S.C.C. File No. 35684 & 35678

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

-and-

ATTORNEY GENERAL OF CANADA

APPELLANT
(Party Intervener)

AND:

SIDNEY CHARLES

RESPONDENT
(Appellant)

AND:

HUSSEIN JAMA NUR

RESPONDENT
(Appellant)

AND:

ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, PIVOT LEGAL SOCIETY, JOHN HOWARD SOCIETY OF CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE ADVOCATES' SOCIETY, THE CANADIAN BAR ASSOCIATION, CANADA'S NATIONAL FIREARMS ASSOCIATION, CANADIAN ASSOCIATION FOR COMMUNITY LIVING, AFRICAN CANADIAN LEGAL CLINIC

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Attorney General of British Columbia (AGBC) submits that the reasonable hypothetical should be abandoned as a constitutional device when assessing whether a mandatory minimum sentence violates s. 12 of the *Charter*.

2. The two appeals before this Court highlight how "reasonable hypotheticals" pose significant theoretical and practical problems. The reasonable hypothetical encourages a wide-ranging and abstract search for a constitutional doppelgänger whose imaginary personal circumstances, when combined with equally imaginary circumstances of the offence, will serve as a basis to strike down a mandatory minimum sentence that is otherwise constitutionally unimpeachable for most, perhaps all, real offenders actually sentenced by the courts.

3. Allowing a statutory mandatory minimum sentence to be invalidated based on hypothetical - rather than actual - circumstances is contrary to this Court's stated deference to Parliament's choice of sentencing regimes provided there is no gross disproportionality. Because the reasonable hypothetical involves the judicial creation of a better placed litigant than the actual *Charter* claimant and obviates the real offenders Parliament was intending to capture, it is inconsistent with the level of deference asserted elsewhere within the s. 12 test.

4. By inviting the Court to reconsider the use of the reasonable hypothetical under s. 12, AGBC is not seeking to overturn a prior ruling or to negate a previously recognized right: *Ontario (Attorney General) v. Fraser.*[1] Rather, AGBC suggests modifying one step in the analytical framework without departing from the gross disproportionality test or the relevant factors previously set out by the Court under s. 12.

B. Statement of Facts

5. As an intervener, AGBC adds no facts to these appeals but relies on the facts as set out by the appellants.

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[1] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3 at paras. 56-58 and 129-139.

6. However, these two appeals illustrate how the reasonable hypothetical generates a result divorced from the facts of the case. In both appeals before this Court, the Ontario Court of Appeal struck down two *Criminal Code* mandatory minimum firearm sentences. In neither case was this done because the penalties would have violated the s. 12 *Charter* rights of the offender. Instead, the Court of Appeal constructed a hypothetical scenario that it considered to be reasonable and then concluded that the mandatory minimum sentences would constitute cruel and unusual punishment and therefore violate the s. 12 *Charter* right of this imaginary offender. However, the Court went on to then affirm the very sentences imposed on both Respondents, which were in excess of the mandatory minimums.

PART II – INTERVENER'S POSITION ON CONSTITUTIONAL QUESTIONS

7. The position of AGBC is that ss. 95(2)(a)(i) and (ii) of the *Criminal Code* do not violate s. 12 of the *Charter*.

PART III – STATEMENT OF ARGUMENT

A. Particularized inquiry is sufficiently broad to meet s. 12 requirements

8. Section 12 of the *Charter* provides a guarantee against cruel and unusual punishment. It is a right belonging to individual offenders and designed to protect them, not a licence to embark on what amounts to a constitutional reference on facts not before the court.

9. In determining whether a sentence meets the established threshold of "gross disproportionality", the court must examine all relevant contextual factors.[2] Those are sufficient in themselves to fully assess the constitutionality of the sentence without creating new facts through reasonable hypotheticals. The current analysis already looks to both individualized and broad social factors in equal measure:

- the gravity of the offence;
- the personal circumstances of the offender;
- the particular circumstances of the offence ;

[2] *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at paras. 27-28.

- the actual effect of the punishment on the offender;
- the penological goals and sentencing principles upon which the sentence is fashioned;
- the existence of valid alternatives to the punishment imposed; and
- a comparison of punishments imposed for other crimes.

Combined, these diverse factors contain all the necessary elements required to analyze the sentence as it applies to the *Charter* claimant. The factors do not require reasonable hypotheticals to be examined; the factors can be fully assessed and the *Charter* claim adjudicated on the real, proven facts of the case.

10. The existing s. 12 "particularized inquiry", which applies the broad contextual factors above to the individual circumstances of the offender and offence before the court, is entirely consistent with the traditional law of standing and with how disputes generally are settled by the courts – based on the actual situation of the claimant.

11. Currently, the analysis is extended by the addition of a reasonable hypothetical stage. This arises when a sentence is found not to be grossly disproportionate for the individual offender (that is it fails to breach s. 12). In those circumstances, despite the absence of a *Charter* violation, the framework invites the court to go on to consider whether such a violation arises from "reasonable hypothetical circumstances". Since the reasonable hypothetical was created in 1987, its scope has been revisited, adjusted and limited by this Court on two occasions and each time the Court has split on the approach to be taken. Now, a quarter of a century later, the parties and interveners on this appeal do not yet agree on what constitutes a reasonable hypothetical.

