Court File No. 35678

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

BETWEEN:

HER MAJESTY THE QUEEN and ATTORNEY GENERAL OF CANADA

APPELLANTS

and

HUSSEIN JAMA NUR

RESPONDENT

and

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

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PART I – OVERVIEW

1. Pivot Legal Society advocates for the legal rights of people living in Vancouver's Downtown Eastside neighbourhood and other highly marginalized communities. Pivot's interest in these appeals arises from how mandatory minimum sentences imposed for a variety of *Criminal Code* and drug offences impact society's most marginalized members in both obvious and subtle ways.

2. This Court should adopt a broad conception of the reasonable hypothetical case for use in assessing whether a mandatory minimum infringes *Charter* s. 12. The reasonable hypothetical case should be based on the least serious set of circumstances and the most mitigating set of personal circumstances potentially subject to the mandatory minimum. Offenders in these circumstances and possessed of these characteristics—the least serious offenders—are those whom a mandatory minimum necessarily affects most.

3. If the reasonable hypothetical case were to exclude the least serious offenders, courts could be forced to wait for a least serious offender actually to be convicted before invalidating an unconstitutional mandatory minimum, all the while sentencing others under an unconstitutional law. Moreover, as a practical matter, the least serious offenders may never have occasion to challenge the mandatory minimum to which they are subject: its very existence may induce them to plead guilty to a different offence, thereby expanding the influence of an unconstitutional sentencing regime.

4. Because of mandatory minimums' influence even in cases in which they are never applied, no one has a complete picture of the variety of people they affect. Pre-mandatory minimum sentencing ranges miss the mark, for they leave out the many people who were diverted, who pleaded guilty to and were sentenced for a different offence, or who were sentenced without a reported decision. Absent reliable information about whom a mandatory minimum affects, a broad conception of the reasonable hypothetical case should be used.

5. This approach accords with the analytical approach applicable in all other *Charter* litigation: a law that is unconstitutional for even one person is unconstitutional for everyone, and the person for whom it is unconstitutional need not be the person before the court. There is no reason to adopt a special approach in s. 12 cases by focussing on the particular offender being sentenced.

6. Finally, prosecutorial discretion cannot be relied on to safeguard s. 12 rights, as that discretion is effectively unreviewable by courts.

PART II – POSITION ON APPELLANTS' QUESTIONS

7. Pivot's submissions relate to two questions posed by the appellants and stated by McLachlin C.J. as constitutional questions:

> Does s. 95(2)(*a*)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46 infringe the right in s. 12 of the *Canadian Charter of Rights and Freedoms*?
>
> Does s. 95(2)(*a*)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46 infringe the right in s. 12 of the *Canadian Charter of Rights and Freedoms*?

8. Pivot takes no position on the answer to these questions. Its submissions address the analytical approach to be taken in all *Charter* s. 12 cases.

PART III – STATEMENT OF ARGUMENT

A. Mandatory minimums impact the least serious offenders the most.

9. A mandatory minimum has its greatest impact on the least serious offenders because it raises the floor of permissible sentences for them. Parliament could have chosen to impose a presumptive minimum sentence with an escape clause for cases involving the least serious offenders. By choosing instead to make the minimum mandatory for the least serious offenders, and to set the minimum above the sentences they would otherwise receive, Parliament ensured that the least serious offenders would be affected, and affected the most.

10. In introducing these and other mandatory minimums, the Minister of Justice at the time indicated that they were intended to tackle "the problem of gun violence, particularly gang related gun violence which is prevalent in Canada's major urban centres".[2] During subsequent debate, the

[2] *House of Commons Debates*, 39th Parl., 1st Sess., No. 33 (June 5, 2006) at 1939 (Hon. Vic Toews speaking on Bill C-10, *An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make a consequential amendment to another Act* which was subsequently incorporated into Bill C-2, *Tackling Violent Crime Act*, which enacted the mandatory minimum sentences at issue in this appeal).

legislation was described as targeting "gun crimes with a particular focus on when such crimes are committed by criminal organizations, which of course includes gangs".[3]

11. While dealing with gangs and dangerous offenders may have been the stated *intention* of the Minister of Justice, the use of a mandatory minimum rather than a presumptive minimum, or an increased maximum,[4] means that the legislation's only guaranteed *effect* is to increase sentences for the least serious offenders. By contrast, the effect on sentences for more serious offenders is indirect and relatively uncertain: it depends on the new, raised floor having an inflationary influence on sentences that remain subject to judicial discretion.

