Court File No. 37687

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent on C61097
Appellant on C61110)

-and-

DOUGLAS MORRISON

RESPONDENT
(Appellant on C61097
Respondent on C61110)

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Criminal Lawyers' Association's (CLA's) intervention is focused on two issues with great potential to impact constitutional litigation in criminal cases: how appellate courts should approach s. 1 justifications being relied on for the first time on appeal and whether reading in a lower mandatory minimum is an appropriate remedy for a violation of s. 12. Both issues have been raised by the positions taken by the Appellant in the course of its appeals in this case.

2. When the Respondent, Douglas Morrison, challenged the presumption of age in s. 172.1(3) of the *Criminal Code* under s. 11(d) of the *Charter of Rights and Freedoms*, the Crown did not justify any infringement as a reasonable limit under s. 1. After the Respondent was successful at trial, the Crown appealed. Leading no fresh evidence, the Crown then sought to justify s. 172.1(3) under s. 1 using only common-sense reasoning. The Court of Appeal for Ontario, after affirming that s. 1 should generally not be raised for the first time on appeal, went on to consider the Crown's arguments and ultimately upheld the trial judge's striking down of s. 172.1(3).

3. It is the position of the CLA that there should be a strong presumption against the Crown's relying on s. 1 for the first time on appeal. The general prohibition on raising new issues on appeal should not be weakened when it is the state raising the issue. Furthermore, litigating s. 1 for the first time on appeal based only on common sense reasoning curtails the opportunity for and ability of *Charter* applicants to respond fully to the Crown's purported justifications with evidence of their own.

4. The Court of Appeal for Ontario also upheld the trial judge's striking down of the mandatory minimum sentence of one-year prescribed by s. 172.1(2)(a) when the Crown proceeds by indictment. For the first time in these proceedings, the Appellant seeks a novel remedy: should this Court find s. 172.1(2)(a) to be grossly disproportionate, it asks this Court to read in the different mandatory minimum applicable in summary conviction proceedings.

5. The CLA's position is that this alternative remedy is not appropriate. It is not clear that Parliament would have substituted a 90-day mandatory minimum had it known the one-year minimum sentence it originally enacted was unconstitutional. With a series of possible options at its disposal, Parliament must be left to make its choice. No court has yet found otherwise.

6. There are also practical problems that would flow from the availability of reading in as an alternative remedy under s. 52(1): the constitutionality of the lower mandatory minimum would become a central part of the *Charter* analysis under s. 12 as only a constitutionally sound minimum may be read in. This will increase the cost and complexity of challenging hybrid mandatory minimum sentences. The cost of this added complexity will be borne by the clients of the CLA's members.

B. Statement of Facts

7. The CLA takes no position with respect to the facts as advanced by the parties and defers to the parties on the factual record.

PART II – QUESTIONS IN ISSUE

8. The appeal and cross-appeal are primarily about the constitutionality of the *Criminal Code*'s child luring provisions. However, the Appellant's written argument raises two broader issues on which the CLA sought and was granted leave:

> **Issue 1:** How should appellate courts approach s. 1 being raised for the first time on appeal?
>
> **Issue 2:** Is "reading in" an alternative lower mandatory minimum sentence an appropriate remedy when the mandatory minimum sentence chosen by Parliament imposes cruel and unusual punishment?

The significance of both these issues extends beyond the constitutionality of ss. 172.1(3), 172.1(4) and 172.1(2)(a).

PART III – STATEMENT OF ARGUMENT

A. There should be a strong presumption against the Crown's relying on s. 1 to justify a *Charter* breach for the first time on appeal.

9. As a general rule, s. 1 should not be raised for the first time on appeal.[1] While the Court of Appeal for Ontario did consider the Crown's s.1 argument, it did so only after affirming this rule.[2] Ultimately, the Court found that the Crown had not met its burden. The CLA submits that there should be a strong presumption against the Crown seeking to justify a *Charter* violation for the first time on appeal.

