SCC File No. 35982

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

BETWEEN:

JOSEPH RYAN LLOYD

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

MEMORANDUM OF ARGUMENT OF PIVOT LEGAL SOCIETY AND THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS
(Motion for leave to intervene pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)

PART I - STATEMENT OF FACTS

A. Overview

1. Pivot Legal Society ("Pivot") and the Union of British Columbia Indian Chiefs "(UBCIC") jointly seek leave to intervene in this appeal pursuant to Rules 47 and 55 to 59 of the *Rules of the Supreme Court of Canada.* Pivot and the UBCIC (collectively, "Coalition") meet the test for leave to intervene. Both organisations have an interest in the constitutionality of the mandatory minimum sentence in s. 5(3)(*a*)(i)(D) of the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19 ("CDSA"), and will bring a unique perspective on the impact of s. 5(3)(*a*)(i)(D) on Aboriginal persons, women, people who face drug charges as a result of their addictions, sex workers and other people living on the margins of Canadian society: in other words, people who are most likely to be impacted by the mandatory minimum sentence. The outcome of the appeal has the potential to affect many of those on behalf of whom Pivot and the UBCIC advocate.

2. If granted, leave to intervene, the Coalition will offer reasonably foreseeable applications informed by real word experience, based on the communities it represents, including

Aboriginal peoples; and will provide this Court with the relevant context in which the impugned mandatory minimum sentence at issue operates.

B. Description and expertise of the Coalition

3. Pivot's origins, activities, litigation experience and interest in these proceedings are described in detail in the affidavit of its Executive Director, Katrina Pacey, made on September 30th, 2015 and filed in support of the Coalition's application. The UBCIC's origins, activities, litigation experience and interest in these proceedings are described in detail in the affidavit of Grand Chief Stewart Phillip, made on October 8, 2015 and also filed in support of the Coalition's application.

Pivot Legal Society

4. Pivot is a non-profit legal advocacy group founded in 2001. It is a community organisation with almost 5,000 members and a network of volunteers and supporters, including over 300 lawyers across Canada.[1] Pivot's work focuses on human rights issues that affect the residents of Vancouver's Downtown Eastside ("DTES"), one of Canada's poorest urban neighborhoods, with endemic drug and social problems, which have been the subject of comment by the Court.[2]

5. In *PHS*, an unanimous Court, described the reality of addicts who live in the DTES:

> The residents of the DTES who are intravenous drug users have diverse origins and personal histories, yet familiar themes emerge. Many have histories of physical and sexual abuse as children, family histories of drug abuse, early exposure to serious drug use, and mental illness. Many injection drug users in the DTES have been addicted to heroin for decades, and have been in and out of treatment programmes for years. Many use multiple substances, and suffer from alcoholism. Some engage in street-level survival sex work in order to support their addictions. It should be clear

---

[1] Affidavit of Katrina Pacey, sworn September 30, 2015 ("Pacey Affidavit"), paras.5-7.

[2] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R 134 at paras. 4-11, 27.

> from the above that these people are not engaged in recreational drug use: they are addicted. Injection drug use is both an effect and a cause of a life that is a struggle on a day to day basis.[3]

6. Pivot has extensive experience in education, law reform advocacy and strategic litigation in health and drug policy which is relevant to the issues on this appeal.[4]

7. Pivot has previously been granted leave to intervene in this Court; the British Columbia Court of Appeal; and the Ontario Court of Appeal.[5] In *Bedford ONCA*, Pivot's submissions were specifically referred to by the Ontario Court of Appeal.[6] In Can*ada (Attorney General) v. Sex Workers United Against Violence Society*, Pivot's involvement was a factor in the Supreme Court of Canada's discretionary grant of public interest standing to pursue *Charter* litigation on behalf of sex workers.[7]

The Union of British Columbia Indian Chiefs

8. UBCIC is a representative organization of First Nations in British Columbia, which is dedicated to promoting and supporting the efforts of First Nations in British Columbia to affirm and defend their Aboriginal Rights and Aboriginal Title. The UBCIC's mandate is to give the Aboriginal people of British Columbia a voice strong enough to be heard around the world. The mission of the UBCIC includes holding the federal government to its fiduciary obligations; building trust, honour and respect in order to achieve security and liberty and continue healing and reconciliation of Aboriginal people.