B. The true range of people affected by a mandatory minimum is unknown.

12. If the impact of mandatory minimums is felt most acutely by the least serious offenders, then a mandatory minimum's constitutionality must, in all fairness, be assessed with them in mind. But the courts do not have reliable information about who even the *typical* offender is. Absent a complete picture of whom a mandatory minimum affects, courts must reject a narrow conception of the reasonable hypothetical case.

13. The full variety of people affected by a mandatory minimum can never be known fully to the courts, given the number of people who agree to be diverted early in the process, who plead guilty to a different offence, or who plead guilty to a lesser included offence. In many cases, the decision to plead guilty will be driven by a desire to avoid a more severe punishment, in the form of the mandatory minimum.

14. Thus, the people left standing before a trial judge after conviction and awaiting sentence for the particular offence subject to the mandatory minimum will always be a subset of a larger group who were potentially subject to the mandatory minimum. Courts have no reliable information about the larger group's characteristics, and therefore no basis to conclude that the subset is representative of all those affected.

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[3] *House of Commons Debates*, 39th Parl., 1st Sess., No. 156 (May 17, 2007) at 9637 (Hon. Rob Nicholson speaking on Bill C-10).

[4] The maximum sentence under s. 95(2)(*a*)(i) was not increased when the mandatory minimum was introduced in 2008: compare *Firearms Act*, S.C. 1995, c. 39, s. 139 with *Tackling Violent Crime Act*, S.C. 2008, c. 6 s. 8(2).

15. Moreover, even considering only the subset—the offenders that ultimately stand before a judge—there will be variation in its composition from province to province, and from community to community. Judges in different parts of the country will have justifiably different impressions about who the typical offenders are.

16. For the reasonable hypothetical to be an effective tool for assessing the constitutionality of a mandatory minimum sentence, it must include both the circumstances of the offence, and the circumstances of the offender. In particular, courts must consider possible personal characteristics of offenders, include age, drug addiction, and Aboriginal status. These personal characteristics are important factors in determining an appropriate, proportionate sentence for any given offender and therefore also relevant when constructing a reasonable hypothetical by which to assess whether a sentence is grossly disproportionate. These characteristics also animate the concept of "everyone", to whom the text of *Charter* s. 12 guarantees the right to be free from cruel and unusual punishment.

17. As a matter of fairness, if courts cannot reliably describe even the typical offender, they should err on the side of using a broad conception of the reasonable hypothetical. This avoids the situation where an unconstitutional mandatory minimum persists, while those who might have successfully challenged it plead guilty, possibly even when they are factually innocent, in order to ensure the mandatory minimum is not applied to them.

C. Pre-mandatory minimum sentencing ranges do not necessarily show whom a mandatory minimum affects.

18. The lack of reliable information about whether reported decisions reflect the true variety of offenders ruins the argument of the Attorney General of Ontario (the "AGO"). Under the AGO's approach, the sentencing range from reported decisions would replace the reasonable hypothetical as the tool for the generalized inquiry into whether a mandatory minimum infringes *Charter* s. 12.

19. Reported decisions and sentencing ranges, however, may not reflect the true variety of offenders potentially subject to a mandatory minimum. For starters, many sentencing decisions go unreported. Furthermore, even reported decisions for the offence carrying the mandatory minimum do not capture those offenders who pleaded guilty to a different or lesser included offence as part of a plea bargain. Yet it is possible that their cases raise circumstances relevant to the question of gross disproportionality. The constitutionality of a mandatory minimum should not depend on which

offenders proceed to sentencing for a particular offence, or which sentencing decisions for that offence get reported.

