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

FACTUM OF THE RESPONDENT
(CURTIS ZWOZDESKY, RESPONDENT)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

LEGAL AID SOCIETY OF ALBERTA
400 Revillon Building
10320 102 Avenue
Edmonton, AB T5J 3L7

Dane F. Bullerwell
Katherine E. Clackson
Tel: (780) 638-6588
Fax: (780) 415-2618
Email: dbullerwell@legalaid.ab.ca
kclackson@legalaid.ab.ca

Counsel for the Respondent, Curtis Zwozdesky

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Respondent, Curtis Zwozdesky

JUSTICE & SOLICITOR GENERAL
Appeals & Specialized Prosecutions Office
3rd Floor, Centrium Place
300, 332 – 6 Avenue S.W.
Calgary, AB T2P 0B2

Andrew Barg
Tel: (403) 297-6005
Fax: (403) 297-3453
Email: Andrew.barg@gov.ab.ca

Counsel for the Appellant, Her Majesty the Queen

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Appellant, Her Majesty the Queen

MOREAU & COMPANY
300 Energy Square, 10109-106 St. NW.
Edmonton, AB T5J 3L7

Paul L. Moreau
Tel: (780) 425-8337
Fax:
Email: paul@moreaulaw.ca

Counsel for the Respondent, Ocean William Storm Hilbach

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Respondent, Ocean William Storm Hilbach

PUBLIC PROSECUTION SERVICE OF CANADA
234 Donald Street, Suite 515
Winnpeg, MB R3C 1M8

Janna Hyman
Tel: (204) 984-0493
Fax: (204) 974-1350
Email: janna.jyman@ppsc-sppc.gc.ca

Counsel for the Intervener, Director of Public Prosecutions

PUBLIC PROSECUTION SERVICE OF CANADA
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

Francois Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: flacasse@ppsc-sppc.gc.ca

Ottawa Agent for Counsel for the Intervener, Director of Public Prosecutions

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office – Criminal
10th Floor, 720 Bay Street
Toronto, ON M7A 2S9

Michael Perlin
Erica Whitford
Tel: (406) 326-4600
Fax: (416) 326-4656
Email: Michael.perlin@ontario.ca
Erica.whitford@ontario.ca

Counsel for the Intervener, Director of Public Prosecutions, Attorney General of Ontario

ATTORNEY GENERAL FOR SASKATCHEWAN
Constitutional Law Branch
820 – 1874 Scarth Street
Regina, SK S4P 4B3

Katherine Roy
Tel: (306) 787-8385
Fax: (306) 787-9111
Email: Katherine.roy@gov.sk.ca

Counsel for the Intervener, Attorney General for Saskatchewan

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General for Saskatchewan

STOCKWOODS LLP
77 King Street West, Suite 4130
Toronto-Dominion Centre, TD North Tower
Toronto, Ontario
M5K 1H1

Nader R. Hasan
Ryann Atkins
Telephone: (416) 593-1668
FAX: (416) 593-9345
Email: naderh@stockwoods.ca

Counsel for the Intervener, Canadian Civil Liberties Association

POWER LAW
130 Albert Street
Suite 1103
Ottawa, Ontario
K1P 5G4

Maxine Vincelette
Telephone: (613) 702-5573
FAX: (613) 702-5573
Email: mvincelette@juristespower.ca

Ottawa Agent for Counsel for the Intervener, Canadian Civil Liberties Association

PECK AND COMPANY
610 - 744 West Hastings
Vancouver, British Columbia
V6C 1A5

Eric V. Gottardi, Q.C.
Chantelle Van Wiltenburg
Telephone: (604) 669-0208
FAX: (604) 669-0616
Email: egottardi@peckandcompany.ca

Counsel for the Intervener, Canadian Bar Association

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, Ontario
K2P 0J8

Michael J. Sobkin
Telephone: (613) 282-1712
FAX: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Intervener, Canadian Bar Association

TABLE OF CONTENTS

Page

PART I – OVERVIEW & FACTS 1

1. Overview of Appeal 1
2. Mr. Zwozdesky's circumstances and the circumstances of the offences 2
3. Sentencing Decision (Yungwirth J.) 5
4. Judgments in the Court of Appeal (Wakeling, Strekaf, and Feehan JJ.A.) 6

PART II – ISSUES 7

PART III – ARGUMENT 7

1. A mandatory minimum sentence violates section 12 when it results in grossly disproportionate sentences in reasonably foreseeable circumstances. 7
2. Robbery with a firearm is a much broader offence than it might first appear 9
    a. Robbery can be committed in many ways, and not all robberies are planned 9
    b. "Firearm" is defined to include unregulated, relatively less-dangerous devices 10
    c. A firearm can be "used" in many ways 12
    d. Secondary liability dramatically expands the reach of the minimum sentence 13
3. Offenders who commit robberies and robberies with firearms often have compelling mitigating circumstances or relatively peripheral involvement 14
    a. Sean Conlon 14
    b. Bryna Link 17
    c. Reported cases involving robberies with other weapons or with imitation firearms 18
4. There are reasonably foreseeable circumstances where a four-year penitentiary sentence is grossly disproportionate 19
    a. Scenario A: Indigenous accused with mental illness who robs to feed addiction 19
    b. Scenario B: FASD offender commits unplanned purse-snatching carrying BB gun 20

c. Scenario C: Refugee youth who acts as a lookout for an unexpected robbery 21

d. Scenario D: Shoplifting turns into an unexpected robbery with a firearm 22

e. Scenario E: The Case of the Knucklehead Hunter 22

f. A four-year sentence is grossly disproportionate for these foreseeable offenders 23

5. "Rare and unique" is commentary, not the test under section 12 of the *Charter* 24

6. We can take gun crime seriously without imposing grossly disproportionate sentences 25

7. Decisions upholding this mandatory minimum sentence have failed to grapple with the breadth of the crime or foreseeable offenders who commit this crime 27

8. The Court should not overrule a recent decision that discounts the relevance of parole under section 12 of the *Charter* 29

9. The dissent is unpersuasive. This Court should reject its reasoning and its approach 31

10. Mr. Zwozdesky should not be reincarcerated even if the minimum is upheld 34

a. If the minimum sentence is restored, the remaining sentence should be stayed 34

b. The totality principle justifies Mr. Zwozdesky's four-year global sentence 35

c. Sentences that would otherwise be consecutive can be made concurrent to account for the distinction between *disproportionality* and *gross* disproportionality 36

d. The "inflationary floor" theory is misguided. A mandatory minimum sentence is not reserved for the "best" offender 37

PART IV – COSTS 38

PART V – ORDER SOUGHT 38

PART VI – SUBMISSIONS ON CASE SENSITIVITY 39

PART VII – TABLE OF AUTHORITIES 40

TEXTS, ARTICLES, & SECONDARY SOURCES 44

LEGISLATION 45

PART I – OVERVIEW & FACTS

1. Overview of Appeal

[1] The *Charter* exists because the democratic process can overlook edge cases. This risk is particularly acute when Parliament makes new sentencing rules. When Parliament creates a new mandatory minimum sentence, our legislators are usually responding to Canadians' concerns about serious crime. But in doing so, Parliament sometimes overlooks more sympathetic or less culpable offenders – people who are not at the forefront of the public imagination.

[2] Fortunately, section 12 of the *Charter* allows courts to reconcile the democratic process with the need for fairness in sentencing. This Court has created – and repeatedly reaffirmed – a workable, principled test for determining whether Parliament strayed into unconstitutional territory: are there reasonably foreseeable offenders for whom the mandatory minimum punishment would be grossly disproportionate?[1]

[3] To answer this question, a court considers both the breadth of the offence and the characteristics of offenders who commit this crime. The test under section 12 is deferential, giving legislators leeway to impose stern sentences that judges might consider disproportionate. But this deference has limits. If a crime can be "committed in many ways and under many different circumstances by a wide range of people," then section 12 usually demands some sentencing flexibility.[2]

[4] When we hear the expression "*robbery with a firearm*," an archetypal offence might spring to mind. But the shorthand expression used to describe this crime does not define the full breadth of the behaviour caught by section 344 of the *Criminal Code*. To resolve this appeal, the Court must look beyond the archetypal robbery. Robberies can be committed in many ways, under many different circumstances. The definition of a "firearm" is much broader than it might first appear. And the doctrine of secondary liability dramatically expands the scope of the offence, capturing offenders with relatively limited involvement in a robbery.

---

[1] *R v Nur*, 2015 SCC 15; *R v Lloyd*, 2016 SCC 13; *R v Boudreault*, 2018 SCC 58.
[2] *Lloyd* at para 3.

[5] These robberies are also committed by a wide range of people. Foreseeable offenders include people like Bryna Link: an 18-year-old, drug-addicted Indigenous woman who assisted with an unsophisticated robbery – but who turned her life around before sentencing.[3] They include people like Sean Conlon: someone who overcame a horrific childhood of physical and emotional abuse to become an electrician, but who then, in the depths of a drug binge, acted as a driver and a lookout during a robbery – yet who, by the date of sentencing, was a "clearly different man," having achieved an impressive record of sobriety and having become a "devoted husband, father, and employee."[4] These are not "make-believe offenders."[5] These are real people. Other offenders like them are reasonably foreseeable.

[6] The appellant repeats the mantra heard from the Crown in nearly every case involving a mandatory minimum sentence: "*public safety is paramount*." But there is no reason to believe that *universally* stern sentences are a more-effective deterrent. Nor is stern denunciation demanded for *every* foreseeable offender. Appeals to public safety cannot justify grossly disproportionate sentences.

[7] To be sure, everyone agrees that four years is not a grossly disproportionate sentence for *most* robberies with a firearm. Four years is often a reasonable sentence, and perhaps even toward the low end of the range for particularly serious robberies. But there are foreseeable circumstances where the mandatory minimum sentence will be grossly disproportionate, and therefore unconstitutional. Mr. Zwozdesky respectfully invites this Court to dismiss the Crown appeal.

2. Mr. Zwozdesky's circumstances and the circumstances of the offences.

[8] Curtis Zwozdesky's first criminal convictions came at age 55. Raised in Edmonton, both of Mr. Zwozdesky's parents had serious alcohol problems. His parents divorced when he was five years old. Mr. Zwozdesky lived with his mother for a few years until she moved to Australia. His father was an inconsistent presence in his life. At first, he and his sister were left in the care of his father's parents. And as a child, he was abused by people in positions of authority, and remembers

---

[3] *R v Link*, 2012 MBPC 25.
[4] *R v Conlon*, 2011 ABPC 259, aff'd 2011 ABCA 379.
[5] *R v Hilbach*, 2020 ABCA 332 at para 85.

trying to hide bruises from his grandparents. He described his childhood as "chaotic" and "confusing." As he grew older his living arrangements remained unsettled. He bounced between grandparents, his mother, his father, and an aunt in Prince George. He left school at age fifteen. Older partners had introduced him to sex while he was still in his teens – behaviour that, today, we recognize as serious abuse, not "*de facto* consent." Mr. Zwozdesky explained how, after these encounters ended, he wanted "to be celibate and become a priest." A psychologist who examined Mr. Zwozdesky explained how people who are abused and introduced to sex at an early age often struggle with feelings of inadequacy.[6]

[9] Despite these challenges and only a Grade 9 education, Mr. Zwozdesky lived an interesting and pro-social life. He was a talented musician, teaching and playing professionally. He worked on the oil rigs, was employed in shipping-and-receiving, and managed a grocery store. He co-owned and operated a bait-and-tackle shop. He enjoyed reading and writing poetry.[7]

[10] Then, more than two decades ago, Mr. Zwozdesky was involved in a pair of life-altering car accidents. He has lived with unrelenting pain ever since. He was diagnosed with severe post-traumatic cognitive dysfunction (affecting his memory), fibromyalgia, nerve damage, and chronic pain. Too disabled to work, Mr. Zwozdesky began receiving modest social assistance from Assured Income for the Severely Handicapped. He worked with a doctor specializing in chronic pain for about a decade, and he found the pain medication and treatment helpful. After this doctor retired, however, he struggled to find another physician who understood his pain.[8]

[11] Mr. Zwozdesky started using non-prescription opioids to help manage his chronic pain.[9] Then, in September 2016, Mr. Zwozdesky assisted the principal offenders in the commission of two robberies about one-week apart. He recalled being high during the robberies, probably on fentanyl. During the first robbery, Mr. Zwozdesky went inside a rural convenience store and purchased a lighter before returning to his car. The two principal offenders then went inside with

---

[6] Pre-Sentence Report (Exhibit S-1), pp 36-37 (Tab 4 of the Record of the Respondent, Curtis Zwozdesky ["RRZ"]); Psychological Assessment (Exhibit S-2), p 47 (Tab 5 of RRZ).