10. A strong presumption against the Crown's raising s. 1 for the first time on appeal is consistent with the general rule that courts will not permit any issue, including a constitutional issue, to be raised for the first time on appeal.[3] The Appellant emphasizes that the body of case

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[1] *R. v. R.S.*, 2015 ONCA 291, 20 C.R. (7th) 336, at para. 37.
[2] Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, Tab 4, at para. 67.
[3] *R. v. Reid*, 2016 ONCA 524, 132 O.R. (3d) 26, at paras. 37-44 [*Reid*]; *R. v. Roach*, 2009 ONCA 156, 246 O.A.C. 96, at paras. 7-8.

law from this Court stressing the importance of an adequate evidentiary record in constitutional cases relates to the breach stage, rather than the justification stage.[4] However, this Court stated as early as in *R. v. Oakes* that the Crown's burden under s. 1 is a high one that will generally require the Crown to lead evidence:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.[5]

A strong presumption ensures that it is not *easier* for the Crown to seek to justify for the first time on appeal a law found unconstitutional at trial, than it is for the accused to raise *Charter* issues in the same venue.

11. The Crown, acting for the state, is a differently-situated litigant. It should be a rare case indeed when the Crown is allowed effectively to concede that a violation cannot be justified under s. 1 at trial and then to resile from that position on appeal, as appears to have been done in this case.[6] As the potential relevance of s. 1 will always be foreseeable – triggered as it is by an applicant's *Charter* challenge – a failure to address s. 1 at first instance should lead to a negative presumption on appeal.[7]

12. Accused persons are unfairly prejudiced when s. 1 arguments are made for the first time on appeal. In *Sauvé v. Canada (Chief Electoral Officer)*, McLachlin C.J. made clear that, while common sense reasoning may supplement the evidence led, courts "must be wary of stereotypes

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[4] Appellant's Factum, at para. 44, citing *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 28.
[5] *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 138; footnotes omitted, emphasis added.
[6] Excerpt Crown Submissions from the Transcript of Proceedings – Colloquy, Respondent's Record, Tab 1, at pp. 1-2.
[7] See *Reid*, *supra* note 3, at para. 43: Watt J.A., citing L'Heureux-Dubé J., dissenting in *R. v. Brown*, [1993] 2 S.C.R. 918, at p. 927, holds that, for a party to succeed in raising a new issue on appeal, that party's failure to raise the issue at trial must not have been for tactical reasons.

cloaked as common sense".[8] When the Crown seeks to rely only on "logic, common sense and inferential reasoning"[9] on appeal, as here, the accused person is denied the opportunity to test whether the Crown's proffered reasoning is the product of logic or of stereotype. At trial, a *Charter* applicant can cross-examine Crown witnesses or lead their own evidence to show that the provision's purpose is not pressing and substantial or that the means chosen is out of proportion with that purpose. When the Crown relies only on common sense reasoning on appeal, and for the first time, the *Charter* applicant is left to bring a costly fresh evidence application or to challenge that reasoning with contrary logic alone.

B. Reading in a lower mandatory minimum is not an appropriate remedy for a violation of s. 12.

13. If this Court finds that the mandatory minimum sentence in s. 172.1(2)(a) violates s. 12 of the *Charter*, it must then address the Appellant's proposed remedy: the reading in of an alternative mandatory minimum sentence. Here, the Appellant appears to be asking this Court to read in the 90-day minimum that would have applied to the Respondent had his matter proceeded summarily at the time.[10] The CLA's position is that reading in a lower mandatory minimum is not an appropriate remedy when a court finds the higher mandatory minimum sentence to be grossly disproportionate.

(i) The test for reading in is not met.

14. The usual remedy for a mandatory sentencing provision that imposes cruel and unusual punishment contrary to s. 12 of the *Charter* is a declaration that the law is of no force and effect under s. 52(1) of the *Constitution Act, 1982*.[11] In *R. v. Ferguson*, this Court considered and rejected one proposed alternative remedy: an individual constitutional exemption under s. 24(1) of the *Charter* for cases in which the mandatory minimum would be grossly disproportionate.[12] While

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[8] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 18.
[9] Appellant's Factum, at para. 44.
[10] Appellant's Factum, at paras. 99-103. The mandatory minimum sentence for summary convictions was increased to 6 months on July 17, 2015.
[11] *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 36 [*Ferguson*]; see e.g. *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130.
[12] *Ferguson*, *supra* note 11.

