ABlawg.ca

December 10, 2015

The Next Shot in the Constitutional Debate Over Mandatory Minimum Sentences for Firearms Offences

By: Erin Sheley

Case Commented On: *R v Friesen*, 2015 ABQB 717

The Court of Queen's Bench has found a new constitutional limitation on Parliament's attempt to impose mandatory minimum sentences for firearms offences. Just on the heels of *R v Nur*, 2015 SCC 15, where the Supreme Court struck down three- and five-year mandatory minimums for possession offences under section 95 of the *Criminal Code*, Mr. Justice Vital O. Ouellette has, in *R v Friesen*, 2015 ABQB 717, held an identical sentencing provision to be likewise unconstitutional for trafficking offences under section 99. This case suggests that *Nur* could have marked the beginning of widespread dismantling of the *Criminal Code's* policy of gun-related mandatory minimums. In both *Friesen* and *Nur* the courts' concerns are the same: the risk of discrepancy between the prototypical violent offenders targeted by the minimums and the potentially far less culpable parties who might be swept along by them.

The underlying facts of the case are uniquely personal and quite sad. The accused Jacob Friesen, owner of a general store in rural Blumenort, Alberta, sold two .22 caliber single-shot rifles to his childhood friend Jacob Froese (at para 5). Mr. Froese subsequently used one to kill himself (at para 10). While such rifles are classified as non-restricted firearms, Friesen did not have a license to sell them (at para 11), and was reckless as to Froese's lack of license to own one. The Crown thus charged Friesen with weapons trafficking under section 99. The deceased's brother submitted a letter to the sentencing judge stating that his family did not hold Mr. Friesen accountable for the suicide and urging that "to blame it on John Friesen is not right" (at para 49). The letter went on to observe that "if Jacob would not have had that gun, he could have broken into somebody's building and taken a gun or used a knife or rope or any other way…John Friesen is a harmless, happy guy. He will always greet you with a smile" (at para 49). Nonetheless, section 99(2) of the *Criminal Code* requires the Court to sentence Friesen to at least three years imprisonment.

The issues for Justice Ouellette were as follows:

1. Does the three-year mandatory minimum term of imprisonment, set out in section 99(2), violate section 12 of the *Charter*?
2. If it does, should the section be declared null and void under section 52 of the *Constitution Act 1982*?
3. What is the appropriate sentence for Mr. Friesen?

The Court ruled the mandatory minimum imposed by section 99(2) violates the *Charter* and declared the applicable provisions of the Criminal Code null and void under section 52. Having struck the mandatory minimum provisions, it remained for Justice Oellette to determine the appropriate sentence for Mr. Friesen and he was thus sentenced to six months imprisonment.

In determining whether to impose the mandatory minimum sentence, the Court takes up the question of whether section 99(2) violates the prohibition against cruel and unusual punishment in section 12 of the *Charter*. The lodestars for a section 12 analysis are section 718 of the *Criminal Code*, which lists the purposes of imposing criminal punishment, and section 718.1, which mandates that a sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Punishments that are either unmoored from section 718 values such as denunciation, deterrence, incapacitation and rehabilitation, or which violate the section 718.1 proportionality requirement, run afoul of section 12.

To begin its analysis under these sections, the Court takes up the question of what public decency standards would hold to be disproportionate (at para 17). It states that this standard can only be determined through Parliamentary intent (at para 18). The Court's reasons quote at length from the remarks of the Minister of Justice to the House of Commons' Standing Committee on Justice and Human Rights. Then-Minister Toews declared that Parliament intends for the mandatory minimums for firearms crimes to "target the supply of handguns and restricted weapons to the criminals on our streets" (at para 21). The Court therefore finds that Parliament had created the mandatory minimums to address handguns, drug traffickers, and gangs (at para 22), which are a class of accused far removed from Mr. Friesen, who sold a long gun to an individual who had no intention of committing an illegal act with it (at para 29). As a result, the Court holds that section 99(2) would impose a grossly disproportionate punishment on Mr. Friesen (at para 30). The Court likewise remarks that, even if it were not disproportionate as applied to Mr. Friesen, the provision would nonetheless violate section 12 as it would apply in even less culpable cases, such as the transmission of a family heirloom to an unlicensed relative (at para 34). Finally, the Court adopts wholescale the reasoning of the Supreme Court in *Nur*, which held that the identical punitive goals motivating section 95 could not justify it under section 1 of the Charter (at para 37). Thus, the Court declares the three-year mandatory minimum imposed by section 99(2) to be unconstitutional and null and void under section 52 of the *Constitution Act.*

