SCC File No. 39338

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

BETWEEN:

JESSE DALLAS HILLS

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

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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 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.

PART II – POSITION ON THE APPELLANT'S QUESTIONS

5. 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.

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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".

PART III – STATEMENT OF 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

6. Since the death penalty was abolished, incarceration is the most extreme measure taken by the Canadian state against an offender.[5] 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 for the individual and for society.

7. 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[6] and long-term impacts on children whose parents are incarcerated:[7]

> The human cost of punitive sentencing goes well beyond the sentence imposed on an individual offender. 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.[8]

8. The serious impacts of incarceration have been recognized in the academic literature,[9] by Parliament,[10] and by the commissions of inquiry following wrongful convictions.[11] Indeed, these impacts are necessarily implicit in this Court's s. 12 jurisprudence.[12]

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[5] *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).
[6] Raji Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing* (BC Civil Liberties Association, 2014) ("**BCCLA Report**") at p. 43.
[7] BCCLA Report at p. 41.
[8] BCCLA Report at p. 40.
[9] See *e.g.* BCCLA Report at pp. 40-44 and sources cited therein.
[10] See *e.g. Youth Criminal Justice Act*, S.C. 2002, c. 1, Preamble and s. 4.
[11] See *e.g.* Peter Cory, *The Inquiry Regarding Thomas Sophonow*, Manitoba Justice, (2001).
[12] See *e.g. R. v. Nur*, 2015 SCC 15 at para. 65.

9. The adverse impacts of incarceration are particularly felt by Indigenous offenders: as this Court has long recognized, Indigenous persons are over-represented in the criminal justice system.[13] 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.[14]

10. The fact that incarceration is commonly-imposed does not detract from its severity, but it does render it more likely that its severity will be overlooked: familiarity, after all, breeds contempt. This Court has a crucial role to play in ensuring the law continues to recognize the severity of imprisonment.

11. In other words, contrary to Wakeling J.A.'s assertion,[15] incarceration is indeed cruel and unusual, despite its commonality.

II. Custodial sentences must be individually-assessed

12. 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.

13. This Court has long recognized the inherently discretionary and extremely individual nature of sentencing.[16] 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 offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system".[17]

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

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[13] *R. v. Ipeelee*, 2012 SCC 13 at paras. 57-58
[14] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2(e).
[15] *R. v. Hills*, 2020 ABCA 263 at paras. 135 and 234-250.
[16] 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).
[17] *R. v. Nur*, 2015 SCC 15 at para. 43 (internal citations omitted).

15. 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 particular Indigenous heritage or connection.[18]

16. As part of the individual sentencing process, the court also considers factors such as general deterrence and harm to the community.[19] 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.

17. 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,[20] 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>

18. 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

19. 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

[18] *R. v. Ipeelee,* 2012 SCC 13 at para. 59, citing *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 66.
[19] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718(a)-(b).
[20] *R. v. Hills*, 2020 ABCA 263 at paras. 288-89

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.[21]

20. It was 34 years ago that this Court determined that an excessive sentence that is "merely" so does not offend s. 12.[22] In light of the growing understanding of the harsh impacts of incarceration outlined above, this no longer holds true.

21. 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".[23]

22. 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

23. While this Court has repeatedly affirmed that proportionality in sentencing is not a principle of fundamental justice,[24] this Court has also held that mandatory minimum penalties are *all* constitutionally vulnerable, in part because their blanket application will almost inevitably

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[21] 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.

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

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

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

catch scenarios where the mandatory minimum would result in a grossly disproportionate 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. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.[25]

24. 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.

25. In the context of incarceration, this makes sense. As this Court has routinely affirmed, measuring gross disproportionality involves a balancing exercise.[26] 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".

26. 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.

27. Importantly, this approach would not eliminate the broader considerations of general deterrence and community harm, which mandatory minima typically seek to address.[27] As noted above, these considerations are part of an individualized sentencing process by virtue of the *Criminal Code*.[28] Indeed, Parliament remains free to set the factors considered by courts as part of

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

an individualized sentencing process. As this Court has held, Parliament may "modify and abrogate" the "principles and purposes for determining a fit sentence".[29]

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

29. 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.

30. 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 offender. This is the domain of sentencing appeals, not constitutional challenges.

31. 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.

32. 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 and that it is not usurped by constitutional challenges.[30] 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.[31] By constitutionalizing individual assessments of carceral sentences, the sentencing appeal process would be reinvigorated.

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[29] *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 71.
[30] *R. v. Smith,* [1987] 1 S.C.R. 1045, at p. 1072.
[31] 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.

D. Reasonable hypotheticals are a crucial aspect of this analysis

33. 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.

34. The use of reasonable hypotheticals is firmly trenched in legal principle, both in s. 12 jurisprudence and in *Charter* review generally. Courts have long considered challenges to legislation under s. 52 of the *Constitution Act, 1867* on the basis of third parties and not the claimant before the court.[32] Indeed, considering hypothetical applications of challenged legislation is the only way in which this Court can ensure that no one is subject to an unconstitutional law.[33]

35. 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. Such a straightforward analysis would be far from Wakeling J.A.'s concern of a "make-believe problem that would never happen in real life".[34]

36. Consideration of reasonably foreseeable applications of the law in hypothetical scenarios is a common and well-established feature of *Charter* review, and it is essential to uphold the rule of law. To depart from this analytical device in the s. 12 context would, to use the words of McLachlin CJC, "artificially constrain the inquiry into the law's constitutionality".[35] It would also seriously diminish *Charter* protection—potentially for those individuals least likely or able to marshal a constitutional challenge, such as marginalized populations, whom mandatory minimum penalties are most likely to disproportionately affect.

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[32] See, *e.g.*, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 296 at p. 314; *R. v. Appulonappa*, 2015 SCC 59 at paras. 26-30.
[33] *R. v. Nur*, 2015 SCC 15 at para. 51.
[34] *R. v. Hills*, 2020 ABCA 263 at para. 140.
[35] *R. v. Nur*, 2015 SCC 15 at para. 46.

PART IV – COSTS

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 30th day of August 2021

per Emily MacKinnon / Amanda G. Manasterski / Christian Garton (Articled Student)

PART VII – TABLE OF AUTHORITIES

Cases	**Paragraph Referred to**
Canada (Attorney General) v. Bedford, 2013 SCC 72	25
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Secondary Sources	**Paragraph Referred to**
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