A. Style of Cause and Procedural History

Style of Cause: *Procureur général du Québec, et al. v. H.V.* (S.C.C. File. No. 40093)

Procedural History:

- Supreme Court of Canada – *Attorney General of Quebec, et. Al. v. H.V.* (leave to appeal granted on August 18, 2022)
    - Québec Court of Appeal – *R. c. H.V.*, 2022 QCCA 16 (*per* Schrager, Moore, Kalichman JJ.C.A.)
        - Superior Court of Québec – *R. c. H.V.*, 2021 QCCS 837 (*per* Lachance J.C.S.).
            - Court of Québec – November 21, 2019 (per Garneau, J.C.Q.)

B. Filing Timeline

***Procureur général du Québec, et al. v. H.V.* (S.C.C. File. No. 40093)**

[TBA] – CBA's motion for leave to intervene is due 4 weeks after the filing of the appellant's factum, which has not yet been filed.

[TBA] – CBA's appeal factum due (the *Supreme Court Rules* require an intervener's factum to be filed within 6 weeks after leave to intervene is granted).

[TBA] – tentative hearing date for the appeal.

C. Background Facts and Lower Court Judgments

i. Background Facts

H.V. pleaded guilty to child luring contrary to s. 172.1(1)(a) of the *Criminal Code*. At the time of the offence, H.V. was a 52-year-old principal. The complainant was his 16 year old niece. The offence consisted of several text messages aimed at obtaining sexual favours from the niece. The accused touched the complainant's thigh on one occasion and asked her to delete the text messages.

ii. Reasons of the Court of Québec

H.V. was subject to punishment pursuant to s. 172.1(2)(b) of the *Criminal Code*, which imposes a mandatory minimum sentence of six months for summary convictions. At his sentencing, he successfully challenged the mandatory minimum sentence as contrary to s. 12 of the *Charter*. The trial judge concluded that the mandatory minimum sentence was grossly disproportionate based on what he deemed appropriate for H.V., which was a two-year probation order with the obligation to perform 150 community hours within 12 months. The trial judge did not consider reasonable hypotheticals and pointed out that H.V. did not provide any such hypotheticals because he referred to case law.

iii. Reasons of the Superior Court

On appeal to the Superior Court, the parties agreed that the reasonable hypotheticals referred to in the case law were relevant to the analysis, and that it was useless to speculate on new

hypotheticals (paras. 206-208, 213-226). Lachance J.C.S. allowed the Crown's appeal with respect to the appropriate sentence. However, she agreed that s. 172.1(2)(b) violated s. 12 of the *Charter* because it would impose a grossly disproportionate sentence on certain offenders in reasonably foreseeable circumstances.

In her analysis of s. 12, Lachance J.C.S. considered the impact of *R. v. Friesen*, 2020 SCC 9 but still relied on the reasonable hypotheticals as set out in the decisions of *R. v. Hood*, 2018 NSCA 18 and *R. v. Randall*, 2018 ONCJ 470, which were decided in advance of that decision. Lachance J.C.S. replaced H.V.'s sentence with 90 days of imprisonment to be served intermittently with 3 years' probation along with the performance of 150 hours of community service.

iv. Reasons of the Court of Appeal

In a unanimous judgment, Schrager, Moore, and Kalichman JJ.C.A. applied the framework from *Lloyd* and *Nur* and confirmed that mandatory minimum sentence imposed by s. 172.1(2)(b) violated s. 12 of the *Charter* because it was grossly disproportionate. In its analysis, the Court relied on two reasonable hypotheticals set out by the case law.

First, it relied on the reasonable hypothetical considered by the Nova Scotia Court of Appeal in *Hood*. In that case, the Court declared the one-year mandatory minimum sentence imposed for sentencings with respect to s. 172.1(1)(a) and (b) unconstitutional. The reasonable hypothetical it relied on involved a first-year high school teacher in her mid-20s, suffering from a mental health condition, who texted her 15-year-old student to inquire about a school assignment, and, when feeling manic, directed the conversation to sexual. They agree to meet in a private location that evening where they fondle each other. The teacher entered a guilty plea and had sincere remorse.

