SCC File No. 39438

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

OCEAN WILLIAM STORM HILBACH and CURTIS ZWOZDESKY

Respondents

FACTUM OF THE INTERVENER
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

OSLER, HOSKIN & HARCOURT LLP
1055 West Hastings Street
Suite 1700, The Guinness Tower
Vancouver, BC V6E 2E9

Emily MacKinnon
Tel: (604) 692-2705
Fax: (778) 785-2745
emackinnon@osler.com

Counsel for the Intervener
British Columbia Civil Liberties Association

OSLER, HOSKIN & HARCOURT LLP
340 Albert Street
Suite 1900
Ottawa, ON K1R 7Y6

Geoffrey Langen
Tel: (613) 787-1015
Fax: (613) 235-2867
glangen@osler.com

Ottawa Agent for the Intervener
British Columbia Civil Liberties Association

Andrew Barg
Justice and Solicitor General
Appeals Unit
300 Centrium Place, 332-6 Avenue SW
Calgary, AB T2P 0B2
Telephone: (403) 297-6005
FAX: (403) 297-3453
Email: JSG-ACPS.CAL-Appeals@gov.ab.ca
Counsel for the Appellant

D. Lynne Watt
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Telephone: (613) 786-8695
FAX: (613) 788-3509
Email: lynne.watt@gowlingwlg.com
Agent for the Appellant

Paul L. Moreau
Moreau & Company
10109 - 106 Street, N.W.
Suite 300
Edmonton, AB T5J 3L7
Telephone: (780) 425-8337
FAX: (780) 425-4296
Email: paul@moreaulaw.ca
Counsel for the Respondent, Ocean William Storm Hilbach

Marie-France Major
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca
Agent for the Respondent, Ocean William Storm Hilbach

Dane F. Bullerwell
Legal Aid Society of Alberta
400 Revillon Building
10320 102 Avenue
Edmonton, AB T5J 4A1
Telephone: (780) 638-6588
FAX: (780) 415-2618
Email: dbullerwell@legalaid.ab.ca
Counsel for the Respondent, Curtis Zwozdesky

Marie-France Major
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca
Agent for the Respondent, Curtis Zwozdesky

Janna A. Hyman
Public Prosecution Service of Canada
515 - 234 Donald Street
Winnipeg, MB R3C 1M8
Telephone: (204) 984-0493
FAX: (204) 984-1350
Email: janna.hyman@ppsc-sppc.gc.ca
Counsel for Director of Public Prosecutions

François Lacasse
Public Prosecution Service of Canada
160 Elgin Street
12th Floor
Ottawa, ON K1A 0H8
Telephone: (613) 957-4770
FAX: (613) 941-7865
Email: Francois.Lacasse@ppsc-sppc.gc.ca
Agent for Director of Public Prosecutions

Michael Perlin / Erica Whitford
Attorney General of Ontario
720 Bay Street
10th Floor
Toronto, ON M7A 2S9
Telephone: (416) 326-4500
FAX: (416) 326-4656
Email: michael.perlin@ontario.ca
Counsel for Attorney General of Ontario

Katherine Roy
Attorney General for Saskatchewan
Constitutional Law Branch
820 - 1874 Scarth Street
Regina, SASK S4P 4B3
Telephone: (306) 787-8385
FAX: (306) 787-9111
Email: katherine.roy@gov.sk.ca
Counsel for the Attorney General of Saskatchewan

D. Lynne Watt
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Telephone: (613) 786-8695
FAX: (613) 788-3509
Email: lynne.watt@gowlingwlg.com
Agent for the Attorney General of Saskatchewan

Nader R. Hasan / Ryann Atkins
Stockwoods LLP
77 King Street West, Suite 4130
Toronto-Dominion Centre, TD North Tower
Toronto, ON M5K 1H1
Telephone: (416) 593-1668
FAX: (416) 593-9345
Email: naderh@stockwoods.ca
Counsel for Canadian Civil Liberties Association

Maxine Vincelette
Power Law
130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4
Telephone: (613) 702-5573
FAX: (613) 702-5573
Email: mvincelette@juristespower.ca
Agent for Canadian Civil Liberties Association

