resiled from his initial position that he would not abide by any decision of the Court. He also noted that in addition to Mr. Simpson's altruistic and compassionate motives, there had also been an attempt to engage in a battle of wills with the legal community over a law which he perceived to be wrong.

[103] Justice Cacchione declined to impose a discharge, indicating that Mr. Simpson had previously had the benefit of not being charged on an earlier occasion in which his crops had been seized by police. To impose a discharge on Mr. Simpson would be sending a message to the accused and to the community that would be detrimental to the rule of law. This would be the message that if you do not like the law, you can ignore it and there will be no consequences. Nonetheless, Justice Cacchione did not impose a jail sentence on Mr. Simpson, but instead sentenced him to one day in jail and a fine of $2,000.

[104] In this case, Mr. Boudreau's marihuana was being produced for a "dual purpose, for his own use and for the purpose of trafficking": Exhibit 1 (Sentencing Facts).

[105] In *Baillie*, Judge Atwood considered and applied Justice Cacchione's approach in *Simpson,* and thus, on the basis of the parity principle imposed a similar sentence on Mr. Baillie. He sentenced Mr. Baillie to one day in jail, considered time served, coupled with a $2,000 fine. In reaching that decision, Judge Atwood considered Mr. Baillie's sincere expression of remorse, which included his full acceptance of responsibility for having committed the offence. Judge Atwood also found that Mr. Baillie's degree of moral blameworthiness was diminished because of his history of drug dependency. Judge Atwood concluded that the offence fell at the lower end of the range as the case was not a large-scale for profit operation.

[106] Unlike in these aforementioned cases, Mr. Boudreau was not only growing marihuana for his own purposes, but he was providing to friends, which imports the element of trafficking.

Other Jurisdictions: Without the Mandatory Minimum

[107] The following cases from other jurisdictions demonstrate that the range of sentences for the offence of production of marihuana absent the mandatory minimum varies. The following cases are not meant to represent an exhaustive review of the case law, but they are, instead, a sample of similar cases in which non-custodial sentences have been imposed.

British Columbia

[108] The British Columbia Court of Appeal's observations in *R. v. Koenders*, 2007 BCCA 378 at paras. 21-22, are apposite:

> [22] Obviously, there are cases that are not driven solely by commercial benefits. Purely non-commercial marihuana grow operations are generally regarded as being the least serious manifestations of the offence of production. **Production solely for personal use or solely for the medical use of others will often attract a non-custodial sentence.** Thus, as the level of commerciality increases, so does the seriousness of the offence.

[Emphasis added]

[109] In *R. v. Lieph*, 1989 CarswellBC 1255 (CA) , the British Columbia Court of Appeal declined to interfere with two six month *conditional discharges* granted to an individual with no record who had pled guilty to possession and cultivation of 74 marihuana plants on the basis that he required the marihuana oil that he produced from the plants to alleviate the symptoms of severe psoriasis that had developed in the many areas of his body which were burned in a serious explosion.

Manitoba

[110] In *R. v. Young*, 2008 MBPC 50 (Man. PC), the accused was 54 years old. He pled guilty to the production of marihuana. Mr. Young and his wife were arrested as they pulled up to a residence situated on an acreage where a grow operation was discovered.

[111] Mr. Young's daughter and her boyfriend were found inside the home, and she was also arrested. The grow operation, located in outbuildings on the property, involved between 80 and 90 plants and various growing equipment. As a result of Mr. Young's plea arrangement, the charges against his wife and daughter were dropped.

[112] Mr. Young was an immigrant from Trinidad with no record and had been married for 22 years and employed for 20 years. He had been on and off disability for the last four years as a result of an on-the-job injury.

[113] He had been prescribed medicine for his pain from the injury, but testified as a proponent of natural remedies, and thus, began to use marihuana to control his pain.

[114] The Crown conceded Mr. Young had a chronic pain condition and that there was no evidence the operation was a commercial one. It expressed concern the plants were not concealed from Mr. Young's daughter.

[115] The Defence urged the Court to consider the fact Mr. Young was not a citizen and could be subject to deportation depending on his sentence. It sought a conditional discharge, while the Crown sought a nine-month conditional sentence or a fine.

