

35982

**Joseph Ryan Lloyd v. Her Majesty the Queen**  
**(British Columbia) (Criminal) (By Leave)**



**\*\* Preliminary Version \*\***

*Case Name:*  
**R. v. Lloyd**

**Joseph Ryan Lloyd, Appellant;**  
**v.**  
**Her Majesty the Queen, Respondent, and**  
**Canadian Bar Association, African Canadian Legal Clinic, Pivot**  
**Legal Society, Union of British Columbia Indian Chiefs, HIV &**  
**AIDS Legal Clinic Ontario, Canadian HIV/AIDS Legal Network,**  
**British Columbia Centre for Excellence in HIV/AIDS, Prisoners**  
**with HIV/AIDS Support Action Network, 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, Intervenors.**

[2016] S.C.J. No. 13

[2016] A.C.S. no 13

2016 SCC 13

2016EXP-1224

J.E. 2016-666

EYB 2016-264530

File No.: 35982.

Supreme Court of Canada

Heard: January 13, 2016;

Judgment: April 15, 2016.

**Present: McLachlin C.J. and Abella, Cromwell, Moldaver,  
Karakatsanis, Wagner, Gascon, Côté and Brown JJ.**

(110 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against cruel and unusual treatment or punishment -- Appeal by Lloyd from judgment setting aside Provincial Court decision declaring that s. 5(3)(a)(i)(D) of Controlled Drugs and Substances Act was unconstitutional and increasing Lloyd's sentence to 18 months allowed -- While one-year minimum jail term was not grossly disproportionate as applied to Lloyd, it could be in relation to reasonably foreseeable applications to others -- Insofar as provision required one-year sentence, it violated s. 12 guarantee against cruel and unusual punishment and was not justified under s. 1 -- Exception requiring offender to complete drug treatment program was too narrow to cure constitutional infirmity -- Controlled Drugs and Substances Act, s. 5(3)(a)(i)(D) -- Canadian Charter of Rights and Freedoms, s. 12 -- Constitution Act, 1982, s. 52(1).*

*Criminal law -- Jurisdiction -- Courts -- Provincial and territorial courts -- Trial courts -- Appeal by Lloyd from judgment setting aside Provincial Court decision declaring that s. 5(3)(a)(i)(D) of Controlled Drugs and Substances Act was unconstitutional and increasing Lloyd's sentence to 18 months allowed -- Provincial court judge had power to consider constitutional validity of mandatory minimum sentence provision at issue and did not err in finding it unconstitutional -- Controlled Drugs and Substances Act, s. 5(3)(a)(i)(D) -- Canadian Charter of Rights and Freedoms, s. 12 -- Constitution Act, 1982, s. 52(1).*

*Criminal law -- Sentencing -- Non-Criminal Code and regulatory offences -- Controlled drugs and substances -- Possession for the purpose of trafficking -- Other substances -- Particular sanctions -- Imprisonment -- Sentencing considerations -- Previous record -- Related -- Maximum or minimum sentence available -- Appeal by Lloyd from judgment setting aside Provincial Court decision declaring that s. 5(3)(a)(i)(D) of Controlled Drugs and Substances Act was unconstitutional and increasing Lloyd's sentence to 18 months allowed -- While one-year minimum jail term was not grossly disproportionate as applied to Lloyd, it could be in relation to reasonably foreseeable applications to others -- Insofar as provision required one-year sentence, it violated s. 12 guarantee against cruel and unusual punishment and was not justified under s. 1 -- Court of Appeal did not establish that 12-month sentence was demonstrably unfit -- Trial judge's determination of appropriate sentence was entitled to deference -- Controlled Drugs and Substances Act, s. 5(3)(a)(i)(D) -- Canadian Charter of Rights and Freedoms, s. 12 -- Constitution Act, 1982, s. 52(1).*

Appeal by Lloyd from a judgment of the British Columbia Court of Appeal setting aside a Provincial Court judgment declaring that s. 5(3)(a)(i)(D) of the Controlled Drugs and Substances Act (CDSA) was unconstitutional and increasing Lloyd's sentence to 18 months. Lloyd was convicted of possession of a Schedule I substance for the purpose of trafficking. Because he had been convicted of a similar offence shortly before, he was subject to a mandatory minimum sentence pursuant to s. 5(3)(a)(i)(D) of the CDSA. This provision provided a minimum sentence of one year of imprisonment for trafficking or possession for the purpose of trafficking, where the offender had been convicted of any drug offence (except possession) within the previous 10 years. At trial, Lloyd asked for a declaration under s. 24(1) of the Canadian Charter of Rights and Freedoms (Charter) that the mandatory minimum provision was unconstitutional and of no force or effect because it violated ss. 7, 9 and 12 of the Charter. The trial judge acknowledged that lower sentences had occasionally been imposed on repeat offender, addicted traffickers. In this case, however, he found that the appropriate sentencing range for Lloyd's offences was 12 to 18 months, and that the appropriate sentence for him was 12 months. He noted that, in spite of this conclusion, Lloyd had standing to challenge the constitutional validity of the mandatory minimum because of its potential inflationary effect on the appropriate sentencing range. The trial judge found that the mandatory minimum violated s. 12 of the Charter and that the violation was not justified under s. 1 of the Charter. The Court of Appeal held that judges of the Provincial Court did not have the power to make formal declarations of constitutional invalidity. It also held that while Lloyd had standing to challenge the mandatory minimum provision under which he was sentenced, the court was not obligated to consider the issue unless it would have had an impact on the sentence, which was not the case here. The Court of Appeal also allowed the Crown's appeal and increased Lloyd's sentence to 18 months concurrent for the three offences. The issues raised on appeal related to (1) the power of the provincial court judge to decide the constitutionality of the mandatory minimum sentence; (2) the constitutionality of the mandatory minimum sentence law; and (3) whether the Court of Appeal erred in increasing Lloyd's sentence from 12 months to 18 months.

**HELD:** Appeal allowed. The provincial court judge in this case had the power to consider the constitutional validity of the mandatory minimum sentence provision at issue. He did not err in finding it unconstitutional. Just as no one could be convicted of an offence under an invalid statute, so too could no one be sentenced under an invalid statute. The provincial court judge had the power to consider the constitutional validity of the challenged sentencing provision in the course of making his decision on the case before him. The finding by the provincial court judge that the provision was

unconstitutional did not render the law of no force or effect under s. 52(1) of the Constitution Act, 1982, however. The law remained in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction. While Lloyd conceded that the one-year minimum jail term was not a sentence that was grossly disproportionate as applied to him, it could be in relation to reasonably foreseeable applications of the law to others. A foreseeable situation caught by the law would be that of an offender trafficking in order to support an addiction that had been conquered following conviction. Even if this offender were to ask the sentencing court for a short sentence that would allow him to resume a productive life, under the law the judge would have no choice but to sentence him to a year in prison. Such a sentence would be grossly disproportionate to what was fit in the circumstances and would shock the conscience of Canadians. Section 10(5) of the CDSA did provide an exception to the minimum one-year sentence if the offender had, prior to sentencing, successfully completed a drug treatment court program or another program approved under s. 720(2) of the Criminal Code. However, it was too narrow to cure the constitutional infirmity. Insofar as s. 5(3)(a)(i)(D) of the CDSA required a one-year sentence of imprisonment, it violated the guarantee against cruel and unusual punishment in s. 12 of the Charter and was not justified under s. 1. It was therefore of no force or effect under s. 52(1) of the Constitution Act, 1982. On the issue of the sentence, a trial judge's determination of the appropriate sentence was entitled to deference. The Court of Appeal did not establish that a 12-month sentence in this case was demonstrably unfit. The sentence of one year imposed by the trial judge on Lloyd was reinstated.

#### **Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 7, s. 9, s. 12, s. 24(1)

Criminal Code, R.S.C. 1985, c. C-46, s. 231(5)e), s. 718.1, s. 718.2 e), s. 720(2)

Criminal Code, R.S.C. 1970, c. C-34, s. 214(5)e)

Constitution Act, 1982, s. 52(1)

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 2(1), s. 2(1), ss. 4-10, s. 5(3)a), s. 5(3)a)(i)(D), s. 5(3)a.1), s. 10(4), s. 10(5)

Safe Streets and Communities Act, S.C. 2012, c. 1, s. 39(1)

Penal Code [Brottsbalken] (Swed.), c. 29, s. 5

Criminal Law Amendment Act, 1997 (Afr. S.), No. 105 of 1997, s. 51(3)a)

Criminal Law (Sentencing) Act 1988 (S.A.), s. 17

Firearms Act 1968 (U.K.), 1968, c. 27, s. 51A(2)

Powers of Criminal Courts (Sentencing) Act 2000 (U.K.) 2000, c. 6, s. 109(3), s. 110(2), s. 111(2)

Sentencing Act (N.T.), s. 78DI

Sentencing Act 1991 (Vic.), s. 10(1)

Sentencing Act 2002 (N.Z.), s. 86E, s. 102, s. 103

Violent Crime Reduction Act 2006 (R. U.), 2006, c. 38, s. 29(4)

#### **Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

**Court Catchwords:**

*Constitutional law -- Charter of Rights -- Cruel and unusual treatment or punishment -- Sentencing -- Mandatory minimum sentence -- Controlled substances offence -- Accused convicted of possessing controlled substances for purpose of trafficking and sentenced to one year of imprisonment -- Whether one-year mandatory minimum imprisonment term pursuant to s. 5(3)(a)(i)(D) of Controlled Drugs and Substances Act results in cruel and unusual punishment and therefore infringes s. 12 of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Whether Court of Appeal erred in increasing sentence to 18 months -- Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(3)(a)(i)(D).*

*Constitutional law -- Charter of Rights -- Fundamental justice -- Sentencing -- Whether proportionality in sentencing process a principle of fundamental justice under s. 7 of Canadian Charter of Rights and Freedoms -- If so, whether one-year mandatory minimum sentence pursuant to s. 5(3)(a)(i)(D) of Controlled Drugs and Substances Act infringes s. 7 of Charter.*

*Constitutional law -- Charter of Rights -- Courts -- Jurisdiction -- Provincial court judge deciding mandatory minimum sentencing provision unconstitutional -- Whether provincial court has power to determine constitutionality.*

**Court Summary:**

L was convicted of possession of drugs for the purpose of trafficking. Because he had a recent prior conviction for a similar offence, he was subject to a mandatory minimum sentence of one year of imprisonment, pursuant to s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* ("CDSA"). Section 5(3)(a)(i)(D) provides a minimum sentence of one year of imprisonment for trafficking or possession for the purpose of trafficking in a Schedule I or II drug, where the offender has been convicted of any drug offence (except possession) within the previous 10 years. The provincial court judge declared the provision contrary to s. 12 of the *Charter* and not justified under s. 1. The Court of Appeal allowed the Crown's appeal, set aside the declaration of unconstitutionality and increased the sentence to 18 months.

