SUPREME COURT OF CANADA

CITATION: R. *v.* Hills, 2023 SCC 2

APPEAL HEARD: March 22, 2022
JUDGMENT RENDERED: January 27, 2023
DOCKET: 39338

BETWEEN:

Jesse Dallas Hills
Appellant

and

His Majesty The King
Respondent

- and -

Director of Public Prosecutions, Attorney General of Ontario, Attorney General of Nova Scotia, Attorney General of Saskatchewan, British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario), Canadian Bar Association and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: (paras. 1 to 175)
Martin J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Kasirer and Jamal JJ. concurring)

DISSENTING REASONS: (paras. 176 to 226)	Côté J.

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Jesse Dallas Hills *Appellant*

v.

His Majesty The King *Respondent*

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Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Nova Scotia,
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British Columbia Civil Liberties Association,
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2023 SCC 2

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Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Sentencing — Mandatory minimum sentence — Discharging firearm — Accused convicted of discharging firearm into or at place knowing that or being reckless as to whether another person is present in place — Accused challenging constitutionality of mandatory minimum sentence of four years' imprisonment prescribed for offence — Whether mandatory minimum sentence constitutes cruel and unusual punishment — Canadian Charter of Rights and Freedoms, s. 12 — Criminal Code, R.S.C. 1985, c. C-46, ss. 244.2(1)(a), 244.2(3)(b).

Following an incident in May 2014 where the accused shot at a car and at a residential home with a hunting rifle, the accused pled guilty to a number of offences, including intentionally discharging a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place, contrary to s. 244.2(1)(a) of the *Criminal Code*. At the time, this offence carried a mandatory minimum sentence of four years' imprisonment, set out in s. 244.2(3)(b). The accused brought a challenge under s. 12 of the *Charter*, arguing that the mandatory minimum sentence was grossly disproportionate and therefore constituted cruel and unusual punishment. His challenge relied on a hypothetical scenario, where a young person intentionally discharges an air-powered pistol or rifle at a residence that is incapable of perforating the residence's walls.

The sentencing judge found that s. 244.2(3)(b) was grossly disproportionate in the hypothetical scenario relied on by the accused and concluded

the infringement of s. 12 could not be justified under s. 1 of the *Charter*. He sentenced the accused to three and a half years of incarceration. The Crown appealed both the finding that s. 244.2(3)(b) infringed s. 12 of the *Charter* and the accused's sentence. The Court of Appeal allowed the appeal on both grounds. It set aside the sentencing judge's declaration of invalidity of the mandatory minimum sentence and imposed the minimum sentence of four years' imprisonment.

Held (Côté J. dissenting): The appeal should be allowed.

Per Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, **Martin**, Kasirer and Jamal JJ.: The mandatory minimum sentence set out in s. 244.2(3)(b) of the *Criminal Code* is grossly disproportionate. It infringes s. 12 of the *Charter* and is not saved by s. 1. It is immediately declared of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, and the declaration applies retroactively. The three-and-a-half-year sentence imposed on the accused by the sentencing judge is reinstated.

Section 12 of the *Charter* grants individuals a right not to be subjected to any cruel and unusual treatment or punishment by the state. The underlying purpose of s. 12 is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. Section 12 has two prongs that are united by their shared animating purpose of safeguarding human dignity. First, s. 12 protects against the imposition of punishment that is so excessive as to be incompatible

with human dignity. This prong is concerned with the severity of a punishment and queries whether the effects of an impugned punishment are grossly disproportionate to the appropriate punishment in a given case. Mandatory minimum sentences are analyzed under this prong of s. 12. Second, s. 12 protects against the imposition of punishment and treatment that are cruel and unusual because, by their very nature, they are intrinsically incompatible with human dignity. Under the second prong, the focus is on the method of punishment. The narrow class of punishments that fall within the second category will always be grossly disproportionate because these punishments are in themselves contrary to human dignity because of their degrading and dehumanizing nature.

To assess whether a mandatory minimum sentence violates s. 12 of the *Charter*, the Court has developed a two-stage inquiry: a court must (1) assess what constitutes a fit and proportionate sentence having regard to the objectives and principles of sentencing; and (2) consider whether the impugned provision requires the imposition of a sentence that is grossly disproportionate, not merely excessive, to the fit and proportionate sentence. This two-part assessment may proceed on the basis of either (a) the actual offender before the court, or (b) another offender in a reasonably foreseeable case or hypothetical scenario. Where the court concludes that the term of imprisonment prescribed by the mandatory minimum sentence provision is grossly disproportionate in either case, the provision infringes s. 12 and the court must turn to consider whether that infringement can be justified under s. 1 of the *Charter* if arguments or evidence to that effect are raised by the Crown.

The first stage of the s. 12 inquiry involves the individualized process of determining what a fit and proportionate sentence is for the particular (or representative) offender under consideration using the general sentencing principles set out by Parliament. It involves a complex and multifactorial assessment. To assist in this assessment, Parliament enacted s. 718 of the *Criminal Code*. Proper consideration is to be given to various objectives such as denunciation, deterrence, rehabilitation, providing reparations for harm done to victims, promoting a sense of responsibility and, when necessary, separating offenders from society. No sentencing objective should be applied to the exclusion of all others. Courts should also consider any aggravating and mitigating circumstances relating to the offence or to the offender. Whatever weight a judge may wish to accord to the objectives for sentencing in the *Criminal Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is a central tenet of Canada's sentencing regime, with roots that predate the recognition of it as the fundamental principle of sentencing in s. 718.1 of the *Criminal Code*. Founded in fairness and justice, the purpose of proportionality is to prevent unjust punishment for the sake of the common good and it serves as a limiting function to ensure that there is justice for the offender. The amount of punishment an offender receives must be proportionate to the gravity of the offence and the offender's moral blameworthiness. The gravity of the offence refers to the seriousness of the offence and should be measured by taking into account the consequences of the offender's actions on victims and public safety, and the physical and psychological harms that flowed from the offence. The offender's moral culpability or degree of responsibility should be measured by gauging the essential substantive

elements of the offence including the offence's *mens rea*, the offender's conduct in the commission of the offence, the offender's motive for committing the offence, and aspects of the offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity. Moreover, since sentencing is a highly individualized and discretionary endeavour, a sentencing judge cannot simply approximate a sentence or otherwise provide a range of penalties. The judge is expected to articulate an individual, specific and defined sentence.

Punishments can be impugned not only on the basis that they infringe the s. 12 rights of a particular offender, but also on the basis that they infringe those of a reasonably foreseeable offender. Because it is the nature of the law that is at issue, not the claimant's status, it suffices for a claimant to allege unconstitutional effects in their case or on third parties. In crafting reasonable hypotheticals, a court is examining the scope of the impugned law and not merely the justice of a particular sentence imposed by a judge at trial. A reasonable hypothetical scenario needs to be constructed with care and should include five characteristics. First, the hypothetical must be reasonably foreseeable. It ought not to be a far-fetched or marginally imaginable case, nor should it be a remote or extreme example. The appropriate approach is to construct a reasonably foreseeable offender with characteristics and in circumstances that are reasonably foreseeable based on judicial experience and common sense. What must be considered is how the provision impacts other persons who might reasonably be caught by it and the reasonably foreseeable situations in which the law may apply. Second, in

defining the scope of the hypothetical scenario and the qualities of a reasonably foreseeable offender, courts may rely on reported cases since they not only illustrate the range of real-life conduct captured by the offence, they actually happened. However, courts may modify the facts of a reported case to illustrate reasonably foreseeable scenarios. Third, the hypothetical must be reasonable in view of the range of conduct in the offence in question. It needs to involve conduct that falls within the relevant provision. The scope of the offence can be explored and it is permissible to establish the breadth of the offence by reference to how it may be committed and by whom; however, straining each and every constituent element by fanciful facts is not helpful. Fourth, characteristics that are reasonably foreseeable for offenders, like age, poverty, race, Indigeneity, mental health issues and addiction, may be considered in crafting reasonable hypotheticals. Proportionality requires a consideration of the gravity of the offence and the offender's particular circumstances, which include their personal characteristics. Including such characteristics in hypothetical scenarios strengthens the analytical device by helping courts explore the reach of the mandatory penalty. However, the scenarios should not involve the most sympathetic offender but rather present a reasonably foreseeable offender. The hypothetical cannot be remote, far-fetched or utterly unrealistic. A court should be wary of detailed scenarios that stack mitigating factors combined with an interpretation that stretches and strains the technical meaning of the offence. Fifth, reasonable hypotheticals are best tested through the adversarial process. Although it is up to the offender/claimant to articulate and advance the reasonably foreseeable hypothetical which forms the basis for the claim that the impugned provision is unconstitutional, all parties should ideally be afforded a

fair opportunity to challenge or comment upon the reasonableness of the hypothetical before making submissions on its constitutional implications. In doing so, parties can help the judge determine what type of hypothetical is reasonable in the circumstances. However, while testing the reasonable hypothetical through the adversarial process is to be encouraged, it is not mandatory in the sense that its absence represents a reviewable error.

The general sentencing principles applicable to an actual offender also apply when fixing a sentence for a reasonably foreseeable offender. Sentencing judges are bound by the *Criminal Code* and they must consider the sentencing proposals argued by counsel and utilize the method of analysis endorsed in their jurisdiction (whether sentencing ranges or starting point-sentences). As with cases involving an actual offender, courts should fix as narrowly defined a sentence as possible for a reasonably foreseeable offender. A court, however, may find it somewhat more difficult to fix a specific sentence for a reasonably foreseeable offender, given that hypotheticals are advanced without evidence or detailed facts. Accordingly, some latitude in fixing the fit sentence may be necessary. Courts may specify, for instance, that a sentence would be around a certain number of months. Any estimate must be circumscribed and tightly defined.

Once the fit sentence has been determined at the first stage, the second stage requires a contextual comparison between the fit sentence and the impugned mandatory minimum to see whether the latter complies with the widely-worded right

set out in s. 12. Whether a mandatory minimum sentence is challenged based on its effect on the actual offender or on a reasonably foreseeable offender in a reasonable hypothetical, gross disproportionality is the applicable standard for invalidating it under s. 12 as cruel and unusual punishment. As the purpose of s. 12 is to safeguard human dignity, it protects offenders against grossly disproportionate terms of imprisonment. Furthermore, when comparing a mandatory minimum sentence to the fit sentence, the focus must be on the sentence itself. Courts must not consider parole eligibility as a factor reducing the actual impact of the impugned sentence, because the possibility of parole cannot cure a grossly disproportionate sentence.

The first part of the comparative task is to articulate what, if any, differences exist between the fit sentence identified at stage one and the mandatory minimum. Second, the punishment must be disproportionate in a manner or amount that is grossly so. This requires both the identification of any disparity between the sentences and an assessment of the mandatory minimum's effect and severity against constitutional standards. The process of assessing the existence and extent of any disparity between a fit punishment and the mandatory minimum imposed bears a resemblance to what occurs when a sentence is appealed and challenged as being demonstrably unfit. In such cases, there is a comparison between what would be fit and what has been imposed. However, gross disproportionality is a constitutional standard and a high bar. The elevated standard of gross disproportionality is intended to reflect a measure of deference to Parliament in crafting sentencing provisions. The word "grossly" signals Parliament is not required to impose perfectly proportionate

sentences, which would undermine the ability of Parliament to establish norms of punishment, including mandatory minimum sentences. This is because, in respect of mandatory minimums, there is likely to be some disproportion between the individually fit sentence and the uniform mandatory minimum. In this regard, a sentence may be demonstrably unfit in the sense that an appellate court would intervene, but nevertheless not meet the constitutional threshold of being grossly disproportionate.

Three crucial components must be assessed when determining whether a mandatory minimum sentence is grossly disproportionate. The first component is the scope and reach of the offence. The case law reveals that a mandatory minimum sentence is more exposed to challenge where it captures disparate conduct of widely varying gravity and degrees of offender culpability. The wider the scope of the offence, the more likely there is a circumstance where the mandatory minimum will impose a lengthy term of imprisonment on conduct that involves lesser risk to the public and little moral fault. A court must assess to what extent the offence's *mens rea* and *actus reus* capture a range of conduct as well as the degree of variation in the offence's gravity and the offender's culpability. It may consider whether the offence necessarily involves harm to a person or simply the risk of harm, whether there are ways of committing the offence that pose relatively little danger, and to what degree the offence's *mens rea* requires an elevated degree of culpability of the offender.

The second component in the gross disproportionality analysis is the effects of the penalty on the offender. Courts must aim to identify the precise harm

associated with the punishment. This calls for an inquiry into the effects that the impugned punishment may have on the actual or reasonably foreseeable offender both generally and based on their specific characteristics and qualities. The principle of proportionality implies that where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate. For this reason, courts have reduced sentences to reflect the comparatively harsher experience of imprisonment for certain offenders, like offenders in law enforcement, for those suffering disabilities, or for those whose experience of prison is harsher due to systemic racism. A court should also consider the additional period of imprisonment imposed by the mandatory minimum, given the profound impact of imprisonment.

The last component of the analysis focuses on the penalty and its objectives. When assessing gross disproportion, courts assess the severity of the punishment mandated by Parliament to determine whether and to what extent the minimum sentence goes beyond what is necessary to achieve Parliament's sentencing objectives relevant to the offence while having regard to the legitimate purposes of punishment and the adequacy of possible alternatives. Denunciation and deterrence, both general and specific, are valid sentencing principles. However, deference to Parliament's decision to impose denunciatory sentences cannot be unlimited, as this purpose could support sentences of unlimited length. In enacting mandatory minimums, Parliament can prioritize some sentencing objectives over others, but within certain limits. Given the purpose of s. 12, the role given to rehabilitation when considering a mandatory minimum will help determine if the provision amounts to

cruel and unusual punishment. While rehabilitation has no standalone constitutional status, there is a strong connection between the objective of rehabilitation and human dignity. A punishment that completely disregards rehabilitation would disrespect and be incompatible with human dignity and would therefore constitute cruel and unusual punishment under s. 12. In order to respect s. 12, punishment or sentencing must take rehabilitation into account. In addition, courts should assess whether the length of imprisonment legislated is too excessive in light of other potentially adequate alternatives. There is no mathematical formula to determine the specific number of years that would make a sentence in excess of a legitimate penal aim. The analysis, in all cases, must be contextual and there is no hard number above or below which a sentence becomes grossly disproportionate. A mandatory minimum sentence, however, will be constitutionally suspect and require careful scrutiny when it provides no discretion to impose a sentence other than imprisonment in circumstances where there should not be imprisonment, given the gravity of the offence and the offender's culpability. In addition, a minimum sentence can be grossly disproportionate where a fit and proportionate sentence would include a lengthy term of imprisonment. A mandatory minimum that adds to an offender's prison sentence may have a significant effect, given the profound consequences of incarceration on an offender's life and liberty. Courts should evaluate the punishment in light of the principles of parity and proportionality.

