

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

BETWEEN:

JOSEPH RYAN LLOYD

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

and

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

INTERVENERS

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**FACTUM OF THE INTERVENER, WEST COAST WOMEN'S  
LEGAL EDUCATION AND ACTION FUND**

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## PART I – OVERVIEW AND STATEMENT OF FACTS

1. West Coast Women’s Legal Education and Action Fund (“WCL”) seeks to achieve equality for women by changing historic patterns of systemic discrimination through equality rights litigation, law reform and public legal education.
2. In this appeal, WCL seeks to ensure that ss. 7 and 12 of the *Charter* are interpreted and applied in a manner consistent with the *Charter’s* equality guarantees, and that the Court’s assessment of the constitutionality of the impugned provision takes account of the circumstances of female offenders and the impugned provision’s unique impact on them.
3. WCL adopts the statement of facts as set out in the Appellant’s Factum, and takes no position on disputed facts.

## PART II – WEST COAST LEAF’S POSITION ON THE QUESTIONS IN ISSUE

4. The issue in this appeal is whether s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*<sup>1</sup> (the “**impugned provision**”), which creates a mandatory minimum sentence of one year imprisonment for the possession of drugs for the purpose of trafficking in certain situations, offends ss. 7 and/or 12 of the *Charter*.
5. WCL submits that the impugned provision violates both ss. 7 and 12, and is not justified by s. 1.<sup>2</sup> In this regard, WCL makes the following specific submissions:
  - (a) The scope and application of ss. 7 and 12 of the *Charter* must be informed by, and consistent with, the *Charter’s* equality guarantees;
  - (b) In using reasonable hypotheticals to assess the constitutionality of legislation, the Court’s analysis must take into account the values and purposes underlying the equality guarantees, and in particular, equality between men and women;
  - (c) It is imperative that the circumstances of female offenders be considered by the Court in determining the impugned provision’s constitutionality; and

<sup>1</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19, s. 5(3)(a)(i)(D).

<sup>2</sup> West Coast LEAF takes no position on the remaining issues raised in the appeal.

- (d) When such reasonable hypotheticals are considered it is apparent that the impugned provision violates ss. 7 and 12, and is not justified under s. 1.

### PART III –STATEMENT OF ARGUMENT

#### A. Sections 7 and 12 must be interpreted in accordance with the *Charter*'s equality guarantees

6. *Charter* rights must be read in a contextual and purposive manner, in the light of the interests they were meant to protect. As part of this purposive approach, the *Charter*'s provisions must be read in the context of its other provisions and its overall purposes, in a manner that maintains the *Charter*'s underlying values.<sup>3</sup> In this way, *Charter* rights strengthen and support each other; they cannot be read or understood in isolation.<sup>4</sup>

7. The *Charter*'s equality guarantees play a unique and important role in this interpretive process. The equality guarantee set out in s. 15 is the “broadest of all guarantees” in the *Charter*, and a right which “applies to and supports all other rights guaranteed by the *Charter*”.<sup>5</sup> As such, s. 15 influences the interpretation of other constitutional rights,<sup>6</sup> including ss. 7 and 12.<sup>7</sup>

8. In this regard, WCL submits that a purposive and contextual interpretation of ss. 7 and 12 must account for the purposes underlying the equality guarantee,<sup>8</sup> and in particular, ensuring equality between men and women.

9. This is confirmed by the language of s. 28, which provides that notwithstanding anything in the *Charter*, “the rights and freedoms referred to in it are guaranteed equally to male and female

<sup>3</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at 344.

<sup>4</sup> See, for example, *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326; *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 976.

<sup>5</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 185. The values of equality and respect for human dignity are among the central values underlying the *Charter* in its entirety: see *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 81, citing *R. v. Zundel*, [1992] 2 S.C.R. 731; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103.)

<sup>6</sup> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 (“*G.(J.)*”) at para. 112, per L'Heureux-Dubé J.

<sup>7</sup> *G.(J.)*, *supra* at para. 115. See also *Inglis*, at para. 375 and *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 502 (ss. 12 illustrative of the rights protected by s. 7).