9. The UBCIC views mandatory minimum sentences (along with the legacy of residential schools, the apprehension of aboriginal children into foster care, and the *Indian Act*

---

[3] *PHS, supra* at para. 7.
[4] Pacey Affidavit, paras 20-37.
[5] *R. v. Nur*, 2015 SCC 15 (on whether a mandatory minimum in the Criminal Code violated s. 12 of the *Charter*); *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (as part of a coalition with PACE and Downtown Eastside Sex Workers United Against Violence, ("SWUAV")); *R. v. Lloyd*, 2014 BCCA 224; *Victoria (City) v. Adams*, 2009 BCCA 563; *Tanudjaja v. Attorney General (Canada) (Application)*, 2014 ONCA 852 (as part of a coalition with Charter Committee on Poverty Issues, the Income Security Advocacy Center and Justice for Girls); *Canada (Attorney General) v. Bedford,* 2012 ONCA 186, (2012), 109 OR (3d) 1 ("Bedford ONCA") (as part of a coalition with PACE and SWUAV).
[6] *Bedford ONCA*, paras. 318-322, *per* majority and 366, *per* dissent.
[7] *Canada (Attorney General) v. Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 545 at para. 74.

regime) as a feature of the ongoing colonial process, which disproportionately imprisons aboriginal people and separates them from their families and their communities. The decisions in *R v Gladue*, [1999] 1 SCR 688, and *R v Ipeelee,* 2012 SCC recognized the shockingly high likelihood that aboriginal offenders would be being sentenced to jail. Reconciliation depends on having the ameliorative factors set out in section 718.2(e) of the *Criminal Code,* R.S.C. 1985, C-46, and in *Gladue* and *Ipeelee* respected.

10. The UBCIC has extensive experience supporting First Nation communities through education, law reform advocacy, government engagement and litigation on Aboriginal issues which is relevant to this Court's consideration of reasonably foreseeable applications under s. 12 of the *Charter* and in issue in this appeal.[8] The UBCIC has previously been granted leave to intervene in this Court, in the British Columbia Court of Appeal and the Supreme Court of British Columbia.

PART II - POINTS IN ISSUE

11. Should the Coalition be granted leave to intervene in this appeal?

PART III - ARGUMENT

A. Introduction

12. This Court has a history of permitting interventions from interested parties on matters of public interest:

> Public interest organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts.[9]

13. An applicant seeking leave to intervene before this Court pursuant to s. 55 of the *Rules of the Supreme Court of Canada* must demonstrate: (1) an interest in the issues raised by the parties to the appeal; and (2) that its submissions will be useful to the Court and will

---

[8] Stewart Affidavit.

[9] *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236 at para. 43.

be different from those of the other parties.[10] It is respectfully submitted that the Coalition meets these criteria.

B. The Coalition has an interest in the subject matter of this appeal

14. The question of whether s. 5(3)(*a*)(i)(D) of the CDSA is contrary to s. 12 of the *Charter* is a public law issue. Many in the DTES and Aboriginal communities served by Pivot and the UBCIC will be profoundly affected by the outcome of this appeal. Pivot's representative base, experience in the DTES and expertise in health and drug policy and sex work issues and the UBCIC's mandate to improve the security and liberty of Aboriginal peoples will allow the Coalition to offer an useful perspective not represented by the parties.

C. The Coalition will provide useful and different submissions

15. Pivot's mandate is to work on human rights issues that affect the residents of the DTES, one of Canada's poorest communities with endemic drug and social problems. It has extensive front line experience with, and knowledge about, the people most likely to be affected by the mandatory minimum sentence in s. 5(3)(*a*)(i)(D) and therefore on the circumstances on which relevant reasonably foreseeable applications used in the s. 12 *Charter* analysis should be based.

16. The UBCIC is an important voice for First Nations in British Columbia and can provide the Court with an Aboriginal perspective on the application of the mandatory minimum in this appeal. This perspective is important given the crisis of the over-incarceration of Aboriginal people in Canada, which this Court has repeatedly recognised.[11]

17. The Coalition will not duplicate the submissions of other parties and has consulted with counsel for the other proposed interveners and the Respondent and undertakes to continue doing so with the intent of avoiding duplication. The Coalition's proposed submissions will be distinctive and will provide a helpful perspective on the mandatory minimum sentence issue to be resolved by this Court.