[7] *R v Zwozdesky*, 2019 ABQB 322 at paras 32-34 [*Zwozdesky* (ABQB)].

[8] Psychological Assessment (Exhibit S-2), p 48 (Tab 5 of RRZ).

[9] Psychological Assessment (Exhibit S-2) at pp 45-46 (Tab 5 of RRZ).

a modified shotgun. They ordered the clerk to fill a bag. One fired the shotgun into a shelf. No one was injured. The group drove away. One week later, Mr. Zwozdesky assisted two individuals with another robbery of a convenience store. The principal offenders went inside the store, brandished a shotgun, and sprayed a clerk with pepper spray before making off with cash and cigarettes. Mr. Zwozdesky remained in the vehicle throughout the second robbery.[10]

[12] Mr. Zwozdesky confessed to the police. His statement appears to have been the lynchpin to a conviction: he admitted he was the getaway driver during both robberies. Once the Crown proved the voluntariness of his statement, Mr. Zwozdesky entered a guilty plea to one count of robbery with a firearm (the first incident), and one count of robbery *simpliciter* (the second incident). No one who was present in the convenience store was called to testify at trial. Mr. Zwozdesky apologized to the Court and expressed sympathy for the victims.[11]

[13] The pre-sentence report was positive. Mr. Zwozdesky was described as polite, articulate, and cooperative with police. He explained that he used drugs to help relieve his chronic pain. Mr. Zwozdesky maintained the support of his mother, sister, and ex-common-law partner, all of whom had positive comments about him – although they believed he continued to struggle with emotional issues arising from childhood, and they suggested he needed help managing his pain.[12]

[14] A psychologist met with Mr. Zwozdesky while he awaited sentencing. He thought Mr. Zwozdesky's description of his pain seemed accurate. He said Mr. Zwozdesky presented as an "overwhelmed and broken man." He did not believe Mr. Zwozdesky presented a danger to the community. He suggested that Mr. Zwozdesky had a pressing need for treatment by a chronic pain specialist who could prescribe medication that managed his pain, while also monitoring for the possibility of addiction.[13]

---

[10] *Zwozdesky* (ABQB) at paras 25-28.
[11] Excerpts from transcript dated April 4, 2019 – Reasons for sentence, p 10 (Tab 3 of RRZ).
[12] Excerpts from transcript dated April 4, 2019 – Reasons for sentence, p 25 (Tab 3 of RRZ).
[13] Psychological Assessment (Exhibit S-2), p 50 (Tab 5 of RRZ).

3. Sentencing Decision (Yungwirth J.)

[15] The Crown sought a global sentence of five years for Mr. Zwozdesky: four years with respect to the offence of robbery with a firearm, plus one year consecutive for the second robbery. Mr. Zwozdesky challenged the minimum sentence for robbery with a firearm.

[16] Justice Yungwirth issued oral reasons for judgment that were later reported with only editorial revisions.[14] She understood the seriousness of these offences, which were committed by multiple offenders against vulnerable victims. She commented that "someone could have died," and specifically noted Parliament's clear signals to sentencing judges about the seriousness of firearm offences. She recognized that Mr. Zwozdesky's memory of his crimes was cloudy and there were inconsistencies between his statement to police and the two sentencing reports. These inconsistencies prevented her from coming to any "definitive conclusions" about Mr. Zwozdesky's interactions with the two other perpetrators. She did, however, make the common-sense observations that Mr. Zwozdesky "may not have been the mastermind behind either robbery," and that his "association with the co-accused may have been for the purpose of supporting his addictions as a result of his long-standing pain". She described his moral culpability as being in the "medium to high range."[15]

[17] Although Mr. Zwozdesky's guilty plea came after a ruling on the voluntariness *voir dire*, Justice Yungwirth accepted that his plea reflected an acceptance of responsibility, was a sign of his remorse, and helped demonstrate good rehabilitative prospects. She also noted that Mr. Zwozdesky had expressed remorse to the PSR author, the psychologist, and the Court itself, and she noted the support of Mr. Zwozdesky's loved ones.[16]

[18] Justice Yungwirth struck down the mandatory four-year sentence for robbery with a firearm under section 344(1)(a.1) of the *Criminal Code*. She was satisfied that a four-year sentence would not be grossly disproportionate for Mr. Zwozdesky himself. But she agreed there were foreseeable cases of robbery with a firearm where the four-year minimum sentence would be grossly

---

[14] *Zwozdesky* (ABQB).
[15] *Zwozdesky* (ABQB) at paras 24 to 70.
[16] *Zwozdesky* (ABQB) at paras 37, 71 to 76.

disproportionate, highlighting how some robberies are unplanned, are committed by young offenders with troubled backgrounds, or are committed by mentally ill offenders.

[19] Nonetheless, Justice Yungwirth imposed a sentence close to what the Crown sought: three years on the first robbery, plus one year consecutive for the second robbery. Presumably because the Crown had already taken totality into consideration when determining its sentencing position on the second robbery, she made no further reduction for totality. This left a global sentence of four years, less pre-disposition custody.[17]

4. Judgments in the Court of Appeal (Wakeling, Strekaf, and Feehan JJ.A.)

[20] The Crown appealed against the declaration of invalidity and appealed against the sentence imposed on Mr. Zwozdesky. Mr. Zwozdesky consented to his appeal being joined with Mr. Hilbach's appeal, which had yet to be argued.

[21] The majority of the Court of Appeal (Justices Strekaf and Feehan) dismissed the Crown appeal. They concluded that the minimum sentence could result in grossly disproportionate punishments for reasonably foreseeable offenders – for example, offenders with peripheral involvement in a robbery, or offenders who suffered from mental health issues. They identified no other errors with Justice Yungwirth's reasons for sentence.[18]

[22] For his part, the dissenting justice would have allowed the appeal, restored the mandatory minimum sentence, and increased Mr. Zwozdesky's sentence well beyond even the Crown's position, to a remarkable 3,449 days (or 9.45 years). The dissent built on the same justice's concurring reasons for judgment in *Hills*,[19] a decision also on appeal to this Court, where the author had criticized this Court's section 12 jurisprudence. In the Hilbach-Zwozdesky appeal, the dissent did not investigate the breadth of the crime of robbery with a firearm. Nor did the dissent discuss any characteristics of foreseeable offenders. After concluding the mandatory minimum sentence did not violate section 12, the dissent went on to create and apply a novel and idiosyncratic sentencing regime for robbery with a firearm.[20]

---

[17] *Zwozdesky* (ABQB) at para 77.
[18] *R v Hilbach*, 2020 ABCA 332 at paras 1-82, esp. at paras 56-71.
[19] *R v Hills*, 2020 ABCA 263 at paras 120-327.
[20] *Hilbach* at paras 83-187.

PART II - ISSUES

[23] ***Issue 1*****:** 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*?

> ***Respondent's position*****:** Yes. There are reasonably foreseeable applications of the four-year mandatory minimum sentence that will result in a grossly disproportionate sentence.

[24] ***Issue 2*****:** Where an offender commits the offence of robbery with a restricted or prohibited firearm, does the mandatory minimum sentence of five years pursuant to section 344(1)(a)(i) of the *Criminal Code* infringe section 12 of the *Canadian Charter of Rights and Freedoms*?

> ***Respondent's position*****:** Yes, but this issue does not arise in Mr. Zwozdesky's case.

PART III – ARGUMENT

1. A mandatory minimum sentence violates section 12 when it results in grossly disproportionate sentences in reasonably foreseeable circumstances.

[25] This case involves a straightforward application of existing law. No one has asked the Court to significantly change the test under section 12 of the *Charter*. Under well-established law, if an offender challenges a mandatory minimum penalty, the first question is whether the mandatory sentence is grossly disproportionate for that offender.[21] Mr. Zwozdesky agrees the four-year minimum was not grossly disproportionate in his own circumstances.

[26] Next, a court asks whether "it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples' situations".[22] The court considers the breadth of the offence covered by the mandatory minimum penalty:

> It is an inquiry into the range or scope of the law — into what Dickson J. in *Big M* referred to as the "nature of the law". … Determining the reasonable reach of a law is essentially a question of statutory interpretation. At bottom, the court is simply asking: What is the reach of the law?

---

[21] *Nur* at para 46.

[22] *Nur* at para 57.

> What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable impact?[23]

[27] The court also considers the characteristics of foreseeable offenders who might commit this crime. This is natural, since sentencing is inherently individualized – and proportionality involves an assessment of not only the seriousness of an offence, but also a particular offender's degree of responsibility.[24] It was once unclear which personal characteristics a court should consider, but *Lloyd* and *Boudreault* resolved the uncertainty. It is foreseeable that some offenders will have highly mitigating personal circumstances, including:

- ***Addiction and pre-sentencing rehabilitation***. In *Lloyd*, for example, this Court considered a drug trafficker who commits the offence to support his own addiction, and who, "[b]etween conviction and the sentencing … goes to a rehabilitation centre and conquers his addiction."[25]
- ***Intellectual disability and mental illness***. Courts frequently consider foreseeable offenders with very low IQs, schizophrenia, other mental health concerns.[26]
- ***Poverty and homelessness.*** In *Boudreault*, the majority considered offenders who were poor, homeless, mentally ill, or disabled. Justice Martin noted that "offenders with some or all of these characteristics appear with staggering regularity in our provincial courts."[27]

[28] Foreseeable circumstances are not "remote" or "far-fetched," but foreseeability "is not confined to situations that are likely to arise in the general day-to-day application of the law," nor are courts limited to considering circumstances that fall within the usual sentencing range.[28] Broad offences that can be committed by diverse offenders are inherently problematic:

> … [T]he reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of

---

[23] *Nur* at para 61.

[24] *R v Nasogaluak*, 2010 SCC 6 at para 43; *R v Ipeelee*, 2012 SCC 13 at para 38; *Nur* at para 43; *Criminal Code*, section 718.1; see D. Stuart, "*Boudreault*: The Supreme Court Strikes Down Mandatory Victim Surcharges to Protect Vulnerable Offenders" (2019), 50 CR (7th) 276. Book of Authorities of Respondent, "BAR" [Tab 6].

[25] *Lloyd* at para 33.

[26] *R v Hood*, 2018 NSCA 18 at para 150; *R v JED*, 2018 MBCA 123 at para 106-7; *R v Scofield*, 2019 BCCA 3 at para 83; *R v Morrison*, 2019 SCC 15 at para 183 (per Karakatsanis J.).

[27] *Boudreault* at paras 49-55.

[28] *Nur* at paras 68, 70.

people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.[29]

2. Robbery with a firearm is a much broader offence than it might first appear.

(a) Robbery can be committed in many ways, and not all robberies are planned.

[29] Robbery is defined in section 343 of the *Criminal Code*. The most common case involves "theft plus violence," but section 343 defines four different modes of robbery:

> Every one 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.

[30] "Stealing" means "committing theft," and includes even temporarily depriving someone of their property.[30] Under the second prong, subsection 343(b), theft and violence – or threats – do not need to be entirely contemporaneous, nor must violence – or a threat – precede the theft. For example, a shoplifting sometimes morphs into a robbery when a store clerk pursues the shoplifter and the shoplifter scuffles with the clerk.[31] Under the fourth prong, subsection 343(d), a firearm is always a qualifying "weapon."[32] This subsection does not require the use of violence or even the threat of violence. To be "armed" means merely to be "equipped with" something.[33] And not all robberies are planned or premeditated – as noted, a theft sometimes blossoms into an unplanned robbery. Finally, although a robbery requires the specific intent to steal, the offender only requires

---

[29] *Lloyd* at para 35.

