SCC File Number:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

OCEAN WILLIAM STORM HILBACH and CURTIS ZWOZDESKY

Respondents

MEMORANDUM OF ARGUMENT
HER MAJESTY THE QUEEN, APPLICANT
PURSUANT TO SECTION 40 *OF THE SUPREME COURT ACT*

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TAB A – MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The two respondents, Hilbach and Zwozdesky, were each convicted of offences involving armed robberies arising from different transactions. Each was sentenced before different judges. However, the appeals from their sentences were heard together and the Alberta Court of Appeal issued a single judgment with respect to both of them.

2. The two respondents, Hilbach and Zwozdesky, each engaged in violent armed robberies of convenience stores. Hilbach carried a prohibited sawed-off shotgun which he pointed at one store clerk as his thirteen-year-old accomplice physically assaulted that clerk and a second clerk. Zwozdesky drove the get-away car for a robbery during which his accomplice brandished a non-restricted shotgun and fired a round into the store's shelf.

3. Pursuant to section 344(1)(a)(i) of the *Criminal Code*,[1] Hilbach was subject to a five year mandatory minimum sentence for robbery with a prohibited or restricted firearm. Pursuant to section 344(1)(a.1) of the *Criminal Code*, Zwozdesky was subject to a four year mandatory minimum sentence for robbery with a non-restricted firearm. Both respondents brought a constitutional challenge to the respective mandatory minimum sentences alleging that the sentences breached section 12 of the *Canadian Charter of Rights and Freedoms*[2] ("*Charter*").

4. Each sentencing judge declared the relevant mandatory minimum sentence to be unconstitutional and of no force and effect pursuant to section 52 of the *Constitution Act, 1982*.[3] The Crown appealed these rulings. In a divided decision, the majority of the Alberta Court of Appeal,[4] comprised of Justice Strekaf and Justice Feehan, upheld the lower courts'

[1] *Criminal Code*, RSC 1985 c C-46
[2] *Canadian Charter of Rights and Freedoms*, Part 1, the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11
[3] *R v Hilbach*, 2018 ABQB 526, 75 Alta LR (6th) 359; *R v Zwozdesky*, 2019 ABQB 322, 95 Alta LR (6th) 386
[4] *R v Hilbach sub nom R v Zwozdesky*, 2020 ABCA 332, 2020 CarswellAlta 1681

declarations of unconstitutionality. Justice Wakeling dissented and would have set aside the respective declarations of unconstitutionality.

5. The Applicant submits that the majority of the Alberta Court of Appeal committed errors of law in its analysis of this Court's well-established section 12 *Charter* jurisprudence. The result of these errors is that now a discrepancy exists among appeal courts on the constitutionality of these two mandatory minimum sentences. Without exception, all other appeal courts which have considered the constitutionality of these respective mandatory minimum sentences have affirmed their constitutionality.

6. Accordingly, a robber can use a prohibited or restricted firearm in Alberta and not be subject to the five year mandatory minimum sentence pursuant to section 344(1)(a)(i) of the *Criminal Code*. If the robber uses a non-restricted firearm in Alberta they would not be subject to the four year mandatory minimum sentence pursuant to section 344(1)(a.1) of the *Criminal Code*. However, if those crimes were committed in any other Province or Territory the respective mandatory minimum sentence would apply.

7. This discrepancy in sentencing for these serious and violent offences is a question of national or public importance for this Court to consider. Alberta is now alone in an otherwise national matrix of appellate authority. This Court's intervention is required to prevent uneven application of these two mandatory minimum sentencing provisions.

8. Unlike *R v Hills*,[5] an application for leave presently before this Court, this is not a matter of *application* of well-established principles. As will be set out below, in the instant matters there are clear and discernable errors of law committed by the majority of the Alberta Court of Appeal. Secondly, unlike *R v Hills* there now exists a disparity of appellate authority.

[5] *R v Hills*, 2020 ABCA 263, [2020] AJ No 740, leave to appeal application brought by Mr. Hills pending Supreme Court of Canada No 39338

Facts

Circumstances of the Robbery Committed by Hilbach

9. At 3:00 in the morning on June 9, 2017, Hilbach, along with a thirteen-year-old accomplice, entered a 711 convenience store in Edmonton, Alberta. Hilbach carried a prohibited sawed-off .22 calibre rifle and had his shirt pulled up and over his head in an effort to conceal his identity.[6] The firearm was not loaded.

10. Hilbach ran around the store counter and confronted the store employee. He pointed the sawed-off rifle at the employee and demanded cash from the safe. Hilbach became impatient and took some scratch and win lottery tickets from the display.

