Court File No. 39438

THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

OCEAN WILLIAM STORM HILBACH & CURTIS ZWOZDESKY

Respondents

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CANADIAN BAR ASSOCIATION

Interveners

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(OCEAN WILLIAM STORM HILBACH, RESPONDENT)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Crown appeals from the decision of the Alberta Court of Appeal, dismissing the appeal from the declaration of the sentencing judge that the minimum mandatory sentence for Armed Robbery with a prohibited firearm under s.344(1)(a) of the *Criminal Code* was in violation of s.12 of the *Charter* and not saved by s.1, and therefore was of no force and effect, and from the sentence of three years and six months incarceration imposed. Ancillary orders were also imposed, with which no one takes issue. It should be noted that the Alberta Court of Appeal stayed the execution of the remainder of the sentence over and above the sentence of two years less a day imposed by the sentencing judge, as the Respondent had fully served the sentence by the time of the appeal.

2. The circumstances of the offence, and of the offender, were thoroughly set out in the Court below by way of an Agreed Statement of Facts, a Pre-Sentence Report, and a Gladue Report, all of which were entered as exhibits, and formed part of the record in that Court. The Pre-Sentence Report and Gladue Report are reproduced in the Record of the Respondent in this Court. The circumstances of the offence are summarized in the Factum of the Crown Appellant, and the Respondent takes no issue with that summary.

3. The Alberta Court of Appeal was divided in this case. The dissenting decision of Wakeling, JA, citing evidence never called by any party at any level of court, [1] held that the s.12 jurisprudence of this Honourable Court is "unsound", and noted that he had previously invited this Court to re-consider its position[2], citing his own dissenting decision in *R. v. Hills*.[3]

4. The majority decision agreed with the sentencing judge that the mandatory minimum sentence of five years was grossly disproportionate, although they differed as to a fit sentence, finding that three years was the fit sentence for this offender. Hilbach did not rely on any hypotheticals, relying on his own circumstances to demonstrate disproportionality. The majority considered the serious and violent nature of the offence and the circumstances of its commission.

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[1] Appellant's Record, p. 55.
[2] Appellant's Record, p. 56.
[3] *R. v. Hills* 2020 ABCA 263 (leave to appeal granted, SCC 39338).

They took into account the offender's prior criminal record, and the foreseeable impact on the victims and the community.[4]

5. The majority held that deterrence and denunciation were primary sentencing goals in a case of this nature, and specifically cited the principles articulated in ss.718-718.2 of the *Criminal Code*.[5]

6. The majority cited the correct test for the s.12 analysis, and found:

> *that a reasonable, properly informed Canadian, taking into account all of these considerations, would find the mandatory minimum five-year sentence imposed upon Mr. Hilbach, compared to a fit and proper sentence of three years, to outrage standards of decency, and find the sentence abhorrent or intolerable. An additional two years in jail over and above a fit and proper sentence would shock the conscience of the reasonable person.*[6]

7. The majority decision did not stake out any new law, nor disagree with, or fail to follow the binding s.12 jurisprudence of this Honourable Court, as defined in *R. v. Nur* [7], *R. v. Lloyd* [8] and *R. v. Boudreault*[9] . It does not appear that the Crown (as distinct from Wakeling JA) is asking this Court to re-define s.12 doctrine. The Crown's argument simply amounts to saying that this offender should have received a higher sentence.

PART II – ISSUES

Issue No. 1

8. Where an offender commits the offence of robbery with a firearm, does the mandatory minimum sentence of four years pursuant to section 344(1)(a.1) of the *Criminal Code* infringe section 12 of the *Canadian Charter of Rights and Freedoms?*

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[4] Appellant's Record, pp.46-47.
[5] Appellant's Record, p. 47, paras. 45-46.
[6] Appellant's Record, p.48, para. 54.
[7] *R. v. Nur* 2015 SCC 15.
[8] *R. v. Lloyd* 2016 SCC 13.
[9] *R. v. Boudreault* 2018 SCC 58.

Respondent's Position:

9. As this issue relates only to the co-respondent Zwozdesky, this Respondent makes no submissions.

Issue No. 2

10. Where an offender commits the offence of robbery with a restricted or prohibited firearm, does the mandatory minimum sentence of five years pursuant to s.344(1)(a)(i) of the *Criminal Code* infringe s.12 of the *Canadian Charter of Rights and Freedoms*?