[30] *Criminal Code* ss. 2 ("steals"), 332 ("theft"); *R v Lafrance*, [1975] 2 SCR 201; *R v Neve*, 1999 ABCA 206 at paras 25-31.

[31] *R v Morgan*, 2013 ABCA 26. This also depends on how the charge is particularized: see *R v Newell*, 2007 NLCA 9; *R v Jean*, 2012 BCCA 448; *R v McKay*, 2014 SKCA 19.

[32] All firearms are "weapons" in the meaning of the *Code*: *R v Felawka*, [1993] 4 SCR 199.

[33] *R v Saunders*, 1996 CarswellOnt 519 (Ont Ct (Gen Div)) at para 38 (per Watt J.); *R v Langevin* (1979), 47 CCC (2d) 138 (Ont CA) at 145. BAR [Tab 1]

the basic understanding they are intentionally taking someone else's property. Even someone who is drunk or high will usually understand taking someone else's possessions.[34]

(b) "*Firearm*" is defined to include unregulated, relatively less-dangerous devices.

[31] Not all "firearms" are highly regulated weapons. A firearm includes any "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".[35] Although a firearm is defined as a "weapon," firearms do not need to meet the separate *Criminal Code* definition of a "weapon."[36]

[32] The *Code* does not define "serious bodily injury," but firearms experts and judges rely on the so-called "pig's eye test": a firearms expert uses the device to shoot a projectile at a dead pig's eye, to test whether the projectile could rupture a human eye, which is physiologically similar. Because a ruptured eye is "serious bodily injury," a "firearm" is any barrelled, projectile-firing device capable of "putting someone's eye out."[37]

[33] Many barrelled devices fall within this definition, but the *Code* excludes some less-dangerous firearms from the *Firearms Act* licencing regime discussed in *Nur*. Even if a device meets the definition of firearm, there are certain devices – such as BB guns and a paintball guns with a sufficiently low muzzle velocity, airsoft guns, flare guns, nail gun used for roofing, or tranquilizer guns – that can be lawfully possessed without a firearms licence:

> 84(3) For the purposes of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of this Act and the provisions of the *Firearms Act*, the following weapons are deemed not to be firearms: …
>
> (b) any device that is
>
> (i) designed exclusively for signalling, for notifying of distress, for firing blank cartridges or for firing stud cartridges, explosive-driven rivets or other industrial projectiles, and

---

[34] *Neve* at para 30; *R v Daley*, 2007 SCC 53 at paras 41-42.

[35] *Criminal Code*, section 2. A firearm also includes "any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm".

[36] *R v Dunn*, 2013 ONCA 539, aff'd at 2014 SCC 69.

[37] *Dunn* (ONCA) at paras 8, 40; *R v Goard*, 2014 ONSC 2215 at paras 120-123; *R v Crawford*, 2015 ABCA 175 at para 24.

(ii) intended by the person in possession of it to be used exclusively for the purpose for which it is designed;

(c) any shooting device that is

(i) designed exclusively for the slaughtering of domestic animals, the tranquillizing of animals or the discharging of projectiles with lines attached to them, and

(ii) intended by the person in possession of it to be used exclusively for the purpose for which it is designed; and

(d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge

(i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules, or

(ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second or an energy exceeding 5.7 Joules.

[34] But this exception only applies to the *Firearms Act* regime, and to the offences mentioned in subsection 84(3). If a barrelled device satisfies the "pig's eye test," then it is a "firearm" for offences involving the *use* of a firearm, such as robbery. As a result, some projectile-firing devices sold at every Canadian Tire store – and possessed without a licence, and without special storage or transport rules – are "firearms" for this offence.[38] The device's ammunition does not need to be readily accessible for the device to meet the definition of a firearm.[39] If the device is "*capable* of being loaded and fired during the commission of the offence," then it is a firearm.[40] Even an inoperable device may be a firearm. A disassembled or broken firearm that is incapable of firing a projectile also qualifies, so long as it can be readily converted into a working device.[41]

[35] The appellant misconstrues a passage in the *Firearms Reference* where this Court suggested there are not "two categories" of firearms.[42] The Court was referring to the various types of firearms regulated under the *Firearms Act* – devices that Parliament *has* chosen to treat differently than some other barrelled devices that fall within the *Code* definition of "firearm." In the *Reference*, the Court simply acknowledged that Parliament has a valid criminal-law interest in

---

[38] *Crawford* at paras 24-37; *R v Maguire*, 2012 ONCJ 366.
[39] *R v Covin*, [1983] 1 SCR 725 at p 370.
[40] *Crawford* at para 37 (emphasis added). See also *R v Belair* (1981), 34 OR (2d) 302 (CA).
[41] *Covin*; *R v Hasselwander*, [1993] 2 SCR 398.
[42] *Reference re Firearms Act (Canada)*, 2000 SCC 31 at paras 44-45.

regulating less-dangerous firearms. This Court did not suggest that, when a sentencing judge considers someone's moral culpability, there are never any relevant distinctions between different firearms, based on the distinct danger they pose. There are, obviously. A BB gun is not a high-powered hunting rifle. A paintball gun is not a semi-automatic handgun. A farmer's .22 rifle used for hunting gophers is not a .50 calibre machine gun designed for the battlefield.

(c) A firearm can be "used" in many ways.

[36] The mandatory minimum sentence for robbery with a firearm requires the offender to "use" a firearm during the offence:

> 344 (1) Every person who commits robbery is guilty of an indictable offence and liable …
>
> (a.1) in any other case where a [*non-prohibited, non-restricted*] firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; …

[37] In *Steele*,[43] this Court defined the meaning of "use" under subsection 85(1) of the *Code*:

> 85(1) Every person commits an offence who uses a firearm, whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm,
>
> (a) while committing an indictable offence, other than an offence under … [*certain sections, including*] 344 (robbery) …

[38] Although *Steele* considered a different offence, there is no reason to interpret "use" differently under paragraph 344(1)(a.1) than under subsection 85(1). "Use" requires more than just possession of a firearm, but does not require the firearm to be discharged, nor does it require the firearm to be in the offender's actual physical possession:

> "Use" has been held to include *discharging* a firearm, *pointing* a firearm, "pulling out a firearm which the offender has upon his person and holding it in his hand to intimidate another", and *displaying* a firearm for the purpose of intimidation. In *Gagnon*, the court indicated in passing that "use of firearm" may include revealing its presence by word or deed. … In the absence of a statutory definition, I would … hold that an offender "uses" a firearm, within the meaning of s. 85(1), where, to facilitate the commission of an offence or for purposes of escape, the offender reveals by words or conduct the *actual presence* or *immediate availability* of a firearm. The weapon must then be in the physical possession of the offender or readily at hand.

---

[43] *R v Steele*, 2007 SCC 36.

[Emphasis in original; internal citations omitted.][44]

[39] The firearm does not need to be within arm's reach. A firearm can be "readily at hand" in a nearby vehicle.[45]

(d) Secondary liability dramatically expands the reach of the minimum sentence.

[40] The principal offender – the person who uses the firearm in the commission of the robbery – is not the only person caught by the mandatory minimum sentence. As *Steele* explained, the usual principles of secondary (or "party") liability apply to use-based firearms offences:

> Where two or more offenders are acting in concert, the usual rules of complicity apply. It will therefore be sufficient, where one of the offenders is in physical possession of a firearm or has immediate access to it, for another to utter the firearm-related threat.[46]

[41] Secondary liability dramatically expands the scope of liability. Anyone who aids or abets – that is, assists or encourages – the principal offender is guilty of the same offence.[47] As a result, they are also subject to a mandatory minimum sentence. To be caught by the mandatory minimum sentence, a party does not need to have helped plan a robbery. Nor must they personally desire that a robbery be committed. Nor must the party gain anything from the robbery. The only *mens rea* required is the intention to assist the principal offender, knowing the principal offender intends to commit the offence (or being wilfully blind to the same).[48] An act of assistance or encouragement does not need to be substantial – or even effective.[49]

[42] The act of assistance can be performed either before or during the actual robbery. That is, someone can be a party to a robbery without ever taking part in the robbery. Consider an offender who takes some meaningful step to assist a robber – say, helping the main offender find a ski mask, to use as a disguise – but then gets cold feet and does not follow through with the robbery itself. If the principal offender still commits the robbery, this is enough: the party took a step to assist the principal, knowing the principal intended to rob using a gun. The defence of abandonment is strict.

---

[44] *Steele* at paras 27, 32.
[45] *Steele* at paras 38, 55-56.
[46] *Steele* at para 33 (internal citation omitted).
[47] *Criminal Code* s. 21(1); see also ss. 21(2) (common unlawful purpose), 22 (counselling).
[48] *R v Briscoe*, 2010 SCC 13 at paras 16-17.
[49] *R v Dooley*, 2009 ONCA 910 at paras 122-124; *R v Alcantara*, 2015 ABCA 258 at para 11-12.

The party must not only communicate their intention to abandon the scheme to the principal, but also take proportionate steps to neutralize their involvement.[50] And while a party's limited involvement is often considered during sentencing,[51] with a mandatory sentence, there is no way to account for the parties' different moral culpability during sentencing.

3. Offenders who commit robberies and robberies with firearms often have compelling mitigating circumstances or relatively peripheral involvement.

[43] Mr. Zwozdesky drew some of his foreseeable circumstances from other reported sentencing decisions. To be sure, some of the offenders were sentenced for crimes other than robbery with a firearm. And all else being equal, a sentence for robbery with an imitation firearm (or some dangerous, non-firearm weapon) might be marginally lower than a robbery with a firearm. An aggravating factor is missing. But that does not mean these cases are unhelpful, or that the facts from other cases cannot help a court in the search for reasonably foreseeable circumstances. They give the Court a sense of the qualities and characteristics of people who often commit robbery – and it is easy to imagine the robberies in these reported decisions having been committed with a real firearm. Although the sentences imposed in these cases do not necessarily reveal the sentence the offender would have received if a "real" firearm were used, they still reveal something about the nature of the offence of robbery, the broad sentencing range for armed robbery, and the kinds of people who often commit robberies.

(a) Sean Conlon

[44] *Conlon*[52] demonstrates just how far a proportionate sentence might depart from the mandatory minimum when a judge is left unconstrained by the minimum. Mr. Conlon was a 20-year-old father of two young children. He had been the victim of physical abuse as a child. As a five-year-old, he spent a year in hospital after he was ejected from a vehicle when his mother crashed while she was driving drunk. He was taken into foster care for a year before moving in with his father. He started drinking at age eight. He was an alcoholic by adulthood.

---

[50] *R v Gauthier*, 2013 SCC 32 at para 50.
[51] *R v Arcand*, 2010 ABCA 363 at para 60.
[52] *R v Conlon*, 2011 ABPC 259, aff'd 2011 ABCA 379.

[45] An electrician by trade, Mr. Conlon had become addicted to crack cocaine by the time of the offence. He spent $12,000 on crack in the week leading up to the robbery. He was hanging around with others who were plotting a robbery. He agreed to act as the "wheelman" because he was desperate for his next hit of crack. He drove the others to purchase masks and gloves.

[46] After arriving at a bottle depot, all three donned masks and gloves and went inside. Mr. Conlon was recruited as the driver, but he went inside and acted as a lookout. One of the other robbers pointed a sawed-off shotgun at the clerk, racked it, and told him: "You have two seconds to open the register or I'll put one in ya." The group made off with between $2,500 and $3,000. Arrested two days later, Mr. Conlon confessed. The Crown never recovered the shotgun, so the Crown did not proceed with a charge of robbery with a firearm. However, "it clearly looked like a real shotgun and no doubt after it was visibly and audibly racked, the cashier thought so too".[53]

[47] Mr. Conlon turned his life around after the robbery. He completed a residential treatment program, saw an addictions counsellor twice a month, and regularly attended AA meetings. He enjoyed the support of his wife and his church. He was "clearly a completely different man" than at the time of the robbery. He had been abstinent for years. He was overcome with remorse and guilt for his role in the offence. A forensic psychiatrist described him as a low risk to reoffend. In a thoughtful decision, which acknowledged the *Johnas* starting point and the need for general deterrence, the judge sentenced Mr. Conlon to 90 days in jail, plus probation.