11. A second store employee was standing in front of the storage room near the front counter. The thirteen-year-old accomplice ran and jump-kicked this employee. The accomplice then approached the store employee who had the firearm pointed at him by Hilbach and punched that employee in the side of his head with a closed fist.

12. Hilbach and his accomplice left the store with $290.00 in lottery tickets. The store employees called the police and locked the door. Prior to the arrival of the police, Hilbach and his accomplice returned to the store and banged on the locked door. Hilbach pointed the firearm at one of the employees through the glass and then fled the area with the accomplice. Hilbach was arrested shortly thereafter wearing clothing consistent with that worn during the robbery. The firearm was located nearby.

13. At the time of this robbery, Hilbach was bound by a five-year weapons' prohibition order imposed pursuant to section 110 of the *Criminal Code.* The prohibition was entered into by Hilbach approximately three months prior to this robbery as a result of a conviction for uttering death threats.[7]

14. Hilbach pleaded guilty to the offence of robbery with a prohibited firearm pursuant to section 344(1)(a)(i) of the *Criminal Code* and to breach of the weapons' prohibition order

[6] Exhibit S-1 Agreed Statement of Facts (dated January 26, 2018) **[TAB 2]**
[7] Exhibit S-2 Criminal Record of Ocean William Storm Hilbach **[TAB 3]**

pursuant to section 117.01(1) of the *Criminal Code*. He was sentenced to two years less one day imprisonment on both counts.

15. The Alberta Court of Appeal increased Hilbach's sentence on the armed robbery to three years' imprisonment and reduced the sentence for breach of the weapons' prohibition to six months' imprisonment but ordered that it be served consecutively to the former. Therefore, the total aggregate sentence for Hilbach was three-and-one-half years' imprisonment.

16. The dissenting Justice would have set aside the finding of unconstitutionality and increased Hilbach's aggregate sentence.

Circumstances of the robbery committed by Zwozdesky

17. On September 13, 2016 at approximately 6:10 p.m., Zwozdesky and two accomplices robbed a rural convenience store in Caslan, Alberta.[8] Zwozdesky was the driver of the vehicle that transported himself and the other two individuals to and from the store. Zwozdesky observed that one of the accomplices carried a sawed-off shotgun.[9]

18. Zwozdesky entered the store immediately prior to the robbery and purchased a lighter. He then left the store and waited in the vehicle.[10] The two accomplices were masked and entered the store. Zwozdesky indicated in his statement to the RCMP that he also may have worn a mask at some point.[11]

19. One accomplice pushed the female clerk behind the counter, pointed the gun at her, gave her a bag and ordered her to fill it up.[12] The sawed-off shotgun was fired with the round striking a shelf inside the store.

[8] Sentence Appeal Record (*R v Zwozdesky*) p 108/14-18 **[TAB 4]**
[9] *Ibid*
[10] *R v Zwozdesky*, *supra* n 3 at para 25
[11] AR 108/23-26, *supra* n 8
[12] AR 108/20-23, *supra* n 8

20. Zwozdesky heard the firearm go off.[13] He knew that his two accomplices intended to rob the store of cigarettes and money, the amount of which was under $5000.00.[14] The clerk suffered profound psychological injury.

21. Zwozdesky pleaded guilty to robbery with a non-restricted firearm pursuant to section 344(1)(a.1) of the *Criminal Code* as well as an additional robbery count from another date pursuant to section 344 of the *Criminal Code*. He was sentenced to three years' imprisonment on the robbery with a firearm and one year imprisonment for the second robbery to be served consecutively. The Alberta Court of Appeal upheld this aggregate sentence. The dissent would have increased the aggregate sentence.

Impact of the offence upon the victims

22. The sentencing judge in Hilbach concluded that the "*two store clerks were terrorized and the community, including the store owner and potential customers, was made to feel less secure.*"[15]

23. Victim impact statements tendered in Zwozdesky's sentencing hearing described the adverse psychological effects of this offence upon the clerk of the convenience store as well as her children. The clerk suffered depression and sleeplessness since the robbery. She moved her children to a safer location and was scared to return to work. She poignantly described that when she "*thinks about that gunshot missing me I think about what my husband and kids would go through without me. The worst part of the robbery was when I was held a (sic) gunpoint, just standing there not knowing if he was going to shoot me or not.*"[16]

24. The clerk's children also filed victim impact statements which reflect that they have suffered anguish and anxiety at the thought that their mother could have been killed during

