Citation: ☼ Date: ☼

File No: 217586

Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(Criminal Division)

REGINA

v.

JOSEPH RYAN LLOYD

RULING ON APPLICATION
OF THE
HONOURABLE JUDGE J. F. GALATI

Counsel for the Crown:	P. Riley and K. Torvik
Counsel for the Defendant:	D. Fai
Place of Hearing:	Vancouver, B.C.
Dates of Hearing:	Dec. 11, 31; 2013
Date of Judgment:	January 24, 2014

INTRODUCTION

[1] On September 10, 2013, I convicted Mr. Lloyd on three counts of possession for the purpose of trafficking with respect to 2.39 grams of crack cocaine, 6.16 grams of methamphetamine and 0.64 grams of heroin found in possession on March 22, 2013. He was also in possession of $304 cash and what was referred to as a "score sheet", namely a page in a notebook with names and numbers, likely reflecting sales of drugs and amounts paid or owing.

[2] Sentencing was adjourned to allow Mr. Lloyd sufficient time to provide notice of a constitutional challenge to the validity of s. 5(3)(a)(i)(D) of the ***Controlled Drugs and Substances Act ("CDSA")***.

[3] As it pertains to the circumstances of this case, that section of the ***CDSA*** provides that anyone convicted of a trafficking offence involving a Schedule 1 substance, who has been convicted of or served a term of imprisonment for a designated drug offence in the preceding ten years, is liable to a maximum sentence of imprisonment for life and a minimum sentence of one year in jail.

[4] Mr. Lloyd has recently been convicted of a designated drug offence and accordingly, pursuant to s. 5(3)(a)(i)(D), he is subject to that mandatory minimum sentence.

[5] He has filed and served a Notice of Application For Constitutional Remedy seeking a declaration pursuant to s. 24(1) of the ***Charter of Rights and Freedoms*** (the "***Charter***") that s. 5(3)(a)(i)(D) is unconstitutional and of no force and effect on the basis that it violates ss. 7, 9 and 12 of the ***Charter***. The jurisprudence makes it clear that with

respect to challenges which invoke a violation of s.12, the remedy is properly sought pursuant to s.52(1) of the, ***Constitution Act*** *1982.* No submissions were made in this regard and I have considered the application as though it were properly framed.

[6] The Public Prosecution Service of Canada (the "Crown") has responded to this application, submitting it should be dismissed on the basis that s. 5(3)(a)(i)(D) does not infringe any ***Charter*** rights, but that if an infringement is found, the Crown should be granted an opportunity to address whether the infringement can be justified as a reasonable limit prescribed by law under s.1 of the ***Charter.***

[7] The Crown also takes the position that if an infringement is found, this court does not have jurisdiction to grant the declaratory relief sought as it is not a court of inherent jurisdiction and may only grant a remedy to Mr. Lloyd. It was not specified what that remedy might be but in the context of a sentence proceeding, I have assumed the remedy would be a sentence less than the mandatory minimum, as sought by Mr. Lloyd or failing that, a sentence less than that sought by the Crown.

[8] The constitutional application proceeded simultaneously with submissions on sentence. Both parties have filed materials and provided case authorities in support of their respective positions. In addition, Mr. Lloyd has testified on his own behalf, primarily with respect to his personal circumstances and his involvement in trafficking drugs.

[9] With respect to sentence, the Crown acknowledges that concurrent sentences are appropriate and seeks a sentence of imprisonment for two years less one day. Mr. Lloyd submits that an appropriate sentence is imprisonment for three to four months.

The parties are agreed that Mr. Lloyd should receive credit on a one for one basis for the period of time he has spent in custody since October 2, 2013.

[10] In the course of submissions I was referred to ***R. v. Curry*** 2013 ONCA 420 where the trial judge determined a sentence greater than the mandatory minimum was in any event appropriate and declined to consider a constitutional challenge of the applicable sentencing provision. The Ontario Court of Appeal agreed with this procedure on the basis that the constitutionality of the sentencing provision was, at that point, irrelevant. A similar procedure was followed in ***R. v. Craig*** 2013 BCSC 2098. In neither case were fulsome reasons provided for not adhering to what has come to be referred to as the two stage inquiry developed and refined in several Supreme Court of Canada decisions regarding challenges to mandatory minimum sentences alleged to amount to cruel and unusual punishment, contrary to s.12 of the ***Charter***.