*Held (Wagner, Gascon and Brown JJ. dissenting in part):* The appeal should be allowed.

*Per McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis and Côté JJ.:* The provincial court judge in this case had the power to decide the constitutionality of s. 5(3)(a)(i)(D) of the *CDSA*. While provincial court judges do not have the power to make formal declarations that a law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*, they do have the power to determine the constitutionality of mandatory minimum provisions when the issue arises in a case they are hearing. L challenged the mandatory minimum sentence of one year of imprisonment that applied to him. He was entitled to do so. The provincial court judge, in turn, was entitled to consider the constitutionality of that provision. He ultimately concluded that the mandatory minimum sentence was not grossly disproportionate as to L. The fact that the judge used the word "declare" does not convert his conclusion to a formal declaration that the provision is of no force or effect.

While L conceded that a one-year sentence of imprisonment would not be grossly disproportionate as applied to him, it could in other reasonably foreseeable cases. That was the problem in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773. Again, in the present case, the mandatory minimum sentence

provision covers a wide range of potential conduct. As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. This renders it constitutionally vulnerable.

At one end of the range of conduct caught by the mandatory minimum sentence provision stands a professional drug dealer who engages in the business of dangerous drugs for profit, who is in possession of a large amount of drugs, and who has been convicted many times for similar offences. At the other end of the range stands the addict who is charged for sharing a small amount of drugs with a friend or spouse, and finds herself sentenced to a year in prison because of a single conviction for sharing marijuana in a social occasion nine years before. Most Canadians would be shocked to find that such a person could be sent to prison for one year.

Another foreseeable situation caught by the law is where a drug addict with a prior conviction for trafficking is convicted of a second offence. In both cases, he was only trafficking in order to support his own addiction. Between conviction and the sentencing he attends rehabilitation and conquers his addiction. He comes to court asking for a short sentence that will allow him to resume a healthy and productive life. Under the law, the judge has no choice but to sentence him to a year in prison. Such a sentence would also be grossly disproportionate to what is fit in the circumstances and would shock the conscience of Canadians.

Section 10(5) of the *CDSA* provides an exception to the minimum one-year sentence if the offender has, prior to sentencing, successfully completed a drug treatment court program or another program approved under s. 720(2) of the *Criminal Code*. This exception is however too narrow to cure the constitutional infirmity. First, it is confined to particular programs, which a particular offender may or may not be able to access. Second, to be admissible to these programs, the offender must usually plead guilty and forfeit his right to a trial. One constitutional deprivation cannot cure another. Third, the requirement that the offender successfully complete the program may not be realistic for heavily addicted offenders whose conduct does not merit a year in jail. Finally, in most programs, the Crown has the discretion to disqualify an applicant.

The reality is this: mandatory minimum sentence provisions that apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are constitutionally vulnerable. This is because such provisions will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to maintain mandatory minimum sentences for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit that mandatory minimum sentences. In the alternative, Parliament could provide for judicial discretion to allow for a lesser sentence where the mandatory minimum would be grossly disproportionate and would constitute cruel and unusual punishment.

Insofar as s. 5(3)(a)(i)(D) of the *CDSA* requires a one-year mandatory minimum sentence of imprisonment, it violates the guarantee against cruel and unusual punishment in s. 12 of the *Charter*. This violation is not justified under s. 1. Parliament's objective of combatting the distribution of illicit drugs is important. This objective is rationally connected to the imposition of a one-year mandatory minimum sentence under s. 5(3)(a)(i)(D) of the *CDSA*. However, the provision does not minimally impair the s. 12 right.

Because the mandatory minimum sentence provision at issue violates s. 12 of the *Charter*, the question of whether it also violates s. 7 need not be addressed. In any event, the provision would not vio-

late s. 7 of the *Charter* because proportionality in sentencing is not a principle of fundamental justice.

Finally, the provincial court judge's determination of the appropriate sentence is entitled to deference. The Court of Appeal in this case took the view that the provincial court judge applied the wrong sentencing range. A careful reading of the reasons of the provincial court judge does not bear this out. The provincial court judge noted that sentences of three to four months had been upheld in a few exceptional cases, but went on to identify the appropriate sentencing range as 12 to 18 months. Applying a number of mitigating factors, he sentenced L to 12 months. In any event, even if the provincial court judge had erred in stating the range, the Court of Appeal would not have been entitled to intervene. It did not establish that a 12-month sentence in this case was demonstrably unfit.

*Per Wagner, Gascon and Brown JJ. (dissenting in part):* The one-year mandatory minimum sentence in s. 5(3)(a)(i)(D) of the *CDSA* does not infringe s. 12 of the *Charter*. Given the extremely high threshold that must be met before a s. 12 infringement will be found, the Court has struck down mandatory minimums under s. 12 only in very rare cases. It has done so only twice since the *Charter's* enactment, in *R. v. Smith*, [1987] 1 S.C.R. 1045, and more recently in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773. This is simply not one of those rare cases. The majority's reasons would represent a departure from the Court's jurisprudence, which has consistently maintained that mandatory minimums are not *per se* unconstitutional.

Unlike in either *Smith* or *Nur*, the mandatory minimum here is limited. It applies only to trafficking offences (not when the drugs are for personal use). It applies only to specific narcotics (Schedule I and II drugs) in specific quantities (of certain Schedule II drugs). And it applies only to certain repeat offenders. Thus, the minimum here does not cover a wide range of conduct. It is, rather, carefully tailored to catch only harmful and blameworthy conduct. The gross disproportionality test that has developed under s. 12 of the *Charter* is a difficult standard to meet. And it is not met in either of the sharing or rehabilitation scenarios described by the majority.

The sharing scenario described could fall outside the offence of trafficking and instead constitute mere joint possession. If the conduct would not result in a conviction for the offence at issue, then the hypothetical is not reasonable and should not be considered. The analysis must focus on the effect of the sentence once a conviction has properly been secured, rather than the effect of the sentence where the innocence of the accused remains debatable.

Assuming that sharing could ground a conviction for trafficking, however, this hypothetical scenario remains unfit for consideration under s. 12. In this hypothetical, the offender is convicted of trafficking for sharing drugs not once, but twice. Since there appear to be very few reported cases where offenders have been convicted of trafficking for sharing drugs, a scenario involving a two-time sharing trafficker with no other conviction appears far-fetched or marginally imaginable, and thus inappropriate for the s. 12 analysis. In any event, the blameworthiness of a repeat offender must be higher than that of a first-time offender.

Even if the sharing scenario were accepted as a reasonable hypothetical, the mandatory minimum would not impose grossly disproportionate punishment. While the sharing trafficker may be somewhat less morally blameworthy than the cold-blooded trafficker of hard drugs for profit, she is not so much less morally blameworthy that a one-year sentence would outrage standards of decency. Whether the offender traffics by sharing, to support her own addiction or purely for profit, she facil-

itates the distribution of dangerous substances into the community. The harm to the community -- in the form of overdose, addiction and the crime that sometimes comes with supporting addiction -- remains the same regardless of the offender's motives.

As for the rehabilitation scenario, the application of the mandatory minimum there is not a grossly disproportionate punishment, for two reasons. First, the mandatory minimum may not even apply. If the offender attends and successfully completes an approved treatment program between conviction and sentencing, s. 10(5) of the *CDSA* would apply and the sentencing judge would not be required to impose the mandatory minimum sentence at all. Second, even if the minimum does apply, the scenario is remarkably similar to the circumstances of L himself, for whom the majority agrees that the one-year sentence is not cruel and unusual.

Thus, given the seriousness of the offence of drug trafficking and the deference owed to Parliament in setting mandatory minimum policies, this well-tailored one-year mandatory minimum does not impose grossly disproportionate punishment in either scenario. The mandatory minimum is therefore constitutional.

As the majority suggests, Parliament may wish to consider providing judges some discretion to avoid applying mandatory minimums in appropriate cases. But Parliament is not obliged to create exemptions to mandatory minimums as a matter of constitutional law. Parliament may legislate to limit judges' sentencing discretion. Limiting judicial discretion is one of the key purposes of mandatory minimum sentences, and this purpose may be inconsistent with providing judges a safety valve to avoid the application of the mandatory minimum in some cases. Whether Parliament should enact judicial safety valves to mandatory minimum sentences and if so, what form they should take, are questions of policy that are within the exclusive domain of Parliament. The only limits on Parliament's discretion are provided by the Constitution and in particular, the *Charter* right not to be subjected to cruel and unusual punishment. Section 5(3)(a)(i)(D) of the *CDSA* does not exceed this limit and does not amount to cruel and unusual punishment.