In the instant case, the hypothetical scenario raised by the accused is reasonably foreseeable. It falls within the scope of the offence and does not stretch or

strain its constituent elements. The *actus reus* of the offence requires an offender to discharge a firearm into or at a place, which means any building or structure. A residence constitutes a place. As for whether an air-powered rifle or pistol could constitute a firearm per s. 2 of the *Criminal Code*, the expert evidence revealed that there are numerous air-powered rifles and pistols commonly available in Canada which meet the *Criminal Code* definition of a firearm, but are not capable of perforating a typical residential framed wall assembly. It is also reasonably foreseeable to imagine a young person firing a BB gun or a paintball gun at a house as part of a game, to pass time, or for a bit of mischief.

At the first stage of the s. 12 inquiry, a fit sentence for the hypothetical offender in the accused's proposed scenario would not involve imprisonment. Because the gravity of the offence and the culpability of the offender in this scenario are low, and the youthfulness of the offender acts as a mitigating factor, the fit and proportionate sentence is a suspended sentence of up to 12 months' probation. At stage two of the inquiry, the analysis leads to the conclusion that the four-year mandatory minimum sentence under s. 244.2(3)(b) is grossly disproportionate to the fit sentence. It applies to an offence that captures a wide spectrum of conduct, ranging from acts that present little danger to the public to those that pose a grave risk. The mandatory punishment would have significant deleterious effects on youthful offenders, who are viewed as having high rehabilitative prospects. Therefore, the mandatory minimum's effect is extremely severe as it replaces a probationary sentence with four years of imprisonment. A four-year custodial sentence is so excessive as to be significantly out

of sync with sentencing norms and goes far beyond what is necessary for Parliament to achieve its sentencing goals for this offence. Denunciation and deterrence cannot support the minimum punishment, nor does the minimum show any respect for the principles of parity and proportionality. It would outrage Canadians to learn that an offender can receive four years of imprisonment for firing a paintball gun at a home. As the Crown does not advance any argument or evidence to demonstrate that the punishment may be justified under s. 1, there is no need to address this issue.

Per **Côté** J. (dissenting): The appeal should be dismissed. The four-year mandatory minimum sentence formerly imposed by s. 244.2(3)(b) of the *Criminal Code* does not violate s. 12 of the *Charter*.

There is agreement with the majority's affirmation of the two-stage inquiry for determining whether a mandatory minimum sentence violates s. 12. Courts must: (1) determine what constitutes a proportionate sentence for the offence, having regard to the objectives and principles of sentencing; and (2) ask whether the mandatory minimum sentence is grossly disproportionate to the sentence that would be fit and proportionate, either for the actual offender or for another offender in a reasonable hypothetical case.

However, there is disagreement with the majority's attempt to clarify the established framework through a new three-part test for gross disproportionality. The majority sets out three components to be assessed at stage two of the framework: (1) the scope and reach of the offence; (2) the effects of the punishment on the offender; and

(3) the penalty and its objectives. Each of these duplicates considerations relevant to determining the low end of the range of fit and proportionate sentences for the offence at stage one. At the second stage, whether a mandatory minimum sentence is grossly disproportionate in relation to the length of the fit sentence — i.e., whether it is a sentence that is beyond merely excessive but so excessive as to outrage standards of decency — remains a normative judgment.

There is also disagreement with the majority's interpretation of s. 244.2(1)(a) of the *Criminal Code*. Parliament did not intend s. 244.2 to capture the reckless discharge of firearms in situations which present little danger to the public. Rather, it targeted offenders who specifically turned their mind to the fact that discharging their firearm would jeopardize the lives or safety of others. The *actus reus* of the offence, on its own, would extend to a wide range of conduct. But the scope of the offence is narrowed significantly by its mental element. The double *mens rea* requirement of s. 244.2(1)(a) captures only offenders who (1) intentionally discharge a firearm into or at a building or other place, with (2) knowledge of or recklessness as to the presence of occupants — and thus, who have turned their mind to the fact that shooting the firearm could put the lives or safety of others at risk. This interpretation, consistent with that of previous appellate courts, gives effect to the real intention of Parliament.

Properly interpreted, mere probation is not a fit and proportionate sentence for the s. 244.2(1)(a) offence. The hypothetical air-powered rifle scenario put forth by

the accused at trial does not, without more, involve the kind of conduct that the law may reasonably be expected to catch. This scenario is crafted primarily on the offence's *actus reus.* There is no sufficient basis on which to conclude that the requisite *mens rea* would be satisfied. Missing from the hypothetical is whether the offender turned his mind to the presence of occupants, and the corresponding risk to lives or safety. The majority's position, which depends on the presence of a residential wall to protect occupants, ignores the possibility that bullets could go through a window or door, psychological effects on occupants or neighbours, and the risk of escalating violence. Intentionally shooting any firearm — which, by definition, must be capable of causing serious injury or death — into or at a building or other place, with knowledge of or recklessness as to the presence of occupants, is highly dangerous and culpable conduct. The absence of serious injury or death will just be a matter of luck.

A sentence of two years should properly be considered the low end of the range of fit and proportionate sentences in reasonably foreseeable applications of s. 244.2(1)(a). The minimum four-year sentence imposed by s. 244.2(3)(b) would double this period of incarceration. The effects of this should not be minimized and may be devastating. However, as a constitutional matter, this additional period of imprisonment does not meet the high threshold established by the Court for cruel and unusual punishment. A mandatory minimum sentence oversteps constitutional limits when it is grossly disproportionate, beyond merely excessive. It is only on rare occasions that the Court has found a minimum sentence to violate s. 12, in contrast to punishments which are cruel and unusual by nature such as torture or castration.

Parliament is within its rights to emphasize the objectives of deterrence and denunciation in the context of firearms offences. The Court has repeatedly affirmed the denunciatory role of minimum sentences for conduct which offends our society's basic code of values. The intentional shooting of a life-threatening firearm into or at a building or other place, with knowledge of or recklessness as to the presence of occupants, is a clear example of such conduct.

The hypothetical scenario relied on by the majority is unmoored from judicial experience and common sense. It has not resulted in a single conviction under s. 244.2(1)(a) — nor would it, on a proper interpretation of the offence. Section 244.2(1)(a) only captures intentional shootings which are highly blameworthy and antithetical to the peace of the community. A four-year minimum sentence is not so excessive as to outrage standards of decency or incompatible with human dignity to rise to the level of cruel and unusual punishment under s. 12.

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By Martin J.

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By Côté J. (dissenting)

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(WL); *R. v. Cheung, Gee and Gee* (1977), 5 A.R. 356; *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, aff'd 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. McMillan*, 2016 MBCA 12, 326 Man. R. (2d) 56; *R. v. Lyta*, 2013 NUCA 10, 561 A.R. 146; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Guiller* (1985), 48 C.R. (3d) 226; *R. v. Felawka*, [1993] 4 S.C.R. 199; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

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APPEAL from a judgment of the Alberta Court of Appeal (O'Ferrall, Wakeling and Antonio JJ.A.), 2020 ABCA 263, 9 Alta. L.R. (7th) 226, [2021] 2 W.W.R. 31, 391 C.C.C. (3d) 37, 466 C.R.R. (2d) 286, 65 C.R. (7th) 233, [2020] A.J. No. 740 (QL), 2020 CarswellAlta 1265 (WL), setting aside a decision of Jerke J., 2018 ABQB 945, 79 Alta. L.R. (6th) 161, [2019] 1 W.W.R. 551, 425 C.R.R. (2d) 43, [2018] A.J. No. 1379 (QL), 2018 CarswellAlta 2760 (WL), and varying the sentence of the accused. Appeal allowed, Côté J. dissenting.

Heather Ferg and *W. E. Brett Code, K.C.*, for the appellant.

Robert A. Fata, for the respondent.

Janna A. Hyman, for the intervener the Director of Public Prosecutions.

Andreea Baiasu and *Gregory Furmaniuk*, for the intervener the Attorney General of Ontario.

Written submissions only by *Glenn Hubbard*, for the intervener the Attorney General of Nova Scotia.

Grace Hession David, for the intervener the Attorney General of Saskatchewan.

Emily MacKinnon, *Amanda G. Manasterski* and *Stephen Armstrong*, for the intervener the British Columbia Civil Liberties Association.

Janani Shanmuganathan and *Laura Metcalfe*, for the intervener the Criminal Lawyers' Association (Ontario).

Eric V. Gottardi, *K.C.*, and *Chantelle van Wiltenburg*, for the intervener the Canadian Bar Association.

Nader R. Hasan and *Ryann Atkins*, for the intervener the Canadian Civil Liberties Association.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ. was delivered by

MARTIN J. —

I. Introduction

[1] This appeal, and the companion appeal of *R. v. Hilbach*, 2023 SCC 3, provide the Court with an opportunity to clarify the legal principles that govern when the constitutionality of a mandatory minimum sentencing provision is challenged under s. 12 of the *Canadian Charter of Rights and Freedoms*. At issue in both appeals are three different offences under the *Criminal Code*, R.S.C. 1985, c. C-46, which involve the use of a firearm. In this appeal, the appellant, Jesse Dallas Hills, was convicted of

discharging a firearm into or at a home under s. 244.2(1)(a). Mr. Hills challenges the four-year mandatory minimum sentence previously imposed by s. 244.2(3)(b) for this offence. The mandatory minimum sentence prescribed in s. 244.2(3)(b) was repealed after this appeal was heard. Despite this legislative change, the reasons examine the impugned mandatory minimum as previously enacted. In the companion case, Ocean William Storm Hilbach and Curtis Zwozdesky were convicted of armed robbery. They challenge, respectively, the five-year mandatory minimum for robbery with a restricted or prohibited firearm under s. 344(1)(a)(i) and the former four-year mandatory minimum for robbery with a firearm under s. 344(1)(a.1). The mandatory minimum sentence set out in s. 344(1)(a.1) was also repealed after the *Hilbach* appeal was heard.

[2] In both appeals, the offenders argue that the prescribed mandatory minimum sentences constitute cruel and unusual punishment contrary to s. 12 of the *Charter*. They claim that these automatic sentences, which impose a stated minimum term of imprisonment, are grossly disproportionate to what would be a fit and appropriate punishment and therefore offend the *Charter*. Mr. Hills and Mr. Zwozdesky admit that the minimum sentences were warranted based on the facts of their cases, but nevertheless challenge the law based on how the sentencing provisions could reasonably apply to others for whom they claim the minimum penalties imposed would be constitutionally infirm punishments.

[3] This is not the first time the constitutionality of mandatory minimum sentences has been before this Court. While these appeals reveal some of the challenges

faced when determining whether a punishment is grossly disproportionate, there is no reason to upset sound and settled law and adopt the new approaches advocated by some parties, interveners and judges of the Alberta Court of Appeal. The principles for assessing whether a punishment is cruel and unusual are well established and were recently and unanimously affirmed in *R. v. Bissonnette*, 2022 SCC 23. In this decision, the Court seeks to provide further guidance, direction and clarity. These reasons offer a framework in response to submissions in both this appeal and in *Hilbach*. As such, I will not distinguish between submissions from counsel in both cases addressing suggested changes to the s. 12 framework.

[4] In this appeal, I first set out the generally applicable framework and foundational principles for the s. 12 analysis and then apply them to Mr. Hills and, in *Hilbach*, to Mr. Hilbach and Mr. Zwozdesky. Whether a mandatory minimum is grossly disproportionate will depend upon the scope and reach of the offence, the effects of the punishment on the offender, and the penalty and its objectives.

[5] In respect of Mr. Hills, I conclude that s. 244.2(3)(b) is grossly disproportionate. Here, the evidence showed that numerous air-powered rifles constituted "firearms", including air-powered devices like paintball guns, even though they could not perforate the wall of a typical residence. It is also reasonably foreseeable that a young person could intentionally discharge such a "firearm" into or at a place of residence. This provision therefore applies to an offence that captures a wide spectrum of conduct, ranging from acts that present little danger to the public to those that pose

a grave risk. Its effect at the low end of the spectrum is severe. The mandatory minimum cannot be justified by deterrence and denunciation alone, and the punishment shows a complete disregard for sentencing norms. The mandatory prison term would have significant deleterious effects on a youthful offender and it would shock the conscience of Canadians to learn that an offender can receive four years of imprisonment for firing a paintball gun at a home. As a result, s. 244.2(3)(b) imposes a mandatory minimum of four years' imprisonment for a much less grave type of activity such that it is grossly disproportionate and amounts to cruel and unusual punishment. The Crown did not argue that s. 244.2(3)(b) could be saved under s. 1 of the *Charter*. Accordingly, I would allow the appeal. I address s. 344(1)(a)(i) and (a.1) in the companion case of *Hilbach*.

II. Legislative Background

A. *The Challenged Mandatory Minimum*

[6] Mr. Hills was subject to the mandatory minimum at issue after he pled guilty to the offence in s. 244.2(1)(a):

> **244.2 (1)** Every person commits an offence
>
> > **(a)** who intentionally discharges a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place; or
> >
> > **(b)** who intentionally discharges a firearm while being reckless as to the life or safety of another person.

> **(2)** For the purpose of paragraph (1)(a), ***place*** means any building or structure — or part of one — or any motor vehicle, vessel, aircraft, railway vehicle, container or trailer.
>
> **(3)** Every person who commits an offence under subsection (1) is guilty of an indictable offence and
>
> > **(a)** if a restricted firearm or prohibited firearm is used in the commission of the offence or if the offence is committed for the benefit of, at the direction of or in association with a criminal organization, is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of
> >
> > > **(i)** five years, in the case of a first offence, and
> >
> > > **(ii)** seven years, in the case of a second or subsequent offence; and
> >
> > **(b)** in any other case, is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years.

[7] After leave to appeal was granted, Parliament introduced and passed *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15. The legislation received royal assent on November 17, 2022. It removed the mandatory minimum sentence prescribed in s. 244.2(3)(b). Mr. Hills' offence no longer attracts a mandatory minimum. The parties do not rely on Parliament's choice to remove this measure in their arguments. Further, the four-year mandatory minimum sentence was still in effect at the time of the hearing. While I acknowledge this legislative change, these reasons examine the provision as previously enacted with the applicable mandatory minimum term and as such, I will not address this issue further.

