

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

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant  
(Party Intervener)**

**- AND -**

**ATTORNEY GENERAL OF ONTARIO**

**Appellant  
(Respondent)**

**- AND -**

**HUSSEIN JAMA NUR**

**Respondent  
(Appellant)**

**- AND -**

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

**Interveners**

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

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**SIDNEY CHARLES**

**Respondent  
(Appellant)**

**- AND -**

**ATTORNEY GENERAL OF ALBERTA,  
ATTORNEY GENERAL OF BRITISH COLUMBIA,  
ATTORNEY GENERAL OF QUEBEC, PIVOT LEGAL SOCIETY,  
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BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and  
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---

**(Cont'd on next page)**

**RUBY SHILLER CHAN HASAN**

**Barristers**

11 Prince Arthur Ave.  
Toronto, ON M5R 1B2

**Nader R. Hasan**

**Gerald Chan**

T: (416) 964-9664

F: (416) 964-8305

Email: [nhasan@rubyshiller.com](mailto:nhasan@rubyshiller.com);

[gchan@rubyshiller.com](mailto:gchan@rubyshiller.com)

**Counsel for the Intervener,  
British Columbia Civil Liberties Association**

**SACK GOLDBLATT MITCHELL LLP**

**Barristers and Solicitors**

West 500 – 30 Metcalfe St.  
Ottawa, ON K1P 1C3

**Colleen Bauman**

T: (613) 482-2463

F: (613) 235-3041

Email: [cbauman@sgmlaw.com](mailto:cbauman@sgmlaw.com)

**Ottawa Agent for the Intervener,  
British Columbia Civil Liberties Association**

**ORIGINAL TO:** **SUPREME COURT OF CANADA**  
**The Registrar**  
301 Wellington Street  
Ottawa, ON K1A 0J1

**COPIES TO:**

**DEPARTMENT OF JUSTICE CANADA**  
**Ontario Regional Office**  
130 King St. West  
Suite 3400, Box 36  
Toronto, ON M5X 1K6

**DEPUTY ATTORNEY GENERAL OF CANADA**  
East Memorial Building  
284 Wellington St.  
Ottawa, ON K1A 0H8

**Nancy L. Dennison**  
**Richard A. Kramer**  
T: (416) 954-8032 (Mrs. Dennison)  
T: (416) 952-6330 (Mr. Kramer)  
F: (416) 973-4328  
Email: [nancy.dennison@justice.gc.ca](mailto:nancy.dennison@justice.gc.ca);  
[rkramer@justice.ca](mailto:rkramer@justice.ca)

**Robert J. Frater**  
**William F. Pentney**  
T: (613) 957-4763  
F: (613) 954-1920  
Email: [robert.frater@justice.ca](mailto:robert.frater@justice.ca)

**Counsel for the Appellant,**  
**Attorney General of Canada**

**Ottawa Agent for the Appellant,**  
**Attorney General of Canada**

**MINISTRY OF THE ATTORNEY GENERAL**  
**Crown Law Office – Criminal**  
720 Bay St., 10<sup>th</sup> Fl.  
Toronto, ON M7A 2S9

**BURKE-ROBERTSON**  
441 MacLaren St.  
Suite 200  
Ottawa, ON K2P 2H3

**Riun Shandler**  
**Andreea I. Baiasu**  
T: (416) 326-4600  
F: (416) 326-4656  
Email: [riun.shandler@ontario.ca](mailto:riun.shandler@ontario.ca);  
[andreea.baiasu@ontario.ca](mailto:andreea.baiasu@ontario.ca)

**Robert E. Houston, Q.C.**  
T: (613) 236-9665  
F: (613) 235-4430  
Email: [rhouston@burkerobertson.com](mailto:rhouston@burkerobertson.com)

**Counsel for the Appellant,**  
**Attorney General of Ontario**

**Ottawa Agent for the Appellant,**  
**Attorney General of Ontario**

**DERSTINE PENMAN**  
559 College St., Suite 302  
Toronto, ON M6G 1A9

**Dirk Derstine**

**Janani Shanmuganathan**

T: (416) 304-1414 (Mr. Derstine)  
T: (416) 304-1920 (Mrs. Shanmuganathan)  
F: (416) 304-1345  
Email: [dertstine@derstinepenman.com](mailto:dertstine@derstinepenman.com);  
[shanmuganathan@derstinepenman.com](mailto:shanmuganathan@derstinepenman.com)

**Counsel for the Respondent,  
Hussein Jama Nur**

**DAWE & DINEEN**  
171 John St., Suite 101  
Toronto, ON M5T 1X3

**Michael Dineen**

**Carlos Rippell**

T: (416) 649-5059 (Mr. Dineen)  
T: (416) 738-7839 (Mr. Rippell)  
F: (416) 352-7733  
Email: [mdineed@dawedineen.com](mailto:mdineed@dawedineen.com);  
[carlos.rippell@roylelaw.ca](mailto:carlos.rippell@roylelaw.ca)

**Counsel for the Respondent,  
Sidney Charles**

**THE ATTORNEY GENERAL OF  
ALBERTA**

**Appeals Branch**

332 6<sup>th</sup> Ave. S.W., Suite 300  
Calgary, AB T2B 0B2

**Joshua B. Hawkes, Q.C.**

T: (403) 297-6005  
F: (403) 297-3453  
Email: [josh.hawkes@gov.ab.ca](mailto:josh.hawkes@gov.ab.ca)

**Counsel for the Intervener,  
Attorney General of Alberta**

**SUPREME ADVOCACY LLP**  
340 Gilmour St., Suite 100  
Ottawa, ON K2P 0R3

**Marie-France Major**

T: (613) 695-8855 Ext: 102  
F: (613) 695-8580  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa Agent for the Respondent,  
Hussein Jama Nur**