The Court refused to set aside this reasonable hypothetical on the basis that a portion of it had been denounced in *Friesen*, which focused on sentencing principles for sexual offences involving children. It noted that *Friesen* rejected a "hierarchy of physical acts" and invited the courts to look at the harm caused to the complainant. *Hood* was useful, as there was no particularized evidence of harm to the complainant in *Hood* (paras. 44-47). Further, comparable factual circumstances were not hard to imagine, as *R. v. Morrison*, 2019 SCC 15 presented a situation where there was no evidence of harm to the complainant because it was a policeman posing as a 14-year-old girl. It noted how in that case, the Court raised concerns regarding the constitutionality of s. 172.1(2) given the wide range of conduct to which it applies (para. 49).

Second, the Court relied on a reasonable hypothetical as set out in *Randall*, where the accused was a 50-year-old father with no criminal record who had himself been the victim of sexual abuse in his youth. He developed a virtual relationship with a police officer posing as a 15-year-old and engaged in sexual conversations with her. They arranged to meet, and the accused was arrested. The court imposed a 90-day sentence to be served intermittently and 3 years' probation with a curfew for the first year and 120 hours of community service (para. 50).

The Court disagreed with the appellant's argument that it should not rely on *Randall* because it had been decided before *Morrison*. Rather, it noted that since *Morrison* several appellate decisions had declared the minimum sentence applicable to child luring to be unconstitutional (para. 51). The Court also noted that given the decision in *Bertrand Marchand* finding s. 172.1(2)(a) unconstitutional required it to s. 172.1(2)(b) unconstitutional. Otherwise, an individual who was charged summarily would face a greater sentence than someone charged through indictment. This would lead to unfair and inconsistent situations (paras. 52-53).

D. CBA Policies and Principles

The CBA has long advocated for the use of reasonable hypotheticals when assessing whether mandatory minimums comply with s. 12 of the *Charter*. The CBA has also repeatedly called for the addition of a "safety valve" provision to preserve judicial discretion in the face of a mandatory minimum sentence.

As recently as February 17, 2021, the CBA reaffirmed its stance against mandatory minimum sentences and the importance of a safety valve:

Resolution 21-04-A: Mandatory Minimum Sentences

> WHEREAS the *Criminal Code* imposes an increasing number of mandatory minimum sentences;
>
> WHEREAS mandatory minimum sentences exacerbate systemic racism against members of Indigenous, Black and other communities;
>
> WHEREAS mandatory minimum sentences remove discretion from sentencing, precluding judges from balancing all factors of a case and imposing a one-size-fits-all sentence;
>
> WHEREAS sentencing judges must balance many factors, including the nature of the offence, characteristics of the offender, prospects for rehabilitation, criminal record, and impact on the victim;
>
> WHEREAS mandatory minimum sentences add to ballooning court dockets by removing incentives for accused to plead guilty early in the process;
>
> WHEREAS mandatory minimum sentences can require prosecutors to substitute offences without mandatory minimum sentences to accommodate pleas, which creates a conflict between their duties to the public as public prosecutors and as ministers of justice to ensure fairness to an accused;
>
> WHEREAS mandatory minimum sentences fail to promote deterrence, contribute to overcrowding in prisons and disproportionately incarcerate members of Indigenous, Black and other racialized communities;
>
> WHEREAS a legislative exemption from imposing a mandatory minimum sentence (for offences other than murder) would bring Canada in line with other democratic countries committed to fairness and equality in sentencing;
>
> WHEREAS a legislative exemption from imposing a mandatory minimum sentence (for offences other than murder) could ameliorate the effects of systemic racism on racialized and marginalized communities;
>
> BE IT RESOLVED THAT the Canadian Bar Association urge the federal government to eliminate mandatory minimum sentences for offences other than murder, and for offences other than murder, where mandatory minimums remain, add a "safety valve" in section 718 of the *Criminal Code* as follows:

> "where injustice could result by the imposition of a mandatory minimum sentence, in the interests of justice, the sentencing judge may depart from the mandatory minimum sentence and consider other sentencing options."