[11] I have come to the conclusion that this issue is one of standing which I will address further, together with the issue of my jurisdiction, following my finding with respect to an appropriate sentence for Mr. Lloyd without reference to s. 5(3)(a)(i)(D).

CIRCUMSTANCES OF THE OFFENCE

[12] At approximately 12:37 a.m. on March 22, 2013, Mr. Lloyd was detained by two police officers for riding a bicycle on a sidewalk in the 500 block of Seymour Street, in Vancouver.

[13] Both officers were familiar with Mr. Lloyd and were aware that he was known to carry knives. Upon his detention, Mr. Lloyd appeared to the officers to be somewhat agitated and nervous. Having safety concerns, the officers performed a pat down

search for weapons, which produced a knife in a sheath on Mr. Lloyd's belt. That was removed and one of the officers asked Mr. Lloyd if he was still bound by a probation condition not to possess knives. When Mr. Lloyd replied in the affirmative, he was arrested for breach of probation. Once the existence of the probation condition was confirmed through a police data base, Mr. Lloyd was provided with his s.10 ***Charter*** rights and was thereafter subjected to a more thorough search incident to the arrest which produced the drugs, cash and score sheet.

[14] Although I found that the police conduct after the knife was found resulted in ***Charter*** breaches, I held the evidence obtained was admissible.

CIRCUMSTANCES OF THE OFFENDER

[15] Mr. Lloyd is twenty-five years old. He is originally from Alberta, where he resided with his family until he was sixteen years old. He has only a grade ten education and has sporadically worked in construction. He has a five year old daughter in Alberta with whom he has contact by telephone.

[16] Mr. Lloyd came to Vancouver in 2011. Although he had committed some minor criminal offences in Alberta, the bulk of his criminal offending has taken place here.

[17] He has a total of twenty one prior convictions, including numerous breaches of court orders, several fraud or forgery related offences, thefts, assault and possession of a prohibited weapon.

[18] Most significantly, he has a recent prior conviction for possession of a controlled substance for the purpose of trafficking, relating to having been found in possession of

eighteen packages of methamphetamine, as well as $548 cash and a small folding knife. That offence occurred on December 18, 2012, and the conviction was entered on February 3, 2013. He received an effective sentence of eighty days in jail, which after credit of fifty three days for time in custody, resulted in a net sentence of twenty seven days.

[19] Mr. Lloyd would have been released from custody approximately one month before he committed the offences at bar and during that period he was bound by an earlier probation order.

[20] Mr. Lloyd also committed five further offences after he was released on bail for the offences at bar. Those convictions are for breach of probation, three counts of possession of a controlled substance and resisting arrest and they resulted in short custodial sentences.

[21] Mr. Lloyd testified that he is addicted to all three of the drugs he possessed on March 22, 2013, and that he was selling those drugs to obtain drugs for his own use. He said he had been involved in trafficking drugs up to four or five days some weeks and less often when he had part time work in construction. Mr. Lloyd testified that most of the time, including the offences at bar, he was paid in drugs. He acknowledged the probation condition with respect to not possessing knives but denied that the knife on his belt was for protection while selling drugs, indicating it was for use when he had work.

[22] Mr. Lloyd further testified that while he has been in custody, since May 2013, he has taken steps to get help with his drug addiction. He has, for the first time, contacted

a recovery facility he hopes to attend on his release and he has taken the limited programs currently available to him. He acknowledged that the drugs he trafficked in the downtown east side of Vancouver are dangerous and addictive and that until recently he had not given any thought to the effect of those drugs on the persons who purchased them.