<sup>8</sup> *G.(J.)*, *supra* at para. 115; *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 (“*Inglis*”) at paras 378 and 509, citing *R. v. Turpin*, [1989] 1 S.C.R. 1296 and *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para 66.

persons”.<sup>9</sup> Section 28 was not included in the *Charter* as mere surplusage;<sup>10</sup> it was an express direction that the provisions of the *Charter* be read in a manner that protects the rights and freedoms of men and women equally. As stated succinctly by L’Heureux -Dubé J. in *G.(J.)*:

The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.<sup>11</sup>

10. Interpreting ss. 7 and 12 in a manner responsive to the different circumstances of female offenders, where applicable, is not only consistent with the purposive approach and the importance of s. 15, but is responsive to the direction contained in s. 28.

**B. The use of reasonable hypotheticals must take account of and reflect the values and purposes underlying the equality guarantees**

11. Section 52 provides that any law inconsistent with the *Charter* is of no force and effect. To give effect to s. 52, the Court must not only address the impact of a law on the offender before it, but must also scrutinize the nature of the law itself. By examining the “reasonably foreseeable reach of the law” the Court ensures that no one is subjected to an unconstitutional law and safeguards every person’s right to constitutional behaviour by Parliament.<sup>12</sup>

12. As a result, an analysis under s. 12 requires consideration of whether it is reasonably foreseeable that the impugned provision will impose sentences that are grossly disproportionate to some peoples’ situations. The Court considers how the impugned law may impact third parties in reasonably foreseeable situations, taking account of their relevant personal characteristics.<sup>13</sup> Similarly, under s. 7, the Court may also consider “reasonable hypotheticals” to determine whether a law is consistent with the principles of fundamental justice.<sup>14</sup>

<sup>9</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s 28.

<sup>10</sup> See generally Kerri A. Froc, “Is Originalism Bad for Women? The Curious Case of Canada’s “Equal Rights Amendment”” (2014) 19 *Rev Const Stud* 237 at 249-250 (describing s. 28 as intended to ensure that gender equality infused the interpretation of the *Charter*’s provisions, such that the “definitions and understandings of all Charter rights and freedoms are derived from women’s perspective as well as men’s”).

<sup>11</sup> *G.(J.)*, *supra* at para. 115.

<sup>12</sup> *R. v. Nur*, [2015] 1 SCR 773, 2015 SCC 15 (“*Nur*”) at para 63 and 51; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45.

<sup>13</sup> *Nur*, *supra* at paras. 56-57, 68, 62 and 76

<sup>14</sup> *Nur*, *supra* at paras 50-58; *R. v. Appulonappa*, 2015 SCC 59 (“*R. v. Appulonappa*”) at para. 28.



13. WCL submits that the Court’s consideration of reasonable hypotheticals must reflect the principles underlying the equality guarantees. That is, reasonable hypotheticals must facilitate consideration of the full impact of the impugned provision upon those to whom it applies, including historically disadvantaged groups.<sup>15</sup> These considerations are necessary to ensure that the impacts of the law on the equality-seeking groups are accounted for. Justice necessarily requires consideration of the experiences of “those whose lives reflect different realities”, including in this case, female offenders.<sup>16</sup>

14. Meaningful constitutional review demands no less. Consideration of reasonably foreseeable impacts is fundamental to our constitutional order. Ignoring the impact of the impugned law on historically marginalized groups, including in this case female offenders, would seriously undermine the protection afforded by the *Charter*, be inconsistent with principles of *Charter* interpretation, and would “dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order”.<sup>17</sup>

### **C. The Unique Circumstances of Female Offenders**

15. It is imperative that the circumstances of female offenders be considered in determining the impugned provision’s constitutionality. This is critical to both the s. 12 and s. 7 analyses.

#### ***(a) Section 12 Analysis and Reasonable Female Hypotheticals***

16. Under s. 12, the Court considers whether the impugned provision may impose a grossly disproportionate sentence for some offenders, having regard to the circumstances of the offence and the personal circumstances of reasonably foreseeable offenders. This is because the starting point of the analysis requires consideration of what an appropriate sentence would have been

<sup>15</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (“**Andrews**”) at 165. This reflects the principles and considerations underlying s. 15 of the *Charter*, including consideration of whether the law in issue “widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it” (*Quebec (Attorney General) v. A*, [2013] 1 SCR 61, 2013 SCC 5 at para. 332, per Abella J.), imposes burdens, obligations or disadvantages on an individual or group not imposed upon others (*Andrews, supra* at 174), or treats individuals as human beings equally deserving of concern, respect and consideration (*Andrews, supra* at 171; *R. v. Kapp*, [2008] 2 SCR 483, 2008 SCC 41 at para 15).

