SCC File No. 35982

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

B E T W E E N :

JOSEPH RYAN LLOYD

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

CANADIAN BAR ASSOCIATION, AFRICAN CANADIAN LEGAL CLINIC, PIVOT LEGAL SOCIETY AND UNION OF BRITISH COLUMBIA INDIAN CHIEFS, HIV & AIDS LEGAL CLINIC ONTARIO, CANADIAN HIV/AIDS LEGAL NETWORK, BRITISH COLUMBIA CENTRE FOR EXCELLENCE IN HIV/AID, PRISONERS WITH HIV/AIDS SUPPORT ACTION NETWORK, AND CANADIAN ASSOCIATION OF PEOPLE WHO USE DRUGS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

Interveners

FACTUM ON APPEAL OF THE INTERVENERS PIVOT LEGAL SOCIETY AND THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

ANDREW I. NATHANSON
Fasken Martineau DuMoulin LLP
Barristers & Solicitors
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3

Tel: 604 631 4908
Fax: 604 632 4908
Email: anathanson@fasken.com

YAEL WEXLER
Fasken Martineau DuMoulin LLP
Barristers & Solicitors
Suite 1300, 55 Metcalfe Street
Ottawa, Ontario K1P 6L5

Tel: 613 236 3882
Fax: 613 230 6423
Email: ywexler@fasken.com

Agent for the Interveners

MAIA TSURUMI
Barrister & Solicitor
154 West 18th Avenue
Vancouver, BC V5Y 2A5

Tel: 604 736 8703
Email: mtsurumi@gmail.com

ADRIENNE SMITH
Pivot Legal Society
Barristers & Solicitors
121 Heatley Avenue
Vancouver BC, V6A 3E9
Tel: 604-255-9700 109
Fax: 604-255-1552
Email: Adrienne@pivotlegal.org

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

Pivot Legal Society and the Union of British Columbia Indian Chiefs

ORIGINAL TO:

The Registrar, Supreme Court of Canada

AND COPIES TO:

DAVID N. FAI
David N. Fai Law Corporation
Barrister & Solicitor
815 - 402 West Pender Street
Vancouver, BC V6B 1T6

Tel: 604 685 4150
Fax: 604 986 3409
Email: davidfai@telus.net

Counsel for the Appellant
Joseph Ryan Lloyd

JEFFREY W. BEEDELL
Gowling Lafleur Henderson LLP
Barristers & Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel: 613 786 0171
Fax: 613 788 3587
Email: jeff.beedell@gowlings.com

Ottawa Agent for the Appellant
Joseph Ryan Lloyd

W. PAUL RILEY
Public Prosecution Service of Canada
900 - 840 Howe Street
Vancouver, BC V6Z 2S9

Tel: 604 666 0704
Fax: 604 666 1599
Email: paul.riley@ppsc-sppc.gc.ca

Counsel for the Respondent
Her Majesty the Queen

FRANÇOIS LACASSE
Director of Public Prosecutions of Canada
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

Tel: 613 957 4770
Fax: 613 941 7865
Email: francois.lacasse@ppsc-sppc.gc.ca

Ottawa Agent for the Respondent
Her Majesty the Queen

ROGER A. LOVE
African Canadian Legal Clinic
402-250 Dundas Street
Toronto, ON M5T 2Z5

Tel: 416 214 4747
Fax: 416 214 4748
Email: lovero@lao.on.ca

Counsel for the Intervener African Canadian Legal Clinic

BRUCE F SIMPSON
Barnes Sammon LLP
Barristers & Solicitors
400-200 Elgin Street
Ottawa, ON K1P 1L5

Tel: 613 594 8000
Fax: 613 7235 7578
Email: bfsimpson@barnessammon.ca

Ottawa Agent for the African Canadian Legal Clinic

MATTHEW A. NATHANSON
MN Law
Barrister & Solicitor
1000 - 355 Burrard Street
Vancouver, BC V6C 2G8

Tel: 604 608 6185
Fax: 604 677 5560
Email: matthew@mnlaw.ca

Counsel for the Intervener British Columbia Civil Liberties Association

DIRK DERSTINE
Derstine, Penman
Criminal Lawyers
302-559 College Street
Toronton, OM M6G 1A9

