SCC File No. 39338 & 39438

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

BETWEEN:

JESSE DALLAS HILLS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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Interveners

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

OCEAN WILLIAM STORM HILBACH and CURTIS ZWOZDESKY

Respondents

- and -

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PART I - OVERVIEW

1. In *R. v. Lloyd*, this Court called upon Parliament to limit the reach of mandatory minimum sentences for broadly worded offences.[1] Five years later, this call has not yet been answered. Despite recent legislative efforts,[2] mandatory minimum sentences persist for offences that capture a wide range of people and conduct—without a safety valve to guard against grossly disproportionate results.

2. In the absence of a statutory exemption clause, improperly tailored mandatory minimum sentences for broad offences remain constitutionally suspect under s. 12 of the *Charter*. The Court is once again asked to assess the constitutionality of specific mandatory minimum sentences. This case presents an opportunity to reaffirm that mandatory minimum sentences for broadly defined offences will typically violate s. 12 of the *Charter* in the absence of judicial discretion to avoid a grossly disproportionate sentence.

3. This case also invites the Court to affirm an application of s. 12 that is responsive to the everyday composition of offenders in our courts. In line with the Court's recent guidance in *R. v. Boudreault*, the s. 12 test should not be based on abstractions, but reasonably foreseeable characteristics of offenders who are overrepresented in our justice system.[3] This approach promotes access to justice and substantive equality in sentencing.

PART II – STATEMENT OF POSITION

4. The Canadian Bar Association ("CBA") submits that:

   a. Mandatory minimum sentences for broadly defined offences are likely to violate s. 12 of the *Charter*. Future attempts to craft mandatory minimum sentences must be strictly tailored to apply to a targeted subset of offenders, or incorporate an adequate exemption clause to meet constitutional standards.

   b. Reasonably foreseeable applications of the law under a s. 12 analysis can include basic attributes of groups that are overrepresented in our criminal justice system,

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[1] *R. v. Lloyd*, 2016 SCC 13 at paras. 35-36 [*Lloyd*].
[2] Bill C-22, *An Act to amend the Criminal Code and the Controlled Drug and Substances Act*, 2nd Sess, 43 Parl, Canada, 2020 (Introduction and First Reading in the House of Commons 18 Feb 2021).
[3] *R. v. Boudreault*, 2018 SCC 58 [*Boudreault*].

such as Indigenous peoples and individuals with mental illness. This approach promotes access to justice and substantive equality in sentencing.

PART III – ARGUMENT

i. An Exemption Clause Will Typically Be Necessary for a Mandatory Minimum Sentence to Meet Constitutional Standards

5. The CBA has consistently submitted—and this Court has repeatedly affirmed[4]—that a statutory exemption clause will typically be necessary for a mandatory minimum sentence to meet constitutional standards. This is particularly so where an offence is broadly framed to capture a wide range of people or conduct, such as in the case at bar.

6. The fundamental principle of sentencing is proportionality: a sentence must be commensurate with the nature of the offence and the degree of responsibility of the offender.[5] Crafting a proportionate sentence is a delicate task.[6] The judge must balance several factors, including denunciation, general and specific deterrence, rehabilitation, aggravating and mitigating factors, and—where applicable—the circumstances of Aboriginal offenders.[7] As stated in *R. v. Nasogaluak,* "[n]o one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case."[8]

7. Mandatory minimum sentences threaten to destabilize this careful balance. By their very nature, mandatory minimum sentences risk undermining the principle of proportionality by emphasizing denunciation, deterrence, and retribution at the expense of a proportionate sentence.[9] While it is within Parliament's prerogative to prioritize these objects,[10] *R. v. Boudreault* makes it clear that "elevating" specific sentencing principles "above all other[s]" is constitutionally

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[4] *Lloyd*, para 35; *R. v. Morrison*, 2019 SCC 15, paras. 148, 194 [*Morrison*].
[5] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.1 [*Criminal Code*].
[6] *R. v. Lacasse*, 2015 SCC 64, para. 12.
[7] *Criminal Code*, ss. 718, 718.2.
[8] *R. v. Nasogaluak*, 2010 SCC 6, para. 43.
[9] *R. v. Nur*, 2015 SCC 15, para. 44 [*Nur*].
[10] *R. v. Friesen*, 2020 SCC 9, para. 95 [*Friesen*].