Eric V. Gottardi, Q.C.
Chantelle Van Wiltenburg
Peck and Company
610 - 744 West Hastings
Vancouver, BC V6C 1A5
Telephone: (604) 669-0208
FAX: (604) 669-0616
Email: egottardi@peckandcompany.ca
Counsel for Canadian Bar Association

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON K2P 0J8
Telephone: (613) 282-1712
FAX: (613) 288-2896
Email: msobkin@sympatico.ca
Agent for Canadian Bar Association

TABLE OF CONTENTS

PART I – OVERVIEW

1. A custodial sentence is the most extreme consequence that the state imposes on an offender in the criminal process. The effects that flow from incarceration are significant and far-reaching. The repercussions are felt not only by the incarcerated individual, but also by their families, communities, and greater society. Accordingly, when an individual is incarcerated for even one more day than a "fit" sentences requires, the consequences are severe.

2. The state's significant power is limited by the protection in s. 12 of the *Charter* against cruel and unusual punishment. A cruel and unusual punishment is one that is "grossly disproportionate", as established by this Court in *Smith*[1] and later confirmed in *Nur*[2] and *Lloyd*[3].

3. The protection provided by s. 12 has been hollowed, however, by the interpretation of "grossly disproportionate" in the context of custodial sentences. The current standard requires that a "grossly disproportionate" sentence be more than "merely excessive"; it must be "so excessive as to outrage the standards of decency" and be "abhorrent or intolerable" to society.[4] But in the context of incarceration—considering its severe impacts—any additional day in custody that is not justified for the individual offender is cruel and unusual.

4. The BCCLA intervenes, as it did in *Hills v. The Queen*,[5] to ask this Court to hold that s. 12 requires that individual circumstances be considered when imposing custodial sentences. Thus, there is no such thing as a *merely* excessive imprisonment. An excessive period of imprisonment is either unfit, in which case it can be corrected on appeal, or else it is unconstitutional, which arises if it is not imposed for reasons connected to the individual offender.

5. The BCCLA also intervenes in this case to highlight the importance of reasonable hypotheticals in this analysis. The hypothetical application of a law in reasonably foreseeable situations has long been a cornerstone of *Charter* review. It is essential to uphold the rule of law, and this Court should reaffirm this long-standing practice.

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[1] *R. v. Smith*, [1987] 1 S.C.R. 1045.
[2] *R. v. Nur*, 2015 SCC 15.
[3] *R. v. Lloyd*, 2016 SCC 13.
[4] *R. v. Lloyd*, 2016 SCC 13 at para. 24. In this case, the four-year mandatory sentence was six months in excess of the appropriate sentence: excessive, but not "grossly disproportionate".
[5] *Hills v. The Queen*, SCC File No. 39338.

PART II – POSITION ON THE APPELLANT'S QUESTIONS

6. A custodial sentence that exceeds a fit sentence by any length is grossly disproportionate—and therefore cruel and unusual—if it is imposed without consideration for the individual circumstances of the offender.

7. In addition, reasonable hypotheticals are an essential tool in assessing the constitutionality of sentencing provisions.

PART III – STATEMENT ON ARGUMENT

A. Custodial sentences are extreme in nature and must be individually-tailored

I. Incarceration is the most serious sanction imposed by the Canadian state against an offender

8. As the BCCLA noted in *Hills*, since the death penalty was abolished, incarceration is the most extreme measure taken by the Canadian state against an offender.[6] It entails not only a complete removal of an offender's liberty, but also severe impacts on their health, employability, children, and community—to name but a few. It carries severe consequences.

9. The significant adverse effects of incarceration are well-documented. In its 2014 report, the BCCLA identified the significant impacts of incarceration, including poor physical and mental health among inmates[7] and long-term impacts on children whose parents are incarcerated:[8]

> Incarceration has a ripple effect, touching nearly every aspect of the offender's life and community. These range from the health and wellbeing of the offender, to the impact of incarceration on an offender's family, through to the infrastructure of communities – whether they are good places to live, work and raise children. The collateral costs of increasingly punitive approaches to sentencing – the human and social costs – are difficult to measure, but necessary to appreciate.[9]

10. The serious impacts of incarceration have been recognized in the academic literature,[10] by

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[6] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at p. 562; *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 at p. 532, *per* Wilson J. (concurring).

[7] Raji Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing* (BC Civil Liberties Association, 2014) ("**BCCLA Report**") at p. 43.