[116] A sentence of less than two years would leave Mr. Young with a right to appeal from any deportation order. The Court granted Mr. Young a two-year conditional discharge. The fact Mr. Young grew the marihuana for pain relief, not profit, was a mitigating factor. The difference between a conditional sentence and a conditional discharge was likely to be whether or not Mr. Young was subject to deportation proceedings. There was no doubt Mr. Young was a person of good character given his lack of a prior record. Therefore, deterrence and rehabilitation were not relevant considerations.

Ontario

[117] In *R. v. Morris,* [2016] O.J. No. 3175 (S.C.), the accused pleaded guilty to cultivating marihuana. The accused was charged with possession of 29 marihuana plants. The search revealed 29 marihuana plants growing in a cordoned-off section of one of the bedrooms of Mr. Morris' home. Mr. Morris' 13-year-old daughter also resided in the home with him. He claimed that he raised the plants for his personal use, and sold off small surplus quantities to his friends, - a kind of "social trafficking". Mr. Morris, 43 at the time of the offence, had a generally positive pre-sentence report and had no previous criminal record. He was employed by himself in his own janitorial company. He had been co-operative with police.

[118] Although the Crown had withdrawn its notice that it would seek the minimum sentence, it sought a sentence of six months' imprisonment, claiming as

aggravating factors the residence of his 13-year-old daughter in his home. Mr. Morris argued that incarceration was not warranted. Mr. Morris was a first offender, and sole supporter of his daughter. The Defence argued that he had already paid a heavy price for committing the offence. The CAS was initially involved with his daughter, he lost his employment when his employer learned of the offence, and he later lost his home due to financial pressures brought about by a period of unemployment. Since his loss of employment, he had established his own janitorial business where he works seven days a week to try to make ends meet for himself and his daughter. He no longer uses alcohol or marihuana, as evidenced by the drug testing he has voluntarily undergone over the previous months. He was cooperative with the police, and his inculpatory statement to the police elevated this charge to one of trafficking. He was growing marihuana, at least in part, for self-medication purposes due to chronic pain.

[119] The Court imposed a suspended sentence with probation for 18 months. In reaching this decision, Justice Mulligan noted that Mr. Morris is a first-time offender who expressed remorse and entered a plea of guilty and had taken positive steps towards his own rehabilitation over the last three years since being charged with this offence.

[120] It would appear that the circumstances surrounding the offence and offender in *Morris* are similar to the circumstances of the case at bar, except for the following:

- Mr. Morris was a first offender;
- His grow operation was not as large as Mr. Boudreau's grow operation;
- Mr. Morris was in possession of only 29 marihuana plants; and
- Mr. Morris lost his employment and home as a consequence of the offence.

Quebec

[121] In *R. v. Galipeau*, 2008 QCCQ 10167 (C.Q), the accused, aged 61, was found guilty of production of cannabis and possession of cannabis for the purpose of trafficking. He allowed a woman who lived on his premises to produce cannabis. The plants were discovered by firefighters who put out a fire in the home. Mr. Galipeau did not derive any benefit from the marihuana production or

trafficking, other than the women's company. The amount was found to be minimal and Mr. Galipeau did not participate for financial reasons. He did not have a related record. The vourt imposed a suspended sentence with three years' probation and ordered Mr. Galipeau to perform 100 hours of community work for each offence. Mr. Galipeau was also ordered to make a $500 donation to a designated charity.

New Brunswick

[122] The Crown, in this case, also submitted in its written brief two New Brunswick cases for consideration, which were of limited assistance because they were not production cases.

[123] Both cases involved trafficking marihuana and have marginal value for the purpose of this case, as they are clearly distinguishable. In *R. v. Collier,* 2006 NBCA 92, the accused pled guilty to two separate indictable offences of trafficking marihuana. The Court of Appeal overturned the imposition of a conditional discharge and varied the sentences to consecutive terms of imprisonment of two months to be served in the community under the terms of a conditional sentence order. In doing so, the Court noted that Mr. Collier committed the offences on two separate occasions, and he required specific deterrence. The Court also stressed the importance of emphasizing the principles of denunciation and deterrence in trafficking in drug cases, which generally requires imprisonment.

