File No. 37608

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

SEAMUS JOHN NEARY

APPLICANT
(Respondent/Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant/Respondent)

APPLICATION FOR LEAVE TO APPEAL
FILED BY THE APPLICANT, SEAMUS JOHN NEARY
PURSUANT TO SECTION 40(1) OF THE *SUPREME COURT ACT*
AND SECTION 691(1)(B) OF THE *CRIMINAL CODE*

Co-counsel for the Applicant:

CHRIS LAVIER
LAVIER LAW OFFICE
Historic Land Titles Building
311 21st Street East
Saskatoon SK S7K 0C1
Tel: (306) 653-5656 ext. 5
Fax: (866) 306-3065
Email: chris@306law.com

JOHN W. CONROY, Q.C.
MATTHEW J. JACKSON
CONROY & COMPANY
2459 Pauline Street
Abbotsford, BC V2S 3S1
Tel: (604) 852-5110
Fax: (604) 859-3361
Email: jconroy@johnconroy.com
mjackson@jacksonlitigation.ca

Agent for Co-counsel for the Applicant:

MOIRA S. DILLON
SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, ON K1P 5H9
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Counsel for the Respondent:

Wade E. McBride
Public Prosecution Service of Canada
Saskatoon Office
123 – 2nd Avenue South, 10th Floor
Saskatoon, SK S7K 7E6
Tel: (306) 975-6187
Fax: (306) 975-4507
Email: wade.mcbride@ppsc-sppc.gc.ca

Agent for Counsel for the Respondent:

François Lacasse
Public Prosecution Service of Canada
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: flacasse@ppsc-sppc.gc.ca

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW OF THE APPLICANT'S POSITION WITH RESPECT TO ISSUES OF NATIONAL IMPORTANCE RAISED ON THIS APPLICATION.

1. The Applicant seeks leave of the Supreme Court to consider the following constitutional issue of national importance:

> Whether the *Safe Streets Act*, which *inter alia* eliminates the availability of Conditional Sentences of Imprisonment ("CSOs") under the *Criminal Code* for all offenders convicted of an indictable offence for which the maximum term of imprisonment is 14 years or life (s.742.1(c)), is by its application to offences such as marihuana trafficking that do not necessarily involve violence and offenders who are not a danger to the community and who clearly meet the conditions for the imposition of a CSO if available, is 'overbroad' in relation to the legislative purposes of the *Safe Streets Act*, thereby impacting the applicant's liberty (and others like him) in violation of the principle of fundamental justice of 'overbreadth' in breach of s. 7 of the *Canadian Charter of Rights and Freedoms* ["*Charter*"], and in a manner that is not justifiable under s. 1 of the *Charter*?

2. The Applicant's position is that s. 742.1(c) does violate his s. 7 *Charter* rights in a manner that is not in accordance with the principles of fundamental justice and that is not justifiable under s. 1 of the *Charter.*

3. The Applicant also seeks leave of the Supreme Court to consider the following issue of national importance:

> Whether a sentencing court that enjoys a wide discretion to impose a sentence from ranging from probation to imprisonment, there being no statutory aggravating factors present in the circumstances and no mandatory minimum penalty required, and in a case involving cannabis (marihuana) in 2016, in considering the s. 7 *Charter* issue above, and in considering the Purposes and Principles of sentencing (*Criminal Code*, s.718 and in particular, (a) "denunciation" and (b) "deterrence"), the fundamental principle of proportionality between the gravity of the offence and the degree of responsibility of the

offender (*Criminal Code*, s.718.1) and other sentencing principles (*Criminal Code*, s.718.2, and in particular (d) the appropriateness of less restrictive sanctions and (e) all available sanctions other than imprisonment that are reasonable in the circumstances), when weighing the sentencing purposes and principles of "denunciation" and "deterrence" in particular, is entitled or is not precluded from taking into account changes in the social-legal context, in this case the fact that the new Government of Canada had announced that it proposes to "legalize and regulate" this particular substance/product Cannabis (Marihuana) thereby removing it from the criminal law and in particular schedule II to the *Controlled Drugs and Substances Act* [the "*CDSA*"], as signaling a lessening of the seriousness of the offences and therefore of the reduced emphasis to be placed upon denunciation and deterrence, without erring in law or in principle?