[8] BCCLA Report at p. 41.

[9] BCCLA Report at p. 40.

[10] See *e.g.* BCCLA Report at pp. 40-44 and sources cited therein.

Parliament,[11] and by commissions of inquiry following wrongful convictions.[12]

11. They have also been recognized by the courts:

> In view of its extremely negative collateral effects, incarceration should be used with great restraint where the justification is general deterrence. These effects have been repeatedly noted with depressing regularity.[13]

12. Indeed, these impacts are necessarily implicit in this Court's s. 12 jurisprudence.[14]

13. The adverse impacts of incarceration are particularly felt by Indigenous offenders—who, as this Court has long recognized, are over-represented in the criminal justice system.[15] For this reason, the *Criminal Code* requires that all available sanctions *other* than imprisonment be considered, with particular attention to the circumstances of Indigenous offenders.[16]

14. This Court has a crucial role to play in ensuring the law continues to recognize the severity of imprisonment.

II. Custodial sentences must be individually-assessed

15. As the BCCLA argued in *Hills,* the nature of a custodial sentence is such that to be imposed, it must be tailored to the circumstances of the individual. In other words, it must be fit for the individual offender before the court.

16. This Court has long recognized the inherently discretionary and extremely individual nature of sentencing.[17] As this Court recently held:

> It is no surprise, in view of the constraints on sentencing, that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime… "Only if this is so can the public be satisfied that the

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[11] See *e.g. Youth Criminal Justice Act*, S.C. 2002, c. 1, Preamble and s. 4.
[12] See *e.g.* Peter Cory, *The Inquiry Regarding Thomas Sophonow*, Manitoba Justice, (2001).
[13] *R. v. W. (J.)*, (1997) 115 C.C.C. (3d) 18 at p. 36 (Ont. C.A.), 1997 CarswellOnt 969 at para. 49, 1997 CanLII 3294; relied on in *e.g. R. v. Lyn*, 2007 ONCJ 400 at para. 21, *R. v. Bratzer*, 2001 NSCA 166 at para. 47, and *R. v. T.M.*, 2020 NSPC 57 at paras. 32, 33.
[14] See *e.g. R. v. Nur*, 2015 SCC 15 at para. 65.
[15] *R. v. Ipeelee*, 2012 SCC 13 at paras. 57-58.
[16] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2(e).
[17] See *e.g. R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 76, 93. For this reason, *R. v. Lacasse*, 2015 SCC 64, sets a high bar for appellate intervention on sentencing appeals (see paras. 43-44).

> offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system".[18]

17. Thus, an individual sentencing process is necessary both for the individual and for the broader public faith in the criminal justice system.

18. The necessity of considering individual circumstances is particularly acute for Indigenous offenders. Courts must consider the unique systemic or background factors which may have played a part in bringing that Indigenous offender before the courts. The courts must also consider the types of sanctions which may be appropriate due to the offender's Indigenous heritage.[19]

19. As part of the individual sentencing process, the court also considers factors such as general deterrence and harm to the community.[20] While these factors are not about the individual offender, *per se*, they remain part of an individualized sentencing process: these factors are evaluated on a case-by-case basis and in the context of the individual offender before the court.

20. The importance of an individualized sentencing process is highlighted in the context of incarceration, given its serious impacts and adverse consequences. Its imposition merits no less than the careful consideration of a judge, faced with the circumstances of an individual offender. While Wakeling J.A. laments that judges impose sentences considered too lenient by the public,[21] this is, in fact, the role of the *Charter*: to protect the individual against the rule of the mob.

B. <u>An excessive carceral sentence is grossly disproportionate if it is not individually-assessed</u>

21. As it did in *Hills*, the BCCLA asks this Court to recognize that *any* period of incarceration beyond that which is fit for the individual offender will be cruel and unusual—and, consequently, grossly disproportionate.