The CBA has previously advanced the above position through its interventions in *Nur*, *Lloyd, Hills* and *Hillbach*. The CBA's involvement in these appeals is set out in the August 2022 intervention publication, reproduced below:

Mandatory Minimum Sentences (R. v. Nur; R. v. Lloyd)

BACKGROUND

- The CBA opposes the use of mandatory minimum sentences (MMS), for several reasons. International social science research shows that MMS do not advance key sentencing goals. They do not deter people from committing crime, while they do subvert important aspects of Canada's sentencing regime, including principles of proportionality and individualization.

- The CBA supports judicial independence, and reliance on judges to impose a just sentence after hearing all facts in the individual case and about the individual offender.

- MMS do not target the most egregious or dangerous offenders, who are already subject to stiff sentences precisely because of the nature of their crimes. More often, less culpable offenders are caught by MMS and subjected to disproportionate terms of imprisonment.

- The impact of MMS on vulnerable and marginalized groups, who already suffer from poverty and deprivation, is particularly harsh. In Canada, this most notably affects Aboriginal communities, a population already grossly over-represented in custody.

- In 2011, CBA Council passed a resolution on *Justice in Sentencing*. While the CBA opposes MMS (except for murder), if MMS remain part of Canadian law, and especially given legislative initiatives under the government at that time, the federal government should legislate a sentencing "safety valve" to allow judges to avoid MMSs when injustice would result from imposing them. CBA Council has also passed resolutions addressing the disproportionate impact that MMS have on mentally ill and marginalized communities. Some Canadian courts have refused to impose MMS in certain circumstances.

- *R. v. Nur* involved a man found guilty of one count of possession of a firearm under section 95(2)(a)(i) of the *Criminal Code*, which carries a mandatory minimum three-year sentence. The CBA intervened at the Supreme Court of Canada. Criminal Justice Section Chair Eric Gottardi acted as pro bono counsel.

- The CBA focused on the constitutionality of s. 95(2)(a)(i), arguing that the MMS violates *Charter* ss. 7 or 12, and cannot be justified under s. 1 of the *Charter*. Reasonable alternatives such as a legislative "safety valve" are available in other countries with MMS, and must be available under Canadian law to be *Charter* complaint. In addition, the particular circumstances of marginalized offenders should be factored into any *Charter* analysis.

- In April 2015, the SCC held that the sections violate section 12 of the *Charter*, and cannot be saved by section 1, as the minimal impairment and proportionality requirements are not met. (2015 SCC 15).

- The CBA intervened in *R. v. Lloyd*, which dealt with similar issues in the context of drug trafficking. Eric Gottardi and Mila Shah acted as pro bono counsel. In April 2016, a majority of the SCC again held that the relevant sections violated section 12 of the *Charter* and was not saved by section 1.

- In fall 2015, the government undertook to review changes to the criminal law and sentencing over the past decade, including the operation of MMS. Justice Canada conducted regional consultations on criminal justice generally, but the CBA Section was not formally invited to contribute to that review. The 2015 mandate letter from the Prime Minister to the Justice Minister similarly directed her to limit MMS.

- Given that undertaking, the Section is now emphasizing the CBA's key support for judicial independence in sentencing, rather than advocating for a "safety valve" in special cases of injustice. Inaction on the direction in the mandate letter was explained by Justice Canada officials as pending a more comprehensive review of sentencing generally, which did not take place before the 2019 election and has not been pursued since.

- Bill S-251, a public Senate bill introduced by Senator Kim Pate in September 2018, proposed to repeal MMS, including for murder. Past Section Chair Eric Gottardi attended a consultation on the Bill in October 2018. The subject was also on the agenda of the Section's annual meeting with Justice Canada. The Section wrote to the Senate Legal and Constitutional Affairs Committee in June 2019, recommending that the Bill's objectives could be better achieved in a different way. The Bill died on the Order Paper with the call of the 2019 federal election.

CURRENT STATUS

- The Criminal Justice Section sponsored a resolution adopted at the 2021 AGM, urging the federal government to eliminate mandatory minimum sentences for offences other than murder and, for offences other than murder, where mandatory minimums remain, to add a "safety valve" in section 718 of the *Criminal Code*.