12. By its very nature, the reasonable hypothetical test is difficult to contain under what Peter Hogg has called the "relentless application of the most innocent offender principle".[3] It is an unnecessary appendage to the s. 12 analytical framework that distorts the constitutional analysis in the ways described below.

[3] Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2 at p. 53-7.

B. The "Reasonable Hypothetical" Analysis – Emergence and Current Status

13. The reasonable hypothetical as a component of the s. 12 analysis first emerged in *R. v. Smith*[4] in circumstances that are not entirely clear.

14. In *Smith*, this Court considered whether the seven year mandatory minimum sentence for importing a narcotic under s. 5(2) of the *Narcotic Control Act*[5] constituted cruel and unusual punishment contrary to s. 12 of the *Charter*. Mr. Smith returned to Canada from Bolivia with 7.5 ounces of 85 to 90% pure cocaine hidden on his body. It does not appear that he advanced a challenge based on his own personal circumstances. Rather, five justices agreed that Mr. Smith had standing to challenge a punishment based on circumstances other than his own. Ultimately, Lamer J., as he then was, writing for the majority, held that the punishment was cruel and unusual because there was the potential that the following hypothetical person would receive a seven year sentence: "a young person who, while driving back into Canada from a winter break in the U.S.A., is caught with only one, indeed, let's postulate, his or her first 'joint of grass'".[6] Effectively, the Court considered whether the mandatory minimum sentence was cruel and unusual for what has come to be referred as the "small offender", the "best possible offender", the "most innocent possible offender" or "that imaginary small offender".[7] It is worth noting that even after the mandatory sentence was invalidated, Mr. Smith received a sentence that was only one year shy of what had been the minimum.[8]

15. The creation of the reasonable hypothetical in *Smith* must be placed in its proper historical context. The *Charter* was only five years old and there was a clear desire by the Supreme Court to provide early, broad guidance to its interpretation and in its application an entire legislative *corpus* enacted without the *Charter* in mind.[9] An expansive interpretative tool, like the reasonable hypothetical, may have well have had

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[4] *R. v. Smith*, [1987] 1 S.C.R. 1045.
[5] *Narcotic Control Act,* R.S.C. 1970, c. N-1.
[6] *Smith*, at pp. 1053-1054.
[7] *Smith,* at p. 1078; *R. v. Nur*, 2013 ONCA 677 at paras. 115, 121.
[8] *Morrisey*, at para. 91, per Arbour J.
[9] "In the early years of the *Charter*, the Court was often inclined to establish broad rules and guidelines to structure *Charter* adjudication. *Smith* was a perfect example of this tendency." Kent Roach, "Searching for Smith: The Constitutionality of Mandatory Sentences" (2003) 39 Osgoode Hall L.J. 367 at 382.

its place, even if it was inconsistent with the normal rule of adjudicating claims on real facts.

16. However, since *Smith,* the need to revisit the nature and scope of reasonable hypotheticals has repeatedly demonstrated the problems such conjectural reasoning creates. The Court has had to step in and considerably narrow permissible hypotheticals, principally because of the imbalance in assessing any mandatory minimum sentence based on the most innocent possible offender approach used in that case.

17. In *R. v. Goltz,* Gonthier J., writing for the majority, acknowledged that this Court "has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the *Charter".*[10] However, without elaborating as to why, Gonthier J. went on to state "the s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance".[11] Despite that conclusion, Gonthier J. sounded a cautionary note about first selecting a relevant hypothetical, and second invalidating the statute on that basis. After stressing the difficulty of fashioning a reasonable and relevant hypothetical example of the offence, he pointed out that even if such an example were presented in that case, "it is doubtful that it would have overcome the strong indication of validity arising from the first particularized step of the s. 12 analysis".[12] That is, "the particular facts of the [case before the court] provide an important benchmark for what is a reasonable example".[13]

18. Despite *Goltz*, this Court had to intervene to again constrain the concept of the reasonable hypothetical in *R. v. Morrisey*. In *Morrisey,* Gont*hier* J., again writing for a majority of this Court, reiterated his conclusion in *Goltz* that hypotheticals *must be* "common" rather than "extreme" or "far-fetched".[14] He recognized the serious limitations of an unbounded approach to reasonable hypotheticals where an offence can be committed in a number of different ways that reflect widely divergent levels of moral

[10] *Goltz*, at pp. 515-516.
[11] *Goltz*, at pp. 515-516.
[12] *Goltz,* at pp. 516, 517, 519.
[13] *Goltz,* at p. 516 (emphasis added).
[14] *Morrisey*, at paras. 30-31, 33.

culpability. Gonthier J. further cautioned against reliance on reported cases as reasonable hypotheticals.[15] Rather, the solution was found in limiting reasonable hypotheticals to scenarios that arise with a degree of generality appropriate to the particular offence. In the two hypotheticals developed by the Court, neither incorporated any personal characteristics of the offender.

