File No. 39438

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

-and-

OCEAN WILLIAM STORM HILBACH & CURTIS ZWOZEDSKY

RESPONDENTS
(Respondents)

and-

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INTERVENERS

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF SASKATCHEWAN

(Pursuant to Rules 37 and 42 of *The Rules of the Supreme Court of Canada)*

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PART I
OVERVIEW

1. The Attorney General for Saskatchewan ("Saskatchewan") intervenes to respond to the Constitutional Questions regarding the validity of the four and five year mandatory minimums in ss. 344(1)(a)(i) and (a.1) of the *Criminal Code*.[1]

2. Saskatchewan respectfully submits that neither ss. 344(1)(a)(i) nor (a.1) of the *Criminal Code* infringes s. 12 of the *Charter*.[2]

3. The Alberta Court of Appeal's constitutional analysis, with respect to Mr. Hilbach, was flawed by its failure to adhere to this Court's direction in *R v Lloyd*.[3] Specifically, the Court did not identify the appropriate range of fit sentences for similar offenders who commit similar kinds of robbery with a firearm. Instead, the Court incorrectly based its s. 12 conclusion on the disparity between the five-year mandatory minimum and the three-year sentence the Court determined was fit and proper for the accused. With respect to Mr. Zwozdesky, the Court erred in its application of the reasonable hypothetical.

4. The prevailing sentencing jurisprudence demonstrates that both the four and five year mandatory minimums are proportionate sentences. The mandatory minimums are neither abhorrent nor intolerable and do not outrage standards of decency.

5. Finally, the Court of Appeal's decision evidenced insufficient deference to Parliament's "considered view" respecting the seriousness of offences involving the use of restricted or prohibited firearms.

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[1] *Criminal Code*, RSC 1985, c C-46, as amended [*Criminal Code*].
[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].
[3] 2016 SCC 13, [2016] 1 SCR 130 [*Lloyd*].

PART II
INTERVENER'S POSITION ON THE CONSTITUTIONAL QUESTIONS IN ISSUE

6. The two constitutional questions in issue state as follows:

> **Question in Issue No.1:**
>
> Where an offender commits the offence of robbery with a firearm, does the mandatory minimum sentence of four years pursuant to s. 344(1)(a.1) of the *Criminal Code* infringe s. 12 of the *Canadian Charter of Rights and Freedoms*?
>
> **Question in Issue No.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 s. 344(1)(a)(i) of the *Criminal Code* infringe s. 12 of the *Canadian Charter of Rights and Freedoms*?

7. Saskatchewan answers "no" to each of the constitutional questions.

PART III
ARGUMENT

A. Neither ss. 344(1)(a)(i) nor 344(1)(a.1) infringes s. 12 of the *Charter*

8. *R v Nur*[4] prescribed a two-step process for the s. 12 inquiry. The first step is to conduct a contextual or particularized inquiry. The object of this inquiry is to consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would be appropriate having regard to the objectives and principles of sentencing in the *Criminal Code*. This scrutiny involves an analysis of whether the mandatory minimum in question requires the imposition of a sentence that is grossly disproportionate to the fit and proper sentence for the offender before the court.

9. In the second step, the court must consider if the mandatory minimum would be grossly disproportionate in "reasonable hypotheticals". If the answer is yes, there is a violation of s. 12 and a finding that the mandatory minimum sentence constitutes cruel and unusual punishment.[5]

10. This Court has stressed that the hurdle for making a "cruel and unusual" finding is high. The requirement is that the proposed sentence must be "so excessive as to outrage the standards of decency". A proposed mandatory minimum that is simply excessive or harsh does not meet the test. Alternatively, any mandatory minimum that may be considered "abhorrent or intolerable" to society will constitute cruel and unusual punishment.[6]

i) The Court of Appeal's Lack of Deference to Parliament

11. The Court of Appeal erred by paying insufficient deference to Parliament. A mandatory minimum sentence represents a "forceful expression of government policy in the area of criminal law"[7] by lawmakers who serve Canadian citizens.