- In February 2021, the Justice Minister introduced Bill C-22, amendments to the *Criminal Code* and the *Controlled Drugs and Substances Act*, to repeal mandatory minimum sentences for 14 offences in the *Criminal Code* and all six sentences in the *Controlled Drugs and Substances Act.*

- The CBA Board approved three interventions on mandatory minimum sentences in 2021. Appeals for all three will be heard in March 2022. Eric Gottardi and Charlotte van Wiltenburg of Peck and Company Barristers in Vancouver act as pro bono counsel*:*

    - *R. v. Sharma:* appeal re constitutionality of *Criminal Code* ss. 742.1(c) and (e)(ii), which limit the availability of a conditional sentence order (more commonly known as house arrest). Key issue is whether these restrictions violate ss. 7 and/or 15 of the *Charter*. Court granted a Crown motion to put appeal on hold pending outcome of related bill before Parliament. CBA application for leave to intervene in SCC to be filed in accordance with new filing deadlines to be set by the Court.

    - *R. v. Hills*; *R. v. Hilbach:* Appeals will revisit constitutionality of mandatory minimum sentences under s. 12 of the *Charter*. Applications for leave to intervene granted in July 2021.

- The three cases were heard by the Supreme Court of Canada in March 2022.

- In December 2021, Justice Minister Lametti reintroduced Bill C-5, amendments to repeal mandatory minimum sentences for 14 offences in the *Criminal Code* and all six sentences in

the *Controlled Drugs and Substances Act*. Jody Berkes, past Chair of the Criminal Justice Section, appeared before the House Committee in May 2022. He noted the Bill's progress but urged the Committee to extend MMSs to further offences. The Bill was referred to the Senate Committee in June 2022.

NEXT STEPS

- Await decisions in the *Sharma, Hills* and *Hilbach* appeals.
- CBA Advocacy staff will monitor the impact of the Supreme Court decisions, and the Criminal Justice Section continues to highlight the reasons for its opposition of MMSs, despite partial movement on reforms.

In addition to the authorities cited above, several other CBA documents advocate more generally for less reliance on incarceration, substantive equality for Indigenous peoples and other marginalized groups, and the maintenance of judicial discretion in sentencing:

- **Resolution 20-02-A:** United Nations Declaration on the Rights of Indigenous Peoples
- **Resolution 15-05-A:** Programs for Aboriginal Offenders
- **Resolution 14-04-A**: Advancing Public Safety
- **Submission:** Responding to the Truth and Reconciliation Commission's Calls to Action (March 2016)
- **Resolution 14-03-M:** Reaching Equal Justice
- **Resolution 13-01-A:** Harm Reduction Drug Policy
- **Resolution 13-12-A:** Accommodating the Disability of FASD to Improve Access to Justice
- **Resolution 11-12-A:** Preserving Special Consideration for Aboriginal Offenders in the Criminal Justice System
- **Resolution 11-11-A:** Justice Resources
- **Resolution 11-09-A:** Justice in Sentencing
- **Resolution 11-07-A:** Mentally Ill Persons in the Criminal Justice System
- **Resolution 10-02-A:** Fetal Alcohol Spectrum Disorder in the Criminal Justice System
- **Resolution 06-09-A:** Statement of Core Principles of the Legal Profession

E. Importance of Issues to CBA

H.V. presents an opportunity for the CBA to advance three key policy initiatives:

1. opposing the continued widespread use of mandatory minimum sentences;
2. promoting the enactment of an exemption clause to preserve judicial discretion in sentencing; and
3. promoting access to justice and substantive equality when sentencing marginalized groups.

These issues relate to the CBA's core mission and values, and are of national importance to the legal profession.

As outlined above, the CBA has a been a longstanding proponent of judicial discretion and restraint in sentencing. As one example, the CBA actively opposed many of the proposed changes in the *Safe Streets and Communities Act.* These amendments restrained judicial

discretion in a variety of ways, including by expanding the use of mandatory minimum sentences.

In the past decade, the CBA has played an important role in challenging the use of mandatory minimum sentences through courtroom advocacy. In particular, the CBA's interventions in *Nur* and *Lloyd* have made an important contribution to the s. 12 *Charter* jurisprudence. In *Nur,* the CBA successfully defended the continued use of the reasonable hypothetical test. In *Lloyd,* the CBA's submissions on the importance of judicial discretion and an adequate "safety valve" provision were endorsed by McLachlin CJ at para. 36.