[8] The *actus reus* of s. 244.2(1)(a) requires that an offender discharge a firearm into or at a "place" (as defined by s. 244.2(2)). It is significant, for this appeal, that "place" has a very wide meaning: it includes "any building or structure", which encompasses anything from a windowless garden shed to a residential home. The *mens rea* for this offence contains two main components. First, the offender must *intentionally* discharge the firearm into or at a place. Second, in intentionally discharging the firearm into or at a place, the offender must know a person is present in the place or be reckless as to whether a person is present there (*Vézina v. R.*, 2018 QCCA 739, at para. 27 (CanLII)). The *actus reus* does not require a person to be at the "place" where the firearm is discharged, only that the firearm be discharged *into or at a place* (para. 46). Thus, there is no requirement for a person to even be present when the firearm is discharged.

[9] Mr. Hills committed his offence using a hunting rifle, which is classified as an ordinary firearm. As a result, he was subject to the four-year minimum for s. 244.2(1)(a) listed in s. 244.2(3)(b). To appreciate the scope of s. 244.2(1)(a) and the mandatory minimum sentence in question, it is necessary to review the meaning of a "firearm" under the *Criminal Code* and Canada's regulatory scheme for firearms.

B. *The Applicable Firearms Regime*

[10] Parliament regulates firearms through a variety of legislation including the licensing and registration regime in the *Firearms Act*, S.C. 1995, c. 39, and through criminal prohibitions in the *Criminal Code* (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R.

773, at para. 6; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783). This legislation forms the background to this appeal and given its complexity, it is important to appreciate its operation before turning to Mr. Hills' challenge.

[11] To start, s. 244.2(1)(a) incorporates the *Criminal Code* definition of a firearm. Section 2 of the *Criminal Code* generally defines a "firearm" as "a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm". While firearms are defined as "weapons", they do not need to meet the *Criminal Code* definition of a weapon (*R. v. Dunn*, 2013 ONCA 539, 117 O.R. (3d) 171, at para. 66, aff'd 2014 SCC 69, [2014] 3 S.C.R. 490).

[12] Courts rely on the "pig's eye test" to determine whether a barrelled weapon is capable of causing serious bodily injury or death and thus meets the definition of a "firearm" in the *Criminal Code* (*Dunn*, at paras. 8 and 40). The test asks whether a projectile fired from the device can rupture a pig's eye, which is physiologically similar to a human eye (para. 8). Since a ruptured eye is a "serious bodily injury", a "firearm" is any barrelled, projectile-firing device capable of putting someone's eye out (paras. 8 and 40). As the expert evidence on this appeal establishes, some air-powered devices, like BB guns, airsoft guns, and paintball guns, are capable of firing projectiles with enough velocity to rupture a pig's eye. As a result, they can be classified as firearms under the *Criminal Code*.

[13] However, some air-powered devices that are "firearms" for the purposes of the *Criminal Code* are not subject to the *Firearms Act*'s licensing and registration regime. Indeed, the *Criminal Code* exempts some "firearms" from the *Firearms Act*. Specifically, at issue in this appeal is the exemption in s. 84(3)(d)(i):

> **(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:
>
> . . .
>
> **(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 . . . .

[14] Under s. 84(3)(d)(i), some air-powered devices that meet the pig's eye test and constitute firearms under the *Criminal Code* are nevertheless exempted from the *Firearms Act*, since their muzzle velocity falls at or below 152.4 metres per second. As a result, even though they are "firearms" for the purposes of the *Criminal Code*, they can be freely possessed without a firearms licence.

[15] The implication for this appeal is that some air-powered devices, which can be freely possessed in Canada, are "firearms" for the purposes of s. 244.2(1)(a). Put simply, an offender could be convicted under s. 244.2(1)(a) for firing a BB gun or a paintball gun at a shed. This offender would then be subject to the four-year mandatory minimum. While s. 244.2(1)(a) may typically apply where an ordinary firearm is used (like Mr. Hills' hunting rifle), it is possible for an offender to be

convicted for using devices that are not known to inflict deadly force, like paintball guns. As I explain, this possibility underlies the constitutional frailty of the mandatory minimum at issue here.

III. Facts and Judicial History

[16] During an incident on May 6, 2014, Mr. Hills attacked two vehicles and a residence. In the hours prior to the incident, Mr. Hills consumed a large volume of prescription medication and alcohol. Around midnight, while intoxicated, he left his home in Lethbridge, Alberta with a loaded .303 Enfield bolt action rifle and a baseball bat. The rifle was designed for big game hunting.

[17] Mr. Hills proceeded to swing his bat at a passing car before firing a shot at it. The driver called 9-1-1. Before police arrived, Mr. Hills turned his attention to an unoccupied parked car, and smashed its windows with the bat. Mr. Hills then approached a new target: a residential home. He fired a round that went through the home's living room window and through a wall into a computer room before it stopped in a drywall stud and bookcase.

[18] At the time Mr. Hills fired his shots, the home was occupied by two parents and their two children. The father was sitting in the computer room when Mr. Hills fired his first shot. The father left the computer room to investigate and heard another shot. He ran to alert the mother and pressed the panic alarm on his security system. He then heard what sounded like Mr. Hills trying to break through the front door. The

father opened the door and yelled at Mr. Hills to get away. As the father grabbed an axe to defend himself, Mr. Hills fired again.

[19] The father managed to retreat and call 9-1-1. He went to the basement with the rest of his family where they waited for police to arrive. When police arrived, they discovered several rounds had penetrated the home. The rounds were fired into areas of the home where a person could have been standing and hit.

[20] After a preliminary inquiry, Mr. Hills pled guilty to four offences: discharging a firearm into or at a house contrary to s. 244.2(1)(a) of the *Criminal Code*, pointing a firearm at the occupant of a car, possession of a firearm without a licence, and mischief to property under $5,000. Mr. Hills was unable to recollect the events or the motive for his actions.

A. *Alberta Court of Queen's Bench, 2018 ABQB 945, 79 Alta. L.R. (6th) 161*

[21] At sentencing, Mr. Hills brought a challenge under s. 12 of the *Charter* to the mandatory minimum sentence of four years of imprisonment for intentionally discharging a non-restricted firearm into or at a house imposed by s. 244.2(3)(b). He argued that such a mandatory minimum sentence was grossly disproportionate in reasonably foreseeable scenarios and, therefore, constituted cruel and unusual punishment.

[22] Mr. Hills relied on a scenario where the hypothetical culprit discharged a firearm that was incapable of penetrating a typical residential wall. A firearms expert, called on Mr. Hills' behalf, tested eight different types of air-powered pistols or rifles and concluded that while they met the *Criminal Code* definition of a firearm, many of them were incapable of penetrating the wall of a house.

[23] The sentencing judge, in light of the expert evidence, agreed that s. 244.2(3)(b) was grossly disproportionate in the reasonably foreseeable scenario where "a young person intentionally discharges an air-powered pistol or rifle such as an airsoft pistol, BB gun, paintball marker, .177 calibre pellet rifle, a .22 calibre pellet pistol or pellet rifle at a residence" (para. 14). The culprit in this situation clearly committed an offence of lesser gravity than the other conduct caught by the provision: the behaviour was of low moral blameworthiness and the risk of harm was also low. He concluded the infringement of s. 12 could not be justified under s. 1 of the *Charter*.

[24] Having concluded the mandatory minimum was unconstitutional, in a subsequent oral decision, the sentencing judge imposed a sentence of three and a half years of incarceration for Mr. Hills.

B. *Alberta Court of Appeal, 2020 ABCA 263, 9 Alta. L.R. (7th) 226*

[25] The Crown appealed both the finding that s. 244.2(3)(b) infringed s. 12 of the *Charter* and Mr. Hills' sentence. The Alberta Court of Appeal allowed the appeal on both grounds, with each justice writing separately.

[26] Justice Antonio concluded the expert evidence was insufficient to establish the low gravity of the scenario considered by the sentencing judge. The expert did not exclude the possibility that rounds fired from an air-powered pistol or rifle could travel through a door or window. Nor had the sentencing judge accounted for the psychological harms flowing from the scenario. Regardless of the physical risk, psychological and social harm was inherent in the reckless use of a firearm. She distinguished *Nur*, reasoning that if it was not grossly disproportionate to impose a 40-month sentence on a 19-year-old who possessed a loaded firearm in public, it was surely not grossly disproportionate to impose a 4-year sentence where a firearm was actually discharged. In re-sentencing Mr. Hills, she concluded that the sentencing judge had underestimated the gravity of the offence and concluded an appropriate sentence was four and a half years of imprisonment. She, however, reduced the sentence to the minimum of four years to account for the time spent on appeal. She stayed the execution of the post-appeal portion of his sentence.

[27] Justice O'Ferrall agreed with Antonio J.A. that s. 244.2(3)(b) complied with the *Charter* and with Antonio J.A.'s decision to impose the minimum sentence. Justice O'Ferrall added that this Court's s. 12 jurisprudence ought to be revisited. He was troubled with the "air of unreality" associated with the use of "reasonable hypotheticals" and reasoned the s. 12 analysis should proceed based solely on the offender before the court (para. 103). Further, he questioned whether a grossly disproportionate sentence was an adequate measure of cruel and unusual punishment.

Proportionality is not the fundamental purpose of sentencing and it is foreseeable that a grossly disproportionate sentence could sometimes be justified.

[28] Justice Wakeling joined O'Ferrall J.A. in calling for the Court to revisit its s. 12 jurisprudence. Justice Wakeling concluded s. 12 protects only against cruel *and* unusual punishment. Put differently, it does not protect against "usual" punishments, like imprisonment. Consequently, a "grossly disproportionate" prison sentence cannot engage s. 12. He criticized reasonable hypotheticals, reasoning that since s. 12 protects against an offender being *subjected* to cruel and unusual punishment, its plain language means an offender can only challenge the particular sentence to which they are subject. He added the method of reasonable hypotheticals would leave Canadians "aghast" that adjudicators rely on "make-believe" scenarios to evaluate the constitutionality of a sentencing provision (para. 263). Justice Wakeling went on to note that the results of Canadian sentencing are irrational and indefensible, which militate in favour of a narrow construction of s. 12. Applying his own personal method of fixing sentences, he would have sentenced Mr. Hills to approximately 5.9 years of imprisonment.

IV. Issues

[29] This appeal raises two questions. First, whether the mandatory minimum sentence mandated by s. 244.2(3)(b) of the *Criminal Code* constitutes cruel and unusual punishment such that it violates s. 12 of the *Charter*. Second, whether the Alberta Court of Appeal erred in failing to consider Mr. Hills' *Gladue* report and his Métis status in re-sentencing him.

V. Analysis

[30] Mr. Hills concedes the mandatory minimum sentence is not grossly disproportionate on the facts of his case. He argues, however, that this high bar is met in reasonably foreseeable scenarios in which other differentially situated reasonably foreseeable offenders are likely to be involved. In particular, he says it is met in the hypothetical case of a youthful offender who fires an air-powered pistol or rifle at a house. The Crown concedes this scenario is reasonably foreseeable, but maintains the mandatory minimum sentence is not grossly disproportionate in this hypothetical. Before turning to Mr. Hills' arguments, I will clarify the applicable framework for a challenge to a mandatory minimum sentence under s. 12 and address the proposals for revising this framework advanced by the Crown, several interveners, and the Court of Appeal.

A. *The Protection Against Cruel and Unusual Punishment Under Section 12 of the Charter*

[31] Section 12 of the *Charter* grants individuals a right not to be subjected to any cruel and unusual treatment or punishment by the state. As a threshold issue, an impugned measure must initially qualify as "treatment" or "punishment" to fall within s. 12. State action amounts to punishment where it: "(1) . . . is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) . . . is imposed in furtherance of the purpose and principles of sentencing, or (3) . . . has a significant impact on an

offender's liberty or security interests" (*Bissonnette*, at para. 57, citing *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 39, quoting *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 41). Despite the views of O'Ferrall and Wakeling JJ.A., s. 12 is engaged here. This Court has consistently held that imprisonment, the "penal sanction of last resort", clearly constitutes punishment (under both ss. 11 and 12 *Charter* jurisprudence) (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 36; see *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1077; *Nur*; *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 40).

[32] The underlying purpose of s. 12 is "to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals" (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at para. 51). Dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect, irrespective of their actions (*Bissonnette*, at para. 59).

[33] The analytical approach under s. 12 spans many years and has been used to address different types of legal issues. Mandatory minimum sentences have been considered in *Smith*, *R. v. Luxton*, [1990] 2 S.C.R. 711, *R. v. Goltz*, [1991] 3 S.C.R. 485, *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, *Nur*, and most recently in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130. A mandatory victim surcharge which applied to all offences was struck down in *Boudreault*; a mandatory weapons prohibition order was upheld in *R. v.*

Wiles, 2005 SCC 84, [2005] 3 S.C.R. 895; and a sentence of life imprisonment with parole ineligibility of 10 years was upheld in *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3.

[34] In *Bissonnette*, this Court invalidated the stacking of periods of parole ineligibility in cases of multiple murder convictions and reaffirmed and consolidated the well-established analytical approach under s. 12. Chief Justice Wagner, writing for a unanimous Court, emphasized the need for a purposive *Charter* interpretation which is generous and aimed at securing the full benefits of *Charter* protections for individuals (para. 98). Based on the purpose of s. 12, he concluded that a sentence that entirely negates the penal objective of rehabilitation violates human dignity and, therefore, contravenes s. 12 in a manner which could not be saved under s. 1 (para. 8).

[35] *Bissonnette* also confirmed that s. 12 has two prongs that are united by their shared animating purpose of safeguarding human dignity. First, s. 12 protects against the imposition of punishment that is "so excessive as to be incompatible with human dignity" (para. 60). This prong of cruel and unusual punishment is concerned with the *severity* of a punishment — it queries not whether an impugned punishment is excessive or disproportionate, but whether its effects are grossly disproportionate to the appropriate punishment in a given case (paras. 61 and 68; *Nur*, at para. 39; *Morrisey*, at para. 26). Under the first prong, it is not the nature or type of punishment that is at issue, but the amount or quantity of punishment imposed: the focus is whether its

particular effects make it grossly disproportionate and thereby constitutionally infirm (*Bissonnette*, at para. 62).

[36] Second, s. 12 protects against the imposition of punishment and treatment that are cruel and unusual because, by their very nature, they are "intrinsically incompatible with human dignity" (*Bissonnette*, at para. 60). Under the second prong, the focus is on the *method* of punishment. The narrow class of punishments that fall within the second category "will 'always be grossly disproportionate' because . . . [t]hese punishments are in themselves contrary to human dignity because of their 'degrading and dehumanizing' nature" (para. 64, quoting *Smith*, at p. 1073; *9147-0732 Québec inc.*, at para. 51).

[37] Mandatory minimum sentences are analyzed under the first prong of s. 12. As their name suggests, Parliament has prescribed a minimum sentence which applies whenever a particular offence has been committed. They are "mandatory" in the sense that Parliament has not provided the safety valve of judicial discretion, exemptions, or escape clauses.