20. Moreover, sentencing ranges may vary across the country with different types of offenders and different circumstances under which the offence was committed. For example, the sentencing range for s. 95(2)(*a*)(i), as the trial judge identified in *Nur*, was between two years less a day and three years for offenders in Toronto.[5] However, outside Toronto, the range ran from the former mandatory minimum sentence of one year to two years.[6] The AGO gives no guidance about how to handle situations like *Nur* where different regions of the country have different sentencing ranges because of different circumstances making denunciation more or less important. The AGO also gives no guidance about how to deal with a mandatory minimum for a new offence, for which there will never be an existing sentencing range.

21. The AGO's approach would also disregard the personal characteristics of offenders for purposes of the generalized inquiry under s. 12, suggesting that these personal characteristics amount to idiosyncrasies that can be distilled out of the sentencing ranges. This is untenable. The purpose of sentencing ranges is to give a baseline from which individual adjustments are made. To assume that the former baseline alone permits determination of whether the new mandatory minimum is grossly disproportionate is to ignore how courts actually determine appropriate, proportionate sentences.

22. Because courts have no reliable information about the true variety of people affected by a mandatory minimum sentence, any generalized inquiry, such as the reasonable hypothetical, must be broadly constructed. It must recognize that offenders who appear before the courts, and whose sentences find their way into sentence range calculations, are a potentially narrow, non-representative subset of a larger group.

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[5] *R. v. Nur*, 2011 ONSC 4874 at para. 45.
[6] See, *e.g.*, *R. v. Nguyen*, 2005 BCCA 115 (one year); *R. v. D. (H.C.)*, 2008 NSSC 246 (one year); *R. v. Romero*, 2009 MBQB 167 (one year); *R. v. Wharry*, 2007 ABQB 462, aff'd in part 2008 ABCA 293 (two years); *R. v. Violette*, 2009 BCSC 1557 (two years).

D. Consistency with other *Charter* jurisprudence demands a broad conception of the reasonable hypothetical.

23. Since *R. v. Big M Drug Mart*, this Court has consistently held that no one should be convicted under a law that is unconstitutional for anyone.[7] This reasoning flows through *Charter* decisions about offences, sentencing, remedies, and standing. In the context of *Charter* s. 12 challenges to mandatory minimums, this reasoning demands a broad conception of the reasonable hypothetical.

24. This Court has held that if a law breaches the *Charter* rights of even one person, then it is unconstitutional for everyone.[8] Consistent with that approach, this Court has rejected the use of constitutional exemptions as a remedy where a law has unconstitutional effects in only limited circumstances.[9] Indeed, this Court has often considered hypotheticals far removed from the case actually before the Court, and struck down laws because they would be unconstitutional in an imagined case.

25. For example, in *R. v. Sharpe*, an offence preventing a hypothetical child from taking sexual photographs of him or herself was found to violate *Charter* s. 2(*b*) in a case involving only an unmitigated pedophile.[10] Similarly, in *Big M*, this Court struck down a law based on an infringement of religious freedom, even though the accused was a corporation and therefore incapable of having any religious beliefs. This Court has also adopted a liberal and flexible approach to public interest standing, allowing a plaintiff who is unaffected by an allegedly unconstitutional law nonetheless to challenge its constitutionality.[11]

26. Applying this consistent approach in the context of *Charter* s. 12 dictates a broad conception of the reasonable hypothetical. It requires the courts to imagine all offenders who may be affected by a mandatory minimum, and to consider whether it would be unconstitutional in any one of its applications.