Tel: 416 304 1414
Fax: 416 304 1345
Email: derstine@derstinepenman.com

Counsel for the Intervener Criminal Lawyers' Association (Ontario)

ERIC V. GOTTARDI
Peck and Company
Barristers
610-744 West Hastings
Vancouver, BC, V6C 1A5

Tel: 604 669 0208
Fax: 604 669 0616
Email: egottardi@peckandcompany.ca

Counsel for the Intervener Canadian Bar Association

MATTHEW S. ESTABROOKS
Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel: 613.233.1781
Fax: 613.596.3952
Email: matthew.estabrooks@gowlings.com

Ottawa Agent for the British Columbia Civil Liberties Association

JEFFREY W. BEEDELL
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600-160 Elgin Street
Ottawa, ON K1P 1C3

Tel: 613 786 0171
Fax: 613 788 3587
Email: jeff.beedell@gowlings.com

Ottawa Agent for Criminal Lawyers Association (Ontario)

JEFFREY W. BEEDELL
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600-160 Elgin Street
Ottawa, ON K1P 1C3

Tel: 613 786 0171
Fax: 613 788 3587
Email: jeff.beedell@gowlings.com

Ottawa Agent for the Canadian Bar Association

KHALID JANMOHAMED
HIV AIDS Legal Clinic Ontario
Barrister & Solicitor
400-65 Wellesley Street East
Toronto ON M4Y 1G7

Tel: 416 340 7790 ext 45
Fax: 416 340 7248
Email: janmohak@lao.on.ca

Counsel for the Intervener HIV/AIDS Coalition

KASANDRA CRONIN
La Liberté Cronin
1190 - 605 Robson St.
Vancouver, BC V6B 5J3

Tel: 604-669-8602
Fax: 604-669-8939
k.cronin@telus.net

JOANA THACKARAY
Gaul Legge Grant & Munroe
1000-1199 W Hastings Street
Vancouver BC, V6E 3T5

Tel: 778 330 1061
Fax: 604 669 5101
Email: jthackeray@glgmlaw.com

Counsel for the Intervener Westcoast LEAF

MARIE-FRANCE MAJOR
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Tel: 613 695-8855
Fax: 613 695 8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for HIV/AIDS Coalition

JUSTIN DUBOIS
Power Law
1103-130 Albert Street
Ottawa, ON K1P 5G4

Tel: 613 702 5561
Fax: 613 702 5561
Email: jdubois@juristespower.ca

Ottawa Agent for Westcoast LEAF

TABLE OF CONTENTS

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Introduction

1. In its 2014 decision in *R. v. Anderson*, this Court said that "[i]f a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged".[1] This is such a challenge. Pivot Legal Society ("Pivot") and the Union of British Columbia Indian Chiefs ("UBCIC") (together, the "Coalition") submit that in its reasonably foreseeable applications, the mandatory minimum sentence in s. 5(3)(*a*)(i)(D) of the *Controlled Drugs and Substances Act*, R.S.C. 1985, c. 19 ("CDSA"), will result in grossly disproportionate sentences, with the result that it violates s. 12 of the *Charter*'s guarantee that "[e]veryone has the right not to be subjected to any cruel and unusual ... punishment".

2. This is so because the s. 5(3)(a)(i)(D) mandatory minimum sentence applies to Aboriginal offenders, despite their unique history and circumstances, and removes restorative sentencing options altogether. It is also so because it applies to women who suffer from addiction, some with dependent children and some who resort to drug trafficking to avoid the significant risk of violence faced by street-level sex workers. Further, it applies despite addiction being a recognised illness, one which diminishes an offender's choice and therefore their moral culpability. All of these applications of s. 5(3)(a)(i)(D) are reasonably foreseeable, rooted as they are in the record and the real-world characteristics of the communities on behalf of whom the Coalition advocates.

B. Statement of facts relevant to Coalition's position on the Appeal

3. Pivot and the UBCIC champion, among other causes, the human rights of members of Vancouver's Downtown Eastside ("DTES") community. The DTES is one of Canada's poorest urban neighbourhoods, with endemic drug and social problems. It is also home to one of the country's largest urban populations of Aboriginal persons.