[48] The Crown appealed, seeking a sentence of 18 to 24 months. The Alberta Court of Appeal dismissed the appeal. The Court of Appeal agreed it was uncommon for an offender to have such a long, proven record of rehabilitation before sentencing. But after considering these efforts, it could identify no error, and upheld the sentence.

[49] Although the Crown did not prove the shotgun was a "firearm" in the meaning of section 2 of the *Code*, the appellant cannot suggest this had a dramatic impact on Mr. Conlon's sentence. Operable or not, the shotgun would have been terrifying. And courts have recognized that imitation firearms or inoperable guns can cause as much fear and chaos harm as operable firearms. For this reason, the argument "*but the Crown didn't prove it was a real gun*" rarely carries much weight at

---

[53] *Conlon* (ABPC) at paras 4-9.

sentencing. As the British Columbia Court of Appeal has explained, "[m]oral culpability is not diminished by the use of an imitation, and not a real, firearm."[54]

[50] The Crown cannot have it both ways: it cannot argue that robberies involving imitation firearms should attract similar sentences as robberies involving real firearms – because both can be equally terrifying and can provoke similarly dangerous response – while simultaneously arguing that the sentences for robbery with an imitation firearm are poor comparators for the purposes of a reasonable foreseeability analysis under section 12. For example, suppose in *Conlon* the Crown had proven the shotgun was operable. Would this have justified a mandatory minimum sentence that was *sixteen times* higher than the sentence the Court of Appeal upheld?[55]

[51] The sentencing judge refused to treat *Conlon* as a reasonably foreseeable case because she believed the circumstances were "highly unusual" and "remote."[56] Respectfully, she erred. In *Nur*, the majority specifically rejected the suggestion that reported decisions should be discarded as foreseeable applications of a mandatory minimum sentence because the judge considered that reported case "marginal":

> Reported cases illustrate the range of real-life conduct captured by the offence. I see no principled reason to exclude them on the basis that they represent an uncommon application of the offence, provided that the relevant facts are sufficiently reported. Not only is the situation in a reported case reasonably foreseeable, it has happened.[57]

[52] Nor is it unusual for an offender to be sentenced long after the offence, giving them time to undertake rehabilitative efforts, like Mr. Conlon did. Drug treatment court programs, for example,

---

[54] *R v Al-Isawi*, 2017 BCCA 163 at para 40. See also *R v Johnas*, 1982 ABCA 331 at para 23, where the Alberta Court of Appeal noted how it is often difficult to prove a "firearm" was loaded, and suggested the distinction is usually insignificant. So too with operability.

[55] See *Morrison* at para 186, where Karakatsanis J. noted that a summary conviction mandatory minimum (90 days) was only one-quarter of the indictable mandatory minimum (one year). This 400% disparity suggested the indictable minimum was grossly disproportionate.

[56] *Zwozdesky* at para 77.

[57] *Nur* at para 72.

often require an offender to take part for at least one year. And the *Code* itself authorizes sentencing adjournments for treatment purposes.[58]

(b) Bryna Link

[53] In *Link*,[59] an 18-year-old Indigenous woman assisted the two principal offenders in a convenience store robbery. Ms. Link was aware of the plan to rob the convenience store when she went inside. What she did not know was that the principal offender was carrying an imitation handgun. The principal offender pulled out the "gun" and pointed it directly at the clerk. Understandably, the clerk was left badly shaken.

[54] Ms. Link had no idea that a gun was involved – imitation or otherwise – until she saw it produced. One of the others hollered "bag, bag, bag." Ms. Link produced a bag and helped stuff cigarettes and food into the bag before the group escaped. Of the $400 in property that were stolen, Ms. Link's take was minimal: she sold two packs of cigarettes for $5.00 each, kept one pack, and gave four packs away.

[55] She was cooperative with police, and she expressed sympathy for the clerk upon arrest. She had been using methamphetamine and marijuana both before and after the robbery.

[56] During high school, Ms. Link had fallen in with a self-destructive group of friends. By age fifteen she was drinking daily and taking any drugs she could find. Although she had some initial relapses after her arrest for the robbery, she successfully completed residential treatment before sentencing. She passed random drug tests. She attended AA meetings daily. She was close to finishing high school. She worked part-time. She aspired to become an addictions nurse.

[57] The Crown argued that the Manitoba Court of Appeal had suggested a penitentiary sentence was usually required for convenience store robbery. The sentencing judge imposed an eight-month conditional sentence order, which he believed was available under the law.

---

[58] *Criminal Code*, subsection 720(2).
[59] *R v Link*, 2012 MBPC 25.

[58] Again, while Ms. Link did not plead guilty to robbery with a firearm, her own moral blameworthiness was not reduced simply because the device turned out to be inoperable. The appellant says it would be "quite different" if Ms. Link knew a "real firearm" would be used. But Ms. Link would have had no idea whether the gun was real or not. She still participated in the robbery, albeit in a more limited way than the principal offender.

(c) Reported cases involving robberies with other weapons or with imitation firearms.

[59] Some other reported decisions are useful not because the offenders were sentenced for the same offence as Mr. Zwozdesky, but because they reveal something about the characteristics of offenders who might commit less-serious robberies with less-serious firearms.

[60] In *Soosay*, the offender was an Indigenous man with an extraordinarily sad upbringing who suffered from FASD, had a very low IQ, and had been drinking daily since he was eight years old.[60] And in *Ayorech*,[61] the offender pleaded guilty to two liquor store robberies. He brandished a knife on both occasions. He was diagnosed as having a severe mental illness and intellectual disability with a "well-established psychiatric history of developmental disorder and schizophrenia." The Alberta Court of Appeal upheld a one-year sentence on a Crown appeal. The use of a firearm would have been aggravating. But would a single instance of a robbery using, for example, an eye-penetrating BB gun have justified a sentence *four times* higher than what the Court of Appeal upheld for *two* armed robberies?

[61] There are still other robbery cases that involved unusual facts, or less-culpable parties to an offence. *Sutherland*, for example, featured a robbery using an air pistol that had been painted black to look like a real firearm. A party to the crime, who had a long history of mental health struggles, received a non-custodial sentence.[62]

---

[60] *R v Soosay*, 2012 ABPC 220.

[61] *R v Ayorech*, 2012 ABCA 82.

[62] *R v Sutherland*, 2019 NSPC 17; see also *R v Ullah*, 2010 ONCJ 45 (imitation firearm, strange circumstances, CSO imposed); *R v LaPointe-Melo*, 2010 ONCJ 314 (BB gun, 30 days); *R v Thompson*, 2010 ONCJ 107 (knife, four months); *R v Kotelko*, 2011 MBPC 76 (knife, staged robbery that went awry, four months).

[62] The reported sentencing decisions reveal three undeniable realities. First, it is reasonably foreseeable that some robberies with a firearm will be committed by offenders who are mentally ill, who are low-functioning, or who have experienced serious intergenerational trauma. Second, there are foreseeable circumstances where a party to a robbery will be substantially less culpable than the principal offender. Finally, in cases where sentencing judges had discretion because the Crown did not allege a weapon or firearm-like device was a "firearm," judges imposed proportionate sentences that were far below the four-year minimum – even though the offenders were not substantially less culpable than offenders who were proven to have used "firearms" during a robbery. With these principles in mind, consider five foreseeable applications of the law – which are essentially the same scenarios that Mr. Zwozdesky advanced in the Court of Appeal.

4. There are reasonably foreseeable circumstances where a four-year penitentiary sentence is grossly disproportionate.

(a) Scenario A: Indigenous accused with mental illness who robs to feed addiction.

[63] Adam, now age 26, is a Cree man born on a reserve near Edmonton. He was apprehended from his mother as an infant. He grew up in the city. He has never met his birth parents, and he has no meaningful connection to his home community. He is alienated from his traditional culture. He has grown up bouncing between non-Indigenous foster parents and group homes. He dropped out of school in Grade 9, and then started smoking marijuana every day. Adam's first diagnosis of schizophrenia came when he was 20 years old. He has spent several stints as an involuntary patient at a psychiatric hospital, suffering from acute psychosis. He usually stops his medication shortly after being released. He has been homeless since age 16, and he usually stays at a homeless shelter or sleeps in the river valley. He has a short criminal record, mostly for shoplifting, breach of recognizance, and failing to appear in court.[63]

[64] Adam has been roughed up on the street, so he sometimes carries an airsoft pistol – which meets the definition of a firearm – for self-protection. He is addicted to methamphetamine. He has been on a meth binge and has not slept in days. He is out of money. He is desperate, but not so

[63] On the impact of mental health issues, see e.g. *Ayorech* at paras 10-13; *R v Shevchenko*, 2018 ABCA 31. On the relevance of *Gladue* factors, see, of course, *R v Ipeelee*, 2012 SCC 13.

unwell that he fits the criteria of section 16 of the *Code*. He meets his dealer in the parking lot by a homeless shelter. He pulls out his airsoft pistol and points it at his dealer, demanding some meth. A police foot patrol sees him running from the scene and arrests him after a short pursuit.

[65] After about three months on remand, Adam is released on bail into a dual-diagnosis (addiction and mental-health) program at a residential treatment facility, which he completes successfully. He begins receiving depot injections every month. These control his psychosis and help with his drug cravings. With help from a caseworker with the John Howard Society he finds stable and supportive housing for the first time in his adulthood. He starts meeting with an elder from a local Indigenous healing society. He pleads guilty before trial. A psychological assessment reveals diagnoses of schizophrenia and polysubstance abuse disorder (in remission).

(b) Scenario B: FASD offender commits unplanned purse-snatching carrying BB gun.

[66] Consider Brian – a variation on a real-world incident mentioned in *Smart*.[64] In *Smart*, the accused was "extremely intoxicated and lying face down in a snowbank when a Good Samaritan stopped to help him". When the Good Samaritan reached down to touch him, he "grabbed [her] and at the same time reached in his waistband for what [she] believed to be a gun or a knife". Suppose that, in addition to grabbing for the Good Samaritan, he snatched her purse. Even without any threat or direct application of force, he has stolen from someone while armed with an offensive weapon: a robbery. He has also brandished his BB gun: use of a firearm. Assume Brian's intoxication was enough to reduce his impulse control and make him act out of character, but not enough to interfere with his ability to form the specific intent to steal. The Good Samaritan quickly escapes, and Brian is arrested moments later in possession of a BB gun. The BB gun is operable and can put an eye out, but it is unloaded.

[67] In this foreseeable scenario, Brian is 21 years old with no criminal record. He was in the care of Children's Services before dropping out of high school. He is on Assured Income for the Severely Handicapped for Fetal Alcohol Spectrum Disorder. He is also an alcoholic. A psychological assessment reveals that Brian's cognitive deficits make it difficult for him to connect

[64] *R v Smart*, 2014 ABPC 175.

his actions with their consequences.[65] Brian tells the judge he "just wants to get it over with" and pleads guilty without the assistance of a lawyer at his second court appearance.

(c) Scenario C: Refugee youth who acts as a lookout for an unexpected robbery.

[68] Chahid is 19 years old. He was born in a war-torn country. His earliest memories involve the chaos of civil war. He and his family fled the country, and he spent the next several years living in a refugee camp. He came to Canada with his family when he was twelve years old. He struggled in school and was placed in a modified English-as-a-second-language program. A school psychologist diagnosed him as suffering from PTSD and a learning disability. After dropping out in grade 11, he started hanging around some street youth, who he knows commit petty crime. He supports himself through manual labour arranged through a temp agency.