27. That is how this Court originally employed the reasonable hypothetical in *R. v. Smith*.[12] Subsequent decisions of this Court have attempted to narrow the reasonable hypothetical's scope, by

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[7] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*Big M*] at p. 313.
[8] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 123.
[9] *R. v. Ferguson*, 2008 SCC 6.
[10] *R. v. Sharpe*, 2001 SCC 2 [*Sharpe*] at para. 110.
[11] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.
[12] *R. v. Smith*, [1987] 1 S.C.R. 1045.

restricting it to "imaginable circumstances which could commonly arise in day-to-day life"[13] or to "imaginable circumstances which could commonly arise with a degree of generality appropriate to the particular offence".[14] While these may appear superficially like sensible restrictions, designed to avoid flights of fancy, they fail to recognize the problems articulated above: judges do not have reliable information about when and how any offence commonly arises, and there is any event no principled reason to limit the s. 12 analysis to commonly arising cases. In *Sharpe*, there was no hint that children taking sexual photographs of themselves were commonly charged with a child pornography offence, but this Court still held that this purely hypothetical example proved the offence's unconstitutionality.

28. As a result, to the extent that *Goltz* and *Morrisey* have restricted the scope of the reasonable hypothetical by excluding possible personal characteristics of the offender and the full range of imaginable circumstances, they should not be followed.

29. In any event, the s. 12 gross disproportionality analysis is always forward-looking. It takes place before the particular offender before the court is actually sentenced to the mandatory minimum. The analysis is therefore driven by judicial hypothesis about the likely impact on the offender. The offender has no relevant evidence to give. Any evidence he or she did give would be entirely speculative and self-serving. If the court sees that the mandatory minimum would be unconstitutional as applied in a hypothetical, but not fanciful, case, there is no practical reason to wait for that exact case before invalidating the mandatory minimum.

E. Prosecutorial discretion cannot cure constitutional infirmity under *Charter* s. 12.

30. An expectation as to how prosecutors may exercise their discretion with respect to an offence carrying a mandatory minimum is not a cure for constitutional infirmity in the mandatory minimum: the exercise of that discretion is effectively unreviewable by the courts.

31. Where the Crown elects to proceed by indictment and thereby trigger a mandatory minimum, there is an extremely low likelihood of a successful attack on the Crown's exercise of its discretion. Prosecutorial discretion is reviewable for an abuse of process alone.[15] Abuse of process is a high

[13] *R. v. Goltz*, [1991] 3 S.C.R. 485 [*Goltz*] at p. 516.
[14] *R. v. Morrisey*, [2000] 2 S.C.R. 90 [*Morrisey*] at para. 50.
[15] *R. v. Anderson*, 2014 SCC 41 at para. 36.

threshold, requiring "conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system".[16]

32. Moreover, bare allegations of abuse of process will not produce an inquiry into the exercise of prosecutorial discretion.[17] Yet any evidence of abuse of process in electing to trigger a mandatory minimum would likely be known only to the Crown.

33. As a result of both the high threshold and the evidentiary difficulties, it is unsurprising that a review of the reported decisions where the Crown's election to proceed by indictment was challenged reveals that in almost every instance the Crown's election was upheld.[18]

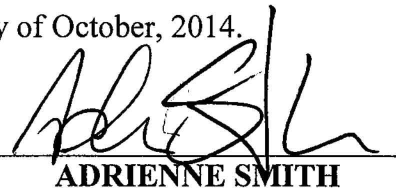
34. It is unsound to rely on the exercise of prosecutorial discretion to avoid the unconstitutional application of a mandatory minimum. Constitutional rights cannot be secured through the Crown's exercise of a discretion that is effectively unreviewable:

> Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.[19]

PART IV – ORDER REQUESTED

35. Pivot asks for permission to make 10 minutes of oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 21st day of October, 2014.



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[16] *R. v. Anderson*, 2014 SCC 41 at para. 50.
[17] *R. v. Nixon*, 2011 SCC 34 at para. 62.
[18] See, *e.g.*, *R. v. Kelly,* [1998] O.J. No. 3236 (C.A.); *R. v. Hogan*, 2008 NBQB 119; *R. v. Sheehan*, 2010 NLTD 167. Contrast with *R. v. Turcin*, 2008 ABQB 231.
[19] *R. v. Bain*, [1992] 1 S.C.R. 91 at pp. 103-104.

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