suspect.[11] A mandatory minimum sentence cannot go so far as to nullify the objects of rehabilitation,[12] restraint,[13] or fundamental proportionality.[14]

8. Sentencing judges have a duty to apply all of the principles mandated by ss. 718.1 and 718.2 of the *Criminal Code*.[15] By prescribing a "one-size-fits all" approach to punishment, mandatory minimum sentences come into conflict with these competing statutory mandates. For example, mandatory minimum sentences can frustrate the ameliorative purpose of *R. v. Gladue* and s. 718.2(e) of the *Criminal Code,* which must be applied in all cases involving Indigenous offenders.[16] And as noted in *Nur,* by shifting the judge's focus from the offender before the court, mandatory minimum sentences can undermine the statutory imperative of proportionality.[17]

9. Given that most substantive offences are designed to capture a wide range of conduct, there are many mandatory minimum penalties for which a foreseeable factual scenario would result in a grossly disproportionate sentence. In *Lloyd,* this Court recognized the constitutional infirmity of mandatory minimum sentences that apply indiscriminately to offences that can be committed in a broad range of ways by a wide range of people. As McLachlin C.J. wrote:

> … the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.[18]

10. McLachlin C.J. identified an elegant solution to this problem: a statutory exemption clause. She noted that constitutional compliance could be achieved by limiting the scope of a mandatory minimum sentence, or enacting a safety valve provision "that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment".[19] A

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[11] *Boudreault,* para. 81.
[12] *Boudreault,* para. 82.
[13] *Boudreault,* para. 83.
[14] *Boudreault,* para. 81.
[15] *R. v. Ipeelee,* 2012 SCC 13, para. 51 [*Ipeelee*].
[16] *R. v. Gladue,* [1999] 1 S.C.R. 688, para. 93 [*Gladue*]; *Ipeelee,* para. 59; *Boudreault,* para. 83.
[17] *Nur,* para. 44.
[18] *Lloyd,* para. 35 (emphasis added).
[19] *Lloyd,* paras. 35-36.

statutory exemption clause would preserve Parliament's message that a minimum carceral term is presumptively appropriate, while retaining residual judicial discretion to avoid unconstitutional results.[20]

11. In the absence of a legislative response, many mandatory minimum sentences remain vulnerable to constitutional challenge. The practical reality recognized by McLachlin C.J. is that *most* offences can be "committed in various ways, under a broad array of circumstances and by a wide range of people".[21] Indeed, according to Moldaver J. in *R. v. Morrison,* "[it] is generally the case with most criminal offences" that they may be "committed in a various ways and in a broad array of circumstances".[22] While a *mens rea* requirement may provide outer limits on the scope of an impugned law,[23] the fact remains that for "broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others".[24]

12. In *Morrison,* the Court called once again for a safety valve to address the constitutional risks posed by mandatory minimum sentences. The majority (led by Moldaver J.) signalled that the mandatory minimum sentence for child luring was, at the very least, constitutionally suspect due to the lack of a statutory exemption clause:

> As this brief overview demonstrates, there is considerable variation in terms of the conduct and circumstances that may be caught by s. 172.1(1). Yet, despite this variation, Parliament has not included a "safety valve" in the provision that would allow judges to exempt outlier cases where a significantly lower sentence might be appropriate, making the mandatory minimum provision vulnerable to constitutional challenge: see *Lloyd,* at para. 36.[25]

13. In concurrence, Karakatsanis J. made the same point in more emphatic terms. Unlike the majority, she adjudicated the s. 12 issue and held that the mandatory minimum sentence for child

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[20] *R. v. Morrison,* 2019 SCC 15, *per* Karakatsanis J. (concurring), para. 194.
[21] *Lloyd,* para. 35.
[22] *Morrison,* para. 153.
[23] *Morrison,* para. 153.
[24] *Friesen,* para. 91.
[25] *Morrison,* para. 148 (emphasis added).

luring was unconstitutional. She then pointed to a statutory exemption clause as the way out of this constitutional quagmire:

> Such constitutional defects, however, are avoidable. The harms associated with unconstitutional mandatory minimum sentences stem from their rigidity. They rob judges of the flexibility necessary to avoid imposing grossly disproportionate sentences. Building a safety valve — residual discretion — into mandatory minimum provisions would remedy this by allowing judges to make an exception in cases where the mandatory minimum would prove unconstitutional. This approach would allow legislators to send a clear and unequivocal signal that minimum sentences are presumptively appropriate, while permitting judges to depart from those guidelines in cases where the mandatory minimum would constitute excessive and unacceptable punishment.[26]

Taken together, both the majority and concurrence in *Morrison* took a unified stance on the importance of a safety valve.