<sup>16</sup> *Yukon Francophone School Board, Education Area #23 v. Yukon (AG)*, [2015] 5 S.C.R. 282, 2015 SCC 25 at para. 23, “Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand “life” – their own and those whose lives reflect different realities”.

<sup>17</sup> *Nur, supra* at para. 63.

applying well settled sentencing principles (namely that a sentence be proportionate to the gravity of the offence and the moral blameworthiness of the offender).<sup>18</sup>

***(b) Section 7 Analysis and Reasonable Female Hypotheticals***

17. Under s. 7, the Court must address whether the impugned provision captures conduct or circumstances that fall outside of the purpose for which the law was enacted. If a law triggering the interests protected by s. 7 is overbroad, in that it captures even a single person whose conduct falls outside of the purposes of the law, it will violate s. 7.<sup>19</sup>

18. In order to properly determine whether a law is overbroad, the unique circumstances of female offenders must be considered in the context of constructing reasonable hypotheticals, as these circumstances may reveal situations in which conduct falls outside the purposes of a law. This approach was recently adopted by this Court in *R. v. Appulonappa*, where the Court used a reasonable hypothetical female offender - a mother carrying her small child - to demonstrate that the impugned law captured conduct which exceeded the scope of its purpose.<sup>20</sup> Although the law also captured other conduct that rendered the law overbroad, this sensitivity to the unique situations of female offenders helped reveal the overbreadth of the law.

***(c) The Circumstances of Female Offenders***

19. Female offenders are a distinctive (although, not homogeneous) group, whose personal circumstances may differ from those of male offenders.

20. In particular, in B.C. female offenders tend to be significantly less violent than male offenders, vulnerable, with low levels of education and employment, many with mental health issues, a high rate of substance abuse, and histories of being victims of abuse (both as children and adults).<sup>21</sup> Aboriginal women are significantly overrepresented in this population.<sup>22</sup> In addition, female offenders are also frequently mothers of dependent children. A high proportion of these mothers are the primary caregivers for their children, and many are single mothers.<sup>23</sup>

<sup>18</sup> *Nur, supra* at para 41 and 43.

<sup>19</sup> *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para 123 (“*Bedford*”).

<sup>20</sup> *R. v. Appulonappa, supra* at 29, 72.

<sup>21</sup> See *Inglis, supra* at paras. 5, 324-328, and 549-551, in relation to provincially incarcerated women.

<sup>22</sup> See *Inglis, supra*, at paras. 5, 16, 327, 551 (provincially incarcerated women).

<sup>23</sup> *Inglis, supra* para. 326 (provincially incarcerated women).

21. The circumstances of female offenders also suggest that the impact of imprisonment on them may be different from male offenders, and in some circumstances, may impose additional and substantial burdens. For instance, in B.C. female offenders are likely to be incarcerated at a further distance from their homes, families and communities, given the relatively few provincial facilities for women, as compared to men.<sup>24</sup> In these circumstances, female offenders risk undermining their rehabilitative prospects and familial relationships, by losing in-person contact with family and community.<sup>25</sup>

22. Similarly, the impact of a jail sentence on a female offender may be particularly punitive given her obligations as a caregiver of dependent children. The consequences of incarceration for both the mother and her child(ren) are potentially substantial and devastating. In contrast to male offenders, far more women in prison are primary or sole caregivers for their children, making it more likely that incarceration will disrupt her relationship with her child(ren), and increase the likelihood of state apprehension.<sup>26</sup> The apprehension of children from incarcerated mothers is associated with a host of adverse consequences for the child and the mother.<sup>27</sup> The adverse impact may be heightened for Aboriginal female offenders, given the history of overrepresentation of Aboriginal women in prison and the history of dislocation of Aboriginal families caused by state action.<sup>28</sup> This Court has found that state removal of a child from parental custody constitutes a serious infringement of the psychological integrity of the parent.<sup>29</sup>

<sup>24</sup> *Inglis, supra* at para. 550 (provincially incarcerated women).

<sup>25</sup> This additional burden of incarceration on female offenders, as compared to male offenders, has also been observed in other jurisdictions. In the U.S., female prisoners experience a significant disadvantage compared to male prisoners because incarcerated women are usually placed farther from their homes than men because there are few prisons for women in most states: Shimica Gaskins, “Women of Circumstances” – The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes” (2004), 41 *Am. Crim. L. Rev* 1533 (“**Gaskins (2004)**”), at 1551.