4. The Applicant's position is that sentencing judge's do have discretion to take into consideration changes in the social-legal context in considering *Charter* issues and sentencing principles and factors generally and particularly as to what weight to place on denunciation and deterrence in light of the changed circumstances. Furthermore, there appears to be a conflict or inconsistency in the decisions of the Saskatchewan Court of Appeal in this case and the British Columbia Court of Appeal in its recent decision in *R. v. Elliott,* 2017 BCCA 214 at paras. 36 to 38, and it is therefore of national importance to clarify the matter.

B. STATEMENT OF FACTS

5. In 2012 the previous Government of Canada passed into law the *Safe Streets Acts* which by operation of s. 34 amended s. 742.1 of the *Criminal Code*, which *inter alia* removed CSOs as an option for sentencing judges in sentencing offenders charged with trafficking and possession for the purpose of trafficking in Cannabis (marihuana) in an amount over 3 kilograms.

6. In October 2015 a federal election occurred and a new government was elected on a platform that included a policy and election promise to legalize and regulate cannabis (marihuana). In November 2015 the new Prime Minister of Canada, in furtherance of this election promise, instructed Cabinet members in writing by way of specific mandate letters to the Minister of Justice and Attorney General of Canada, the Minister of Public Safety and

Emergency Preparedness, and the Minister of Health, to work together to create a federal, provincial/territorial process that will lead to the legalization and regulation of marihuana.[1]

7. On November 16, 2015, Mr. Neary was convicted after trial before Justice R.S. Smith in the Saskatchewan Queen's Bench of possession of marihuana for the purpose of trafficking under section 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ["*CDSA*"], trafficking in marihuana in an amount exceeding 3 kg contrary to section 5(1) of the *CDSA*, and possession of proceeds obtained by crime contrary to sections 354(1) and 355(b) of the *Criminal Code,* and pled guilty to the possession of psilocybin contrary to section 4(1) of the *CDSA*, all relating to events of February 5th and 6th, 2014. The maximum sentence for section 5(1) and 5(2) offences is "imprisonment for life" pursuant to s. 5(3)(a) of the *CDSA.*

8. On June 23, 2016, Justice R.S. Smith [the "sentencing Judge"] issued Judgment, 2016 SKQB 218, on the *Charter* applications and ordered a suspended sentence of 2 years on all charges concurrently subject to 12 conditions, including a condition that he remain in his residence between the hours of 9 PM and 7 AM every day until August 31, 2016, except for purposes of employment and with the permission of the probation officer, and 4 incidental or ancillary orders, including forfeiture of funds seized, four victim fine surcharges, an ancillary 10 year firearms prohibition, and a DNA sample order.[2]

9. In June 2016 the Government of Canada in furtherance of its mandate to legalize and regulate Cannabis(marijuana) released a 'Discussion Paper' and established a Task Force on Cannabis Legalization and Regulation that in turn produced a final report on November 30, 2016 making recommendations as to how the government of Canada should carry out its mandate in this regard, and that report, "A framework for the legalization and regulation of cannabis in

[1] Mandate Letters were before the court at sentencing and on appeal and are attached as legal materials herein.

[2] Judgment and reasons for judgment by the trial and sentencing Court on the *Charter* applications [hereinafter referred to as SKQB RFJ], at paras. 38-39.

Canada", was made available to the Saskatchewan Court of Appeal at the time of the appeal in January 2017.[3]

10. Further, on April 12, 2017, the Government of Canada introduced Bill C-45 - *An Act respecting Cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, also known as the '*Cannabis Act*', and announced that it proposes to have it enacted into law on July 1, 2018. The proposed *Cannabis Act* makes lawful the personal possession of up to 30 grams of cannabis by an adult (a person over the age of 18 years), up to 5 grams for a 12 to 17 year old, permits the production of up to 4 plants per residence, the sharing and distributing between such adults and young persons but with no distribution by adults to young persons, and a framework for the role of the provinces and territories in the sale of cannabis, including detailed provisions with respect to promotion and advertising among other things analogous to the provisions in the *Tobacco Act*.[4]