the remedy of reading in was not before this Court in *Ferguson*, McLachlin C.J. suggested that it should likewise be rejected:

> In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole. Where this is not possible – as in the case of an unconstitutional mandatory minimum sentence – the unconstitutional provision must be struck down.[13]

15. It has long been recognized that courts risk inappropriately intruding into the legislative sphere when they opt for severance or reading in instead of striking down.[14] Courts should only apply one of these alternative remedies when Parliament would likely have enacted the provision as altered had it been aware of the constitutional defect.[15] Where it is not clear Parliament would have passed the amended provision, it is not the court's place to step in and make the amendment.[16] Severance or reading in will be warranted only in the clearest of cases.[17]

16. This is far from the clearest case. It is not sufficiently plain that Parliament would have chosen to redraft the provision by substituting the 90-day mandatory minimum had it been aware of the one-year minimum's constitutional defect. Lamer C.J., writing for the majority in *Schachter v. Canada*, provided the following guidance:

> The court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislative, not the courts.[18]

17. This Court has chosen to read in when the law's constitutional defect stems from something it wrongly excludes.[19] Reading in then serves to *extend* the reach of the legislation.[20] For example, in *Vriend v. Alberta*, this Court determined that reading in "sexual orientation" to a list of prohibited grounds of discrimination would better preserve the legislature's intention than would

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[13] *Ibid*, at para. 65; citations omitted.
[14] *Ibid*, at para. 50.
[15] *Ibid*, at para. 51.
[16] *Ibid*; *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 66.
[17] *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 717-718.
[18] *Ibid*, at p. 707.
[19] *Ibid*, at p. 698.
[20] *Ibid*, at p. 698.

striking down the entire legislative scheme.[21] In such cases, the nature of the inconsistency – the exclusion of a particular group – allows the court to define with a sufficient degree of precision how the statute ought to be extended to preserve its constitutionality.[22]

18. In the context of mandatory minimums for hybrid offences, such precision is not possible. In a successful challenge to a mandatory minimum sentence, it is the particular minimum sentence chosen by Parliament – here, one year – that is inconsistent with the *Charter* right to be free from cruel and unusual punishment. The nature of this inconsistency does not suggest a precise solution. The analysis does not yield a single alternative, constitutionally compliant, minimum.

19. Had Parliament been aware that the one-year mandatory minimum was grossly disproportionate, it could have followed one of several paths. Parliament *might* have chosen to apply the same, lower, mandatory minimum upon both indictment and summary conviction. Or Parliament might have sought to maintain the distinction it ultimately enacted by either choosing a mandatory minimum lower than one year but higher than 90-days or by choosing to lower both mandatory minimums in a step-wise fashion. Parliament might have chosen to maintain the one-year minimum but introduced discretion to be applied in individual cases where a one-year jail sentence would offend s. 12. Or Parliament might have eliminated the mandatory minimum entirely for this offence. There is no clear and obvious path.

20. It is simply not sufficiently clear that Parliament would have chosen to impose a 90-day mandatory minimum in place of the constitutionally defective one-year minimum. Furthermore, by trying to anticipate Parliament's choice rather than letting Parliament choose, this Court might snuff out – rather than spark – *Charter* dialogue.

21. The Supreme Court of British Columbia has twice considered whether reading in the mandatory minimum sentence for a summary conviction was appropriate when the minimum on indictment was challenged. In both cases, the Court was not satisfied that, had Parliament known the one-year mandatory minimum sentence at issue was grossly disproportionate, it would have

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[21] *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 150, 155.
[22] See *ibid*, at paras. 155-159.

imposed the lower mandatory minimum sentence.[23] The CLA is not aware of any case in which a court has substituted an alternative mandatory minimum as a remedy.

(ii) The availability of reading in as a remedy would create practical issues for litigants.