Respondent's Position

11. The Respondent respectfully submits that the mandatory minimum sentence does meet the s.12 test of cruel and unusual punishment, in that it is grossly disproportionate to a fit sentence for this offender and this offence. In the particular circumstances of this case, the majority of the Court of Appeal held that a fit sentence would be 3 years' incarceration. Although this Respondent did not rely on any reasonable hypotheticals, the trial judge did consider some hypotheticals, and a more sympathetic offender, for whom an even lower sentence would be fit, is not difficult to picture. The analysis should start from the proposition articulated by this Court in *Wust* [10]:

> *Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the Code, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the Code: the principle of proportionality.*

PART III – ARGUMENT

Gross Disproportionality

12. The Factum of the Crown Appellant correctly sets out the test to be applied in an application under s.12 to consider whether a mandatory minimum sentence is grossly disproportionate, and thus amounts to cruel and unusual punishment in breach of s.12.

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[10] *R. v. Wust* [2000] 1 S.C.R. 455, at para. 18.

13. The Respondent submits that the majority judgment of the Alberta Court of Appeal correctly states and correctly applies that test.

14. This Honourable Court stated:

> *To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the Charter involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the Criminal Code. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the Charter.*[11]

15. The majority decision of the Court of Appeal determined that the fit sentence for this Respondent was three years. The Court then went on to consider the relationship between that fit sentence and the mandatory minimum five-year sentence:

> *Is the additional two-year sentence "so excessive as to outrage standards of decency" that reasonable, well-informed Canadians "would find the punishment abhorrent or intolerable"? The application of this test must evaluate the perception of a reasonable person "properly informed of the philosophy of the legislative provisions, the values set out in the Charter, and the full circumstances of the case." The reasonable person "is a thoughtful person not prone to emotional reaction, who has knowledge of the circumstances of the case" (R v Bentley, 2017 ABQB 221, para 53), considering whether the punishment is necessary to achieve a valid penal purpose and whether there are valid alternatives to the punishment: Boudreault, para 48.*[12]

16. In answering that question, the majority held that the mandatory minimum sentence was so high that it had the effect of subordinating all other sentencing considerations to the goals of denunciation and deterrence, thus running contrary to the principles articulated by this Honourable Court in *Boudreault* [13], at para's 80-83:

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[11] *R. v. Nur* 2015 SCC 15, at para. 46.
[12] Appellant's Record, p. 48, para. 52.
[13] *Supra*.

[81 The problem with the victim surcharge regime is that it elevates this one objective above all other sentencing principles. Most obviously, it ignores the "fundamental principle" of proportionality set out in s. 718.1 of the Code. Relatedly, it does not allow sentencing judges to consider mitigating factors or to look to the appropriate sentences received by other offenders in similar circumstances: see Michael, at para. 91.

[82 Moreover, it utterly ignores the objective of rehabilitation: s. 718(d) of the Code. Rehabilitation must be designed with the specific offender in mind and is best advanced by appropriate treatment and/or punishment aimed at reintegration and future success. In my view, an insurmountable criminal sanction does little or nothing to foster this objective.

[83 Finally, the surcharge also undermines Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison: s. 718.2(e) of the Code. This Court has recognized the need to adapt criminal sentencing given "the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system": R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, at para. 34. As a result, any criminal sanction that falls disproportionately on the marginalized and vulnerable will likely fall disproportionately on Indigenous peoples: R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 61-62 and 77. Just as Indigenous peoples remain overrepresented in Canada's prisons, so we may expect them to be overrepresented at committal hearings for defaulting on a surcharge order.

Scope of Offence

17. While the Crown asserts that the Court of Appeal erred in the application of the s.12 test, the arguments advanced amount to a mere disagreement with the assertion that robbery is a broadly-defined offence, which can be committed in different ways, attracting greater or lesser degrees of seriousness and moral culpability. In fact, although the majority decision cited several authorities commenting on the general proposition that mandatory minimum sentences are problematic when applied to broadly defined offences[14] they did not actually make a determination on that point. The majority noted the submissions of counsel for Mr. Zwozdesky to that effect at para. 34. However there is no indication that the majority failed to grasp the elements of the offence, nor that they ignored the seriousness, or the moral culpability of such offenders. In fact, the majority specifically noted: *There is no doubt that the commission of*

[14] Para. 33.

robbery using a prohibited firearm is a serious violent offence with potentially grave consequences.[15]

18. Robbery is defined in s.343 as follows:

> 343. ROBBERY — Every person commits robbery who
> (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
>
> (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
>
> (c) assaults any person with intent to steal from him; or
>
> (d) steals from any person while armed with an offensive weapon or imitation thereof.
>
> [R.S.C. 1970, c. C-34, s. 302.]