[13] AR p 4/9-10, *supra* n 8
[14] AR 4/13-14, *supra* n 8
[15] *R v Hilbach, supra* n 3 at para 148
[16] Exhibit S-4 Three Victim Impact Statements (Shawna Boucher dated October 10, 2016)
[TAB 5]

the robbery. Profoundly, one of the children indicated that she no longer feels safe.[17] The dissenting judgment in the Alberta Court of Appeal recognized that "*the robbery caused lasting and significant psychological harm to the cashier and her children*."[18]

The decision of the Alberta Court of Appeal

25. In relation to Hilbach's constitutional challenge to the five year mandatory minimum sentence of imprisonment, the majority first determined that a sentence of three years' imprisonment was appropriate for Hilbach. A primary consideration was that in 1982 in *R v Johnas*[19] the Alberta Court of Appeal had created a starting point of three years' imprisonment for robbery of convenience stores committed *without* a firearm.[20] The Court of Appeal had been referred to that case as standing for the principle that convenience store robberies with no actual physical harm to the victim and with modest or no success were in an especially serious category.

26. The Alberta Court of Appeal utilized *Johnas* as a starting point and did not increase or decrease Hilbach's final sentence from the three year period of imprisonment. As will be discussed below, this resulted in the majority of the Alberta Court of Appeal ignoring the fact that the sentences for robbery with firearms have been twice amended by Parliament since 1982.

27. Hilbach was nineteen years' old at the time of the offence, had pleaded guilty, had *Gladue* factors and a prior criminal record. The majority said, having reviewed *Johnas*, that "*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*

[17] *Ibid* (Emily Eskow and Dominic Lloyd Eskow dated October 10, 2016) **[TAB 5]**
[18] *R v Zwozdesky*, *supra* n 4 at para 169
[19] *R v Johnas*, 1982 ABCA 331, 2 CCC (3d) 490
[20] Although a BB gun and CO2 pistol were used in two of the robberies discussed in *R v Johnas* there was no evidence that either of these would be categorized as a firearm under today's definition of firearm in section 2 of the *Criminal Code*.

Mr. Hilbach, compared to a fit and proper sentence of three years, to outrage standards of decency and find the sentence abhorrent or intolerable."[21]

28. In one brief paragraph the majority mentioned one contrary appellate authority[22] as well as three contrary trial level decisions.[23] The majority did not mention that two of the trial level decisions had been appealed and the respective appellate courts had upheld the constitutionality of the mandatory minimum sentence.[24] Rather, the majority of the Alberta Court of Appeal deferred to the sentencing judge's conclusion of law on these cases and said: *"[h]e determined that those cases were not as appropriate as the other reasonably foreseeable applications presented and that the five-year mandatory minimum sentence was, as well, grossly disproportionate to the fit and proper sentence for three of those other reasonably foreseeable applications of the law.*"[25]

29. In relation to Zwozdesky's constitutional challenge, the majority said that a fit and proper sentence for Zwozdesky on the robbery with a non-restricted firearm was three years' imprisonment. It held that the four-year mandatory minimum sentence pursuant to section 344(1)(a.1) of the *Criminal Code* was therefore not grossly disproportionate to the three year sentence.

30. The majority of the Alberta Court of Appeal went onto consider four hypotheticals, two of which were argued for the first time on appeal. Without proper analysis of these hypotheticals it concluded that the four year mandatory minimum sentence would be grossly disproportionate to those hypotheticals.[26] The majority concluded that "*a reasonable, properly informed Canadian, taking into account all of these scenarios and considerations, would find the mandatory minimum four year sentence imposed to be an outrage to*

[21] *R v Hilbach, supra* n 4 at para 54
[22] *R v McIvor*, 2018 MBCA 29, [2018] 5 WWR 139
[23] *R v McIntyre*, 2017 ONSC 360, 373 CCC (2d)144, *R v Stocker*, 2017 BCSC 542, 376 CRR (2d) 361, *R v Bernarde*, 2018 NWTSC 27, [2018] 5 WWR 804
[24] *R v Bernarde*, 2018 NWTCA 7, 150 WCB (2d)740; *R v McIntyre* 2019 ONCA 161, 153 WCB (2d) 488
[25] *R v Hilbach, supra* n 4 at para 16
[26] *R v Zwozdesky, supra* n 4 at para 68

standards of decency and find the mandatory minimum sentence abhorrent or intolerable. It would be perhaps double a fit and proper sentence."[27]