14. Despite this judicial call to action, no such exemption clause has been enacted to date. In the wake of *Lloyd*, and *Morrison*, a number of mandatory minimum sentences have been properly struck down for violating s. 12 of the *Charter*.[27]

15. Some judges have expressed discomfort with this state of affairs, citing concerns of judicial activism.[28] Lower courts should be reminded that this outcome does not arise from an interventionist bench, but a drastic originating law. In the absence of a safety valve, mandatory minimum sentences are a radical interpolation into the "inherently … judicial function" of sentencing.[29] In effect, Parliament has concluded that either (1) denunciation and deterrence trump the principle against gross disproportionality, or (2) in all reasonably foreseeable applications, the law avoids grossly disproportionate results. The former assertion inherently undermines s. 12 of the *Charter*. The latter assertion must be tested by the courts.

16. As seen in *Lloyd* and *Morrison*, unless there is a judicial outlet to deal with factual outliers, mandatory minimum sentences for broadly defined offences are likely to violate s. 12 of the

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[26] *Morrison, per* Karakatsanis J. (concurring), para. 194 (emphasis added).
[27] See for e.g. Department of Justice Canada, "Mandatory Minimum Penalties and the Courts: Backgrounder" (February 18, 2021); *R. v. Hills*, 2020 ABCA 263, para. 123, footnote 6 [*Hills*].
[28] *R. v. Hilbach*, 2020 ABCA 332, para. 91 [*Hilbach*]; see also *Hills*, para. 123.
[29] *Nur*, para. 87.

Charter. Contrary to the assertions of Wakeling J.A.,[30] the uptick in successful s. 12 challenges does not arise from an error in doctrine, but legislative inaction. McLachlin C.J. forewarned that mandatory minimum sentences for broad offences are vulnerable to challenge where judges lack residual discretion to avoid unconstitutional results. In the continued absence of a statutory exemption clause, this Court should once again reaffirm that mandatory minimum sentences for broad offences remain constitutionally suspect under s. 12 of the *Charter*.

ii. The "Reasonable Applications" Test Should Be Responsive to Overrepresented Populations in the Criminal Justice System

17. Unless and until Parliament crafts an appropriate legislative response, it falls upon the courts to protect against grossly disproportionate punishment. The test in *Nur* and *Lloyd* is working well and need not be revisited. In particular, there is no basis to reconsider the "reasonably foreseeable applications" test as part of the s. 12 *Charter* analysis. In line with the Court's recent direction in *Boudreault,* prominent offender characteristics can feature in reasonably foreseeable applications of the impugned law. This approach ensures that overrepresented populations in the criminal justice system receive equal protection under the *Charter*.

18. As a starting point, any suggestion that the reasonable applications test should be abolished must be rejected out of hand. In *Nur*, this Court carefully considered the question of whether to incorporate reasonable applications into its modernized s. 12 doctrine.[31] McLachlin C.J. concluded that "[t]o confine consideration to the offender's situation runs counter to the long and settled jurisprudence of this Court relating to *Charter* review generally, and to s. 12 review in particular".[32] This approach has been reaffirmed in *Lloyd,*[33] *Boudreault,*[34] and *Morrison.*[35] The assertions of Wakeling and O'Ferrall JJ.A.[36] undermine *stare decisis* and do not warrant a reconsideration of the use of the reasonable hypothetical.[37]

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[30] *Hilbach*, para. 91; *Hills,* para. 123.
[31] *Nur*, paras. 47-77.
[32] *Nur*, para. 50.
[33] *Lloyd*, para. 22.
[34] *Boudreault,* para. 55.
[35] *Morrison,* para. 144.
[36] *Hilbach,* para. 91; see also *Hills,* paras. 102-103, 109-111, 119, 123-125.
[37] *R. v. Comeau,* 2018 SCC 15, para. 26.