**GOWLING LAFLEUR HENDERSON LLP**  
160 Elgin St., Suite 2600  
Ottawa, ON K1P 1C3

**Brian A. Crane**

T: (613) 233-1781  
F: (613) 563-9869  
Email: [brian.crane@gowlings.com](mailto:brian.crane@gowlings.com)

**Ottawa Agent for the Respondent,  
Sidney Charles**

**GOWLING LAFLEUR HENDERSON LLP**  
160 Elgin St., Suite 2600  
Ottawa, ON K1P 1C3

**D. Lynne Watt**

T: (613) 786-8695  
F: (613) 788-3509  
Email: [lynne.watt@gowlings.com](mailto:lynne.watt@gowlings.com)

**Ottawa Agent for the Intervener,  
Attorney General of Alberta**

**THE ATTORNEY GENERAL OF BRITISH COLUMBIA**

**Crown Law Division**  
940 Blanshard St., 3<sup>rd</sup> Fl.  
Victoria, B.C. V8W 3E6

**Rodney G. Garson**

T: (250) 387-9087  
F: (250) 387-4262  
Email: [rodney.garson@gov.bc.ca](mailto:rodney.garson@gov.bc.ca)

**Counsel for the Intervener,  
Attorney General of British Columbia**

**THE ATTORNEY GENERAL OF QUEBEC**

1200 de l'Église Rd.  
Quebec, QC G1V 4M1

**Sylvain Leboeuf**

**Julie Dassylva**  
T: (418) 643-1477  
F: (418) 644-7030  
Email: [sylvain.leboeuf@justice.gouv.qc.ca](mailto:sylvain.leboeuf@justice.gouv.qc.ca)

**Counsel for the Intervener,  
Attorney General of Quebec**

**FASKEN MARTINEAU DUMOULIN LLP**

333 Bay St., Suite 2400  
Bay Adelaide Centre, Box 20  
Toronto, ON M5H 2T6

**Jennifer McAleer**

**Kimberly Potter**  
T: (416) 865-4413  
F: (416) 364-7813  
Email: [jmcaleer@fasken.com](mailto:jmcaleer@fasken.com)

**Counsel for the Intervener,  
Canadian Civil Liberties Association**

**BURKE-ROBERTSON**

441 MacLaren St., Suite 200  
Ottawa, ON K2P 2H3

**Robert E. Houston, Q.C.**

T: (613) 236-9665  
F: (613) 235-4430  
Email: [rhouston@burkerobertson.com](mailto:rhouston@burkerobertson.com)

**Ottawa Agent for the Respondent,  
Attorney General of Ontario**

**NOËL & ASSOCIÉS LLP**

111 Champlain St.  
Gatineau, QC J8X 3R1

**Pierre Landry**

T: (819) 771-7393  
F: (819) 771-5397  
Email: [p.landry@noelassocies.com](mailto:p.landry@noelassocies.com)

**Ottawa Agent for the Intervener,  
Attorney General of Quebec**

**FASKEN MARTINEAU DUMOULIN LLP**

55 Metcalfe St., Suite 1300  
Ottawa, ON K1P 6L5

**Yael Wexler**

T: (613) 236-3882  
F: (613) 230-6423  
Email: [ywexler@fasken.com](mailto:ywexler@fasken.com)

**Ottawa Agent for the Intervener,  
Canadian Civil Liberties Association**

**WOMEN'S LEGAL EDUCATION AND  
ACTION FUND**

703-60 St. Clair Ave. E.  
Toronto, ON M4T 1N5

**Joanna L. Birenbaum**

**Susan Chapman**

T: (416) 595-7170 ext. 223

F: (416) 595-7191

Email: [j.birenbaum@leaf.ca](mailto:j.birenbaum@leaf.ca)

**Counsel for the Intervener,  
Canadian Association for Community Living**

**MCCARTHY TETRAULT LLP**

777 Dunsmuir St., Suite 1300  
Vancouver, B.C. V7Y 1K2

**Michael A. Feder**

**Adrienne Smith**

T: (604) 643-5983

F: (604) 622-5614

Email: [mfeder@mccarthy.ca](mailto:mfeder@mccarthy.ca)

**Counsel for the Intervener,  
Pivot Legal Society**

**SUPREME ADVOCACY LLP**

100-340 Gilmour St.  
Ottawa, ON K2P 0R3

**Marie-France Major**

T: (613) 695-8855 ext. 102

F: (613) 695-8580

Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa Agent for the Intervener,  
Canadian Association for Community Living**

**BORDEN LADNER GERVAIS LLP**

World Exchange Plaza  
100 Queen St., Suite 1300  
Ottawa, ON K1P 1J9

**Nadia Effendi**

T: (613) 237-5160

F: (613) 230-8842

Email: [neffendi@blg.com](mailto:neffendi@blg.com)

**Ottawa Agent for the Intervener,  
Pivot Legal Society**

**BARNES SAMMON LLP**

400-200 Elgin St.  
Ottawa, ON K2P 1L5

**Bruce F. Simpson**

T: (613) 594-8000  
F: (613) 235-7578

**Counsel for the Intervener,  
John Howard Society of Canada**

**AFRICAN CANADIAN LEGAL CLINIC**

811-8 King St. E.  
Toronto, ON M5C 1B5

**Virginia A. Nelder**

**Anthony Morgan**

T: (416) 214-4747  
F: (416) 214-4748

Email: [nelderv@lao.on.ca](mailto:nelderv@lao.on.ca)

**Counsel for the Intervener,  
African Canadian Legal Clinic**

**KAPOOR BARRISTERS**

235 King St. E., 2<sup>nd</sup> Floor  
Toronto, ON M5A 1J9

**Anil Kapoor**

T: (416) 363-2700  
F: (416) 363-2787

Email: [akk@kapoorbarristers.com](mailto:akk@kapoorbarristers.com)

