> **42** The legislative objectives of deterring serious crime and, in particular, serious violent and property crime and protecting Canadians from serious offenders are engaged in Mr. Neary's case.[10]

19. It is respectfully submitted that the above stated legislative objectives are too broad, and conflate policy objectives (i.e., protecting the public) with animating social values (i.e., consistency and clarity to the sentencing regime) and means of achieving those objectives (i.e., paramountcy of denunciation and deterrence, and treating non-violent serious offences as serious offences). A statement of legislative purpose "should be both precise and succinct", as "precision requires that the courts focus on the purpose of the particular statutory provision".[11]

20. Evidence of the impugned law's legislative objective is found in the Hansard transcripts of the parliamentary debates during the first readings of the proposed legislation on September 21, 2012, for example:

> Greater clarity and consistency is needed to limit the availability of conditional sentences and to protect Canadians from serious and violent offenders. In order to address these concerns, the proposed amendments contained in this bill would retain all the existing prerequisites for conditional sentences but would make it crystal clear which offences are ineligible. Specifically, the reforms would eliminate the reference to serious personal injury offences in section 742.1 and would make all offences punishable by 14 years or life ineligible for a conditional sentence.
>
> […]
>
> This government is committed to ensuring that conditional sentences are used the way they were originally intended to be used, and that is for less serious offences. I am confident the more appropriate use of conditional sentence orders will strengthen public confidence in the sanction and administration of justice.[12] [emphasis added]

21. It is important to note that prior to the passing of the *Safe Streets Act* a CSO was only otherwise available if, regardless of the maximum penalty available, the court intended to impose a sentence of less than 2 years – indicating the offence was less serious than for sentences 2 years and over that result in imprisonment in federal penitentiary -- and that the offender not pose a

[10] SKCA RFJ at paras. 34-36, 42
[11] *Safarzadeh-Markhali* at para. 28
[12] Shelly Glover, Parliamentary Secretary to the Minister of Finance, *House of Commons Debates*, 41st Parliament, 1st Session (22 September 2011) at 1305-1320.

safety risk to the public.[13] In this case, the Court of Appeal's sentencing range for marihuana trafficking was 15-18 months, which falls 6 months below the 2 year limitation for CSOs, and Mr. Neary was not considered a risk to the public, thus Mr. Neary was eligible for a CSO but for the maximum sentence amendments implemented by the *Safe Streets Act*.

22. It is respectfully submitted that the Court of Appeal, in applying its analysis of the text, context and scheme of the *Safe Streets Act*, should have concluded that the legislative purpose of the particular challenged *Criminal Code* provisions created by the *Safe Streets Act* is the following: protection of the public by incarcerating offenders in prison who commit serious crimes and pose a risk to public safety.

23. The next step of the s. 7 overbreadth analysis involves consideration of whether the impugned law is overbroad in that the law goes further than reasonably necessary to achieve its legislative goals.[14] The focus is on whether the means of implementing the legislative purpose – the impugned law – "sweeps conduct into its ambit that is unrelated to the law's objective".[15]

24. It is respectfully submitted that the Court of Appeal erred at this stage of the analysis. The Court of Appeal's error arises as a result of the incorrect statement of the legislative purpose of the particular impugned law.

25. The *Safe Streets Act* by way of amending the *Criminal Code* removes the option of a CSO with respect to offenders who commit crimes with a 14 year or life sentence, including trafficking marihuana over 3 kilograms, thereby requiring incarceration in prison of <u>all</u> offenders convicted of these crimes, regardless of the circumstances of the offence or the offender and the safety risk to the public he or she may pose. These amendments (s.742.1 and in particular subsection (c) of the *Criminal Code*) are the means Parliament chose to employ to achieve the legislative purpose of the *Safe Streets Act*, of protection of the public by incarcerating offenders who commit serious crimes and who pose a risk to public safety.

