

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)**

B E T W E E N :

**JOSEPH RYAN LLOYD**

**APPELLANT**

- and -

**HER MAJESTY THE QUEEN**

**RESPONDENT**

-and-

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BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,  
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and  
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND**

**INTERVENERS**

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**FACTUM OF THE INTERVENER  
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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## PART I - OVERVIEW

1. The intervenor, the British Columbia Civil Liberties Association (“BCCLA”), is an organization dedicated to protecting and defending individual rights and civil liberties and has a longstanding interest in sentencing and post-conviction rights. The BCCLA asserts that the mandatory minimum sentence in s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* (“CDSA”) is unconstitutional because it results in grossly disproportionate sentences in some cases, violating the guarantee in s.12 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) against cruel and unusual punishment and is not justified under s.1. Its submissions are designed to highlight the profoundly negative impact that the mandatory minimum sentence in s. 5(3)(a)(i)(D) has on fundamental freedoms.

2. The BCCLA submits that when assessing the constitutionality of s. 5(3)(a)(i)(D) this Court should look at the reasonably foreseeable and broad, practical effects of the one year mandatory minimum sentence on individual rights and civil liberties. For permanent residents and foreign nationals (not designated as refugees), by operation of sections 36(1)(a), 44, 45 and 64 of the *Immigration and Refugee Protection Act* (“IRPA”), a one year jail sentence will effectively result in deportation from Canada, without a right of appeal. The BCCLA submits that this is an important consideration when assessing whether the mandatory minimum sentence in some cases constitutes cruel and unusual punishment under s.12 of the *Charter*.

3. The one year mandatory minimum sentence removes the discretion of the sentencing judge to consider collateral immigration consequences when crafting a just and appropriate sentence for an individual offender. The inability to consider those collateral immigration consequences frustrates key sentencing principles, such as proportionality and rehabilitation.

4. The collateral immigration consequences that flow from this mandatory minimum sentence significantly affect the rights of individual offenders. Deportation is a life-changing event that often results in offenders being separated from their families and

removed from needed social and health services. The likely immigration consequences of a criminal sentence can be significantly more adverse than the jail sentence itself.

5. It is submitted that these additional, negative immigration consequences are important in assessing whether a sentence is proportionate. It is also submitted that a proportionality analysis should recognize the fact that many of the persons caught by the impugned legislation will be of diminished moral blameworthiness as a result of addiction. Thus, an already vulnerable group (immigrants), with reduced moral blameworthiness (due to addiction), will be further negatively impacted by the impugned legislation (deportation). The cumulative effect of these circumstances, in reasonable hypothetical scenarios, will result in grossly disproportionate sentences contrary to s.12 of the *Charter*.

6. The BCCLA takes no position on the facts as summarized by the parties.

## **PART II - POINTS IN ISSUE**

7. Whether s. 5(3)(a)(i)(D) of the CDSA violates s.12 of the *Charter* because it results in grossly disproportionate sentences in some cases.

## **PART III - ARGUMENT**

### **i.) Fundamental Sentencing Principles and Section 12**

8. Just sentences must be proportionate. Section 718 of the *Criminal Code* requires that a sentence be proportionate to the gravity of the offense and the degree of responsibility of the offender. As this Court stated in *R. v. Ipeelee; R. v. Ladue*, 2012 SCC 13, “a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other” (para. 37).

9. Although mandatory minimum sentences are not presumptively unconstitutional, across the wide range of cases to which a criminal provision may apply, there is an inherent conflict between mandatory minimum sentences and the principle of proportionality in sentencing. Mandatory minimum sentences must be carefully



scrutinized to ensure that they do not unfairly trench upon individual rights and freedoms. As this Court recognized in *R. v. Wust*, 2000 SCC 18:

Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the Code, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the Code: the principle of proportionality” (para. 18).

10. Mandatory minimum sentences remove part of the discretion of the sentencing judges and where applied 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 the 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.

11. Section 12 of the *Charter* states that everyone has the right not to be subjected to any cruel and unusual punishment. A “cruel and unusual” punishment is one that is grossly disproportionate. In *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073, Justice Lamer, writing for a plurality of judges, explained that a “cruel and unusual” punishment is a punishment that is grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender.