**Counsel for the Intervener,  
Advocates' Society**

**BARNES SAMMON LLP**

400-200 Elgin St.  
Ottawa, ON K2P 1L5

**Bruce F. Simpson**

T: (613) 594-8000  
F: (613) 235-7578

**Ottawa Agent for the Intervener,  
African Canadian Legal Clinic**

**BORDEN LADNER GERVAIS LLP**

World Exchange Plaza  
100 Queen St., Suite 1300  
Ottawa, ON K1P 1J9

**Nadia Effendi**

T: (613) 237-5160  
F: (613) 230-8842

Email: [neffendi@blg.com](mailto:neffendi@blg.com)

**Ottawa Agent for the Intervener,  
Advocates' Society**



**PECK AND COMPANY**  
610-744 West Hastings  
Vancouver, B.C. V6C 1A5

**Eric V. Gottardi**  
**Nikos Harris**  
T: (604) 669-0208  
F: (604) 669-0616

**Counsel for the Intervener,  
The Canadian Bar Association**

**EDELSON CLIFFORD D'ANGELO  
FRIEDMAN LLP**  
200 Elgin St., Suite 600  
Ottawa, ON K2P 1L5

**Solomon Friedman**  
T: (613) 237-2290  
F: (613) 237-0071  
Email: [solomon@edelsonlaw.ca](mailto:solomon@edelsonlaw.ca)

**Counsel for the Intervener,  
Canada's National Firearms Association**

**GOWLING LAFLEUR HENDERSON LLP**  
160 Elgin St., Suite 2600  
Ottawa, ON K1P 1C3

**Jeffrey W. Beedell**  
T: (613) 786-0171  
F: (613) 788-3587  
Email: [jeff.beedell@gowlings.com](mailto:jeff.beedell@gowlings.com)

**Ottawa Agent for the Intervener,  
The Canadian Bar Association**

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## **PART I: STATEMENT OF FACTS**

1. The British Columbia Civil Liberties Association (the “BCCLA”) accepts the facts as set out in the parties’ facts. The BCCLA takes no position on disputed facts.

## **PART II: THE BCCLA’S POSITION ON THE QUESTION IN ISSUE**

2. The BCCLA respectfully proposes that this Honourable Court revise the existing analytical framework for determining whether a sentence is grossly disproportionate under s. 12 of the *Charter*<sup>1</sup> by adopting a proportionality test modeled on the *Oakes* test.<sup>2</sup>

3. In *R. v. Smith*,<sup>3</sup> this Court developed a framework for evaluating the constitutionality of mandatory minimum sentences under s. 12 of the *Charter*.<sup>4</sup> The organizing principles of this framework are the related concepts of “proportionality” and “gross disproportionality”. The lower courts, however, have had difficulty translating these principles into a workable test. Part of the difficulty is that although proportionality is *the* fundamental principle of sentencing under s. 718.1 of the *Criminal Code*,<sup>5</sup> the *Code* also requires sentencing courts to take into account other objectives, purposes and secondary principles. This Court has not yet addressed how these disparate sentencing objectives, purposes and principles fit with the proportionality principle.

4. Under this Court’s existing framework for determining whether a mandatory minimum sentence is grossly disproportionate under s. 12 of the *Charter*, the sentencing court must first determine what would have been the proportionate sentence for the offender absent the mandatory minimum. Under the BCCLA’s proposed framework, the Court would determine the proportionate sentence by asking:

- (a) what sentence is *rationaly connected* to the applicable objectives of sentencing;
- (b) what sentence is no more severe *than necessary* to accomplish these objectives; and

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, ss. 7, 12 [the “*Charter*”].

<sup>2</sup> See *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-40.

<sup>3</sup> See *R. v. Smith*, [1987] 1 S.C.R. 1045.

<sup>4</sup> *Charter*, *supra*, s. 12.

<sup>5</sup> *Criminal Code*, R.S.C., 1985, c. C-46, s. 718.1.

- (c) what sentence will achieve the proper *balance between the deleterious effects on the individual and society's interest* in punishing the offender?

5. This framework, if adopted, would help ensure greater analytical clarity in the decisions of sentencing courts and foster more meaningful appellate review of those decisions.

### **PART III: STATEMENT OF ARGUMENT**

#### **I. THE CURRENT FRAMEWORK FOR DETERMINING “GROSS DISPROPORTIONALITY”**

6. The current framework for assessing whether a sentence is grossly disproportionate involves a two-part test that is further subdivided into two stages. Under the first part of the test, the Court must determine whether the impugned mandatory minimum sentence is grossly disproportionate for the particular offender challenging the sentence (the “particularized inquiry”).<sup>6</sup> Within that inquiry, the court must first identify what would have been a proportionate sentence for that particular offender without regard to the mandatory minimum sentence. Second, the court must compare that proportionate sentence to the mandatory minimum sentence to determine whether the mandatory minimum sentence is grossly disproportionate.

7. If the sentence passes constitutional muster under the particularized inquiry, the Court must then go on to consider whether the mandatory minimum sentence would be grossly disproportionate for a “reasonable hypothetical” offender.<sup>7</sup> This involves determining the proportionate sentence for the reasonable hypothetical offender, and then comparing that proportionate sentence to the mandatory minimum sentence to determine whether the mandatory minimum is grossly disproportionate.

8. Under this framework, the linchpin of the analysis — at both the particularized inquiry and reasonable hypothetical offender analysis — lies in applying the proportionality principle and identifying the proportionate sentence without regard to the mandatory minimum sentence.

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<sup>6</sup> See *R. v. Nur*, [2013] O.J. No. 5120 at para. 104 (C.A.).

<sup>7</sup> *Ibid.* at paras. 164-169.

## II. THE DIFFICULTY IN APPLYING THE PROPORTIONALITY PRINCIPLE

9. The concept of proportionality is *the* fundamental principle of sentencing.<sup>8</sup> It requires that a sentence *must* be proportionate to the gravity of the offence and the degree of responsibility (moral blameworthiness) of the offender.<sup>9</sup> The proportionality principle “serves a limiting or restraining function” and ensures that the offender’s sentence is “equivalent to his or her moral culpability, and not greater than it.”<sup>10</sup> It is a simple yet compelling premise — derived from the “just deserts” principle — that the punishment should fit the crime.

