Court of Appeal File No. CA42866

COURT OF APPEAL

On appeal from sentence imposed by the Honourable Mr. Justice Greyell of the Supreme Court of British Columbia, at Quesnel, on the 15th day of June, 2015

BETWEEN:

REGINA

APPELLANT

AND:

CHAD DICKEY

RESPONDENT

-and-

Court of Appeal File No. CA42867

On appeal from sentence imposed by the Honourable Judge Harris, of the Provincial Court of British Columbia, at Vancouver, on the 16th day of June 2015

BETWEEN:

REGINA

APPELLANT

AND:

MARCO TRASOLINI

RESPONDENT

FACTUM OF THE INTERVENOR, PIVOT LEGAL SOCIETY

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INDEX

INDEX..... i

CHRONOLOGY.....ii

OPENING STATEMENT.....iii

PART 1 – STATEMENT OF FACTS.....1

PART 2 – ISSUES ON APPEAL.....2

PART 3 – ARGUMENT.....2

PART 4 – NATURE OF THE ORDER SOUGHT.....10

LIST OF AUTHORITIES.....11

CHRONOLOGY

Pivot Legal Society does not take a position on the chronology of relevant dates for these appeals.

OPENING STATEMENT

At issue in these appeals is whether section 5(3)(a)(ii)(A) of the *Controlled Drugs and Substances Act*, which provides for a mandatory minimum sentence of two years for persons convicted of trafficking offenses committed "in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years," meets *Charter* scrutiny. In *R. v. Dickey,* the sentencing judge held that this provision was unconstitutional because imposing the minimum sentence would constitute cruel and unusual punishment within the meaning of section 12 of the *Charter of Rights and Freedoms.* In *R. v. Trasolini,* the sentencing judge held that the provision was overbroad and accordingly inconsistent with section 7 of the *Charter.* The Crown appeals from both decisions.

Pivot Legal Society has been granted leave to intervene in these appeals on the constitutionality of the impugned provision. Following the Supreme Court of Canada's recent decision in *R. v. Nur,* it is clear that the approach to constitutional review of mandatory minimum sentences requires the consideration of not only the actual offenders before the court but also that of a "reasonably foreseeable offender". While the Court in *Nur* confined its approach to section 12 of the *Charter,* it expressly left open the possibility of recourse to section 7 to challenge mandatory minimum sentences where necessary.

Pivot advocates for the rights of persons living in the Downtown Eastside of Vancouver ("DTES") and other marginalized communities. In these appeals it takes the position that having regard to the reasonably foreseeable aboriginal, female, and drug addicted offenders, particularly those living on Vancouver DTES, the impugned provision cannot pass constitutional scrutiny.

Pivot seeks an order dismissing these appeals.

Part 1: Statement of Facts

1. Pivot Legal Society ("Pivot") applied for and was granted leave to intervene on the issue of the constitutionality of the mandatory minimum sentencing provisions contained in section 5(3)(a)(ii)(A) of the *Controlled Drugs and Substance Act,* S.C. 1996, c. 19 (*"CDSA"*).

2. That provision provides as follows:

> (3) Every person who contravenes subsection (1) or (2)
>
> (a) subject to paragraph (a.1), if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and
>
> . . .
>
> (ii) to a minimum punishment of imprisonment for a term of two years if
>
> (A) the person committed the offence in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years,

3. In *R. v. Dickey* (CA42866) (*"Dickey"*), Greyell J found that section 5(3)(a)(ii)(A) of the *CDSA* violated the protection against cruel and unusual punishment in section 12 of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*), having regard to both Mr. Dickey's circumstances and to those circumstances of a reasonably foreseeable offender who was addicted to drugs and engaged in trafficking to support his or her addiction in a number of locations, including a disused school, along the Skytrain line, and in the parking lots of McDonald's restaurants, and Wal-Mart stores. He held that this infringement was not saved by section 1.

> Reasons for Judgment in *R. v. Dickey* (*Dickey* Appeal Book ("DAB") at 78 – 133)

4. In *R. v Trasolini* (CA42867) ("*Trasolini*"), Harris PCJ found that the impugned provision violated section 7 of the *Charter* for being unconstitutionally overbroad, because it applied virtually everywhere. Harris PCJ found that the infringement was not saved by section 1.

Ruling on Charter Application in *R. v. Trasolini* (*Trasolini* Appeal Book ("TAB") at 81 – 103).