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[4] 2015 SCC 15, [2015] 1 SCR 773 [*Nur*].
[5] *Ibid*., at paras 39, 46, 65 and 77.
[6] *R. v. Morrisey*, 2000 SCC 39, [2000] 2 SCR 90 at para 26 [*Morrisey*]; *Nur*, at para 39 and *Lloyd*, at paras 24, 32-33.
[7] *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206 at para 45.

12. The challenged provisions of the *Criminal Code* were enacted in 2008 by means of Bill C-2, *An Act to Amend the Criminal Code*.[8] The legislation was introduced with the aim of "increasing mandatory minimum terms of imprisonment for individuals who commit serious or repeat firearms offences." Parliament was responding to a pressing problem.

13. The Honourable Rob Nicholson, Minister of Justice and the Attorney General of Canada, addressed the Legislative Committee on October 30, 2007 and explained that implementing mandatory minimums is a legitimate exercise of Parliament's legislative responsibilities:

> I remember on a number of occasions when we revisited certain sections of the *Criminal Code* and said that the maximum sentence doesn't reflect the seriousness with which society views this type of behaviour. That was a legitimate exercise of our legislative responsibilities. And putting minimum sentences, in my opinion, is also a responsible exercise of our legislative responsibilities.
>
> What we're trying to do is give some guidance as to the seriousness with which Parliament views some of this activity. You know and I know some of the serious problems that have arisen and can arise in this country with respect to firearms offences and crimes that are committed with firearms….
>
> I think it's incumbent upon us to try to draft legislation to take into consideration these legitimate concerns of law-abiding people while at the same recognizing the charter and the rights under the Canadian Bill of Rights of individuals who are accused of a crime. What we are trying to do is strike that reasonable balance. I'm convinced that we are doing that. Again, it's a legitimate exercise and it's why we are sent here and what we are supposed to do.[9]

14. This Court in *R v Friesen* addressed an increase in maximum sentences for child sexual offences and held that such sentences should generally increase as a result of such a legislative initiative.[10] Specifically, at paragraph 109:

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[8] Bill C-2, *An Act to Amend the Criminal Code*, SC 2008, c 2. (c.i.f. May 1, 2008 by SI/2008-0034).

[9] Legislative Committee on Bill C-2, Tuesday, October 30, 2007, 39th Parliament, 2nd Session, page 9. Available online at: https://www.ourcommons.ca/DocumentViewer/en/39-2/CC2/meeting-2/evidence

[10] 2020 SCC 9 at para 109 [*Friesen*].

> Parliament's decision in 2015 to increase maximum sentences for sexual offences against children should shift the range of proportionate sentences as a response to the recognition of the gravity of these offences. Sentences should increase as a result of this legislative initiative.

15. The Court of Appeal, in its strict reliance on *R v Johnas*[11] as the benchmark, failed to account for the 2008 amendments that increased the mandatory minimum terms of imprisonment. In contrast, the Manitoba Court of Appeal in *R v McIvor* correctly held that "regard must be had to Parliament's clear intention to discourage the use of firearms for criminal purposes through the imposition of mandatory minimum punishments and to treat robberies committed with firearms more harshly than such crimes were treated previously."[12]

16. The Quebec Court of Appeal in *R c Lapierre* further held that there is "no need" to conduct a comprehensive study of the Canadian jurisprudence to recognize that the a perpetrator of a robbery with firearm must expect a severe sentence.[13] Putting aside the fact that robbery "is in and of itself a violent crime", the Court in *Lapierre* found that courts have had "to reconcile themselves with legislation which reflects the aggravating nature of the use of a firearm in the course of a robbery."[14]

17. The Alberta Court of Appeal further discounted the particularly grave nature of firearms offences, as outlined in *Morrisey*. Saskatchewan submits that Justice Gonthier's warning, albeit in reference to s. 220(a) of the *Criminal Code*, is equally applicable to the offences before this Court:[15]

> [54] …Extra vigilance is necessary with guns, and while society would expect people to take precautions on their own, unfortunately people do not always do so. Consequently, Parliament has sent an extra message to such people: failure to be careful will attract severe criminal penalties. The sentence represents society's denunciation, having regard to the gravity of

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[11] 1982 ABCA 331, 2 CCC (3d) 490.
[12] 2018 MBCA 29, at para 36 [*McIvor*].
[13] (1998), 123 CCC (3d) 332 (Que CA) at para 22 [*Lapierre*].
[14] *Ibid*., at para 22.
[15] *Morrisey*, at para 54.

