

## COURT OF APPEAL

ON APPEAL FROM THE SENTENCE IMPOSED BY THE HONOURABLE  
JUDGE GALATI OF THE PROVINCIAL COURT OF BRITISH COLUMBIA,  
AT VANCOUVER, ON THE 19<sup>th</sup> DAY OF FEBRUARY, 2014

**BETWEEN:**

**REGINA**

**APPELLANT**

**AND:**

**JOSEPH RYAN LLOYD**

**RESPONDENT**

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

**INTERVENOR**

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### INTERVENOR'S FACTUM

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1 **OVERVIEW**

2  
3 1. The Intervenor British Columbia Civil Liberties Association ("BCCLA") is an  
4 organization dedicated to protecting and defending individual rights and civil  
5 liberties. Its submissions are designed to highlight the profoundly negative  
6 impact that the mandatory minimum sentence in s.5(3)(a)(i)(D) of the *Controlled*  
7 *Drugs and Substances Act* ("CDSA") has on these fundamental freedoms.

8 2. One of the key safeguards for individual rights in the sentencing process is  
9 the discretion of the sentencing judge. It is that discretion that enables him or her  
10 to craft a just and appropriate sentence, taking into account all of the relevant  
11 circumstances of the offender and the offence. It is that discretion that allows  
12 him or her to engage in a delicate balancing of competing legal principles and  
13 practical considerations. It is that discretion which is removed by the mandatory  
14 minimum sentence in s.5(3)(a)(i)(D).

15 3. Mandatory minimum sentences are not *per se* unconstitutional. However,  
16 given that they bind the hands of sentencing judges, the persons who know the  
17 unique circumstances of each case, and who are best equipped to determine a fit  
18 and just sentence in those unique circumstances, mandatory minimum sentences  
19 must be carefully scrutinized to ensure that they do not unfairly trench on  
20 individual rights and freedoms. That is exactly what s.5(3)(a)(i)(D) does.

21 4. The effect of the s.5(3)(a)(i)(D) is to send people to jail for significant  
22 periods of time (at least one year), in circumstances where it is neither necessary  
23 nor justifiable. Such grossly disproportionate sentences do not further legitimate  
24 sentencing principles. They undermine them. Rehabilitation, the best defense  
25 against recidivism, cannot be sacrificed at the altar of false deterrence. This is  
26 particularly true in the context of addiction.

27 5. Those suffering from addiction, which is now recognized as a true medical  
28 issue, should be treated, not warehoused. Treatment, which is effectively  
29 precluded by a one year jail sentence, is the most effective way to promote the  
30 long-term protection of the community. Grossly disproportionate jail sentences

1 are not only fundamentally unfair, they virtually ensure that the cycle of addiction  
2 and recidivism will remain unbroken.

3 6. The people who will bear the brunt of the unfair effects of this legislation,  
4 namely low-level drug-addicted offenders, are among the most vulnerable and  
5 disadvantaged members of our society. These are exactly the people the law  
6 must be vigilant to protect. They are also the people least likely to be deterred,  
7 given that their behavior stems from actual physical dependency.

8 7. Higher-level, profit-driven drug traffickers, will not, generally speaking, be  
9 affected by this mandatory minimum sentence. Ironically, these are the people  
10 for whom deterrence may have some efficacy.

11 8. Put another way, the impugned law most directly affects people who will  
12 be treated unfairly by it, and for whom its real purpose has little practical  
13 application. This is very troubling from a civil liberties perspective.

14 9. It is ironic that the United States, long the champion of mandatory  
15 minimum sentences for drug offences, is now recognizing their futility at the very  
16 same time that they are being introduced with greater frequency in Canada.  
17 While the American legal system is separate and distinct from the Canadian one,  
18 it is submitted that the American experience holds important warnings, and  
19 lessons, for Canada.

20 10. For the reasons outlined in these submissions, the BCCLA respectfully  
21 adopts the position of the Respondent that s.5(3)(a)(i)(D) violates s.12 of the  
22 *Canadian Charter of Rights and Freedoms* ("the *Charter*"), and cannot be saved  
23 by s.1. From a civil liberties perspective, this legislation has a wide-reaching and  
24 profoundly negative impact on individual rights.

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## Part 1

### Statement of Facts

11. The BCCLA will not make submissions on the specific facts of the case at bar. However, it will rely on the following reasonable hypothetical scenarios to demonstrate that the impugned legislation violates s.12 of the *Charter*.