With the mandatory minimum struck down, the Court moves on to sentence Mr. Friesen with full discretion. The Court finds Mr. Friesen to possess a relatively low level of blameworthiness, given his lack of knowledge of Mr. Froese's intentions and the deceased's actual lack of criminal intent (at paras 50-52). The reasons also note Mr. Friesen's lack of criminal record and his family and professional responsibilities in the community (at para 43). However, the Court finds it to be an aggravating factor that "Mr. Friesen was negligent and should have taken the steps to simply follow the law and acquire a license to carry on his business" (at para 53). Finally, and perhaps most significantly, the Court declares that the transfer of an unrestricted firearm should be treated differently from that of a restricted or prohibited firearm (at para 56). After weighing these factors the Court sentences the accused to six months in prison.

Most of the analysis in *Friesen* grows out of *Nur*, which dealt with two defendants who had received three- and five-year sentences under section 95(2) for possession of loaded firearms. In that case the Supreme Court found that the sentences were *not* grossly disproportionate for the accused themselves. However, the Court struck down section 95(2) based on the reasonably foreseeable parties who might be unfairly captured by it. Like the Court in *Friesen*, in *Nur* the Supreme Court envisions the disparity between the most innocent offender and the typical

offender targeted by the provision: “Most cases within the range may well merit a sentence of three years or more,” the Court concedes, but at the “far end” of the range of offenders “stands, for example, the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored” (at para 82). These cases seem to state firmly that Parliament must, if it wants to preserve the crime-fighting benefits of the mandatory minimum, be more precise in its definition of the offences to which it applies.

A critique of *Nur* and *Friesen* might observe that if the goal of Parliament, broadly stated, is to reduce the number of firearms circulating in society, it might justifiably intend to impose three-year sentences on the Mr. Friesens of the world. Once a gun is released into the world its trajectory, it is true, is out of the hands of the seller. But licensing requirements, even of unrestricted weapons such as long guns, may exert some sort of cabining effect on this stream of weapons. If this is true, perhaps Parliament’s mandatory minimums appropriately deter comparatively well-intentioned parties from nonetheless creating violent harm by ignoring such requirements. After all, the *Friesen* case did result in a violent, if not criminal, death.

These cases implicitly reject such a deterrence argument by subordinating it to two other important values. The first is retribution. By focusing on the relative blameworthiness of both the real and hypothetical accused, both courts signify that the most important relevant inquiry is about the subjective morality of the wrongdoer, viewed retrospectively. The second is the relationship between discretionary sentencing and substantive justice. In the background of these mandatory minimum cases lies the broader debate over whether, in the interests of administrability and equality, courts should be given stricter guidelines for calculating sentences. (The argument in favor of such limitations was championed by Justice Wakeling at the Alberta Court of Appeal in his concurring reasons in *R v Ryan*, 2015 ABCA 286). In their choice of language and reasoning rejecting mandatory minimums, the *Nur* and *Friesen* courts seem to affirm the importance of trial courts retaining the freedom to make case-by-case, fact-specific sentencing determinations. Time will tell how broadly the reach of this analysis will spread across the various firearms provisions of the *Criminal Code*.

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**
Follow us on Twitter **@ABlawg**