<sup>26</sup> Dorothy E. Roberts, “The Meaning of Gender Equality in Criminal Law” (1994) 85 *Journal of Criminal Law and Criminology*; Lisa Kerr, “Tough Sentencing: Women and Children First”, online: In Due Course <<http://induecourse.ca/tough-sentencing-women-and-children-first/>> (“**Kerr (2014)**”), citing Candace Kruttschnitt, “The paradox of women's imprisonment.” (2010) 139 *Daedalus* 32-42; see also E. Sheehy, “The Discriminatory Effects of Bill C 15’s Mandatory Minimum Sentences” (2010) 70 *C.R.* (6th) 320 (“**Sheehy (2010)**”), at 315.

<sup>27</sup> *Inglis, supra* at paras. 21, 229, 411, 485-6. These effects can include adverse health effects, such as depression and suicidal ideation, increased use of alcohol and drugs and increased criminal activity (see *Inglis, supra* at para. 335. Childcare obligations may even motivate a female offender to seek a lengthier sentence in order to ensure/facilitate access to children. In *Inglis*, one of the Plaintiffs, Patricia Block, requested a two-year federal sentence so she would be eligible to take part in a federal mother-baby program at a federal corrections institution (see *Inglis, supra* at para. 220). For a discussion of adverse effects in the U.S. context, see M. Raeder, “Special Issue: Making a Better World for Children of Incarcerated Parents”, *Family Court Law Review*, 50(1) (2012), 23-35.

<sup>28</sup> *Inglis, supra*, at paras. 5, 15, 544, 574 and 578-579.

<sup>29</sup> *G.(J.), supra* at para. 61.

23. An offender's caregiving obligations have long been a factor considered by sentencing judges in determining an appropriate sentence, as a mitigating factor relating to the circumstances of the offender, both in terms of the impact on the offender and her children, and also on her community.<sup>30</sup>

24. The relevance of an offender's childcare obligations to determining a just and fit sentence is reflected in the recent decision of *Inglis v. British Columbia*, in which the B.C. Supreme Court considered a ss. 7 and 15 challenge to a decision to cancel a provincial program that permitted mothers to have their babies with them while they served sentences of provincial incarceration in certain circumstances.<sup>31</sup> In *Inglis*, the defendant government of British Columbia argued, *inter alia*, that the decision did not give rise to a s. 7 breach because any concern about the impact of incarceration on an offender with childcare obligations could be accounted for in sentencing.<sup>32</sup>

25. The court wholly rejected this argument, in large part because childcare obligations could have no bearing on determining the appropriate sentence where the offence was subject to a statutorily imposed mandatory minimum sentence. As Justice Ross concluded:

I was not persuaded by this submission. [...] while the fact that a woman is pregnant or has a young infant is a factor that can be taken into account in sentencing, by virtue of provisions in the *Criminal Code*, R.S.C. 1985, c. C-46 [the *Criminal Code*], prescribing mandatory minimum sentences and restricting the offences for which a conditional sentence order is available, it is clear that a community disposition is not available for all women who are pregnant or with young infants.<sup>33</sup>

<sup>30</sup> See, for example, see: *R. v. Hamilton*, 2003 CanLII 2862 (ON SC), where the court held that "As a general rule, the sentencing function should take account of the best interests of an offender's wholly dependent children" (at para 197). In that case, six dependent children would have been effectively orphaned by the imprisonment of their single mothers. Ultimately the court imposed a conditional sentence. See also *R. v. Wellington*, [1999] OJ No 569 (CA), where the Court of Appeal varied a custodial sentence for 15 months' imprisonment importing drugs into Canada to a 15 month sentence to be served in the community, plus a period of probation. The Court of Appeal's reasoning was based in large part on taking account of the appellant's childcare obligations. The appellant offender was a single mother of two young children, one who was less than a year old and the other of whom had serious behaviour problems and required special classes in school to address these problems. If the children were relocated to live with relatives due to their mother's incarceration, access to this educational accommodation would be undermined. Given the age of the children and the special needs of one of them, the children's need to remain with their mother at the time was critical; *R. v. Bunn*, 2000 SCC 9, in which the offender's caregiving responsibilities (as the sole caregiver for his disabled spouse and teenage daughter), was considered a mitigating factor in sentence (at para. 23).

<sup>31</sup> The Court ultimately concluded that the decision to cancel the Mother Baby Program violated the ss. 7 and 15 rights of both the mothers and babies eligible for the program.