[124] In the second case, *R. v. Frost*, 2012 NBCA 94, the New Brunswick Court of Appeal allowed the appeal, and varied the conditional sentences to concurrent terms of four months' imprisonment. In that case, Mr. Frost pled guilty to two separate indictable charges of possession for the purpose of trafficking, one indictable charge of having in his possession proceeds of property of a value exceeding five thousand dollars, knowing that the proceeds of property were obtained by the commission of an offence, and unlawful possession of a controlled substance. Mr. Frost was a first offender and a fourth-year university student with a good academic record. The Court of Appeal stressed that it was important to note that the offences occurred on a university campus, and that Mr. Frost had been trafficking drugs to university students for approximately two years. The Court of Appeal commented that:

> [20] Those convicted of possession for the purpose of trafficking or trafficking so called 'soft drugs' should, where the quantity of drugs is significant, where there is evidence of long term criminal activity, or where there is evidence of

> significant profit, face incarceration absent exceptional circumstances". … *Frost* at para. 20.

The Appropriate Sentence for the Offence and Mr. Boudreau Without the Mandatory Minimum Sentence of Six Months

[125] Having carefully considered the thoughtful and able submissions of counsel, the cases submitted by counsel and others, as well as all of the circumstances surrounding the offence and offender, Mr. Boudreau, and the purpose and principles of sentencing set out in ss. 718, and 718.1 of the *Criminal Code*, including s. 781.2 which requires me to consider the principle of *restraint* and which requires me to further consider that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders.

[126] Thus, I am required to consider alternatives to imprisonment and impose an alternative if it is *reasonable in* all the circumstances. The circumstances would include the circumstances surrounding the offence and Mr. Boudreau, as well as the statutory and common law principles of sentencing.

[127] In this case, given the nature of the offence, denunciation and deterrence must be considered; however, they are considered in light of the diminished degree of Mr. Boudreau's moral blameworthiness.

[128] I am satisfied that Mr. Boudreau has learned his lesson, and thus, specific deterrence does not appear to be an issue. This offence is also his first drug conviction.

[129] I am of the view that without the mandatory minimum sentence, a fit and proportionate sentence for the offence and Mr. Boudreau would be a fine, in the range of $3,000 to $ 5,000 coupled with a 12-month period of probation, rather than a custodial sentence.

[130] I am satisfied that in this specific case the imposition of a fine, coupled with probation, can contribute to denunciation and deterrence: See *R. v. George* (1992), 112 N.S.R. (2d) 183 (C.A.). Further, In *R. v. Martin* 1996, 154 N.S.R. (2d) 268, the Nova Scotia Court of Appeal recognized that probation with conditions is a form of deterrence.

[131] A substantial fine coupled with probation is warranted in this case to reflect the additional aggravating factor that Mr. Boudreau was engaged in the production of marihuana for the purpose of trafficking.

[132] In the *Simpson* and *Baillie* cases, the offenders were only engaged in the production for altruistic reasons and/or personal use; not to re-distribute to friends. Mr. Boudreau possessed the marihuana for a dual purpose. Moreover, Mr. Boudreau's grow operation was slightly more sophisticated. Thus, a more severe sentence is warranted in this case because of these additional aggravating factors, which require more emphasis on the principles of denunciation and deterrence to commensurate with the circumstances surrounding the offence and Mr. Boudreau.

[133] Let me be clear, I have reached this decision by applying the parity principle in s. 718. 2(b) of the *Criminal Code*, which states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

The First Stage of the Inquiry: *The Particularized Inquiry*

[134] At the first stage of the analysis, the question is whether a six-month sentence of imprisonment is *grossly disproportionate* for this offence and Mr. Boudreau. The burden is on Mr. Boudreau to demonstrate that the mandatory minimum sentence of six months is *grossly disproportionate* in his case, and therefore, violates s. 12 of the *Charter*. This means that the sentence must be "so excessive as to outrage standards of decency": *Lloyd* at para. 24.

[135] It is the position of the Defence that Mr. Boudreau's moral blameworthiness is low and that in all of the circumstances of the offence, a six-month mandatory minimum sentence is grossly disproportionate in light of the circumstances surrounding the offence and Mr. Boudreau.

[136] The Crown takes the position that, given the broad range of sentences, for the offence, which includes an intermittent custodial sentence, the six-month mandatory minimum sentence is *not* grossly disproportionate. It is not so excessive as to outrage standards of decency, nor is it abhorrent or intolerable to society.