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[1] *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167 at para. 24.

4. In *Canada (Attorney General) v. PHS Community Services Society*[2], Chief Justice McLachlin, writing for an unanimous Court, described the reality of people who live with addiction 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 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]

5. In *PHS, supra*, this Court referred to the federal Minister of Health's Expert Advisory Committee survey of 1,000 drug users living in the DTES. That study showed that those surveyed had been injecting drugs for an average of 15 years; 18% were Aboriginal; 20% were homeless and many more lived in single resident rooms; 80% had been incarcerated; 38% were involved in the sex trade; and 59% reported a non-fatal overdose in their lifetime. As this Court pointed out, "[f]or injection drug users, the nature of addiction makes for a desperate and dangerous existence".[4]

6. The Coalition offers this, not as evidence of adjudicative facts, but as confirmation that the foreseeable application of the mandatory minimum sentence in s. 5(3)(a)(i)(D) as described below cannot be dismissed as speculative, "marginally imaginable" or "far-fetched". This is the reality of life for many who live in the DTES and to whom s. 5(3)(a)(i)(D) will apply. This grounds the inquiry into the second limb of the s. 12 *Charter* analysis in "experience and common sense".[5] It is consistent with this Court's holding in *R. v. Nur* that courts may consider reported cases as illustrative of the application of the impugned statutory provision. "Reported cases allow us to know what

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[2] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R 134 ("*PHS*") at paras. 4-11, 27.
[3] *PHS, supra* at para. 7.
[4] *PHS, supra*, paras. 9-10.
[5] *R. v. Nur*, [2015] 1 SCR 773, 2015 SCC 15 at para. 62.

conduct the offence captures in real life".[6] *PHS, supra* is such a case, as are the cases which anchor the reasonably foreseeable applications provided by the Coalition.

7. The record in this case supports the same conclusion. Galati P.C.J. found that the Appellant Joseph Ryan Lloyd ("Lloyd") was engaged in drug trafficking in the DTES. It was a mitigating factor that Mr. Lloyd was trafficking to support his own addiction. Most of the time, Mr. Lloyd was paid in drugs.[7]

8. The primary hypothetical proposed by Mr. Lloyd was that of an addicted person in possession of a small amount of a Schedule 1 substance, which he or she intended to share with a spouse or friend. Galati P.CJ. found as a fact that "[t]his is a situation which happens daily in the downtown east side of Vancouver and is in no way a far-fetched or extreme scenario. Many of these persons have prior convictions for designated drug offences".[8]

9. In considering Mr. Lloyd's *Charter* application, Galati P.C.J. also drew on his experience sitting in the DTES. He observed that "Provincial Court Judges in the City of Vancouver deal constantly with drug addicts who resort to crime to feed their addictions".[9] He found that there were "numerous drug addicts" to whom s. 5(3)(a)(i)(D) could be expected to apply because they had designated substance offence convictions in the preceding ten years. Many such offenders "are of aboriginal heritage and their respective personal circumstances would otherwise warrant particular attention pursuant to s. 718.2(e) of the *Criminal Code*".[10]

PART II - POSITION ON QUESTIONS IN ISSUE

10. The Coalition's position is that s. 5(3)(*a*)(i)(D) of the CDSA violates s. 12 of the *Charter* because it is grossly disproportionate in reasonably foreseeable applications.

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[6] *R. v. Nur, supra*, at para. 72.
[7] *R. v. Lloyd*, 2014 BCPC 8 at paras. 21-22 and 32, AR, Vol. 1, pp. 6 to 7 and 9 to 10. Galati P.C.J. also found that Mr. Lloyd trafficked less often when he had the alternative of part time construction work.
[8] *R. v. Lloyd, supra*, at paras. 48-49, AR, Vol. 1, p. 14; see *also R. v. Lloyd*, 2014 BCPC 11 ("*Lloyd (No. 2)*") at para. 17, AR, Vol. 1, p. 27. At sentencing, this example was drawn from Mr. Lloyd's personal experience: AR, Vol. 2, p. 19, lines 37-43.
[9] *R. v. Lloyd, supra*, at para. 33, AR Vol. 1, p. 10.
[10] *R. v. Lloyd, supra*, at para. 33, AR, Vol. 1, p. 10; *Lloyd (No. 2), supra*, at para. 14, AR, Vol. 1, p. 26.

