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February 1, 2021

Via email: registry-greffe@scc-csc.ca

Registrar
Supreme Court of Canada Registry
301, rue Wellington Street
Ottawa, Ontario
K1A 0J1

Dear Mr. Registrar:

RE: ***Her Majesty the Queen v. Hilbach and Zwozdesky***
SCC File No: 39438

Please consider this letter as the reply of the applicant to the response filed by the respondent, Zwozdesky:

1. In reply to the respondent's comment that the applicant fails to mention the cases of *Conlon* and *Link*, the applicant points out that *Link* is expressly mentioned in its Application for Leave.[1] The critical point is that the majority of the Court of Appeal erred in using the facts of *Link* as a reasonable hypothetical because *Link* involved a sentencing on a charge of robbery pursuant to s. 344(1)(b) of the *Criminal Code*, which does not have a mandatory minimum sentence. *Link* does not deal with the offence of robbery with a firearm and the corresponding four-year mandatory minimum sentence which is at issue in the instant case.

2. Although *Conlon* is discussed by the majority of the Court of Appeal,[2] *Conlon* is ***not*** expressly adopted as one of the four hypotheticals that the Court of Appeal used to determine that this mandatory minimum sentence was unconstitutional.[3] *Conlon* does not deal with sentencing for the offence that the respondent,

[1] Application for Leave paras 55, 57
[2] *R v Hilbach/Zwozdesky*, 2020 ABCA 332 para 59 [Tab D of Application for Leave]
[3] *Ibid* para 68

Zwozdesky, is guilty. Similar to *Link*, *Conlon* deals with sentencing for robbery pursuant to s. 344(1)(b) of the *Criminal Code* for which there is no mandatory minimum sentence.

3. The applicant submits that if a fact scenario from a reported case is to be used as a reasonable hypothetical it must involve the same offence as the one for which the mandatory minimum sentence is impugned. *R v Brown*[4] was referenced by this Court in *Nur*[5] as an example of a case where this Court declined to consider a reasonable hypothetical with a different underlying offence from that involved in the case before it.

4. In *EJB,*[6] the Alberta Court of Appeal said that the use of the hypotheticals advanced by *EJB* in his constitutional challenge to a mandatory minimum sentence "should have been avoided as remote and far-fetched. Neither dealt with the same offence and changed the facts to the point where they were no longer reasonably foreseeable cases."

5. Relying upon *Nur, Brown* and *EJB*, the majority of the Court of Appeal in the instant case said that a reasonable foreseeable application "should involve the same offence for which the mandatory minimum sentence is impugned."[7] Yet, the Court of Appeal did not follow this principle as it relied upon cases, such as *Link*, that did not involve the impugned mandatory minimum sentence.

6. Finally, the analysis of the majority of the Court of Appeal in which it referred to four identified reasonable hypotheticals is largely a deferral to the trial judge's analysis without reference to other appellate authority. The critical point is that the Court of Appeal ignored other appellate authority in this analysis.

7. The applicant respectfully asks this Court to grant leave to appeal at large.

Sincerely,

D. Alford

Deborah J. Alford
Appellate Counsel
/ad

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[4] *R v Brown* [1994] 3 SCR 749
[5] *R v Nur*, 2015 SCC 15 footnote 1 [Tab D Application for Leave]
[6] *R v EJB*, 2018 ABCA 239 at para 64; leave to appeal dismissed *EJB v R,* 2019 CanLII 45254 [Tab D Application for Leave]
[7] *R v Hilbach/Zwozdesky, supra* n 2 at para 56 [Tab D Application for Leave]

cc: Lynne Watt, Gowling WLG (Canada) LLP
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