31. In his dissenting judgment in both cases, Justice Wakeling outlined ranges of sentences for various firearms offences. He held that neither impugned mandatory minimum sentence would constitute cruel and unusual punishment under section 12 of the *Charter*. He said: *"[t]hese statutory minima when applied to [Hilbach and Zwozdesky] do not subject them to grossly disproportionate sentences that are 'so excessive as to outrage standards of decency.' The same is true of any make-believe offender who fits within the hypothetical construct the Supreme Court introduced in The Queen v Smith.*" [28]

32. He referenced data that "*indicates that most Canadians are convinced that judges impose unjustifiably lenient sentences.*"[29]Justice Wakeling further said "*even conceding for the sake of argument that some hypothetical could be constructed that justified a prison term less than the mandatory minimum, I cannot accept that the disparity between the two sentences would 'outrage standards of decency'*."[30]

PART II – QUESTIONS IN ISSUE

Question One:

The majority of the Alberta Court of Appeal erred in determining that the five year mandatory minimum sentence for robbery with a prohibited or restricted firearm pursuant to section 344(1)(a)(i) of the *Criminal Code* is unconstitutional.

Question Two:

The majority of the Alberta Court of Appeal erred in determining that the four-year mandatory minimum sentence for robbery with a non-restricted firearm pursuant to section 344(1)(a.1) of the *Criminal Code* is unconstitutional.

[27] *Ibid* n 4 at para 70
[28] *Ibid* at para 85
[29] *R v Hilbach, supra* n 4 at para 86
[30] *Ibid* at para 86

PART III: ARGUMENT

Question One:

The majority of the Alberta Court of Appeal erred in determining that the five year mandatory minimum sentence for robbery with a prohibited or restricted firearm pursuant to section 344(1)(a)(i) of the *Criminal Code* is unconstitutional.

Legislative History

33. Prior to 1995 the offence of robbery was punishable by a maximum sentence of life imprisonment yet there was no mandatory minimum sentence.[31] In 1995, the robbery section of the *Criminal Code* was amended by the *Firearms Act*.[32] The mandatory minimum sentence of four years' imprisonment for robbery where a firearm is used in the commission of the offence was created.[33] There was no distinction as to the type of firearm used in the robbery.

34. In 2008, through the introduction of the *Tackling Violent Crime Act*,[34] a distinction among different types of firearms was made. Firearms deemed to be prohibited or restricted would have a mandatory minimum sentence of five years' imprisonment and any second offence would have a seven year mandatory minimum sentence. Robberies committed with a non-restricted firearm would remain subject to the four year mandatory minimum sentence.[35] The distinction as per the types of firearms is further described in section 84(1) of the *Criminal Code* and the Regulations.[36]

[31] *Crankshaw's Criminal Code of Canada: Legislative Histories* (Thomson Reuters Canada, 2018), online: WestlawNext Canada, section 344 and section 343
[32] *Firearms Act*, SC 1995 c 39
[33] *Ibid* at s 149
[34] *Tackling Violent Crime Act*, SC 2008, c 6.
[35] *Ibid* at s 32(1)
[36] *Criminal Code*, RSC 1985 c. C-46 s. 84(1); *Criminal Code*, SOR-98-463 "*Regulations prescribing certain firearms and other weapons, components and parts of weapons, accessories, cartridge magazines, ammunition and projectiles as prohibited or restricted.*"

35. Robbery, even absent a firearm, is a strictly indictable offence punishable by a maximum possible sentence of life imprisonment, indicative of the seriousness with which Parliament viewed the offence. By its decision, the majority of the Alberta Court of Appeal has shown insufficient deference to the will of Parliament, blurring the line between legislative and judicial functioning.

The test under section 12 of the Charter

36. There are two stages to the section 12 analysis. First, the court must employ the principles of sentencing to determine a fit and appropriate sentence or range of sentences, which focusses on the individual circumstances of the offender, without regard to the mandatory minimum. The court must determine whether the mandatory minimum is "*so excessive as to outrage the standards of decency*" in light of that fit and appropriate sentence.[37] If the answer is yes, the mandatory minimum provision is inconsistent with section 12 and will fall unless justified under section 1 of the *Charter*.[38]

37. The second stage arises where a sentence is not grossly disproportionate for the individual offender. In those circumstances, the court can nevertheless go on to consider whether a breach of section 12 arises from "*reasonably foreseeable*" circumstances advanced by the offender.[39]

38. As stated numerous times by this Court,[40] the determination of a reasonable hypothetical involves the "*application of well-established principles of legal and constitutional interpretation*."[41] The inquiry must be *"grounded in judicial experience and*