APPROPRIATE RANGE OF SENTENCE

[23] I have reviewed all of the numerous cases provided by the Crown with respect to the appropriate range of sentence but have found most of them to be of limited assistance for the oft repeated reason that sentencing is an individual exercise that is not readily amenable to comparisons with other cases. I find it necessary to refer to only two cases.

[24] In ***R. v. Furey*** 2007 BCCA 395, the offender pleaded guilty to three counts of possession for the purpose of trafficking in relation to 0.4 grams of heroin, 8.4 grams of crack cocaine and 0.8 grams of methamphetamine, as well as a single count of possession on marijuana. He was thirty seven years of age and worked sporadically in construction. At the time of the offences he was on probation for a recent conviction for possession for the purpose of trafficking, in respect of which he had also received a four month sentence of imprisonment. He had a lengthy record of thirty two prior convictions for a wide array of offences. He was a crack cocaine addict who had been making efforts to address his addiction and depression issues.

[25] The sentencing judge rejected a joint submission for an effective sentence of seven months imprisonment (based on double credit for time served of three and one

half months) plus probation and instead imposed a sentence of imprisonment for two years (apparently without credit for time served).

[26] The primary issue on appeal concerned the failure of the judge to accept the joint submission and to inform counsel before imposing sentence. Our Court of Appeal held that such failures did not render the sentence unfit and went on to consider whether the sentence was excessive. As noted at paragraph 16, the crown had conceded a broad sentencing range for trafficking in controlled substances and indicated that in like circumstances of an addicted offender it would fall between twelve to eighteen months. The court appears to have agreed in that it substituted an effective sentence of eighteen months imprisonment (before seven months credit for time served) followed by probation for two years.

[27] ***Furey*** was one of several cases reviewed by the Court of Appeal in ***R. v. Kukelka*** 2010 BCCA 180, which involved a thirty nine year old drug addict selling drugs to support his addiction. The offender was convicted after trial of having been in possession of 27.83 grams of heroin for the purpose of trafficking. He had a lengthy criminal record, including two relatively recent trafficking related convictions for which he had been sentenced to five months imprisonment and fourteen months imprisonment, respectively.

[28] The thirty six month effective sentence imposed in ***Kukelka*** by the trial judge was reduced to time served of approximately twenty four months but at paragraph 32 the court referred to ***Furey*** and two similar appellate cases which identified the range for

low level dealers with prior relevant convictions, trafficking to support their own addictions, as being twelve to eighteen months imprisonment.

[29] All of the cases dealing with offences involving trafficking of Schedule 1 substances clearly recognize denunciation and deterrence as the primary sentencing objectives. Many of those cases comment on the serious adverse health consequences and personal misery associated with those offences, as well as the resultant social and economic consequences to society.

[30] The aggravating circumstances pertaining to Mr. Lloyd are significant. He was in possession of three different harmful Schedule 1 substances for the purpose of trafficking, shortly after having served a sentence for a similar offence. He was on probation and in breach of a condition not to carry knives. He has a lengthy string of criminal convictions over a relatively short period of time, including the recent possession for the purpose of trafficking. He candidly acknowledges that his offences are not an isolated incident but were a routine part of his life in the downtown east side of Vancouver and were committed without consideration of the harm done to victims.

[31] The offences he committed while on bail for the current offences, while not an aggravating factor, are nevertheless a reflection of his inability or unwillingness to purposely engage in his own rehabilitation and to cease his criminal behaviour.

[32] Mr. Lloyd can only be described as a low level drug dealer and in mitigation; I accept that he was trafficking to support his own addiction. I do not give significant weight to his recent inclination to address his addiction but I acknowledge it as a step in the right direction and note that he is young enough to look forward to being a

productive member of society over the long term if he maintains his resolve and succeeds. The step up principle is only marginally engaged with respect to Mr. Lloyd but as there is a realistic prospect of rehabilitation; his sentence should not be too large a step up from his prior sentence.

[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.

