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# The Death of Constitutional Exemptions? Alberta RCMP Officer Sentenced to Mandatory Four Years for Manslaughter with a Firearm

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**Cases Considered:**

*R. v. Ferguson*, 2008 SCC 6

The death of 23 year old Darren Varley in the custody of the RCMP in Pincher Creek made headlines in October 1999. Varley was shot by an RCMP officer, Constable Michael Ferguson, who was charged with second-degree murder but eventually convicted by a jury of the lesser offence of manslaughter after a four week trial in 2004 (2 earlier trials having resulted in hung juries). Justice G.C. Hawco of the Alberta Court of Queen's Bench granted Ferguson a constitutional exemption from s. 236(a) of the Criminal Code, which imposed a mandatory minimum sentence of four years for manslaughter with a firearm, and granted a conditional sentence of two years less one day (2004 ABQB 928). The Crown appealed, and a majority of the Alberta Court of Appeal held that the mandatory minimum sentence could not be avoided (2006 ABCA 261). Constable Ferguson appealed to the Supreme Court of Canada, which dismissed his appeal on February 29, 2008.

The Supreme Court's judgment was written by Chief Justice Beverley McLachlin, who hails from Pincher Creek herself. She framed the issues in the case as follows (at para. 1):

> First, does imposition of the four-year mandatory minimum sentence for manslaughter with a firearm constitute cruel and unusual punishment contrary to s. 12 of the Canadian Charter of Rights and Freedoms in the circumstances of this case? Second, can an offender who demonstrates that a mandatory minimum sentence would constitute cruel and unusual punishment in his case obtain a stand-alone constitutional exemption from the application of that minimum sentence?

As the first issue required an inquiry into the circumstances of the case, Chief Justice McLachlin examined the evidence of events leading to Ferguson's shooting of Varley. On October 2, 1999, Varley was socializing with friends at Leo's bar in Pincher Creek. At some point his fiancée went missing, leading to a fight in the parking lot in which Varley and a friend were involved. The friend was injured and ended up at the Pincher Creek Hospital, where Varley went to visit him at about 3:30 a.m. on October 3. The RCMP were called by hospital security, and Constable

Ferguson arrived on the scene. An intoxicated Varley demanded that Ferguson help him find his fiancée. According to witnesses, Ferguson grabbed Varley, "punched him in the jaw and forced him to the ground" (at para. 5). Ferguson handcuffed Varley and left him in the police cruiser while he returned to the hospital. Varley then kicked and broke the window of the police cruiser. Ferguson drove Varley to the RCMP detachment, booked him and led him into the cell area with a booking officer, who retuned to his desk after opening Varley's cell. Ferguson entered the cell with Varley, and within a matter of seconds, Varley was shot in the stomach and head, the second shot proving fatal. At trial, Ferguson testified that Varley had attacked him in the cell, "pulling his bulletproof vest over his head and face and grabbing his firearm from its holster" (at para. 6). He said that he and Varley were struggling over the gun when the shots were fired. In an earlier statement, however, which was "supported by expert evidence and accepted by the trial judge for sentencing purposes," Ferguson admitted that he had regained control of the gun when the shots were fired.

On the first question, whether the four year mandatory minimum amounted to cruel and unusual punishment, McLachlin, C.J. noted that Ferguson's argument "implicitly accepted that, as a matter of precedent, s. 236(a) does not violate s. 12 of the *Charter*." Instead, his argument was that, in the rare circumstances of his case, the sentence was cruel and unusual and merited a constitutional exemption. To determine whether a particular sentence amounts to cruel and unusual punishment, *R. v. Smith*, [1987] 1 S.C.R. 1045, was cited for the proposition that the sentence must be "grossly disproportionate." A grossly disproportionate sentence is one "so excessive as to outrage standards of decency" and "disproportionate to the extent that Canadians 'would find the punishment abhorrent or intolerable'" (*R. v. Wiles*, 2005 SCC 84 at para. 4, cited in para. 14 of *Ferguson*).

To make this determination, McLachlin, C.J. noted that it was necessary to examine what the jury had decided about Constable Ferguson's conduct. This gave rise to a difficulty, because in a jury trial the jury makes findings of fact that form the basis for its verdict, but the sentencing judge is not privy to what the jury decided about the facts. In such a situation, the Court explained that "the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand" (at para. 16); where there is no ambiguity the judge must accept the express and implied factual findings of the jury.