#### Hypothetical 1

Person A is heroin addict who was convicted of trafficking \$40 worth of heroin 9 years earlier. He had been selling drugs to support his addiction. He is now in recovery, and is on the methadone program. He no longer sells drugs, and is not engaged in a criminal lifestyle. Person A has a friend who is trying to “kick” his own heroin habit, but is not on the methadone program, and thus does not have a prescription for methadone. Person A shares his methadone with his friend.

(Person A has trafficked methadone, contrary to Schedule I of the CDSA. He is subject to a mandatory minimum sentence of 1 year imprisonment)

Note: “traffic” is defined in s. 2(1) of the CDSA to include: “administer” “give” and “transfer”

#### Hypothetical 2

Person B is an addict with several recent convictions for selling small amounts of crack cocaine. He had been trafficking to support his addiction. He “rolled his charges together” and plead guilty, receiving sentences in the range of 2-4 months imprisonment. After his release from jail, Person B enrolls in a recovery house. However, still in the grips of addiction, he leaves the recovery house, desperate for a “fix”. He goes to the downtown eastside. He does not have any drugs, and no way to obtain money to buy drugs. Desperate to make money so that he can obtain drugs, he stands outside a pub on Hastings Street. He offers to sell several pills, holding them out as being oxycodone (or Tylenol 3’s – which contain codeine). The pills are actually aspirin.

(Person B has trafficked in a substance held out to be oxycodone/codeine, contrary to Schedule I of the CDSA. He is subject to a mandatory minimum sentence of 1 year imprisonment).

Note: “traffic” is defined in s. 2(1) of the CDSA to include “offer to sell”; and s.2(2) of the CDSA states that a “controlled substance includes a reference to any substance that contains a controlled substance...”

1  
2 Hypothetical 3  
3

4 Person C is a young recreational user of drugs. He is not an addict.  
5 When he was 20 years old he was convicted of possession for the  
6 purposes of trafficking in MDA (ecstasy) as a result of being found with 10  
7 pills, which he intended to give to his friends at a fraternity party. He  
8 received a suspended sentence and probation, which he successfully  
9 completed. He has never been to jail and has no other criminal record. 5  
10 years later Person C is approached by a friend who says a group of  
11 people are planning on attending a rave party at the PNE, and invites  
12 Person C to join them. He asks Person C if he knows where to get some  
13 MDA, and if he can get a good price for 10 pills for the group. Person C  
14 says he will see what he can do. Person C contacts an old drug  
15 "connection", negotiates a price of \$15 a pill, and goes and picks up the  
16 pills, paying the "connection". He tells his friend and the group to meet  
17 him at the PNE with the money for the drugs, and to buy his ticket to the  
18 rave as payment for his efforts. Person C transports the MDA pills to the  
19 PNE for distribution to the group.  
20

21 (Person C has trafficked in MDA, a Schedule I drug. He is subject to a  
22 mandatory minimum sentence of 1 year imprisonment. The members of  
23 the group are convicted of simple possession of MDA and receive  
24 absolute discharges).  
25

26 Note: "traffic" is defined in s.2(1) to include "transfer" "transport" "give" or  
27 "deliver".  
28

29 Note: Pursuant to *R. v. Greyeyes* (1977) 116 CCC (3d) 334 (SCC) [tab 21  
30 of the Appellant's Authorities] Person C's actions would be characterized  
31 as that of a trafficker, not a mere purchaser or agent for the purchaser.  
32

33 Hypothetical 4  
34

35 Person D is addicted to crack cocaine. In return for small amounts of  
36 crack which he uses to feed his addiction, he stands outside the Carnegie  
37 Center at Main and Hastings streets, and "steers" prospective customers  
38 to associates who sell drugs from a nearby alley. He also gives the  
39 associates a "sign" if he sees police officers in the area, so that they can  
40 avoid detection. Person D has been previously convicted of trafficking in  
41 cocaine as a party, by "steering" an undercover officer to one of his  
42 associates in the alley, in order to facilitate a drug sale. Because Person  
43 D is known to the police, frequents a high-crime area, and stands in a  
44 visible location outside the Carnegie Center, the police set up a covert  
45 surveillance post and watch him. They observe Person D "steering"  
46 several people to the alley, where quick hand-to-hand transactions are

1 observed. They also see him giving hand signals whenever a police car  
2 drives by. The police arrest Person B and his associates in the alley. The  
3 associates are found to possess relatively small amounts of crack cocaine,  
4 packaged for sale.