[38] Despite this absence of discretion, mandatory minimum sentence provisions have not been found to be inherently or presumptively unconstitutional. As this Court stated in *Smith*, "[t]he legislature may . . . provide for a compulsory term of imprisonment upon conviction for certain offences without infringing rights protected by s. 12 of the *Charter*" (p. 1077; see also p. 1072). Nevertheless, the absence of any discretion, as well as the manner of their operation, expose their constitutional

vulnerabilities. Mandatory minimums can "function as a blunt instrument" and "deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range" (*Nur*, at para. 44). In "extreme cases", they may impose unjust sentences "because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality" (para. 44). When the effects of the impugned punishment are grossly disproportionate to what would have been appropriate (*Smith*, at p. 1072), the punishment is cruel and unusual because it shows the "state's complete disregard for the specific circumstances of the sentenced individual and for the proportionality of the punishment inflicted on them" (*Bissonnette*, at para. 61).

[39] I turn now to the framework this Court has developed to assess whether a sentence is grossly disproportionate.

B. *The Framework for Assessing Grossly Disproportionate Sentences*

(1) Overview

[40] To assess whether a mandatory minimum violates s. 12 of the *Charter*, this Court has developed a two-stage inquiry that involves a contextual and comparative analysis (*Bissonnette*, at para. 62). A court must:

1. Assess what constitutes a fit and proportionate sentence having regard to the objectives and principles of sentencing in the *Criminal Code* (*Bissonnette*, at para. 63; *Boudreault*, at para. 46; *Nur*, at para. 46).

2. Consider whether the impugned provision requires the imposition of a sentence that is grossly disproportionate, not merely excessive, to the fit and proportionate sentence (*Bissonnette*, at para. 63; *Nur*, at para. 46; *Smith*, at p. 1072). The constitutional bar is set high to respect Parliament's general authority to choose penal methods that do not amount to cruel and unusual punishment.

[41] This two-part assessment may proceed on the basis of either (a) the actual offender before the court, or (b) another offender in a reasonably foreseeable case or hypothetical scenario (*Bissonnette*, at para. 63; *Nur*, at para. 77).

[42] Where the court concludes that the term of imprisonment prescribed by the mandatory minimum sentence provision is grossly disproportionate in either case, the provision infringes s. 12 and the court must turn to consider whether that infringement can be justified under s. 1 of the *Charter* if arguments or evidence to that effect are raised by the Crown (*Boudreault*, at para. 97; *Nur*, at para. 46).

(2) Applying the Framework

[43] Justices O'Ferrall and Wakeling, as well as several interveners, invite this Court to make several revisions to this accepted framework because they say it is difficult to apply and lacks cohesion. Many of their criticisms do not accept the principles of law contained in the majority judgments of this Court, but are instead grounded in *dicta* from dissenting opinions. Others endorse the existing framework and argue that those critical of it are really taking issue with the results it produces because they do not agree with them (see I.F., Canadian Civil Liberties Association, at paras. 27-32). These various criticisms and proposals will be considered in relation to the particular issues raised. I would, however, acknowledge from the outset that there are challenges and complexities which make it impractical to establish bright-line rules that can be applied uniformly to mandatory minimum sentences under s. 12.

[44] The first stage of the s. 12 inquiry involves the individualized process of determining what a fit and proportionate sentence is for the particular (or representative) offender under consideration using the general sentencing principles set out by Parliament. While this is a daily occurrence in courts across this country, it involves a complex and multifactorial assessment. Judges are tasked with crafting sentences that balance various sentencing objectives, account for aggravating and mitigating factors, and are proportionate to the gravity of each offence and the moral blameworthiness of the offender.

[45] The second stage requires a contextual comparison between the fit sentence and the impugned mandatory minimum to see whether the latter complies with the

widely-worded right set out in s. 12. Judges must consider the uniform and mandatory minimum sentence Parliament has selected for particular crimes. A mandatory minimum is a penal provision of a very different type in which Parliament has intentionally removed discretion and has instead given priority to certainty, deterrence, denunciation and sometimes removing the offender from society. It has not only specified a minimum penalty, it anticipates that the minimum penalty will apply automatically regardless of how the crime was committed or by whom. The same punishment or period of incarceration applies both to the full breadth of the conduct criminalized and to "everyone" who commits it, no matter how diversely situated.

[46] When comparing the sentence produced from the individual process under general sentencing principles with the uniform standard under the mandatory minimum, some mismatch or disproportion is very likely. As observed by Arbour J. in *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 18: "Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the *Code*, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the *Code*: the principle of proportionality."

[47] It is not therefore the existence of some disproportion which will offend the *grossly* disproportionate requirement of s. 12. Stated otherwise, the analysis of the grossly disproportionate standard poses the following question: is the difference between the fit sentence and the mandatory minimum sentence so grossly

disproportionate that it violates human dignity such that it amounts to cruel and unusual punishment? According to well-established jurisprudence, the challenged penalty may be unfit, excessive and disproportionate, but it only crosses the constitutional line when it becomes grossly disproportionate. This question raises the common challenge of distinguishing the gradations and demarcations between related legal standards and reaching a conclusion about which legal standard is met. While it is frequently difficult to gauge questions of degree or to measure when something that is otherwise permitted has become grossly disproportionate, many legal standards require just this type of analysis. Whether under s. 12 or s. 7 of the *Charter*, there will be a continuum between exact fit and gross disproportion, and a judge not only has the authority to make such a determination, but is recognized as being well placed to do so: "This is the sort of inquiry judges have consistently conducted in *Charter* review" (*Nur*, at para. 60).

[48] In addition, assessing gross disproportionality may be more challenging in certain circumstances. This is because sometimes the difference between stages one and two will involve penalties which are of different types or fall within distinct categories. For example, there may be cases in which a fine would be a fit sentence but the impugned provision imposes imprisonment, or cases in which a discharge or conditional sentence would be fit but instead a custodial sentence is mandated by law. The disparity in such cases is more readily apparent because the comparison involves two different types of punishment and the effects are often more extreme. Other cases may involve a comparison between the term of a proportionate period of incarceration and the term of imprisonment contained in the mandatory minimum. In such cases the

type of punishment is the same: imprisonment. Such cases ask decision makers to engage in normative reasoning and make a judgment call about when a sentence is so long it becomes grossly disproportionate.

[49] I do not accept that these challenges and complexities mean that the established framework has always been fundamentally flawed or has become unworkable. Indeed, many of the arguments accepted by O'Ferrall and Wakeling JJ.A. and advanced before us by the Attorney General of Ontario and others were also forcefully argued and firmly rejected by this Court in 2015 in *Nur*. Like the Court in that case, in my view, the jurisprudence continues to provide a principled approach to assess when the effects of a penalty are so undermining of human dignity that the penalty qualifies as cruel and unusual punishment. Elaborating on the multiple, sometimes nuanced, questions and normative standards that are/may be considered within the framework, should help bring an end to the "exaggerated debate" sometimes applied to s. 12 (para. 61, per McLachlin C.J.). While no major methodological shifts are warranted, the Court seeks to provide greater clarity and more guidance.

C. *Stage One: Determining a Fit and Proportionate Sentence*

[50] In this section I outline the first stage of the s. 12 inquiry, which is how to determine a fit and appropriate sentence. I begin by addressing the situation in which the constitutional challenge involves the particular offender before the court. This will involve a familiar task: a full consideration of all relevant sentencing provisions in the applicable legislation and jurisprudence. Since proportionality in sentencing relates to

the gravity of the offence and the moral culpability of the individual before the court, there will necessarily be a consideration of the circumstances of the commission of the offence and the personal characteristics of the offender. The goal should be to determine as specific a punishment as would emerge from a traditional sentencing hearing — especially because this is the penalty that would be served if the mandatory minimum were declared unconstitutional.

[51] I then turn to cases in which the constitutional challenge involves the presentation of reasonably foreseeable offenders by way of hypothetical scenarios. Since what is being challenged is a law of general application, this Court has repeatedly used and authorized the use of reasonable hypotheticals to test the law's scope, reach, nature and effects. I explain the purposes they serve and the limitations to which they are subject. They may include personal characteristics but they must be reasonable in the sense of being reasonably foreseeable and realistic. While a bit more flexibility is needed to determine what a proportionate sentence would be for a reasonably foreseeable offender, every attempt at precision is encouraged to ensure that the comparison under stage two may be conducted in a fair manner.

(1) Sentencing an Individual Offender

[52] When the constitutional challenge to a mandatory minimum proceeds on the basis of the particular circumstances of the individual offender charged and convicted, the task for the judge at stage one of the s. 12 inquiry set out in *Nur* is a familiar one: to determine a fit and proportionate sentence for the particular offender

before the court. In this section I provide an overview of the relevant sentencing provisions and principles, with a focus on the need for a fit, proportionate and precise sentence, having regard to the offender's personal characteristics and the circumstances surrounding the commission of the offence.

(a) *General Sentencing Principles*

[53] The general principles of sentencing in the *Criminal Code* and the common law govern when evaluating the just and appropriate sentence for the actual or reasonably foreseeable offender (*Nur*, at paras. 40-42). Each sentence must be selected based on the particular facts of the case and in light of existing case law (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43). Courts should employ sentencing tools and guides that are most relevant to their jurisdiction. In crafting a fit sentence, judges may reference sentencing ranges or starting points as appropriate to reach a proportionate sentence, so far as these tools align with established principles and objectives of sentencing (see *R. v. Parranto*, 2021 SCC 46, at para. 16).

[54] To assist in evaluating what constitutes a just and appropriate punishment in a given case, Parliament enacted s. 718 of the *Criminal Code* (or s. 38 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, where appropriate). Proper consideration is to be given to various objectives such as denunciation, deterrence, rehabilitation, providing reparations for harm done to victims, promoting a sense of responsibility and, when necessary, separating offenders from society. No sentencing objective should be

applied to the exclusion of all others. Courts should also consider any aggravating and mitigating circumstances relating to the offence or to the offender.

[55] In addition, s. 718.2(e) of the *Criminal Code* provides a mandatory direction to consider the unique situation of Aboriginal offenders for all offences (*Gladue*, at para. 93; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 84-85). Sentencing judges must consider the systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the court and the types of sentencing procedures and sanctions which may be appropriate in the circumstances for that offender. Sanctions other than imprisonment are to be considered. While this Court has not addressed the issue, certain provincial courts of appeal have found that, in the case of Black offenders and groups who experience systemic discrimination, social context evidence or background factors which may have contributed to the offender being before the court can also serve as a mitigating factor at sentencing (see, e.g., *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at paras. 13 and 87-95; *R. v. Anderson*, 2021 NSCA 62, 405 C.C.C. (3d) 1, at para. 114).

(b) *Proportionality*

[56] Proportionality is a "central tenet" of Canada's sentencing regime, with roots that predate the recognition of it as the fundamental principle of sentencing in s. 718.1 of the *Criminal Code* (*Ipeelee*, at para. 36, citing *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.); see *R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12; *Nasogaluak*, at paras. 40-42; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at

paras. 40-42). Indeed, "whatever weight a judge may wish to accord to the objectives [for sentencing prescribed in ss. 718 to 718.2 of the *Criminal Code*], the resulting sentence *must* respect the fundamental principle of proportionality" (*Nasogaluak*, at para. 40 (emphasis in original)).

[57] The purpose of proportionality is founded in "fairness and justice" (*R. v. Priest* (1996), 30 O.R. (3d) 538 (C.A.), at p. 546). It is to prevent unjust punishment for the "sake of the common good" (p. 547) and it serves as a limiting function to ensure that there is "justice for the offender" (*Ipeelee*, at para. 37). As the "*sine qua non* of a just sanction" (para. 37), the concept expresses that the amount of punishment an offender receives must be proportionate to the gravity of the offence and the offender's moral blameworthiness (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at paras. 70-71; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 51-54; *Ipeelee*, at paras. 36 and 38; *Nur*, at para. 43; C. C. Ruby, *Sentencing* (10th ed. 2020), at §2.14).

[58] The "gravity of the offence" refers to the seriousness of the offence in a general sense and is reflected in the potential penalty imposed by Parliament and in any specific features of the commission of the crime (*R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 90). The gravity of the offence should be measured by taking into account the consequences of the offender's actions on victims and public safety, and the physical and psychological harms that flowed from the offence. In some cases where there is bias, prejudice or hatred, the motivation of the offender may also be

relevant (see s. 718.2(a)(i) of the *Criminal Code*). The offender's moral culpability or degree of responsibility should be measured by gauging the essential substantive elements of the offence including the offence's *mens rea*, the offender's conduct in the commission of the offence, the offender's motive for committing the offence, and aspects of the offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity (*Hamilton*, at para. 91; *Boudreault*, at para. 68; *Ipeelee*, at para. 73).

[59] Further, the sentence imposed must be commensurate with the responsibility and "moral blameworthiness of the offender" (*Ipeelee*, at para. 37). The sentence must be no greater than the offender's moral culpability and blameworthiness (*Nasogaluak*, at paras. 40-42; *M. (C.A.)*, at para. 40; *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645).

[60] In setting out the two-stage process in *Nur*, McLachlin C.J. said at para. 46:

> First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence.

Based on this passage, some argue that the first stage is limited to consideration of a proportionate sentence solely *for the offence*. The claim is that only the nature of the offence governs and there is no room to take into account other aspects of

proportionality, like moral blameworthiness or the personal characteristics of the offender.

[61] With respect, this narrow reading is incomplete and suggests that McLachlin C.J. chose, without any explanation, to only reference half of the well-known whole of proportionality. It is more sensible to read her reference to a "proportionate sentence" as incorporating both the gravity of the offence and the moral blameworthiness of the offender. Her requirement that the sentence be assessed according to the objectives and principles of sentencing in the *Criminal Code* expressly acknowledges and incorporates the offender's personal characteristics and circumstances. Under those principles, there is no proportionate sentence that only takes into account the offence and ignores the offender. The sentencing contemplated at the first stage in *Nur* therefore encompasses both aspects of proportionality.

(c) *The Sentence Should Be Specific and Defined*

[62] Sentencing is a highly individualized and discretionary endeavour (*R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 4; *M. (C.A.)*, at para. 92). Each sentence is to be custom tailored to match the particular offence, as well as the offender (*R. v. Bottineau*, 2011 ONCA 194, 269 C.C.C. (3d) 227; *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728; *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399). There is no "one size fits all" penalty (*R. v. Lee*, 2012 ABCA 17, 58 Alta. L.R. (5th) 30, at para. 12), as sentencing is "an inherently individualized" and "profoundly subjective process" (*M. (C.A.)*, at para. 92; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46):

> The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.
>
> (*M. (C.A.)*, at para. 91)

[63] During the course of argument, counsel often argue for a punishment within a certain sentencing range, or courts of appeal establish ranges or starting points to pursue parity. Nevertheless, a sentencing judge cannot at the end of the day simply approximate a sentence or otherwise provide a range of penalties. The judge is expected to articulate an individual, specific and defined sentence. They cannot order that an offender be imprisoned for around two or three months, or that a sentence be "around three years" or "fall within the range of time". Judges must exercise their discretion in each case and fix a specific and defined punishment.