22. The Appellant stipulates that the 90-day mandatory minimum should be read in "[p]rovided that the lower mandatory minimum is not a grossly disproportionate penalty".[24] This Court has made clear that reading in will only be appropriate when it ensures the validity of the legislation; this remedy cannot be used to solve one constitutional problem by creating another.[25] Therefore, in determining whether or not to read in, this Court, and future lower courts facing the same suggested remedy, must determine whether or not the lower minimum also violates s. 12. It will inevitably fall to *Charter* litigants to address the constitutionality of a mandatory minimum sentence to which they are not even subject. This will increase the cost and complexity of challenges to mandatory minimum sentences.

23. Furthermore, in the event that a court conducting the analysis made necessary by the Appellant's proposed remedy finds both mandatory minimum sentences run afoul of s. 12 of the *Charter*, that court would not necessarily have the power to strike down the lower mandatory minimum. This is because the *Charter* applicant is only subject to a single mandatory minimum and thus only the constitutionality of that mandatory sentence is properly before the court – absent a freestanding challenge to that lower minimum in Superior Court. This too would increase the cost and complexity of litigation.

24. The mandatory minimum sentences tied to sexual offences have frequently been subject to constitutional challenge, with sometimes diverging results in lower courts across the country.[26] Introducing this alternative remedy would only add a third layer of confusion to this landscape: in addition to a split between courts upholding and striking down the same mandatory minimum

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[23] *R. v. E.R.D.R.*, 2016 BCSC 1759, at paras. 21-23; *R. v. Scofield*, 2018 BCSC 419, at paras. 41-54.
[24] Appellant's Factum, at para. 100.
[25] *M. v. H.*, [1999] 2 S.C.R. 3, at paras. 139-141.
[26] See e.g. *R. v. Gumban*, 2017 BCPC 226; *R. v. J.G.*, 2017 ONCJ 881 [*J.G.*] (invitation to sexual touching, s. 152(b)).

sentence, a third group of courts could choose to read in and impose a lower mandatory minimum sentence. That mandatory minimums have changed over time, and sexual offences may be historical and subject to an earlier scheme, as in the Respondent's case, enhances this complexity. In this context, mandatory minimum sentences, intended to remove discretion and create certainty in sentencing,[27] are in danger of having just the opposite effect.

25. The Crown's proposed remedy in this case illustrates these practical issues. First, reading in a 90-day minimum would do nothing to allay the Crown's concerns about an "incongruous" [28] sentencing scheme: this remedy would put in place a lower mandatory minimum for when the Crown proceeds by indictment (90 days) than for when it proceeds summarily (6 months). This is a product of the historical nature of the Respondent's offence and the frequent amendments to the mandatory minimum sentencing laws. These factors are not unique to s. 172.1. Second, it is not clear that a 90-day sentence would pass constitutional muster. The Nova Scotia Court of Appeal in *R. v. Hood* found that there were reasonable hypothetical scenarios in which a suspended sentence with a period of probation (with strict conditions) would be appropriate.[29] Provincial courts have also found 90-day mandatory minimum sentences to be unconstitutional in the context of other sexual offences.[30] Because this remedy is being proposed for the first time on appeal to this Court, the constitutionality of the 90-day mandatory minimum at issue has not been litigated. The risk of a court imposing an unconstitutional mandatory minimum is present here.

PART IV – SUBMISSIONS ON COSTS

26. The CLA makes no submissions as to costs.

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[27] *Ferguson*, *supra* note 11, at para. 54.
[28] Appellant's Factum, at para. 103.
[29] *R. v. Hood*, 2018 NSCA 18, at paras. 149-156.
[30] *R. v. Brandon Boeyenga* (2 November 2016), Midland (Ont. Ct. J., per Main J.) (sexual interference, s. 151(b)); *J.G.*, *supra* note 26 (invitation to sexual touching, s. 152(b)); *R. v. Okoro*, [2018] O.J. No. 2102 (Ct. J.) (sexual exploitation, s. 153(1.1)(b)).

PART V – ORDER SOUGHT

27. The CLA respectfully requests an opportunity to present five minutes of oral argument or as long as this Honourable Court sees fit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF MAY, 2018.

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PART VI – AUTHORITIES RELIED ON

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Secondary Sources	Paragraph(s)
None.	