5. The Crown appeals the findings of unconstitutionality and the sentences imposed in these cases.

6. Pivot advocates for the legal rights of people living in Vancouver's Downtown Eastside ("DTES") neighbourhood and other highly marginalized communities. The social context of the DTES has been described by the Supreme Court of Canada as "home to some of the poorest and most vulnerable people in Canada" (*PHS* at para. 4). The Court noted in respect of the circumstances in particular of intravenous drug users in the DTES "familiar themes emerge" including histories of physical and sexual abuse as children, family histories of drug abuse, early exposure to serious drug use and mental illness (*PHS* at para. 8). Pivot's interest in these appeals arises from how mandatory minimum sentences imposed for a variety of *Criminal Code* and drug offences impact society's most marginalized.

See, e.g., Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44 at para 4-8.

7. Pivot takes no position with respect to the fitness of the sentences imposed on the respondents but submits that Mr. Justice Greyell and Provincial Court Judge Harris were correct in finding respectively that the impugned provision violates section 12 and section 7 of the *Charter*.

Part 2: Issues on Appeal

8. Pivot intervenes on the following issues on appeal:

(i) Whether section 5(3)(a)(ii)(A) of the *CDSA* is contrary to section 12 of the *Charter;*

(ii) Whether section 5(3)(a)(ii)(A) of the *CDSA* is contrary to section 7 of the *Charter*

Part 3: Argument

9. It is a fundamental principle of Canadian criminal law that sentences should be proportionate to the degree of moral culpability of the offender.

Judges are expert "front-line workers in the criminal justice system" who craft sentences which are proportional the gravity of the offence and the degree of responsibility of the offender, after considering aggravating and mitigating factors, including, where relevant, the circumstances of aboriginal offenders. Proportionality is also a principle of fundamental justice. Sentencing schemes which impose mandatory minimum sentences like the one at issue in these appeals frustrate this principle by imposing a uniform floor below which no sentence can be imposed, even if a shorter sentence would otherwise be proportionate. This leads to unfair sentences.

> *Criminal Code of Canada,* R.S.C., 1985, c. C-46, ss. 718.1-718.2; *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 233, at para. 67; *R. v. Proulx,* [2001] 1 S.C.R. 61 at para. 82; *R. v. Malmo-Levine,* [2003] 3 S.C.R. 571 at para. 163; *R. v. Nasogaluak,* 2010 SCC, at para. 40-42; *R. v. Pham,* [2013] 1 S.C.R. 739 at para. 7.

10. In Pivot's experience, the unfairness is particularly grave for three groups of people: indigenous offenders, female offenders, and offenders who become involved in drug crime as a result of their addictions. Members of these groups might otherwise have normally received sentences shorter than the two-year mandatory minimum jail term prescribed by the impugned provision.

11. While longer sentences for these offenders will often be unfair or unfit, in Pivot's submission they are also unconstitutional in two ways. On the harsher end of the sentencing range, when longer sentences are so grossly disproportionate to the degree of moral blameworthiness of the offender that they "shock the conscience of the public", they run afoul of section 12 of the *Charter.* More generally, when sentences are unnecessarily long, even if not shockingly so, they may violate section 7 of the *Charter* where the provision imposing the mandatory minimum sentence is arbitrary, overbroad or unconstitutionally vague. Here, the impugned provision leads to mandatory sentences for vulnerable offenders which in these circumstances may violate both sections of the *Charter.*

A. The impugned provision violates section 12

12. In *Nur,* the Supreme Court of Canada recently reaffirmed the test for cruel and unusual punishment, which requires a two-stage analysis for: (1) the offender before the court, and, (2) a reasonably foreseeable offender (formerly the "reasonable hypothetical" offender). The Court confirmed that it is appropriate to consider personal characteristics of the reasonably foreseeable offender.

R. v. Nur, 2015 SCC 15 ("*Nur*") at paras. 56, 76.

13. A cruel and unusual sentence is one that is "so unfit having regard to the offence and the offender as to be grossly disproportionate". A grossly disproportionate sentence is one that is "so excessive as to outrage standards of decency" to the extent Canadians "would find the punishment abhorrent or intolerable". Reasonably foreseeable examples must not be "marginally imaginable", or far-fetched, and must reasonably be expected to arise.

R. v. Smith, [1987] 1 S.C.R. 1045 ("*Smith*") at 1072 , *R. v. Goltz* [1991] 3 S.C.R. 485, at 515 – 516; *R. v. Morrisey*, 2000 SCC 39 ("*Morrissey*") at para. 30, *R. v. Ferguson,* 2008 SCC 6 at para. 14; *Nur* at 56.