[64] Sentencing is not an exact science. It can be difficult for sentencing judges to select the exact fit punishment as there is often more than one correct sentencing response to a crime (*Hamilton*, at paras. 85 and 156; Ruby, at §2.5; *Shropshire*, at para. 48, citing *R. v. Muise* (1994), 94 C.C.C. (3d) 119 (N.S.C.A.), at pp. 123-24). However, that is the burden sentencing judges confront daily. At this first stage of s. 12, while there may be reference to sentencing ranges and starting points for the offence to assist in the determination of the fit penalty, there should be no approximation in the final sentence. The key question is: what specifically is the fit sentence for this individual offender?

[65] Precision and certainty about the legal penalty is required because all must know exactly what punishment was imposed and when it will end. Similarly, if the mandatory minimum falls, the sentence affixed by the judge at the first stage of *Nur* will be applied to the offender. Scrupulously selecting a precise and defined sentence also supports an analytically fair and principled result at the second stage of the s. 12 inquiry.

[66] When Lamer J. in *Smith*, at p. 1073, wrote that a court must first consider "the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender", he was talking about how to assess gross disproportionality at the second stage of the analysis — not how to conduct a sentencing hearing. He did not say that setting the fit and proportionate sentence at the first stage could involve a "range of sentences" as urged upon us by some interveners. Even reasonably foreseeable offenders, for whom there is greater latitude, call for careful calibration of discretion and as specific a sentence as required in a traditional and typical sentencing proceeding.

(2) Sentencing Reasonably Foreseeable Offenders and the Use of Reasonable Hypotheticals

[67] In other cases, the courts will be asked to consider the circumstances of reasonably foreseeable offenders not before them. In these cases, the constitutional analysis will be supplemented by or conducted on the basis of reasonable hypothetical scenarios that raise realistic issues about the scope of the mandatory minimum and its

application to everyone. Justices O'Ferrall and Wakeling propose that this Court abandon the use of reasonably foreseeable scenarios. In my opinion, this proposal runs counter to the jurisprudence of this Court and lacks merit. In this section, I explain that reasonably foreseeable hypotheticals are an accepted and appropriate tool to identify the scope and thus explore the constitutionality of an impugned provision. I address how to construct a reasonably foreseeable hypothetical; discuss why personal characteristics, including Indigeneity, are not excluded from consideration; and suggest that the hypothetical should be reasonable and is best tested through the adversarial process.

(a) *Reasonably Foreseeable Hypotheticals Are an Accepted and Appropriate Analytical Tool*

[68] As s. 12 jurisprudence has developed, this Court has consistently accepted that punishments can be impugned not only on the basis that they infringe the s. 12 rights of a particular offender, but also on the basis that they infringe those of a reasonably foreseeable offender. Beginning in *Smith*, this Court established the use of a reasonable hypothetical in assessing whether a punishment is grossly disproportionate. The majority in that case struck down a mandatory minimum of seven years for importing narcotics because such a sentence would be grossly disproportionate if applied to a hypothetical young person driving home to Canada with a small amount of marijuana.

[69] Since *Smith*, reasonable hypothetical situations have been either expressly used by this Court to invalidate sentencing provisions (see *Nur*, at paras. 82-83; *Lloyd*, at paras. 32-33; *Boudreault*, at para. 55), or affirmed as a matter of principle where they were not relied upon (see *Goltz*, at p. 515; *Morrisey*, at paras. 31 and 51-53; *Ferguson*, at para. 30; *Bissonnette*, at para. 63). Importantly, in the three cases in which this Court has struck down mandatory minimums, it has done so on the basis of a reasonable hypothetical offender (*Smith*, *Nur* and *Lloyd*).

[70] Beyond s. 12, the assessment of a law's scope based on reasonable hypotheticals is an accepted analytical inquiry in *Charter* challenges more generally. They have been relied upon as an analytical tool in s. 7 jurisprudence, resulting in successful *Charter* challenges (*R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 799; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at paras. 29-30 and 72-75; *R. v. Ndhlovu*, 2022 SCC 38, at paras. 87-88).

[71] This Court in *Nur* set out certain binding principles about the use of reasonable hypotheticals. Chief Justice McLachlin said the use of reasonable hypotheticals was "at the heart of th[e] case" (para. 47) and placed them at the protected core of the s. 12 analysis. This Court firmly and clearly rejected the argument that reasonable hypotheticals should be abandoned and that the primary or exclusive focus ought to be on the offender before the court (paras. 48-64; see also C. Fehr, "Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the Charter" (2021), 25 *Can. Crim. L.R.* 235, at p. 240). Even as early as 2015, it was recognized that

"excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would run counter to the settled authority of this Court and artificially constrain the inquiry into the law's constitutionality" (*Nur*, at para. 49).

[72] Foreclosing the consideration of the reasonably foreseeable impacts of an impugned law "would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order" (*Nur*, at para. 63). Because it is the "nature of the law" that is at issue, not the claimant's status, it suffices for a claimant to allege unconstitutional effects in their case or on third parties (para. 51, quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 314). In crafting reasonable hypotheticals, a court is examining the scope of the impugned law and "not merely the justice of a particular sentence imposed by a judge at trial" (*Goltz*, at p. 503; see *Big M Drug Mart*, at p. 314; *Nur*, at para. 60). Further, "[i]f the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely" (*Nur*, at para. 51).

[73] The effective use of judicial resources also favours the use of reasonable hypotheticals as they allow one judge to consider an impugned mandatory minimum from multiple vantage points and they help reduce the number of challenges that will be heard in or among jurisdictions. Importantly, they promote the rule of law by underscoring how no one should be convicted or sentenced under an unconstitutional law (*Lloyd*, at para. 16). Hence, "allowing accused to employ reasonable hypothetical

scenarios is more likely to further the purpose of the *Charter*: protecting citizens from abuse of state power" (Fehr, at p. 236).

[74] It is for these reasons that, to repeat McLachlin C.J., "[t]his Court has consistently held that a challenge to a law under s. 52 of the *Constitution Act, 1982* does not require that the impugned provision contravene the rights of the claimant" (*Nur*, at para. 51; see also *Goltz*, at pp. 503-4). Under well-established case law, there is no need to wait for a "real" offender to appear to impugn the constitutionality of a provision of general application.

[75] Justices O'Ferrall and Wakeling's desire to excise the use of reasonably foreseeable scenarios from this Court's s. 12 framework is thus completely contrary to both precedent and principle. They rely upon certain parts of dissenting judgments from this Court and fail to follow the repeated authoritative statements that reasonable hypotheticals are an established device courts use to measure whether a legislatively mandated sentence is cruel and unusual punishment under s. 12 (S. Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018), 23 *Appeal* 89, at p. 96).

(b) *Defining the Parameters of a Reasonably Foreseeable Hypothetical*

[76] A reasonable hypothetical scenario needs to be constructed with care. While it may be tempting to allow the word "hypothetical" to overwhelm, it is the *reasonableness* of the scenario that must be underscored (*Nur*, at para. 57). While

earlier case law did not often explain or explore what went into the construction of a reasonable hypothetical, or tended to consider hypotheticals more narrowly and at a higher level of generality, the more recent analytical approach in *Nur*, *Lloyd*, and *Boudreault* is broader and permits more detailed hypotheticals.

[77] The characteristics of a reasonable hypothetical include the following:

(i) The hypothetical must be reasonably foreseeable;

(ii) Reported cases may be considered in the analysis;

(iii) The hypothetical must be reasonable in view of the range of conduct in the offence in question;

(iv) Personal characteristics may be considered as long as they are not tailored to create remote or far-fetched examples; and

(v) Reasonable hypotheticals are best tested through the adversarial process.

(i) <u>The Hypothetical Must Be Reasonably Foreseeable</u>

[78] Throughout the case law there is a legitimate concern that the hypotheticals must be reasonable. They ought not to be "far-fetched or marginally imaginable cases", nor should they be "remote or extreme examples" (*Morrisey*, at para. 30, quoting *Goltz*,

at pp. 506 and 515). In *Goltz*, the Court focussed on circumstances that "could commonly arise in day-to-day life" (p. 516).

[79] Greater flexibility was introduced in *Nur* when the Court held that the appropriate approach is to construct a reasonably foreseeable offender with characteristics and in circumstances that are reasonably foreseeable based on judicial experience and common sense (para. 62). *Nur*'s selection and use of reasonable foreseeability is significant and goes beyond whether a projected application of the law is common or likely:

> The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are "remote" or "far-fetched" are excluded . . . . [para. 68]

[80] Thus, what must be considered is how the provision impacts other persons who might reasonably be caught by it (*Nur*, at para. 47) and the reasonably foreseeable situations in which the law may apply.

(ii) Reported Cases May Be Considered in the Analysis

[81] In defining the scope of the hypothetical scenario and the qualities of a reasonably foreseeable offender, courts may rely on reported cases, as this Court did in *Boudreault*. While marginal cases may be excluded (*Morrisey*), in *Nur*, the Court affirmed that reported cases can be used because they not only illustrate the range of

real-life conduct captured by the offence, they actually "happened" (para. 72). Reported cases, while potentially helpful, should not be used as a licence or straitjacket and courts may modify the facts of a reported case to illustrate reasonably foreseeable scenarios (paras. 62 and 72). However, courts are not limited to hypotheticals from the cases available to them.

(iii) The Hypothetical Must Be Reasonable in View of the Range of Conduct in the Offence in Question

[82] Under s. 12, the reach, breadth and scope of the impugned law will figure prominently. It can be expected that the proffered hypotheticals will test the kind of conduct the impugned provision is reasonably expected to catch and the law's reasonably foreseeable effects (*Nur*, at para. 62).

[83] To be reasonable, the hypothetical must be tailored to the offence in question. It needs to involve conduct that falls within the relevant provision. The scope of the offence can be explored and it is permissible to establish the breadth of the offence by reference to how it may be committed and by whom. However, straining each and every constituent element by fanciful facts is not helpful. Incredible combinations of bizarre behaviours tells a court more about the imagination of counsel than it does the true scope of the impugned provision. The total scenario must be reasonably foreseeable.

(iv) Personal Characteristics May Be Considered as Long as They Are Not Tailored to Create Remote or Far-fetched Examples

[84] Several interveners in this appeal and in *Hilbach* seek to curtail the use of personal characteristics in crafting reasonable hypotheticals. The Attorney General of Ontario, for instance, proposes that "generic" mitigating personal circumstances that are not "specific" to the offence, like Indigeneity, should be excluded from reasonable hypotheticals (I.F., at paras. 13-20; transcript, at pp. 117-18). Counsel submits that immutable personal characteristics, like race, gender, age, or mental health factors do not contribute information that goes directly to the offence and therefore "should be excluded from the generalized inquiry" (transcript, at p. 119). Counsel posits that it is not enough for a scenario to be "theoretically possible"; it must also be "expected" to arise (pp. 120-21). In the Attorney General of Ontario's view, characteristics like race or Indigeneity are not "expected" characteristics appropriate for use in reasonable hypotheticals. In contrast, the Director of Public Prosecutions accepts that Indigeneity can be a proper part of a reasonable hypothetical.

[85] Similar arguments were rejected in *Nur* when the Court held that such characteristics could not be abstracted out of the test. Instead, an "inquiry into reasonably foreseeable situations the law may capture may take into account personal characteristics relevant to people who may be caught by the mandatory minimum" (para. 76). In that case, the Court actually invalidated the law on the basis of a hypothetical involving a licensed and responsible gun owner who improperly and unwittingly stored a licensed weapon in a manner that infringed the statute (para. 82). Similarly, in *Lloyd*, the Court struck down the one-year minimum sentence for certain drug-related offences on the basis of two different scenarios. The hypotheticals were

detailed: one concerned a marginalized person who experienced poverty, completed rehabilitation for a substance use disorder and had a dated prior conviction. In the other hypothetical, a person shared a small quantity of drugs with a friend or spouse. In *Boudreault*, this Court realistically considered the varied life circumstances of individual offenders, including poverty, illness, disability, addiction or other disadvantages which could reduce an offender's moral blameworthiness, thus illustrating the actual and foreseeable characteristics of real offenders (paras. 55 and 58).

[86] This Court should not depart from the methodology and approach affirmed in *Nur*, *Lloyd*, and *Boudreault*. As a rule, characteristics that are reasonably foreseeable for offenders in Canadian courtrooms, like age, poverty, race, Indigeneity, mental health issues and addiction, should not be excluded from consideration. Proportionality, a mandatory principle of sentencing under the *Criminal Code*, requires a consideration of the gravity of the offence and the offender's particular circumstances, which include their personal characteristics (*Nasogaluak*, at para. 42; *Ipeelee*, at para. 38). The assessment of a mandatory minimum's constitutionality should also be similarly rooted in the realities of people's lives.

[87] Given mandatory sentencing provisions and modern realities, there is no principled reason why race and Indigeneity may not also be relevant legal personal characteristics for reasonable hypothetical scenarios. Section 718.2(e) of the *Criminal Code* is mandatory and was enacted to address the overincarceration of Indigenous

people and their disproportionate representation in Canada's criminal justice system. The unfortunate truth is that Indigeneity is an offender characteristic that is more than "theoretically possible". Indigenous offenders are not only reasonably foreseeable in the sense contemplated by *Nur*, the statistics over the years demonstrate that Indigenous people are vastly overrepresented before the courts. The same is true for Black and other racialized offenders who are overrepresented in the criminal justice system and whose experiences of historic and systemic disadvantage may reduce their moral blameworthiness (*Ipeelee*, at para. 73; *Anderson*, at para. 146; *Morris*, at para. 179).

[88] The concern underlying the position of the Attorney General of Ontario is that if personal characteristics, like *Gladue* factors, are taken into account, then the fit sentence will be so reduced at the first stage that the disproportion would become greater at the second stage, thereby rendering mandatory minimums more constitutionally fragile (D. Stuart, "*Boudreault*: The Supreme Court Strikes Down Mandatory Victim Surcharges to Protect Vulnerable Offenders" (2019), 50 C.R. (7th) 276). I do not accept that any constitutional issue which may arise in such circumstances will be the result of the hypothetical proffered rather than the scope and legal effects of the mandatory minimum. As explained further under stage two, the constitutional bar is set high at gross disproportionality. Section 12 is not violated due to the absence or presence of one sentencing principle, even one as important as s. 718.2(e), and where the offence involves grave conduct, the personal characteristics and circumstances of the offender will necessarily carry less significance (*Latimer*, at para. 85).