There is agreement with the majority's analysis on the jurisdiction of provincial court judges and on s. 7 of the *Charter*, as well as the majority's decision to restore the 12-month sentence.

### Cases Cited

By McLachlin C.J.

**Applied:** *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; **referred to:** *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Re Shewchuk and Ricard* (1986), 28 D.L.R. (4th) 429; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Miller v. The Queen*, [1977] 2 S.C.R. 680; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Greyeyes*, [1997] 2 S.C.R. 825; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Guiller* (1985), 48 C.R. (3d) 226; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089.

By Wagner, Gascon and Brown JJ. (dissenting in part)



*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Guiller* (1985), 48 C.R. (3d) 226; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Luxton*, [1990] 2 S.C.R. 711; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Tabujara*, 2010 BCSC 1568; *R. v. Yonis*, 2011 ABPC 20; *R. v. Johnson*, 2011 ONCJ 77, 227 C.R.R. (2d) 41; *R. v. Young*, 2010 NWTSC 18; *R. v. Desmond*, 2010 BCPC 127; *R. v. Bryan*, 2010 NWTSC 41; *R. v. Otchere-Badu*, 2010 ONSC 5271; *R. v. Meunier*, 2011 QCCQ 1588; *R. v. Tracey*, 2008 CanLII 68168; *R. v. Draskoczi*, 2008 NWTTC 12; *R. v. Kotsabasakis*, 2008 NBQB 266, 334 N.B.R. (2d) 396; *R. v. Rainville*, 2010 ABCA 288, 490 A.R. 150; *R. v. Delorme*, 2010 NWTSC 42; *R. v. Scheer* (1932), 26 Alta. L.R. 489; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Miller v. The Queen*, [1977] 2 S.C.R. 680; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Gardiner* (1987), 35 C.C.C. (3d) 461; *R. v. Weiler* (1975), 23 C.C.C. (2d) 556; *R. v. O'Connor*, 1975 CarswellBC 842 (WL Can.); *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.

### **Statutes and Regulations Cited**

18 U.S.C. s. 3553(f) (2012).

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 9, 12, 24(1).

*Constitution Act, 1982*, s. 52(1).

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ss. 2(1) "designated substance offence", "traffic", Part I, 4 to 10, 5(3)(a), (a.1), 10(4), (5), schs. I, II, VII.

*Criminal Code*, R.S.C. 1970, c. C-34, s. 214(5)(e).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 231(5)(e), 718.1, 718.2(e), 720(2).

*Criminal Law Amendment Act, 1997* (S. Afr.), No. 105 of 1997, s. 51(3)(a).

*Criminal Law (Sentencing) Act 1988* (S.A.), s. 17.

*Firearms Act 1968* (U.K.), 1968, c. 27, s. 51A(2).

*Penal Code [Brottsbalken]* (Swed.), c. 29, s. 5.

*Powers of Criminal Courts (Sentencing) Act 2000* (U.K.), 2000, c. 6, ss. 109(3), 110(2), 111(2).

*Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 39(1).

*Sentencing Act* (N.T.), s. 78DI.

*Sentencing Act 1991* (Vic.), s. 10(1).

*Sentencing Act 2002* (N.Z.), ss. 86E, 102, 103.

*Violent Crime Reduction Act 2006* (U.K.), 2006, c. 38, s. 29(4).

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Ruby, Clayton C., Gerald J. Chan and Nader R. Hasan. *Sentencing*, 8th ed. Markham, Ont.: LexisNexis, 2012.

### **History and Disposition:**

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Kirkpatrick and Groberman JJ.A.), 2014 BCCA 224, 356 B.C.A.C. 275, 610 W.A.C. 275, 12 C.R. (7th) 190, 312 C.R.R. (2d) 66, [2014] B.C.J. No. 1212 (QL), 2014 CarswellBC 1688 (WL Can.), setting aside two decisions of Galati Prov. Ct. J., 2014 BCPC 11, [2014] B.C.J. No. 145 (QL), 2014 CarswellBC 423 (WL Can.), and 2014 BCPC 8, [2014] B.C.J. No. 274 (QL), 2014 CarswellBC 358 (WL Can.). Appeal allowed, Wagner, Gascon and Brown JJ. dissenting in part.

### **Counsel:**

*David N. Fai* and *Jeffrey W. Beedell*, for the appellant.

*W. Paul Riley*, *Q.C.*, and *Todd C. Gerhart*, for the respondent.

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*Khalid Janmohamed* and *Ryan Peck*, for the interveners the HIV & AIDS Legal Clinic Ontario, the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS, the Prisoners with HIV/AIDS Support Action Network and the Canadian Association of People Who Use Drugs.

*Matthew A. Nathanson*, for the intervener the British Columbia Civil Liberties Association.

*Dirk Derstine* and *Janani Shanmuganathan*, for the intervener the Criminal Lawyers' Association (Ontario).

*Kassandra Cronin* and *Kendra Milne*, for the intervener the West Coast Women's Legal Education and Action Fund.

The judgment of McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis and Côté JJ. was delivered by

## McLACHLIN C.J.:--

### I. Introduction

1 Parliament has the power to proscribe conduct as criminal and determine the punishment for it, and judges have the duty to apply the laws Parliament adopts on punishment to offenders. But individuals are also entitled to receive, and judges have a duty to impose, sentences that are constitutional having regard to the circumstances of each case that comes before them. Sometimes a judge's duty to apply a mandatory minimum sentence provision conflicts with the judge's duty to impose a sentence that does not violate the guarantees of the *Canadian Charter of Rights and Freedoms*. In this appeal, the Court is once again confronted with the problem of how the imposition of a mandatory minimum sentence can be reconciled with the imperative that no person shall be punished in a manner than infringes the *Charter*.

2 We are asked to decide the constitutionality of a one-year mandatory minimum sentence for a controlled substances offence. I conclude that this provision, while permitting constitutional sentences in a broad array of cases, will sometimes mandate sentences that violate the constitutional guarantee against cruel and unusual punishment. Insofar as the law requires a one-year sentence of imprisonment, it violates the guarantee against cruel and unusual punishment in s. 12 of the *Charter* and is not justified under s. 1.

3 As this Court's decision in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, illustrates, the reality is that mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence. One solution is for such laws to narrow their reach, so that they catch only conduct that merits the mandatory minimum sentence. Another option to preserve the constitutionality of offences that cast a wide net is to provide for residual judicial discretion to impose a fit and constitutional sentence in exceptional cases. This approach, widely adopted in other countries, provides a way of resolving the tension between Parliament's right to choose the appropriate range of sentences for an offence, and the constitutional right to be free from cruel and unusual punishment.

4 For the reasons that follow, I conclude that, although he was not required to do so, the provincial court judge in this case had the power to consider the constitutional validity of the mandatory minimum sentence provision at issue; that he did not err in finding it unconstitutional; and that the sentence of one year he imposed on the appellant should be upheld.

### II. The Challenged Law

5 Section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"), provides:

5 (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

(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

(i) to a minimum punishment of imprisonment for a term of one year if

...

(D) the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years, or

6 To be subject to the mandatory minimum sentence of one year of imprisonment, an offender must be convicted of trafficking, or of possession for the purpose of trafficking, of either any quantity of a Schedule I substance, such as cocaine, heroin or methamphetamine, or three kilograms or more of a Schedule II substance, namely cannabis: s. 5(3)(a) and (a.1), *CDSA*. The offender must also have been convicted within the previous 10 years of a "designated substance offence", which is defined at s. 2(1) of the *CDSA* as any offence under Part I of the *CDSA* other than simple possession.

### III. The Factual Background

7 The appellant, Joseph Ryan Lloyd, was a drug addict and dealer in Vancouver's Downtown Eastside. He was addicted to cocaine, methamphetamine and heroin, and sold drugs to support his addiction. He had been convicted of a number of drug-related offences.

8 On February 8, 2013, Mr. Lloyd was convicted of possession of a Schedule I substance, methamphetamine, for the purpose of trafficking, and sentenced to jail. A month after his release, he was again arrested and charged with three counts of possession for the purpose of trafficking of a Schedule I drug, namely crack cocaine, methamphetamine, and heroin. The presiding judge, Galati Prov. Ct. J., convicted him on all three counts.

9 At the sentencing hearing, Mr. Lloyd told the provincial court judge that he trafficked in drugs to support his drug addiction, but that he was taking steps to get help. He acknowledged that the drugs he trafficked in were dangerous and addictive, and that until recently he had given no thought to their effect on the people who purchased them. Because he had been convicted of a similar drug offence shortly before, he was subject to a mandatory minimum sentence of one year of imprisonment, pursuant to s. 5(3)(a)(i)(D) of the *CDSA*. Mr. Lloyd therefore asked for a declaration under s. 24(1) of the *Charter* that the mandatory minimum provision is unconstitutional and of no force or effect because it violates ss. 7, 9 and 12 of the *Charter*.

10 Galati Prov. Ct. J. acknowledged that lower sentences have occasionally been imposed on repeat offender, addicted traffickers (2014 BCPC 8). In this case, however, he found -- without considering the mandatory minimum provision -- that the appropriate sentencing range for Mr. Lloyd's offences was 12 to 18 months, and that the appropriate sentence for him was 12 months. He noted that, in spite of this conclusion, Mr. Lloyd had standing to challenge the constitutional validity of

the mandatory minimum because of its potential inflationary effect on the appropriate sentencing range. Turning to that issue, Galati Prov. Ct. J. found that the mandatory minimum violates s. 12 of the *Charter* because it would impose cruel and unusual punishment in cases where, for example, an addict possesses a small amount of a Schedule I drug to share with a spouse or a friend. A one-year sentence for such an offender, he held, would be grossly disproportionate to what is justified by the legitimate penological goals and sentencing principles of the *CDSA*, and would be considered abhorrent or intolerable by most Canadians. Galati Prov. Ct. J. rejected the claim that the mandatory minimum sentence also violates ss. 7 and 9 of the *Charter*. He found that the violation of s. 12 was not justified under s. 1 of the *Charter* (2014 BCPC 11), and sentenced Mr. Lloyd to one year of imprisonment.