PART III - ARGUMENT

A. Section 12: Reasonably foreseeable applications

11. This case involves a straightforward application of this Court's decision in *Nur*, *supra*, to s. 5(3)(a)(i)(D) of the CDSA. There, the Court explained:

> Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. ... They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality.[11]

12. Section 12 of the *Charter* protects against punishment which is grossly disproportionate, that is, which is so excessive as to outrage society's sense of decency.[12] At the second stage of the s. 12 analysis, the court considers the penalty's application to reasonable hypothetical scenarios to determine if the sentence is constitutional.[13] In doing so, the court is simply asking, "[w]hat is the reach of the law?".[14] Individual characteristics of offenders are relevant to this analysis.[15] An offender's Aboriginal status is such a characteristic. Gender, involvement in sex work and addiction are others.

13. That s. 5(3)(ii)(D) is unconstitutional is demonstrated by its application to three groups of people: indigenous offenders, female offenders and offenders who become involved in crime as a result of their addictions. Imposing a mandatory minimum on these vulnerable individuals, some of whom, but for the mandatory minimum, would not be so sentenced, is grossly disproportionate to their degree of moral blameworthiness such that it would "outrage society's sense of decency".

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[11] *R. v. Nur, supra*, at para. 44.
[12] R. v. *Nur, supra*, at para. 39.
[13] *R. v. Smith*, [1987] 1 S.C.R. 1045 at p. 1072; *R. v. Goltz*, [1991] 3 S.C.R. 485 at p. 505; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90 at pp. 108-109; *R. v Nur*, 2015 SCC 15.
[14] *R. v. Nur, supra*, at para. 61.
[15] *R. v. Nur, supra.*

B. The application of s. 5(3)(*a*)(i)(D) to Aboriginal offenders

14. The application of the one year mandatory minimum to Aboriginal offenders denies sentencing judges the ability to apply, where appropriate, the unique circumstances of Aboriginal offenders that this Court in *R. v. Gladue* and *R. v. Ipeelee* has said must be applied.[16] While s. 5(3)(a)(i)(D) does not relieve the sentencing judge from considering the *Gladue* factors, having considered s. 718.2(e) of the *Criminal Code*, 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 grossly disproportionate.

15. 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". Section 718.2(e) imposes a duty on sentencing judges "to consider the unique circumstances of Aboriginal offenders". It also codifies the principle of fundamental justice, proportionality.[17] 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".[18]

16. In *Ipeelee*, *supra*, this Court reaffirmed in strong terms the requirement for courts to consider *Gladue* factors in sentencing. Sentencing courts must consider the unique circumstances of Aboriginal offenders as well as "the types of sentencing procedures and sanctions which may be appropriate" for them. Both "bear on the ultimate question of what is a fit and proper sentence".[19]

17. As this Court observed in *Ipeelee*, *supra*, despite *Gladue*, fourteen years later this "crisis in the Canadian criminal justice system" was "worse than ever".[20] Aboriginal peoples continue to be dramatically overrepresented in Canadian prisons.[21] Aboriginal people constitute less than 4% of the general Canadian population, yet Aboriginal men and

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[16] *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.
[17] *R. v. Anderson*, *supra*, at para. 24, citing *R. v. Ipeelee*, *supra*, at para. 87.
[18] *R. v. Ipeelee*, *supra*, at para. 87.
[19] *R. v. Ipeelee*, *supra*, at paras. 59, 72, 75 and 79.
[20] *R. v. Ipeelee*, *supra*, at para. 62.
[21] See *e.g.*, Office of the Correctional Investigator, "BACKGROUNDER: Aboriginal Offenders- A Critical Situation. (Ottawa, 2013)" online: <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx> ("Office of the Correctional Investigator").

women make up 20% and 41% of federal penitentiary inmates respectively.[22] The recent findings of the Truth and Reconciliation Commission of Canada ("TRC") further confirm this.[23]