[37] *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 at paras 23 and 24
[38] *Ibid* at para 23
[39] *R v Nur* 2015 SCC 15, [2015] 1 SCR 773 at paras 46, 56, 65, 77
[40] *R v Smith, Edward Dewey* [1987] 1 SCR 1045, 1987 CanLII 64; *R v Goltz* [1991] 3 SCR 485, 1991 CanLII 51; *R v Morrisey* [2000] 2 SCR 90, 2000 SCC 39; *R v Latimer* [2001] 1 SCR 3, 2001 SCC 1; *R v Ferguson*, 2008 SCC 6, 2008 CarswellAlta 228; *R v Nur, supra* n 36; *R v Lloyd*, *supra* n 34; *R v Morrison*, 2019 SCC 15, [2019] 2 SCR 3; *R v Boudreault*, 2018 SCC 58, [2018] 3 SCR 599; Quebec *(Attorney General) v 9147-0732 Québec Inc.*, 2020 SCC 32, 2020 CarswellQue 10837
[41] *R v Nur, supra* n 36 at para 57

common sense."[42] A reasonable hypothetical must not be "*far-fetched*," "*fanciful*," "*remote*," or "*marginally imaginable*."[43] Statutes should "*not be set aside on the basis of mere speculation*."[44] A "*sentence will only be found to be grossly disproportionate in the clearest of cases, where it is 'so excessive as to outrage standards of decency'*[45] *and where it is 'abhorrent or intolerable' to society…a sentence that is merely excessive or unfit is not grossly disproportionate unless it would 'shock the conscience of Canadians.' "*[46] A reasonable hypothetical must involve the same offence and not some other crime.[47]

39. All relevant contextual factors must be examined including the gravity of the offence, the personal circumstances of the offender and the particular circumstances of the offence. In addition, the court must also consider the actual effect of the punishment on the offender, the penological goals and sentencing principles upon which the sentence is fashioned, the existence of a valid alternative to the punishment imposed and a comparison of punishments imposed for other crimes.[48] Not all of the factors will necessarily be relevant in each case, nor will the presence or absence of any one of them be determinative of the question of gross disproportionality. Further, in weighing the section 12 *Charter* considerations, the court must also consider and defer to the valid legislative objectives underlying the criminal law responsibilities of Parliament.[49]

Deference to Parliament

40. The question of whether a mandatory minimum sentence is constitutional is reviewable on the standard of correctness.[50] In both *Hilbach* and *Zwozdesky*, the majority of the Alberta Court of Appeal did not increase the sentences from that established by

[42] *Ibid* at para 62
[43] *Ibid* at paras 56, 62, 68
[44] *Ibid* at para 62
[45] *R v Lloyd*, *supra* n 34 at para 24
[46] *Ibid* at para 33
[47] *R v EJB*, 2018 ABCA 239, 72 Alta LR (6th) 29 at para 66; *R v Nur* supra n 37 at para 56 footnote 1; *R v Al-Isawi* 2017 BCCA 163, 348 CCC 3d 524 at para 59
[48] *R v Morrisey*, *supra* n 37 at para 27-28; *R v Goltz, supra* n 37 at pp 499-500; *R v Boudreault*, *supra* n 37 at para 48
[49] *R v Latimer*, *supra* n 37 at paras 76-77
[50] *R v Bernarde*, *supra* n 24 at para 5

benchmark sentencing cases rendered prior to the amendments to the legislation that set the mandatory minimum sentences. They failed to discuss the effect of these legislative amendments on the benchmark sentence.

41. Parliament has signalled on two different occasions that the sentence for armed robberies was too low. The majority of the Alberta Court of Appeal never grappled with the question of deference to Parliament. The imposition of the same punishment as that set prior to the legislative amendments is a breach of the deferential standard which is to be afforded by courts to Parliament. It fails to account for the legislated mandatory minimum sentences.

42. When Parliament establishes a minimum sentence there should be an increase in sentences as a result of the legislative initiative. As recently stated by this Court in *R v Friesen* albeit in reference to an increase in maximum sentences for child sexual offences:

> *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 (Rayo, at para 175). In certain cases, a sentencing judge [translation] "must feel free to impose sentences above" a past threshold (R v Regnier, 2018 QCCA 306, at para 78). As the Quebec Court of Appeal has reasoned, courts must give "the legislative intent its full effect" and should not feel bound to adhere to a range that no longer reflects Parliament's view of the gravity of the offence (para 40). Such a range may in fact be "obsolete and must be revised upwards." (para 30).* [51]

Gravity of the offence and effect on victims and the community

43. Additionally, the majority of the Alberta Court of Appeal failed to consider as a significant factor in its analysis the inherent seriousness and harm caused by the offences. This is the crux of the contrary appellate authority on the constitutionality of both mandatory minimum sentences.[52]