10. The Supreme Court of Canada has repeatedly confirmed that the proportionality principle is the dominant principle driving the determination of the sentence.<sup>11</sup> “Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*,” this Court recently wrote, “the resulting sentence must respect the fundamental principle of proportionality.”<sup>12</sup> Proportionality “is the *sine qua non* of a just sanction.”<sup>13</sup>

11. Despite this Court’s guidance on the proportionality principle, it has not yet adopted a test for assessing proportionality in sentencing.<sup>14</sup> The absence of a test has made it difficult for lower courts to apply the proportionality principle in the real-world sentencing context.

12. The sentencing case law for the offence at issue in these appeals — s. 95(1) of the *Criminal Code* — underscores the disparity in approaches to proportionality. In *R. v. Smickle*, Molloy J. considered the range of sentence in comparable cases involving first-time offenders of low moral blameworthiness.<sup>15</sup> Because those offenders received sentences of 18 months and Smickle’s conduct was less blameworthy than theirs, it followed that he should be given a lower sentence.<sup>16</sup> Thus, she held that one year, served conditionally, would have been the

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<sup>8</sup> *Criminal Code*, *supra*, s. 718.1.

<sup>9</sup> *Ibid.*

<sup>10</sup> *R. v. Nasogaluak*, [2010] 1 S.C.R. 206 at para. 42.

<sup>11</sup> *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 82; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 163; *R. v. Nasogaluak*, *supra* at paras. 40-42 (S.C.C.); *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at para. 37; *R. v. Pham*, [2013] 1 S.C.R. 739 at para. 7.

<sup>12</sup> *R. v. Ipeelee*, *supra* at para. 37 (S.C.C.).

<sup>13</sup> *Ibid.* at para. 37; *R. v. Pham*, *supra* at para. 7 (S.C.C.).

<sup>14</sup> *R. v. Nur*, *supra* at para. 79 (Ont. C.A.) (noting that “[t]here is no formula to be applied in weighing and assessing the various factors in any given case.”).

<sup>15</sup> See, e.g., *R. v. Grant* (2006), 209 C.C.C. (3d) 250 at paras. 81-82 (Ont. C.A.), varied [2009] 2 S.C.R. 353; *R. v. Los*, [2008] O.J. No. 3248 (S.C.J.); *R. v. Canepa*, [2011] O.J. No. 924 (S.C.J.).

<sup>16</sup> *R. v. Smickle*, [2012] O.J. No. 612 at paras. 65-68 (S.C.J.).

proportionate sentence for Smickle (absent a mandatory minimum). In *Nur*, Code J. considered an analogous set of facts involving an offence under s. 95(1) at the low end of the spectrum of moral blameworthiness (i.e., Nur did not have any criminal antecedents; possession of the firearm did not appear to be tied to any other criminal activity; and a sentence of two years or more would make him deportable under the *Immigration and Refugee Protection Act*.<sup>17</sup>). Code J. also considered the range of sentence reflected in the case law but stressed the need for denunciation and deterrence, which are the primary goals of Parliament’s gun control scheme.<sup>18</sup> He held that 2.5 years was the proportionate sentence absent a mandatory minimum despite the significant mitigating factors.<sup>19</sup> Meanwhile in *R. v. Snobelen*, Brown J. focused on the absence of a need for specific deterrence in that case, and held that general deterrence could be adequately served by a financial penalty rather than a conviction and jail; thus, he granted an absolute discharge.<sup>20</sup> Other sentencing decisions involving offences under s. 95(1) reinforce the diversity of approaches to the proportionality principle and sentencing outcomes.<sup>21</sup>

13. Part of sentencing courts’ difficulty in applying the proportionality principle arises from the fact that although the proportionality principle is *the* fundamental principle of sentencing, the *Criminal Code* instructs sentencing courts to apply, in addition to the proportionality principle, a series of other sentencing objectives, purposes and principles, which often tug in opposite directions. Under s. 718, a court is required to consider “one or more” of a series of sentencing objectives, including, “respect for the law and the maintenance of a just, peaceful and safe society”; denunciation of unlawful conduct; general deterrence; specific deterrence; rehabilitation; reparation to the victims and the community.<sup>22</sup> Then, under s. 718.2, courts are required to consider “other sentencing principles”, including various statutory aggravating and mitigating factors. The *Code*, however, does not include any instruction on how these sentencing objectives, purposes and principles interact with each other or with the proportionality principle.

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<sup>17</sup> *Ibid.* at paras. 28-36.

<sup>18</sup> *R. v. Nur*, [2011] O.J. No. 3878 at para. 52 (S.C.J.).

<sup>19</sup> *Ibid.* at para. 71.

<sup>20</sup> *R. v. Snobelen*, [2008] O.J. No. 6021 at paras. 44-45 (O.C.J.).

<sup>21</sup> See, e.g., *R. v. T.A.P.*, [2014] O.J. No. 857 (C.A.) (90-day intermittent sentence followed by probation); *R. v. Adamo*, [2013] M.J. No. 302 at paras. 58-70 (Q.B.) (emphasizing mitigating nature of offender’s disability and holding that 6 months’ imprisonment followed by probation was the proportionate sentence).

<sup>22</sup> *Criminal Code*, *supra*, s. 718.