[137] As previously mentioned, the factors that inform the gross disproportionality analysis include:

(a) the gravity of the offence;

(b) the personal characteristics of the offender;

(c) the particular circumstances of the case;

(d) the actual effect of the punishment on the individual;

(e) the penological goals and sentencing principles reflected in the challenged minimum;

(f) the existence of valid effective alternatives to the mandatory minimum; and

(g) a comparison of punishments imposed for other similar crimes.

[138] These factors must be carefully examined and weighed against each other. They are guidelines which, although not determinative in themselves, help to assess whether the punishment is grossly disproportionate: *Goltz* at para. 29.

[139] Obviously, some of these factors have already been carefully considered and weighed in reaching a fit and proportionate sentence for the offence and Mr. Boudreau. In an effort not to be redundant, I will attempt to be economical in my examination of each factor in the context of assessing whether the six-month mandatory minimum sentence is grossly disproportionate for the specific circumstances of Mr. Boudreau and the offence.

(A) The Gravity of the Offence

[140] The gravity of the offence, as explained in *R. v. Hamilton*, 2004 O.J. No. 3252 (Ont. C.A.) at para. 90 refers to:

> [90] … the seriousness of the offence in a generic sense as reflected by the potential penalty imposed by Parliament and any specific features of the commission of the crime which may tend to increase or decrease the harm or risk of harm to the community occasioned by the offence . …

[141] In terms of gravity of the offence, the unauthorized production of marihuana attracts a maximum sentence of 14 years' imprisonment. Subsections 7(2) and (3) of the *CDSA* provide an escalating scale of mandatory minimum sentences applicable to the production of marihuana depending on the number of plants produced and, for some of the mandatory minimum sentences, the existence of enumerated aggravating factors. Again, the Crown did not rely in this case on s. 7(2)(b)(ii) or the aggravating circumstances set out in s. 7(3). Thus, there is no evidence of specific harms or risks associated with the particular property in question.

[142] The case law seems to suggest that in some circumstances there are generally harms and risks associated with grow operations and particularly in relation to commercial marihuana operations. The Crown conceded in this case that Mr. Boudreau's grow operation had no commercial features involved in the operation, and the Crown did not proffer any evidence concerning risks and/or harm to the community associated with Mr. Boudreau's grow operation.

[143] In my view, this case is at the low end of the range of sentence because of the circumstances surrounding the offence and Mr. Boudreau, as discussed earlier in these reasons.

[144] While the principles of denunciation and deterrence are paramount considerations in these types of offences, the degree of emphasis to be placed on them must commensurate with the specific circumstances of the case and unique attributes of the individual offender.

[145] In this case, as discussed earlier, Mr. Boudreau operated a relatively small grow operation in his home for his own personal use and for the purpose of accommodating friends. Thus, in my view, his degree of moral blameworthiness is much lower than an offender engaged in a commercial grow operation designed to profit off the vulnerabilities of others such as someone using their grow operation as a criminal enterprise.

(B) The Personal Characteristics of the Offender

[146] The personal characteristics of the offender, Mr. Boudreau, have been discussed earlier in these reasons. It is important to stress, again, that Mr. Boudreau has a dated and unrelated criminal record, and has never received a custodial sentence. He is gainfully employed as a carpenter. He seems genuinely remorseful for having committed the offence. He has endured the stress associated with having to wait for the outcome of his case for an inordinate amount of time. He has felt the effect of public shame for being convicted of the offence. Thus, an emphasis on specific deterrence is not necessary in this case.

(C) The Particular Circumstances of the Case

[147] As previously discussed, Mr. Boudreau operated a home grow operation in the basement of his house that consisted of less than 60 marihuana plants. There is

no evidence that the operation involved a hydro bypass or the theft of power. He had a dual purpose for growing the marihuana: he grew it for his personal use and to provide it to his friends. The re-distribution to friends constitutes trafficking and therefore he was in possession of the illicit substance for the purpose of trafficking, which is an aggravating factor. He was not, however, selling the illicit substance to vulnerable persons or customers for pure greed or profit; he was only accommodating friends. There is no suggestion that Mr. Boudreau was aware that his product was used for resale on the black market.

[148] While I am aware that courts have recognized that commercial grow operations can have a negative impact on neighbourhoods, attract organized criminal activity, and violent crimes, there is no such concerns raised in the case at bar.