19. However, even this attempt to clarify the application of reasonable hypotheticals has not resolved matters. In *Nur*, Doherty J.A. expressed confusion about this part of *Goltz*, stating "it is not clear to me why the facts of a given case are necessarily representative of available reasonable hypotheticals. On this approach, the two stages of the gross disproportionality inquiry begin to merge into one. However, after *Goltz*, the actual facts of the case have become an important "benchmark" in shaping reasonable hypotheticals."[16]

20. In sum, the Court's own jurisprudence on reasonable hypotheticals has had to revisit (i) their relationship to the actual facts of the case, (ii) their relationship to the facts of other real, reported cases, and (iii) impose further limitations on which imagined factual scenarios will count, without resolving fundamental uncertainties in their application. In other words, all aspects of the reasonable hypothetical have required some attempt at re-definition with only mixed success, suggesting the tool is ultimately not viable.

C. The "Reasonable Hypothetical" Analysis – Critique

1. The use of reasonable hypotheticals is incompatible with the principle of judicial restraint

21. The use of the reasonable hypothetical highlights the difficulty in reconciling two principles of Canadian constitutional law: (1) the requirement that there be a factual matrix for the assessment and adjudication of constitutional issues; and (2) the question of standing (often colloquially referred to as the *R. v. Big M Drug Mart*[17] principle that

[15] *Morrisey*, at paras. 32, 33, 50.
[16] *Nur*, at para. 130.
[17] *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, at pp. 313-314.

"any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid").

22. As the British Columbia Court of Appeal has recently stated the "fact that a party has standing to make a constitutional argument...does not compel a court to rule on that argument".[18] Even where an accused has standing, this Court has consistently held that adjudication of a *Charter* claim requires a proper factual foundation.[19] Absent an appropriate factual foundation for the assessment and adjudication of the constitutional issue, courts should decline to decide such questions. Even where this Court has stated Constitutional Questions, it has maintained its policy of not dealing with such Questions the abstract.[20]

23. One of the obvious practical difficulties with a s. 12 violation based on a reasonable hypothetical is that it involves only a risk of adverse impact on one or more imaginary individual offenders who may or may not materialize. No actual violation of an offender's s. 12 *Charter* right has occurred, and one may never occur. Of course, if the circumstances of the hypothetical actually arise in a given case, that offender can bring his or her own s. 12 constitutional challenge to the mandatory minimum sentence. If it is found to constitute cruel and unusual punishment for that offender, that person will have access to a constitutional remedy, and the mandatory minimum sentence will be declared unconstitutional by a court with jurisdiction to do so.

24. The importance of making a determination of constitutionality on the basis of the individual circumstances of an actual offender is reflected in some of the enduring and resonating critiques of the reasonable hypothetical. For example, in *Smith*, McIntyre J. "wrote a forceful dissent, disagreeing with the use of reasonable hypotheticals in a constitutional challenge of a sentence under s. 12".[21] Noting an "air of unreality" about the appeal that arose from the fact that not one of 10 judges who considered Mr.

[18] *R. v. Lloyd*, 2014 BCCA 224 (Leave to Appeal to SCC Pending; File No. 35982) at para. 42.
[19] *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.); *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; see also *R. v. Levkovic*, 2010 ONCA 830, at paras. 28-29, affirmed 2013 SCC 25, [2013] 2 SCR 204; *Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, at paras. 47-51.
[20] *Moysa*, at p. 1579-1580.
[21] This was the phrase used by Arbour J. in *Morrisey* at para. 90 to describe McIntyre J's dissent in *Smith*.

Smith's case from his trial to the Supreme Court of Canada felt that the mandatory minimum sentence was grossly disproportionate for him personally, McIntyre J. stated that "[u]nder s. 12 of the *Charter*, individuals should be confined to arguing that *their* punishment is cruel and unusual and not be heard to argue that the punishment is cruel and unusual for some hypothetical third party." [22]

25. Though LeDain J. ultimately accepted the reasonable hypothetical in concurring reasons, he admitted that the reasonable hypothetical analysis had also given him "considerable difficulty" and that he had "considerable misgivings about determining the issue of the constitutional validity, on its face, of the mandatory minimum sentence in s. 5(2) on the basis of hypothesis."[23]

26. Similar concerns were expressed seven years after *Smith*. In *R. v. Kumar*,[24] Lambert J.A., dissenting in part, noted that "[t]he task of the court in applying the second aspect of the *Goltz* test is a difficult one. Judges of the United States Supreme Court have stated in memorable phrases <u>their reluctance to base constitutional conclusions on hypothetical foundations</u>".[25] After citing from that U.S. jurisprudence, Lambert J.A. added, "[t]he long experience of the law serves as a stern caution to us of the frailty of human foresight when predicting in an evidentiary vacuum the situations in which people may one day find themselves".[26]

27. The need for a factual foundation upon which to assess gross disproportionality under s. 12 of the *Charter* was also stressed in *Morrisey* by Arbour J., writing concurring reasons for herself and McLachlin J. (as she then was). While Arbour J.'s reasons can be seen as endorsing the constitutional exemption, her judgment can also be understood as implicitly adopting McIntyre J.'s critique of the reasonable hypothetical in *Smith*.[27] Arbour J. acknowledged that, at some point in the future, there would unavoidably be a case in which the mandatory minimum sentence would be grossly