18. The TRC concluded that mandatory minimum sentences have further contributed to the over-incarceration of Aboriginal people. Mandatory minimum sentences prevent judges from implementing community sanctions "even when they are consistent with the safety of the community and even when they have a much greater potential than imprisonment to respond to the inter-generational legacy of residential schools that often results in offences by Aboriginal persons".[24] As an important piece of the reconciliation process, the TRC recommended that Parliament allow trial judges sentencing Aboriginal offenders to depart from mandatory minimum sentences.[25]

19. The Crown Respondent argues that the sentencing judge must consider an offender's Aboriginal status, along with all other statutory factors, but that s. 718.2(e) and *Gladue* factors "cannot be invoked to override a statutory minimum".[26] This observation is true, but irrelevant: the issue here is not one of statutory interpretation, but whether the "statutory minimum" sentence is constitutionally valid in the first place.

20. Section 5(3)(a)(i)(D) is grossly disproportionate in its reasonably foreseeable application to Aboriginal persons. It denies Aboriginal offenders access to restorative justice measures such as sentencing circles and the "statutory affirmation of an Aboriginal right

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[22] *R. v. Kokopenace*, 2013 ONCA 389 at paras. 136 and 140-141, appeal allowed, 2015 SCC 28. See also *R. v. Ladue*, 2011 BCCA 101 at para. 50. See also Office of the Correctional Investigator, *supra*, which for 2013, reported that 23.2% of federal inmates were Aboriginal.

[23] Truth and Reconciliation Commission of Canada, *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada*, 2015 ("TRC Summary") at p. 170 and footnotes therein. The TRC reported that in 1995–1996, Aboriginal people made up 16% of all those sentenced to custody. By 2011–2012, that number had grown to 28% of all admissions to sentenced custody. The situation of women is even more disproportionate: in 2011–2012, 43% of admissions of women to sentenced custody were Aboriginal. See TRC 2015 Final Report, Summary, at p. 170, citing Canada, Statistics Canada, *Adult Correctional Services in Canada 1995–1996* and Canada, Statistics Canada, *Adult Correctional Services in Canada 2011–2012*.

[24] TRC Summary, *supra*, at p. 174.

[25] TRC Summary, *supra*, at p. 174. The TRC defines the reconciliation framework as, "one in which Canada's political and legal systems, educational and religious institutions, the corporate sector and civic society function in ways that are consistent with the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples*".

[26] Respondent's Factum, at para. 102.

to have traditional concepts of social dispute resolution applied in sentencing".[27] It ignores the reality that some Aboriginal offenders' "constrained circumstances may diminish their moral culpability...Failing to take these circumstances into account would violate 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".[28] It imposes disparate burdens on First Nations individuals who are often required to serve their sentences far from their home communities, perpetuating the colonial pattern of family disruption and alienation of Aboriginal peoples from their culture.[29] Requiring a sentence of imprisonment despite a different result indicated by the *Gladue* principles conscripts sentencing judges into participating in a violations of proportionality, contrary to their fundamental role of fashioning a proportional sentence.[30]

21. Section 5(3)(a)(i)(D) aggravates the situation of over-incarceration of Aboriginal people, which *Gladue*, *Ipeelee* and s. 781.2(e) aim to ameliorate. The U.S. experience offers a striking example of this.[31] There, the application of mandatory minimum sentences for certain drug offences contributed to the dramatic over-incarceration of African Americans[32], to the point that as of 2004, nearly one-third of black men in their twenties were behind bars, on probation or on parole.[33] Scholars argue that racial disparities were lower when judges had wider discretion and punishment was more individualised.[34]

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[27] L.N. Chartrand, "Aboriginal Peoples and Mandatory Sentencing" (2001), 39 Osgoode Hall L.J. 449 at p. 463.
[28] *R. v. Ipeelee*, *supra*, at para. 73.
[29] TRC Summary, *supra*, at pp. 1 to 4.
[30] *R. v. Anderson, supra*, para. 25.
[31] However, because the sentencing regime is so different, care should be taken in drawing lessons from the American experience.
[32] D.E. Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities" (2004), 56 Stan. L. Rev. 1271 ("Roberts 2004"); J. B. Fishman and M. M. Schanzenbach, "Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums," (2012) 9: 4 J Empirical Leg Stud 729 ("Fishman and Schanzenbach 2012"); D. C. McDonald and K. E. Carlson, "Why did racial/ethnic sentencing differences in federal district courts grow larger under the guidelines?" (1994) 6:4 *Federal Sentencing Reporter* 223 at pp. 224-225.
[33] Roberts 2004, *supra*, at p. 1272. In a later article, Roberts also found that, "[w]omen are the fastest-growing segment of the prison population, with an 828 percent increase in the number of black women behind bars for drug offenses between 1986 and 1991." Dorothy E. Roberts, "Prison, Foster Care, and the Systemic Punishment of Black Mothers," (2011-2012) 59 UCLA L. Rev. 1474 ("Roberts 2012") at p. 1480.
[34] Roberts 2004, *supra*, p. 1301; Fishman and Schanzenbach 2012, *supra*, p. 730.