I. There is no such thing as a "merely excessive" custodial sentence

22. When it comes to custodial sentences, there is no such thing as a "merely excessive" sentence. Incarceration is the most severe of punishments. *Any* time an offender spends imprisoned

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[18] *R. v. Nur*, 2015 SCC 15 at para. 43 (internal citations omitted).
[19] *R. v. Ipeelee,* 2012 SCC 13 at para. 59, citing *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 66.
[20] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718(a)-(b).
[21] *R. v. Hilbach*, 2020 ABCA 332 at paras. 86-87.

that is not fit for their individual circumstance cannot be justified on the grounds that it is "merely excessive". There is no such thing:

> How can a sentence be "merely" excessive? The expression itself is an oxymoron. Excessive, by definition, describes a degree that exceeds what is normal, reasonable or tolerable.[22]

23. It was 34 years ago that this Court determined that an excessive sentence that is "merely" so does not offend s. 12.[23] In light of the growing understanding of the harsh impacts of incarceration outlined above, this no longer holds true.

24. This Court's jurisprudence should evolve to recognize the growing understanding of the impacts of incarceration. What offends s. 12 is not frozen in time: even 34 years ago, "outrage the standards of decency" was never meant to be a "precise formula".[24]

25. Imprisonment should not be imposed for reasons that are divorced from the prisoner. When an incarceration sentence arises by operation of a mandatory jail term, applied in a manner divorced from any consideration of that offender's individual circumstances, then the result is a grossly disproportionate sentence if it is any more than that offender deserves. A merely excessive carceral sentence does not exist.

II. The fundamental problem with mandatory minima is that they are not individually-assessed

26. While this Court has repeatedly affirmed that proportionality in sentencing is not a principle of fundamental justice,[25] this Court has also held that mandatory minimum penalties are *all* constitutionally vulnerable, in part because their blanket application will almost inevitably catch scenarios where the mandatory minimum would result in a grossly disproportionate

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[22] Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in Ipeelee: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 Sup. Ct. L. Rev. (2d) 461 at 468-69; see also Jeffrey Kennedy, "Justice as Justifiability: Mandatory Minimum Sentences, Section 12, and Deliberate Democracy" (2020) UBC L. Rev. 351 at 370.

[23] *R. v. Smith*, [1987] 1 S.C.R. 1045 at p. 1072.

[24] *R. v. Smith*, [1987] 1 S.C.R. 1045 at p. 1089, *per* McIntyre J. (dissenting in the result).

[25] See, e.g., *R. v. Lloyd*, 2016 SCC 13 at paras. 38-47; *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at paras. 67-73.

sentence:

> As I have already said, in light of *Nur*, the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.[26]

27. This suggests that mandatory minima are constitutionally infirm because they remove *individual considerations* from the sentencing process, even though proportionality alone does not have constitutional status. It follows that a "cruel and unusual" carceral sentence is one imposed without regard to the individual offender.

28. In the context of incarceration, this makes sense. As this Court has routinely affirmed, measuring gross disproportionality involves a balancing exercise.[27] Under s. 12, what is grossly disproportionate must be assessed in light of the particular form of punishment at hand. Given the severe impacts of incarceration set out above, *any* excessive imprisonment that is imposed without regard to the individual offender is "grossly disproportionate".

29. The BCCLA asks this Court to follow its reasons in *Lloyd* to their natural conclusion and constitutionalize the consideration of an offender's individual circumstances for incarceration. Put differently, it is cruel and unusual to impose an excessive jail sentence on an individual for reasons that have nothing to do with that individual.

30. Importantly, this approach would not eliminate the broader considerations of general deterrence and community harm, which mandatory minima typically seek to address.[28] As noted above, these considerations are part of an individualized sentencing process by virtue of the *Criminal Code*.[29] Indeed, Parliament remains free to set the factors considered by courts as part of an individualized sentencing process.[30]

31. This approach also would not prohibit Parliament from legislating mandatory sentences: it

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[26] *R. v. Lloyd*, 2016 SCC 13 at para. 35.
[27] See *e.g. Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 121.
[28] See *e.g. R. v. Lloyd*, 2016 SCC 13 at paras. 44, 49.
[29] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718(a)-(b).
[30] *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 71.

would merely require that any mandatory sentence be tied to an individual assessment and individual characteristics. For instance, just as Parliament may legislate mandatory aggravating factors, Parliament may attach mandatory minimum consequences to such factors.

C. Requiring individualized sentencing processes for custodial sentences preserves and respects the sentencing appeal process

32. As this Court has warned, not every excessive custodial sentence should result in a constitutional appeal. The approach advocated by the BCCLA would preserve and respect the sentencing appeal process by distinguishing an unfit sentence from an unconstitutional one.