[22] *Smith*, at pp. 1083-1084.
[23] *Smith*, at p. 1112.
[24] *R. v. Kumar* (1993), 36 B.C.A.C. 81 (B.C.C.A.).
[25] *Kumar*, at para. 54 (emphasis added).
[26] *Kumar*, at para. 54
[27] *Morrisey*, at para. 90.

disproportionate.[28] She proposed a "more individualized approach to s. 12 challenges"[29] whereby courts would "give effect to Parliament's direction that a threshold be applied as the minimum penalty for the offence, save in cases where such penalty is grossly disproportionate punishment for the particular offender".[30] Arbour J. would have upheld the constitutionality of the mandatory sentence "generally, while declining to apply it in a future case if the minimum penalty is found to be grossly disproportionate for that future offender".[31] She saw "little purpose in attempting to tailor a [hypothetical] factual scenario that would illustrate this point of gross disproportionality. It could only be done by injecting a high degree of specificity to the hypothetical, which stretches the use of that jurisprudential technique beyond the purpose for which it was originally designed".[32]

28. While there are some constitutional analyses where reasonable hypotheticals might serve a purpose (such as the overly broad application of a statute[33]), such hypotheticals are not consistent with s. 12 in the sentencing process. The sentencing process is - at its core - an individualized one and the guarantee of s. 12 is an individual rather than a collective right.

29. Arbitrariness and overbreadth and gross disproportionality, as principles of fundamental justice under s. 7 of the *Charter*, stand on a qualitatively different footing than the threshold of gross disproportionality as it exists in the s. 12 *Charter* analysis. They demand a much narrower and stark assessment than called for under the multi-factored s. 12 threshold of gross disproportionality. As this Court has stated: "[g]ross disproportionality under s. 7 of the *Charter* does *not* consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law."[34]

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[28] *Morrisey*, at para. 82.
[29] *Morrisey*, at para. 66.
[30] *Morrisey*, at para. 92 (emphasis added); see also para. 94.
[31] *Morrisey*, at para. 66 (emphasis added).
[32] *Morrisey*, at para. 82.
[33] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paras. 120-123.
[34] *Bedford*, at 121, emphasis in original.

30. This is entirely different than the s. 12 test, which clearly incorporates a much broader assessment involving the very factors that cannot be considered under the s. 7 framework. Gonthier J. in *Goltz* explained the breadth:

> This acknowledgement that sanctions serve numerous purposes underscores the legitimacy of a legislative concern that sentences be geared in significant part to the continued welfare of the public through deterrent and protective aspects of a punishment. This perspective is explicitly affirmed in *R. v. Luxton*, *supra*, *per* Lamer C.J., at p. 721. Thus, while the multiple factors which constitute the *Smith* test are aimed primarily at ensuring that individuals not be subjected to grossly disproportionate punishment, it is also supported by a concern to uphold other legitimate values which justify penal sanctions. These values unavoidably play a role in the balancing of elements in a s. 12 analysis. [35]

31. To properly make this broad assessment, s. 12 requires a real factual foundation. Accordingly, the concerns expressed by McIntyre J., Arbour J. and Lambert J.A. are equally applicable today. Without a proper factual foundation, courts are engaging in complex constitutional analysis in an evidentiary vacuum and making judicial pronouncements about hypothetical offences and offenders that may never materialize.

32. This also fails to respect the principle of judicial restraint and mootness. It is a related and equally well-established principle. Courts should not decide issues of law, and particularly constitutional issues, that are not necessary to the resolution of the matter before the court.[36] This principle of judicial restraint cannot be applied in the s. 12 context where reasonable hypotheticals can be considered at the second stage of the test even if the sentence is not cruel and unusual for the actual offender before the court.

33. Recently, a number of Canadian courts have endorsed the principles of judicial restraint and mootness in the s. 12 context, concluding that it is not necessary to engage in the s. 12 analysis at all if the court ultimately concludes that, without regard to the mandatory minimum sentence, a fit sentence would equal or exceed the mandatory

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[35] *Goltz*, at p. 503, emphasis added.

[36] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at pp. 112-114; *R. v. Banks*, 2007 ONCA 19, at para. 25, leave to appeal refused, [2007] S.C.C.A. No. 139 (S.C.C.).

minimum sentence.[37] These courts have declined to engage in the s. 12 constitutional analysis on the basis that resolution of the issue would have no effect on the disposition of the case and would therefore be academic. It is submitted that these decisions are a natural reaction to the anomalies created by reasonable hypotheticals and reflect a proper tendency to adjudicate claims on their own facts.