22. Contrary to the Crown Respondent's criticism of Mr. Lloyd's position[35], the preceding submissions are not abstract and do not "presume" that Aboriginal status alone will render s. 5(3)(a)(i)(D) grossly disproportionate in the case of every indigenous offender. For the purposes of s. 12, it is enough to show that this will be so in some non-marginal cases. Reported cases[36]; the characteristics of addicted persons in the DTES described in *PHS*; the sentencing judge's reasons; and common sense satisfy this requirement.

23. In assessing gross disproportionality for the purposes of s. 12, the court asks whether the impugned punishment would rightly be regarded by informed members of the Canadian public as abhorrent and intolerable. This "hypothetical Canadian community member is also one that is apprised of the backdrop against which Aboriginal people come before criminal courts, with an awareness of the history of colonialism, dislocation and residential schools that *R. v. Gladue* and *Ipeelee*...describe".[37] A punishment which mandates incarceration despite individualised evidence that would otherwise lead to a contrary conclusion, and which perpetuates and even exacerbates historic discrimination would, for all the reasons given here, rightly "outrage society's sense of decency".

C. The application of s. 5(3)(*a*)(i)(D) to female and addicted offenders

24. Other reasonably foreseeable applications of s. 5(3)(a)(i)(D) will include mothers who have primary child care responsibilities; women who engage in trafficking in order to avoid the high levels of violence associated with sex work, to which they would otherwise resort to support their addiction; and those who are primary breadwinners with dependent families.[38] For offenders with primary child care and family support

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[35] Respondent's Factum, at para. 101.

[36] See for example, *R. v. Wilson*, 2011 BCPC 499 (Aboriginal offender struggling with addiction convicted of trafficking and sentenced to a six month Conditional Sentence Order; sentencing judge taking into account mitigating factors and principles in *R. v. Gladue*) and *R. v. Bouchard*, 2012 ONCJ 425 (Aboriginal woman with a long criminal record sentenced to four months in prison for trafficking marijuana; sentencing judge holding that, "A sentence of imprisonment within the range suggested by Crown counsel, absent the compelling *Gladue* factors affecting Ms. Bouchard, could be justified. However, in my view, that range of sentence must be tempered to reflect those systemic factors that have contributed to Ms. Bouchard's offending behaviour and address her rehabilitation").

[37] *R. v. Chambers*, 2013 YKTC 77, appeal allowed 2014 YKCA 13 at para. 119.

[38] *R. v. Lloyd*, *supra*, at para. 33, AB, Vol. 1, p. 10; Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry*, Executive Summary (British Columbia, 2012) ("*Missing Women Inquiry*") at pp. 13 to 15; W. Small, L. Maher, J. Lawlor, E. Wood, K. Shannon and T. Kerr, "Injection drug users' involvement in drug dealing in the downtown eastside of Vancouver: Social organization and systemic violence", (2013) 24 Int. J. of Drug Policy 479 ("Small et al.") See also Roberts 2012 at p. 1477 (~ 1/3 of women in U.S. prisons in 2008 were black and most were primary caretakers of their children).

responsibilities, compulsory incarceration can lead to the apprehension of their children[39] with its attendant harms[40], when community sentencing orders used to be available.