(D) The Actual Effect of the Punishment on Mr. Boudreau

[149] It is well-established that mandatory minimum sentences for offences that can be committed in many ways by offenders who are similarly situated and whose conduct spans a wide spectrum of moral culpability are constitutionally vulnerable. The Defence argues this is so because they will almost inevitably catch individuals like Mr. Boudreau, where the prescribed mandatory minimum requires the imposition of a grossly disproportionate sentence. In this case, rather than the imposition of a fine coupled with a period of probation, the law mandates a custodial sentence of six months which would have a serious detrimental effect on Mr. Boudreau since he would lose his liberty for a significant period of time.

[150] In this case, the mandatory minimum sentence imposes a six-month term of imprisonment on an individual with diminished moral blameworthiness and who poses little or no danger to the public.

[151] I am mindful that determining whether a sentence has crossed the threshold from merely excessive to grossly disproportionate is more than a simple exercise in comparing the number of months an offender would receive prior to and after the enactment of the minimum sentencing regime. The Crown ably argued this point.

[152] As acknowledged earlier in these reasons, Parliament has the right to "raise the floor". However, a six-month mandatory sentence for Mr. Boudreau, in the Defence's view, is grossly disproportionate to the offence, even taking into the account the penological goals of Parliament and the moral gravity of using and sharing illicit substances. Since trafficking includes giving, even without

commercial profit, as in this case, the addition of the requirement that the Crown prove trafficking before triggering the mandatory minimum does not, in my view, sufficiently restrict the type of offender and offence falling within the reach of s. 7(2)(b)(i) of the *CDSA*.

[153] The effect of the mandatory minimum in this case is to incarcerate for six months a small-time offender for whom such a sentence is grossly disproportionate. The constitutional vulnerability of s. 7(2)(b)(i), in part, arises because of the failure to draw a distinction between those who produce marihuana and sell significant quantities of marihuana for commercial profit and those who produce small amounts to give to friends in need, as in this case. As stated by Justice Quinlan, in *R. v. Boulton*, 2016 ONSC 2979 at para. 30:

> [30] S. 7(2)(b)(i) "casts its net" too broadly: it applies, as in *Lloyd*, "irrespective of the reason for [trafficking] and regardless of the intent to make a profit" (para. 30). The provision applies to persons producing for the purpose of trafficking any number of plants from six to 200. The provision catches not only those involved in serious instances of production for the purpose of trafficking--the legislation's "proper aim"-- but also "conduct that is much less blameworthy" (para. 27). These features of the provision make it applicable in a large number of situations in which the offenders' blameworthiness varies greatly.

[154] As Chief Justice McLachlin (as she was then), in *Lloyd*, at paras. 27-32 explained:

> [27] The problem with the mandatory minimum sentence provision in this case is that it 'casts its net over a wide range of potential conduct": *Nur*, at para. 82. As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. This renders it constitutionally vulnerable.
>
> [28] Three features of the law make it applicable in a large number of situations, varying greatly in an offender's blameworthiness.
>
> [29] First, it applies to any amount of Schedule I substances. As such, it applies indiscriminately to professional drug dealers who sell dangerous substances for profit and to drug addicts who possess small quantities of drugs that they intend to share with a friend, a spouse, or other addicts.
>
> [30] Second, the definition of "traffic" in the *CDSA* captures a very broad range of conduct. It targets not only people selling drugs, but all who "administer, give, transfer, transport, send or deliver the substance" (s. 2(1)), irrespective of the reason for doing so and regardless of the intent to make a profit. As such, it would catch someone who gives a small amount of a drug to a friend, or someone who is only trafficking to support his own habit.

> [31] Third, the minimum sentence applies when there is a prior conviction for any "designated substance offence" within the previous 10 years, which captures any of the offences in ss. 4 to 10 of the *CDSA*, except the offence of simple possession. In addition, the prior conviction can be for any substance, in any amount – even, for example, a small amount of marihuana.
>
> [32] At one end of the range of conduct caught by the mandatory minimum sentence provision stands a professional drug dealer who engages in the business of dangerous drugs for profit, who is in possession of a large amount of Schedule I substances, and who has been convicted many times for similar offences. At the other end of the range stands the addict who is charged for sharing a small amount of a Schedule I drug with a friend or spouse, and finds herself sentenced to a year in prison because of a single conviction for sharing marihuana in a social occasion nine years before. I agree with the provincial court judge that most Canadians would be shocked to find that such a person could be sent to prison for one year.