26. The question is whether the means employed – incarcerating <u>all</u> offenders who fall under the ambit of the impugned law regardless of whether they pose a risk to public safety – are

[13] *Criminal Code*, s.742.1 and 742.1(a).
[14] *Safarzadeh-Markhali* at para. 50
[15] *Carter* at para. 86.

overbroad the legislative objectives. It is submitted that the impugned law is overbroad in two ways: 1) it requires incarceration for all offenders who commit the specified drug crimes such as trafficking over 3 kilograms of marihuana, as being "serious crimes" regardless of the length of sentence actually sought by the Crown or imposed by the sentencing court, but which do not inherently involve acts of violence or otherwise necessarily create a threat to public safety depending on the circumstances of each case; and, 2) it requires incarceration of all offenders who commit crimes within the purview of the impugned law such as marihuana drug trafficking even if the said offenders do not commit acts of violence during the offence transaction and who have no past record of violent crime or violent behaviour that would suggest the offender poses any risk to public safety.

27. It is important to note that the impugned law includes offences for which there is no mandatory minimum sentence otherwise restricting or limiting judicial discretion in relation to other non-custodial sentences and circumstances where none of the specific aggravating circumstances set out in the CDSA or *Criminal Code* exist. It is submitted that it is irrational to remove the availability of the CSO option from the sentencing court simply because of the maximum penalty, in particular when the sentence sought by the Crown for the offence at issues is substantially far removed from the maximum penalty, and where the Court of Appeal's previously pronounced sentencing range is 12 to 18 months imprisonment for such offences.

28. In the case of Mr. Neary, whom the Court described as "not… the usual offender"[16] and whose offence was to traffick marihuana,[17] and whom the Crown acknowledged was a solid candidate for a CSO if it had been available[18] due to him not posing a threat to the public, putting Mr. Neary in jail does not serve the legislative purpose of protecting the community from offenders who commit serious crimes and pose a risk to public safety. The *Safe Streets Act* therefore goes further than reasonably necessary to achieve its legislative objective. The impugned law is rationally disconnected from its legislative purpose when applied to Mr. Neary

[16] SKQB RFJ at para. 31

[17] Mr. Neary was convicted of trafficking 7 pound of marihuana and possession for the purpose of trafficking of another 13 pounds of marihuana.

[18] SKQB RFJ at para. 33

and to others like him, and is therefore overbroad in relation to the proper ambit of the legislation.

29. The same conclusion arises with respect to the hypothetical offender presented to the Court of Appeal by way of the Applicant's factum, the hypothetical student who grows and then gives away large quantities of cannabis to his friends:

> Hypothetical – "the Student"
>
> A 20 year-old male ("the Student) lives with his parents at a 100 acre farm in central Saskatchewan north of Prince Albert. He attends college in Prince Albert studying physiotherapy, he works part time as waiter at a restaurant, and he does volunteer work from time to time at a local soup kitchen preparing food for the needy. He plays baseball and volleyball, fixes motorcycles as a hobby. The Student and his friends are into the party scene and marihuana is their recreational drug of choice. That summer the Student secretly grows 20 marihuana plants at a secluded area of the farm, and at the end of summer he harvests a crop of 7 kilograms of poor quality marihuana, far more than he could ever use. He gives away marihuana to his party friends for free from time to time, but on one occasion the police observe him doing this and arrest the Student for trafficking. They get a search warrant for the farm and find 5 kilograms of marihuana in his bedroom closet. The police charge the Student with trafficking and PPT over 3 kilograms, but not production as the remnants of the crop are long gone. The Student has no criminal record. [19]

30. There are myriad other foreseeable offenders who, like the hypothetical student, commit a crime within the impugned law's purview, in particular trafficking of over 3 kg of marihuana, but whose conduct could not be said to meet the definition of dangerous offenders who require removal from society in order to protect the public by way of a sentence of incarceration in jail. Imprisoning the hypothetical student offender and others like him bears no relation to the purpose of *Safe Streets Act*. Consequently the impugned provisions go too far and capture people that they were not meant to capture and are overbroad.

31. The Court of Appeal's conclusions as to whether the impugned law is overbroad are as follows:

[19] The Court of Appeal dismisses Mr. Neary's reasonable hypothetical without giving reasons for doing so at para. 43 of the Court of Appeal's Reasons for Judgment.

