APPENDIX B: Relevant Excerpts from *R. v. Smickle*, 2012 ONSC 602

[112] The defence argues that the current legislation cannot be saved under s. 1 of the *Charter* because it does not minimally impair the rights protected. The defence further argues that a residual discretion in the sentencing judge would provide the necessary safety valve required to save the provision from violating the rights of those for whom the three year sentence would constitute cruel and unusual punishment. Such a limited discretion, it is argued, would impair the *Charter* right much less significantly than the existing legislation

[113] The Crown argues that such a discretion would defeat the whole purpose of the legislation, which is to ensure stiffer sentences for possession of loaded weapons by taking away judicial discretion. The problem with the Crown's argument is that, regardless of its objective, the existing legislation breaches *Charter* rights. If it was possible to accomplish the objective of stiffer sentences without breaching the *Charter*, s. 1 of the *Charter* would require that route to be taken. In my opinion, it is possible to impose a presumptive sentence for possession of a loaded weapon, while still preserving a judicial discretion to be exercised in those rare circumstances where the presumptive sentence would be grossly disproportionate given the circumstances of the offender and the offence. In every case where such a judicial discretion is exercised, there would be a right of appeal, thus providing supervision of the proper use of the discretion. This would still further the objectives of the legislation without breaching the s. 12 right to be free from cruel and unusual punishment.

[114] This would be consistent with the approach taken in a number of other jurisdictions. For example, legislation in England and Wales contains a minimum sentence for certain firearms offences, but permits the court not to impose that minimum where there are exceptional circumstances. The residual discretion section provides[41]:

> The court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its doing so.
>
> [*Criminal Justice Act 2003*, (U.K.), 2003, c. 44, s. 287(2).]

[115] Similarly, in South Africa there are legislated mandated minimum sentences for a small number of offences, including murder, rape, robbery and serious economic crimes. However, the legislation reserves a discretion for the sentencing judge to impose a lesser sentence where there are "substantial and compelling circumstances." The relevant provision[42] states:

> If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall

> enter those circumstances on the record of the proceeding and must thereupon impose such lesser sentence …
>
> [*Criminal Law Amendment Act*, vol. 510, No. 30638 of 2007, s. 51(3)(a).]

[116] The South African Supreme Court of Appeal has interpreted the extent of this discretion in a manner striking similar to the language our courts have used in describing cruel and unusual punishment. In *S. v. Malgas*,[43] that Court held:

> If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
>
> In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislation has provided. [Emphasis added.]
>
> [*S. v. Malgas*, 2001 (1) SACR 469 at para. 25 (S.C.A.).]

[117] In my opinion, it is possible to craft a sentencing provision for the offence of possession of a loaded weapon that advances the government's stated purpose of deterring crimes involving guns by increasing the severity of sentence for such crimes, while still vesting a residual discretion in the trial judge to prevent any *Charter* breach that might arise from the imposition of a mandatory sentence on absolutely every offender who meets the definition of the crime regardless of the circumstances. It is impossible to imagine or predict the variety of circumstances that might arise. The possibilities are endless and exceed the human imagination. This is not a "one-size-fits-all" type of offence. Therefore, some flexibility is required to deal with those exceptional circumstances where the imposition of a mandatory minimum sentence would run afoul of the *Charter*. The existing legislation is cast too broadly to prevent such abuse and does not meet the minimal impairment test provided for in *Oakes*.

[120] Here, it is impossible to take issue with the broad objectives of the mandatory minimum sentence; **every reasonable person would support reducing violent crime and protecting the public. However, there is no tangible evidence that imposing a mandatory minimum does anything to actually accomplish that objective. One might hope that would be the case, but proving it is a far different matter.** Clearly, making possession of a handgun a crime and subject to the criminal justice system creates a deterrent effect. But what does the three year mandatory minimum sentence do to enhance that effect?