**11** The British Columbia Court of Appeal (Groberman J.A., for himself and Newbury and Kirkpatrick JJ.A.) held that judges of the Provincial Court do not have the power to make formal declarations of constitutional invalidity ( 2014 BCCA 224, 356 B.C.A.C. 275). Only superior courts of inherent jurisdiction have this power. The Court of Appeal therefore set aside what it read as the provincial court judge's declaration of unconstitutionality. It further held that while Mr. Lloyd had standing to challenge the mandatory minimum provision under which he was sentenced, the court was not obligated to consider the issue unless it would have had an impact on the sentence. Because the minimum sentence provision at issue did not result in a significant change to the low end of the sentencing range, and could not have affected Mr. Lloyd, the court declined to consider the constitutional challenge to the mandatory minimum provision.

**12** The Court of Appeal also allowed the Crown's sentence appeal and increased Mr. Lloyd's sentence to 18 months concurrent for the three offences. It held that a sentence at the high end of the normal range was justified because (1) Mr. Lloyd possessed three different substances for street-level distribution; (2) the substances are dangerous, highly addictive, and socially destructive; (3) he committed the offences while on probation; (4) he was carrying a knife in a sheath, contrary to the terms of his probation; (5) he had a lengthy criminal record, with 21 prior convictions; and (6) his attempts at rehabilitation were embryonic, and he showed little insight into the harm caused to others. The Court of Appeal held that the sentencing judge wrongly took three to four months as the low end of the normal range for sentences, when in fact it was one year. It increased the sentence accordingly.

#### IV. Analysis

**13** Three issues are raised on appeal: (1) Did the provincial court judge have the power to decide the constitutionality of the mandatory minimum sentence? (2) Is the mandatory minimum sentence law at issue unconstitutional? (3) Did the Court of Appeal err in increasing Mr. Lloyd's sentence from 12 months to 18 months?

##### A. *Did the Provincial Court Judge Have the Power to Decide the Constitutionality of the Mandatory Minimum Sentence?*

**14** The provincial court judge, having found that the mandatory minimum sentence at issue would affect Mr. Lloyd's sentence only if it raised the floor of the appropriate range of sentences, proceeded to consider the law's constitutionality and "declare" it unconstitutional. The Court of Appeal set aside this declaration and declined to consider the question on the ground that the challenged law does not raise the threshold of the sentencing range and thus could not have affected Mr.

Lloyd's sentence. The Crown asks us to confirm that provincial courts cannot make declarations of constitutional invalidity and should rule on the constitutionality of a mandatory minimum sentence only if it would have an impact on the offender before them.

**15** The law on this matter is clear. Provincial court judges are not empowered to make formal declarations that a law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*; only superior court judges of inherent jurisdiction and courts with statutory authority possess this power. However, provincial court judges do have the power to determine the constitutionality of a law where it is properly before them. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 316, "it has always been open to provincial courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute." See also *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at pp. 14-17; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 592; *Re Shewchuk and Ricard* (1986), 28 D.L.R. (4th) 429 (B.C.C.A.), at pp. 439-40; K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at p. 6-25.

**16** Just as no one may be convicted of an offence under an invalid statute, so too may no one be sentenced under an invalid statute. Provincial court judges must have the power to determine the constitutional validity of mandatory minimum provisions when the issue arises in a case they are hearing. This power flows directly from their statutory power to decide the cases before them. The rule of law demands no less.

**17** In my view, the provincial court judge in this case did no more than this. Mr. Lloyd challenged the mandatory minimum that formed part of the sentencing regime that applied to him. As the Court of Appeal found, he was entitled to do so. The provincial court judge was entitled to consider the constitutionality of the mandatory minimum provision. He ultimately concluded that the mandatory minimum sentence was not grossly disproportionate as to Mr. Lloyd. The fact that he used the word "declare" does not convert his conclusion to a formal declaration that the law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*.

**18** To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trial and decision-making process.

**19** The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.

**20** I conclude that the provincial court judge in this case had the power to consider the constitutional validity of the challenged sentencing provision in the course of making his decision on the case before him.

**B. *Is the Mandatory Minimum Sentence Here Unconstitutional?***

**21** Section 5(3)(a)(i)(D) of the *CDSA* provides a minimum sentence of one year of imprisonment for trafficking or possession for the purpose of trafficking in a Schedule I or II drug, where the offender has been convicted of any drug offence (except possession) within the previous 10 years. The law provides an exception to the minimum one-year sentence if the offender has, prior to sentencing, successfully completed a drug treatment court program or another program approved under s. 720(2) of the *Criminal Code*, R.S.C. 1985, c. C-46: s. 10(5), *CDSA*. The question is whether this law violates the *Charter*.

(1) Does the Law Violate Section 12 of the *Charter*?

**22** The analytical framework to determine whether a sentence constitutes a "cruel and unusual" punishment under s. 12 of the *Charter* was recently clarified by this Court in *Nur*. A sentence will infringe s. 12 if it is "grossly disproportionate" to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *Nur*, at para. 39; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. A law will violate s. 12 if it imposes a grossly disproportionate sentence on the individual before the court, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others: *Nur*, at para. 77.

**23** A challenge to a mandatory minimum sentencing provision under s. 12 of the *Charter* involves two steps: *Nur*, at para. 46. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. The court need not fix the sentence or sentencing range at a specific point, particularly for a reasonable hypothetical case framed at a high level of generality. But the court should consider, even implicitly, the rough scale of the appropriate sentence. Second, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances: *Smith*, at p. 1073; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 498; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at paras. 26-29; *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 337-38. In the past, this Court has referred to proportionality as the relationship between the sentence to be imposed and the sentence that is fit and proportionate: see e.g. *Nur*, at para. 46; *Smith*, at pp. 1072-73. The question, put simply, is this: In view of the fit and proportionate sentence, is the mandatory minimum sentence grossly disproportionate to the offence and its circumstances? If so, the provision violates s. 12.

**24** This Court has established a high bar for finding that a sentence represents a cruel and unusual punishment. To be "grossly disproportionate" a sentence must be more than merely excessive. It must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society: *Smith*, at p. 1072, citing *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 688; *Morrissey*, at para. 26; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14. The wider the range of conduct and circumstances captured by the mandatory minimum, the more likely it is that the mandatory minimum will apply to offenders for whom the sentence would be grossly disproportionate.

**25** This brings us to the law challenged in this case. Mr. Lloyd concedes that the one-year minimum jail term is not a sentence that is grossly disproportionate as applied to him but only in relation

to reasonably foreseeable applications of the law to others. The question before us is therefore: Could a one-year sentence of imprisonment be grossly disproportionate to the offence of possession for the purpose of trafficking a Schedule I substance in reasonably foreseeable cases?

**26** On its face, a one-year sentence for an offender with a prior conviction for a drug offence who is convicted for trafficking or possession for the purpose of trafficking in a Schedule I drug, such as cocaine, heroin or methamphetamine, may not seem excessive. Schedule I drugs are highly addictive and inflict great harm on individuals and society. Trafficking in these drugs is rightly considered a serious offence: see *R. v. Greyeyes*, [1997] 2 S.C.R. 825, at para. 6, per L'Heureux-Dub   J.; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 80, per Cory J. (dissenting on another issue).

**27** The problem with the mandatory minimum sentence provision in this case is that it "casts its net over a wide range of potential conduct": *Nur*, at para. 82. As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. This renders it constitutionally vulnerable.

**28** Three features of the law make it applicable in a large number of situations, varying greatly in an offender's blameworthiness.

**29** First, it applies to any amount of Schedule I substances. As such, it applies indiscriminately to professional drug dealers who sell dangerous substances for profit and to drug addicts who possess small quantities of drugs that they intend to share with a friend, a spouse, or other addicts.

**30** Second, the definition of "traffic" in the *CDSA* captures a very broad range of conduct. It targets not only people selling drugs, but all who "administer, give, transfer, transport, send or deliver the substance" (s. 2(1)), irrespective of the reason for doing so and regardless of the intent to make a profit. As such, it would catch someone who gives a small amount of a drug to a friend, or someone who is only trafficking to support his own habit.

**31** Third, the minimum sentence applies when there is a prior conviction for any "designated substance offence" within the previous 10 years, which captures any of the offences in ss. 4 to 10 of the *CDSA*, except the offence of simple possession. In addition, the prior conviction can be for any substance, in any amount -- even, for example, a small amount of marihuana.

**32** At one end of the range of conduct caught by the mandatory minimum sentence provision stands a professional drug dealer who engages in the business of dangerous drugs for profit, who is in possession of a large amount of Schedule I substances, and who has been convicted many times for similar offences. At the other end of the range stands the addict who is charged for sharing a small amount of a Schedule I drug with a friend or spouse, and finds herself sentenced to a year in prison because of a single conviction for sharing marihuana in a social occasion nine years before. I agree with the provincial court judge that most Canadians would be shocked to find that such a person could be sent to prison for one year.