19. It is clear from the definition itself that robbery can be committed in at least four different ways. Three of the four forms of robbery include "steal" thus importing the definition of theft from s.322, which is also very broad:

> 322. THEFT — (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent
>
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
>
> (b) to pledge it or deposit it as security;
>
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
>
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

20. Adding the additional element of use of a firearm has the effect of broadening the scope of the offence still further, due to the expansive definition thereof in s.2:

[15] Para. 40.

"firearm" means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;"

21. The definition is very broad, as noted by Lamer, CJC in *R. v. Covin*:

> *It is apparent that the section extends the definition of "firearm" to include anything that has the potential of becoming a firearm through adaptation. The section goes on to extend that category to include "frames and receivers", and by reason thereof, the section when read literally, (at least in its English version) includes these frames and receivers irrespective of their adaptability. This would mean that even firearms inoperative because beyond repair would still be firearms inasmuch as there was a frame or receiver.* [16]

22. Many items qualify as firearms in this context, including nail guns, flare guns, paintball guns, air guns, and similar items, even though such items are exempted from the strict licensing regime of the *Firearms Act*.

23. The "use" of a firearm in the context of s.85 was considered by this Honourable Court in *R. v. Steele*. The reasoning of the Court can readily be applied to robbery as well:

> *"Use" has been held to include discharging a firearm (R. v. Switzer (1987), 1987 ABCA 23 (CanLII), 32 C.C.C. (3d) 303 (Alta. C.A.)), pointing a firearm (R. v. Griffin (1996), 1996 CanLII 3210 (BC CA), 111 C.C.C. (3d) 567 (B.C.C.A.)), "pulling out a firearm which the offender has upon his person and holding it in his hand to intimidate another" (Langevin, at p. 145, citing Rowe v. The King, 1951 CanLII 7 (SCC), [1951] S.C.R. 713, at p. 717; see also Krug, at p. 265), and displaying a firearm for the purpose of intimidation (R. v. Neufeld, [1984] O.J. No. 1747 (QL) (C.A.)). In Gagnon, the court indicated in passing that "use of firearm" may include revealing its presence by word or deed.* [17]

24. The hypotheticals advanced by the co-respondent Zwozdesky are instructive as to the potential scope of the offence of armed robbery.

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[16] *R. v. Covin* [1983] 1 S.C.R. 725, p. 728.
[17] *R. v. Steele* 2007 SCC 36, para. 27.

25. In a similar vein, moral culpability can vary significantly between offenders, and this element often depends on facts which are not part of the offence matrix. Mental illness, addiction, reduced cognitive capacity, and "Gladue factors" all fall to be considered under this heading, and can make a significant difference to the ultimate fit sentence to be imposed. The mandatory minimum sentence, as pointed out by the majority decision here, will often fail to leave breathing room to consider these factors.

26. It is not irrelevant that this Respondent happens to be aboriginal, as it has been noted that mandatory minimum sentences operate disproportionately to the detriment of aboriginal people.[18]

27. To be clear, this respondent does not disagree with the Crown's assertion that the offence of robbery with a restricted or prohibited weapon is a serious offence, and almost invariably engages a significant degree of moral culpability. However, that does not answer the question. It is equally obvious that the offence can be committed in different ways which raise or lower the seriousness. For example, the bank robber, acting in a group, who not only points but discharges a sawed-off shotgun to terrorize the victims, inflicts bodily harm, utters threats, and escapes with significant loot is clearly in a different category than the shoplifter who takes a loaf of bread for his starving child, is apprehended and produces an unloaded handgun to facilitate escape. Each is guilty of the same offence, but in greatly different circumstances in terms of seriousness.

28. In addition to the discrepancies noted above, the individual moral culpability of offenders can vary widely, and the severe minimum mandatory sentence at issue in this case leaves little or no room to consider potentially mitigating factors such as mental illness, addiction, poverty, homelessness, not to mention the factors applicable to indigenous offenders as required by s.718.2(e) of the *Criminal Code.*

29. It is thus clear that many disparate types of offenders may be caught in the net of the minimum mandatory sentence in s.344(1)(a)(i). The scope of the offence is broad.