Since the release of the *Lloyd* decision in 2016, the CBA has renewed its commitment to promoting judicial discretion in sentencing and minimizing the reach of mandatory minimums. For example, in its February 2021 Resolution 21-04-A, the CBA urged the federal government to eliminate mandatory minimums for offences other than murder, or to add a "safety valve" provision to retain judicial discretion and to avoid unjust sentences where mandatory minimums are not repealed.

The CBA has also committed to reviewing the impact of the *Nur* and *Lloyd* decisions to further promote judicial independence in sentencing (see February 2021 publication, "Mandatory Minimum Sentences (R. v. Nur, R. v. Lloyd)). Its interventions in *Hills* and *Hillbach* appeals presented an opportunity for the CBA to defend the s. 12 test developed in *Nur* and *Lloyd,* to reaffirm the importance of enacting a safety valve, and to further refine the reasonable hypothetical test to promote access to justice and substantive equality in sentencing. The Supreme Court of Canada has yet to release its decisions in *Hills* and *Hillbach*.

H.V. provides another opportunity for the CBA to continue this work, and to ensure a consistent and principled approach to mandatory minimum sentences by the Supreme Court of Canada.

F. Applying Body's Consideration of Matter

We have consulted with Mr. Bertrand Marchand's lawyer (Samuel Bérubé de Deus) but have not heard back from H.V.'s lawyer. We advised both lawyers of our interest in applying to intervene in this matter. Mr. Bérubé de Deus advises that the following parties have served notices of intervention or showed an interest in intervening: Attorney General of Ontario, Attorney General of Saskatchewan, Attorney General of Alberta, and Directrice des poursuites pénales, and Association Québécoise des Avocats et Avocates de la Défense ("AQAAD"). We intend to confer with AQAAD if they are granted leave to intervene to ensure the CBA's arguments would not be duplicative of them.

We have carefully reviewed the leave applications for *Bertrand Marchand* and *H.V.*, the CBA's previous facta in *Lloyd*, *Nur*, *Hills* and *Hillbach*, and recent academic commentary. We have considered how to preserve the recent advancements to the s. 12 jurisprudence, while further promoting the broader aims of the CBA pertaining to access to justice and substantive equality in sentencing.

G. Applying Body's Discussion with other CBA Bodies

As counsel for the CBA on the *Nur*, *Lloyd*, *Hills* and *Hillbach* interventions, we have closely consulted with CBA bodies on the issue of mandatory minimums as they apply to s. 12 of the *Charter*. The present proposal represents a recapitulation of those same submissions, adapted to

incorporate reference to the SCC's *Lloyd* decision as well as the factual context of the underlying appeals.

H. Expedited Filing Plan

With a view to expedite consultation and filing, the proposed argument draws from the CBA's intervention submissions of *Nur* and *Lloyd,* and its recent interventions in *Hills* and *Hillbach* which have been previously developed with and reviewed by CBA bodies.

I. Disclosure of any Personal or Professional Interest in the Matter

None.

J. Names and Firm of Proposed Counsel

Eric Gottardi, Q.C. and Caroline Senini of Peck and Company Barristers would act as counsel for the CBA on a *pro bono* basis.

Eric V. Gottardi, Q.C.: Mr. Gottardi is a senior partner at Peck and Company, a Vancouver criminal litigation boutique. His practice encompasses all aspects of criminal and quasi-criminal cases, including trials, appeals, extraditions, and special prosecutions. He has successfully intervened on behalf of the CBA in the previous cases of *R. v. Nur,* 2015 SCC 15, and *R. v. Lloyd,* 2016 SCC 13. He previously acted as chair of the CBA National Criminal Justice Section and acts as a founding co-chair for the National CBA Annual Criminal Law conference. He is a member of the Planning Committee for the Federation of Law Societies Criminal Law Program, in addition to being a member of faculty. Prior to his work at Peck and Company, he clerked at the Court of Appeal for Ontario. He was appointed Queen's Counsel in 2020.