[34] The cases provided by Mr. Lloyd, particularly ***R. v. Awasis*** 2009 BCCA 134 and ***R. v. Patterson*** 2006 BCCA 201 reflect appellate approval of sentences well below the range identified in ***Furey*** and ***Kukelka***, where considerations of that nature were present. No such considerations arise in the case at bar and there does not appear to be any reason for a sentence below the appropriate range.

[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.

[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.

[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.

SECTION 12 of the *CHARTER*

[38] Under s.12 of the ***Charter*** "everyone has the right not to be subjected to cruel and unusual treatment or punishment". The analytical framework for a constitutional challenge alleging a breach of s.12 has been developed and refined by the Supreme Court of Canada, primarily in ***R. v. Smith***, [1987] 1SCR 1045; ***R. v. Goltz***, [1991] 3 SCR 485; ***R. v. Morrisey*** 2000 SCC 39; ***R. v. Latimer*** 2001 SCC 1 and ***R. v. Ferguson*** 2008 SCC 6.

[39] Those cases and others were recently extensively reviewed by Doherty, J.A. in ***Nur***, which was one of six appeals heard together by a panel of five judges of the Ontario Court of Appeal, all involving mandatory minimum terms of imprisonment for various firearm-related offences. All of the other judges on the panel concurred in the Reasons for Judgment. I find the reasoning very persuasive.

[40] Under s.12 of the ***Charter***: "Everyone has a right not to be subjected to any cruel and unusual treatment or punishment". In order to establish that a particular sentencing

provision gives rise to cruel and unusual punishment, the punishment must be shown to be "grossly disproportionate" (***Smith*** at p.139). The burden is on the applicant to meet this test (***Goltz*** at p.506-507). A sentence which is merely excessive or disproportionate will not offend the threshold of gross disproportionality, it must be so excessive as to outrage standards of decency and disproportionate to the extent that Canadians would find it abhorrent or intolerable (***Ferguson*** at para. 14).

[41] The inquiry into gross disproportionality is described in ***Nur***:

> • The Two-Step Inquiry into Gross Disproportionality
>
> **75** A claim that a mandatory minimum sentence constitutes cruel and unusual punishment is tested in two ways. First, the court must decide whether the punishment is grossly disproportionate as applied to the accused before the court. This particularized inquiry asks whether the mandatory minimum is a grossly disproportionate punishment for the particular accused in the particular circumstances: Goltz, at p. 505.
>
> **76** If the sentence survives the particularized inquiry, the court goes on to decide whether the sentence is grossly disproportionate when applied to reasonable hypotheticals: see Goltz, at pp. 505-06. The selection of an appropriate reasonable hypothetical is a matter of some controversy and is the key to the outcome of this constitutional challenge.
>
> **77** 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: Ferguson, at paras. 34-74.
>
> **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:
>
> - the gravity of the offence;
> - the personal characteristics of the offender;

- the particular circumstances of the case;
- the actual effect of the punishment on the individual;
- the penological goals and sentencing principles reflected in the challenged minimum;
- the existence of valid effective alternatives to the mandatory minimum; and
- a comparison of punishments imposed for other similar crimes.

[42] The reasoning of the Supreme Court of Canada in ***Ferguson*** referred to by Doherty, J.A. 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.

[43] With respect to the first stage or "particularized inquiry" of the gross disproportionality analysis, I have taken into account all of the factors summarized in ***Nur***. I will not repeat my remarks with respect to the gravity of the offences, the circumstances in which they were committed or the personal circumstances of Mr. Lloyd.

[44] The actual effect on Mr. Lloyd of a sentence of imprisonment for a minimum of one year will not be disproportionate given that he has served several other jail sentences and that the actual sentence will be reduced for the time he has spent in custody before sentencing, while the actual time he will serve will be subject to statutory remission.

[45] I acknowledge the right of Parliament to fashion a drug sentencing regime which stresses denunciation and deterrence over other sentencing objectives and as should be clear from the considerations which informed my conclusion as to what would

otherwise be an appropriate sentence for Mr. Lloyd, I agree with the Crown submission that this is not a significant departure from the prevailing judicial approach to sentencing in relation to trafficking Schedule 1 substances.