> the crime; it provides retributive justice to the family of the victim and community in general; and it serves a general deterrent function to prevent others from acting so recklessly in the future.

18. Sadly, gun violence across Canada is a persistent and escalating problem. The most recent statistics from the Canadian Centre for Justice Statistics report that for the year 2019 the rates of violent and non-violent firearm specific offences increased for the fifth consecutive year:

> Among violent offences involving the use of a firearm that are specified in the *Criminal Code*, 43% in 2019 were for discharging a firearm with intent, while another 41% were for pointing a firearm. The remaining 16% were for using a firearm in the commission of an indictable offence. The number of violent offences specific to firearms increased by 642 incidents in 2019 (from 2,861 in 2018 to 3,503 in 2019), a 21% increase in rate. This marks the fifth consecutive increase, and the second relatively large change following a 26% rise in 2015. Police reported an increase in the rate of all three violent firearm violations: discharging a firearm with intent (+28%, +341 incidents), pointing of a firearm (+17%, +223 incidents), and using a firearm in the commission of an indictable offence (+14%, +78 incidents). Much of the increase in firearm-related offences in 2019 was the result of more incidents in Ontario (+268) and British Columbia (+162).[16]

19. Saskatchewan echoes the Appellant's summary of not only the reasons why robbery with a firearm is serious, but also the strong public interest in protecting Canadians from gun-related violence.[17]

ii) The Court of Appeal's Flawed s. 12 Analysis in Mr. Hilbach's Case

20. Saskatchewan respectfully disagrees with the Alberta Court of Appeal's conclusion that a reasonable, properly informed Canadian, taking into account all of the relevant considerations as set out above, would find the mandatory minimum five-year sentence imposed upon Mr. Hilbach

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[16] Canada. Statistics Canada. "Police-Reported Crime Statistics in Canada, 2019", Released October 29, 2020 at pages 8 and 42. Available at: https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00010-eng.pdf

[17] Appellant's factum, at paras 75-84.

abhorrent, intolerable and an outrage to standards of decency.[18] The Court of Appeal's failure to conduct the particularized inquiry mandated by the proper application of s. 12 is evident at paragraphs 51-55 which constitutes the entirety of the Court's analysis. Specifically, at paragraphs 52-54, the Court states:

> [52] The issue with respect to Mr. Hilbach is whether the mandatory minimum of five years in s 344(1)(a)(i) is grossly disproportionate to the fit and proper sentence for him, three years for robbery with a prohibited firearm. Is the additional two-year sentence "so excessive as to outrage standards of decency" that reasonable, well-informed Canadians "would find the punishment abhorrent or intolerable"?...
>
> [53] In this case, the five-year mandatory minimum is so high that many cases will attract the minimum sentence and even aggravated cases may frequently not result in a sentence higher than the minimum, such that mitigating factors are lost. The mandatory minimum also elevates the sentencing principles of denunciation and deterrence to such an extent as to minimize objectives of rehabilitation, the imposition of a just sanction, and special considerations for Indigenous offenders: *Boudreault*, paras 80-83.
>
> [54] We conclude that a reasonable, properly informed Canadian, taking into account all of these considerations, would find the mandatory minimum five-year sentence imposed upon Mr Hilbach, compared to a fit and proper sentence of three years, to outrage standards of decency, and find the sentence abhorrent or intolerable. An additional two years in jail over and above a fit and proper sentence would shock the conscience of the reasonable person.

21. Following Saskatchewan's submissions in *R v Bear*, a Court of Queen's Bench decision concerning the mandatory minimum in s. 271(b) of the *Criminal Code*, phrases such as "so excessive as to outrage standards of decency" are not "speed bumps that do nothing more than slow judicial traffic on the road to findings of unconstitutionality" under s. 12.[19] Rather, the s. 12

[18] *R v Hilbach*, 2020 ABCA 332 at para 54 [*Hilbach*].
[19] 2020 SKQB 140 at para 22.

analysis involves "deep, careful consideration" well beyond "reflexive incantation."[20] The Court of Appeal's analysis lacks this degree of consideration.