[89] Parliament is taken to know that the mandatory minimum it selects applies to "everyone", just like the s. 12 right against cruel and unusual punishment. That means all people, regardless of their personal characteristics, are to benefit from the protections of s. 12. Canada is a large and diverse country and people will have personal characteristics which may aggravate or mitigate their moral blameworthiness. It is appropriate that the effects of a mandatory minimum be scrutinized based not only on the reach of the law and the length of the sentence selected, but also on the breadth of the population to which it is made to apply.

[90] Including immutable personal characteristics in hypothetical scenarios strengthens the analytical device by helping courts explore the reach of the mandatory penalty. Individuals with reduced culpability may find themselves subject to mandatory minimum penalties. It is possible Parliament set penalties with a certain offender in mind without fulsome consideration of how the mandatory penalty may apply to offenders with reduced moral blameworthiness due to their disadvantaged circumstances, including marginalization or systemic discrimination.

[91] There is an important limit on the use of personal characteristics: the scenarios should not involve the most "sympathetic" offender but rather present a *reasonably foreseeable offender* (*Nur*, at para. 75). The hypothetical cannot be remote, far-fetched or utterly unrealistic (para. 76). A court should be wary of detailed scenarios that stack mitigating factors combined with an interpretation that stretches and strains

the technical meaning of the offence, like certain of Mr. Zwozdesky's hypotheticals in the companion appeal to this case (*Hilbach*, at para. 89).

[92] It makes little sense to evaluate scenarios that, based on common sense and judicial experience, appear outlandish. As Canadian courtrooms illustrate, on occasion truth may be stranger than fiction. That should not, however, become an invitation to consider every "sympathetic" case on the theory that it *could* or *might* happen one day. There may be the rare case in which all of the factors are mitigating and operate to reduce the moral blameworthiness of the offender but judicial experience points to the need to ensure the scenario as a whole is reasonably foreseeable. As McLachlin C.J. wrote in *Nur*, "[l]aws should not be set aside on the basis of mere speculation" (para. 62).

(v) Reasonable Hypotheticals Are Best Tested Through the Adversarial Process

[93] It is up to the offender/claimant to articulate and advance the reasonably foreseeable hypothetical which forms the basis for the claim that the impugned provision is unconstitutional. All parties should ideally be afforded a fair opportunity to challenge or comment upon the reasonableness of the hypothetical before making submissions on its constitutional implications. In this respect, it is commonplace for courts to question counsel about the content and contours of any scenario put forward as a reasonable hypothetical. This is a sound practice which brings transparency to the arguments and fairness to the process. I agree with Antonio J.A. that reasonable

hypotheticals are best tested through the rigour of the adversarial process (para. 69). There are benefits to providing parties with the opportunity to make submissions on who constitutes a realistic and reasonably foreseeable offender. In this way, the parties can help the judge determine what type of hypothetical is reasonable in the circumstances. However, while testing the reasonable hypothetical through the adversarial process is to be encouraged, it is not mandatory in the sense that its absence represents a reviewable error.

(c) *Sentencing a Reasonably Foreseeable Offender*

[94] The same general sentencing principles apply when fixing a sentence for a reasonably foreseeable offender. This means that sentencing judges will: be bound by the *Criminal Code*; consider the sentencing proposals argued by counsel; and utilize the method of analysis endorsed in their jurisdiction (whether sentencing ranges or starting point-sentences). As with cases involving an actual offender, courts should fix as narrowly defined a sentence as possible for a reasonably foreseeable offender. A court, however, may find it somewhat more difficult to fix a *specific* sentence for a reasonably foreseeable offender, given that hypotheticals are advanced without evidence or detailed facts. Accordingly, in fixing the fit sentence for reasonably foreseeable offenders, some latitude may be necessary. But while the court may not be able to necessarily arrive at a single figure, broad statements are not very helpful either. Stating, for instance, that the case law would support a sentence of three to five years does not answer the question of what sentence the offender would otherwise receive

and does not assist the analysis. Courts may specify, for instance, that a sentence would be "around" a certain number of months. Fixing a sentence for reasonably foreseeable offenders requires essentially the same approach that judges take in the daily task of sentencing offenders in courtrooms across this country. Any estimate must be circumscribed and tightly defined.

[95] Setting too wide a scope for what would be a fit sentence could skew the analysis and distort the gross disproportionality assessment by unfairly reducing the disparity between the sentence imposed and the mandatory minimum. Indeed, because the purpose of the reasonable hypothetical is to test the limits of the scope of application of a mandatory minimum, the lowest fit sentence that is reasonably foreseeable will figure prominently in the assessment. The large margin of appreciation embedded into the gross disproportionality standard means there is no need to build flexibility into the fit and proportionate sentence.

[96] I will now turn to the second stage of the analysis.

D. *Stage Two: The Gross Disproportionality Standard*

[97] Once the fit sentence has been determined at the first stage, the inquiry turns into a comparative exercise under which the fit sentence is contrasted with the punishment imposed under the impugned provision. Whether a mandatory minimum sentence is challenged based on its effect on the actual offender or on a reasonably foreseeable offender in a reasonable hypothetical, gross disproportionality is the

applicable standard for invalidating it under s. 12 as cruel and unusual punishment (*Nur*, at paras. 39 and 77; *Lloyd*, at para. 22; *Smith*, at p. 1073).

[98] Below, I begin with two preliminary points: first, I explain why O'Ferrall and Wakeling JJ.A. erred in concluding that s. 12 does not apply to imprisonment, and second, I reaffirm that the comparison applies to the sentence imposed, without consideration of parole eligibility. I then turn to how the gross disproportionality assessment should be undertaken, explain why it remains the governing standard under s. 12, and set out the analytical framework to assess whether a mandatory minimum sentence is grossly disproportionate. I canvass the markers of a grossly disproportionate sentence and reinforce how the focus should be on the offence in question, the punishment prescribed, and the effects both have on individuals subject to the prescribed minimum penalty.

(1) Section 12's Protection Against Cruel and Unusual Punishment Applies to Cruel and Unusual Periods of Imprisonment

[99] Justices O'Ferrall and Wakeling erred in their result and in their reasoning. Wakeling J.A. failed to follow binding authority from this Court on the interpretation of *Charter* rights, including s. 12. He employed a personal and idiosyncratic approach to sentencing instead of the legal requirements set out in the *Criminal Code* and in this Court's authoritative jurisprudence.

[100] Specifically, his conclusion that s. 12 is limited to both cruel *and* unusual punishments and that since imprisonment is not unusual, s. 12 does not protect against excessive terms of imprisonment is simply wrong. The phrase "cruel and unusual" punishment is not that narrow. Rather, it represents a "compendious expression of a norm" that draws on broader fundamental social and moral values (*Smith*, at pp. 1069 and 1072, per Lamer J., and p. 1088, per McIntyre J., dissenting, quoting *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 690).

[101] Imprisonment is the harshest form of punishment in Canada (*Gladue*, at paras. 36 and 40), and "[a]part from death, imprisonment is the most severe sentence imposed by the law" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 532, per Wilson J., concurring). Incarceration entails not only a complete removal of an offender's liberty, it also has a ripple effect that touches nearly every aspect of the offender's life and physical and mental health, employability, children, and community (R. Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing* (2014), at pp. 40-44).

[102] As the purpose of s. 12 is to safeguard human dignity, it protects against grossly disproportionate terms of imprisonment. It ensures that offenders do not suffer completely unwarranted or utterly underserved punishment including grossly disproportionate and abusive periods of incarceration. Given the potentially devastating impacts of incarceration on an offender (*Bissonnette*, at para. 97), its heavy costs cannot

be imposed without limit, scrutiny or justification. There is no reason for this Court to alter course and remove grossly excessive imprisonment from the reach of s. 12.

(2) The Comparison Is Based on the Sentence, Without Considering Parole

[103] The Crown argued that when assessing the disparity between a fit sentence and a mandatory minimum, a court should factor in the possibility of parole. This Court previously rejected this same argument in *Nur*, where it held that when comparing a mandatory minimum sentence to the fit sentence, the focus must be on the *sentence* itself. Accordingly, courts must not consider parole eligibility as a factor reducing the actual impact of the impugned sentence because the possibility of parole cannot cure a grossly disproportionate sentence (*Nur*, at para. 98).

[104] Factoring in the possibility of parole into the comparison inappropriately tips the scales away from what should be an apples to apples comparison between sentences and introduces unwarranted speculation. Parole is "a statutory privilege rather than a right" that turns on a discretionary decision of the parole board (*Nur*, at para. 98). Hence, there is "no guarantee that offenders will be granted parole when their ineligibility period expires" (*Bissonnette*, at para. 41). Parole also "involves a process that is independent of and distinct from the sentencing process" (para. 37). It is the role of the court, not that of the parole board, to ensure that a sentence imposed is not grossly disproportionate. The parole board's task is to determine whether an offender may safely be released into the community (*Nur*, at para. 98).

[105] 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. Considering parole would require judges to wade into the complexities of the legislation governing parole and consider how to take into account, for example, the reports on how Indigenous and Black offenders are often released later in their sentences and experience lower parole grant rates (Department of Justice, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (2017), at p. 7; Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries* (2013), at para. 84). Finally, even if granted, "[t]he idea that parole puts an end to an offender's sentence is a myth. Conditional release only alters the conditions under which a sentence is served; the sentence itself remains in effect for its entire term" (*Bissonnette*, at para. 89, citing *M. (C.A.)*, at para. 57).

(3) What It Means for a Sentence to Be Grossly Disproportionate

[106] For a punishment to offend s. 12, it must first be different from and disproportionate to a fit and proportionate sentence. The first part of the comparative task is to articulate what, if any, differences exist between a fit sentence (identified at stage one) and the mandatory minimum. Following this, courts must gauge the effects of this disparity.

[107] Second, the punishment must be disproportionate in a manner or amount that is grossly so. This requires both the identification of any disparity between the sentences and an assessment of the mandatory minimum's effect and severity against constitutional standards.

[108] The process of assessing the existence and extent of any disparity between a fit punishment and the mandatory minimum imposed bears a resemblance to what occurs when a sentence is appealed and challenged as being "demonstrably unfit". In such cases, there is a comparison between what would be fit and what has been imposed. Courts are comfortable with this standard (*Parranto*, at paras. 30 and 38). Considerations include the gravity of the offence, the moral blameworthiness of the offender, the objectives of sentencing and any aggravating and mitigating circumstances.

[109] However, gross disproportionality is a *constitutional* standard. In using phrases such as "so excessive as to outrage standards of decency" (*Boudreault*, at para. 45; *Lloyd*, at para. 24, citing *Morrisey*, at para. 26; *Wiles*, at para. 4, citing *Smith*, at p. 1072), "abhorrent or intolerable" to society and "shock the conscience" of Canadians (*Morrisey*, at para. 26; *Lloyd*, at para. 33; *Ferguson*, at para. 14), this Court has repeatedly emphasized that gross disproportionality is a high bar (*Lloyd*, at para. 24; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417).

[110] Whether a sentence "outrage[s] standards of decency", is abhorrent or intolerable, "shock[s] the conscience" or undermines human dignity is a normative

question (see *Bissonnette*, at para. 65). Such a conclusion does not turn on a court's opinion of whether a majority of Canadians support the penalty. Rather, the views of Canadian society on the appropriate punishment must be assessed through the values and objectives that underlie our sentencing and *Charter* jurisprudence.

[111] The starting point is that proportionality is a basic tenet of punishment. This means the sentence imposed must bear a direct relationship to the offence committed. As Wilson J. explained:

> . . . it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.
>
> (*Re B.C. Motor Vehicle Act*, at p. 533)

[112] Proportionality is based in fairness and justice for the offender and does not permit unjust punishment for the "sake of the common good" (*Priest*, at p. 547; see *Ipeelee*, at para. 37). While society can be understood to be deeply concerned with the criminal behaviour which gave rise to the conviction, people are also committed to fair and just punishments which are not cruel, unusual or grossly disproportionate to the sanction which was deserved.

[113] In addition, the elevated standard of gross disproportionality is intended to reflect a measure of deference to Parliament in crafting sentencing provisions. The word "grossly" signals Parliament is not required to impose perfectly proportionate

sentences (*Goltz*, at p. 501; *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 344-45), which would undermine the ability of Parliament to establish norms of punishment, including mandatory minimum sentences (*Lloyd*, at para. 45). This is because, in respect of mandatory minimums, there is likely to be some disproportion between the individually fit sentence and the uniform mandatory minimum.

[114] In this regard, a sentence may be demonstrably unfit in the sense that an appellate court would intervene, but nevertheless not meet the constitutional threshold of being grossly disproportionate. For example, in *R. v. McDonald* (1998), 40 O.R. (3d) 641 (C.A.), a 21-year-old person with an untreated manic-depressive disorder pled guilty to using a firearm to commit a robbery and was sentenced to the 4-year mandatory minimum for that offence. Justice Rosenberg expressed numerous serious concerns about the fitness of the sentence for this offender and opined that on the usual scale of appellate review he would find a sentence of three or four years to be demonstrably unfit. Nevertheless, he concluded at para. 72:

> However, that is not the same as gross disproportionality and I am not convinced that having regard to the objective gravity of any offence involving the use of a firearm, even an unloaded one, a sentence approaching four years shocks the conscience.

[115] Courts "should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation" as s. 12 is intended to police the "outer limit" of sentencing (*Smith*, at p. 1072, per Lamer J., and p. 1091, per McIntyre J., dissenting, but not on this point). It is only on "rare and unique occasions"

that a sentence will infringe s. 12, as the test is "very properly stringent and demanding" (*Steele*, at p. 1417; see also *Goltz*, at p. 502).

(4) Gross Disproportionality Is the Governing Standard

[116] The gross disproportionality standard has come under criticism from both sides and various sources. Justices O'Ferrall and Wakeling thought that gross disproportionality should not be a measure of cruel and unusual punishment because it is not the "fundamental purpose" of sentencing, which O'Ferrall J.A. believed to be the protection of society and respect for the law (para. 117). Justice Wakeling wrote that proportionality has no relation to s. 12 because the drafters did not expressly include it in the text (paras. 229-30).

[117] Others claim the bar is set too high. For example, an intervener argued that there "is no such thing as a 'merely excessive' sentence" and that "[a]ny time an offender spends imprisoned that is not fit for their individual circumstance cannot be justified on the grounds that it is 'merely excessive'" (I.F., British Columbia Civil Liberties Association, at para. 19 (emphasis deleted); see also R. Cairns Way, "A Disappointing Silence: Mandatory Minimums and Substantive Equality" (2015), 18 C.R. (7th) 297).