11. On April 25, 2017 the Saskatchewan Court of Appeal [the "Court of Appeal"] issued reasons for judgment, 2017 SKCA 29 [hereinafter referred to as "SKCA RFJ"]. The Court of Appeal allowed the Crown's sentence appeal and imposed a sentence of 15 months imprisonment, and dismissed the Applicant's constitutional challenges based on sections 7 and 12 of the *Charter* to section 742.1(c) of the *Criminal Code*. The Court of Appeal found that the sentencing Judge overemphasized the Applicant's personal circumstances and underemphasized the circumstances of the offence and that the sentencing Judge failed to take into account the seriousness of the offence and the Applicant's moral culpability. In addition the Court of Appeal emphasized in particular that the sentencing Judge erred in law in considering the federal government's proposed pending legalization of cannabis as impacting the sentence by attenuating the emphasis or "decibel level" of the sentencing factors of "denunciation" and "deterrence" in the circumstances, thereby justifying appellate intervention following the principles and directions set out in relation to such intervention in a sentencing court's discretion by this Court in *R v. Lacasse*, 2015 SCC 64.

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[3] *A framework for the legalization and regulation of cannabis in Canada*, Task Force on Cannabis Legalization and Regulation. http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/index-eng.php

[4] SKCA RFJ at para. 46 and 47

12. The constitutional issue brought before this Court on this application for leave is of national importance in view of the fact that all Canadians convicted of offences (in particular marihuana offences) with a maximum 10 year, 14 year or life sentence, are affected by the decision of the Court of Appeal in this case and by the decision of the Ontario Court of Justice in the case of *R. v. Sawh*, 2016 ONSC 7797, upholding s. 742.1(c) of the *Criminal Code*, such that these offenders (including Mr. Neary) who receive sentences of less than two years and who do not pose a risk to the public are not able to receive a CSO, thereby depriving all such offenders of liberty by requiring the sentence be served in actual prison rather than in the community. The Applicant seeks leave from this Court to determine whether the deprivation of liberty he and others like him have or will suffer as a consequence of s. 742.1(c) is the result of an unconstitutional law that deprives such offenders of liberty in a manner that does not accord with the principles of fundamental justice in violation of s. 7 of the *Charter*.

13. The issue of whether a sentencing judge may consider the pending legalization of Cannabis (marihuana) as a change in the social-legal context that lessens the emphasis to be placed on denunciation and deterrence in determining a fair and fit sentence affects all Canadians convicted of any cannabis(marihuana) offences.. The Court of Appeal's prohibition of sentencing judges considering the change in social-legal context of pending marihuana legalization as an error of law therefore impacts all Canadians in Saskatchewan convicted of these offences and potentially all Canadians convicted of marihuana offences should courts in other provinces choose to follow the Court of Appeal's decision. Recently, the Court of Appeal for British Columbia appears to have come to a different conclusion in the case of *R v. Elliott*, 2017 BCCA 214 ,at para.s 36 –37 in the course of its decision striking down the mandatory minimum of 6 months imprisonment under section 7(2)(b)(i) of the *CDSA* for Cannabis (marihuana) production, as follows:

> [36] Finally, *Charter* interpretation is energized by and must take account of changing social values and expectations: *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 47; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 41, 44; *R. v. Nur*, 2011 ONSC 4874 at para. 49 (varied on other grounds, 2013 ONCA 677; aff'd 2015 SCC 15); *Al-Isawi* [2017 BCCA 163 (CanLII)] at paras. 51-52. Values are not immutable. They change in response to changing social conditions, social sentiments and expectations, evolving human knowledge, and technological advancement. For this

reason, the *Charter* must adapt to changes in social context and not remain frozen in the past.

[37] The point is this: assessing whether the mandatory minimum term of imprisonment applicable in this case is grossly disproportionate requires consideration of widespread changes in social attitudes towards small-scale, non-commercial marijuana production and use. The Court cannot blind itself to these changes or to the different policy and legislative choices currently being debated to address the complex issues that arise in this area.

[38] While informed by context, the issue before the Court in this case is limited to the very narrow question of whether reasonably foreseeable applications of s. 7(2)(b)(i) of the *CDSA* and imposition of the mandatory minimum term of six months imprisonment for producing between six and 200 plants for the purposes of trafficking would violate s. 12 of the *Charter*. This judgment does not address any of the other sentencing provisions contained within s. 7 of the *CDSA.*

Consequently, there are conflicting decisions from 2 provincial courts of appeal on this issue that require clarification as a matter of national importance

PART II: STATEMENT OF QUESTIONS IN ISSUE

14. The Applicant seeks leave from the Supreme Court to consider the following two issues of national importance:

i. Is s. 742.1(c) of the *Criminal Code* unconstitutional as being "overbroad" the legislative purposes of the implementing legislation, the *Safe Street Act*, in breach of the Applicant's right to liberty under s. 7 of the *Charter* and in a manner that is not justifiable under s. 1 of the *Charter*?;

ii. 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?