34. In *R. v. Lloyd*,[38] for example, the trial judge held that the one year mandatory minimum sentence for drug trafficking in s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* ("*CDSA*")[39] violated s. 12 on the basis of reasonable hypothetical circumstances. However, the British Columbia Court of Appeal allowed the Crown's appeal and held, in part, that the trial judge erred in engaging in the s. 12 analysis. While Mr. Lloyd had standing to challenge the constitutional validity of the sentence, "the court was not obliged to determine that issue unless that section would have an impact on the appropriate sentence for Mr. Lloyd".[40] Given that a fit sentence exceeded the one year mandatory minimum, "it was unnecessary and unwise to address the question of its constitutionality" on appeal.[41] As Groberman J.A., writing for the court, explained:

> The fact that a party has standing to make a constitutional argument, however, does not compel a court to rule on that argument. There is a general (though not invariable) principle that courts avoid making constitutional pronouncements when cases can be decided on less esoteric bases…
>
> In short, while Mr. Lloyd clearly had standing to challenge the validity of s. 5(3)(a)(i)(D) of the *CDSA*, the court was not obliged to determine that issue unless that section would have an impact on the appropriate sentence for Mr. Lloyd.

[37] *R. v. Lloyd*, at paras. 39-47; *R. v. Christensen*, 2012 BCPC 374, at paras. 13 and 47-48, appeal from sentence pending; *R. v. Faria,* 2013 ONCJ 119, at paras. 3-4, 74-75*; R. v. Neault,* 2013 SKPC 174, at paras. 6, 14, 32, 49; *R. v. Curry,* 2013 ONCA 420, at para. 21; *R. v. Craig,* 2013 BCSC 2098, at paras. 13-18; *R. v. Chambers,* 2013 ONCA 680, at para. 46; *R. v. Ball*, 2013 BCSC 2372, at paras. 24-32, sentence varied on other grounds, 2014 BCCA 120; *R. v. Gladish*, 2014 BCSC 977, at paras. 25-30; *R. v. Brown,* 2014 BCPC 113; *R. v. Hammerstrom*, 2014 BCSC 1201, at paras. 16-17, 26-30. *Contra*, see *R. v. Nur*, at paras. 104 (FN11) and 110 (FN12).

[38] *R. v. Lloyd*, 2014 BCCA 224.

[39] *Controlled Drugs and Substances Act,* S.C. 1996, c. 19.

[40] *Lloyd,* at para. 43.

[41] *Lloyd,* at para. 6.

> Mr. Lloyd contends that the court is required to determine the constitutionality of s. 5(3)(a)(i)(D), because "no one may be sentenced under an unconstitutional law". While there is some merit in that contention, I do not think that it can be said that Mr. Lloyd would be "sentenced under an unconstitutional law" unless that law in some way affects his sentence. Before embarking on the constitutional inquiry, therefore, the court should consider whether the impugned provision would have any effect on the sentence to be imposed.[42]

35. The court also rejected the intervener's argument that it should nevertheless consider the constitutionality of the mandatory minimum sentence "because others whose sentences might be affected may ultimately not have the wherewithal to bring constitutional challenges to the section".[43] Groberman J.A. held that while that kind of argument may have force in "free-standing challenges to legislative regimes outside of criminal prosecutions...it is much less forceful within the context of a criminal prosecution against a person who is not affected by the impugned legislation".[44]

36. Following *Lloyd*, it appears (at least in British Columbia) that a sentencing judge should only engage in the s. 12 analysis if the new or enhanced mandatory minimum sentence has an impact on the appropriate sentence for the offender. Groberman J.A. suggested that in order to determine whether an offender is affected by the minimum sentence provision, the sentencing judge "should analyse the case law, to determine what the range of sentence was prior to the enactment of the [mandatory minimum sentence], and to determine whether the enactment has any appreciable effect on that range".[45] This threshold approach set out in *Lloyd* respects the principle of judicial restraint, allows a court to keep the circumstances of the offence at the forefront of the analysis, and evinces a reluctance to have mandatory minimum sentences constitutionally scrutinized in the abstract.

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[42] *Lloyd*, at paras. 42-44 (emphasis added).
[43] *Lloyd*, at para. 45.
[44] *Lloyd*, at para. 46.
[45] *Lloyd* (BCCA), at para. 58.

2. There are no limits on who can advance or construct a reasonable hypothetical

37. The abstract nature of the reasonable hypothetical inquiry and its disconnection from the offence and offender before the court leads to uncertainty about who can advance such hypotheticals.

38. In *Goltz*, Gonthier J. held that the onus of establishing a "reasonable hypothetical" is on "the party challenging the provision's validity",[46] an approach that appears to have been followed in *Latimer*,[47] *Ferguson*,[48] and *R. v. Stewart*,[49] where the courts declined to engage in a reasonable hypothetical analysis where no hypothetical was advanced by the offender. However, in *Morrisey*, Gonthier J. rejected the hypotheticals considered in the courts below, which were based largely on reported cases, and instead crafted his own hypotheticals based on two types of situations that commonly arise in relation to the offence in question. In *Nur*, Doherty J.A. considered, but did not adopt, the hypotheticals proposed by the sentencing judge and counsel, and instead constructed his own.