[118] However, in every s. 12 case, this Court has used gross disproportionality as the applicable standard and there is no reason to upset well-settled law. It represents a workable and balanced principle, well-grounded in human dignity and basic

sentencing norms. It also has the benefit of being a balanced standard which recognizes Parliament's authority to pursue sentencing objectives and options which do not amount to cruel and unusual punishment. In addition, the clarifications in this judgment about what qualifies as gross disproportion will, it is to be hoped, promote certainty and a greater ease of application. In the result, a mandatory term of imprisonment must be grossly disproportionate to what would have otherwise been a fit sentence in order to violate s. 12 (*Smith*, at pp. 1072-74).

(5) Whether a Mandatory Minimum Sentence Is Grossly Disproportionate

[119] The way courts have historically applied the grossly disproportionate standard to mandatory minimum sentences clarifies which factors or features inform the analysis. This Court has upheld the constitutionality of mandatory minimum sentences in 5 cases: (1) life imprisonment without eligibility for parole for 25 years for first degree murder in *Luxton*; (2) a mandatory sentence of 7 days of imprisonment and a $300 fine for a first conviction of driving while prohibited in *Goltz*; (3) a 4-year mandatory minimum sentence for criminal negligence causing death using a firearm in *Morrisey*; (4) the mandatory minimum sentence for second degree murder of life without possibility for parole for 10 years in *Latimer*; and (5) a 4-year mandatory minimum sentence for manslaughter with a firearm in *Ferguson*.

[120] This Court has also struck down mandatory minimum sentences on three occasions — including in two of its most recent cases. In *Smith*, this Court invalidated a seven-year mandatory minimum for importation of drugs pursuant to s. 5(2) of the

Narcotic Control Act, R.S.C. 1970, c. N-l. In *Nur*, the three- and five-year mandatory minimum terms of imprisonment for the possession of a prohibited or restricted firearm when the firearm is loaded or kept with readily accessible ammunition were declared of no force or effect. In *Lloyd*, the Court invalidated the one-year mandatory minimum sentence for trafficking or possession for the purpose of trafficking of a controlled substance provided by s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[121] The ruling and reasoning in these cases provide helpful guidance about when a mandatory minimum is grossly disproportionate. The Court has, in certain cases, articulated various factors which may bear on the assessment, and certain helpful propositions and principles have emerged. For example, in *Smith*, this Court identified four factors to assess gross disproportionality in the context of a mandatory minimum: the gravity of the offence; the personal characteristics of the offender; the particular circumstances of the case; and the actual effect of the punishment on the offender. *Goltz* later added other factors. In *Nur*, this Court established the two-part test for a s. 12 violation, and while McLachlin C.J. did not explicitly reference the above factors, she did consider the breadth of conduct the mandatory minimum captured; the seriousness of the impugned conduct as compared to the conduct targeted by the mandatory minimum; and whether the punishment is necessary to achieve a valid penal purpose. In *Boudreault*, which did not deal with a mandatory minimum, but was built on the authorities which did, this Court explained that such factors do not form part of a

required or “rigid” test (para. 48; *Latimer*, at para. 75). Certain factors may highlight important considerations and remain salient.

[122] However, there is merit to regrouping them to simplify the analysis and more directly focus on the three crucial components that must be assessed when considering the validity or vulnerability of mandatory minimum sentences: (1) the scope and reach of the offence; (2) the effects of the penalty on the offender; and (3) the penalty, including the balance struck by its objectives.

[123] These components have particular relevance to mandatory minimums. In selecting mandatory minimums as a sentencing tool, Parliament has decided to make the sentence uniform across a range of circumstances and has chosen to remove the constitutional safety valve of judicial discretion to deal with individual cases. It has defined the offence subject to a particular minimum sentence, and set its nature, gravity, scope and reach. It has determined who will be subject to the mandatory minimum — whether explicitly or implicitly by how the offence is defined or the penalty is imposed. And it has prescribed the penalty or sentence for each mandatory minimum it imposes.

[124] The scope and reach of the offence, the effects of the penalty on the offender, and the penalty are three main components that will have a bearing on the gross disproportionality analysis. In some cases, one alone could lead to a conclusion of gross disproportion. Other times it will be the combination of or interplay between these components which will contribute to a finding of gross disproportion or constitutional compliance. For example, a broad licensing offence with a small penalty

may not undermine human dignity as much as a true criminal offence that attaches a significant penalty to less blameworthy conduct.

(a) *The Scope and Reach of the Offence*

[125] The scope and reach of the offence remains a major feature in the gross disproportionality analysis and it is important to explore the full implications of the impugned offence. The case law reveals that a mandatory minimum sentence is more exposed to challenge where it captures disparate conduct of widely varying gravity and degrees of offender culpability (*Lloyd*, at para. 24; *Smith*, at p. 1078). Indeed, mandatory minimum sentences for offences "that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable" (*Lloyd*, at para. 3; see also paras. 24, 27 and 35-36). Thus, the wider the scope of the offence, the more likely there is a circumstance where the mandatory minimum will impose a lengthy term of imprisonment on conduct that involves lesser risk to the public and little moral fault (*Nur*, at para. 83). In those cases, the sentence is liable to capture conduct that clearly does not merit the mandatory minimum.

[126] In *Smith*, this Court struck down a seven-year mandatory minimum for importation of drugs under the *Narcotic Control Act* because the mandatory sentence applied regardless of the type of substance imported, the quantity imported and whether the purpose was for trafficking or personal use. The offence cast too wide a net and its effects were too broad. It caught the conduct of a hypothetical young person driving

back to Canada with their first joint of marijuana: conduct that did not call for the mandatory minimum sentence.

[127] In *Nur*, the Court invalidated the three- and five-year mandatory minimums for the possession of a prohibited or restricted firearm when the firearm is loaded or kept with readily accessible ammunition because the offence "casts its net over a wide range of potential conduct" (para. 82), including violations that created little risk of harm to the public and were instead little more than licensing infractions (para. 83). The *actus reus* of the offence involved possession and there was no proof of harm required (para. 84). The offence therefore caught, on the one end, an "outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade" and, on the other end, a "licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored" (para. 82). The latter involved little or no moral fault and little or no danger to the public (para. 83). The Court reasoned that "a three-year term of imprisonment for a person who has essentially committed a licensing infraction is totally out of sync with the norms of criminal sentencing" (para. 83). The impugned provision captured too broad a range of criminal behaviour and imposed lengthy terms of incarceration in circumstances where such lengthy prison sentences were not necessary to achieve Parliament's otherwise valid penal purposes of protecting the public, discouraging other similar conduct or expressing moral condemnation (para. 104).

[128] In *Lloyd*, the Court used reasonable hypotheticals to explore the actual reach of what appeared to be fairly narrowly drafted prohibitions against trafficking or possession for the purpose of trafficking under s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*. The majority held that the legislation captured a wide breadth of potential conduct, including not only serious drug trafficking but also less blameworthy conduct (para. 27). It treated those who shared smaller amounts of narcotics among friends, spouses or people with substance use disorder as akin to commercial and professional drug dealers.

[129] Thus, a court must assess to what extent the offence's *mens rea* and *actus reus* capture a range of conduct as well as the degree of variation in the offence's gravity and the offender's culpability. In characterizing the offence's scope, a court may consider whether the offence necessarily involves harm to a person or simply the risk of harm, whether there are ways of committing the offence that pose relatively little danger, and to what degree the offence's *mens rea* requires an elevated degree of culpability of the offender. In characterizing the breadth of the offence, one must also remember that s. 12 is not so exacting a standard that it requires a sentence to be perfectly tailored to *every* moral nuance of an offender's circumstance (*Lyons*, at pp. 344-45). However, as the Court cautioned in *Lloyd*, at para. 35: "If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences."

[130] The nature of the offence, and the severity of the punishment in relation to the impugned offence, may influence the gross disproportionality analysis. In assessing the particular mandatory minimums before the court, the general range of criminal offences will provide necessary context. Minimum sentences can be and have been attached to various types of prohibitions: from licensing offences to true crimes. In the case of regulatory offences or licensing infractions, courts would expect corresponding penalties to be less severe. Conversely, courts may expect harsher punishment to attach to offences that result in serious harm or include a grave *mens rea*. For example, the provision in the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, that was upheld in *Goltz* required 7 days' imprisonment and a fine of $300 for those convicted for the first time of driving while being prohibited from doing so. This was a regulatory and preventative provision which sought to ensure people who were prohibited from driving because of their unsafe driving records did not pose a risk of harm to others. The Court upheld the mandatory minimum in *Goltz* in part because the provision applied to a narrow set of culpable behaviours and the ultimate punishment was "lighter than might first appear" (p. 514). The sentence could be designed to be served in a few weekends or in five days rather than the mandated seven through earned remission (p. 514). In addition, the administrative scheme governing the offence was enacted after extensive study by the Government of British Columbia's Motor Vehicle Task Force and the scheme specifically targeted drivers who exhibited open contempt of the law (pp. 507 and 511).

[131] When the impugned minimum is attached to a provision that requires a particular act with a defined harm, the court will assess the scope of the provision and

the seriousness of that harm in its gross disproportionality analysis. For example, *Luxton* concerned first degree murder and parole ineligibility. *Ferguson* dealt with manslaughter in which an RCMP officer shot a detainee. *Latimer* involved a father killing his child who had cerebral palsy, and *Morrisey* involved the death of a friend through horseplay with a firearm. The *actus reus* of these offences involved the death of a person: a specific realized harm, and one of the utmost gravity. This can be expected to carry significant weight in the assessment of gross disproportion.

[132] Courts may also consider sentencing ranges and starting points for such offences, since these tools are useful in assessing proportionality and parity. They reflect judicial consensus on an offence's gravity, and advance parity by reducing substantial disparities in sentencing (*Parranto*, at para. 20, citing *Lacasse*, at para. 2; see also *R. v. Stone*, [1999] 2 S.C.R. 290, at para. 244; *Nasogaluak*, at para. 44; *R. v. Smith*, 2019 SKCA 100, 382 C.C.C. (3d) 455, at para. 126). Under s. 12, these tools can assist courts in evaluating a mandatory minimum's ultimate conformity with sentencing norms to measure whether the mandatory minimum is significantly out of sync with an otherwise fit sentence. Mandatory minimum sentences for similar offences may also assist in this inquiry.

(b) *The Effects of the Penalty on the Offender*

[133] The severity of the mandatory minimum sentence's effects on the people subject to it must be taken into account when assessing the degree to which the sentence is disproportionate. In measuring the overall impact of the punishment on the actual or

reasonably foreseeable offender, courts must aim to identify the precise harm associated with the punishment. This calls for an inquiry into the effects that the impugned punishment may have on the actual or reasonably foreseeable offender both generally and based on their specific characteristics and qualities. This component is central to the underlying purpose of s. 12. If the effect of a mandatory punishment is to inflict mental pain and suffering on an offender such that the offender's dignity is undermined, the penalty cannot stand (*9147-0732 Québec inc.*, at para. 51).

[134] A court should certainly consider the additional period of imprisonment imposed by the mandatory minimum. Given the profound impact of imprisonment, the level and length of the sentence is of great personal and societal import. Hence, when quantitatively comparing the proportionate term of imprisonment to that which is mandated by the mandatory minimum sentence provision, it is important to keep in mind that the assessment is not merely some abstract mathematical calculation, but involves precious time that an offender may be unwarrantedly (and possibly unconstitutionally) spending in prison.

[135] Courts should consider the effect of a sentence on the *particular* offender. The principle of proportionality implies that where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate (*Suter*, at para. 48; B. L. Berger, "Proportionality and the Experience of Punishment", in D. Cole and J. Roberts, eds., *Sentencing in Canada: Essays in Law, Policy, and Practice* (2020), 368, at p. 368). For this reason, courts have reduced sentences to reflect the

comparatively harsher experience of imprisonment for certain offenders, like offenders in law enforcement, for those suffering disabilities (*R. v. Salehi*, 2022 BCCA 1, at paras. 66-71 (CanLII); *R. v. Nuttall*, 2001 ABCA 277, 293 A.R. 364, at paras. 8-9; *R. v. A.R.* (1994), 92 Man. R. (2d) 183 (C.A.); *R. v. Adamo*, 2013 MBQB 225, 296 Man. R. (2d) 245, at para. 65; *R. v. Wallace* (1973), 11 C.C.C. (2d) 95 (Ont. C.A.), at p. 100), or for those whose experience of prison is harsher due to systemic racism (*R. v. A.F.* (1997), 101 O.A.C. 146, at para. 17; *R. v. Batisse*, 2009 ONCA 114, 93 O.R. (3d) 643, at para. 37; *R. v. Marfo*, 2020 ONSC 5663, at para. 52 (CanLII)). To ensure that the severity of a mandatory minimum sentence is appropriately characterized under s. 12, it is necessary to consider the impact of incarceration in light of these individualized considerations (L. Kerr and B. L. Berger, "Methods and Severity: The Two Tracks of Section 12" (2020), 94 *S.C.L.R.* (2d) 235, at pp. 238 and 244-45).

[136] The effects of a sentence are not measured in numbers alone. They are "often a composite of many factors" and include the sentence's "nature and the conditions under which it is applied" (*Smith*, at p. 1073). Thus, as Lamer J. observed, a sentence of "twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement" (p. 1073). When presented with a sufficient evidentiary record, courts should consider how the conditions of confinement — for example, the difference between the supports available while serving a non-custodial conditional sentence versus serving a custodial sentence in a federal institution — would affect an individual offender. Trial courts have increasingly been

of this view (see *Adamo*, at paras. 55 and 65; L. Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017), 32 *C.J.L.S.* 187, at p. 201).

[137] In addition, this Court has repeatedly referred to longstanding doubts about whether mandatory minimum sentences, or incarceration writ large, are effective tools of deterrence (*Nur*, at paras. 113-14; *Bissonnette*, at para. 47; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 107; see also Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987), at pp. 136-37). Though the certainty of criminal punishment may produce certain deterrent effects, empirical evidence indicates that mandatory minimum sentences do not deter crime any more than a less harsh, proportionate sentence would (*Nur*, at para. 114).

(c) *The Penalty and its Objectives*

[138] In relation to the penalty imposed under the mandatory minimum, Parliament sets the length of the minimum sentence based on its sentencing objectives. In turn, when assessing gross disproportion, courts assess the severity of the punishment mandated by Parliament to determine whether and to what extent the minimum sentence goes beyond what is necessary to achieve Parliament's sentencing objectives relevant to the offence while "having regard to the legitimate purposes of punishment and the adequacy of possible alternatives" (*Smith*, at pp. 1099-1100).