[155] Let me be clear, in cases involving a relatively sophisticated commercial grow operation where the offender is engaged in a criminal enterprise for profit, a substantial custodial sentence would be clearly warranted, such as in the *Shacklock* case.

(E) The Penological Goals and Sentencing Principles Reflected in the Challenged Minimum

[156] I must consider the penological goals of sentencing principles reflected in the challenged sentence. In *Nur*, McLachlin's, C.J.'s observations are apposite. At paras. 43-45, she wrote:

> [43] … imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 80. "Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533, per Wilson J.). As LeBel J. explained in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433:
>
> > Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system ... Second, the principle of proportionality ensures that a sentence does not exceed what is

> appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. [para. 37]
>
> [44] Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.
>
> [45] General deterrence – using sentencing to send a message to discourage others from offending – is relevant. But it cannot, without more, sanitize a sentence against gross disproportionality: "General deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual" (*R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 45, per Gonthier J.). Put simply, a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending.

[157] It would appear from a review of the jurisprudence that Parliament's intention when enacting the amendments to the *CDSA* was motivated by the significant increase in grow operations, particularly in British Columbia: See *R. v. McGee* 2017 BCCA 457. The mandatory minimum sentence in s. 7(2)(b)(i), as well as those in related provisions, reflect a choice by Parliament to prioritize the objectives of denunciation and deterrence when sentencing offenders for production offences involving trafficking in the illicit substances. Indeed, the courts in this province have consistently held that the principles of denunciation and deterrence are paramount in cases concerning commercial production of marihuana: see *Shacklock.*

[158] The stated goals and principles are consistent with general principles contained in both s. 10 of the *CDSA* and ss. 718 and 718.1 of the *Criminal Code*. Further, as stressed earlier in these reasons, it is within the scope of Parliament's ability to choose to focus on the principles of denunciation and deterrence, and I must give deference to that decision: *Goltz* at para. 32.

[159] As observed by Gonthier J., in *Goltz,* at paras. 35-36:

> [35] The deference to legislated sentences signalled by these passages is especially comprehensible when one considers the broad and varied purposes of penal sanctions. In Lyons, supra, La Forest J. articulated the [page 503] common view that while sentences are partly punitive in nature, they are mainly imposed for the protection of the public. This view accords with the purpose of the criminal law in general and of sentencing in particular. He stated, at p. 329:
>
> > In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender.
>
> [36] This acknowledgement that sanctions serve numerous purposes underscores the legitimacy of a legislative concern that sentences be geared in significant part to the continued welfare of the public through deterrent and protective aspects of a punishment. This perspective is explicitly affirmed in *R. v. Luxton, supra*, per Lamer C.J., at p. 721. Thus, while the multiple factors which constitute the Smith test are aimed primarily at ensuring that individuals not be subjected to grossly disproportionate punishment, it is also supported by a concern to uphold other legitimate values which justify penal sanctions. These values unavoidably play a role in the balancing of elements in a s. 12 analysis.

[160] Let me add that I am mindful that the enactment of the minimum sentences in s. 7(2) of the *CDSA* represents a particularized focus on the principles of denunciation and deterrence as the paramount consideration, which can also justify higher sentence than may have been imposed before the enactment of the mandatory minimum sentence scheme in s. 7(2) of the *CDSA.*

[161] Parliament created the sliding scale of penalties increasing in severity based on the magnitude of the illegal production. As stated, Parliament's sentencing polices are entitled to deference *unless* shown to produce sentences that are so grossly disproportionate as to offend standards of decency.

(F) The Existence of Valid Effective Alternatives to the Mandatory Minimum

[162] Mr. Murray, counsel for Mr. Boudreau, submitted that the existence of a valid effective alternative to the mandatory minimum is not available to Mr. Boudreau. I am loath to address it; other than to state that in s. 10(4) of the *CDSA* states that a Court sentencing a person who is convicted of an offence under this Part may delay sentencing to enable the offender (a) to participate in a drug treatment court program approved by the Attorney General; or (b) to attend a treatment program under subsection 720(2) of the *Criminal Code*. Subsection 10(5) of the *CDSA* states, that if the offender successfully completes a program

under subsection (4), a drug treatment court program, the Court is not required to impose the minimum punishment for the offence for which the person is convicted.