33. If a carceral sentence must be individually-assessed, then it would not be a constitutional error for a judge to impose an *unfit* sentence, provided the court arrived at that sentence by considering the individual. This is the domain of sentencing appeals, not constitutional challenges.

34. Put differently, an excessive sentence imposed by a judge following an individualized sentencing process is simply in error. An excessive sentence that is imposed for reasons that have nothing to do with that individual is unconstitutional.

35. This is consistent with this Court's reasons in *Smith*, where this Court reasoned that the high standard of "gross disproportionality" ensures the relevance of the sentencing appeal process.[31] Indeed, this approach would return full efficacy to the sentencing appeal process. As legal scholars have warned, under the current approach, the sentencing appeal process cannot save a disproportionate sentence if it is a mandatory minimum.[32] By constitutionalizing individual assessments of carceral sentences, the sentencing appeal process would be reinvigorated.

D. The use of reasonable hypotheticals is justified as a matter of constitutional precedent and principle

36. Reasonable hypotheticals have long been a crucial part of this Court's jurisprudence on s. 12. They would remain so under the BCCLA's proposed approach.

37. The BCCLA submits that, contrary to Wakeling J.A.'s dissenting reasons,[33] the use of

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[31] *R. v. Smith,* [1987] 1 S.C.R. 1045, at p. 1072.

[32] Allan Manson, "Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences" (2012) 57 Sup. Ct. L. Rev. 173 at 200.

[33] *R. v. Hilbach*, 2020 ABCA 332 at para. 91, *per* Wakeling J.A. (dissenting).

reasonable hypotheticals is supported by long-standing constitutional precedent and principle. Reasonable hypotheticals ensure that offenders are not sentenced to lengthier terms of imprisonment due to an unconstitutional law. By preventing unlawful punishments, reasonable hypotheticals give effect to the principles of constitutionalism and the rule of law.

38. Reasonable hypotheticals would remain an important device under the BCCLA's proposed approach to s. 12. The focus would simply shift to identifying whether the mandatory minimum penalty would impose an *excessive* sentence on a hypothetical offender.

I. The Court's jurisprudence upholds the use of reasonable hypotheticals

39. This Court has already, and recently, decided that courts should use reasonable hypotheticals when assessing whether a mandatory minimum sentence is grossly disproportionate. In *Nur*, this Court considered and rejected the Crown's submission that reasonable hypotheticals are unworkable.[34] McLachlin C.J., writing for the majority, held that "a court may look…at other reasonably foreseeable situations" to determine whether a mandatory minimum is grossly disproportionate.[35] She found that excluding consideration of reasonable hypotheticals "would run counter to the settled authority…and artificially constrain the inquiry into the law's constitutionality."[36] Her reasons emphasized that reasonable hypotheticals played a prominent role in *R v. Smith*,[37] *R v. Goltz*,[38] and *R v. Morrisey* [39]—the Court's formative s. 12 decisions.[40]

40. Reasonable hypotheticals facilitate a court's identification of the purpose and effect of a mandatory minimum provision. In *R. v. Big M Drug Mart Ltd.*, this Court held that "both purpose and effect are relevant in determining constitutionality… [i]ntended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity."[41] The reasonable hypothetical is simply an inquiry into the reach of the law to understand its scope and impact.[42] As McLachlin C.J. observed in *Nur*, courts "have always asked these questions".[43] This

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[34] *R. v. Nur*, 2015 SCC 15 at paras. 47-65.
[35] *R. v. Nur*, 2015 SCC 15 at para. 58.
[36] *R. v. Nur*, 2015 SCC 15 at para. 49.
[37] *R. v. Smith*, [1987] 1 S.C.R. 1045.
[38] *R. v. Goltz*, [1991] 3 S.C.R. 485.
[39] *R. v. Morrisey*, 2000 SCC 39.
[40] *R. v. Nur*, 2015 SCC 15 at paras. 53-56.
[41] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pp. 331-332.
[42] *R. v. Nur*, 2015 SCC 15 at para. 61.
[43] *R. v. Nur*, 2015 SCC 15 at para. 61.

is an essential and elementary component of judicial review that cannot be abandoned.

II. Reasonable hypotheticals are supported by the principles of constitutionalism and the rule of law

41. Reasonable hypotheticals are supported by the principles of constitutionalism and the rule of law: they ensure that no one is subjected to a more severe punishment than that which is authorized by law.