> **42** The legislative objectives of deterring serious crime and, in particular, serious violent and property crime and protecting Canadians from serious offenders are engaged in Mr. Neary's case. The offences he has committed are serious. The Canadian public must be protected from the conduct in which Mr. Neary was engaged. His offences, even though non-violent, must be dealt with as serious offences for sentencing purposes. The removal of a conditional sentence as an alternative to institutional incarceration serves the legislative objectives of the impugned law, i.e., to deter serious crime and, in particular, violent and property crime, and to protect Canadians from serious offenders. Mr. Neary clearly falls within the law's intended scope.
>
> […]
>
> **45** In this case the provisions are not overbroad. Mr. Neary has been convicted of serious drug offences. While, admittedly, he poses a reduced threat to the public, the purpose of the *Act* is to address serious crimes and Mr. Neary has been found to have committed those serious crimes.

32. It is respectfully submitted that the Court of Appeal erred by focusing its overbreadth analysis on denunciation and deterrence of serious crime as the legislative objective of the impugned law and to the exclusion of the threat the individual offender who has committed a crime identified as a "serious crime" by the *Safe Streets Act* poses to society.

33. It is respectfully submitted that the Court of Appeal erred in its analysis by concluding that the legislative objective of the impugned law is served by removing <u>all</u> offenders from society who commit a crime identified as "serious crimes" by the *Safe Streets Act* regardless of whether said offenders pose a threat to public safety. It is submitted that the offenders who commit the identified offences must also pose a risk to public safety to fall within the lawful ambit of the legislative objectives of the *Act*. As the impugned law captures non-violent offenders who do not pose a threat to public safety the effect of the impugned law "is to deprive some persons of liberty for reasons unrelated to its purpose", and is therefore overbroad and in breach of Mr. Neary's right to liberty under s. 7 of the *Charter*.[20]

34. The impugned law impacts all offenders across Canada who are convicted of the offences covered by the impugned law, and therefore many non-violent offenders have been or will be sentenced to imprisonment when they could be serving a sentence in the community by way of a CSO but for the impact of the impugned law. The Court of Appeal in this case, and the Ontario Superior Court of Justice in the case of *R. v. Sawh*, 2016 ONCJ 7797, have upheld the impugned

[20] *Safarzadeh-Markhaliat* para. 22

law as constitutional. The Applicant respectfully submits that these courts have erred in upholding the impugned law, and the impact of these decisions results in breaches of many Canadians' right to liberty under s. 7 of the *Charter*. It is therefore submitted that the issue of the constitutionality of the impugned law is of national importance and merits consideration by the Supreme Court of Canada.

Issue 2: Is it an error of law for sentencing judges to consider changes in the social-legal context, in this case the pending legalization of marihuana, when exercising their discretion to determine the weight to place on denunciation and deterrence in the circumstances?

35. In *R v. Lacasse*, supra, this court held that sentencing judges have a broad discretion to impose the sentence they consider appropriate, within the limits of the law, and the appellate standard of review is deferential. An appellate court may only substitute its own sense of an appropriate sentence when the sentence imposed by the trial court is demonstrably unfit or when the trial court makes an error in principle, fails to consider a relevant factor, or gave erroneous consideration to an aggravating or mitigating factor, that had an impact on the sentence. [21],

36. In the circumstances of this case, the sentencing Judge had a wide discretion to impose a sentence ranging from a suspended sentence and probation subject to conditions under s. 731 of the *Criminal Code* to imprisonment for life as the maximum penalty provided for pursuant to s. 5 of the *CDSA*, and the sentencing judge was not limited in his discretion by any of the mandatory minimum punishments set out in section 5(3) of the *CDSA*, nor were any relevant aggravating factors found to be present as set out in s. 10 of the *CDSA* or those set out in s. 718.2 (a) of the *Criminal Code.* The sentencing judge followed the direction of Parliament set out in s. 718.2(d) and (e) of the *Criminal Code* by finding that a less restrictive sanction than deprivation of liberty was appropriate in the circumstances and that sanctions were available other than imprisonment that were reasonable in the circumstances.