[46] With all these considerations in mind, I conclude that a one year mandatory minimum sentence is not grossly disproportionate for Mr. Lloyd.

[47] The second stage of the analysis involves the consideration of the hypothetical scenarios put forward by Mr. Lloyd to determine if one or more of them is a "reasonable hypothetical" as defined in the jurisprudence from the Supreme Court of Canada. That jurisprudence and the scope of what constitutes a reasonable hypothetical was considered in detail by Doherty, J.A. in ***Nur***, and he concluded:

> **142** In my view, after Morrisey and Goltz, a reasonable hypothetical is one that operates at a general level to capture conduct that includes all the essential elements of the offence that trigger the mandatory minimum, but no more. Characteristics of individual offenders, be they aggravating or mitigating, are not part of the reasonable hypothetical analysis. It flows from Morrisey that the broader the description of the offence in the provision creating the offence, the wider the range of reasonable hypotheticals.

[48] The primary hypothetical scenario put forward by Mr. Lloyd is that of an addict who has in his or her possession a small amount of a Schedule 1 substance, which he or she intends to share or does share with a spouse or friend.

[49] This is a situation which happens daily in the downtown east side of Vancouver and is in no way a far-fetched or extreme scenario. Many of these persons have prior convictions for designated drug offences.

[50] The definition of "traffic" in the CDSA captures a very wide range of conduct with respect to the essential elements of the offences of trafficking and possession for the purpose of trafficking. This current definition is broader than definition in effect when ***R. v. Taylor***, [1974] BCJ No. 858 was decided but the breadth of the conduct captured has not diminished from that described by the Court of Appeal:

> **17** In each case the word contemplates a physical act involving two or more persons and it is important to note that these verbs can operate independently of and without reference to the ownership or change of ownership of the object given, delivered or distributed. In other words, one can "give", "deliver" or "distribute" an object to another or others regardless of whether that object is owned by the one, another or others or all or none of them. Here there was ample evidence, including the testimony of the appellant, that the appellant's purpose in bringing the hashish to his home on the day in question was to "give", "deliver" or "distribute" it to some or all of the others, as well as to take some for his own use.
>
> **18** The gravamen of the charge of trafficking is possession plus the intent or purpose of physically making the hashish available to others, regardless of ownership. The simple fact that it was economic for the purchase price to be collected in advance from the potential users of the narcotic and a bulk purchase made, thereby vesting in such users some claim to ownership and title and even a deemed joint possession by them, does not alter the nature of the physical act of giving, delivering or distributing the narcotic to another or others, which in itself constitutes the offence.

[51] Sharing small amounts of Schedule 1 substances is an illegal activity which requires *mens rea* and as such the offender is morally culpable. However, his or her degree of moral culpability is far less than that which would attach to someone selling large amounts for profit. The gravity of the offence for sharing small amounts is less serious as the impact of the dangerous substance is limited to the few people with whom it is intended to share. The impact on society is more directly related to the fact

that dangerous drugs are being used than to the distribution of the small amount to those users.

[52] I am confident that not many cases involving the sharing of small amounts of Schedule 1 substances end up being charged as trafficking or possession for the purpose of trafficking but I am equally confident that there have been such cases which resulted in convictions. In my view, the likelihood that offences of this nature may often be prosecuted as cases of simple possession does not detract from the reasonableness of the hypothetical given the scope to be afforded to reasonable hypotheticals, as determined in ***Nur***.

[53] Sentences in simple possession cases range from discharges to short periods of imprisonment, even for repeat offenders. There is a relatively minor distinction between possessing a small quantity of a Schedule 1 substance for personal use and possessing that same small quantity for the purpose of sharing it, yet the difference in sentences for those slightly different offences would be dramatic if s. 5(3)(a)(i)(D) is constitutionally valid.

[54] The offender in the identified hypothetical would have a prior conviction for a designated drug offence which may be more than ten years old. He or she is likely an addict but may instead be a recreational user of drugs. That is a personal characteristic which is not relevant to a reasonable hypothetical. All sorts of drug users share drugs. 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.