14. This has led to difficulty in applying the proportionality principle. In some cases, the appellate courts have suggested that certain s. 718 sentencing goals, including denunciation and deterrence, are *part of* the proportionality framework.<sup>23</sup> In other cases, appellate courts have suggested that while goals such as denunciation and deterrence can be part of the overall determination of sentence, they are not strictly speaking a part of the proportionality analysis.<sup>24</sup>

### III. A PROPORTIONALITY TEST FOR SENTENCING

15. A workable proportionality test involves integrating the proportionality principle (s. 718.1) with the goals of sentencing (s. 718) and the secondary sentencing principles (s. 718.2). To do this, the Court need not look any further than its well-known *Oakes* test for guidance.<sup>25</sup>

16. A proportionality test for sentencing would be analogous to the second stage of the *Oakes* test (i.e., the “proportionality” stage), drawing on concepts of “rational connection”, “minimal impairment”, and salutary versus prejudicial effects. To determine a proportionate sentence, the sentencing court should consider:

1. What sentence is *rationally connected* to the applicable sentencing objectives set out in s. 718 of the *Criminal Code*?
2. What sentence is *no more severe than necessary* to accomplish the applicable sentencing objectives?
3. What sentence achieves the proper balance between the effect of the punishment on the individual and *society’s interest* in punishing the offender?<sup>26</sup>

<sup>23</sup> See, e.g., *R. v. Latimer*, [2001] 1 S.C.R. 3 at para. 87 (upholding mandatory minimum for second degree murder on the ground that the sentence was consistent with the principles of general deterrence and denunciation).

<sup>24</sup> See, e.g., *R. v. Smith*, *supra* at 1073 (S.C.C.) (holding that general deterrence is not part of the proportionality inquiry).

<sup>25</sup> The *Oakes* test involves three different measures of proportionality: first, whether the impugned measure is rationally connected to the objective; second whether the means chosen are minimally impairing of the infringed right; and third, whether there is balance between the benefits of the measure and its deleterious effects. See *R. v. Oakes*, *supra* at 136-40 (S.C.C.). This third branch was refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 888 (third branch involves determining whether the adverse effects of the measure outweigh its “actual salutary effects”).

<sup>26</sup> While the *Oakes* test involves a comparison between the salutary *effects* of a law and its deleterious effects, this Court held the following in *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para. 121: “Gross 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” (emphasis in original). The same must therefore be true of gross disproportionality under s. 12, which is a specific manifestation of the principles of fundamental justice under s. 7.

### A. Rational Connection Between the Sentence and the Objectives of Sentencing

17. The first prong of the test requires that the punishment have a rational connection to at least one of the objectives of sentencing in s. 718 of the *Criminal Code*. The rational connection branch of the test is strongly supported by the case law and common sense.

18. This Court has held that a sentence that is not rationally connected to the legitimate purposes of punishment is not only disproportionate but also *grossly* disproportionate and thus a violation of s. 12 of the *Charter*.<sup>27</sup> If the punishment is not rationally connected to a legitimate goal of sentencing, it serves no legitimate purpose. It is therefore gratuitous. A gratuitous punishment is the definition of a grossly disproportionate or cruel and unusual punishment.

19. This rational connection test will generally be a low bar. This is because Parliament has adopted certain sentencing objectives, such as general deterrence and denunciation, which are rationally connected to virtually any sentence — no matter how draconian. A twenty-year prison sentence for a parking ticket is rationally connected to the goal of denunciation (i.e., what better way to send a strong denunciatory message that this society abhors parking violations?). The United States Supreme Court has upheld the death penalty as well as “three strikes laws” (i.e., mandatory life imprisonment upon the commission of a third felony offence) on the theory that such measures are rationally connected to denunciation, incapacitation and general deterrence.<sup>28</sup>

20. This does not, however, mean that the rational connection test is meaningless. The rational connection test forces the parties and the Court to articulate the applicable sentencing objectives and how the sentence will promote those objectives. In certain cases, denunciation, deterrence and incapacitation will not be relevant sentencing considerations. For example, these goals will generally not apply to a low-level property offence committed by a youthful first offender. In such a case, rehabilitation would likely be the dominant if not primary goal.

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<sup>27</sup> *R. v. Smith*, *supra* at 1068 (S.C.C.) (sentence is grossly disproportionate if it “has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution...”).

<sup>28</sup> See *Gregg v. Georgia*, 428 U.S. 153 at 186-187 (1976) (upholding death penalty statute on the ground that it is rationally connected to the goal of general deterrence); *Ewing v. California*, 538 U.S. 11 at 28-30 (2003) (upholding mandatory minimum sentence of life without parole for 25 years on theory of incapacitation where offender had committed third felony offence of stealing three golf clubs).



## B. Minimal Impairment: A Sentence that Is No More Severe Than Necessary

21. The second and third prongs of the proportionality test serve to ensure that certain goals of punishment, such as deterrence or denunciation, do not swallow up the proportionality analysis.<sup>29</sup> A punishment may be rationally connected with a goal of punishment, yet the punishment may still be excessive in relation to that goal.

22. The minimal impairment test asks the Court to go further by asking not only whether a sentence is *consistent with* the objectives of sentencing but also whether it is *necessary* to accomplish the applicable objectives of sentencing. Minimal impairment — also called the “principle of restraint” — is reflected in this Court’s jurisprudence. In *Smith*, this Court held that a court assessing the proportionality of a sentence must consider whether the punishment “*goes beyond what is necessary* to achieve a legitimate penal aim.”<sup>30</sup> The Court has repeatedly emphasized that the proportionality principle “serves a *limiting or restraining* function”<sup>31</sup> and ensures that the sentence “punishes the offender *no more than is necessary*”.<sup>32</sup>

23. The concept of minimal impairment in the sentencing context is also codified in sections 718.2(d) and (e) of the *Criminal Code*, which “are directed at” and inform the proportionality principle.<sup>33</sup> Section 718.2(d) requires that the deprivation of liberty be the least restrictive that “may be appropriate in the circumstances,”<sup>34</sup> while s. 718.2(e) speaks specifically to imprisonment, instructing sentencing courts that imprisonment ought to be a last resort.<sup>35</sup> Simply put, an offender should not be subjected to any punishment where a less serious punishment will succeed in accomplishing the applicable sentencing objectives.