22. This Court in *Lloyd* clarified that while at the stage of the particularized inquiry, the court "need not fix the sentence or the sentencing range at a specific point," but "should consider, even implicitly, the rough scale of the appropriate sentence."[21] The Court of Appeal erroneously commenced their analysis with an examination of whether the two years less a day sentence imposed by the sentencing judge was a fit and proper sentence for Mr. Hilbach. The Court of Appeal determined that the sentence of two years less a day was unreasonable and demonstrably unfit. The Court then substituted a sentence of three years' imprisonment without a thorough inquiry as instructed in *Lloyd* and earlier s. 12 jurisprudence.

23. The Court of Appeal should have considered whether the appropriate range of fit sentences for robbery with a prohibited firearm committed by a similar kind of offender rendered the mandatory minimum grossly disproportionate. Had the Court of Appeal asked the correct question with respect to whether the five-year mandatory minimum as opposed to the three-year sentence the Court of Appeal determined as the fit and proper sentence, it would likely have acknowledged appellate authorities in Quebec, British Columbia, Ontario, Manitoba and Northwest Territories that upheld the mandatory minimum.[22]

24. Instead, the Court of Appeal simply relied on the sentencing judge's rejection of any authority that affirmed the constitutionality of s. 344(1)(a)(i) of the *Criminal Code*. These cases, as summarized in the Appellant's factum, demonstrate not only that the five-year mandatory minimum is not grossly disproportionate, abhorrent or so intolerable that it outrages standards of community decency, but also that the mandatory minimum is well within the range of appropriate fit sentences for similar offenders who commit similar offences.

25. It is contrary to the reasoning given by this Court to resolve the s. 12 issue by focusing on the disparity between the mandatory minimum and the fit sentence in a particular case. As stated

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[20] *Ibid*.
[21] *Lloyd*, at para 23.
[22] Appellant's factum, at para 2.

by this Court in *R v M. (C.A)*, "the search for a single appropriate sentence for a similar offender and a similar case will frequently be a fruitless exercise of academic abstraction."[23] The Court of Appeal erred not only in its failure to conduct the particularized inquiry but in further asking an incorrect question with respect to the appropriate range of fit sentences. Instead, the Court approached the s. 12 issue as if it were a sentence appeal to be determined on ordinary appellate review principles.

26. Curiously, the Court was not offended by the one-year disparity between the two sentences in *Zwozdesky*.[24] But once again, this approach was contrary to the proper s. 12 analysis.

27. In his dissenting judgment in *Hilbach* and *Zwozdesky*, Justice Wakeling held that neither the four or the five-year mandatory minimum sentence infringed s. 12 of the *Charter*. He devised three subsets of appropriate sentencing ranges for various firearm offences – from a floor of four or five years to life imprisonment in order to "introduce rationality, consistency and predictability into the sentencing process."[25] Saskatchewan submits that this is the precise reasoning for the mandated particularized inquiry in s. 12 which was not conducted by the majority in *Hilbach*.

iii) The Court of Appeal's Flawed s. 12 Analysis in Mr. Zwozdesky's Case

28. Saskatchewan echoes its written submissions in its *R v Hills*[26] factum. Section 343, like s. 244.2(3)(b), is exactly the sort of narrow offence that Chief Justice McLachlin referenced in *Nur* as being appropriate for a mandatory minimum sentence. Saskatchewan adopts the submissions of the Appellant that none of the hypotheticals employed by the Court of Appeal establishes that the four-year mandatory minimum in *Zwozdesky* is grossly disproportionate.[27]

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[23] [1996] 1 SCR 500 at para 92.
[24] *Hilbach*, at para 51.
[25] *Ibid*., at paras 97-98.
[26] *R v Hills*, 2020 ABCA 263, on appeal to the SCC, File no 39338.
[27] Appellant's factum, at paras 69-74.