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[18] R. Mangat, *More Than We Can Afford* 2014 CanLIIDocs 12, at pp.30-34.

Other Courts

30. Much of the Crown's argument focusses on the fact that other courts have arrived at a different conclusion on this point. However, it scarcely needs to be said that the analysis here imports a sort of "reasonable person" element to the test to be applied. Reasonable people may disagree in a principled way. Moreover, the trial judge in this case did consider those cases, and others, and the Court of Appeal reviewed his analysis, commenting on it at para. 16.[19]

31. In *R. v. McIvor* [20] the Manitoba Court of Appeal dismissed a s.12 application to the five-year mandatory sentence. However, their analysis was grounded in the assumption that the four-year mandatory sentence under s. 344(1)(a.1) was constitutionally valid, based on *R. v. McDonald* [21] and other decisions, and thus did not consider that question. The Court held that the additional one-year penalty could not be held to be so excessive as to outrage standards of decency.[22] Since the constitutional validity of the four-year sentence required by s.344(1)(a.1) is being challenged in the present case, it does not provide a firm foundation for the analysis which this Court must undertake.

32. In *McDonald* the Ontario Court of Appeal was primarily concerned with the question as to whether pre-trial custody could be applied to reduce a resulting sentence below a mandatory minimum. They held that it could. In addition, the Court also held that the four-year mandatory minimum sentence did not violate s.12, ONLY because such a case would necessarily entail substantial pre-trial custody, and by giving two-for-one credit for that, a fit sentence could be achieved. This was, of course, a completely different analysis than that required in the present case.

33. The Crown herein asserts that the Alberta Court of Appeal erred by failing to consider or mention these distinguishable cases, and, more significantly, anchors its' submission in the assertion that *"concerns about public safety have not lessened"*. No evidence is relied upon to support this assertion.

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[19] Appellant's Record, p. 39.
[20] *R. v. McIvor* 2018 MBCA 29.
[21] *R. v. McDonald* 1998 CanLII 13327 (ONCA).
[22] Para. 27.

34. Doubtless all courts continue to be concerned about public safety. In that regard, courts will rightly often inquire into the incidence of particular types of crime. Crimes which have been increasing or have become epidemic will often attract more severe sentences. However, in the case at bar, the trial judge inquired into the incidence of armed robbery cases, relying on data from Statistics Canada with the consent of both parties, and found that the incidence of firearms-related robberies had dropped by 55% from 1998 to 2012:

> *These statistics do not show a pressing problem to which Parliament was responding in imposing mandatory minimum sentences for robberies using firearms in 1995 and 2008, nor do they show a pressing problem as of 2012. There is nothing to suggest that the trend has changed since then.*[23]

35. In the present case, the Crown has not offered any evidence, at any level of court, to suggest that armed robbery is a burgeoning crime. The trial judge reviewed this statistical evidence to find that it did not show that armed robbery was a "pressing problem", as directed by this Court in *Morrissey* [24] at para. 43.

36. In any event, if gun crime or armed robbery is a rising problem in some particular jurisdiction, local judges may act on that information (with appropriate procedural safeguards) to impose condign sentences which are responsive to local conditions, as discussed at some length by this Court in *Lacasse.*[25]

37. However, it is not open to the Crown to assert, without evidence, and for the first time on appeal, that there is some increased amount of crime which demands uniformly higher sentences.

Reasonable Hypotheticals

38. Before the Court of Appeal, this Respondent relied solely on his own circumstances, and did not advance any hypotheticals.[26] As noted above, it would not be difficult to imagine offenders with even less moral culpability than Hilbach, for whom the mandatory minimum would be even more grossly disproportionate. Since the argument was not advanced before the

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[23] Respondent's Record, p.5, para. 19.
[24] *R. v. Morrissey* 2000 SCC 39.
[25] *R. v. Lacasse* 2015 SCC 64, paras. 87-104.
[26] Appellant's Record, p.49, para. 57.

Court of Appeal, and that Court did not venture down that road of its own accord, it will not be further addressed here.

Public Safety

39. The Crown raises public safety concerns at length, stating that gun crime is a serious problem in Canada, citing many judicial pronouncements to that effect. No one can seriously argue against such a motherhood-and-apple-pie proposition. However, implicit in that statement is the imbedded proposition that mandatory minimum sentences have a deterrent effect, and will operate to reduce gun crime. There is ample evidence that mandatory minimum sentences do not have much, or any, effect on crime rates, and this Honourable Court has commented on that in several previous decisions, including *Nur* [27].