12. As this Court explained in *R. v. Nur*, 2015 SCC 15, “a prescribed sentence may be grossly disproportionate as applied to the offender before the court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional” (para. 39). If the sentence applied to the individual offender passes constitutional muster, the Court must then go on to consider whether the mandatory minimum sentence would be grossly disproportionate in “reasonably foreseeable situations where the impugned law may apply” (para. 58). The terminology of the “reasonable hypothetical” is often used to describe this inquiry into whether the law would impose unconstitutional sentences in some other people’s situations.

**ii.) Collateral Immigration Consequences are Relevant: *R. v. Pham***

13. In light of the principle of proportionality, a sentencing judge is permitted to inquire into the collateral consequences of sentencing. In *R. v. Pham*, 2013 SCC 15, this Court recognized that the collateral immigration consequences of a sentence are an appropriate factor for courts to consider when crafting a just and appropriate sentence. That finding represents a practical view of the consequences of a sentence on the individual rights of the accused. It also represents a broad view of the issue of proportionality in sentencing proceedings.

14. While *Pham* did not address the constitutionality of sentencing legislation, it is submitted that its analysis of general principles is relevant in this context. Wagner J., speaking for the Court, stated at para. 22:

In sum, collateral immigration consequences **may be just as relevant** in sentencing as the collateral consequences of other legislation or of circumstances specific to the offender. (emphasis added)

15. While the Court was careful to note that immigration consequences should not be allowed to dominate the sentencing process, *Pham* represents a recognition that the effects of a sentence cannot be measured purely by reference to the length of a period of incarceration. Real justice demands a broader approach.

16. This is exactly the kind of approach that should be taken, in the BCCLA's submission, in determining whether a mandatory minimum sentence violates s. 12 of the *Charter* in reasonably foreseeable cases. In considering whether a mandatory minimum sentence is grossly disproportionate, the reasonable foreseeability that the sentence will impact on an offender's ability to remain in Canada should be considered.

**iii.) Real Effect of the One Year Mandatory Minimum Sentence in Light of Immigration Legislation**

17. Given the Court's detailed observations in *Pham*, these submissions will address the relevant immigration legislation in a summary way only.

18. For individuals who are permanent residents of Canada or foreign nationals, the imposition of the mandatory minimum sentence in s. 5(3)(a)(i)(D) puts them at risk of deportation, while depriving them of the ability to appeal the same: see ss. 36(1)(a), 44, 45 and 64 of the *Immigration and Refugee Protection Act* ("IRPA"). A jail sentence of more than six months will almost certainly result in deportation and disentitles a person from pursuing an appeal of their deportation order. Prior to recent legislative changes, the threshold for an appeal was a sentence of two years or more.

19. Similarly, recent changes to IRPA also provide that individuals who are convicted of an offense punishable by a maximum term of imprisonment of at least 10 years are almost certain to face deportation and do not have a right to pursue an appeal. Section 5(3)(a)(i)(D) provides that a person found guilty of the offence is liable to imprisonment for life, unless, pursuant 5(3)(a.1), the subject matter of the offense is a substance included in Schedule II, which includes marihuana and cannabis resin, in an amount not more than the amount set out in Schedule VII. In effect, if an individual traffics in less than 3 kg of marihuana or cannabis resin, the CDSA provides for a maximum penalty of five years less a day.

20. Most conduct captured under 5(3)(a)(i)(D), if it leads to an indictment, will result in a permanent resident or foreign national's deportation without appeal, regardless of the existence of a mandatory minimum sentence. However, the existence of the mandatory minimum will have a disproportionate impact on certain individuals. Permanent residents and foreign nationals who are found guilty of trafficking in less than 3 kg of marihuana and cannabis resin who are sentenced to more than 6 months will conceivably face disproportionately harsh sentences. This effectively means that these permanent residents and foreign nationals sentenced to the mandatory minimum sentence of one year in jail will be denied the opportunity to have their deportation reviewed based on equitable considerations. Such considerations include the length of time a person has lived in Canada; their ties to family and community in Canada and abroad; the particular circumstances of their offence; and their potential for rehabilitation

21. Thus, the real effect of the one year mandatory minimum jail sentence for someone who would otherwise have been sentenced to something less than the six months trigger for deportation goes far beyond the length of the prison term. The mandatory minimum imposes a grossly disproportionate sentence in reasonably foreseeable situations. Also, deportation involves more than simply removal from Canada. It often involves the separation of families. It can involve the loss of employment, education, and career opportunities. It can involve the loss of health, medical and social services. It can involve the severing of close cultural and community ties.