[51] *R v Friesen*, 2020 SCC 9, [2019] SCJ No 100 at para 109
[52] *R v McIvor, supra* n 22; *R v McIntyre, supra* n 24 ; *R v MacDonald*, 1998 CanLII 13327, [1998] OJ No 299 (ONCA); *R c Lapierre*, 1998 CanLII 13203, 123 CCC (3d) 332 (QCCA); *R v Wust*, 1998 CanLII 5492, 125 CCC (3d) 43 (BCCA), rev'd on other grounds *R v Wust*, 2000 SCC 18, [2000] 1 SCR 455; *R v Bernarde, supra* n 24

44. The unanimous Manitoba Court of Appeal in *R v McIvor,* which upheld the constitutionality of the five year mandatory minimum sentence for robbery with a prohibited firearm, recognized the distinction among types of firearms. It said:

> *"Robbery with any type of firearm, even an imitation one is serious. The use of a prohibited firearm however presents an elevated risk to members of the public because such weapons are easily concealed and are therefore difficult to detect. The fact of their alteration for this purpose adds a layer of criminal conduct that assists the perpetrator in evading detection both before and after an incident of violence such as this one*."[53]

45. The Court in *McIvor* further said "*the use of a prohibited firearm during a robbery is a more serious offence and warrants an increase from the mandatory minimum sentence of four years for robbery with a firearm to five years, and the increase from four years to five years is proportionate. The additional one-year penalty cannot be said to be "so excessive as to outrage standards of decency*."[54]

46. In *R v McIntyre*[55], the unanimous Ontario Court of Appeal concurred with the analysis in *R v McIvor*.[56] It also applied its earlier case of *R v MacDonald*[57] wherein the Court held that the four-year mandatory minimum sentence for robbery with a non-restricted firearm is constitutional.[58]

47. In yet another case upholding the constitutionality of the four year mandatory minimum sentence for robbery with a non-restricted firearm, the Quebec Court of Appeal in *R v Lapierre* commented *"[i]t does not take a very detailed study of Canadian jurisprudence to realize that the perpetrator of a robbery committed with the use of a firearm has long been expected to face a severe sentence. Although the courts over the years may have adjusted the acceptable limits of an appropriate sentence for this type of offence, they have however had to reconcile themselves with legislation which reflects the aggravating nature of the use of a*

[53] *R v McIvor, supra* n 49 at para 26
[54] *Ibid* at para 27
[55] *R v McIntyre, supra* n 49
[56] *Ibid* at para 11
[57] *R v MacDonald, supra* n 49
[58] *R v McIntyre, supra* n 49 at para 16

firearm in the course of a robbery, apart from the fact that it is in and of itself a violent crime."[59]

48. In *R v Wust*, the British Columbia Court of Appeal, in upholding the constitutionality of the four year mandatory minimum sentence for robbery with a non-restricted firearm, recognized armed robberies to be very serious offences that would warrant a significant jail sentence. It said "*the commission of a robbery with a firearm requires a conscious decision that cannot be excused on sympathetic grounds.*"[60]

49. Critically, the majority of the Alberta Court of Appeal, in failing to account for the analysis of the other appellate authorities also failed to recognize the real effect of these violent crimes on victims and the community. As stated by the British Columbia Court of Appeal in *R v Wust*, "*no one can question that robbery with a firearm is a very serious offence causing great risk to and intense fear on the part of robbery victims*."[61] In *Wust*, five separate appeals were heard involving offenders who had robbed convenience stores with firearms. In each, the mandatory minimum sentence of four years' imprisonment was held to be constitutional.

50. In *R c Lapierre*, the Quebec Court of Appeal also recognized the penological goals of Parliament as well as the need to protect the community from such robberies when it said: *"[t]his minimum sentence is above all conceived by the legislator as a protection measure which remains a legitimate objective."*[62]

Deference to the sentencing judge's analysis of the contrary cases was in error

51. As outlined above at paragraph 28, the majority of the Alberta Court of Appeal did not conduct its own analysis of the contrary appellate authority. Rather it deferred on the question of the constitutionality of these mandatory minimum sentences, which is a question of law, to the analysis conducted of some of the contrary authority by the sentencing judge.

[59] *R v Lapierre, supra* n 49 at para 22
[60] *R v Wust, supra* n 49 at para 61
[61] *R v Wust, supra* n 49 at para 26
[62] *R v Lapierre, supra* n 49 at para 27

52. By deferring on a question of law to the trial judge's decision contrary to the standard of review, the majority of the Alberta Court of Appeal failed to grapple with the reasoning of the other appellate courts which recognized that Parliament had legislated mandatory minimum sentences mandating an upward movement in sentences. Additionally by failing to grapple with the cases themselves the Alberta Court of Appeal failed to recognize the inherent dangerousness, severity, and harm caused to victims and the community by armed robbers.