25. Based on this Court's description of the DTES in *PHS, supra*, and the sentencing judge's reasons, reasonably foreseeable offenders to whom s. 5(3)(*a*)(i)(D) will apply will also include material numbers of persons with long-term addictions who have sought treatment, some multiple times, but have relapsed; who are homeless and mentally ill; and a significant percentage of whom are also Aboriginal persons.[41]

26. Appellate courts have long accepted the view expressed by the sentencing judge that the moral culpability of people with addictions is materially different from those who distribute drugs for profit, particularly those in the "upper hierarchy of the drug trade".[42] The importance of this distinction is reinforced by the developing scientific, social and legal understanding of addiction as an illness: "[f]or an addict, using drugs is not a simple 'choice' to be either made or not made, but an illness 'characterized by a loss of control over the need to consume the substance to which the addiction relates'".[43] Just as an Aboriginal or mentally ill offender's moral culpability may be diminished, so too is that of a person suffering from addiction: their disease impairs their control.[44] Without s. 5(3)(*a*)(i)(D), the distinction between the moral culpability of low level traffickers who traffic to support their addiction, and those who do so for profit would be drawn by the trial judge in crafting a fit sentence. Section 5(3)(*a*)(i)(D) now precludes consideration of addiction as a mitigating factor at the bottom end of the sentencing range.

27. The mandatory minimum is likely to be applied to offenders with many, if not all of these characteristics. Experience and social science evidence confirms that these foreseeable applications of s. 5(3)(*a*)(i)(D) are reasonable ones.[45]

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[39] Pivot Legal Society, *Throwing Away the Keys: The Human and Social Costs of Mandatory Minimum Sentences* (Vancouver, 2013).
[40] *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 485. See also Roberts 2012.
[41] *PHS, supra*, at para. 7.
[42] *R. v. Smith, supra*, at pp. 1053 and 1080.
[43] *R. v. Hansen*, 2012 BCCA 142 at para. 26; see also *PHS, supra*, at paras. 99 to 101
[44] *R. v. Ipeelee, supra*; *R. v. Adamo*, 2013 MBQB 225.
[45] *PHS, supra*, at para. 7; *R. v. Lloyd, supra*, at para. 33, AB, Vol. 1, p. 10; *Missing Women Inquiry, supra*, at pp. 13 to 15; Small et al., *supra*, at pp. 481 and 484 to 485.

D. Conclusion

28. When reasonably foreseeable applications as described above are examined in light of the s. 12 contextual factors, s. 5(3)(a)(i)(D) is unconstitutional.[46] A one year mandatory minimum sentence applied to persons with some or all combination of the characteristics described above is grossly disproportionate. What offends s. 12 is the certainty that in cases involving offenders with the described characteristics, "the law is such that it is inevitable that, in some cases, a verdict of guilt will lead to the imposition of imprisonment which will be grossly disproportionate".[47]

PART IV - COSTS

29. The Coalition seeks no costs and asks that no costs be awarded against it in this appeal.

PART V - ORDER SOUGHT

30. The Coalition seeks leave to present oral argument not exceeding 10 minutes at the hearing of the appeal, and that it shall not be entitled to costs and no costs shall be ordered against it in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of December 2015

Andrew I. Nathanson
Fasken Martineau DuMoulin LLP
Barristers & Solicitors

Maia Tsurumi
Barrister & Solicitor

Adrienne Smith
Pivot Legal Society
Barristers & Solicitors

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

Yael Wexler
Fasken Martineau DuMoulin LLP
Barristers & Solicitors
Suite 1300, 55 Metcalfe Street
Ottawa, Ontario, Canada K1P 6L5

Tel: 613 236 3882
Fax: 613 230 6423
Email: ywexler@fasken.com

Agent for the Intervener

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[46] Subsection 10(5) of the CDSA cannot save the constitutionality of s. 5(3)(*a*)(i)(D) as it is not accessible to all offenders (*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at para. 44).
[47] *R. v. Smith*, *supra*, at p. 1078.

PART VI – TABLE OF AUTHORITIES

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12	*R. v. Kokopenace*, 2013 ONCA 389, overturned, 2015 SCC 28	17
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26	W. Small, L. Maher, J. Lawlor, E. Wood, K. Shannon and T. Kerr, "Injection drug users' involvement in drug dealing in the downtown eastside of Vancouver: Social organization and systemic violence", (2013), 24 Int. J. of Drug Policy 479	24, 27
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