[69] Early one evening, Chahid is walking down a street in north Edmonton with some troubled friends. A friend approaches a pair of young people who are watching YouTube on a cell phone as they wait for the bus. Chahid's friend demands the phone. The friend pulls back his shirt, revealing a handgun tucked into his waistband. Chahid also sees the gun.

[70] Chahid did not know his friend planned to rob anyone. He was not even aware his friend carried a gun. He is shocked, scared, and his adrenaline is pumping. So, as his friend takes the cell phone, Chahid keeps a nervous lookout. He realizes this will help his friend steal the cell phone, but in a panic, he casts his lot with his friend. Chahid sees a police car round the corner. He shouts at his friend, telling him to run. His assistance is ineffective. The police arrest the pair a few moments later. The officers recover a handgun, but no ammunition. Chahid just helped his friend commit a robbery with a firearm. As an aider, he is every bit as guilty as his friend.

[71] Chahid is a permanent resident but not a citizen. He will be declared inadmissible to Canada if he receives a sentence longer than six months, with uncertain prospects of a humanitarian

---

[65] On the impact of fetal alcohol spectrum disorder in sentencing, see e.g. *R v Ramsay*, 2012 ABCA 257 at paras 15-39; *R v Friesen*, 2016 MBCA 50 at paras 17-26, 35-36.

appeal.[66] Chahid pleads guilty fifteen months after the offence. By then, he has received his high school diploma and has been accepted into a post-secondary trade program.

(d) Scenario D: Shoplifting turns into an unexpected robbery with a firearm.

[72] Danielle ran away from home at age 14 to escape her stepfather's sexual abuse. Now 19, she has grown up on the street. Although she sometimes works as a dishwasher in a restaurant, more recently she has been trading sex for money and drugs. Her "boyfriend" – he is as much her sex trafficker as her partner – sells drugs and carries a gun. Danielle knows he carries the gun because he recently threatened her with it. The pair decides to shoplift cheese and razor blades. A loss prevention officer sees Danielle put the items in her purse and confronts the two as they try to leave the store. She shouts: "Out of our way – he's got a gun!" The gun is never produced. The security guard steps aside. Danielle and her boyfriend run out of the store. A police officer recognizes her from the surveillance video. She and her boyfriend are arrested at a bus terminal half an hour later. The police find an operable handgun tucked into her boyfriend's waistband.

(e) Scenario E: The Case of the Knucklehead Hunter

[73] Eric, a licenced firearm owner, is an 18-year-old student in Grade 12 at a high school in small-town Alberta. His teachers describe him as "a nice kid, but not the brightest bloom in the canola patch." He lives on a farm with his parents. He and a friend are out hunting on his family's land near the Pembina River. He finds two hunters skinning a deer. He knows from town gossip that one of the men has a prior *Wildlife Act* conviction for poaching. He confronts them and tells them they do not have permission to be on the land. Eric tells the trespassers: "Give me your hunting tags and get out of here." No response. Eric lifts his hunting rifle in the air for effect but does not point it at them. The men hand over their tags. Eric destroys the tags. The men leave. Eric takes the deer. The RCMP arrest him at school the next day. Eric admits he was wrong to take the deer and the hunting tags, even if the deer was shot on his family's land.[67]

---

[66] *Immigration and Refugee Protection Act*, ss. 36, 63(3), 64, 112. See generally S. Baglay, "In the Aftermath of *R v Pham*: A Comment on Certainty of Removal and Mitigation of Sentences" (2018), 41(4) *Manitoba Law Journal* 181.

[67] Also consider the suspended sentence for vigilante gun justice in *R v Knight*, 2012 ABCA 217.

(f) A four-year sentence is grossly disproportionate for these foreseeable offenders.

[74] A reasonable, informed member of the community might agree that some of these scenarios call for a carceral sentence. But four years in the penitentiary? That is not just excessive, or higher than a judge might want to impose. Four years is grossly disproportionate.

[75] These are just a few examples of foreseeable cases. This Court could easily reformulate the facts of these scenarios. But whichever way the foreseeable offences are described, we know that unfortunate offenders like these fill the lower courts. Robberies are often committed by the down-and-out, the mentally ill, the addicted, the naïve, and the impoverished. Not every robbery is a premeditated stick-up job motivated by greed. Not every robbery involves an especially vulnerable victim. Not every party to an offence is equally culpable. And not every "firearm" is a heavily regulated weapon that is difficult to obtain or illegal to possess without a licence.

[76] In cases like these, Crown might exercise prosecutorial discretion and could accept a plea to a lesser offence that does not attract a mandatory sentence. But *Nur* was clear: Crown discretion cannot save an unconstitutional mandatory minimum sentence. The constitutionality of a law cannot depend on the "continuous exemplary conduct of the Crown".[68] Even sympathetic prosecutors may not be able to prevent a mandatory minimum sentence from being imposed, in cases where they only learn about mitigating facts *after* a conviction has been entered. And even if the Crown typically finds ways to work around grossly disproportionate minimums, a mandatory minimum sentence has an inherently coercive effect, incentivizing offenders to negotiate a guilty plea instead of proceeding to trial and risking a crushing penalty.[69]

[77] Brian's scenario – lying in a snowbank with a BB gun – might seem strange at first blush. But this example, inspired by the facts of an unusual real-world crime, highlights how circumstances that could seem implausible or far-fetched are not, in the chaotic docket of our provincial courts, as implausible as they might seem. Although reported decisions can give judges an idea of the different ways an offence might be committed, judges are busy, and less-serious

---

[68] *Nur* at paras 85-98; see also *Morrison* at para 150 (per Moldaver J.).

[69] See e.g. B. Berger, "A More Lasting Comfort?: The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*" (2009), 47 *SCLR* (2d) 101 at 110 to 111.

cases rarely result in reported sentencing decisions.[70] And if a judge is compelled to impose a mandatory minimum sentence in sympathetic circumstances, there is rarely any reason for a judge to write a decision. Reported decisions give judges an idea of the breadth of an offence and who might commit it. But foreseeability is not limited to reported decisions.[71]

5. "Rare and unique" is commentary, not the test under section 12 of the *Charter*.

[78] The appellant points to Justice Cory's observation in *Steele v Mountain Institution* that courts will only find sentences grossly disproportionate on "rare and unique occasions" because the test under section 12 is "stringent and demanding".[72] But an appellate court's observation that a certain outcome will be "rare" or "exceptional" does not define the underlying legal test. Commentary about the "exceptional" nature of an outcome is merely a prediction about how often the test will be satisfied, based on the court's understanding of the legal and factual landscape. "Rare and unique" is not *itself* the test. Gross disproportionality remains the test.

[79] This Court should consider the context for Justice Cory's observation. The sentencing landscape has changed substantially since 1990. At the time, there were only a handful of mandatory minimum sentences in the *Criminal Code*.[73] There was an explosion of new mandatory sentences in the years after *Steele* – often stern sentences applied to broad offences that can be committed by many offenders, in many ways. Justice Cory's basic premise remains sound: courts should not be too eager to brand a penalty grossly disproportionate. But his prediction was issued in an era when Parliament had largely left sentencing to judges' discretion.

[80] Interestingly, Justice Cory made these observations in response to an "as-applied" *Charter* challenge to a Parole Board decision made under the *Code*'s dangerous offender regime – not a challenge to a legislative provision that imposed a minimum penalty. And in the next paragraph in *Steele*, Justice Cory noted that "it should not be forgotten that there is in place a method whereby

---

[70] *R v GF*, 2021 SCC 20 at para 74.
[71] *R v Morrisey*, 2000 SCC 39 at para 33.
[72] *Steele v Mountain Institution*, [1990] 2 SCR 1385 at 1417.
[73] N. Crutcher, "The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada" (2001), 39 *Osgoode Hall Law J.* 273.

appellate courts can review sentences to ensure that they are appropriate." Yet when faced with a mandatory penalty, appellate courts have no more discretion than sentencing judges.

6. We can take gun crime seriously without imposing grossly disproportionate sentences.

[81] The appellant cites many occasions when legislators and courts expressed concerns about gun crime. The appellant says these concerns are reasonable, and says Parliament was entitled to denounce and deter such crime. Therefore, the appellant suggests, the mandatory minimum penalty is not grossly disproportionate. Respectfully, this reasoning involves something of a *non sequitur*. There is no doubt that Parliament takes gun crime seriously. And stern sentences are indeed defensible for most robberies with a firearm.

[82] But under section 12, the question is whether Parliament's concerns about firearm crime will justify the same stern sentences in *every* foreseeable case caught by this minimum penalty. Arguments that "public safety is paramount" are really the appellant's suggestion that the mandatory sentence is not grossly disproportionate for *any* foreseeable offender because Parliament reasonably concluded that this *invariably* long sentence will achieve one of three sentencing goals: deterrence, incapacitation (separation of offenders from society), or denunciation. These arguments do not hold up to scrutiny.

[83] First, there is notoriously weak evidence that longer jail sentences will have any marginal deterrent effect.[74] The Crown cannot overcome even the first stage of the *Oakes* test by demonstrating a rational connection between the sentencing goal of general deterrence and a mandatory minimum penalty.[75] This Court has already concluded as much in *Nur*,[76] and the appellant cites nothing to cast doubt upon this finding. The appellant does not rely on section 1 to defend this mandatory minimum penalty. But bald assertions about the deterrent value of

---

[74] A. Doob & C. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003), 30 *Crime & Justice* 143; A.N. Doob *et. al*., "Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation" (2014, online); BAR [Tab 2]; the Hon. D. Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015), 19 *Can. Crim. L. Rev.* 173 [Paciocco, "the Law of Minimum Sentences"] at 179 to 183. BAR [Tab 4].

[75] C. Fehr, "Instrumental Rationality and General Deterrence" (2019), 57 *Alta. Law Rev.* 53.

[76] *Nur* at paras 114-115.

universally long sentences – the kind of unsupported claims that would never pass muster under section 1 of the *Charter* – should not be given a free pass under the guise of "public safety". General deterrence "cannot, without more, sanitize a sentence against gross disproportionality".[77]

[84] Second, not all offenders need to be incapacitated. Mandatory minimum sentences guarantee that every offender will be separated from society at least temporarily. But it is easy to foresee fully rehabilitated offenders who do not need to be incarcerated to help protect society.

[85] Finally, mandatory minimum sentences are frequently defended on the basis that Parliament is entitled to send a message about the seriousness of a particular crime. Yet denunciation and retribution are rooted in the idea of "just desserts." That is, the "moral foundation for retributivist justice is that the penalty must fit the crime."[78] A punishment that goes well beyond any reasonable measure of a foreseeable offender's "just desserts" cannot be upheld merely because *other* examples of the same crime will call for stern denunciation.[79]

[86] Again, there are foreseeable cases that do not demand anything close to a four-year penitentiary sentence to fully denounce the offender's conduct. This Court has already afforded Parliament substantial deference by how it framed the test under section 12. Disproportionality alone is not enough. Judges do not strike down mandatory minimum sentences merely because they take a modestly different view of how much incarceration is needed to denounce a crime. Courts only intervene if there are reasonably foreseeable offenders for whom the minimum sentence would be grossly disproportionate. In this case, there are. Proportionality is sometimes hard to quantify. Yet we know that real-world offenders who have committed comparable offences, with similar levels of moral culpability – like Ms. Link and Mr. Conlon – have received sentences well below four years. And in other foreseeable circumstances – like when a party to a robbery offers only unplanned and marginal assistance, or when the offender is seriously mentally ill – four years in the penitentiary can go far beyond any reasonable conception of an offender's just desserts.

---

[77] *Nur* at paras 44, 45.
[78] Paciocco, "the Law of Minimum Sentences" at 174. BAR [Tab 4].
[79] *Nur* at paras 116-117.

7. Decisions upholding this mandatory minimum sentence have failed to grapple with the breadth of the crime or foreseeable offenders who commit this crime.

[87] Appellate decisions that have upheld the mandatory minimum sentence for robbery with a firearm have failed to apply the modern approach to reasonable foreseeability under section 12. Some were decided before *Nur*, and those decided after *Nur* did not consider the full breadth of the offence of robbery with a firearm. Nor have the later decisions considered individualized circumstances to the same degree as this Court did in *Nur*, *Lloyd*, and *Boudreault*.