19. The s. 12 test set out in *Nur* and *Lloyd* is being effectively applied to ensure that mandatory minimum sentences operate within constitutional limits. Attempts to dilute the reasonable applications inquiry (and the *Charter* protections that it confers) ought to be rejected.[38] In particular, the suggestion that offender characteristics should be omitted from the s. 12 analysis would impose artificial constraints on the check against gross disproportionality.

20. Offender characteristics are highly relevant to the proportionality assessment. Sentencing is "first and foremost an individualized exercise".[39] Individualization is a core tenet of proportionality; as stated in *R. v. Ipeelee*, judges must have "sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender".[40] Omitting offender characteristics from the s. 12 assessment would disregard the individualized nature of a fit sentence. This level of abstraction would truncate the yardstick with which courts measure gross disproportionality under the *Charter*.

21. Omitting offender characteristics from the s. 12 inquiry would also run counter to the jurisprudence of this Court. *Boudreault* dictates that the gross disproportionality assessment should be alive to the characteristics of offenders who are foreseeably captured by the impugned law. As stated by Martin J.:

> In a constitutional context, the court is also called upon to consider the rights of particular individuals who may be affected by this punishment in a way that is grossly disproportionate, understanding that people have varied life situations and many are impecunious, impoverished, ill, disabled, addicted and/or otherwise disadvantaged.[41]

22. All of these characteristics were considered in *Boudreault.* That case concerned the constitutionality of a mandatory victim surcharge. In assessing the reasonably foreseeable reach of the surcharge, the Court considered a combination of real and representative offenders.[42] These

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[38] See for e.g. the Intervener Attorney General of Ontario's factum for SCC File No. 39338 (*Hills*), paras. 40-47.
[39] *Boudreault*, para. 58.
[40] *Ipeelee*, para. 38 (emphasis added).
[41] *Boudreault*, para. 58.
[42] *Boudreault*, para. 55.

offenders exhibited overlapping characteristics of disadvantage, including poverty, addiction, disability, and Indigeneity.[43]

23. Considering such characteristics does not exclude a hypothetical by rendering it "far-fetched or only marginally imaginable".[44] Such objections overlook the drastic overrepresentation of these populations in the justice system. As noted in *Boudreault,* "[w]ithout a doubt, offenders with some or all of these characteristics [namely, poverty, addiction, disability, and Indigeneity] appear with staggering regularity in our provincial courts".[45] Allusions to these basic attributes do not render a s. 12 assessment inapposite. Indeed, these are precisely the situations that are "reasonably expected to arise" in the everyday operation of our court system.[46]

24. Following *Boudreault,* s. 12 should be responsive to the circumstances of Indigenous peoples as well as other racialized and marginalized groups. When addressing reasonable applications of the impugned law, counsel and courts should be invited to consider offender characteristics that are overrepresented in our justice system, such as Indigenous peoples and individuals with mental illness. This approach, which is responsive to the everyday composition of offenders before our courts, promotes access to justice and substantive equality in sentencing.

25. Integrating prevalent offender characteristics into the s. 12 analysis promotes access to justice in two ways. First, it eliminates the necessity of many individual challenges to mandatory minimum sentences under s. 12 and/or s. 15 of the *Charter*. In line with *R. v. Ferguson,* this approach avoids a "duplication of effort" and "uneven and unequal application of the law".[47]

26. Second, a robust and responsive s. 12 test ensures that all individuals receive equal protection under the *Charter*. Individuals who are overrepresented in the criminal justice system often lack the resources to vigorously defend their *Charter* rights through a costly constitutional

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[43] *Boudreault,* para. 54.
[44] *R. v. Goltz,* [1991] 3 S.C.R. 485 at 506.
[45] *Boudreault,* para. 55.
[46] *Nur,* para. 56 (emphasis removed).
[47] *R. v. Ferguson,* 2008 SCC 6, para. 72.

application.[48] A consideration of prevalent offender characteristics promotes the rights of Indigenous and other marginalized individuals, and affords them equal protection under the *Charter*.