PART III: STATEMENT OF ARGUMENT

Issue 1: Is s. 742.1(c) of the *Criminal Code* unconstitutional as being "overbroad" the legislative purposes of the implementing legislation, the *Safe Street Act,* in breach of the

Applicant's right to liberty under s. 7 of the *Charter* and in a manner that is not justifiable under s. 1 of the *Charter*?

15. The first step in a challenge to the constitutionality of a law under s. 7 of the *Charter* requires consideration of whether the impugned law interferes with the Applicant's rights to life, liberty and security of the person.[5] In this case the Applicant's liberty interest is engaged as the impugned law has resulted in his actual imprisonment in jail for 15 months rather than serving his sentence in the community by way of a CSO.

16. Once it has been established that a protected s. 7 right is engaged, the next step requires consideration of whether the impugned law's impact on an individual's s. 7 protected rights accords with the principle of fundamental justice that a law not be overly broad in its application, referred to as the principle of "overbreadth".[6] The first stage of the overbreadth analysis requires identification of the legislative purpose of the impugned law.[7] The second stage requires consideration of whether the legislative means employed to achieve the identified legislative purpose impacts the life, liberty and security of the person interests of one or more individuals in a manner that is irrationally disconnected from the legislative purpose.[8]

17. The Applicant respectfully submits that the Court of Appeal erred at the first stage of the s. 7 overbreadth analysis in its application of the legislative purpose analysis to the *Safe Streets Act*, in particular the removal of CSOs for offences that carry a 14 year or life maximum sentence as implemented by the creation of s.742.1(c) of the *Criminal Code* (hereinafter referred to as the "impugned law").

18. The Court of Appeal's statement of the legislative purpose of the impugned law is found at paras. 34-36 and 42, as follows:

> **34** Excerpts from *Hansard* related to the *Act* as referenced in the trial judge's decision and additional excerpts of the comments of the Parliamentary Secretary to the Minister of

[5] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 55
[6] *Carter* at paras. 71-72; *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at paras. 101, 112
[7] *R. v. Safarzadeh-Markhali*, [2016] 1 S.C.R. 180 at para. 23
[8] *Safarzadeh-Markhali* at paras. 24-29

Justice cited by Mr. Neary in his factum[9] fairly disclose that the purpose of the *Act* is to:

> (a) provide consistency and clarity to the sentencing regime;
>
> (b) ensure certain non-violent serious offences will be treated as serious offences thus avoiding the use of conditional sentencing for those offences;
>
> (c) protect Canadians from violent offenders;
>
> (d) emphasize the objectives of denunciation and deterrence as sentencing principles for importing, exporting, trafficking and production of drugs, and eliminate the possibility of conditional sentences for these types of offences; and
>
> (e) ensure conditional sentences are used for less serious offences and provide consistent benchmarks regarding the use of such sentences.

35 On this basis, I conclude that the *Act* reflects at least the following broad purposes:

> (a) providing consistency and clarity to the sentencing regime;
>
> (b) promoting of public safety and security;
>
> (c) establishing paramountcy of the secondary principles of denunciation and deterrence in sentencing for the identified offences; and
>
> (d) treating of non-violent serious offences as serious offences for sentencing purposes.

36 Parliament, by passing the *Act*, has emphasized the need for denunciation and deterrence as it is entitled to do. Drug trafficking is a serious offence that warrants social deterrence and sanction (*R v Pearson*, *[1992] 3 SCR 665* at 694-695; *R v Silveira*, *[1995] 2 SCR 297* at para 168). It is a crime of enormous social consequence which causes a great deal of societal harm (*R v Benedetti*, *1997 ABCA 169* at para 13, *[1997] 7 WWR 330*). It is trite that trafficking and possession for the purpose offences are serious by their very nature.

[…]

[9] Mr. Neary's counsel clarified during oral submissions that Mr. Neary was relying on the analysis set out in *Safarzadeh-Markhali*, a case not known to him at the time of writing the factum, and that in light of the Court's analysis in *Safarzadeh-Markhali* Mr. Neary's counsel submitted that the primary legislative objective of the *Safe Streets Act* was protection of the public.

> **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.

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[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

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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