Question Two:

The majority of the Alberta Court of Appeal erred in determining that the four-year mandatory minimum sentence for robbery with a non-restricted firearm pursuant to section 344(1)(a.1) of the *Criminal Code* is unconstitutional.

53. The Alberta Court of Appeal erred in law in finding that four hypotheticals, presented in Zwozdesky, were "reasonable hypotheticals" and that therefore the four year mandatory minimum sentence pursuant to section 344(1)(a.1) of the *Criminal Code* was a grossly disproportionate disposition in each of those four scenarios.

54. As will be discussed, one hypothetical can be traced to a reported pre-legislative amendment case, one does not disclose an offence that would be caught by the mandatory minimum sentence and in yet another, robbery was not an offence upon which the accused was even convicted.

55. The four hypotheticals considered by the majority of the Alberta Court of Appeal were:

1) A fact situation said to be based on the 1982 case of *R v Lodoen,*[63] where an 18-year-old carried a BB gun during a robbery of a convenience store and the Alberta Court of Appeal raised his sentence from 6 months' imprisonment to 18 months' imprisonment.

2) A fact situation said to be based upon the 2012 case of *R v Link*[64] where an 18-year-old Indigenous woman, who was a drug addict, assisted others in a convenience store

[63] *R v Lodoen* sub nom *R v Johnas,* supra n 19
[64] *R v Link*, 2012 MBPC 25, 276 Mac R (2d) 157

robbery wherein one of the other offenders carried an *imitation handgun* which he pointed directly at the clerk. Ms. Link produced a bag to collect cigarettes, food and $400 cash. At the time of sentencing she had taken treatment for alcoholism and was completing high school. The sentencing judge imposed an eight-month conditional sentence order. [65]

3) The case of Adam, a 22-year-old Cree man with drug problems and schizophrenia who pointed an airsoft pistol at his drug dealer in a parking lot and took some methamphetamines. After his arrest he received treatment for his psychosis and drug cravings and pleaded guilty before trial. [66]

4) Brian, a 21-year-old with no criminal record, suffering from alcoholism and Fetal Alcohol Spectrum Disorder is extremely intoxicated and lying face down in a snowbank when a female Good Samaritan stops to help him. He grabs her, displays an operable BB gun which could "put an eye out" in his waistband and steals her purse. This was said to be based upon the 2014 case of *R v Smart*[67].[68]

56. Scenario one references *R v Loeden* which was one of the seven cases decided in *R v Johnas.*[69] Critically this case was decided in 1982, years before the mandatory minimum of four years imprisonment was enacted for the crime of robbery with a firearm. The matrix changed significantly when Parliament amended the sentencing regime. As outlined above, sentences should increase when Parliament's voice is clear and it is an error for the Court not to provide proper deference to the will of Parliament.

57. Turning to scenario two, the majority of the Alberta Court of Appeal failed to adhere to the principle that the offence on which a reasonable hypothetical is founded must have the same elements of the offence for which the mandatory minimum sentence is impugned. The elements of the offence of robbery with a firearm is absent from the second hypothetical as it involves a robbery with an *imitation* firearm. A required element of the offence of robbery with a non-restricted firearm is that it meets the definition of firearm under section 2 of the *Criminal Code.* The firearm must be "*a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or*

[65] *R v Zwozdeksy, supra* n 4 at para 61
[66] *R v Zwozdesky, supra* n 4 at para 63
[67] *R v Smart,* 2014 ABPC 175, [2014] 11 WWR 757
[68] *R v Zwozdesky, supra* n 4 at para 64
[69] *R v Johnas, supra* n 19

death to a person."[70] It is simply wrong to state that an imitation firearm meets this definition and therefore that a "*reasonable hypothetical*" can be founded on such a fact scenario. This offence would properly be considered robbery *simpliciter* pursuant to section 344(1)(b) of the *Criminal Code* for which there is no mandatory minimum sentence.

58. Scenario three was not linked to any existing case authority. It presents a drug dealer being robbed of methamphetamines. Surely, this is an example of what was intended by this Court when it said that a reasonable hypothetical cannot be "remote" or "far-fetched." It is almost impossible to imagine a drug dealer who would seek out the assistance of law enforcement in order to remedy a theft of methamphetamines. Public policy would dictate against law enforcement, and in turn the criminal courts, being used to enforce the illegal activity of drug-dealing.