SECTION 7 of the *CHARTER*

[57] With respect to the challenge based on a violation of s. 7 of the ***Charter***, I agree with the Crown that where the claim falls squarely into one of the rights enumerated in ss.8 to 14 of the ***Charter***, it should be analysed under that particular section rather than s.7.

[58] Mr. Lloyd submits that pursuant to s. 5(3)(a)(i)(D) the inability of the sentencing judge to take into account the personal circumstances of the offender in crafting an appropriate sentence of less than one year amounts to a denial of fundamental justice. This submission appears to be contrary to the reasoning of the majority in ***R. v. Malmo-Levine*** [2002] 3 SCR 571, as explained in ***Nur***:

> **63** A claim that a statutorily-imposed sentence is so harsh as to constitute an infringement on liberty that is inconsistent with the principles of fundamental justice falls to be determined exclusively under the s. 12 prohibition against cruel and unusual punishment. Attempts to introduce some less stringent standard against which to measure the constitutionality of mandatory minimum sentences under the rubric of the principles of fundamental justice have been rejected: *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 160.[8]

[59] Mr. Lloyd also submitted that there is an arbitrary sentencing gap created by the application of s .5(3)(a)(i)(D) to the extent that sentences less than imprisonment for one year and that such a circumstance constitutes a violation of s .7. In my view, there is no arbitrary sentencing gap similar to that which arises in the case of hybrid offences where the available sentencing options are contingent on whether the crown elects to proceed summarily or by indictment. To engage s .5(3)(a)(i)(D) the Crown must provide notice of its intention but upon conviction, the resultant unavailability of sentences less

than imprisonment for one year does not create a gap but rather, a starting point. The real issue is whether the starting point is cruel and unusual.

[60] Mr. Lloyd further submits that in giving of notice of its intention, the Crown must act in accord with the principles of fundamental justice. There is no evidentiary foundation to suggest that the Crown has not done so, either in this case or generally. The Guideline For Federal Prosecutors which was filed by the Crown indicates that where the facts supporting a minimum mandatory sentence offence are present, that offence should generally be prosecuted and notice of intention given but that there is some limited discretion not to rely on the notice. It has not been suggested that this policy results in or has contributed to a violation of s. 7.

SECTION 9 of the *CHARTER*

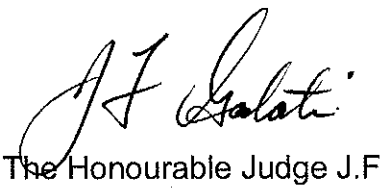
[61] With respect to the challenge based on a violation of s.9 of the ***Charter***, I again agree with the Crown that a mandatory minimum sentence authorized by a law that is only engaged upon the conviction of particular offenders for particular offences, cannot be said to constitute arbitrary detention or imprisonment. This is supported by the reasoning in ***R. v. Luxton*** [1990] 2 SCR 711, which recognizes that a law may legitimately be directed at a narrowly defined class of offenders in a manner that is consistent with the broader objectives of a sentencing scheme, notwithstanding that the predicate offence encompasses a range of moral turpitude.

[62] Section 5(3)(a)(i)(D) of the ***CDSA*** is directed at repeat offender drug traffickers to further the sentencing objectives of denunciation and deterrence in striving toward the fundamental purpose of sentencing expressed in s.10(1) of the ***CDSA***. In my view,

even though the class of offenders may not be defined in a sufficiently narrow fashion to exclude small offenders whose degree of moral turpitude is significantly less than that which attaches to the target group, the real issue is whether the mandatory minimum sentence which attaches to those small offenders is cruel and unusual and it must be determined with reference to s.12 of the ***Charter***.

CONCLUSION

[63] This matter is adjourned to allow the Crown an opportunity to address s.1 of the ***Charter*** if counsel so chooses but from today forward until Mr. Lloyd is sentenced, he shall accrue enhanced credit for time served.



The Honourable Judge J.F. Galati
Provincial Court of British Columbia