**33** Another foreseeable situation caught by the law is the following. A drug addict with a prior conviction for trafficking is convicted of a second offence. In both cases, he was only trafficking in order to support his own addiction. Between conviction and the sentencing he goes to a rehabilitation centre and conquers his addiction. He comes to the sentencing court asking for a short sentence that will allow him to resume a healthy and productive life. Under the law the judge has no choice



but to sentence him to a year in prison. Such a sentence would also be grossly disproportionate to what is fit in the circumstances and would shock the conscience of Canadians.

**34** It is argued that the exception to the mandatory minimum sentence provisions at issue in this case cures its constitutional infirmity. The law does not require the court to impose the one-year minimum jail term if, prior to the imposition of sentence, the offender successfully completes an approved drug treatment court program or a treatment program under s. 720(2) of the *Criminal Code*: s. 10(5), *CDSA*. This exception is a step in the right direction. However, it is too narrow to cure the constitutional infirmity. First, it is confined to particular programs, which a particular offender may or may not be able to access. At the time of Mr. Lloyd's sentencing, there was only one approved drug treatment program in Vancouver. Second, to be admissible to these programs, the offender must usually plead guilty and forfeit his right to a trial. One constitutional deprivation cannot cure another. Third, the requirement that the offender successfully complete the program may not be realistic for heavily addicted offenders whose conduct does not merit a year in jail. Finally, in most programs, the Crown has the discretion to disqualify an applicant. As stated in *Nur*, exemptions from minimum sentences based on Crown discretion provide only "illusory" protection against grossly disproportionate punishment: para. 94.

**35** As I have already said, in light of *Nur*, 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. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.

**36** Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries: Department of Justice Canada, Research and Statistics Division, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models* (2005) (online), at pp. 1, 4 and 35. It allows the legislature to impose severe sentences for offences deemed abhorrent, while avoiding unconstitutionally disproportionate sentences in exceptional cases. The residual judicial discretion is usually confined to exceptional cases and may require the judge to give reasons justifying departing from the mandatory minimum sentence prescribed by the law. It is for the legislature to determine the parameters of the residual judicial discretion. The laws of other countries reveal a variety of approaches: *Criminal Law Amendment Act, 1997* (S. Afr.), No. 105 of 1997, s. 51(3)(a); *Firearms Act 1968* (U.K.), 1968, c. 27, s. 51A(2); *Violent Crime Reduction Act 2006* (U.K.), 2006, c. 38, s. 29(4); *Powers of Criminal Courts (Sentencing) Act 2000* (U.K.), 2000, c. 6, ss. 109(3), 110(2) and 111(2); *Sentencing Act* (N.T.), s. 78DI; *Sentencing Act 1991* (Vic.), s. 10(1); *Sentencing Act 2002* (N.Z.), ss. 86E, 102 and 103; *Criminal Law (Sentencing) Act 1988* (S.A.), s. 17; 18 U.S.C. s. 3553(f) (2012); *Penal Code [Brottsbalken]* (Swed.), c. 29, s. 5. There is no precise formula and only one requirement -- that the residual discretion allow for a lesser sentence where application of the mandatory minimum would result in a sentence that is grossly disproportionate to what is fit and appropriate and would constitute cruel and unusual punishment.

**37** I conclude that the challenged mandatory minimum sentence of one year of imprisonment violates s. 12 of the *Charter*.

(2) Does the Law Violate Section 7 of the *Charter*?

**38** In view of my conclusion that the law violates s. 12 of the *Charter*, the question of whether it also violates the s. 7 guarantee of liberty need not be addressed. However, it may be useful to comment on the issue, since it has arisen in this and other cases.

**39** Section 7 of the *Charter* provides that no person may be deprived of liberty except in accordance with the principles of fundamental justice. Mr. Lloyd argues that the principle of proportionality in sentencing -- that the judge should impose a fit sentence having regard to all relevant factors -- is a principle of fundamental justice under s. 7. The challenged mandatory minimum sentence prevents trial judges from considering all relevant circumstances in sentencing. Therefore, Mr. Lloyd asserts, it violates s. 7.

**40** I am unable to accept the submission that the principle of proportionality in sentencing is a principle of fundamental justice under s. 7 of the *Charter*. My starting point is the observation that principles of fundamental justice in s. 7 must be defined in a way that promotes coherence within the *Charter* and conformity to the respective roles of Parliament and the courts.

**41** I turn first to coherence within the *Charter*. It is necessary to read s. 7 in a way that is consistent with s. 12. Mr. Lloyd's proposal would set a new constitutional standard for sentencing laws -- a standard that is lower than the cruel and unusual punishment standard prescribed by s. 12. As McIntyre J. (dissenting on another issue) stated in *Smith*, at p. 1107:

While section 7 sets out broad and general rights which often extend over the same ground as other rights set out in the *Charter*, it cannot be read so broadly as to render other rights nugatory. If section 7 were found to impose greater restrictions on punishment than s. 12 -- for example by prohibiting punishments which were merely excessive -- it would entirely subsume s. 12 and render it otiose. For this reason, I cannot find that s. 7 raises any rights or issues not already considered under s. 12.

**42** This Court again held that ss. 7 and 12 could not impose a different standard with respect to the proportionality of punishment in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 160, per Gonthier and Binnie JJ.:

Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.

**43** Recognition of the principle of proportionality in sentencing as a principle of fundamental justice under s. 7 would also have implications for the respective roles of Parliament and the courts.

The principle of proportionality is an admirable guide for judges seeking to impose fit sentences within the legal parameters established by Parliament. But it is not an overarching constitutional principle that allows judges to subvert the norms of punishment enacted by Parliament. Those norms are judged only by the standard of s. 12.

**44** It has been said that "proportionality in sentencing could aptly be described as a principle of fundamental justice": *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 36. **However, this does not mean that proportionality constitutes a new principle of fundamental justice distinct from the well-established principle of gross disproportionality under s. 7 of the Charter.**

**45** Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society. Courts owe Parliament deference in a s. 12 analysis. As Borins Dist. Ct. J. stated in an oft-approved passage:

It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.

(*R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont.), at p. 238)

**46** Similarly, in *Lyons*, at pp. 344-45, La Forest J. stressed the importance of the high threshold of s. 12, explaining that the word "grossly" "reflect[ed] this Court's concern not to hold Parliament to a standard so exacting ... as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender".

**47** I conclude that proportionality is not a principle of fundamental justice, and that the challenged mandatory minimum does not violate s. 7 of the *Charter*.

### (3) Is the Violation of Section 12 Saved by Section 1 of the Charter?

**48** In my view, the Crown has not made the case that the challenged law's imposition of grossly disproportionate punishment on some people is justified by an overarching objective. It is therefore not a reasonable limit on the s. 12 right.

**49** Parliament's objective -- to combat the distribution of illicit drugs -- is unquestionably an important objective: *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 141. This objective is rationally connected to the imposition of a one-year mandatory minimum sentence for the offence of possession for the purpose of trafficking of Schedule I drugs. However, the law does not minimally impair the s. 12 right. As discussed above, the law covers a wide array of situations of varying moral blameworthiness, without differentiation or exemption, save for the single exception in s. 10(5) of the *CDSA*. The Crown has not established that less harmful means to achieve Parliament's objective of combating the distribution of illicit drugs, whether by narrowing the reach of the law or by providing for

judicial discretion in exceptional cases, were not available. Nor has it shown that the impact of the limit on offenders deprived of their rights is proportionate to the good flowing from their inclusion in the law.

**50** I conclude that the violation of the s. 12 right is not justified under s. 1 of the *Charter*.

C. *Did the Court of Appeal Err in Increasing the Sentence From One Year to 18 Months?*

**51** Mr. Lloyd also appeals from the Court of Appeal's substitution of a sentence of 18 months of imprisonment for the one-year sentence imposed by the provincial court judge.

**52** A trial judge's determination of the appropriate sentence is entitled to deference. Appellate courts cannot alter a trial judge's sentence unless it is demonstrated that the trial judge made a legal error or imposed a sentence that is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 11, per Wagner J. The Court of Appeal in this case took the view that the provincial court judge applied the wrong sentencing range -- a range of three to four months at the low end to 18 months at the high end. A careful reading of the reasons of the provincial court judge does not, in my respectful view, bear this out. The trial judge noted that sentences of three to four months for the offence had been upheld in a few exceptional cases, but went on to identify the appropriate sentencing range as 12 to 18 months. Noting a number of mitigating factors, he sentenced Mr. Lloyd to 12 months. In any event, even if the provincial court judge had erred in stating the range, the Court of Appeal would not have been entitled to intervene. "[T]he choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error": *Lacasse*, at para. 51.

**53** The Court of Appeal also took issue with the provincial court judge's weighing of the factors relevant to Mr. Lloyd's sentence. It stated that the case was "not one in which there were many mitigating factors that would call for a particularly light sentence": para. 68. But, to once again quote Wagner J. in *Lacasse*, "an appellate court may not intervene simply because it would have weighed the relevant factors differently": para. 49.

**54** Finally, the Court of Appeal did not establish that a 12-month sentence in this case was demonstrably unfit.

**55** I would restore the sentence of one year imposed by the provincial court judge.

V. Conclusion

**56** The appeal is allowed. Section 5(3)(a)(i)(D) of the *CDSA* is declared to be inconsistent with s. 12 of the *Charter* and not justified under s. 1. It is therefore of no force or effect under s. 52(1) of the *Constitution Act, 1982*. The sentence of the Court of Appeal is set aside and the sentence of one year of imprisonment imposed by the provincial court judge is restored.

The following are the reasons delivered by

WAGNER, GASCON and BROWN JJ. (dissenting in part):--

I. Overview

**57** Judicial discretion is fundamental to sentencing in Canada. Between the "distant statutory poles" of minimum and maximum sentences, judges have "considerable latitude in ordering an appropriate period of incarceration which advances the goals of sentencing and properly reflects the overall culpability of the offender": *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 37. This wide discretion ensures that, in accordance with the "fundamental principle" of sentencing, judges impose sentences that are fit and proportionate to the gravity of a particular offence, and to the degree of responsibility of a particular offender: *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.1.