Caroline Senini: Ms. Senini is an associate at Peck and Company. She represents clients in criminal and quasi-criminal matters, including trials, appeals, extraditions, and special prosecutions. She was previously co-counsel at the Supreme Court of Canada on behalf of the Appellant in *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5. Prior to joining Peck and Company, Caroline clerked at the British Columbia Supreme Court, and was called to the Bar in British Columbia in 2017. She received her joint Juris Doctor and Master of Global Affairs from the University of Toronto.

K. Outline of Argument

The CBA would make two broad submissions:

(1) Mandatory minimum sentences for broadly defined offences are likely to violate s. 12 of the *Charter*. An adequate exemption clause will therefore usually be required for a mandatory minimum sentence to meet constitutional standards.

(2) The reasonable hypotheticals applied in a s. 12 *Charter* analysis should include basic attributes of groups that are overrepresented in our prison system, such as Indigenous individuals, those suffering from mental health conditions, and those who are cognitively impaired. This approach promotes access to justice and substantive equality in sentencing.

1 - An Exemption Clause May Be Required for a Mandatory Minimum to Meet Constitutional Standards

The CBA has long opposed the use of mandatory minimums as a means to curtail judicial discretion in sentencing. Sentencing judges are required to balance many factors, including the nature of the offence, characteristics of the offender, prospects for rehabilitation, criminal record, and impact on the victim. Mandatory minimums are a blunt sentencing tool that dictates a "one-size-fits-all" approach to punishment. Given that most substantive offences are designed to capture a wide range of conduct, a grossly disproportionate factual scenario will almost always fall within the scope of the provision.

To respond to this issue, the CBA has advocated for the enactment of a legislative exemption clause. This would allow judges to depart from a mandatory minimum sentence where injustice could result (see for e.g. CBA Resolution 21-04-A: Mandatory Minimum Sentences). Statutory exemption clauses are used in several other jurisdictions (see Peter Sankoff, "The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case" Constitutional Forum (2013), Vol. 22 No. 1 at 6-7). An exemption clause strikes an appropriate balance between increasing the severity of sentences for particular offences, and ensuring that judicial discretion remains to impose a lower sentence where the minimum would be clearly unjust.

The Supreme Court of Canada has recognized the constitutional infirmity of mandatory minimum sentences for broadly worded offences. Writing for the majority, Chief Justice McLachlin observed as follows in *R. v. Lloyd,* 2016 SCC 16 at para. 35:

> [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. [Emphasis added]

The Supreme Court of Canada likewise endorsed the enactment of a legislative exemption clause to promote constitutional compliance. At para. 36 of *Lloyd,* McLachlin CJ continued:

> [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 ... 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 … 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. [Emphasis added]

Despite the Supreme Court of Canada's strong signal to Parliament, no such exemption clause has been enacted. In the wake of *Lloyd,* dozens of mandatory minimums have duly been struck down by the courts for prescribing grossly disproportionate sentences, contrary to s. 12 of the *Charter.*

The wide range of circumstances covered by the sentences for child luring covered in these appeals directly invokes the CBA's position on the use of a safety valve. In *Morrison*, Moldaver J. asserted with respect to s. 172.1 "that the mandatory minimum under subs. (2)(a) is, at the very least, constitutionally suspect", as it "casts its net over a wide range of potential conduct" (para. 146). While Moldaver J. did not decide the constitutionality of this provision, he highlighted how despite the "considerable variation in terms of the conduct and circumstances that may be caught by s. 172.1(1), Parliament had not included a 'safety valve' in the provision (para. 148)."

In *H.V.*, the courts noted how mandatory minimum sentences for both summary and indictable offences with respect to child luring were struck down before the SCC decision in *Friesen* (see for e.g. *H.V.* QCCS at para. 64). As noted in our submissions in *Hills* and *Hillbach*, the uptick in successful s. 12 challenges is not the result of an error in doctrine, but legislative silence. The former Chief Justice forewarned that the constitutionality of many mandatory minimums were vulnerable to challenge, and signalled multiple ways for Parliament to achieve constitutional compliance. The continued absence of a "safety valve" is only cause for this Court to reaffirm the importance of a legislative exemption clause.