---

[10] *Reference re Workers' Compensation Act, 1983* (Nfld), [1989] 2 SCR 335, per Sopinka J. at 339; *R v. Finta*, [1993] 1 SCR 1138, *per* McLachlin J, as she was then, at 1142; *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended, ss 55, 57(2).

[11] *Gladue, supra*; *Ipeelee, supra.*

D. Position the Coalition proposes to take in these proceedings

18. If leave is granted to intervene, the Coalition will address the second stage of the s. 12 inquiry: whether s. 5(3)(*a*)(i)(D) of the CDSA is grossly disproportionate as evidenced in reasonably foreseeable applications circumstances.

E. Outline of proposed submissions

19. As this Court confirmed in *R. v. Nur*, individual characteristics of offenders are relevant to the *Charter*, s. 12 reasonably foreseeable applications analysis.[12] An offender's Aboriginal status is such a characteristic. Addiction, gender, socio-economic status and sex work are others.

20. The mandatory minimum sentence in s. 5(3)(*a*)(i)(D) of the CDSA applies to Aboriginal offenders despite their unique history and circumstances, and removes restorative sentencing options altogether. It applies to offenders struggling with long-term addiction, without regard to the fact that their addiction is a recognised illness, which diminishes their choice and therefore their moral culpability. It applies to women struggling with addiction, some with dependent children, and to sex workers who resort to trafficking to avoid the even greater dangers of violence posed by street-level sex work. In the Coalition's experience, none of these examples are "unreasonable" or "far-fetched", rooted as they are in the record and the real-world characteristics of the communities on behalf of whom Pivot and the UBCIC advocate.

21. The Coalition will argue that taking these characteristics and other contextual factors into account, the mandatory minimum sentence in s. 5(3)(a)(i)(D) is, in its reasonably expected application, grossly disproportionate and contrary to s. 12 of the *Charter*.

22. The application of the mandatory minimum sentence in s. 5(3)(*a*)(i)(D) to Aboriginal offenders could result in grossly disproportionate punishment because it denies the sentencing judge the ability to consider the factors set out in *Gladue*, *Ipeelee* and s.

[12] *R. v. Nur*, 2015 SCC 15.

718.2(*e*) of the *Criminal Code* and with them, consideration of the unique circumstances of Aboriginal offenders that the Supreme Court of Canada has said must apply.[13]

23. On a conviction for possession for the purposes of trafficking, a court sentencing an Aboriginal offender must have regard to s. 718.2(e) of the *Criminal Code*. Section 718.2(e) directs that "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". The provision imposes a statutory duty on sentencing judges "to consider the unique circumstances of Aboriginal offenders". The "application of the *Gladue* principles is required in every case involving an Aboriginal offender and a failure to do so constitutes an error justifying appellate intervention".[14]

24. Aboriginal peoples continue to be dramatically overrepresented in Canadian prisons. Aboriginal people constitute less than 4% of the general Canadian population, yet Aboriginal men and women make up 20% and 41% of federal penitentiary inmates respectively.[15] Despite the fourteen years since *Gladue*, this "crisis in the Canadian criminal justice system" is "worse than ever".[16]

25. The minimum sentence prescribed by s. 5(3)(a)(i)(D) does not relieve the sentencing judge of the duty to consider the *Gladue* principles. However, having considered s. 718.2(e), if the sentencing judge would otherwise have imposed a non-custodial sentence, or would have imposed a custodial sentence of substantially less than one year, the effect of the minimum sentence is to require the imposition of a grossly disproportionate sentence. This is what renders s. 5(3)(a)(i)(D) unconstitutional.

26. The mandatory imposition of a sentence on an Aboriginal offender when the application of statutory criteria designed to redress the destructive history of colonialism and the endemic overpopulation of Aboriginal peoples in Canadian prisons leads to the conclusion that the prescribed term of imprisonment is not proportional, and would rightly be regarded by informed members of the Canadian public as abhorrent and

---

[13] *R. v. Gladue, supra*; *R. v. Ipeelee, supra.*

[14] *Ipeelee, supra* at para. 87.

[15] *R. v. Kokopenace*, 2013 ONCA 389 at paras. 136 and 140-141.