40. The BC Civil Liberties Association has published an extensive position paper on this subject, in which the author extensively reviews the legal, academic, and social science literature on the subject. On the issue of the deterrent effect:

> *Deeply held, the belief that minimum sentences will serve to deter is also deeply flawed. Countless studies have shown that there is no evidentiary basis to support this belief. Simply put, deterrence through sentencing does not work: mandatory minimum sentences do not deter any more than proportionate sentences reached through the exercise of broad judicial discretion.* [28]

41. More authoritatively, well-known researcher Anthony Doob has published extensive research in this area, including *Searching for Sasquatch*[29]. Simply put, deterrence through sentencing does not work: mandatory minimum sentences do not deter any more than proportionate sentences reached through the exercise of broad judicial discretion. Doob and other researchers have detailed why this is so, but for the purposes of this appeal, it suffices to say that the central idea that harsh minimum mandatory sentences deter crime is an idea without

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[27] *Supra.*

[28] R. Mangat, *More Than We Can Afford* 2014 CanLIIDocs 12, p. 23.

[29] Webster, Cheryl Marie and Doob, Anthony N., *"Searching for Sasquatch: Deterrence of Crime through Sentence Severity",* ch. 7, in Petersilia, Joan and Reitz, Kevin R., eds, *The Oxford Handbook of Setencing and Corrections* (New York, Oxford University Press, 2012*).* Book of Authorities [Tab 1].

evidentiary support. In fact, the contrary is true: the evidence that exists tends to point out that such sentences entirely fail to deter crime.

42. Thus, it is fallacious for the Crown to rely on this disproven, or at least unproven, assumption to support the constitutionality of the provision at issue here. The Crown argues that the mandatory minimum must be maintained, because it deters crime and keeps the public safe. The truth is that it does not do so, or at least, there is no evidence that it does.

43. In this context, it should be noted that mandatory minimum sentences are, as this Court noted in *Wust* generally inimical to the concept of individualized sentencing enshrined in s.718. Moreover, as noted by Debra Parkes:

> *One of the most problematic implications of the virtually unrestrained proliferation of mandatory minimum sentences is the extent to which prosecutorial discretion increases. A very significant result of the move to mandatory minimum sentences is a wholesale transfer of discretion from judges to prosecutors. Whether intended or not, this move signals a profound lack of trust in judges (whose decisions are, of course, reviewable through the appellate process) and a simultaneous transfer of discretion, and implicitly trust, to Crown Attorneys (whose decisions are virtually unassailable due to the high degree of deference accorded to prosecutorial discretion which is reviewable only for abuse of process).* [30]

44. If the point of mandatory minimum sentences is to remove discretion in favor of certainty and consistency, as held by McLachlin CJC in *Ferguson* [31] then the result is illogical; discretion has not been removed, it has been shifted from judges to Crown prosecutors.

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[30] Parkes, Debra. "*From Smith to Smickle: The Charter's Minimal Impact on Mandatory Minimum Sentences"*, The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 57. 2012 CanLIIDocs 525 at p. 166.

[31] *R. v. Ferguson* 2008 SCC 6:

> *[54] The intention of Parliament in passing mandatory minimum sentence laws, on the other hand, is to remove judicial discretion to impose a sentence below the stipulated minimum. Parliament must be taken to have specifically chosen to exclude judicial discretion in imposing mandatory minimum sentences, just as it was taken to have done in enacting the rape shield provisions struck down in* Seaboyer. *Parliament made no provision for the exercise of judicial discretion in drafting s. 236(a), nor did it authorize any exceptions to the mandatory minimum. There is no provision permitting judges to*

Fit Sentence or Range of Sentences?

45. The Crown asserts that both the trial judge and the majority of the Court of Appeal were in error by assessing a fit sentence for the Respondent, as opposed to identifying a range of fit sentences. This argument cannot be sustained.

46. This Court stated in *Nur* [32]:

> *To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the Charter involves two steps. First, the court must* ***determine what constitutes a proportionate sentence*** *for the offence having regard to the objectives and principles of sentencing in the Criminal Code. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the Charter.*[33]

47. There is no authority to support the proposition that determining a "range" of sentence rather than a proportionate sentence is a reversible error of law.