[88] In *Lapierre*,[80] the first appellate decision to address this mandatory minimum, the Quebec Court of Appeal approached its reasonable hypothetical analysis by asking what crimes would arise "in everyday life" ("dans la vie quotidienne"). This defines a different – and more restrictive – standard than described in *Nur*, where the majority remarked that the analysis was "not confined to situations that are likely to arise in the general day-to-day application of the law."[81] In a very short section of the judgment – little more than a paragraph long – and without proposing any specific hypothetical scenarios, the Court of Appeal focused on the distinction between real firearms and imitation firearms without considering the breadth of the definition of "firearm." The only offender-specific factor the Court considered was the possibility of a "very young" offender. The court did not consider the effects of mental illness or party liability.

[89] In *Wust*,[82] the British Columbia Court of Appeal confined its section 12 *Charter* analysis to the circumstances of the five actual appellants. The Court refused to consider any reasonable hypotheticals, with Chief Justice McEachern opining that "I do not think this second branch of the test [*i.e. reasonable hypotheticals*] is relevant in these cases because, considering the nature of robbery with a firearm, there is no certainty that any injustice will necessarily be imposed upon an undeserving accused." The court relied on *Lapierre* for the principle that "the commission of a robbery with a firearm requires a conscious decision that cannot be excused on sympathetic grounds." The Court never considered scenarios where the robbery did not involve premeditation or time for considered reflection.

---

[80] *R c Lapierre* (1998), 15 CR (5th) 283 (Que CA).
[81] *Nur* at para 68.
[82] *R v Wust* (1998), 107 BCAC 130 (CA) at paras 22-23, 60-61, aff'd (on other grounds) 2000 SCC 18.

[90] The Chief Justice allowed that "such a case could arise where a very young person without a record is caught up, possibly as an aider or abettor, in a robbery with a firearm, and this question might have to be reviewed …". But *Wust* was grounded in the pre-*Nur* approach to foreseeability: the Court emphasized the need for "certainty" that a grossly disproportionate sentence would be imposed. It never considered the breadth of the definition of a "firearm." And it never considered individualized factors beyond an offender being "very young." This Court granted permission to appeal in *Wust*, but only addressed whether sentencing judges could deduct pre-disposition custody from the mandatory minimum sentence.

[91] In the Ontario case of *McDonald*,[83] the constitutionality of the mandatory minimum sentence for robbery with a firearm in the *general* case was not the focus of the appeal. Instead, the primary question was the same as in *Wust* at the Supreme Court: whether pre-disposition custody could be deducted from a mandatory minimum sentence. The Ontario Court of Appeal essentially adopted the analysis of the earlier British Columbia and Quebec decisions. The Court did not conduct a detailed reasonable hypothetical analysis.

[92] More recently, in *McIntyre*,[84] the Ontario Court of Appeal suggested there was no reason to reconsider *McDonald* because *Nur* had not changed the test under section 12. Respectfully, while *Nur* may not have changed the broad contours of the test, it clarified the reasonable foreseeability analysis, as this Court itself acknowledged in *Lloyd*. And cases like *Boudreault* have also opened the door to a greater consideration of individualized factors in a reasonable foreseeability analysis.

[93] In *McIvor*,[85] the Manitoba Court of Appeal considered five relatively bare-bones scenarios – and two of those hypotheticals did not even make out the offence of robbery with a firearm. None of the scenarios considered offenders who had used a firearm that was not subject to licencing restrictions, such as a BB gun or an airsoft pistol. None of the hypotheticals considered the impact of *Gladue* factors, mental illness, or other substantial mitigating circumstances.

---

[83] *R v McDonald* (1998), 111 OAC 25 (CA).
[84] *R v McIntyre*, 2019 ONCA 161.
[85] *R v McIvor*, 2018 MBCA 29.

[94] Finally, in *Bernarde*,[86] the Northwest Territories Court of Appeal refused to consider foreseeable circumstances, because the offender had not raised any foreseeable cases before the sentencing judge. *Bernarde* only reveals that the Court of Appeal believed Mr. Bernarde's *own* sentence was not grossly disproportionate. Although Mr. Bernarde suffered from FASD, he used a rifle to commit a planned, masked robbery of a convenience store in a rural community, pointing the gun at the clerk. The sentencing judge acknowledged the four-year minimum was "very harsh" for Mr. Bernarde. A less-serious robbery, with a less-dangerous firearm, could tip the scales from "very harsh" to "grossly disproportionate" for an equally sympathetic offender.

[95] Everyone's gut reaction is that four years is not outrageous for, say, a well-planned bank robbery using a firearm. But to properly determine whether a mandatory minimum sentence is grossly disproportionate, a court must carefully examine the breadth of the offence that attracts a mandatory minimum punishment. A court must also consider the characteristics of offenders who are likely to be caught by the offence. The lesson of *Nur*, *Lloyd*, and *Boudreault* is that courts cannot ignore the wider scope of an offence or overlook the sympathetic stories of the people who commit these crimes. Unfortunately, earlier authorities overlooked those factors.

8. The Court should not overrule a recent decision that discounts the relevance of parole under section 12 of the *Charter*.

[96] The appellant – like the dissenting judge below – attempts to revive the discredited argument that parole can temper the harshness of mandatory minimum sentences, and therefore, parole should be considered under section 12. This position would require the Court to overrule an important aspect of *Nur*, where Chief Justice McLachlin explained (at para 98):

> … [T]he Attorney General of Canada, relying on *Morrisey*, argues that parole eligibility reduces the actual impact of [mandatory minimum penalties]. We simply cannot know whether that is in fact the case. … [P]arole is a statutory privilege rather than a right. 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.

[86] *R v Bernarde*, 2018 NWTCA 7, aff'g 2018 NWTSC 27.

[97] Since *Nur*, nothing relevant has changed. The constitutional obligation to ensure sentences are not grossly disproportionate should not be shifted from the judiciary onto a tribunal that operates in a different legal and constitutional context. Parole remains deeply uncertain for many offenders, and the Parole Board continues to serve a different function than a sentencing judge. Proportionality considers an offender's "just desserts," while parole focuses on the utilitarian concern of public safety. Parole remains an intense form of supervision, and procedural rules are often weighted in favour of the state, with no presumption of innocence when an offender is alleged to have violated parole. Correctional authorities can cancel parole without approval from the Board, and the offender must wait up to three months for an independent review.[87] Parole decisions are subject to judicial review, but unsurprisingly, courts show the Board great deference.[88] The Board sometimes considers circumstances that are not considered aggravating during sentencing – such as an offender's failure to accept responsibility for the crime – and uses these factors to deny an offender parole.[89] The Board can withhold some relevant information from offenders.[90] And the Board's decisions are not subject to the open court principle, and sometimes not as transparent for members of the public as judges' sentencing decisions.[91]

[98] More pragmatically, asking judges to consider parole during the assessment of gross disproportionality would introduce a host of complications, requiring judges to delve into the complexities of the *Corrections and Conditional Release Act* and its associated regulations. Courts would not only need to consider foreseeable offences and foreseeable offenders, but also go on to consider if those offenders would be paroled, and when, and on what terms. Every tweak to parole eligibility timelines, the test for release on parole, or even procedural rules could require judges to revisit decisions about the constitutionality of mandatory minimum sentences. This would, in a practical sense, constitutionalize many rules surrounding parole – because any changes to parole rules would have a ripple effect on countless section 12 *Charter* decisions.

---

[87] *Corrections and Conditional Release Act*, s. 135; *Corrections and Conditional Release Regulations,* s. 163.

[88] See e.g. *May v Canada (Attorney General)*, 2020 FC 292.

[89] *Ouellette v Canada (Attorney General)*, 2013 FCA 54 at paras 30-31, 74-76; compare *R v Fash*, 2000 ABCA 244 at para 9; *R v Bradley*, 2008 ONCA 179 at paras 15-16.

[90] *Corrections and Conditional Release Act*, s. 141(4).

[91] *Corrections and Conditional Release Act*, s. 144; see e.g. *Yeager v Canada (National Parole Board)*, 2008 FC 113.

9. The dissent is unpersuasive. This Court should reject its reasoning and its approach.

[99] There is no reason to reconsider the test under section 12 of the *Charter*. The appellant does not invite this Court to adopt the reasoning in either concurring judgment in *Hills*. Nor does the appellant invite this Court to resile from the existing test (except with respect to parole). This is no surprise. The debate surrounding "reasonable hypotheticals" is decades old – and, for the purposes of this appeal – settled. *Nur* saw two attorneys-general ask the Court to abandon "reasonable hypotheticals."[92] But in detailed and cogent reasons, the Court injected new life into the search for "reasonably foreseeable applications" of a mandatory minimum sentence.

[100] Since *Nur*, "reasonable hypotheticals" have also been used outside the context of section 12 – signalling this Court's confidence that foreseeable scenarios are still worth considering.[93]

[101] This Court can revisit precedent. *Charter* doctrine is not written in stone. But stability and predictability matter. And, since *Nur*, the Court seems to have moved on. Although the majority judgments in *Nur* and *Lloyd* attracted strong dissents, in later cases, even the dissenters have accepted the majority's section 12 framework.[94] It would be extraordinary for this Court to reject a longstanding constitutional test the Court reconsidered and reaffirmed less than a decade ago.[95]

[102] In *Hills*, both concurring judgments acknowledged they were bound by this Court's jurisprudence. But the concurrences – and particularly the second concurrence – expressed doubts about this Court's approach under section 12 of the *Charter*. Indeed, the second concurrence invited this Court to reconsider its approach to section 12. The dissent in Mr. Zwozdesky's appeal – written by the same justice who wrote the second concurrence in *Hills* – suggested it had "dealt with the constitutional challenges [by] employing the methodology developed by the Supreme Court in … *Smith*, *Nur* … and *Lloyd*".[96] But the dissent did not consider the breadth of the offence of robbery with a firearm. Nor did the dissent consider the characteristics of foreseeable offenders

---

[92] *Nur* at para 48.

[93] *R v Appulonappa*, 2015 SCC 59 at para 28; *Ontario (Attorney General) v G*, 2020 SCC 38 at para 110.

[94] See e.g. *Boudreault* (Wagner C.J.C. and Moldaver and Brown JJ. concurring).

[95] *Nur* at para 59; see also *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 58.

[96] *Hilbach* at para 90.

who will be caught by this mandatory penalty. The dissent – in a very brief section 12 analysis that relied almost exclusively on survey results from a 2007 criminology paper – said the minimum would not "outrage the standards of decency."[97]

[103] The dissent and the *Hills* concurrence are hard to reconcile with vertical *stare decisis*. Neither seems to apply this Court's framework under section 12 of the *Charter*. They suggest that *Nur* and *Lloyd* were flawed because these decisions had "constructed a model … that … will invalidate sentencing decisions made by both Conservative and Liberal governments over the last approximately fifty years." And they argue that *Nur* and *Lloyd* "sounded the death knell for a host of statutory mandatory-minimum jail terms."[98] Yet these decisions do not reach the outcome they suggest was compelled by binding law. Judges can, of course, criticize this Court's decisions.[99] Over time, criticism from lower-court judges will sometimes help improve the law.[100] But, subject to *Bedford*'s limited exceptions,[101] lower-court judges must still *follow* binding authority – even if they do not like where the authority leads them.

---

[97] Note the paper's conclusion, however: "Perhaps the most interesting finding from this research is the strong public support for individualized sentencing within mandatory minimum sentence regimes. There is a clear understanding by the public that a mandatory penalty that imposes the same sentence on all offenders, regardless of variation in the seriousness of the offence or levels of culpability, will inevitably create injustice." See J. Roberts, *et. al*., "Public Attitudes to Sentencing in Canada: Exploring Recent Findings" (2007), 49(1) *Can. J. Criminology & Crim. Just.* 75 at 99, a paper cited in *Hills* at fn. 7 and *Hilbach* at fn. 7. BAR [Tab 5]; To similar effect, see Canada, Department of Justice, Research and Statistics Division, "Mandatory Minimum Penalties" (2018, online), where "[m]ore than eight in ten (82%) respondents believed that, in general, applying the same minimum sentence to all offenders who are convicted of the same offence is not fair and appropriate." See also Canada, Department of Justice, Research and Statistics Division, "Diversion, Discretion, and Sentencing Commissions" (2018, online).