24. The minimal impairment test will be particularly important in cases such as the present appeals, where the pursuit of general deterrence and denunciation of gun violence has the potential to skew sentencing outcomes. A minimal impairment test will address the Court’s

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<sup>29</sup> See *R. v. Morrissey*, [2000] 2 S.C.R. 90 at para. 45 (“General deterrence cannot, on its own, prevent a punishment from being cruel and unusual.”).

<sup>30</sup> *R. v. Smith*, *supra* at 1068 (S.C.C.) (emphasis added).

<sup>31</sup> *R. v. Ipeelee*, *supra* at para. 37 (S.C.C.) (emphasis added); *R. v. Nasogaluak*, *supra* at para. 42 (S.C.C.).

<sup>32</sup> *R. v. Nasogaluak*, *supra* at para. 42 (S.C.C.) (emphasis added).

<sup>33</sup> *R. v. Safarzadeh-Markhali*, [2014] O.J. No. 4194 at paras. 83-84 (C.A.) (“the principles in s. 718.2 ... are directed at determining the gravity of the offence and the degree of responsibility of the offender.”).

<sup>34</sup> *Criminal Code*, *supra*, s. 718.2(d).

<sup>35</sup> *Ibid.*, s. 718.2(e).

concern from *Smith* and *Morrissey* that the goals of general deterrence and denunciation should not overwhelm the proportionality analysis.<sup>36</sup>

25. To determine whether a given sentence is necessary, the sentencing court can consider the range of sentence for that particular offence. If the Crown has urged a custodial sentence for a particular offender, but other sentencing courts have imposed non-custodial sentences in similar cases, then this is evidence that a custodial sentence may not be necessary.

26. The court should also consider the statutory scheme. The fact that there is no mandatory minimum — and indeed a discharge is available<sup>37</sup> — when the Crown proceeds by way of summary conviction suggests that society does not deem it necessary to send the denunciatory message of jail for every offender who violates s. 95 of the *Criminal Code*. The Crown would have to offer compelling evidence of aggravating factors to displace that presumption that incarceration is not necessary to achieve the relevant sentencing goals.

### C. Weighing the Effects of Punishment and Society's Interest

27. This prong of the test involves *weighing* society's interest in effecting the punishment against the adverse impacts of the punishment on the offender and on society. On one side of the scale, the court must consider the seriousness of the offence and any aggravating factors that tend to increase the individual's moral blameworthiness. On the other side of the scale, the court must consider the adverse impacts on the individual and society if the punishment is carried out.<sup>38</sup> The effect of the sentence on the individual, such as onerous conditions of confinement or pre-trial detention, must also be considered at this stage.<sup>39</sup> Sentencing courts must gather these competing aggravating and mitigating factors to balance the offender's interest in blunting the lasting effects of the punishment with society's interests in seeing the offender punished.

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<sup>36</sup> See *R. v. Smith*, *supra* at 1073 (S.C.C.); *R. v. Morrissey*, *supra* at para. 45 (S.C.C.).

<sup>37</sup> *R. v. Snobelen*, *supra* (O.C.J.).

<sup>38</sup> This weighing of society's interest and the impact on the individual is analogous the test under s. 730(1) of the *Criminal Code* for granting a discharge. See *Criminal Code*, *supra*, s. 730(1) (court may grant a discharge for eligible offences "if it considers it to be in the best interests of the accused and not contrary to the public interest").

<sup>39</sup> *R. v. Smith*, *supra* at 1073 (S.C.C.) ("The effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied.").

28. Where, for example, an offence is violent, society may have an interest in a denunciatory sentence. This factor may weigh in favour of custodial sentence.<sup>40</sup> On the other end of the scale, the court will need to consider the negative effects that a custodial sentence will carry. Effects such as thwarting an otherwise promising career,<sup>41</sup> taking the sole caregiver out of the home,<sup>42</sup> and adverse immigration consequences<sup>43</sup> should be considered as factors weighing against a custodial sentence. The court must ask whether sending a denunciatory message through a custodial sentence will outweigh the harm it will do to the individual offender.

29. This third prong of the proportionality test is not strictly a matter of pitting society's interests in a harsh punishment against the individual's interest in leniency. Society's interest is not always to punish more harshly. Concerns about over-incarceration of disadvantaged groups and the *Gladue* sentencing principles may militate against harsher penalties in appropriate cases.<sup>44</sup> Those societal interests should be accounted for at this stage of the analysis.

30. To assess society's interest in punishing a particular offender for a particular offence, the court should consider the range of sentence for that offence and analogous offences. If other offenders convicted of that offence are not always punished with imprisonment, then it is reasonable to conclude that society has only an attenuated interest in ensuring that offenders are punished with imprisonment.<sup>45</sup>

#### IV. COMPARING THE PROPORTIONATE SENTENCE TO THE MANDATORY MINIMUM SENTENCE

31. In challenges to mandatory minimum sentences under s. 12 of the *Charter*, once the proportionate sentence is determined, the Court must then compare the proportionate sentence to the impugned mandatory minimum. That comparison should be both *quantitative* and *qualitative*.

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<sup>40</sup> *R. v. Drabinsky*, [2011] O.J. No. 4022 at paras. 159-162 (C.A.) (Denunciation and deterrence most often find expression in the length of sentence imposed).

<sup>41</sup> See, e.g., *R. v. Folino*, [2005] O.J. No. 4737 at para. 29 (C.A.).

<sup>42</sup> See, e.g., *R. v. Collins*, [2011] O.J. No. 978 at para. 41 (C.A.).

<sup>43</sup> See, e.g., *R. v. Pham*, *supra* (S.C.C.).

<sup>44</sup> See *R. v. Ipeelee*, *supra* at paras. 64-79 (S.C.C.).