22. Consideration of collateral immigration consequences does not involve reference to “far-fetched” or “marginally imaginable” cases. (*Nur*, para. 56). The prospect of such cases is very real, potentially affecting a large number of individuals. They do not represent “outlier” cases that should be excluded from an analysis of reasonable hypotheticals. Based on experience and common sense, these situations may reasonably be expected to be caught by the mandatory minimum.

23. Put another way, the enhanced negative effect of the one year mandatory minimum sentence may be foreseeably felt by an entire class of people: immigrants. This class is objectively determined, easily identifiable, and large in number. It is a class of vulnerable individuals, and the disproportionate impact of legislation on a particularly vulnerable group runs contrary to the values of equality and non-discrimination protected by the *Charter*.

#### **iv.) Reduced Moral Blameworthiness of Drug Addicted Individuals**

24. The unfairness created by the collateral immigration consequences of the impugned legislation is further exacerbated by the fact that many individuals caught by it will have diminished moral culpability as a result of addiction. To avoid duplication with other interveners, the BCCLA will not be making detailed submissions on the issue of addiction as a medical issue, and how it relates to reduced levels of moral blameworthiness. It does, however, support that position.

25. The perils of the mandatory terms of imprisonment contained in 5(3)(a)(i)(D) will be visited upon the most marginalized and vulnerable offenders: low-income drug users and the drug-addicted engaged in street-level trafficking are the most likely to be caught due to their visibility, lack of sophistication and location in heavily-monitored high-crime areas. Most addicts traffic in small quantities of drugs to support their addictions, and their addictions compromise their ability to act in an informed, rational way, thus reducing their moral blameworthiness.

26. Thus, individuals with lesser moral culpability may be subjected to significantly greater punishment by virtue of another vulnerability: their immigration status. In this way, the mandatory minimum sentence doubly victimizes vulnerable individuals.

#### **v.) Section 1**

27. The BCCLA submits that it will always be difficult for the government to show that a mandatory minimum sentence that has been found to be grossly disproportionate under s.12 is proportionate as between the deleterious and salutary effects of the law under s.1.

28. Here, the government has failed to prove that the law passes either the minimal impairment or the proportionality branches of the *Oakes* test. Therefore, the law is not saved under s.1 of the *Charter*.

#### **CONCLUSION**

29. The BCCLA respectfully submits that the collateral immigration consequences of the one year mandatory minimum sentence in s. 5(3)(a)(i)(D) of the CDSA should be considered as part of the “gross disproportionality” analysis under s. 12 of the *Charter*. It is submitted that only when the full effect of a sentence is considered can a true proportionality balancing occur and that when that full effect is taken into consideration the mandated minimum sentence may, in certain circumstances, amount to a sentence that

is so disproportionate that it amounts to cruel and unusual punishment. Section 5(3)(a)(i)(D) of the CDSA cannot be saved by s.1.

**PART IV - COSTS**

30. The BCCLA seeks no costs and respectfully asks that no costs be awarded against them.

**PART V – ORDER SOUGHT**

31. The BCCLA takes no position on the disposition of the appeal, but respectfully requests that it be determined in light of the submissions set out above.

32. The BCCLA respectfully requests leave to present oral argument of no more than 10 minutes in length.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17<sup>TH</sup> DAY OF DECEMBER, 2015.**

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<b>Authorities Tab</b>	<b>Cases</b>	<b>Para.</b>
1.	<i>R. v. Ipeelee; R. v. Ladue</i> , 2012 SCC 13	8
2.	<i>R. v. Nur</i> , 2015 SCC 15	12, 22
3.	<i>R. v. Pham</i> , 2013 SCC 15	13, 14, 15, 17
4.	<i>R. v. Smith</i> , [1987] 1 S.C.R. 1045	11
5.	<i>R. v. Wust</i> , 2000 SCC 18	9