48. The sentence analysis of both the trial judge and the Court of Appeal was informed by the Court of Appeal's venerable "starting point" decision on armed robbery: *R. v. Johnas* [34] in which the Court held that consideration of sentence should start at three years, and then be adjusted to reflect aggravating and mitigating factors. Thus, parity of sentence was considered in arriving at the sentence imposed here.

Parole

49. The Crown's final argument may be disposed of in the same way. The Crown argues that the mandatory minimum sentence may not be cruel and unusual because there exists a statutory scheme for discretionary early release. As the Crown concedes, this Court rejected that argument in *Nur*:

> *depart from the mandatory minimum, even in exceptional cases where it would result in grossly disproportionate punishment.*

[32] *Supra*.
[33] *Ibid*., para. 46 (emphasis added).
[34] *R. v. Johnas* 1982 ABCA 331.

> *The discretionary decision of the parole board is no substitute for a constitutional law. Canada's submission also misunderstands the role of the parole board — which is to ensure that an offender is safely released into the community, not to ensure that an offender serves a proportionate sentence. That is the function of one person alone — the sentencing judge.*[35]

s.1 Justification

50. The Crown does not advance any argument that the provision in question may be saved under s.1. Accordingly, the Respondent makes no comment thereon.

The Dissenting Judgment

51. Although the Crown does not appear to be particularly relying on the dissenting judgment of Wakeling, JA, it nonetheless should not pass without comment.

52. The dissenting judgment holds that the s.12 jurisprudence of this Court is fundamentally flawed by the inclusion of the reasonable hypothetical approach. Although this analysis has formed part of this Court's s.12 jurisprudence since *Smith*[36], and has been affirmed in multiple judgments of this Court, the dissenting judge nonetheless holds that this Court's jurisprudence is "unsound".

53. Citing his own previous decision in *Hills* (also under appeal to this Court), the dissenting judge relies on polling data (from 2007) which was not tendered in evidence by either party to decide *"that most Canadians are convinced that judges impose unjustifiably lenient sentences"*. The dissenting judge failed to note that in the same article, poll respondents supported individualized sentencing, and that support for the sentencing objectives of promoting responsibility and making reparations was significantly higher than support for deterrence and denunciation. [37]

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[35] Para. 98.
[36] *R. v. Smith* 1987 CanLII 64.
[37] Roberts, Crutcher & Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings", 49 Can. J. Criminology & Crim. Just. 75. Book of Authorities of the Respondent Curtis Zwozdesky, [Tab 5].

54. Inferentially, it may also be noted that the balance of the decision of the dissenting judge, in which he purports to craft an entirely new sentencing paradigm for armed robbery, entirely ignores the "starting point" decision on this point from his own court, and bypasses the Alberta Court of Appeal's own published Practice Directive, known as the Reconsideration Protocol.[38]

Conclusion

55. The decision of the majority of the Alberta Court of Appeal is a straightforward application of the settled jurisprudence of this Court in the application of s.12. The appeal should be dismissed.

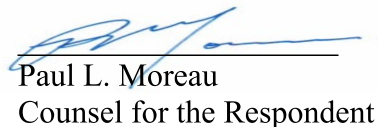
PART IV – SUBMISSION ON COSTS

56. The Respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

57. The Respondent respectfully requests that the appeal be dismissed.

All of which is respectfully submitted in Edmonton, Alberta this 28th day of July 2021.



Paul L. Moreau
Counsel for the Respondent

PART VI – SUBMISSIONS ON CASE SENSITIVITY

58. There is no sealing or confidentiality order, publication ban, or other restriction on public access to information in this case that could have an impact on the Court's reasons in this appeal.

[38] See *R. v. Arcand* 2010 ABCA 363, at para. 196.

PART VII – TABLE OF AUTHORITIES

Cases **Para Ref.**

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R. v. Boudreault 2018 SCC 58..7, 15, 16

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Parkes, Debra. "*From Smith to Smickle: The Charter's Minimal Impact on Mandatory Minimum Sentences*", The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 57. 2012 CanLIIDocs 525 43

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The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss. 1, 2, 12
Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11. art. 1, 2, 12

Criminal Code, RSC 1985, c C-46, ss. 322, 343, 344(1)(a), 718-718.2
Code criminel, LRC 1985, c C-46, art. 322, 343, 344(1)(a), 718-718.2

Firearms Act, SC 1995, c 39, s. 85
Loi sur les armes à feu, LC 1995, c 39, art. 85