<sup>45</sup> *R. v. Nur*, *supra* at para. 199 (Ont. C.A.) (“Parliament’s decision to make s. 95 a hybrid offence, punishable by a maximum of one year if the Crown proceeds summarily, tends to diminish or undermine the deterrence/denunciation objective of s. 95 in that it reduces the certainty of significant punishment upon conviction.”).

32. The greater the temporal gap between the proportionate sentence and the mandatory minimum, the more likely the mandatory minimum sentence is grossly disproportionate.<sup>46</sup> The comparison should also be qualitative because it should take into account the real-world effects of the punishment on the individual.<sup>47</sup> A difference between the proportionate sentence and the mandatory minimum by a single day in some exceptional cases may render a sentence grossly disproportionate (e.g., if the mandatory minimum sentence operates to render someone ineligible to remain in Canada under the *IRPA*). Likewise, the increase of a sentence from 2 years less a day to 2 years could render a sentence grossly disproportionate because of the impact on how the offender serves his sentence (in federal penitentiary rather than provincial jail).

#### **V. THIS FRAMEWORK FOSTERS REVIEWABILITY, CONSISTENCY AND ANALYTICAL CLARITY**

33. The above-described approach to proportionality reflects an idea that is already stated in the appellate jurisprudence: the proportionality principle, the s. 718 objectives of sentencing, and the s. 718.2 principles of sentencing do not operate in a vacuum, but inform each other.<sup>48</sup> This framework provides a way of weighing the retributive concept of proportionality in s. 718.1 of the *Criminal Code* against the utilitarian goals of sentencing addressed in s. 718, and should enhance the analytical clarity, consistency and reviewability of sentencing decisions.


#### **PART IV: SUBMISSIONS ON COSTS**

34. The BCCLA does not seek costs and asks that none be awarded against it.

#### **PART V: NATURE OF THE ORDER REQUESTED**

35. The BCCLA respectfully requests leave to present oral argument for no more than 10 minutes at the hearing of this appeal.

All of which is respectfully submitted this 24<sup>th</sup> day of October, 2014.

  
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**NADER R. HASAN / GERALD CHAN**  
**Ruby Shiller Chan Hasan, Barristers**  
*Counsel for the BCCLA*

\_\_\_\_\_  
**COLLEEN BAUMAN**  
**Sack Goldblatt Mitchell LLP**  
*Agent for the BCCLA*

<sup>46</sup> See *R. v. Nur*, *supra* at para. 169 (Ont. C.A.).

<sup>47</sup> *Ibid.* at para. 93.

<sup>48</sup> See *R. v. Safarzadeh-Markhali*, *supra* at paras. 83-84 (Ont. C.A.); *R. v. Ipeelee*, *supra* at para. 37 (S.C.C.).

**PART VI: TABLE OF AUTHORITIES**

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**PART VII: LEGISLATION CITED**

**Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11**

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.

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.

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.

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.

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

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

**Criminal Code, R.S.C. 1985, c. C-46**

95. (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

95. (1) Sous réserve du paragraphe (3), commet une infraction quiconque a en sa possession dans un lieu quelconque soit une arme à feu prohibée ou une arme à feu à autorisation restreinte chargées, soit une telle arme non chargée avec des munitions facilement accessibles qui peuvent être utilisées avec celle-ci, sans être titulaire à la fois:

(a) an authorization or a licence under which the person may possess the firearm in that place; and

(a) d'une autorisation ou d'un permis qui l'y autorise dans ce lieu;

(b) the registration certificate for the firearm.

(b) du certificat d'enregistrement de l'arme.

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

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable:

- |   |  |
|---|--|
| (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of   | (a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :   |
| (i) in the case of a first offence, three years, and  | (i) de trois ans, dans le cas d'une première infraction,   |
| (ii) in the case of a second or subsequent offence, five years; or  | (ii) de cinq ans, en cas de récidive;  |
| (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.  | (b) soit d'une infraction punissable, sur déclaration de culpabilité par procédure sommaire, d'un emprisonnement maximal de un an.   |
| (3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it.     | (3) Le paragraphe (1) ne s'applique pas à quiconque utilise une arme à feu sous la surveillance directe d'une personne qui en a la possession légale, de la manière dont celle-ci peut légalement s'en servir.   |
| 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: | 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) to denounce unlawful conduct;   | a) dénoncer le comportement illégal;   |
| (b) to deter the offender and other persons from committing offences;   | b) dissuader les délinquants, et quiconque, de commettre des infractions;  |
| (c) to separate offenders from society, where necessary;  | c) isoler, au besoin, les délinquants du reste de la société;  |
| (d) to assist in rehabilitating offenders;  | d) favoriser la réinsertion sociale des délinquants;   |
| (e) to provide reparations for harm done to victims or to the community; and  | e) assurer la réparation des torts causés aux victimes ou à la collectivité;   |
| (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm   | f) susciter la conscience de leurs   |



done to victims and to the community.

responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

718.01 Le tribunal qui impose une peine pour une infraction qui constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans accorde une attention particulière aux objectifs de dénonciation et de dissuasion d'un tel comportement.

718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

718.02 Le tribunal qui impose une peine pour l'une des infractions prévues au paragraphe 270(1), aux articles 270.01 ou 270.02 ou à l'alinéa 423.1(1)b) accorde une attention particulière aux objectifs de dénonciation et de dissuasion de l'agissement à l'origine de l'infraction.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant :

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique ou l'orientation sexuelle,

(ii) evidence that the offender, in committing the offence, abused the offender's

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement de

spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.  
718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

son époux ou conjoint de fait,

(ii.1) que l'infraction perpétrée par le délinquant constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iii.1) que l'infraction a eu un effet important sur la victime en raison de son âge et de tout autre élément de sa situation personnelle, notamment sa santé et sa situation financière,

(iv) que l'infraction a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle,

(v) que l'infraction perpétrée par le délinquant est une infraction de terrorisme;

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.  
718.21 Le tribunal détermine la peine à infliger à toute organisation en tenant compte également des facteurs suivants:

(a) any advantage realized by the organization as a result of the offence;

(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;

(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

(e) the cost to public authorities of the investigation and prosecution of the offence;

(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;

(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

a) les avantages tirés par l'organisation du fait de la perpétration de l'infraction;

b) le degré de complexité des préparatifs reliés à l'infraction et de l'infraction elle-même et la période au cours de laquelle elle a été commise;

c) le fait que l'organisation a tenté de dissimuler des éléments d'actif, ou d'en convertir, afin de se montrer incapable de payer une amende ou d'effectuer une restitution;

d) l'effet qu'aurait la peine sur la viabilité économique de l'organisation et le maintien en poste de ses employés;

e) les frais supportés par les administrations publiques dans le cadre des enquêtes et des poursuites relatives à l'infraction;

f) l'imposition de pénalités à l'organisation ou à ses agents à l'égard des agissements à l'origine de l'infraction;

g) les déclarations de culpabilité ou pénalités dont l'organisation — ou tel de ses agents qui a participé à la perpétration de l'infraction — a fait l'objet pour des agissements similaires;

h) l'imposition par l'organisation de pénalités à ses agents pour leur rôle dans la perpétration de l'infraction;

i) toute restitution ou indemnisation imposée à l'organisation ou effectuée par elle au profit de la victime;

j) l'adoption par l'organisation de mesures en vue de réduire la probabilité qu'elle commette d'autres infractions.

730. (1) Where an accused, other than an

730. (1) Le tribunal devant lequel comparait

organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

(2) Subject to Part XVI, where an accused who has not been taken into custody or who has been released from custody under or by virtue of any provision of Part XVI pleads guilty of or is found guilty of an offence but is not convicted, the appearance notice, promise to appear, summons, undertaking or recognizance issued to or given or entered into by the accused continues in force, subject to its terms, until a disposition in respect of the accused is made under subsection (1) unless, at the time the accused pleads guilty or is found guilty, the court, judge or justice orders that the accused be taken into custody pending such a disposition.

(3) Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that

(a) the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;

(b) the Attorney General and, in the case of summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and

l'accusé, autre qu'une organisation, qui plaide coupable ou est reconnu coupable d'une infraction pour laquelle la loi ne prescrit pas de peine minimale ou qui n'est pas punissable d'un emprisonnement de quatorze ans ou de l'emprisonnement à perpétuité peut, s'il considère qu'il y va de l'intérêt véritable de l'accusé sans nuire à l'intérêt public, au lieu de le condamner, prescrire par ordonnance qu'il soit absous inconditionnellement ou aux conditions prévues dans l'ordonnance rendue aux termes du paragraphe 731(2).

(2) Sous réserve de la partie XVI, lorsque l'accusé qui n'a pas été mis sous garde ou qui a été mis en liberté aux termes ou en vertu de la partie XVI plaide coupable ou est reconnu coupable d'une infraction mais n'est pas condamné, la sommation ou citation à comparaître à lui délivrée, la promesse de comparaître ou promesse remise par lui ou l'engagement contracté par lui demeure en vigueur, sous réserve de ses dispositions, jusqu'à ce qu'une décision soit rendue à son égard en vertu du paragraphe (1) à moins que, au moment où il plaide coupable ou est reconnu coupable, le tribunal, le juge ou le juge de paix n'ordonne qu'il soit mis sous garde en attendant cette décision.

(3) Le délinquant qui est absous en conformité avec le paragraphe (1) est réputé ne pas avoir été condamné à l'égard de l'infraction; toutefois, les règles suivantes s'appliquent :

a) le délinquant peut interjeter appel du verdict de culpabilité comme s'il s'agissait d'une condamnation à l'égard de l'infraction à laquelle se rapporte l'absolution;

b) le procureur général ou, dans le cas de poursuites sommaires, le dénonciateur ou son mandataire peut interjeter appel de la décision du tribunal de ne pas condamner le délinquant à l'égard de l'infraction à laquelle se rapporte

(c) the offender may plead autrefois convict in respect of any subsequent charge relating to the offence.

(4) Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under section 733.1, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.

l'absolution comme s'il s'agissait d'un jugement ou d'un verdict d'acquiescement de l'infraction ou d'un rejet de l'accusation portée contre lui;

c) le délinquant peut plaider autrefois convict relativement à toute inculpation subséquente relative à l'infraction.

(4) Lorsque le délinquant soumis aux conditions d'une ordonnance de probation rendue à une époque où son absolution a été ordonnée en vertu du présent article est déclaré coupable d'une infraction, y compris une infraction visée à l'article 733.1, le tribunal qui a rendu l'ordonnance de probation peut, en plus ou au lieu d'exercer le pouvoir que lui confère le paragraphe 732.2(5), à tout moment où il peut prendre une mesure en vertu de ce paragraphe, annuler l'absolution, déclarer le délinquant coupable de l'infraction à laquelle se rapporte l'absolution et infliger toute peine qui aurait pu être infligée s'il avait été déclaré coupable au moment de son absolution; il ne peut être interjeté appel d'une déclaration de culpabilité prononcée en vertu du présent paragraphe lorsqu'il a été fait appel de l'ordonnance prescrivant que le délinquant soit absous.

**Immigration and Refugee Protection Act, S.C. 2001, c 27**

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada,

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants:

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi

would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

(2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

(3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

(a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

(b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

(i) designated as a contravention under the Contraventions Act,

(ii) for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.

(b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquiescement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

(c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

(d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

(e) l'interdiction de territoire ne peut être fondée sur les infractions suivantes :

(i) celles qui sont qualifiées de contraventions en vertu de la Loi sur les contraventions,

(ii) celles dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la Loi sur les jeunes contrevenants, chapitre Y-1 des Lois révisées du Canada (1985),

(iii) celles pour lesquelles le résident permanent ou l'étranger a reçu une peine spécifique en vertu de la Loi sur le système de justice pénale pour les adolescents.