14. Pivot proposes three types of reasonably foreseeable offenders for whom sentences imposed under the impugned provision would result in punishment which are grossly disproportionate to the level of moral culpability of the offenders. The examples all represent what the Court in *Smith* called the "small offender" as opposed to a cartel kingpin trafficking for pure profit. None of these examples are far-fetched or marginally imaginable, and in the context of the DTES[1], many of them are rooted in reported case law. Consideration of these reasonably foreseeable offenders demonstrates the constitutional infirmity of section 5(3)(a)(ii)(A) of the CDSA under section 12 of the *Charter.*

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[1] *See, e.g.,* description in *Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44 ("*PHS*") at para. 4-12, esp. 7.

(i) Reasonably foreseeable aboriginal offenders

15. The over-incarceration of aboriginal offenders is well known. The effect of compulsory incarceration also has a particularly detrimental impact on members of First Nations communities who are often transported long distances away from their home communities to serve their sentence. Section 718.2(e) of the *Criminal Code* was enacted in order to address this problem. The Supreme Court of Canada stated in *Gladue* and confirmed in *Ipeelee* that consideration of these factors is not optional. Despite the Supreme Court of Canada's emphasis that sentences must respect the fundamental principle of proportionality, the imposition of mandatory terms of incarceration leads to sentences that are grossly disproportionate for aboriginal offenders.

> *R. v. Gladue* [1999] 1 SCR 688 at pp. 67, 50-65; *R. v. Ipeelee* 2012 SCC 13 ("*Ipeelee*").

16. Pivot's reasonably foreseeable aboriginal offender is an indigenous person currently resident in the DTES. The offender has a favourable *Gladue* report which documents a profound connection with their home Nation, long experience with the residential school system and foster care, and well documented intergenerational trauma including sexual abuse, and Fetal Alcohol Syndrome or other condition potentially affecting cognitive function or mental health. The person is arrested attempting to sell a very small amount of cocaine in Pigeon Park in the DTES, in order to buy food. As an aboriginal offender the court is required to consider the mitigating aspects of this person's Gladue report, along with their personal circumstances, and is required by section 718.2(e) of the *Criminal* Code to consider all sanctions short of incarceration. However the impugned provisions calls for the imposition of a two-year mandatory minimum sentence of incarceration.

17. In *R. v. Wilson*, a decision of the Vancouver Provincial Court in the DTES, an aboriginal offender similar to our hypothetical, who was convicted after trial of trafficking 2.4 grams of heroin and 4.1 grams of crack cocaine was sentenced to a 6 month Conditional Sentence Order ("CSO") at the Gastown Hotel where he lived with his wife. Mr. Wilson was trafficking to support his addiction and had

begun methadone maintenance treatment at the time of his sentencing. While this sentence is at the low end of the range in place before the mandatory minimum, a non-custodial sentence was fit for Mr. Wilson, and Pivot submits, so it would be for our reasonably foreseeable aboriginal offender.[2] It is clear that the difference between a 6 month CSO (then available under Canadian law) and a two-year prison term is grossly disproportionate to the level of moral culpability of this foreseeable offender, and so runs afoul of the *Charter* protection set out in section 12.

R. v. Wilson 2011 BCPC 499

(ii) Reasonably foreseeable female offenders

18. In Canadian society, women tend to have primary responsibility for the care of children. In marginalized communities, 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 with its attendant harms, when community-based sentenced orders might previously have been available to these offenders.[3]

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[2] The Reasons for Sentence in Mr. Wilson's case disclose difficult personal circumstances, First Nations heritage, "a number of systemic factors which result in not only Mr. Wilson but a large number of other First Nations persons finding themselves coming from rural areas of the province, of the country, and ending up in conditions of poverty in the Downtown Eastside of Vancouver where drug use and drug addiction is rampant" (*R. v. Wilson*, 2011 BCPC 499, at para. 14). They do not disclose the presence of fetal alcohol syndrome or other condition resulting in cognitive impairment or mental health issues. A documented condition impacting cognitive ability or mental health may be another reason courts are reluctant to impose mandatory minimum sentences: see, e.g. *R. v. Adamo*, 2013 MBQB 225 (declining to impose mandatory minimum where accused had suffered a serious head injury)

[3] *See, e.g.,* DAB at p. 112, para. 95 ("in a number of the cases referred to, the offender was sentenced to a CSO. . .the court no longer has this sentencing option under the new amendments").