(G) A Comparison of Punishments Imposed for Other Similar Offences

[163] The aforementioned cases from Nova Scotia and other jurisdictions represent a comparison of punishments imposed for other similar offences without the mandatory minimum sentence. What these cases have in common is the diminished degree of moral blameworthiness for each offender. In other words, the sentences imposed are similar because they are all proportionate to the circumstances surrounding the offence and offender, including the offender's degree of culpability.

[164] It should be noted that sentences imposed for other or similar offences in the same jurisdiction may be considered in determining whether a sentence constitutes cruel and unusual punishment against the specific offender being sentenced: *R. v. Tran (Trung),* 2017 ONSC 651 at para. 38.

[165] As discussed earlier in these reasons, absent the mandatory minimum sentence, the appropriate range for this offence is very wide: it ranges from a conditional discharge to an intermittent period of custody.

[166] In my view, for all the foregoing reasons, I have concluded that that the appropriate sentence for the offence and Mr. Boudreau is a substantial fine coupled with a period of probation. This sentence does, in my opinion, commensurate with the purpose and principles of sentencing in s. 718 of the *Criminal Code*, including the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1. This sentence also includes consideration and application of the parity principle in s. 718.2(b) of the *Criminal Code.*

[167] This sentence is a more severe than the sentences in *Riley*, *Simpson,* and *Baillie,* for the reasons earlier discussed in this decision.

Conclusion

[168] In conclusion, for all the foregoing reasons, I find that a mandatory minimum sentence of six months' imprisonment pursuant to s. 7(2)(b)(i) of the *CDSA* is *grossly disproportionate* to the punishment that is appropriate in this case,

which is a fine in the range of $3,000 to $5,000, coupled with a 12-month period of probation.

[169] I find that a mandatory six-month loss of *liberty* would be grossly disproportionate to the offence and its circumstances. Indeed, the challenged provision, s. 7(2)(b)(i) of the *CDSA*, would impose on Mr. Boudreau a sanction so excessive or grossly disproportionate that it would, in my view, outrage standards of decency to the point of being abhorrent or intolerable.

[170] The outrage would be grounded in the authorities requiring the imprisonment of a non-violent, cannabis accommodator, with a low degree of moral blameworthiness, who was not preying upon the vulnerabilities of others, but rather producing an amount for personal use and for re-distribution to friends.

[171] Again, in view of what is a fit and proportionate sentence for the offence and Mr. Boudreau, which is a fine coupled with probation, the mandatory minimum sentence of six months is grossly disproportionate to the circumstances surrounding the offence and offender, Mr. Boudreau.

[172] In the result, I find that s. 7(2)(b)(i) of the *CDSA* violates s. 12 of the *Charter*.

[173] Given my finding, I need not proceed to the second stage of the analysis, which focuses on the reasonable hypothetical.

[174] However, the Crown requested an opportunity to make submissions in relation to s.1 of the *Charter*. After granting the Crown their adjournment request in order to consider whether it was going to make an application pursuant to s. 1 of the *Charter*, the Crown decided it would not. Accordingly, the sentencing continued with submissions in relation to the appropriate disposition for the offence and Mr. Boudreau.

[175] After hearing evidence from Mr. Boudreau regarding his financial ability to pay a fine, and submissions of counsel, the Court imposes a fine in the amount of $3,000 coupled with a period of probation for 12 months.

[176] The Court also imposes the following ancillary orders:

- The mandatory *Firearm Prohibition Order*, for 10 years, pursuant to s. 109 of the *Criminal Code*; and

- An Order of Forfeiture pursuant to s. 16 of the Controlled Drugs and Substances Act.

Frank P. Hoskins, J.P.C.

PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Boudreau*, 2018 NSPC 19

Date: 20180419
Docket: 2990150
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Andre Lyle Boudreau

ERRATUM

JUDGE: The Honourable Frank P. Hoskins

DECISION: April 19, 2018

CHARGE: That on or about the 15th day of April, 2016 at, or near Eastern Passage, did unlawfully produce Cannabis (Marihuana), a substance included in Schedule II of the *Controlled Drugs and Substances Act*, s.c. 1996, c. 19, and did thereby commit an offence contrary to section 7(1) of the said *Act*.

COUNSEL: Peter Dostal, for the Crown
Jonathan Hughes, for the Defence

Erratum Date: June 12, 2018

Counsel for the Crown should read David Schermbrucker and Christian Girouard-Leclerc

Counsel for the Defence should read Donald Murray, Q.C.