39. As Doherty J.A. aptly observed in *Nur*, "the virtues of the hypothetical offender and the mitigating factors relevant to the commission of the offence seem limited only by the imaginations of counsel and judges".[50] This can be contrasted with La Forest J. who explained in *R. v. Lyons* (for the whole Court on this point) that the s. 12 gross disproportionality standard embodied "this Court's concern not to hold Parliament to a standard so exacting, at least in the context of s. 12, as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender."[51] Yet that is precisely what the reasonable hypothetical tends to produce: litigation in which the offence is tested by every crime and every offender that can be "reasonably" imagined.

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[46] *Goltz*, at p. 520.
[47] *Latimer*, at para. 79.
[48] *Ferguson*, at para. 30.
[49] *R. v. Stewart*, 2010 BCCA 153 at para. 23.
[50] *Nur*, at para. 115.
[51] *R. v. Lyons*, [1987] 2 S.C.R. 309 at 345 (quotation cited with approval by Gonthier J. in *Goltz*, at p. 519.)

40. The inclusion of the reasonable hypothetical has the effect of automatically turning all s. 12 claimants into public interest litigants able to rely on facts that are not their own, without applying the thresholds and discretion contemplated in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*[52]. While no one would equate an offender facing sentencing to a "busybody", the use of reasonable hypotheticals allows the offender in s. 12 cases to litigate someone else's case without demonstrating a need to do so. With other legal rights under the *Charter*, most notably s. 8, the Court has rejected as "discredited" the "automatic standing rule"[53] and it should require more of s. 12 claimants than a good imagination before allowing them to advance a breach that is not their own.

3. The hypotheticals often bear no resemblance to how the offence is actually committed

41. Retreating from *Smith*'s "most innocent offender" in the exercise of crafting reasonable hypotheticals, this Court has repeatedly stressed that statutes should not be invalidated on the basis of marginally imaginable, remote or extreme examples because legislated punishments need not be precisely calibrated to suit the moral nuances of every crime and offender.[54] Yet the "circumstances" of the hypothetical often bear no relation to how the offence is actually committed in real life. As Watt J. (as he then was) presciently observed in 1984: "[i]n assessing *Charter* applications, it is generally socially unrealistic to consider only the possible worst case where such case is not before the Court. Indeed it is only too easy for the creative legal imagination to concoct bizarre examples that never come to court. [55]

42. This "air of unreality" is seen in *Nur*, where Doherty J.A. constructed a hypothetical for a s. 95 offence (unauthorized possession of a restricted or prohibited firearm, either loaded or with readily accessible ammunition) at the so-called

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[52] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*[52] [2012] 2 S.C.R. 524 at para. 37.
[53] *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 54-56
[54] *Goltz*, at p. 519.
[55] *R. v. Moore* (1984), 10 C.C.C. (3d) 306 (Ont. H.C.), at 312.

"regulatory" end of the spectrum, despite acknowledging that the vast majority of s. 95 cases occur at the "true crime" end of the spectrum and pose a risk of harm to others.[56]

43. Similarly, in *R. v. Charles*,[57] the Ontario Court of Appeal considered the constitutionality of the five year mandatory minimum sentence in s. 95(2)(a)(ii) of the *Code*, where an offender is being sentenced for a second or subsequent enumerated offence. Cronk J.A., writing for the court, used the same "regulatory" reasonable hypothetical employed in *Nur*, with the modification that the reasonable hypothetical offender had a conviction in the prior 10 years for any of the offences listed in s. 84(5)(a) of the *Code*. She utilized this hypothetical despite acknowledging that the facts of Mr. Charles' case also fell at the "true crime" end of the spectrum,[58] and that the facts of the reasonable hypothetical bore no relation to the facts of either *Charles* or *Nur*.[59]

44. AGBC submits that the Ontario Court of Appeal erred in its characterization of the scope and seriousness of the s. 95 offence and erred by failing to limit its consideration of reasonable hypotheticals to scenarios that would actually warrant an indictable election even on the existing test. The posited hypotheticals are fundamentally divorced from the acknowledged reality that the vast majority of s. 95 offences pose a real and imminent risk to public safety[60] and warrant an indictable election. Nor are the decisions consistent with Justice Gonthier's direction in *Goltz* that "the particular facts [of the case before the court] provide an important benchmark for what is a reasonable example".

45. Furthermore, the abstract nature of the reasonable hypothetical is compounded where the offence can be prosecuted summarily or by indictment. In those cases, the reasonable hypothetical requires an initial hypothetical Crown election. Matters of

[56] *Nur*, at paras. 85, 92, 144, 165, 167.
[57] *R. v. Charles*, 2013 ONCA 681.
[58] *Charles*, at para. 56.
[59] *Charles*, at para. 61.
[60] For example, in *R. v. Felawka*, [1993] 4 S.C.R. 199, Cory J. said a firearm "always presents the ultimate threat of death to those in its presence" (at p. 211). Similarly, in *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783, the Court observed that "[g]uns cannot be divided neatly into two categories – those that are dangerous and those that are not dangerous. All guns are capable of being used in crime. All guns are capable of killing and maiming. It follows that all guns pose a threat to public safety" (para. 45).

actual Crown discretion are afforded considerable deference, but there is no coherent answer to how to exercise hypothetical deference to imagined prosecution choices in fictitious cases.