19. When these women are aboriginal, the break-up of families in these circumstances becomes part of a pattern of family disruption. Such apprehensions may also run afoul of the Supreme Court of British Columbia's finding that the removal of children from the care of their birth parents as a result of incarceration can violate the *Charter* rights of both the mother and the child.

Inglis v. British Columbia 2013 BCSC 2309 ("*Inglis*") at para 485, 501.

20. In the DTES, women who face drug charges often engage in "street-level survival sex work in order to support their addictions". 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. For when who are also aboriginal, it is uncontroversial that they are significantly overrepresented in the prison population.

PHS at para. 7; *Inglis* at para. 5.

21. Pivot's reasonably foreseeable female offender is a street-level, outside sex worker living in poverty, who recently delivered a baby. The child will undoubtedly be removed from her upon the imposition of a long custodial sentence. Until the mandatory minimum sentence was enacted, such offenders would generally be given sentences of punishment which allowed them to remain in the community or shorter custodial sentences which might not require long-term removal of the child. For example, in *R. v. Burke*, a female aboriginal drug user pled guilty to possession for the purpose of trafficking. The court found that her rehabilitation would be supported were she to be able to care for her daughter, and so sentenced her to a term of imprisonment in the community, with time away from home to allow her to walk her daughter to the school bus.

R. v. Burke, 2004 BCSC 1130.

(iii) Reasonably foreseeable addicted offenders

22. Many offenders come before the court as a result of their addictions, like both respondents in these appeals, and many that Pivot encounters in its work. 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".[4] Some are paid for their work as low level dealers in the drugs to which they are addicted. Addiction is an illness in law, which has the effect of reducing an offender's voluntariness, and as a result, their moral culpability.

23. Normally the distinction between the moral culpability of low level addicted traffickers and cartel kingpins would be made by the trial judge in crafting a fit sentence. However the mandatory minimum sentence precludes consideration of addiction as a mitigating factor at the bottom of the sentencing range.[5]

24. In Pivot's experience, it is foreseeable that an offender in the DTES could have all of these characteristics, that is a female aboriginal offender with an addiction issue. It is also likely that the reasonably foreseeable offender could commit the offense of trafficking in an area which young people could normally frequent for example, at Pigeon Park, Andy Livingstone Park, or near Strathcona School or Community Centre, thereby attracting the two year mandatory minimum sentence set out in the impugned provision.

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[4] *PHS* at para. 7

[5] The sentencing judge in *Dickey* considered the unavailability of drug treatment court provided for in ss. 10(4) and 10(5) of the *CDSA* in his analysis of the constitutionality of the impugned provision, finding that in Mr. Dickey's case the "apparent inapplicability" of the dug court provisions made the mandatory minimum sentence "particularly unfair" in Mr. Dickey's case (DAB at 118, para. 116). While the drug court provisions might appear to act as a "safety valve" that would assist in overcoming the constitutional infirmity of the impugned provision, in fact the sentencing judge's finding that it cannot do so where its availability is determined on the arbitrary basis of geography is correct and consistent with the well-established principle that in order to provide a "safety valve" sufficient to save a law from a finding of unconstitutionality that "safety valve" must be real and accessible: *Chaoulli v. Quebec (AG)*, 2005 SCC 35 at paras. 44, 119 *R. v. Morgentaler*, [1988] 1 SCR 30 at 105-106; *PHS* at para. 117; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 147.

25. Reported cases demonstrate the types of sentences female aboriginal addicted offenders convicted of possession of cocaine for the purpose of trafficking could have received before the mandatory minimum sentence was enacted: an addicted aboriginal mother of 4 and grandmother had a CSO converted to a 4 month custodial sentence (*Awasis);* a young woman with addiction issues was given a 9 month custodial sentence (*Clough*); an aboriginal first time female offender was given a 90 day intermittent sentence (*Arcand);* a young woman was given a 1-year conditional sentence (*Van Dam)*; a very young woman was given a CSO (*Von Hagen*). None of the accuseds mirrors our reasonably foreseeable offender in every respect, but a range which is substantially lower than the two-year mandatory minimum sentence is clearly identifiable.

> *R. v. Awasis*, 2009 BCCA 134, *R. v. Clough*, 2001 BCCA 613; *R. v. Arcand*, 2014 SKPC 12; *R. v. Van Dam,* 2013 BCSC 1121, *R. v. Von Hagen,* 2008 SKCA 123.