**58** Judicial sentencing discretion is also key to the public's confidence in the criminal justice system. Unfit sentences -- whether because they are too severe or too lenient -- "could cause the public to question the credibility of the system in light of its objectives": *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 3. As Wilson J. observed in her concurring reasons in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533:

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

**59** Mandatory minimum sentences can sometimes be inconsistent with the principle that sentences should be proportionate to the gravity of the offence and the degree of responsibility of the offender. Mandatory minimums shift the focus of sentencing away from the particular offender's circumstances, and instead prioritize denunciation, general deterrence and retribution: *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 44. As a result, "[t]hey may, in extreme cases, impose unjust sentences": para. 44.

**60** Nevertheless, while mandatory minimums are sometimes inconsistent with the proportionality principle, the Court has long held that they do not, in and of themselves, impose cruel and unusual punishment: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1077, per Lamer J.; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 501. Mandatory minimums are "a forceful expression of governmental policy in the area of criminal law": *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 45. As such, Parliament is owed substantial deference in crafting mandatory minimum sentences: *Goltz*, at p. 501; *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.). It is only on "rare and unique occasions" that a minimum sentence will infringe s. 12 of the *Canadian Charter of Rights and Freedoms*, as the test for infringing s. 12 is "very properly stringent and demanding": *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417. This longstanding framework was maintained and reaffirmed last year by the Court in *Nur*.

**61** We accept the Chief Justice's account of the facts of this case and the decisions below. We also agree with her analysis on the jurisdiction of provincial court judges and her analysis of s. 7 of the *Charter*. Finally, for the reasons given by the Chief Justice, we would allow the appellant's sentence appeal, and reduce his sentence from 18 months to 12 months, as ordered by the provincial court judge.

**62** We respectfully disagree, however, with the Chief Justice's analysis of s. 12 of the *Charter*. Applying the "stringent and demanding" s. 12 test to this appeal, we cannot conclude that the challenged one-year mandatory minimum infringes s. 12. The Court has struck down mandatory mini-

mums under s. 12 only in very rare cases. Indeed, it has done so only *twice* in the decades since the *Charter's* enactment. This is simply not one of those rare cases. The impugned provision would not result in grossly disproportionate sentences for any of the hypothetical offenders used by the Chief Justice to justify her finding that s. 12 is infringed. In our view, if the well-established s. 12 jurisprudence is applied, the challenged one-year mandatory minimum is constitutional.

## II. Analysis

### A. *The Court Has Very Rarely Invalidated Mandatory Minimum Sentences*

**63** The Court has upheld the constitutionality of mandatory minimum sentences in almost every case where it has considered the issue. It has rarely found mandatory minimum sentences to be unconstitutional, given the extremely high threshold that must be met before a s. 12 infringement will be found. This approach acknowledges Parliament's legitimate role in the sentencing process, while ensuring that no Canadian is subjected to cruel and unusual punishment.

**64** For instance, in *R. v. Luxton*, [1990] 2 S.C.R. 711, the Court upheld the mandatory minimum sentence for first degree murder of life imprisonment with no eligibility for parole for 25 years. *Luxton* involved a murder that occurred in the course of a forcible confinement. Pursuant to then s. 214(5)(e) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 231(5)(e)), this murder was deemed to be first degree murder even though it was not "planned and deliberate". The Court nevertheless found that the mandatory minimum sentence for first degree murder did not infringe s. 12 in these circumstances.

**65** In *Goltz*, the Court upheld a mandatory minimum sentence of seven days' imprisonment and a \$300 fine for the offence of driving while prohibited. An offender had to have a poor driving record resulting in a driving prohibition, and drive in knowing breach of the prohibition, in order to be convicted under this section. Justice Gonthier, writing for the majority, stated that the offence of driving while prohibited was "grave" because "[i]t may involve a risk to the lives and limbs of innocent users of the province's roads, by persons designated bad drivers by a fair and cautious identification system, who knowingly step outside the law" (p. 511). A sentence of seven days' imprisonment for this offence did not constitute cruel and unusual punishment.

**66** In *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, a four-year mandatory minimum sentence for the offence of criminal negligence causing death with a firearm was found not to infringe s. 12. The offence captured conduct that was "wanton or reckless, and deserving of criminal liability" (para. 36), regardless of whether the offender had the subjective intention to break the law.

**67** In *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, the Court held that the mandatory minimum sentence for second degree murder of life imprisonment with no eligibility for parole for 10 years did not infringe s. 12. It stated that the *mens rea* required for second degree murder -- subjective foresight of death -- is the "most serious level of moral blameworthiness" (para. 82), regardless of the offender's subjective motives for committing the offence. A mandatory minimum sentence of life imprisonment is not cruel and unusual punishment where "the gravest possible consequences resulted from an act of the most serious and morally blameworthy intentionality" (para. 84).

**68** Finally, in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, the Court upheld a four-year mandatory minimum sentence for manslaughter with a firearm.

**69** In comparison, there have been only two instances since the advent of the *Charter* where the Court has found that a mandatory minimum sentence infringes s. 12: *Smith* and *Nur*.

**70** In *Smith*, at issue was a seven-year mandatory minimum for importing narcotics into Canada. The minimum applied regardless of the seriousness or quantity of the imported drugs, or whether the drugs were intended for personal use: pp. 1077-78. Justice Lamer held that the minimum infringed s. 12 because of the "wide net" it cast: p. 1077. He relied on the hypothetical case of a young person who drove back into Canada from a winter break in the U.S. with his or her first "joint of grass": p. 1053.

**71** In *Nur*, the Court considered the three-year mandatory minimum for an offender's first conviction for possessing prohibited or restricted firearms when the firearm is loaded or kept with readily accessible ammunition. The minimum was five years for a second or subsequent conviction. Again, in striking down the minimums, the Court emphasized their breadth. These minimums applied even in the case of a "licensing" type offence, when a "licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby ... makes a mistake as to where it can be stored": para. 82. The minimums were grossly disproportionate in the licensing scenario because of the "minimal blameworthiness of the offender ... and the absence of any harm or real risk of harm flowing from the conduct": para. 83. In its s. 1 *Charter* analysis, the Court suggested that a constitutionally compliant alternative would keep "a close correspondence between conduct attracting significant moral blameworthiness -- such as those engaged in criminal activity or conduct that poses a danger to others -- and the mandatory minimum": para. 117.

**B.** *This Case Is Not One of These Rare Cases*

**72** The impugned one-year mandatory minimum in s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("CDSA"), was enacted in 2012 as part of the *Safe Streets and Communities Act*, S.C. 2012, c. 1 (see s. 39(1)). It provides as follows:

**5 (1)** No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

**(2)** No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

**(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

**(i)** to a minimum punishment of imprisonment for a term of one year if

...

**(D)** the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years, or

...

**(a.1)** if the subject matter of the offence is a substance included in Schedule II in an amount that is not more than the amount set out for that substance in Schedule VII, is guilty of an indictable offence and liable to imprisonment for a term of not more than five years less a day;

**73** Two conditions must be satisfied for the challenged one-year mandatory minimum to apply.

**74** First, the offender must have trafficked, or possessed for the purpose of trafficking, any amount of a Schedule I substance, three kilograms of cannabis resin or marihuana (Schedule II substances), or any amount of the other Schedule II substances (ss. 5(3)(a), 5(3)(a.1) and Schedule VII). Schedule I contains the most serious drugs, such as opium, codeine, heroin, cocaine, fentanyl, and methamphetamine. Therefore, the mandatory minimum applies where the offender traffics or possesses for the purpose of trafficking any amount of the most serious drugs known to our law, or a significant quantity of cannabis, a less serious drug.

**75** Second, the offender must have either been convicted of a designated substance offence, or served a term of imprisonment for a designated substance offence, within the previous 10 years. A "designated substance offence" is any offence under Part I of the *CDSA*, except for simple possession: *CDSA*, s. 2(1). Thus, the minimum applies if the offender has a prior record for offences such as trafficking, possession for the purpose of trafficking, importing and exporting, or production.

**76** We observe that the one-year mandatory minimum sentence in s. 5(3)(a)(i)(D) of the *CDSA* confirmed existing sentencing practice for this offence. As noted by the provincial court judge, 2014 BCPC 8, at para. 45 (CanLII) of his reasons, the impugned mandatory minimum codified the bottom of the sentencing range for trafficking in Schedule I substances by offenders with at least one prior, related conviction. Across Canada, offenders who trafficked in small amounts of Schedule I substances with at least one prior, related conviction were routinely sentenced to at least 12 months' imprisonment: see, e.g., *R. v. Tabujara*, 2010 BCSC 1568 (1 year); *R. v. Yonis*, 2011 ABPC 20 (2 years less a day); *R. v. Johnson*, 2011 ONCJ 77, 227 C.R.R. (2d) 41 (18 months); *R. v. Young*, 2010 NWTSC 18 (13 months); *R. v. Desmond*, 2010 BCPC 127 (20 months); *R. v. Bryan*, 2010 NWTSC 41 (1 year); *R. v. Otchere-Badu*, 2010 ONSC 5271 (1 year); *R. v. Meunier*, 2011 QCCQ 1588 (18 months); *R. v. Tracey*, 2008 CanLII 68168 (Ont. S.C.J.) (15 months); *R. v. Draskoczi*, 2008 NWTTC 12 (18 months); *R. v. Kotsabasakis*, 2008 NBQB 266, 334 N.B.R. (2d) 396 (15 months); *R. v. Rainville*, 2010 ABCA 288, 490 A.R. 150 (18 months); *R. v. Delorme*, 2010 NWTSC 42 (20 months).