Applying these principles to the case at hand, Chief Justice McLachlin found errors in the trial judgment in light of the jury's manslaughter verdict. While Justice Hawco correctly found that the jury must have rejected Ferguson's argument that he acted in self-defence, as well as the Crown's argument that his conduct was intentional, he erred in speculating that Ferguson's second shot was fired instantaneously and instinctively. This led the trial judge to find that Ferguson was not acting out of anger, which mitigated against a four year sentence. Agreeing with the Alberta Court of Appeal, McLachlin, C.J. held that the "instantaneous and instinctive shot theory" contradicted some of the trial judge's other conclusions, and was inconsistent with the uncontradicted evidence of the booking officer and an inmate in the next cell that there was a time gap of up to three seconds between the shots. Setting aside this error, and in light of the aggravating facts that Ferguson was a trained firearm user in a position of trust to Varley, the

Court concluded that the sentence of four years was not cruel and unusual in the case of Constable Ferguson.

In light of its finding that there was no violation of s. 12 of the *Charter*, the Court could have ended its judgment there. However, because of the "considerable debate and disagreement in the lower courts as to whether the remedy of a constitutional exemption is available", the Court found it "appropriate to settle the question" (at para. 33).

The Court answered this question in the negative, providing a useful review of constitutional remedies and some new insights into the interplay between s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1982*. Ferguson's argument was premised on the idea that even if the mandatory minimum sentence in s. 236(a) of the *Criminal Code* for manslaughter with a firearm was constitutional most of the time, his was a rare case where the application of the minimum would be unconstitutional, and so he should be exempted from the law. This was a remedy based on s. 24(1) of the *Charter*, which provides that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

Chief Justice McLachlin held that the arguments in favour of constitutional exemptions were "outweighed and undermined" by four "counter-considerations" (at para. 40). First, case law was said to support the position that the appropriate remedy for a mandatory sentence that is unconstitutional even in only rare applications is to strike down the law under s. 52, which provides that "The Constitution … is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Second, a constitutional exemption for a mandatory sentence was seen to intrude too greatly on the role of Parliament. While it may seem counter-intuitive that striking a law down would be less intrusive than granting an exemption in rare circumstances, the Supreme Court stated that "the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended" by granting a discretion to sentencing judges that they were not meant to have (at para. 50). Third, the Court clarified that s.24(1) remedies are normally relevant as "personal remedies" to be granted in the case of unconstitutional government acts flowing from discretion granted under laws that are themselves constitutional. In contrast, s. 52 remedies are appropriate where what is challenged is the law itself, as it was in Ferguson's case. If a mandatory minimum sentence is unconstitutional even only rarely, "The ball is thrown back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects" (at para. 65). Fourth, constitutional exemptions were said to undermine the rule of law to the extent they raise concerns about the certainty and predictability of the law.

In its rejection of constitutional exemptions in *Ferguson,* the Supreme Court seemed careful to confine its reasons to mandatory sentencing provisions. While this is a significant development in its own right, what remains to be seen is how the reasoning in this case will be applied to other areas. One case noticeably absent from the Court's discussion is *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519, where former Chief Justice Lamer, writing in dissent, granted a

constitutional exemption from the assisted suicide provisions of the *Criminal Code* for a severely disabled woman. Are constitutional exemptions now inappropriate in such cases as well? The Court's reasoning in Ferguson suggests that the answer is yes, as the same four reasons it gives for rejecting constitutional exemptions in sentencing cases would apply in the case of substantive provisions of the *Criminal Code*, as well as in non-criminal cases. Further, the Court in *Ferguson* framed its reasons very much in terms of the intent of Parliament and the intent of the framers of the Constitution, considerations that apply beyond the realm of sentencing. It appears, then, that constitutional exemptions may remain possible only in cases like *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, where a constitutional exemption was said to be available as an interim remedy where a suspended declaration of invalidity was granted under s. 52. In this kind of case, the rationale is that a claimant may require relief from the burden of an unconstitutional law while Parliament examines its options for replacing the law. Apart from these rare instances, constitutional exemptions may now be dead in the water.