[16] *Ipeelee, supra* at para. 62.

intolerable. Such a result denies Aboriginal offenders restorative justice measures and aggravates the problem of over-incarceration that s. 718.2(e) aims to ameliorate. It ignores the reality that some Aboriginal offenders' "constrained circumstances may diminish their moral culpability...Failing to take these circumstances into account violates the fundamental principle of sentencing - that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".[17]

27. Further, the Coalition will also argue that s. 5(3)(a)(i)(D) of the CDSA is constitutionally infirm because there are other reasonably foreseeable applications that demonstrate the minimum sentence's gross disproportionality. These include women who engage in "street-level survival sex work in order to support their addictions".[18] These women sometimes resort to trafficking as a substitute for sex work in an effort to avoid the high levels of violence that accompanies it.[19]

28. Reasonably foreseeable applications will also include women who are mothers and have primary child care responsibilities and, in a further example given by the sentencing judge, who are primary breadwinners with dependent families. In marginalized communities such as the DTES, women often play a significant role holding together many families. Compulsory incarceration leads to the imprisonment of these women, and the consequent apprehension of their children into care[20] with its attendant harms[21], when community-based sentenced orders used to be available to these offenders. When these women are Aboriginal, the break-up of families in these circumstances becomes part of the colonial pattern of family disruption.

29. Reasonably foreseeable offenders will also include people who face drug charges as a result of their addictions, like the Respondent, who turn to low-level trafficking, receiving payment in drugs when legitimate employment opportunities are unavailable[22],

---

[17] *Ipeelee*, *supra* at para. 73.
[18] *PHS*, *supra* at para. 7.
[19] Pacey Affidavit, Ex. C, pp. 11, 14-15 (dealing used to temporarily avoid sex work to acquire money for drugs in attempt to moderate risk of extreme violence, including murder).
[20] Pacey Affidavit, Ex. F.
[21] *Inglis v British Columbia (Minister of Public Safety)* 2013 BCSC 2309 at para 485.
[22] Pacey Affidavit, Ex. D, p. 17 (street based illicit drug users often motivated by need to pay for personal drug use or fulfill basic needs), p. 18 (illicit drug users engaged in drug dealing included significant proportions of women

or as an alternative to sex work. Based on this Court's description of the DTES and the sentencing judge's findings, reasonably foreseeable offenders to whom s. 5(3)(a)(i)(D) will apply will include material numbers of persons with long-term addictions of 15 years or more to hard drugs like heroin and who have been "in and out of treatment programmes"; who are homeless and mentally ill; and a significant percentage of whom are Aboriginal persons.[23]

30. Finally, the Coalition will argue that ss. 10(5) of the CDSA, which confers a discretion to delay sentencing to allow the offender to participate in an approved drug treatment court or treatment program, is illusory as a "safety valve". To avoid the minimum punishment, the offender must successfully complete the program. In particular, Pivot's experience in the DTES makes it well-situated to assist the Court with the context in which the supposed safety valve operates.

31. As this Court has indicated in a number of landmark cases,[24] if the state intends to rely on "safety valve" provisions in legislation and regulation to save impugned laws from findings of constitutional infirmity, those provisions must be real and accessible. If granted leave, the Coalition will present an example of a reasonably foreseeable drug treatment court participant to illustrate that the safety valve in s. 10 of the CDSA is not accessible.

F. Conclusion

32. In important public law cases like this, the Court recognises the benefit of diverse perspectives. Where issues of public law are raised, leave to intervene may be granted where an applicant has a history of involvement in the issue, creating an expertise that can shed fresh light or provide new information on the matter. In particular, leave to intervene is warranted where the applicant will provide the Court with fresh information

---

and aboriginal peoples); Ex. C, p. 11 ("For all participants, current involvement in dealing activities was motivated by the need to support drug dependency"); p. 14 ("overarching transition evident within participant accounts was a long term shift from dealing for profit, to dealing solely to support one's own drug use as drug dependence increases"); p. 14 (dealing represents "core survival strategy among street-entrenched drug users"); pp. 15 (majority of study participants willing to forego trafficking if they did not need access to street drugs to support their drug dependency).

[23] *PHS, supra* at para. 7.