<sup>32</sup> More specifically, the government of BC argued that there was no cause for concern given measures taken by the government, including "encouraging the Crown and courts to impose community-based sentences" (see *Inglis, supra* at para. 400, emphasis added).

<sup>33</sup> *Inglis, supra* at para. 401.

26. The same issue arises here, as the impugned provision restricts sentencing judges' discretion to fashion a proportionate sentence in some cases, having regard to all relevant factors, including but not limited to an offender's childcare obligations.

27. Finally, for female offenders the circumstances of the offence may vary from those associated with male offenders, in that a female offender may find herself captured by the impugned provision in circumstances that differ from a male offender. With respect to drug related crimes, such as the impugned provision, women's involvement may arise from or relate to circumstances reflecting decreased or reduced moral culpability. In particular:

- (a) Many women involved in the drug trade are delegated to lower-ranking, higher-risk positions,<sup>34</sup> making them more visible and vulnerable to interaction with law enforcement. For example, women disproportionately act as drug mules, who are often forced to carry much larger quantities of drugs than professional traffickers;<sup>35</sup>
- (b) Women's involvement in the drug trade may reflect the decreased economic opportunities and lower political status that women face in everyday life;<sup>36</sup> and
- (c) Women's involvement with drug-related offences may arise from social and/or cultural factors, including where criminal conduct may be an uninvited or unforeseen consequence of an intimate relationship.<sup>37</sup>

28. Accordingly, WCL respectfully submits that the Court's consideration of reasonable hypotheticals must account for the above characteristics and circumstances of female offenders, including the additional punishment as a result of incarceration and potentially limited nature of the offender's moral culpability.

<sup>34</sup> Adam Cotter, Jacob Greenland and Maisi Karam, *Drug-related offences in Canada, 2013* (June 25, 2015), Statistics Canada Online: < <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14201-eng.pdf> > at 16. This same study, at 16, found that in 2013 in Canada, offences involving the import or export of drugs had the highest proportion of female accused (29%), while possession had the lowest (17%).

<sup>35</sup> See the report prepared by the UN Task Force on Transnational Organized Crime and Drug Trafficking as Threats to Security and Stability: UN Women, *A Gender Perspective on the Impact of Drug Use, the Drug Trade, and Drug Control Regimes (Policy Brief)*, (New York: United Nations, 2014), online <[https://www.unodc.org/documents/ungass2016/Contributions/UN/Gender\\_and\\_Drugs\\_-\\_UN\\_Women\\_Policy\\_Brief.pdf](https://www.unodc.org/documents/ungass2016/Contributions/UN/Gender_and_Drugs_-_UN_Women_Policy_Brief.pdf)> (“UN Women”), at 2.

<sup>36</sup> See UN Women, *supra* at 3.

<sup>37</sup> See Gaskins (2004), as cited in Sheehy (2010). For a discussion of the U.S. context, see M. Raeder, “Gender-Related Issues in a Post-Booker Guidelines World” 37 *McGeorge Law Review* (2006) 691 at 696 & 726-731.

#### D. Reasonable Hypotheticals and Female Offenders

29. WCL respectfully submits that the following reasonable hypotheticals demonstrate the impugned provision's unconstitutionality under both ss. 12 and 7 of the *Charter*:<sup>38</sup>

- (a) A female offender whose involvement in drug trafficking arises from an intimate relationship with a partner with a history of criminal activity,<sup>39</sup> e.g.: (i) a female offender lives in the same apartment building as her boyfriend, although in separate units. She is the primary caregiver for their small child and she is financially dependent upon him. He is an active drug trafficker and she has knowledge of this. With her reluctant consent, he conceals drugs within her apartment in order to avoid detection. She is convicted of possession for the purpose of trafficking by aiding and abetting the principal offender (the boyfriend); (ii) a female offender is arrested in the same vehicle as a male accused, her abusive intimate partner. He has been trafficking drugs, and asked her to hide a quantity on her person when stopped by police, in order for him to avoid detection. She has knowledge of his trafficking, and fearful of disagreeing with him, hides the drugs. She is convicted as a party to the offence, and subject to the impugned provision.<sup>40</sup>
- (b) A female offender who is a known drug user, who engages in sex work to support her drug habit, and whose involvement in trafficking arose from being exploited by others;<sup>41</sup>
- (c) A female offender, who is a single parent or primary caregiver, and whose children will be apprehended if she is incarcerated;

<sup>38</sup> For the hypotheticals provided, we assume that the offender was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years.