42. The principles of constitutionalism and the rule of law lie at the root of the Canadian constitutional order.[44] The rule of law principle requires that governments must act within the boundaries of the law.[45] The essence of the constitutionalism principle is "embodied" in s. 52(1) of the *Constitution Act, 1982*, which provides that any law that is inconsistent with the Constitution "is of no force or effect".[46] Every exercise of public authority must comply with the Constitution.[47]

43. A corollary of the constitutionalism and rule of law principles is that "no one can be convicted of an offence under an unconstitutional law".[48] If no one can be convicted of an offence under an unconstitutional law, then no one should be subjected to a longer term of imprisonment than would otherwise be imposed because of an unconstitutional law. The constitutionalism and the rule of law principles require that offenders not be held in the custody of the state, with the deprivations of rights and freedoms which that entails, without the lawful authority to do so.

44. Thus, reasonable hypotheticals are particularly important under the current s. 12 approach. Without reasonable hypotheticals, an offender whose sentence was "merely excessive"—such as the Respondents to this appeal—would be sentenced to a lengthier carceral term than was "fit", due solely to the mandatory minimum punishment. This, notwithstanding that the mandatory minimum is of no force or effect, because it imposes a grossly disproportionate punishment on *other* offenders who did not, cannot, or have not yet challenged the provision.

45. Further, mandatory minimums—and, by extension, reasonable hypotheticals—also play a

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[44] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 70.
[45] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 71; *Ontario (Attorney General) v. G.*, 2020 SCC 38 at para. 96.
[46] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 72.
[47] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 72.
[48] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 313.

significant role in the plea bargaining process. It is not uncommon for an accused to be charged with multiple offences, only some of which may have mandatory minimum punishments. Crown prosecutors wield significant discretion in determining which charges are pursued and whether to proceed by indictment or summary process (which may determine whether a mandatory minimum applies at all, or whether a more severe mandatory minimum applies[49]). Mandatory minimums, therefore, give Crown prosecutors a powerful bargaining chip when seeking a plea arrangement.

46. *Charter* arguments are bread and butter considerations for Crown and defence counsel in the everyday cut and thrust of plea bargaining. Reasonable hypotheticals factor in to this equilibrium as an essential tool for an accused to understand the likelihood of succeeding on a constitutional challenge to mandatory minimums punishments.

47. If an accused could not rely on a reasonable hypothetical to impugn the validity of a mandatory minimum punishment, the balance of power in plea negotiations would be tilted even further in favour of the Crown. With the risk of a lengthy mandatory term of incarceration hanging over their heads, many accused persons would have little if any choice but to accept whatever plea bargain is on offer. This, notwithstanding that the mandatory minimum is of no force or effect. Indeed, if reasonable hypotheticals were removed from the analysis, few (if any) accused persons would dare to challenge the mandatory minimum provision and run the risk of losing. Mandatory minimums influence this aspect of the criminal justice system in a way that is effectively insulated from judicial review. Removing reasonable hypotheticals from the analysis would allow unconstitutional mandatory minimums to be used as a cudgel to encourage accused persons to plead guilty to lesser offences, contrary to the principles of constitutionalism and the rule of law.

PART IV – POSITION ON COSTS

48. The BCCLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 1st day of September 2021

per Emily MacKinnon

[49] See *e.g. Criminal Code*, ss. 96(2), 102(2), 151, 152, 153, 163.1(4) & (4.1).

PART VII – TABLE OF AUTHORITIES

Legislation	**Paragraph Referred to**
Criminal Code, R.S.C. 1985, c. C-46	13, 19, 30, 45
Youth Criminal Justice Act, S.C. 2002, c. 1	10

Secondary Sources	**Paragraph Referred to**
Peter Cory, *The Inquiry Regarding Thomas Sophonow*, Manitoba Justice, (2001)	10
Jeffrey Kennedy, "Justice as Justifiability: Mandatory Minimum Sentences, Section 12, and Deliberate Democracy" (2020) 53:2 UBC L. Rev. 351	22
Raji Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing* (BC Civil Liberties Association, 2014)	9, 10
Allan Manson, "Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences" (2012) 57 Sup. Ct. L. Rev. 173	35
Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in Ipeelee: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 Sup. Ct. L. Rev. (2d) 461	22