[98] *Hills* at para 292.

[99] See e.g. *Canada v Craig*, 2012 SCC 43 at paras 18-21; *Gunn v Canada*, 2006 FCA 281; the Hon. D. Stratas, "A Decade of *Dunsmuir*: Please No More" (2018, online); the Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 *Queen's L.J.* 27.

[100] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 39.

[101] *Canada (Atty. General) v Bedford*, 2013 SCC 72; *R v Comeau*, 2018 SCC 15 at paras 29-34.

[104] The objections to this Court's jurisprudence are unpersuasive on their merits. The second concurrence in *Hills* took an originalist approach. Originalism has an uncertain and controversial place in Canadian constitutional law.[102] But the concurrence's approach to section 12 is dubious even when considered in originalist terms – because, for example, the public meaning of the expression "cruel and unusual" was not as well-settled in 1982 as the concurrence suggests.[103]

[105] The dissent raises another sentencing issue. After dismissing the section 12 arguments, the dissent defined three novel subcategories of robbery with a firearm. Then it assigned a prescriptive sentencing range to each subcategory.

[106] No one asked for this. No one warned the parties that this case might be a guideline judgement. No one asked the parties for submissions about the sentencing principles that are relevant to this new framework, other than perhaps a few broad questions during oral argument.

[107] There are other decisions in the same vein, by the same author.[104] They have a certain legislative quality. Each defines a new sentencing framework for a crime. These decisions reveal a thoughtful – if iconoclastic – perspective on the law of sentencing. Unfortunately, in Mr. Zwozdesky's respectful view, these decisions are also irreconcilable with this Court's binding authorities. These judgments – which have never enjoyed support from another member of the Court of Appeal – advance a sweeping new sentencing system that is entirely the product of one judge's research and preferences. They divide a statutory sentencing range into three or four

---

[102] *Reference Re BC Motor Vehicles Act*, [1985] 2 SCR 486; *Comeau*; *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32; J.G. Morley, "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and *Supreme Court Act* References Bring the Originalism Debate to Canada" (2016), 53 *Osgoode Hall L.J.* 745; B. Oliphant & L. Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016), 42 *Queen's L.J.* 107.

[103] C. Fehr, "Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the *Charter*" (2021), 25 *Can. Crim. L. Rev.* 235; L. Sirota, "Counter-Rebellion" (2020, online).

[104] *R v Murphy*, 2014 ABCA 409 (internet luring); *R v Ryan*, 2015 ABCA 286 (parole ineligibility periods for second-degree murder); *R v KSH*, 2015 ABCA 370 (child abuse; see also the majority reasons reported at 2015 ABCA 369); *R v Rossi*, 2016 ABCA 43 (impaired driving causing bodily harm); *R v Vigon*, 2016 ABCA 75 (sexual exploitation); *R v Yellowknee*, 2017 ABCA 60 (arson); *R v SLW*, 2018 ABCA 235 (child sexual abuse); *Hills*.

subcategories of "egregiousness." They quantify the effect of various aggravating or mitigating factors. Then, having crafted this system of sentencing arithmetic, these decisions apply their brand-new framework to an offender whose sentence is under appeal. If the sentence falls outside a new sub-range, they deem the sentence unfit and worthy of appellate intervention.

[108] The Court should not adopt the approach reflected in the dissent. These one-justice guideline decisions often raise broad and complicated questions about different sentencing principles, but the parties are never given a chance to meaningfully respond. Two Alberta judges have highlighted the *Mian* problems with their colleague's approach.[105] The guideline decisions released after *Lacasse* and *Friesen* continue to cite earlier judgments by the same justice, and in Mr. Zwozdesky's respectful view, these decisions are incompatible with this Court's recent warnings about the use and misuse of sentencing ranges.[106] Mr. Zwozdesky respectfully invites this Court to reaffirm that these guideline judgements are inconsistent with the Court's binding authorities in several ways: in how they are *created* (without adequate notice), in how they are *structured* (highly prescriptive and excessively quantitative), and in how they are *used on appeal* (as a justification for appellate intervention without regard for the usual principles of deference).

10. Mr. Zwozdesky should not be reincarcerated even if the minimum is upheld.

(a) If the minimum sentence is restored, the remaining sentence should be stayed.

[109] Even if this Court allows the Crown appeal, it should stay the newly increased sentence. Mr. Zwozdesky is now on parole. His warrant expires on or about September 1, 2021.[107] If the Court allows the appeal against sentence and increases Mr. Zwozdesky's global sentence from four years to five years, then a new warrant of committal will issue, and he will be reincarnated. Recognizing the injustice that often results from reincarceration after completion of a sentence,

---

[105] *Murphy* at para 1; *R v Mian*, 2014 SCC 54.

[106] *R v Lacasse*, 2015 SCC 64 at para 60; *R v Friesen*, 2020 SCC 9 at para 37. See *KSH* at paras 39-48; *Rossi* at paras 46-55; *Vigon* at paras 45-69; *Yellowknee* at paras 52-77; *SLW* at paras 98-144; *Hills* at paras 304-324; *Hilbach* at paras 94-145.

[107] Mr. Zwozdesky received a global sentence of four years on April 4, 2019, less 579 days credit for pre-disposition custody. April 3, 2023, less 579 days, is September 1, 2021.

this Court and other appellate courts often permanently stay the remaining sentence in similar circumstances.[108] Mr. Hilbach's increased sentence was stayed in the court below, for example.

[110] Here, Mr. Zwozdesky does not need to return to jail for public safety reasons. No appellate delay is attributable to him. He agreed to join his appeal with Mr. Hilbach's, which helped expedite proceedings. The Court of Appeal reserved decision for nearly a year.

[111] Realistically, there is no need to venture beyond the section 12 *Charter* issue to decide this appeal. When the appellant sought permission to appeal to this Court, Mr. Zwozdesky suggested that the Court might grant permission to appeal only against the declaration the mandatory minimum sentence was unconstitutional. The appellant asked for permission to appeal against sentence generally, and the Court agreed. Yet now, on the appeal itself, the appellant makes no submissions about the fitness of Mr. Zwozdesky's sentence apart from arguing that the minimum sentence should be restored. Nor has the appellant made any submissions about the sentencing principles that apply to Mr. Zwozdesky's specific circumstances. Nor has the appellant voiced a position about whether Mr. Zwozdesky's higher sentence should be stayed or made concurrent. Respectfully, the appellant's silence is telling: this case is about the constitutionality of the mandatory minimum sentence, not Mr. Zwozdesky's individual sentence.

[112] In any event, there are at least three other reasons why the net (global) four-year sentence should not be disturbed, even if the mandatory minimum sentence were upheld.

(b) The totality principle justifies Mr. Zwozdesky's four-year global sentence.

[113] Totality is important to this case. While not a one-day "spree," there is strong factual overlap between the two robberies, which were committed about a week apart. More importantly, totality is often invoked to temper the sentence of a first-time offender with good rehabilitative prospects, to prevent global sentences from becoming "crushing" or otherwise unduly harsh.[109] To go to the

---

[108] *R v Anderson*, 2014 SCC 41 at para 65*; R v Suter*, 2018 SCC 34 at para 103; *R v Itturiligaq*, 2020 NUCA 6 at para 99; *Hills* at para 97.

[109] *R v M(CA)*, [1996] 1 SCR 500 at para 42; *R v Taylor*, 2010 MBCA 103; *R v Hutchings*, 2012 NLCA 2; A. Manson, "Some Thoughts on Multiple Sentences and the Totality Principle: Can We Get It Right?" (2013), 55 *Can. J. Criminology & Crim. Just.* 481; BAR [Tab 3]; Paciocco, "The Law of Minimum Sentences" at 211 to 215. BAR [Tab 4].

penitentiary for the first time in one's mid-fifties – while suffering from crippling chronic pain that was difficult to manage even *outside* custody – is itself crushing. There was good reason to restrain the sentence for a first-time offender like Mr. Zwozdesky.

[114] Judges commonly use totality to temper consecutive sentences when an offender has committed multiple robberies. In *Johnas*, a leading Alberta decision that created a starting-point sentence for convenience store robberies, the Court of Appeal discussed how multiple offences should not be "free." But *Johnas* also recognized that multiple robberies often require a considerable downward adjustment to prevent the cumulative sentence from shooting into the stratosphere. For example, in one of the appeals heard with *Johnas*, Mr. Hammond had committed three armed robberies and one attempted robbery within two days. Each involved a CO_2 pistol, described as a "gun." If the court had simply multiplied the starting-point sentence by the number of robberies, he would have faced a sentence of nine years. But the Court of Appeal reduced the sentence to four years to account for totality, among other principles. Or consider sentences imposed against Mr. Morozoff and Mr. Jurgens: their weeklong spree of five robberies – using a broken pellet gun – netted four years after the Court considered totality.[110]

(c) Sentences that would otherwise be consecutive can be made concurrent to account for the distinction between *disproportionality* and *gross* disproportionality.

[115] On a related point, there is an incongruity when an offender is sentenced for multiple offences and a mandatory-minimum penalty must be imposed on one count, but not other counts. The mandatory-minimum sentence on one count is sometimes *disproportionate* without being *grossly* disproportionate. A judge might be required to impose a minimum sentence she would otherwise consider unjustifiability high and inconsistent with the principles of sentencing defined in Part XXIII of the *Code*. If, however, the offender is sentenced for more than one crime, then the

---

[110] *Johnas* at paras 25, 41-57 (Hammond), 72-86 (Morozoff and Jurgens). See also *R v Ramsankar*, 2005 ABCA 323 (five years for seven *Johnas* robberies over eight days); *R v KML*, 2009 ABCA 71 (30 months for three *Johnas* robberies over five days); *R v Farkas*, 2011 ABCA 340 (five years for ten *Johnas* robberies over four months). The dissenting justice appears to have misread *Johnas*, erroneously suggesting that Mr. Morozoff's sentences were made consecutive, not concurrent. Compare *Hilbach* at footnote 97 with *Johnas* at para 85.

sentence imposed for the second offence – which might ordinarily be consecutive to the first sentence – could run concurrent with the first sentence. This not only accounts for totality. It also helps mitigate the disproportionality caused by the minimum sentence imposed on the first count.

[116] In this case, applying the principles found in Part XXIII of the *Code*, Mr. Zwozdesky's global four-year sentence is not demonstrably unfit or disproportionately low. Although the sentence was restrained, it fell within the normal range for similar offences committed by similar offenders in Alberta. The sentencing judge's reasons reveal no errors of principle that influenced the sentence imposed (nor does the Crown now allege errors beyond the section 12 analysis). This Court could respect the logic of Justice Yungwirth's decision by making Mr. Zwozdesky's four-year minimum sentence (on count one) run concurrent to the one-year sentence (on count four), even if these separate offences would normally call for consecutive sentences.

(d) The "inflationary floor" theory is misguided. A mandatory minimum sentence is not reserved for the "best" offender.

[117] Finally, this Court should reject the dubious "inflationary floor" theory. Some lower courts have reasoned that a minimum sentence is reserved for the least-culpable offenders in the least-culpable circumstances. On this logic, sentences for other, more-culpable offenders must rise when Parliament creates a minimum sentence. The mandatory minimum sentence creates an "inflationary floor," pushing up other sentences for the same offence.[111]

[118] Yet a statutory maximum is not reserved for the worst offender in the worst circumstances.[112] Why, then, should a statutory minimum be reserved for the least-blameworthy offenders? And if a minimum sentence can be *disproportionate* provided it is not *grossly* disproportionate, then why does the creation of a disproportionate minimum imply that *all* penalties for the same crime must increase in lockstep? This will risk pushing every sentence disproportionately higher, even if a proper application of the proportionality principle and other sentencing principles would see many sentences cluster near the mandatory minimum.