4. Despite striking the provision, sentences at or in excess of the mandatory minimum are imposed

46. In these appeals, the Ontario Court of Appeal struck the mandatory minimum sentence on the basis of reasonable hypothetical circumstances but did not disturb sentences at or in excess of the mandatory minimum sentences. Such results lead full circle back to the question of how the mandatory minimum sentence could have been considered grossly disproportionate in the first place.

47. For example, in *Nur*, even though Doherty J. held that the three year mandatory minimum sentence constituted cruel and unusual punishment, he nevertheless affirmed the 40 month sentence for Mr. Nur. In so doing, he acknowledged that his constitutional analysis would likely have little impact on the very offenders that Parliament intended to target: individuals who have loaded restricted or prohibited firearms that they have no business possessing anywhere or at any time, and who are engaged in criminal conduct or conduct that poses a danger to others.[61] Similarly, in *Charles*, even though the court struck down the five year mandatory minimum sentence for a second or subsequent offence, it upheld the seven year sentence imposed by the sentencing judge.[62]

48. The Ontario Court of Appeal's conclusion that Mr. Nur's and Mr. Charles' sentences were fit simply highlights two problems created by the use of reasonable hypotheticals. First, the court went through a complex analysis and declared a statute unconstitutional despite the fact that the offenders would be receiving the same sentences in the end. Second, to achieve this strange result, the court had to create an extra-ordinary "regulatory" hypothetical despite the recognition that the respective mandatory minimum sentences were fit for examples that "commonly arise in day-to-day life".

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[61] *Nur*, at para. 206.
[62] *Charles*, at paras. 6, 108.

49. Another example is *Lloyd,* where the sentencing judge imposed a 12 month sentence after striking down the one year mandatory minimum sentence.[63] In contrast to the Ontario Court of Appeal's approach, the British Columbia Court of Appeal held that the trial judge erred in assuming that the minimum sentence created an "inflationary floor" and in engaging in the s. 12 analysis in light of his conclusion that a one year sentence was fit. The court ultimately increased the sentence to 18 months.[64] This approach respects both the need for a factual foundation and the principles of judicial restraint and mootness.

5. Reasonable hypotheticals are inconsistent with *Ferguson's* rejection of constitutional exemptions

50. In *Ferguson*, this Court rejected the use of constitutional exemptions where mandatory minimum sentences violate s. 12 of the *Charter*. One foundation for this ruling was the fact that exemptions would defeat the mandatory nature of the minimum sentence in express contravention of Parliamentary intent. The other was the legal uncertainty and unpredictability flowing from the absence of any practical way to decide when to strike the law pursuant to s. 52 of the *Constitution Act* or provide the individual exemption by way of personal remedy under s. 24(1) of the *Charter*. As a result, s. 52 declarations of invalidity are the singular constitutional response where mandatory minimum sentences violate s. 12. Unlike statutory schemes whose constitutional defects may benefit from the flexible remedial techniques (severance, reading in etc.) set out in *Schachter v. Canada*[65], a s. 12 violation results in complete invalidity of the mandatory minimum sentence.

51. AGBC says these same concerns regarding certainty and predictability demonstrate why the reasonable hypothetical should be rejected as part of the s. 12 *Charter* analysis. Indeed, it is precisely because of the absolute invalidity that attaches to mandatory minimum sentences that violate s. 12 of the *Charter*, that doing so on a hypothetical basis is inappropriate and instead should only flow from an actual *Charter*

[63] *R. v. Lloyd*, 2014 BCPC 8, at paras. 30-35.
[64] *Lloyd* (BCCA), at paras. 65-70.
[65] *Schachter v. Canada*, [1992] 2 S.C.R. 679

violation. Just as citizens are entitled to laws that are sufficiently precise to allow for fair notice as to what constitutes prohibited conduct, Parliament should be equally entitled to craft sentencing laws on the basis that their constitutionality will be tested in actual as opposed to imagined hypothetical cases. Without that the constitutional test that Parliament is to consider in enacting new sentences is itself too vague and unpredictable.

52. The argument advanced by respondent Nur[66] that the reasonable hypothetical is necessary because of the parade of offenders who would be sentenced under an unconstitutional mandatory minimum sentence before it is so declared is unsustainable. It operates on a unsubstantiated premise of prematurity: despite the presumption of constitutionality of laws and the *Charter* claimant's onus to establish a violation, the argument relies on the notion that the mandatory minimum sentence will necessarily and eventually be found to violate s. 12. Consequently, the hypothetical is needed to ensure this happens promptly to avoid offenders being sentenced under the putatively invalid law. Yet, as argued earlier, there is no compelling reason to use an imagined possible offender, when the law can be readily tested for gross disproportionality in actual cases.

53. The further argument that reasonable hypotheticals are necessary because some meritorious claimants will not be able to bring them should be rejected in the absence of evidence that state-funded legal assistance through legal aid programs or *Rowbotham* applications have been insufficient to allow such claims to be advanced.

6. The reasonable hypothetical does not contribute to respect for Parliamentary objectives

54. AGBC says that when Parliament enacts sentencing legislation to respond to an actual pressing social problem based on alarming real-life examples (as in the firearms context), Parliamentary intent is undermined when courts strike down the provision based on hypothetical circumstances that are remote or extreme and may never actually arise.