2 – Reasonable hypotheticals should incorporate the features of overrepresented groups

Any consideration of reasonable hypotheticals should incorporate the features of overrepresented groups in the criminal justice system such as Indigenous individuals, those suffering from mental health conditions, and those who are cognitively impaired.

In *Nur,* this Court carefully considered the question of whether to incorporate reasonable hypotheticals into its modernized s. 12 *Charter* analysis (paras. 47-77). McLachlin CJ concluded that "[t]o confine consideration of the offender's situation runs counter to the long and settled jurisprudence of this Court relating to *Charter* review generally, and to s. 12 in particular" (*Nur,* para. 50).

The Court of Appeal and the trial judge in *Bertrand Marchand* did not consider any reasonable hypotheticals in their analysis. In *H.V.*, the court only considered reasonable hypotheticals raised in other jurisprudence. The Court's decision to focus only on the offender's circumstances in *Bertrand Marchand*, undermines *stare decisis*. The decision in *H.V.* illustrates the benefits of the reasonable hypothetical framework. However, this analysis should be buttressed by incorporating features of other overrepresented groups.

The CBA has long taken the position that the reasonable hypothetical test should incorporate features of overrepresented groups in the criminal justice system (see for e.g. CBA factum, *R. v. Nur,* para. 19, *Hills* and *Hillbach* factum at paras. 17-32). While the Court of Appeal in *H.V.* considered some offenders who are historically marginalized by our criminal justice system, its analysis overlooked Indigenous offenders and those suffering from cognitive impairments. In her concurring judgment in *Morrison*, Justice Karakatanis listed certain factors that could mitigate moral culpability in luring:

> [183] The offender's personal circumstances and relationship with the victim can also vary greatly. Case law shows that luring offences are sometimes committed by individuals who do not have a large age difference with their victims, who have cognitive impairment or mental illness, or who have themselves been assaulted (see, e.g., *R. v. Hood*, 2018 NSCA 18, 409 C.R.R. (2d) 70; *R. v. S. (S.)*, 2014 ONCJ 184, 307 C.R.R. (2d) 147; *R. v. Crant*, 2017 ONCJ 192). These factors can mitigate the moral culpability associated with the offence (see section 718.1 of the *Criminal Code*). [73]

The CBA's submissions would expand the Court's analysis by suggesting reasonable hypotheticals for other groups that are overrepresented in our prison system, such as Indigenous individuals and those with cognitive impairments.

Ensuring an analysis that considers a wide range of reasonable hypotheticals that incorporates features from underrepresented groups promotes access to justice and efficiency in the justice system. It eliminates the need for many individual challenges to mandatory minimums under s. 12 and/or s. 15 of the *Charter,* which would drain court resources. As recognized by Justice McIntyre in his dissenting reasons in *R. v. Smith,* [1987] 1 S.C.R. 1045, part of the purpose of the reasonable hypothetical is to uphold the rights of those claimants who are "simply unable to incur the expense of launching a constitutional challenge" themselves (p. 1084). This is especially pertinent for marginalized groups, who are both overrepresented in the justice system and less likely to have the resources to effectively pursue *Charter* relief.

As McLachlin CJ observed in *Nur* at para. 51:

> [i]f the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely. This violates the rule of law. No one should be subjected to an unconstitutional law: *Big M,* at p. 313. This reflects the principle that the Constitution belongs to all citizens, who share a right to the constitutional application of the laws of Canada.

The reasonable hypothetical framework also promotes substantive equality in sentencing. Characteristics of disadvantage – such as Indigeneity, racialization, or FASD – play a significant role in crafting an appropriate and proportionate sentence (see CBA *Nur* factum, para. 10). A robust s. 12 analysis helps to ensure that the constitutionality of a mandatory minimum is tested against those very individuals for whom a resulting sentence is most likely to be grossly disproportionate.

It is for these reasons that the reasonable hypothetical analysis in *Bertrand Marchand* and *H.V.* should be reaffirmed as the appropriate test for a s. 12 violation.

I. Statement of Regional Interest

The matters raised in this appeal are of national scope and importance.