26. For offenders who are either aboriginal, female, or who had addiction issues, and for offenders having some or all of these characteristics, the two year mandatory minimum sentence set out in section of the CDSA results in punishments that are grossly disproportionate and so violate section 12 of the Charter.

B. The impugned provision violates section 7

27. The majority of constitutional challenges against mandatory minimum sentences have succeeded on the basis of section 12. As a result, trial judges have often declined to consider section 7 arguments when advanced by those facing such sentences. However, as the sentencing judge in *Trasolini* found, section 7 is valid way to strike down sentencing laws which are unfair, but that do not meet the high threshold of "cruel and unusual" in the section 12 test.

28. In *Nur*, the Supreme Court of Canada suggested that section 7 may be available to challenge mandatory minimum sentences in certain circumstances:

> I do not rule out the possibility that despite the detailed sentencing jurisprudence that has developed under s 12 of the *Charter* situations may arise requiring recourse to s. 7 of the *Charter* (para. 110).

29. In *Trasolini,* the sentencing judge found that the impugned provision was overbroad and not sufficiently tailored to meet its objective to meet constitutional standards.[6] In Pivot's submission, this finding should be upheld.

30. The well-known principles that no one should be convicted of an offence under an unconstitutional law, and that unconstitutional laws should be struck to the extent of their inconsistence with the *Charter* demand a broad reading of section 7. If section 7 were not available to challenge sentences, unfair sentences which adversely and disproportionately affect members of marginalized communities would be '*Charter* proof'. Such a reading of the *Charter* would establish islands of rights with gaps in between. This is not the correct large and liberal manner with which to interpret the supreme law of Canada. Such an interpretation would run afoul of the principle of interpretation that legislation, particularly the *Charter*, be read harmoniously and that each word of the stature must have meaning.

> *R. v. Big M Drug Mart Ltd.*, [1985] SCR 295 at 47; *R. v. Ferguson*, 2008 SCC 6 at 56; *The Constitution Act, 1982,* s. 52(1).

Part 4: Order Sought

31. Pivot seeks an order dismissing these appeals on the basis that section 5(3)(a)(ii)(A) of the *Controlled Drugs and Substance Act* violates section 12 and section 7 of the *Canadian Charter of Rights and Freedoms.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13th day of Nov. 2015.

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[6] In another case, a court found a mandatory minimum sentence contrary to section 7 for failing to accord with the principle of proportionality in sentencing taking into account the moral blameworthiness of an offender: *R. v. Adamo,* 2013 MBQB 225 at para. 115.

LIST OF AUTHORITIES

Case	Paragraph
Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44	6, 14, 20, 22
Carter v. Canada (Attorney General), 2015 SCC 5	23
Chaoulli v. Quebec (AG), 2005 SCC 35	23
Inglis v. British Columbia, 2013 BCSC 2309	19, 20
R. v. Adamo, 2013 MBQB 225	17, 29
R. v. Arcand, 2014 SKPC 12	25
R. v. Awasis, 2009 BCCA 134	25
R. v. Big M Drug Mart Ltd., [1985] SCR 295	30
R. v. Burke, 2004 BCSC 1130	21
R. v. Clough, 2001 BCCA 613	25
R. v. Ferguson, 2008 SCC 6	13, 30
R. v. Gladue [1999] 1 SCR 688	15
R. v. Goltz [1991] 3 S.C.R. 485	13
R v Ipeelee, 2012 SCC 13, [2012] 1 SCR 233	9, 15
R. v. Morgentaler, [1981] 1 SCR 30	23
R. v. Morrisey, 2000 SCC 39	13
R. v. Nasogaluak, 2010 SCC 6	9
R. v. Nur, 2015 SCC 15	12, 13, 28
R. v. Pham, [2013] 1 S.C.R. 739	9
R. v. Proulx, [2001] 1 S.C.R. 61	9
R. v. Smith, [1987] 1 S.C.R. 1045	13
R. v. Van Dam, 2013 BCSC 1121	25
R. v. Von Hagen , 2008 SKCA 123	25
R. v. Wilson, 2011 BCPC 499	17
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Canadian Charter of Rights and Freedoms, Constitution Act 1982	3, 7, 31
Controlled Drugs and Substance Act, S.C. 1996, c. 19	1, 2, 14, 31
Criminal Code of Canada, R.S.C., 1985, c. C-46	9, 16
The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	30