5  
6 (Person D is a party to the trafficking, and potentially to possession for the  
7 purposes of trafficking, of cocaine, a Schedule I drug. He is subject to a  
8 mandatory minimum sentence of 1 year imprisonment.)  
9

#### 10 Hypothetical 5

11  
12 Person E is a marihuana activist who was convicted of  
13 production/cultivation of marihuana 9 years earlier. He had a small grow  
14 operation in the basement of his home and consumed the marihuana with  
15 his wife. He never sold marihuana for profit. Person E is approached by a  
16 friend who has a federal license to grow marihuana, but is secretly  
17 growing more than his license allows. He wishes to sell the excess  
18 marihuana to an underground "Compassion Club", which caters to patrons  
19 who smoke marihuana socially, or who, for various reasons, do not have a  
20 medical marihuana license. Person E introduces the friend to other  
21 marihuana activists he knows in order to facilitate the sale of the excess  
22 marihuana; counsels him on growing techniques that will maximize his  
23 "yield" of marihuana, and/or goes to work in the "Compassion Club",  
24 selling the excess marihuana to customers. Word gets out about the  
25 quality of the marihuana sold at the "Compassion Club", and the club's  
26 sales are high (above the amount necessary to trigger the mandatory  
27 minimum sentence, as set out in s.5(3)(a.1) of the CDSA).  
28

29 (Person E is a party to possession for the purposes of trafficking of  
30 marihuana (both the excess growing marihuana, and the marihuana held  
31 for sale at the Compassion Club), or a principal to trafficking in marihuana  
32 (through sales at the Compassion Club itself). He is subject to a  
33 mandatory minimum sentence of 1 year imprisonment.)  
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**Part 2**

**ISSUES ON APPEAL**

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1. Does s.5(3)(a)(i)(D) violate s.12 of the *Charter*?
2. If so, is that violation justified under s.1 of the *Charter*?



**Part 3****ARGUMENT****Section 12**

12. The BCCLA supports the Respondent's position that s.5(3)(a)(i)(D) violates s.12 of the *Charter*, and is not saved by section 1.

13. The BCCLA will not repeat the Respondent's submissions, but will supplement them, emphasizing the deleterious effects of s.5(3)(a)(i)(D) on human rights and civil liberties.

14. The BCCLA submits that mandatory minimum sentences, while not *per se* unconstitutional, are "unusual" in Canadian criminal law: *R v. W.(L.W)* (2000), 143 CCC (3d) 129 (SCC). They remove the discretion of sentencing judges, and make sentencing, long recognized as a "highly individualized process", a generic exercise. This generic exercise devalues the actual circumstances of the offence, and ignores the individual characteristics of offender. In addition, this generic exercise also elevates certain sentencing principles, such as denunciation and deterrence, to the virtual exclusion of others, such as rehabilitation.

15. In other words, mandatory minimum sentences devalue/ignore key factual and legal considerations in the sentencing process. This has a profoundly negative impact on human dignity and individual rights.

16. These principled concerns about mandatory minimum sentences generally are borne out by a specific analysis of s.5(3)(a)(i)(D) of the CDSA. The actual effect of this section, when applied to real-world situations such as the reasonable hypotheticals above, is one of gross disproportionality.

1 17. The BCCLA points to the following factors in support of its position that  
 2 s.5(3)(a)(i)(D) impacts civil liberties in a profoundly negative way:

3 i) the section has a broad reach, and will affect the rights of many persons

- 4
- 5 • no minimum amounts of drugs trafficked needed to trigger the mandatory
  - 6 minimum sentence, except for substances listed in schedule II: (see
  - 7 s.5(3)(a.1))
  - 8 • very low nexus between sentencing offence and “triggering” offence; time
  - 9 span of 10 years;
  - 10 • sentencing offence need not involve trafficking in the same drug as a
  - 11 “triggering” offence;
  - 12 • sentencing offence need not be the same offence as the “triggering” offence
  - 13 (ie. production vs. trafficking); “designated substance offence” is defined in
  - 14 s.2(1) of CDSA to include any offence under Part 1 except for simple
  - 15 possession

16

17 ii) the persons most likely to be affected are vulnerable and disadvantaged  
 18 members of society

- 19
- 20 • addicts;
  - 21 • low level offenders;
  - 22 • small amounts of drugs;
  - 23 • street level trafficking;
  - 24 • those most likely to be caught (visibility, lack of sophistication, street level
  - 25 activities in high crime areas)

26

27 iii) the rights of those caught by the section will be affected in a significant way

- 28
- 29 • 1 year imprisonment

30

31 iv) multiple *Charter* protected rights will be affected

- 32
- 33 • liberty;
  - 34 • security of person;
  - 35 • dignity

36

37 v) the personal circumstances of the offender that will be ignored will most often  
 38 be mitigating factors