[66] Factum of the Respondent, Hussein Jama Nur, para. 69.

55. Some argue that the reasonable hypothetical contributes to both finality and certainty in that courts do not have to wait for an exceptional case,[67] or an offender with adequate resources[68], before the constitutionality of a mandatory minimum sentence can be fully assessed. Finality based on an abstraction is an artifice and other constitutional rights ensure that viable *Charter* challenges are properly heard.

56. Legislated punishments are necessarily directed to a broad range of criminal conduct which can naturally occur in an extraordinarily wide range of circumstances reflecting divergent levels of moral culpability. Such schemes should not be invalidated based on remote hypotheticals that Parliament could have never anticipated, as opposed to an actual constitutional violation. Invalidation based on hypotheticals too far removed from reality tends to undermine rather than respect Parliamentary objectives.

57. Though the rest of the s. 12 test is couched in terms of deference to Parliament, the reasonable hypothetical component amounts to the judicial creation of fictitious litigants designed to have an improved chance at striking down the legislation. Sending such imaginary re-enforcements in to bolster a *Charter* claim is neither appropriate nor necessary given the wide range of factors taken into account during the individualized assessment of gross disproportionality.

D. Conclusion

58. The reasonable hypothetical is an unwieldy device that is inconsistent with principles of constitutional adjudication. Moreover, it is also unnecessary to ensure that no citizen suffers a cruel and unusual punishment. It can potentially compromise mandatory minimum sentences that are legitimate expressions of legislative sentencing policy without an actual breach having been demonstrated. This Court should remove

[67] L. Dufraimont, "Constitutional Cases 2007: *R. v. Ferguson* and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12" (2008), 42 S.C.L.R. (2d) 459, at para. 33. See also *R. v. Morrisey*, at para. 89, per Arbour J., dissenting (McLachlin J. concurring).

[68] As noted above, in *R. v. Lloyd*, the B.C. Court of Appeal rejected a submission made by an intervenor that the Court should consider the constitutionality of the mandatory minimum sentence "because others whose sentences might be affected may ultimately not have the wherewithal to bring constitutional challenges to the section" (para. 45); see also paragraphs 46-47.

the reasonable hypothetical from the s. 12 analytical framework and limit the test to the particularized inquiry.

PART IV – SUBMISSIONS CONCERNING COSTS

59. The AGBC makes no submissions on costs.

PART V – ORDER SOUGHT

60. AGBC submits that the reasonable hypothetical should play no role when assessing whether a mandatory minimum sentence violates s. 12 of the *Charter*. The constitutional rulings in these two appeals were predicated on reasonable hypotheticals and are therefore tainted by legal error. The first constitutional question stated in each of these appeals should be answered in the negative: s. 95(2)(a)(i) and s. 95(2)(a)(ii) do not violate s. 12 of the *Charter*.

All of Which Is Respectfully Submitted,

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Rodney G. Garson
Counsel for the Intervener, Attorney General for British Columbia
Dated this 22nd of October, 2014
Victoria, British Columbia

PART VI: TABLE OF AUTHORITIES

Other Material

Legislation

PART VII: STATUTES

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, ss. 1, 7, 12

LOI CONSTITUTIONELLE DE 1982

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

GARANTIE DES DROITS ET LIBERTES

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

GARANTIES JURIDIQUES

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Cruauté

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Loi constitutionnelle de 1982 (R-U), constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11, art. 1, 7, 12

***CRIMINAL CODE*, 1985**

PART III

FIREARMS AND OTHER WEAPONS

INTERPRETATION

POSSESSION OFFENCES

95. (2) Every person who commits an offence under subsection (1)

(*a*) is guilty of an indictable offences and liable to imprisonment for a term not

***CODE CRIMINEL*, 1985**

PARTIE III

ARMES À AUTRES ARMES

DÉFINITIONS ET INTERPRÉTATION

INFRACTIONS RELATIVES À POSSESSION

95. (2) Quiconque commet l'infraction prevue au paragraphe (1) est coupable:

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la

exceeding 10 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, three years, and

(ii) in the case of a second or subsequent offence, five years; or

(*b*) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year

peine minimale étant:

(i) de trois ans, dans le cas d'une première infraction,

(ii) de cinq ans, en cas de récidive;

b) soit d'une infraction punissable, sur declaration de culpabilité par procédure sommaire, d'un emprisonnement maximal de un an.

PART XXIII

SENTENCING

INTERPRETATION

PURPOSE AND PRINCIPLES OF SENTENCING

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Criminal Code, R.S.C., 1985, c. C-46, ss. 95(2), 95(2)(a)(i), 95(2)(a)(ii), 718

PART XXXIII

DÉTERMINATION DE LA PEINE

DÉFINITIONS

OBJECTIF ET PRINCIPES

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

a) dénoncer le comportement illégal;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causes aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

Code criminel, L.R.C. (1985), ch. C-46, art. 95(2), 95(2)(a)(i), 95(2)(a)(ii), 718