[24] *Chaoulli v Quebec (Attorney General),* [2005] 1 S.C.R. 791, 2005 SCC 35, *R v Morgentaler,* [1988] 1 SCR 30, *PHS supra.*

or a fresh perspective on an important constitutional or public issue.[25] The Coalition submits that it has the relevant experience and expertise to provide assistance to the Court in this appeal, and, if granted leave, will provide a distinct perspective and will assist in contextualising the impacts of the mandatory minimum sentence in issue.

PART IV - COSTS

33. The Coalition submits that there should be no costs on this intervener motion.

PART V - ORDER REQUESTED

34. The Coalition seeks the following orders:

(a) Leave to intervene in this appeal;

(b) Leave to file a factum not exceeding 10 pages in length;

(c) Leave to present oral argument not exceeding 10 minutes;

(d) That the Coalition shall not be entitled to costs and no costs shall be ordered against it in this motion or on the appeal; and

(e) Such further orders as may be considered just by the Judge deciding this motion to intervene.

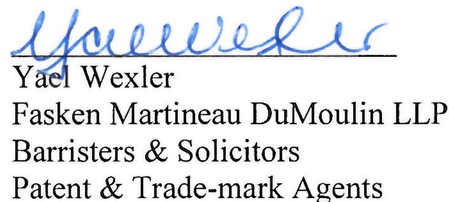
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of October 2015

Andrew I. Nathanson
Fasken Martineau DuMoulin LLP
Barristers & Solicitors

Maia Tsurumi
Barrister & Solicitor

Adrienne Smith
Barrister & Solicitor

Counsel for the Proposed Intervener
Pivot Legal Society and the Union of British
Columbia Indian Chiefs



Yael Wexler
Fasken Martineau DuMoulin LLP
Barristers & Solicitors
Patent & Trade-mark Agents

Tel: 613 236 3882
Fax: 613 230 6423
Email: ywexler@fasken.com
Suite 1300, 55 Metcalfe Street
Ottawa, Ontario, Canada K1P 6L5

Agent for the Proposed Intervener

---

[25] *Reference re Residential Tenancies*, [1981] 1 S.C.R. 714, *per* Dickson J. (as he then was) at 721; *Reference re Workers' Compensation Act, 1983*, *supra.*

Pivot Legal Society and the Union of British Columbia Indian Chiefs

PART VI – TABLE OF AUTHORITIES

	Cases	**Para**
	Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101	7
	Canada (Attorney General) v. Bedford, 2012 ONCA 186, (2012)	7
	Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44, [2011] 3 S.C.R 134	4, 5, 27, 31
	Canada (Attorney General) v. Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 S.C.R. 545	7
	Canadian Council of Churches v. Canada, [1992] 1 S.C.R. 236	12
	Chaoulli v Quebec (Attorney General), 2005 SCC 35, [2005] 1 S.C.R. 791	31
	Inglis v. British Columbia (Minister of Public Safety), 2013 BCSC 2309	28
	Reference re Residential Tenancies, [1981] 1 S.C.R. 714	32
	Reference re Workers' Compensation Act, 1983 (Nfld), [1989] 2 SCR 335	13, 32
	R v. Finta, [1993] 1 S.C.R. 1138	13
	R. v. Gladue, [1999] 1 S.C.R. 688	9, 16, 22, 25
	R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433	9, 16, 22 - 24, 26
	R. v. Kokopenace, 2013 ONCA 389	14
	R. v. Lloyd, 2014 BCCA 224	7
	R v Morgentaler, [1988] 1 S.C.R. 30	31
	R. v. Nur, 2015 SCC 15	7, 19
	Tanudjaja v. Canada (Attorney General), 2014 ONCA 852	7
	Victoria (City) v. Adams, 2009 BCCA 563	7

SCC File No. 35982

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

ON DAY THE DAY OF , 2015

BEFORE:

BETWEEN:

JOSEPH RYAN LLOYD

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

UPON READING the motion for leave to intervene made by Pivot Legal Society and the Union of British Columbia Indian Chiefs:

IT IS HEREBY ORDERED THAT:

1. Pivot Legal Society and the Union of British Columbia Indian Chiefs are granted leave to intervene;

2. Pivot Legal Society and the Union of British Columbia Indian Chiefs are granted leave to serve and file a factum not to exceed 10 pages in length; and

3. Pivot Legal Society and the Union of British Columbia Indian Chiefs are granted leave to present oral argument not to exceed 10 minutes at the hearing of the appeal.

____