- 39
- 40 • addiction;
  - 41 • aboriginal status;
  - 42 • abuse/personal hardship;
  - 43 • linked to dignity issue
- 44

1 vi) the legal factors that will be ignored will be ones that militate against a lengthy  
 2 jail sentence

- 3  
 4 • rehabilitation

5  
 6 vii) the legal factors receiving almost exclusive consideration have little or no  
 7 practical effect on the persons caught by the section

- 8  
 9 • specific deterrence;  
 10 • addiction as medical condition;  
 11 • general deterrence;  
 12 • denunciation;  
 13 • addiction as a medical condition

14  
 15 18. It is submitted that cumulatively, these factors establish a "perfect storm"  
 16 in which individual rights and civil liberties are the victims.

17 19. In *R. v. Smith* (1977), 34 CCC (3d) 97 [tab 49 of the Appellant's  
 18 Authorities] the Supreme Court of Canada struck down the 7 year mandatory  
 19 minimum sentence for importing drugs, in part because of the "wide net" cast by  
 20 the section (*Smith* p.143). It is submitted that the s.5(3)(a)(i)(D) casts a similarly  
 21 wide net.

22 20. The Court in *Smith* was concerned that the section at issue covered  
 23 "numerous substances of varying degrees of dangerousness" (at p.143). The  
 24 same concern applies to s.5(3)(a)(i)(D). The section targets trafficking in a  
 25 Schedule I substance, or a Schedule II substance in excess of certain amounts.  
 26 This covers a wide range of substances, including:

27 Schedule I

- 28 • Cocaine  
 29 • Heroin  
 30 • Morphine  
 31 • Codeine  
 32 • Oxycodone  
 33 • Methadone  
 34 • Ketamine  
 35 • Methamphetamine  
 36 • MDA

1 Schedule II

- 2 • Marihuana  
3 • Cannabis (resin)

4 21. Further, the “triggering factor” of a prior conviction for a “designated drug  
5 offence” is ANY offence under Part 1 of the CDSA, except simple possession of a  
6 controlled substance contrary to s.4. This means that:

- 7 • a prior conviction, either as a principal, party, counsellor, or conspirator  
8 triggers the section  
9  
10 • the prior conviction can be for any substance under Schedule I, II, III, or IV  
11  
12 • regardless of the circumstances of that prior conviction  
13  
14 • regardless of whether it was for the same drug, or a different one  
15  
16 • regardless of the amount of drugs involved (subject to the simple  
17 possession exclusion)  
18  
19 • regardless of whether it was for actual drugs, or simply items held out to be  
20 drugs  
21  
22 • regardless of the sentence imposed  
23  
24 • regardless of how dated the conviction is, provided it is within the preceding  
25 10 years  
26

27 22. Thus the “triggering” event of a prior conviction sets a very low threshold.  
28 The nexus between the “triggering” conviction and the offence which triggers the  
29 mandatory minimum sentence is very tenuous.

30 23. The Court in *Smith* was also concerned that the importing law “totally  
31 disregards the quantity of the drug imported” (*Smith* p.143). The same concern  
32 applies to s.5(3)(a)(i)(D) with regard to Schedule I drugs (although not with  
33 regard to Schedule II drugs). The impugned legislation does not differentiate  
34 between the offender trafficking, or possessing for the purposes of trafficking,  
35 \$10 worth of cocaine, \$100 worth, or \$1,000 worth. It is mandatory that each

1 offender receive a minimum sentence of 1 year imprisonment, regardless of the  
2 disparity between their actions, and their moral culpability.

3 24. The legislation also fails to take into account the circumstances of the  
4 commission of the offence, and the personal circumstances of the offender. Both  
5 of these areas coalesce when one considers the issue of addiction.

6 25. Most addicts traffic in small quantities of drugs to support their addictions.  
7 Their actions, although voluntary in the strict legal sense, contain an element of  
8 involuntariness because their addictions compromise their ability to act in an  
9 informed, rational way. This, in turn, affects their moral blameworthiness.

10 26. These generally unsophisticated persons are most likely to conduct their  
11 activities personally, and at the street level. As a result, they are the most visible  
12 kind of traffickers, and the most likely to be caught. Thus, they are the most likely  
13 to have a trafficking-related conviction within the preceding 10 years, and  
14 therefore be subject to the mandatory minimum sentence.