**77** Further, a prior conviction for a related offence has historically and consistently been treated as an aggravating factor in sentencing, justifying an increased sentence within the range of appropriate sentences for the offence and the offender: *R. v. Scheer* (1932), 26 Alta. L.R. 489 (App. Div.), at p. 491; C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at p. 371. The application of the mandatory minimum in s. 5(3)(a)(i)(D) of the *CDSA* is conditional upon the offender having such a prior conviction. Again, Parliament has merely codified an existing sentencing practice.

**78** Parliament also recognized that many people traffic serious drugs in order to support their own addictions. Sections 10(4) and (5) were added to the *CDSA* in 2012 to allow sentencing judges to refrain from imposing the mandatory minimum sentence on offenders who successfully complete drug treatment programs:



**(4)** A court sentencing a person who is convicted of an offence under this Part may delay sentencing to enable the offender

**(a)** to participate in a drug treatment court program approved by the Attorney General; or

**(b)** to attend a treatment program under subsection 720(2) of the *Criminal Code*.

**(5)** If the offender successfully completes a program under subsection (4), the court is not required to impose the minimum punishment for the offence for which the person was convicted.

**79** Thus, it is only offenders who traffic in serious drugs *and* who have a prior related conviction or served a prison term for a drug offence (excluding simple possession) within the past 10 years *and* who do not successfully complete a treatment program between conviction and sentencing that are subject to a mandatory minimum sentence of one year in prison. This is a very narrow and tailored mandatory minimum sentence.

**80** The conduct caught by s. 5(3)(a)(i)(D) bears no resemblance to the harmless "licensing" offence that was found to infringe s. 12 in *Nur*. In *Nur*, the provision was found to infringe s. 12 because it applied to "truly criminal conduct [that] poses a real and immediate danger to the public" (para. 82, quoting 2013 ONCA 677, 117 O.R. (3d) 401, at para. 51, per Doherty J.A.), as well as to an offender with "minimal blameworthiness" (para. 83) who simply makes a mistake about where his firearm may be stored.

**81** Section 5(3)(a)(i)(D) applies only to the offences of trafficking or possession for the purpose of trafficking. An offender may traffic Schedule I or II drugs in a variety of ways. However, in order to be convicted of trafficking, the offender must intend to traffic the drugs and must know the substance he is trafficking. The act of trafficking will always disseminate the harms and associated miseries caused by illicit drugs to other members of society. Even at the low end of the moral blameworthiness spectrum for this offence, there is nothing resembling the responsible gun owner in *Nur* who mistakenly stores his firearm in the wrong place. All trafficking is serious and involves blameworthy conduct.

**82** Indeed, as the Chief Justice recognizes, Schedule I drugs in particular pose severe health risks to users, including the risk of addiction and overdose. Drug trafficking also leads to serious social harms. For instance, some heavy drug users turn to crime in order to support their drug habits: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 85-88, per Cory J. (dissenting). Drug abuse also imposes "significant if not staggering" societal costs in the form of health care and law enforcement expenses: para. 89. Trafficking in illicit drugs, especially dangerous drugs such as those listed in Schedule I, is a serious crime.

**83** The one-year mandatory minimum at issue in this appeal also stands in stark contrast to the provision that was struck down in *Smith*. The provision in *Smith* imposed a mandatory minimum sentence of seven years for importing any amount of a narcotic, whether the importation was for distribution or mere personal use. There was no exemption clause allowing for a lesser sentence in certain circumstances, and no prior conviction for a related offence was required before it would

apply. Cognizant of these shortcomings, Lamer J. in his s. 1 *Charter* analysis suggested several modifications to the minimum that would make it constitutional. He wrote, at pp. 1080-81:

Clearly there is no need to be indiscriminate. We do not need to sentence the small offenders to seven years in prison in order to deter the serious offender... . The result sought could be achieved by limiting the imposition of a minimum sentence to the importing of certain quantities, to certain specific narcotics of the schedule, to repeat offenders, or even to a combination of these factors. [Emphasis added.]

**84** Section 5(3)(a)(i)(D) is limited in the manner Lamer J. suggested in *Smith*. It applies only to trafficking offences (not when the drugs are for personal use). It applies only to specific narcotics (Schedule I and II drugs) in specific quantities (of certain Schedule II drugs). And it applies only to certain repeat offenders.

**85** The Chief Justice finds that the challenged one-year mandatory minimum "casts its net over a wide range of potential conduct" (para. 27, citing *Nur*, at para. 82), and suggests that all mandatory minimums for offences that can be committed in many ways, in many different circumstances, and by a wide range of people, are "constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence" (para. 3; see also para. 35). We respectfully disagree. If the challenged minimum is compared to those in *Smith* and *Nur*, this mandatory minimum simply does not cover a "wide range" of conduct. It is, rather, carefully tailored to catch only harmful and highly blameworthy conduct.

C. *The Reasonable Hypotheticals Considered Do Not Support a Section 12 Infringement*

**86** The Chief Justice accepts that the one-year mandatory minimum is not grossly disproportionate as applied to the appellant, Mr. Lloyd. The only issue is whether it imposes grossly disproportionate punishment in reasonably foreseeable scenarios.

**87** When considering s. 12 *Charter* challenges to mandatory minimums, courts should keep firmly in mind that, by its terms, s. 12 does not prohibit merely excessive or disproportionate punishments. It prohibits only "cruel and unusual treatment or punishment". As a result, the "gross disproportionality" test that has developed under s. 12 is, quite rightly, a difficult standard to meet. To infringe s. 12, the punishment must be "so excessive as to outrage standards of decency": *Smith*, at p. 1072, citing *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 688, per Laskin C.J. In other words, Canadians must find the punishment "abhorrent or intolerable": *Morrisey*, at para. 26. A merely disproportionate punishment does not infringe s. 12: *Smith*, at p. 1072; *Nur*, at para. 39. And in crafting mandatory minimums, Parliament is not obliged to perfectly accommodate "the moral nuances of every crime and every offender": *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 345.

**88** With respect, the gross disproportionality standard is not satisfied in either of the hypothetical situations relied on by the Chief Justice. In essence, what she does is consider mitigating circumstances in isolation from the moral blameworthiness of the offence, which the mandatory minimum is intended to address.

(1) The Sharing Scenario

**89** First, the Chief Justice invokes the situation of an "addict who is charged for sharing a small amount of a Schedule I drug with a friend or spouse, and finds herself sentenced to a year in prison because of a single conviction for sharing marihuana in a social occasion nine years before" (para. 32). The provincial court judge invoked a similar hypothetical situation in his analysis (see his reasons, at paras. 48-49).

**90** In our respectful view, this hypothetical scenario cannot be relied on in the s. 12 analysis. If the circumstances described in a hypothetical scenario might not result in a conviction for the offence at issue, then the hypothetical is not reasonable and should not be considered: *Goltz*, at pp. 519-20. The analysis must focus on the effect of the sentence once a conviction has properly been secured, rather than the effect of the sentence where the innocence of the accused remains debatable. The jurisprudence suggests that the sharing scenario the provincial court judge described could fall outside the offence of trafficking and instead constitute mere joint possession: *R. v. Gardiner* (1987), 35 C.C.C. (3d) 461 (Ont. C.A.); *R. v. Weiler* (1975), 23 C.C.C. (2d) 556 (Ont. C.A.). Of course, if this hypothetical offender were convicted merely of joint possession, then the challenged mandatory minimum would not apply.

**91** Assuming that sharing can ground a conviction for trafficking, the Chief Justice's hypothetical scenario still strikes us as unfit for consideration under s. 12. In that hypothetical, the offender is convicted of trafficking for sharing drugs not once, but twice -- with the prior sharing incident occurring nine years before, and involving only marijuana. Since there appear to be very few reported cases where offenders have been convicted of trafficking for sharing drugs, a scenario involving a *two-time* sharing trafficker with no other conviction strikes us as "far-fetched" or "marginally imaginable", and thus inappropriate for the s. 12 analysis: *Nur*, at para. 54, citing *Goltz*, at p. 506. With respect, it also comes very close to "the most innocent and sympathetic case imaginable": *Nur*, at para. 75.

**92** That said, even if the Chief Justice's sharing scenario were accepted as a reasonable hypothetical, we are nevertheless of the opinion that the impugned provision would not impose grossly disproportionate punishment. It has been held at least once that those who traffic by sharing are less morally blameworthy than those who traffic for profit. In the somewhat dated case of *R. v. O'Connor*, 1975 CarswellBC 842 (WL Can.), a husband was found guilty of trafficking for transporting cannabis and LSD home for him and his wife to use. He bought the drugs with his wife's knowledge and consent and had prior convictions of an unknown nature. On the peculiar facts of that case, the Court of Appeal reduced the sentence from three years' to three months' imprisonment on the basis of the offender's diminished moral blameworthiness:

... while I have no doubt that the conduct in this case amounted to trafficking ... when we come to the matter of sentence in this case it should be regarded as a case of possession without any element whatever of a commercial dealing in the drugs... . [para. 6]

**93** While the "sharing" trafficker may be somewhat less morally blameworthy than the cold-blooded trafficker of hard drugs for profit, we are not convinced that she is so much less morally blameworthy that a one-year sentence would "outrage standards of decency". Whether the offender traffics by sharing, or to support her own addiction, or purely for profit, she facilitates the distribution of dangerous substances into the community. She may provide drugs to people who would not otherwise have had access to them. The harm to the community -- in the form of overdose, addic-

tion, and the crime that sometimes comes with supporting addiction -- remains the same regardless of the offender's motives.