27. In addition to advancing access to justice, a responsive s. 12 framework promotes substantive equality in sentencing. Mandatory minimum sentences disproportionately impact populations that are already significantly overrepresented in the criminal justice system, such as Indigenous peoples or those with mental illness.[49] A responsive reasonable hypothetical test limits the likelihood that marginalized groups will face grossly disproportionate sentences that contribute to their continued overincarceration.

28. Characteristics of disadvantage are often highly relevant to assessing proportionality. For example, where mental illness, drug addiction, or a developmental disability contributes to the commission of an offence, this may attenuate an offender's moral blameworthiness.[50] However, mandatory minimum sentences often preclude judges from responding to this diminished culpability by imposing a sentencing floor. As a result, these overrepresented groups are especially likely to receive grossly disproportionate sentences that exacerbate their incidence of incarceration.

29. The relationship between reasonable hypotheticals and substantive equality also has special relevance to Indigenous offenders. Mandatory minimum sentences make no concession for the differential sentencing policies grounded in *R. v. Gladue* and s. 718.2(e) of the *Criminal Code.* As noted in *Boudreault*, this failure to accommodate s. 718.2(e)'s ameliorative mandate is a hallmark of gross disproportionality:

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[48] See for e.g. Department of Justice Canada, *Legal Aid Research Series Court Side Study of Adult Unrepresented Accused in the Provincial Criminal Courts* (Department of Justice Canada, 2002) 9, 21, 32.

[49] See for e.g. Elizabeth Sheehy, "The Discriminatory Effects of Bill C-15's Mandatory Minimum Sentences" (2010) 70 CR (6th) 302; Raji Mangat, "More Than We Can Afford: The Costs of Mandatory Minimum Sentencing" BC Civil Liberties Association (2014) at 40-44; David Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" 19 C.C.L.R. 173 (2015) at 189-192.

[50] See for e.g. *R. v. Shevchenko,* 2018 ABCA 31 at para. 28; *R. v. Boutillier*, 2017 SCC 64, para. 123; *R. v. Ramsay,* 2012 ABCA 257, paras. 19-25.

> … the surcharge also undermines Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison: s. 718.2(e) of the *Code*. This Court has recognized the need to adapt criminal sentencing given "the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system": *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 34. As a result, any criminal sanction that falls disproportionately on the marginalized and vulnerable will likely fall disproportionately on Indigenous peoples: *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 61-62 and 77. Just as Indigenous peoples remain overrepresented in Canada's prisons, so may we expect them to be overrepresented at committal hearings for defaulting on a surcharge order.[51]

30. Mandatory minimum sentences restrict judges' abilities to respond to systemic discrimination against Indigenous offenders and to otherwise redress their overincarceration.[52] By impeding the operation of s. 718.2(e) and *Gladue*, mandatory minimum sentences not only result in grossly disproportionate sentences; they also undermine the object of substantive equality for Indigenous peoples.

31. Under a s. 12 analysis, courts must be careful not to homogenize grounds of disadvantage, particularly when considering the distinct circumstances of Indigenous peoples. That said, many marginalized groups share one important commonality: they are acutely impacted by mandatory minimum sentences that restrain judicial discretion in sentencing.

32. By incorporating prevalent attributes of overrepresented populations into the s. 12 assessment, courts can promote access to justice and substantive equality in sentencing. In the *Hilbach* case, the majority at the Alberta Court of Appeal did just that: its reasons engaged with Indigeneity and other characteristics of disadvantage, such as drug addiction, schizophrenia, and FASD.[53] Such an approach should be upheld by this Court, as it helps to ensure that the constitutionality of a mandatory minimum sentence is tested against those very individuals who are most likely to be subject to a grossly disproportionate punishment.

PARTS IV AND V – COSTS SUBMISSION AND NATURE OF ORDER SOUGHT

33. The CBA does not seek costs and respectfully requests that no costs be ordered against it.

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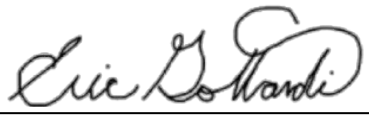
[51] *Boudreault*, para. 83.
[52] *Gladue*, paras. 68-69.
[53] *Hilbach*, paras. 58-70.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 30th date of August, 2021.



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PART VII – TABLE OF AUTHORITIES

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