37. While the sentencing Court dismissed a constitutional challenge pursuant to ss. 7 and 12 of the *Charter* to the removal of the availability of a CSO pursuant to section 742.1 of the *Criminal Code*, notwithstanding the concession of the Crown that the Applicant would be a

[21] See *R v. Lacasse*, 2015 SCC 64 at paras. 39, 43-44, 48–55, 58, 60, 67-68 and 78

classic candidate for such order if available, the Court noted the absence of any minimum sentence in the circumstances and that all the removal of the availability of the CSO had done was "to remove from the judicial quiver the arrow of a conditional sentence order," noting that a full range of sentencing options were still available to him, notwithstanding the seriousness of the offences and their commercial nature, including that a fine or suspended sentence were still available.[22]

38. While the Court of Appeal found – it is submitted erroneously based on the record – that the sentencing Judge overemphasized the Applicant's personal circumstances and underemphasized the circumstances of the offence and its seriousness, and the Applicant's moral culpability, its fundamental concern was that the sentencing Judge chose to depart from the usual sentencing range set out by the Court of Appeal, "in large part" because the sentencing Judge took into account the federal government's statement of intent to "legalize marihuana" and that this pending change resulted in an attenuation of the sentencing purposes and principles of "denunciation" and "deterrence". The sentencing Judge found that the circumstances presented an "interregnum", a time that exists between two governing regimes, and that while the precise dimensions of the new regime were unclear, in the circumstances the change will occur and that it would not be an intellectually honest act to blindly follow the sentencing regime of 15 to18 months imprisonment in the face of the coming changes. As the sentencing Judge put it: "However, facing the reality that the product in which he dealt is to become legal, it should be said that the decibel level of such denunciation and deterrence may be less than it otherwise would be".[23] However, the Court of Appeal was of the view that it is an error of law to take into account these pending announced changes, that this error of law justified appellate intervention, and therefore weighed these factors differently based on prior cases that viewed cannabis offences in a much different and harsher light when the substance had not officially been announced by the Government of Canada to be pending legalization, ultimately imposing a 15 month sentence.

39. It is submitted that the pending legalization and regulation of marihuana constitutes what has been characterized in the jurisprudence as a significant development in the circumstances or

[22] SKQB RFJ at paras. 26 -28
[23] SKQB RFJ at paras. 33 to 37

the law, or a change in the social-legal matrix, such that new legal issues arise even where the substantive facts of the case are similar to previous cases: *Carter v. Canada*, 2015 SCC 15 at paras. 44-45, 109; *Canada v. Bedford*, 2013 SCC 72 at paras. 41-44.

40. It is respectfully submitted that the Court of Appeal erred in law and principle in holding that a change in the legal context is irrelevant to the Trial Judge's consideration of the level of need for denunciation and deterrence. The Supreme Court made this clear in *Carter v. Canada*, *supra*:

> **44** The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, *2013 SCC 72*, *[2013] 3 S.C.R. 1101*, at para. 42).
>
> **45** Both conditions were met in this case. The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide.
>
> See also: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at paras. 41-45 and *R. v. Elliott*, 2017 BCCA 214 at paras. 36-38

41. The pending legalization of marihuana that has resulted from the change in government certainly meets the definition of a change in the factual circumstances that fundamentally shifts the parameters of the legal debate on the issue of the level of harm posed to society by recreational marihuana use in particular and whether its use, possession and sale should remain criminalized activities. Indeed, in direct relation to this case, it is difficult to imagine a greater shift in the circumstances or the legal debate about how marihuana offences should be viewed, considering the previous government imposed mandatory minimums for several marihuana offences and removed the availability of conditional sentence orders for many marihuana offenders (such as the Applicant), and now a new government intends on legalizing marihuana

production, sale, and possession, to tax the sale of the product, and to allow it to be sold through licensed vendors.[24]

42. It is further submitted that, not only was it reasonable for the sentencing Judge to consider the legal fact of pending marihuana legalization and how it impacts on the need for denunciation and deterrence, it would have been unreasonable for him to ignore this fundamental change in the social-legal circumstances. The sentencing Judge carefully considered this change in the legal landscape, noting that the particulars about the new system were as yet unknown, and did not say that 'denunciation' and 'deterrence' for marihuana crimes no longer applied; rather the sentencing Judge reasonably found that as a result of the change in the circumstances "it should be said that the decibel level of such denunciation and deterrence may be less than it otherwise would be".[25]

43. It is submitted that had the sentencing Judge, as he put it, "blindly follow[ed] the current sentencing regime"[26] and imposed a sentence of incarceration within the then existing sentencing range of 15 to 18 months, without the possibility of a conditional sentence order, and without considering the impact of the pending legalization of marihuana, this would have been an unreasonable exercise of judicial discretion that would have resulted in a manifestly unfit and disproportionate sentence and, as the sentencing Judge aptly put it, "not an intellectually honest act in the face of the coming change".[27]

44. In conclusion, it is submitted that the Trial Judge did not err in law or in principle by considering the relevant pending fundamental change in the circumstances pertaining to marihuana offences, and the public's perception of the relative evils of marihuana use and thus the gravity of marihuana offences that those changing circumstances reflect, in his assessment of the weight that should be accorded to the sentencing principles of denunciation and deterrence.