---

[111] See e.g. *R v Ferguson*, 2006 ABCA 261 at paras 71, 85.
[112] *R v LM*, 2008 SCC 31; *R v Solowan*, 2008 SCC 62.

[119] The inflationary floor theory finds support in Justice Arbour's judgment in *Morrisey*, but two provincial appellate courts have recently expressed some misgivings.[113] *Lloyd* did not discuss an "inflationary effect" from any new minimum. And "sentencing floor" reasoning is hard to apply to hybrid offences, where the "floor" will change with the Crown's election.[114] This Court should resolve the uncertainty caused by this unprincipled sentencing rule.

PART IV – COSTS

[120] Mr. Zwozdesky does not seek costs. He asks that no costs be awarded against him.

PART V – ORDER SOUGHT

[121] Mr. Zwozdesky respectfully asks that the appeal be dismissed in its entirety, that is, (a) that the Court uphold Justice Yungwirth's declaration that the mandatory minimum sentence under paragraph 344(1)(a.1) of the *Criminal Code* violates section 12 of the *Charter*, is not saved by section 1 of the *Charter*, and is therefore of no force or effect, and (b) that the Court dismiss the Crown's appeal against sentence.

[122] If the declaration of invalidity is overturned, Mr. Zwozdesky asks the Court to either (a) permanently stay the higher sentence on the first count, or (b) make his sentence on the first count run concurrent to his sentence on the other count, leaving him with no time left to serve.

All of which is respectfully submitted this 28th day of July, 2021:

Dane F. Bullerwell
Counsel for the Respondent, Mr. Zwozdesky

Katherine E. Clackson
Counsel for the Respondent, Mr. Zwozdesky

---

[113] *R v Morrisey*, 2000 SCC 39 at para 75; *R v Lloyd*, 2014 BCCA 224 at para 53; *R v Veinotte*, 2016 BCCA 21 at paras 21-26; *R v Carter*, 2019 NLCA 39 at paras 46-54. See also Paciocco, "The Law of Minimum Sentences" at 225 to 229. BAR [Tab 4].

[114] *Morrison* at para 151.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

[123] There is no sealing order, confidentiality order, publication ban, or classification of information in the file that is confidential under legislation. There is no restriction on public access to information in this file that could have an impact on the Court's reasons in the appeal.

PART VII – TABLE OF AUTHORITIES

Cases	Para. #s
Canada (Attorney General) v Bedford, 2013 SCC 72	103
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65	103
Canada v Craig, 2012 SCC 43	103
Gunn v Canada, 2006 FCA 281	103
May v Canada (Attorney General), 2020 FC 292	97
Ontario (Attorney General) v Fraser, 2011 SCC 20	101
Ontario (Attorney General) v G, 2020 SCC 38	100
Ouellette v Canada (Attorney General), 2013 FCA 54	97
Quebec (Attorney General) v 9147-0732 Québec Inc, 2020 SCC 32	104
R c Lapierre (1998), 15 CR (5th) 283 (Que CA)	78, 89
R v Alcantara, 2015 ABCA 258	41
R v Al-Isawi, 2017 BCCA 163	49
R v Anderson, 2014 SCC 41	109
R v Appulonappa, 2015 SCC 59	100
R v Arcand, 2010 ABCA 363	42
R v Ayorech, 2012 ABCA 82	60, 63
R v Belair (1981), 34 OR (2d) 302 (CA)	36
R v Bernarde, 2018 NWTCA 7	94
R v Bernarde, 2018 NWTSC 27	94
R v Boudreault, 2018 SCC 58	7, 27, 87, 92, 95
R v Bradley, 2008 ONCA 179	99
R v Briscoe, 2010 SCC 13	41
R v Carter, 2019 NLCA 39	119
R v Comeau, 2018 SCC 15	103, 104
R v Conlon, 2011 ABCA 379	3, 44

R v Conlon, 2011 ABPC 259	3, 44, 46
R v Covin, [1983] 1 SCR 725	34
R v Crawford, 2015 ABCA 175	32, 34
R v Daley, 2007 SCC 53	30
R v Dooley, 2009 ONCA 910	41
R v Dunn, 2013 ONCA 539	31, 32
R v Dunn, 2014 SCC 69	31
R v Farkas, 2011 ABCA 340	114
R v Fash, 2000 ABCA 244	97
R v Felawka, [1993] 4 SCR 199	30
R v Ferguson, 2006 ABCA 261	117
R v Friesen, 2016 MBCA 50	67
R v Friesen, 2020 SCC 9	108
R v Gauthier, 2013 SCC 32	42
R v GF, 2021 SCC 20	77
R v Goard, 2014 ONSC 2215	32
R v Hasselwander, [1993] 2 SCR 398	34
R v Hilbach, 2020 ABCA 332	3, 21
R v Hills, 2020 ABCA 263	22, 103
R v Hood, 2018 NSCA 18	27
R v Hutchings, 2012 NLCA 2	113
R v Ipeelee, 2012 SCC 13	27, 63
R v Itturiligaq, 2020 NUCA 6	109
R v Jean, 2012 BCCA 448	30
R v JED, 2018 MBCA 123	27
R v Johnas, 1982 ABCA 331	49, 114
R v KML, 2009 ABCA 71	114
R v Knight, 2012 ABCA 217	73
R v Kotelko, 2011 MBPC 76	61

R v KSH, 2015 ABCA 369	107-108
R v KSH, 2015 ABCA 370	107
R v Lacasse, 2015 SCC 64	108
R v Lafrance, [1975] 2 SCR 201	30
R v Langevin (1979), 47 CCC (2d) 138 (Ont CA)	30
R v LaPointe-Melo, 2010 ONCJ 314	61
R v Link, 2012 MBPC 25	3, 53
R v Lloyd, 2014 BCCA 224	119
R v Lloyd, 2016 SCC 13	5, 7, 27, 28
R v LM, 2008 SCC 31	118
R v M(CA), [1996] 1 SCR 500	113
R v Maguire, 2012 ONCJ 366	34
R v McDonald (1998), 111 OAC 25 (CA)	91
R v McIntyre, 2019 ONCA 161	92
R v McIvor, 2018 MBCA 29	93
R v McKay, 2014 SKCA 19	30
R v Mian, 2014 SCC 54	108
R v Morgan, 2013 ABCA 26	30
R v Morrisey, 2000 SCC 39	77, 119
R v Morrison, 2019 SCC 15	27, 50, 76, 119
R v Murphy, 2014 ABCA 409	109, 108
R v Nasogaluak, 2010 SCC 6	27
R v Neve, 1999 ABCA 206	30
R v Newell, 2007 NLCA 9	30
R v Nur, 2015 SCC 15	7, 25, 26-28, 51, 76, 83, 85, 88, 99, 101
R v Ramsankar, 2005 ABCA 323	114
R v Ramsay, 2012 ABCA 257	67
R v Rossi, 2016 ABCA 43	107-108

R v Ryan, 2015 ABCA 286	107
R v Saunders, 1996 CarswellOnt 519 (Ont Ct (Gen Div))	30
R v Scofield, 2019 BCCA 3	27
R v Shevchenko, 2018 ABCA 31	63
R v SLW, 2018 ABCA 235	107-108
R v Smart, 2014 ABPC 175	66
R v Solowan, 2008 SCC 62	118
R v Soosay, 2012 ABPC 220	60
R v Steele, 2007 SCC 36	37-40
R v Suter, 2018 SCC 34	109
R v Sutherland, 2019 NSPC 17	61
R v Taylor, 2010 MBCA 103	113
R v Thompson, 2010 ONCJ 107	61
R v Ullah, 2010 ONCJ 45	61
R v Veinotte, 2016 BCCA 21	119
R v Vigon, 2016 ABCA 75	107-108
R v Wust (1998), 107 BCAC 130 (CA)	89
R v Wust, 2000 SCC 18	89
R v Yellowknee, 2017 ABCA 60	107-108
Reference Re BC Motor Vehicles Act, [1985] 2 SCR 486	104
Reference re Firearms Act (Canada), 2000 SCC 31	35
Steele v Mountain Institution, [1990] 2 SCR 1385	78
Yeager v Canada (National Parole Board), 2008 FC 113	97

TEXTS, ARTICLES, & SECONDARY SOURCES

	Para. #s
Baglay, Sasha. "In the Aftermath of *R v Pham*: A Comment on Certainty of Removal and Mitigation of Sentences" (2018), 41(4) *Manitoba Law Journal* 181	71
Berger, Benjamin L. "A More Lasting Comfort?: The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*" (2009), 47 *S.C.L.R.* (2d) 101	76
Canada, Department of Justice, Research and Statistics Division, "Mandatory Minimum Penalties" (2018, online: <https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/jul/jul01-eng.pdf>)	102
Canada, Department of Justice, Research and Statistics Division, "Diversion, Discretion, and Sentencing Commissions" (2018, online: <https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/jul/jul02-eng.pdf>)	102
Crutcher, Nicole. "The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada" (2001), 39 *Osgoode Hall Law J.* 273	79
Doob, Anthony N. & Webster, Cheryl M. "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003), 30 *Crime & Justice* 143	83
Doob, Anthony N., Webster, Cheryl M., & Gartner, R. "Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation" (2014, online: <https://www.crimsl.utoronto.ca/sites/crimsl.utoronto.ca/files/Issues related to Harsh Sentences and Mandatory Minimum Sentences General Deterrence and Incapacitation.pdf>)	83
Fehr, Colton. "Instrumental Rationality and General Deterrence" (2019), 57 *Alta. Law Rev.* 53	83
Fehr, Colton. "Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the *Charter*" (2021), 25 *Can. Crim. L. Rev.* 235	104
Manson, Allan. "Some Thoughts on Multiple Sentences and the Totality Principle: Can We Get It Right?" (2013), 55 *Can. J. Criminology & Crim. Just.* 481	113
Morley, J. Gareth. "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and *Supreme Court Act* References Bring the Originalism Debate to Canada" (2016), 53 *Osgoode Hall L.J.* 745	104
Oliphant, Benjamin J. & Sirota, Leonid. "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016), 42 *Queen's L.J.* 107	104
Paciocco, the Hon. David M. "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015), 19 *Can. Crim. L. Rev.* 173	83, 85, 113, 119

Roberts, Julian V., Crutcher, Nicole, & Verbrugge, Paul. "Public Attitudes to Sentencing in Canada: Exploring Recent Findings" (2007), 49(1) *Can. J. Criminology & Crim. Just.* 75	102
Sirota, Leonid. "Counter-Rebellion" (2020, online: <https://canliiconnects.org/en/commentaries/72030>)	104
Stratas, the Hon. David W. "A Decade of *Dunsmuir*: Please No More" (2018, online: <https://www.administrativelawmatters.com/blog/2018/03/08/a-decade-of-dunsmuir-please-no-more-hon-david-w-stratas/>)	103
Stratas, the Hon. David W. "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 *Queen's L.J.* 27	103
Stuart, Don. "*Boudreault*: The Supreme Court Strikes Down Mandatory Victim Surcharges to Protect Vulnerable Offenders" (2019), 50 CR (7th) 276	27

LEGISLATION

Criminal Code, RSC 1985, c C-46, ss. 2 ("firearm", "steal"), 16, 21, 22, 84, 85, 322, 343, 344, 718.1, 720 *Code criminel*, LRC (1985), ch C-46, art. 2 ("arme à feu", "voler"), 16, 21, 22, 84, 85, 322, 343, 344, 718.1, 720
Immigration and Refugee Protection Act, SC 2001, c 27, ss. 36, 63, 64, 112. *Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27, art. 36, 63, 64, 112.
Corrections and Conditional Release Act, SC 1992, c 20, ss. 135, 141, 144 *Loi sur le système correctionnel et la mise en liberté sous condition*, LC 1992, c 20, art. 135, 141, 144
Corrections and Conditional Release Regulations, SOR/92-620, s. 163 *Règlement sur le système correctionnel et la mise en liberté sous condition*, DORS/92-620, art. 163