29. In its factum, the Appellant has accurately set out the required elements of the offence of robbery where a firearm is used. First, a person must be in possession of a firearm. Second, the person must choose to commit robbery, which entails the use of violence or threats of violence. Finally, the person must use the firearm in the commission of the robbery.[28] Robbery, accordingly, does not encompass a wide range of potential conduct and it is a serious offence capable of "causing great risk to and intense fear on the part of robbery victims."[29]

30. The two hypothetical scenarios considered "reasonably foreseeable" by the Alberta Court of Appeal cannot be relied on in the s. 12 analysis. The scenarios extend beyond this Court's direction in *Nur*, that what is reasonably foreseeable will "necessarily require consideration of the sort of situations that may be expected to be caught by the mandatory minimum, based on experience and common sense."[30]

31. The hypothetical of "Adam", a 22-year old Cree person with drug problems and schizophrenia who robbed his drug dealer at gunpoint with an airsoft pistol would not render the four-year mandatory minimum grossly disproportionate. Adam took some methamphetamines from his dealer and then, following his arrest, received treatment for psychosis and drug addiction. The hypothetical is not reasonable with respect to the assumptions that the Court would have to make both with respect to the weapon satisfying the definition of a "firearm" and Adam's criminal responsibility for the offence. Notwithstanding these assumptions, Saskatchewan endorses the Appellant's position that robbing a drug dealer is inherently dangerous and volatile.[31]

32. Similarly, the hypothetical of "Brian" does not establish a basis to find a s. 12 breach. Brian, a 21-year old with no criminal record, suffering from alcoholism and Fetal Alcohol Spectrum Disorder, snatched a purse from a woman who stopped to help him while he was lying face down in a snowbank from excessive alcohol. In the process of snatching the woman's purse, Brian reached into his waistband and displayed an unloaded BB gun. Brian's hypothetical

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[28] Appellant's factum, at paras 51-55.
[29] *R v L.W.W.*, [1998] BCJ No 1076 (BCCA), reversed on other grounds, 2000 SCC 18 at para 26.
[30] *Nur*, at para 74.
[31] Appellant's factum, at para 71.

satisfies all three requirements of the offence and accords with Parliament's strong denunciation of gun crimes.

33. In addition to the hypotheticals of Adam and Brian, the Court of Appeal considered the cases of *R v Lodoen* and *R v Link*,[32] both of which the Court held merited sentences below the mandatory minimum. *Lodoen* was one of the appeals heard together in *R v Johnas* in 1982.[33] Mr. Lodoen, at 18 years of age during the robbery of a convenience store, carried a BB gun that he revealed through an opening in his jacket to a terrified store clerk. Saskatchewan respectfully submits that the four-year mandatory minimum is not grossly disproportionate to Mr. Lodoen, despite the 18-month sentence imposed by the Court of Appeal.

34. The 18-year-old Indigenous offender in *Link*, who assisted others in a convenience store robbery, did not know that one of the offenders was carrying an imitation handgun. Saskatchewan agrees with the Appellant that Ms. Link's conduct would not be caught by the mandatory sentence given her lack of knowledge of the imitation firearm.

35. In reaching its conclusion, the Court of Appeal, despite affirming the three-year sentence for Mr. Zwozdesky, held that a reasonable, properly informed Canadian would find the four-year mandatory minimum "perhaps double a fit and proper sentence."[34] In focusing on the disparity between the sentences, the Court held that an additional year and a half to two years in jail beyond a fit and proper sentence would shock the conscience of the reasonable person. Saskatchewan disagrees.

36. In view of the gravity of the robbery with a firearm, Saskatchewan respectfully submits that the four-year mandatory minimum in s. 344(1)(a.1) is not grossly disproportionate in reasonably foreseeable cases. Saskatchewan further argues in favour of the utility of the reasonable hypothetical inquiry if properly applied with respect to both the *mens rea* requirement and the degree of moral blameworthiness.

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[32] 2012 MBPC 25, 276 Man R (2d) 157 [*Link*].
[33] 1982 ABCA 331, 2 CCC (3d) 490.
[34] *Hilbach*, at para 70.

37. For these reasons, Saskatchewan maintains that the mandatory minimums under ss. 344(1)(a)(i) and (a.1) of the *Criminal Code* are not grossly disproportionate.

PART IV
SUBMISSIONS ON COSTS

38. Saskatchewan does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH is respectfully submitted.

DATED at the City of Regina, in the Province of Saskatchewan, on the 25th day of August 2021.

Katherine Roy **Grace Hession David**

Counsel for the Intervener, the Attorney General for the Province of Saskatchewan

PART VII

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