---

[24] It should also be noted that the recent legalization in other countries and in several states in the United States of America also contributes to the existence of a change in the broader social and legal context as it pertains to the acceptable uses of marihuana.

[25] SKQB RFJ at para. 37
[26] SKQB RFJ at para. 36
[27] SKQB RFJ at para. 36

45. It is submitted that this Court has set a threshold that Courts of Appeal "may not intervene lightly" on the basis that a trial judge has committed an error in principle that impacted on the sentence and a "very high" threshold when it comes to interfering on the basis that the sentence is demonstrably unfit.[28] It is submitted that the trial judge here did not make an error in principle by taking into account the change in circumstances that fundamentally shifted the parameters of the legal debate on the issue of how marihuana will be regulated in the future, nor did the sentencing Judge unduly emphasize one factor over another nor did he overlook any of the factors of sentence. The sentencing Judge properly and judiciously weighed the factors of sentencing and in doing so did not impose a demonstrably unfit sentence by choosing not to follow the previous range set out by the Court of Appeal, because of the changing circumstances and the limited application of prior cases in that regard, and the exceptional circumstances of the offender before the Court. The sentencing Judge imposed a sentence that was lawful and within his jurisdiction as one of the legal options available, and proportionate in consideration of the unusual circumstances of the offender. It is respectfully submitted that the Court of Appeal should not have intervened, and that the sentence ordered by the sentencing judge should be restored and upheld on appeal.

46. It is further submitted that the issue of whether it is an error of law for a sentencing judge to consider the pending legalization of marihuana in determining the weight to accord to the principles of denunciation and deterrence, and as a basis for ordering a lighter sentence than would otherwise be ordered in view of the existing past sentencing range but for the change in the social-legal circumstances, is an issue that affects all current and future offenders convicted of any marihuana offence, and is therefore an issue of national importance requiring clarification, particularly in light of conflicting decisions on this issue between the Saskatchewan Court of Appeal and the British Columbia Court of Appeal in the interpretation of past decisions of this Court

PART IV – COST SUBMISSIONS

47. The issues of national importance on this application are matters requiring clarification in the public interest as they impact the availability of conditional sentence orders for not only Mr.

[28] See *R v. Nasogaluak*, [2010] 1 S.C.R.206 at 39, 40, and 43

Neary but others who are similarly situated, as well as the ambit and scope of the discretion of a judge at sentencing in relation to the consideration of new social/legal developments when considering the sentencing purposes and principles of "denunciation" and "deterrence" which will also impact others that are similarly situated to Mr. Neary, and therefore, the applicant seeks public interest costs on a special costs or substantial indemnity basis.

PART V – ORDER SOUGHT

48. It is respectfully requested that the Applicant be granted leave to appeal the decision of the Court of Appeal for Saskatchewan due to the issues of national importance arising, with costs in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of June, 2017.

Conroy & Company

_____

John W. Conroy, Q.C.
Matthew J. Jackson
Chris Lavier
Solicitors for the Applicant S. Neary

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTORY AUTHORITIES

1. *Supreme Court of Canada Act*, R.S., 1985, c.S-26, s.40
   http://laws-lois.justice.gc.ca/eng/acts/S-26/FullText.html

2. *The Controlled Drugs and Substances Act, SC 1996, c. 19,s.5,7,10*
   http://laws-lois.justice.gc.ca/eng/acts/C-38.8/

3. *The Criminal Code of Canada*, R. S. C. 1970, c. C – 34, s.718,718.1,718.2,742.1
   http://laws-lois.justice.gc.ca/eng/acts/C-46/

4. *The Safe Streets and Communities Act*, SC, 2012, c. 1
   http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_1/FullText.html

5. *Bill C-45 - The Cannabis Act* 2018
   http://www.parl.ca/DocumentViewer/en/42-1/bill/C-45/first-reading