<sup>39</sup> E.g. *Inglis v. BC*, 2013 BCSC 2309 (at paras. 109-110 – Describes DM, a mother who participated in the mother-baby program in issue in that case. DM did not use drugs prior to her romantic involvement with Mr. F, who had a criminal history and issues with drug addiction).

<sup>40</sup> See *R. v. Van Santen*, [2009] A.J. No. 703, as an example of a somewhat similar factual scenario.

<sup>41</sup> See for example, *R. v. Shenfield*, 2008 ABPC 47, where the female accused was a known drug user and sex worker. She was targeted by undercover police officers and ultimately convicted of trafficking \$60 of cocaine. The Court found that, while she was technically guilty of trafficking, she was not one of the principle actors in the purchase and orchestration of the event (she made a phone call at the request of undercover officers, who, when she advised she would need to locate a payphone, provided her with a cell phone, and then insisted when the money changed hands that it go through her). This was not a case where the offender exploited the vulnerabilities of others. Rather, she was targeted precisely because of her own obvious vulnerabilities. She was known to the police. The Court found that a period of incarceration would not be an appropriate sentence in the circumstances.

- (d) A female offender in B.C. whose community and family are located a substantial distance from Prince George and Maple Ridge<sup>42</sup> who: (i) suffers from mental health or substance abuse issues, and for whom ongoing and regular contact with her family is important for her mental health and ongoing treatment; (ii) who is a sole or primary caregiver to a child with special needs, where ongoing and regular contact between mother and child is important to the child's health and ongoing treatment; or (iii) who is nursing an infant child where the geographic distance would deprive the infant and mother of the health and psychosocial benefits of breastfeeding.<sup>43</sup>

30. WCL respectfully submits that the above hypotheticals are not "far-fetched" or "speculative"; indeed, many are based on decided cases. These hypotheticals demonstrate that the impugned provision may result in grossly disproportionate sentences in some cases, and therefore violates s. 12. WCL also submits that the above hypotheticals demonstrate that the impugned provision is overbroad as it catches far more offenders and conduct than is necessary to achieve the legislation's object, and that neither violation is saved by s. 1, given the absence of extraordinary circumstances justifying such violations.<sup>44</sup>


#### PART IV – SUBMISSIONS ON COSTS


31. WCL does not seek costs and requests that no costs be awarded against it.

#### PART V - ORDER SOUGHT

32. WCL seeks leave to present oral argument not exceeding 10 minutes at the hearing.

All of which is respectfully submitted this 23<sup>rd</sup> day of December, 2015.

  
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<sup>42</sup> See *Inglis, supra*, at para. 550 (due to limited facilities for women, most provincially incarcerated women in BC are held near two urban centres, Maple Ridge and Prince George, in contrast to male offenders in BC who are more likely to be imprisoned closer to their families).

<sup>43</sup> *Inglis, supra*, at paras. 229, 329-330, and 648-649.

<sup>44</sup> *Bedford*, at para. 129; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, at para. 66; *Nur*, at para. 111.

## PART VI – TABLE OF AUTHORITIES

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<i>Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society</i> , [2012] 2 SCR 524, 2012 SCC 45	11
<i>Charkaoui v. Canada (Citizenship and Immigration)</i> , [2007] 1 SCR 350, 2007 SCC 9.	30
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Shimica Gaskins, “Women of Circumstances” – The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes” (2004), 41 Am. Crim. L. Rev 1533, at 1551.	21, 27
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**PART VII – LIST OF STATUTES**

*Controlled Drugs and Substances Act*, SC 1996, c 19, s. 5(3)(a)(i)(D).

**Appellant’s Factum, p. 23**

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s 7, 12, 15, 28.

**Respondent’s Factum, p. 45**

<p><b>Equality Rights</b></p> <p><b>Equality before and under law and equal protection and benefit of law</b></p> <p><b>15.</b>          (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</p> <p><b>Affirmative action programs</b>          (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</p>	<p><b>Droits à l'égalité</b></p> <p><b>Égalité devant la loi, égalité de bénéfice et protection égale de la loi</b></p> <p><b>15.</b>          (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.</p> <p><b>Programmes de promotion sociale</b>          (2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.</p>
<p><b>Rights guaranteed equally to both sexes</b></p> <p>28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.</p>	<p><b>Égalité de garantie des droits pour les deux sexes</b></p> <p>28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.</p>