15 27. However, given that their low-level trafficking activities are fuelled by  
16 addiction, they are also the least likely persons to be deterred by a mandatory  
17 minimum sentence of imprisonment. They are also the most likely to be in need  
18 of rehabilitation and assistance to deal with their addictions.

19 28. A one year jail sentence does nothing to provide that assistance. In fact, it  
20 prevents a judge from crafting a sentence designed to address the root causes of  
21 the offenders' criminal behavior, which not only assists the offender, but also  
22 provides long-term protection for the community at large.

23 29. Addiction is an important consideration which is linked to both factual and  
24 legal considerations in the sentencing for drug offences:

- 25 • addiction (as a mitigating factor on sentencing)
- 26
- 27 • addiction (as a medical condition affecting moral blameworthiness)
- 28
- 29 • addiction (as a medical condition capable of explaining recidivism)

- 1
- 2       • addiction (as it relates to rehabilitation)
- 3
- 4       • addiction (as it relates to specific deterrence)
- 5
- 6       • addiction (as it relates to general deterrence)
- 7

8 30. It is submitted that the mandatory minimum sentence in s.5(3)(a)(i)(D)  
9 ignores all of these considerations.

10 31. These factors must be considered when assessing whether s.5(3)(a)(i)(D)  
11 has a grossly disproportionate effect on the offenders set out in the reasonable  
12 hypotheticals above.

13 32. It is submitted that selling, or offering to sell, a single \$10 piece of crack  
14 cocaine should not result in an addicted offender being sentenced to 1 year in  
15 jail. Regardless of the legitimate desire to curb drug trafficking, such a sentence  
16 would outrage standards of decency.

17 33. This scenario is neither fanciful nor unrealistic. Offences of this type are  
18 occurring every day in the downtown eastside of Vancouver. Judges will be  
19 forced to impose such sentences as these cases begin to wind their way through  
20 the courts. There is only one remedy for this injustice: a finding that s.5(3)(a)(i)(D)  
21 is unconstitutional.

22

### 23 **Section 1**

24 34. The BCCLA submits that it is virtually inconceivable that a law with grossly  
25 disproportionate effects, such that it “outrages standards of decency”, could pass  
26 either the minimal impairment or the proportionality arms of the *Oakes* test.

27

28

29

1 35. The words of the Ontario Court of Appeal in *R. v. Nur*, 2013 ONCA 677  
2 [tab 41 of the Appellant's Authorities], are respectfully adopted:

3 Given the very high bar set for a finding that a sentence constitutes  
4 cruel and unusual punishment, I find it very difficult to imagine how a  
5 sentence that clears that high bar could ever qualify as a reasonable  
6 limit demonstrably justified in a free and democratic society...no  
7 system of criminal justice that would resort to punishments that  
8 "outrage standards of decency" in the name of furthering goals of  
9 deterrence and denunciation could ever hope to maintain the respect  
10 and support of its citizenry.

11 *Nur* at para 178-181

12 36. A law which effectively seeks to deter the actions of addicts to support  
13 their addictions does not pass the rational connection test. That is because  
14 addiction involves physical dependency, rather than true "choice".

15 37. A law which has a grossly disproportionate effect on *Charter* rights cannot  
16 be said to "minimally impair" those same rights.

17 38. Similarly, a law which has a grossly disproportionate effect on *Charter*  
18 rights cannot pass a test of overall proportionality. To suggest otherwise would  
19 result in a triumph of form over substance.

## 20 **CONCLUSION**

21 39. The BCCLA submits that mandatory minimum sentences call out for  
22 special scrutiny. The mandatory minimum sentence in s.5(3)(a)(i)(D) does not  
23 withstand this scrutiny. Its effects are grossly disproportionate to reasonable  
24 hypothetical scenarios, many of which are occurring daily on the streets of  
25 Vancouver. Section 12 of the *Charter* provides an important safeguard for  
26 individual rights and civil liberties against over-reaching by the state. It is  
27 respectfully submitted that this safeguard has been infringed by s.5(3)(a)(i)(D),  
28 and that the section is unconstitutional.

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**Part 4**

**NATURE OF ORDER SOUGHT**

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That the appeal be dismissed.

All of which is respectfully submitted,



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Matthew A. Nathanson  
Counsel for the Intervenor,  
British Columbia Civil Liberties Association

Dated: May 15, 2014



LIST OF AUTHORITES

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PARA(S)

*R. v. Greyeyes* (1977) 116 CCC (3d) 334 (SCC) ..... 11

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*R. v. Smith* (1977), 34 CCC (3d) 97..... 19, 20, 23

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