**94** Furthermore, the sharing trafficker in this scenario has a prior drug-related conviction. She was clearly on notice that trafficking in illicit substances is a serious offence, and yet she chose to traffic again anyway. The blameworthiness of a repeat offender must be higher than that of a first-time offender.

**95** Given the seriousness of the offence of drug trafficking and the deference owed to Parliament in setting mandatory minimum policies, we cannot agree that this well-tailored one-year mandatory minimum imposes grossly disproportionate punishment in this scenario.

(2) The Rehabilitation Scenario

**96** The Chief Justice also proposes the scenario of a drug addict with a prior trafficking conviction who is convicted of a second trafficking offence. He traffics to support his addiction. Between conviction for the second offence and sentencing, he is rehabilitated and overcomes his addiction. He seeks a short sentence from the judge so that he can resume a healthy life. The sentencing judge is required to impose a one-year minimum sentence.

**97** We are not convinced that the application of the mandatory minimum in this scenario is a grossly disproportionate punishment, for two reasons. First, the mandatory minimum may not even apply. Second, even if the minimum does apply, the scenario is remarkably similar to the circumstances of Mr. Lloyd himself, for whom the Chief Justice agrees that this one-year sentence is not cruel and unusual.

**98** First, the exemption clause in ss. 10(4) and (5) of the *CDSA* states that the mandatory minimum sentence does not apply where the offender attends and successfully completes an approved treatment program between conviction and sentencing. If the offender in this reasonable hypothetical did indeed go to "a rehabilitation centre and conqu[e]r his addiction" (C.J.'s reasons, at para. 33) between conviction and sentencing, s. 10(5) of the *CDSA* could apply and the sentencing judge would not be required to impose the mandatory minimum sentence at all.

**99** Second, even if the minimum applies, it does not impose grossly disproportionate punishment. In this scenario, the offender has a prior conviction for a related offence, but was trafficking in order to support his own addiction, and is on the path to a healthy and productive life. Similarly, Mr. Lloyd has prior convictions for drug trafficking, but he testified at sentencing that he trafficked only to support his own addictions. Between conviction and sentencing, he contacted rehabilitation facilities and took the addictions programming that was available to him. He came to court at sentencing and asked for a short sentence of three to four months. The Chief Justice's second hypothetical offender would be subject to the same sentencing range as Mr. Lloyd in British Columbia, a range which the courts below both agreed was 12 to 18 months. Indeed, both are "low level dealers with prior relevant convictions, trafficking to support their own addictions", as put by the provincial court judge in establishing the applicable range (para. 28).

**100** The Chief Justice agrees that a one-year sentence is fit for Mr. Lloyd. If this is accepted, then we question how it can be possible for a one-year sentence to be grossly disproportionate for a reasonable hypothetical offender who is almost identically situated to Mr. Lloyd himself. More generally, if a challenged mandatory minimum corresponds to the lower end of the sentencing range ap-

plicable to the hypothetical offender relied on, as it does here, we wonder if that minimum can ever be found to be grossly disproportionate on the basis of such a hypothetical.

### (3) Other Hypothetical Scenarios

**101** Like the Chief Justice, we do not propose to discuss in detail the various hypothetical scenarios raised by the interveners. Many of the interveners suggested hypothetical scenarios, sometimes based on reported cases, which included offenders with various personal characteristics. For instance, the African Canadian Legal Clinic suggested a scenario that emphasizes the circumstances of African Canadians. Pivot Legal Society and the Union of British Columbia Indian Chiefs suggested scenarios involving Aboriginal offenders and addicted offenders. The West Coast Women's Legal Education and Action Fund suggested hypotheticals that focus on the experiences of female offenders.

**102** The interveners' hypothetical scenarios do not convince us that the challenged one-year mandatory minimum imposes grossly disproportionate punishment. In conducting the reasonable hypothetical analysis under s. 12, courts must inevitably consider the personal circumstances of hypothetical offenders, provided of course that courts do not artificially concoct "the most innocent and sympathetic case imaginable": *Nur*, at para. 75. But the personal circumstances of hypothetical offenders must not be allowed to overwhelm the analysis. When considering reasonable hypotheticals, courts must also not lose sight of the seriousness of the conduct that the mandatory minimum proscribes. It must be recalled that the conduct captured by this one-year mandatory minimum -- trafficking or possessing for the purpose of trafficking Schedule I or II substances, with a related prior conviction -- remains serious, harmful and morally blameworthy.

**103** Moreover, mandatory minimum sentences need not "simultaneously pursue all of the traditional sentencing principles" in order to pass constitutional muster: *Morrisey*, at para. 46 (emphasis deleted). Parliament may, within constitutional limits, set a minimum sentence that prioritizes general deterrence, denunciation and retribution over other sentencing objectives like rehabilitation. Similarly, we would add, it is open to Parliament to set a statutory minimum that prioritizes deterrence, denunciation and retribution over other statutory sentencing considerations, such as, to take just one example, the sentencing judge's duty to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances ... with particular attention to the circumstances of Aboriginal offenders": *Criminal Code*, s. 718.2(e); *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 85; *Nasogaluak*, at para. 45.

**104** Parliament must simply refrain from setting minimums that are "so excessive as to outrage standards of decency": *Smith*, at p. 1072 (emphasis added). We are not convinced that a one-year term of imprisonment for the serious conduct caught by the challenged minimum crosses this high constitutional threshold. Accordingly, we conclude that the challenged one-year mandatory minimum does not infringe s. 12 of the *Charter*.

#### D. *Mandatory Minimums Are Not Per Se Unconstitutional*

**105** That said, some further comments about the potential implications of the Chief Justice's reasons are, in our view, warranted.

**106** The Chief Justice suggests that mandatory minimums for offences that can be committed in many ways, in many different circumstances, and by a wide range of people, are "constitutionally

vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence" (para. 3; see also para. 35). This statement, however, is in tension with the Court's s. 12 jurisprudence. In the past, the Court has upheld mandatory minimums that cover a wide range of potential conduct, including in *Morrisey*, *Luxton* and *Latimer*, for offences such as criminal negligence causing death with a firearm and murder. Criminal negligence homicides "can be committed in an almost infinite variety of ways": *Morrisey*, at para. 31. And "[t]he culpability of murderers must vary as much as, and perhaps more than, the culpability of those accused of any other crime": P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 53-10. The Chief Justice's reasons would represent, in our respectful view, a departure from the Court's jurisprudence, which has consistently maintained that mandatory minimums are not *per se* unconstitutional: *Smith*, at p. 1077.

**107** The Chief Justice's s. 12 analysis also seems to be in tension with her reasoning on s. 7 of the *Charter*. She rejects Mr. Lloyd's argument that "proportionality in sentencing" is a principle of fundamental justice under s. 7 on the basis that there is no "overarching constitutional principle that allows judges to subvert the norms of punishment enacted by Parliament" (para. 43). She also states that Parliament may make "policy choices with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society" (para. 45). Yet, if few mandatory minimums can survive the scrutiny exemplified in the Chief Justice's reasons on s. 12, then one must question what role is left for Parliament's legitimate policy choices in setting punishment.

**108** We should not, however, be taken as disagreeing with the suggestion that Parliament may wish to consider providing judges some discretion to avoid applying mandatory minimums in appropriate cases (C.J.'s reasons, at para. 36). But we wish to make clear that Parliament is not obliged to create exemptions to mandatory minimums as a matter of constitutional law. Parliament may legislate to limit judges' sentencing discretion. Limiting judicial discretion is one of the key purposes of mandatory minimum sentences, and this purpose may be inconsistent with providing judges a safety valve to avoid the application of the mandatory minimum in some cases. As the Chief Justice observed in *Ferguson*, at para. 55, the purpose of mandatory minimums is

to remove judicial discretion and to send a clear and unequivocal message to potential offenders that if they commit a certain offence, or commit it in a certain way, they will receive a sentence equal to or exceeding the mandatory minimum specified by Parliament.

**109** Whether Parliament should enact judicial safety valves to mandatory minimum sentences, and if so, what form they should take, are questions of policy that are within the exclusive domain of Parliament. The only limits on Parliament's discretion are provided by the Constitution, and in particular, the *Charter* right not to be subjected to cruel and unusual punishment. Section 5(3)(a)(i)(D) of the *CDSA* does not exceed this limit and does not amount to cruel and unusual punishment.

### III. Conclusion

**110** Accordingly, in our view, the impugned one-year mandatory minimum does not infringe s. 12 of the *Charter*, and for the reasons given by the Chief Justice, it does not infringe s. 7 either. We

agree with the Chief Justice that the sentence appeal should be allowed, and the 12-month sentence imposed by the provincial court judge restored.

*Appeal allowed, WAGNER, GASCON and BROWN JJ. dissenting in part.*

**Solicitors:**

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*Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.*

*Solicitors for the intervener the Canadian Bar Association: Peck and Company, Vancouver.*

*Solicitors for the intervener the African Canadian Legal Clinic: Faisal Mirza, Mississauga; African Canadian Legal Clinic, Toronto.*

*Solicitors for the interveners the Pivot Legal Society and the Union of British Columbia Indian Chiefs: Maia Tsurumi, Vancouver; Pivot Legal Society, Vancouver.*

*Solicitor for the interveners the HIV & AIDS Legal Clinic Ontario, the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS, the Prisoners with HIV/AIDS Support Action Network and the Canadian Association of People Who Use Drugs: HIV & AIDS Legal Clinic Ontario, Toronto.*

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*Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Derstine Penman, Toronto.*

*Solicitors for the intervener the West Coast Women's Legal Education and Action Fund: La LibertÉ Cronin, Vancouver; West Coast LEAF, Vancouver.*

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