59. With respect to the final scenario, the majority of the Alberta Court of Appeal failed to recognize that the case of "Brian" did not involve a robbery with a firearm. A review of *R v Smart*, upon which this scenario is based reveals that it was not a sentencing case but rather an application for a stay of proceedings pending the appointment of state-funded counsel.

60. The accused Smart was charged with assault pursuant to section 266 of the *Criminal Code* and two counts of possession of a weapon for a dangerous purpose contrary to section 88(1) of the *Criminal Code* and the crown proceeded summarily.[71] Even if these offences were prosecuted by indictment, the maximum sentences faced by the accused would be respectively five years and ten years' imprisonment and there are no mandatory minimum sentences. These possible punishments are far less than the potential of life imprisonment for robbery with a firearm. This fact scenario should not have founded a "reasonable hypothetical."

[70] *Criminal Code*, RSC 1985 c C-46 at s 2
[71] *R v Smart*, *supra* n 64 at para 53

CONCLUSION

61. It is the respectful submission of the applicant that in the instant cases the Alberta Court of Appeal discernably erred in law in utilizing pre-amendment cases in its determination of a fit sentence, insufficiently considered deference to Parliamentary objectives, and failed to meaningfully analyze contrary appellate authority. It failed to consider appropriate factors such as the inherent seriousness, dangerousness and harm done to victims and communities by those who choose to arm themselves with a firearm and commit robbery.

62. In *Hilbach*, the majority of the Alberta Court of Appeal also gave unwarranted deference to the sentencing judge's legal determination of those cases which upheld the constitutionality of the sentence provision. In *Zwozdesky*, the Court erred in its unwarranted acceptance of "*reasonable hypotheticals*."

63. The result of these errors is that a person who commits armed robbery in Alberta is not subject to a mandatory minimum sentence whereas across the country the same person in another Province or Territory would be subject to the mandatory minimum sentences. This disparity must be resolved by this Court.

PART IV – SUBMISSIONS ON COSTS

64. The Applicant makes no submissions regarding costs.

PART V – ORDER SOUGHT

65. The Applicant asks that the application for leave to appeal sentence be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta this 17th day of November, 2020.

D. Alford

DEBORAH J. ALFORD
COUNSEL FOR THE APPLICANT

PART VI – AUTHORITIES AND STATUTES, REGULATIONS, RULES, ETC.

TAB	AUTHORITIES	Cited at Paragraph No.
	Canadian Charter of Rights and Freedoms, Part 1, the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 *Loi constitutionnelle de 1982, Référence : Loi constitutionnelle de 1982 (R-U), constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11*	3
1	*Crankshaw's Criminal Code of Canada: Legislative Histories* (Thomson Reuters Canada, 2018), online: WestlawNext Canada, sections 343 and 344	34
	Criminal Code, RSC 1985, c C-46 Code criminel (L.R.C. (1985), ch. C-46)	3
	Criminal Code, RSC 1985 c. C-46 s. 84(1) Code criminel (L.R.C. (1985), ch. C-46) s. 84(1)	36
	Firearms Act, SC 1995, c 39 *Loi sur les armes à feu (L.C. 1995, ch. 39)*	35
	R v Al-Isawi, 2017 BCCA 163, 348 CCC 3d 524	38
	R v Bernarde, 2018 NWTSC 27 [2018] 5 WWR 804	28
	R v Bernarde, 2018 NWTCA 7, 150 WCB (2d)740	40, 43
	R v Boudreault, 2018 SCC 58 [2018] 3 SCR 599	38, 39
	R v EJB, 2018 ABCA 239, 72 Alta LR (6th) 29	38
	R v Ferguson, 2008 SCC 6, 2008 CarswellAlta 228	38
	R v Friesen, 2020 SCC 9, [2019] SCJ No 100	42
	R v Goltz [1991] 3 SCR 485, 1991 CanLII 51	38, 39
	R v Hilbach, 2018 ABQB 526, 75 Alta LR (6th) 359	4, 22, 32, 33
	R v Hilbach, 2020 ABCA 332, 2020 CarswellAlta 1681	4, 27, 28, 30, 31, 32

TAB E – MATERIALS TO BE RELIED ON

TAB	MATERIALS TO BE RELIED ON
2	Exhibit S-1 Agreed Statement of Facts (dated January 26, 2018)
3	Exhibit S-2 Criminal Record of Ocean William Storm Hilbach
4	Sentence Appeal Record (*R v Zwozdesky*)
5	Exhibit S-4 Three Victim Impact Statements