

**The Charter and Criminal Law:
The Perfect Storm: Section 12, Mandatory Minimum Sentences and
the Problem of the Unusual Case**

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The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case

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In Wolfgang Peterson's enjoyable 2000 film *The Perfect Storm*,² starring George Clooney and Mark Wahlberg as fisherman in a doomed struggle against Mother Nature, there is a wonderful scene in which a local weatherman/meteorologist, flushed with excitement, explains the details of an incoming mega-storm to a member of the newsroom:

Oh my God. Just look at this! There's the remnants of Hurricane Floyd coming up from the South. And then there's this incredible low pressure system swooping down from Canada. On top of that, there's a high-pressure system blowing down off the Grand Banks. And all three of them are going to collide. I've never seen anything like this before. It's going to be the *perfect* storm.

Though it is impossible for dry constitutional discussion to match the thrills of crackling dialogue and the impressive special effects of a Hollywood blockbuster, there is little doubt that Canada's courtrooms are feeling the first throes of their own constitutional "perfect storm". Much like the Hollywood version, the storm has developed slowly, caught many unaware, and is the product of several distinct forces. One thing is certain, however. When the storm settles, the constitutional landscape involving s. 12 – the right to be free of cruel and unusual punishment – and the existing judicial approach to Charter litigation generally is unlikely to ever be the same.

The building blocks for this storm stem from three distinct elements, each of which is pushing the jurisprudence in a different direction. The first is the long-standing judicial approach to s.12 of the Charter, which requires courts to assess both the actual impact of a sentence on the person before the court, and the potential for that same sentence to impose cruel and unusual punishment on a "reasonable hypothetical" offender. The second force is a Conservative government armed with a mandate to get tough on crime, whose policies have enacted minimum mandatory sentences for a wide variety of offences – something Canada has never previously experienced. Finally, the third element pushing storm clouds onto the horizon is a recent decision of the Supreme Court extinguishing the possibility of

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² *The Perfect Storm* (Warner Bros., 2000): <http://www.imdb.com/title/tt0177971/>. Enjoyable, of course, is a personal opinion here. The film was not widely praised, and receives an average score of 47% on the Rotten Tomatoes Website, which aggregates film reviews from across the world. See http://www.rottentomatoes.com/m/perfect_storm/.

using the controversial constitutional exemption remedy as a “safety valve” for legislation of this type, a decision that firmly established the likelihood of more confrontations on s. 12 in the courts in years to come.

Two recent decisions from courts in Ontario have signalled that the storm is now quite clearly on the horizon. Like all storms, it is difficult to predict exactly how much damage will be wrought. What seems inevitable however, is that some aspect of the existing approach to s.12 claims is going to be revamped, or a number of the government’s cherished mandatory minimum penalties are going to be struck down. The various doctrines that govern the approach to minimum mandatory sentences are getting more and more difficult to reconcile, and Canada’s highest courts will soon be forced to address the ramifications of three pressure systems colliding at once.

In this article, I will diagram the nature of the conflict that has emerged, and provide analysis of the various approaches that are developing. I will also suggest avenues of “safe sailing” for defence counsel who find themselves tossed upon the waves created by this ever-developing gale.

1. *Background: Storm Clouds on the Horizon*

(a) Section 12 and Reasonable Hypothetical Analysis

Despite being the only Charter provision that focuses exclusively on the sentencing phase of a criminal proceeding, section 12 has had a checkered history and made relatively little impact on the criminal justice system overall. Though early decisions exploring the provision suggested that the clause might be used as an effective constraint against a seemingly never-ending parliamentary trend to ramp up levels of imprisonment for offences of all types, its usefulness waned after a series of Supreme Court judgments watered-down its utility in rather dramatic fashion. Many scholars now regard s.12 as a prohibition with “little vitality”,³ whose potential has been hampered by a judicial record of “retreat and timidity”.⁴

³ J. Cameron, “Fault and Punishment under Sections 7 & 12 of the Charter” (2008) 40 S.C.L.R. (2d) 553 at 584. See also K. Roach, “Searching for Smith: The Constitutionality of Mandatory Sentences” (2001) 39 Osgoode Hall L.J. 367 at 411 [approach to s. 12 characterized by a “cautious form of constitutional minimalism and deference to Parliament”].

⁴ D. Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed. (Carswell: Toronto, 2010) at 497. Much of the criticism is driven by the high threshold required to show a constitutional breach, as the jurisprudence requires any sentence imposed to be “grossly disproportionate”. I have no intention of discussing this aspect of s. 12 here. This article assumes that the threshold can be met in some circumstances, and assesses what might occur when a sentence is, in fact, grossly disproportionate. For criticism of the s. 12 standard, see Roach, *ibid*.