[139] Denunciation and deterrence, both general and specific, are valid sentencing principles (*Bissonnette*, at paras. 46-47 and 49-50). Denunciatory sentences express a "collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values" (*M. (C.A.)*, at para. 81), and the need for denunciation is closely tied to the gravity of the offence (*Ipeelee*, at para. 37). Where the consequences of the offence clearly offend Canadians' "basic code of values" and call for a strong condemnation, this Court has afforded Parliament greater deference in enacting a mandatory minimum (*Morrisey*, at para. 47). Likewise, general deterrence can support a stiffer sentence within a range of sentences that are short of "cruel and unusual" punishment (*Morrisey*, at para. 45; *Nur*, at para. 45). General deterrence cannot, however, justify a mandatory minimum alone: no person can be made to suffer a sentence that is grossly disproportionate to what they deserve in order to deter others (*Nur*, at para. 45; *Bissonnette*, at para. 51). As Lamer J. wrote in *Smith*, it may be unnecessary to punish the "small" offender in order to deter the "serious offender" (p. 1080).

[140] Deference to Parliament's decision to impose denunciatory sentences cannot be unlimited, as this purpose could support sentences of unlimited length (*Bissonnette*, at para. 46, citing Ruby, at §1.22). In enacting mandatory minimums, Parliament can prioritize some sentencing objectives over others, but within certain limits (*Lloyd*, at para. 45; *Morrisey*, at paras. 45-46). No single sentencing objective should be applied to the exclusion of all others (*Nasogaluak*, at para. 43). Each sentencing objective remains relevant to crafting a sentence that respects human

dignity. Given the purpose of s. 12, the role given to rehabilitation in the mandatory minimum under consideration will help determine if the provision amounts to cruel and unusual punishment.

[141] While rehabilitation has no standalone constitutional status, the strong connection between the objective of rehabilitation and human dignity was explained in *Bissonnette* (para. 83; *Safarzadeh-Markhali*, at para. 71). The comments made in relation to offences which may be cruel and unusual by their nature also apply to mandatory minimums under this first prong of s. 12. Rehabilitation "reflects the conviction that all individuals carry within themselves the capacity to reform and re-enter society" (*Bissonnette*, at para. 83; see *Lacasse*, at para. 4). The Court found that a punishment that completely disregards rehabilitation would disrespect and be incompatible with human dignity and would therefore constitute cruel and unusual punishment under s. 12 (*Bissonnette*, at para. 85). Justice Gonthier's statement at para. 45 in *Morrisey*, that s. 12 is not violated due to the "presence or absence of any one sentencing principle", needs to be read in light of this Court's conclusion that "[t]o ensure respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance" (*Bissonnette*, at para. 85).

[142] The objective is not to have rehabilitation prevail over other sentencing objectives but rather to ensure it remains a component "in a penal system based on respect for the inherent dignity of every individual" (*Bissonnette*, at para. 88). It follows then, that in order to be compatible with human dignity, and therefore respect s. 12,

punishment or sentencing must take rehabilitation into account. As noted by one intervener: “A person who has been found guilty of a crime is not simply a canvas on which to paint society’s condemnation, but remains a human being and a rights-holder endowed with human dignity and legal rights” (see I.F., Canadian Civil Liberties Association, at para. 25). The application of any mandatory minimum sentence that has the effect of excluding or completely disregarding rehabilitation will be grossly disproportionate as it is incompatible with human dignity.

[143] Courts should assess whether the length of imprisonment legislated is too excessive in light of other potentially adequate alternatives. For example, if Parliament mandates a lengthy term of imprisonment when a conditional discharge would meet Parliament’s sentencing objectives or if Parliament mandates incarceration when a fine would constitute an adequate penalty. There is no mathematical formula to determine the specific number of years that would make a sentence in excess of a legitimate penal aim. The analysis, in all cases, must be contextual and there is no hard number above or below which a sentence becomes grossly disproportionate.

[144] A mandatory minimum sentence, however, will be constitutionally suspect and require careful scrutiny when it provides no discretion to impose a sentence other than imprisonment in circumstances where there should not be imprisonment, given the gravity of the offence and the offender’s culpability. That said, a minimum sentence can be grossly disproportionate where a fit and proportionate sentence would include a lengthy term of imprisonment. A mandatory minimum that adds to an offender’s prison

sentence may have a *significant* effect, given the profound consequences of incarceration on an offender's life and liberty. A mandatory minimum sentence that has such an effect cannot be categorically excluded from scrutiny under the s. 12 analysis, as O'Ferrall and Wakeling JJ.A. suggest. Even if, in these cases, constitutional considerations are not between different types of sentences, mandatory minimum sentences still require the nuance of considering the extent of the periods of incarceration.

[145] Courts should evaluate the punishment in light of the principles of parity and proportionality. As an expression of proportionality, parity assists courts in fixing a proportionate sentence (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paras. 32-33). Where a mandatory minimum imposes a relatively shorter term of imprisonment, the mandatory minimum will still be grossly disproportionate if it represents an intolerable departure from the proportionate sentence. This would correspond to circumstances where even the smallest difference between the proportionate sentence and the mandatory minimum would outrage standards of decency and shock the conscience of Canadians.

[146] What number Parliament sets as the mandatory minimum is also of significance. There will be some sentences where the length alone can establish gross disproportionality. For example, in *Smith,* Lamer J. observed that a sentence of "twenty years for a first offence against property would be grossly disproportionate". When the sentence is dramatically higher than what the range of sentences would otherwise be

without the mandatory minimum, the provision risks imposing a large penalty on a range of conduct that may not merit it. Further, if the mandatory minimum is set at the top of the range for that offence, there is increased risk that it will impose a disproportionate penalty on those who commit the less serious forms of that offence.

(6) Conclusion

[147] The case law offers helpful guidance on factors that have informed the gross disproportionality assessment. However, courts need not adhere to a rigid test or fixed set of factors to determine whether a state-sanctioned punishment constitutes a grossly disproportionate one. Instead, judges should focus on three essential components when evaluating the constitutionality of mandatory minimum sentences: the scope and reach of the offence, the effects of the penalty on the offender, and the penalty. The first inquiry will often centre on the scope of the offence and whether it captures a broad set of disparate conduct. An inquiry into the effects of the punishment on the individual or reasonably foreseeable offender lies at the heart of the gross disproportionality analysis. Courts should inquire into the actual effects the punishment may have on the offender: both the time period and the material conditions under which the sentence will be served. The interplay between each of the three components should drive courts' gross disproportionality analysis.

[148] An inquiry into the sentence will often focus on whether the penalty at issue is excessive in relation to Parliament's legitimate sentencing objectives. This will often require an analysis of the primary sentencing principles animating the mandatory

penalty to ensure no individual sentencing objectives are being applied to the exclusion of all others. Judges should remain aware of potentially adequate alternatives to the impugned punishment. Having set out the framework for gross disproportionality, I turn now to Mr. Hills' challenge to the mandatory minimum in s. 244.2(3)(b). It is also important to determine the circumstances of the offence in issue.

E. *Section 244.2(3)(b) Is Grossly Disproportionate*

[149] Mr. Hills fired several rounds from a hunting rifle into a residential home, knowing that or being reckless as to whether it was occupied. Mr. Hills concedes the four-year mandatory minimum sentence under s. 244.2(3)(b) is not grossly disproportionate in his circumstances.

[150] Instead, he says the minimum would be grossly disproportionate in a hypothetical scenario where a young person intentionally discharges an air-powered pistol or rifle at a residence that is incapable of perforating the residence's walls (see Court of Queen's Bench decision, at para. 14). As I explain below, the scenario raised by Mr. Hills is reasonably foreseeable. Moreover, I agree with the sentencing judge that four years of imprisonment would be grossly disproportionate in this scenario. In my view, Antonio J.A. erred in overstating the gravity of the offence and the culpability of the offender involved in this realistic scenario.

(1) Mr. Hills Raises a Reasonably Foreseeable Scenario

[151] The Crown rightly conceded and the sentencing judge properly accepted that Mr. Hills advanced a reasonably foreseeable scenario. To begin, the scenario proposed by Mr. Hills falls within the scope of the offence and does not stretch or strain its constituent elements. The *actus reus* of the offence requires an offender to discharge a "firearm" into or at a "place", which means "any building or structure". There is no question that a residence constitutes a place. The sole question is whether an air-powered rifle or pistol could constitute a "firearm" per s. 2 of the *Criminal Code*, despite being incapable of perforating a residential wall. The expert evidence called by Mr. Hills resolved any doubt on this issue and cured the "evidentiary gap" which previously led some courts to decline to consider a similar scenario (see *R. v. Oud*, 2016 BCCA 332, 339 C.C.C. (3d) 379, at para. 46).

[152] Specifically, the expert showed that eight air-powered rifles or pistols discharged a projectile with sufficient velocity to satisfy the "pig's eye test" but most of them were incapable of penetrating a residential wall. Those eight devices were (1) an airsoft pistol, (2) a Daisy Red Ryder model BB gun, (3) a paintball marker, (4) a youth sized pellet rifle, (5) an adult sized .177 calibre pellet rifle, (6) a .22 calibre pellet pistol, (7) a .22 calibre pellet rifle, and (8) a Ruger 10/22 semi-automatic rifle. The expert concluded that there are "numerous air-powered rifles and pistols commonly available in Canada which meet the Criminal Code definition of a firearm, but are not

capable of perforating a typical residential framed wall assembly" (A.R., at p. 393; see also Court of Queen's Bench decision, at para. 16).

[153] The Crown accepted the expert's conclusion that some air-powered devices are firearms under s. 2 of the *Criminal Code*, yet are incapable of perforating a typical residential wall. I have no concern regarding the expert's conclusion either.

[154] It is also reasonably foreseeable to imagine a young person firing a BB gun or a paintball gun at a house. As the sentencing judge wrote, it is "easy to conceive of situations where a young person might do just as posed in the hypothetical case" (para. 17). The offender could do so as part of a game, to pass time, or for a bit of mischief. Thus, it is reasonably foreseeable that (1) a young person intentionally discharges a "firearm" into or at a residence, (2) knowing that or being reckless as to whether a person is present, and that (3) the "firearm" discharged is an air-powered pistol or rifle that is classified as a "firearm" under s. 2 of the *Criminal Code* but is incapable of perforating a typical residential wall.

(2) A Fit and Proportionate Sentence in a Foreseeable Scenario Would Not Involve Imprisonment

[155] I turn to the first stage of the s. 12 inquiry in *Nur* and the question of a fit sentence for the reasonably foreseeable offender in such a situation. The usual deferential appellate standard of review for sentencing applies to a sentence imposed on the actual offender (*Lacasse*, at paras. 11-12). For sentences imposed on

hypothetical offenders, however, the same rationale for deference carries less weight as the fit sentence is determined by supposing facts, and not through weighing actual evidence (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 18 and 74).

[156] However, there is no need to set out when a reviewing court may come to its own conclusion about a fit sentence for reasonably foreseeable offenders, since I agree with the sentencing judge that a fit sentence for this hypothetical youthful offender would involve probation and that "certainly no such offender would receive a four-year penitentiary term or a sentence approaching anywhere near that" (para. 19). Indeed, in light of the gravity of the act and the moral culpability of the offender in such an instance, the scenario is akin to a minor mischief offence where a suspended sentence or probation may be appropriate. The gravity of the offence and the culpability of the offender are low in this scenario, focusing on the offence's consequences and the offender's *mens rea*. Regarding the offence's gravity, the consequences for public safety are relatively low in this scenario. The *actus reus* for this offence does not require *any* person to be present at the "place" where the firearm is discharged. Even if another person were present, the expert evidence establishes the minimal danger posed by the offender's actions, given the firearm's power is substantially reduced. In my view, Antonio J.A. erred in overstating the risks to the public in this scenario as a result.

[157] I do not accept that the sentencing judge overlooked the risk of a projectile flying through an open window or striking a person walking nearby. A conviction does

not require anyone to be where the projectile is shot and the sentencing judge was clearly alive to these risks, observing "the gravamen of the offence is the danger of potential harm, which can be caused by wildly shooting into or at a place. The danger should not depend on whether a person is shooting into a building, through a window or at a motor vehicle. The danger is always present" (para. 41 (emphasis deleted)). The sentencing judge was evidently aware of the very risks that Antonio J.A. suggests were overlooked.

[158] In my view, the sentencing judge concluded the firearms at issue posed a far lower risk relative to conventional firearms, even taking into account the risks raised by Antonio J.A. The sentencing judge found the expert "cured" the "evidentiary gap" in *Oud* (para. 26). Part of the "gap" in *Oud* was the lack of evidence to show whether a projectile fired from an air-powered rifle or pistol was "far less serious than discharging a regular gun" (*Oud*, at para. 47).

[159] Here, the expert evidence showed an air-powered device could be far less dangerous, with some incapable of causing damage beyond cracking the vinyl siding of a house. Moreover, some of the devices that the expert tested were, quite literally, designed to shoot projectiles at other people for *sport*. When these considerations are combined with the fact that no one needs to be near where the projectile is shot, I see no issue with the sentencing judge's conclusion that the risk to life and safety is low in Mr. Hills' hypothetical (para. 16). I fail to see any substantial harm, whether actual or

potential, from an offender firing a paintball gun at a house when *nobody* is around, even though this conduct falls within the impugned section.

[160] Turning to the offender's culpability, the Crown argues that the double *mens rea* tailors this offence to capture particularly blameworthy conduct. In my view, the double *mens rea* requirement does little to narrow the offence. To be convicted, an offender need only know of or be *reckless* as to the presence of others. No harm to others is required to ground the offence. Although recklessness requires the "knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur" (*Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584), the offender must only be thoughtless as to whether anyone is present at the place where the firearm — including a paintball gun, airsoft gun, or BB gun — is discharged. Recklessness as conceived in s. 244.2(1)(a) does not require an offender to explicitly turn their mind to the fact that they are placing others at risk. I agree with the sentencing judge that the scenario discloses immature behaviour and low moral blameworthiness (paras. 17 and 19).

[161] Youth is a mitigating factor on sentencing. The hypothetical scenario is an example of criminalized conduct that may reflect a lack of guidance or supervision more than criminal intent on the part of the offender. In the context of youthful offenders, the principles of general deterrence and denunciation should come secondary to that of rehabilitation (*R. v. Nassri*, 2015 ONCA 316, 125 O.R. (3d) 578, at para. 31). In this scenario, general deterrence should play a limited role in crafting a fit sentence

(Ruby, at §1.36; *R. v. Mohenu*, 2019 ONCA 291, at paras. 12-13 (CanLII)). Instead, specific deterrence and rehabilitation should be the primary objectives when sentencing youthful first offenders (*Priest*, at pp. 543-44; *R. v. Tan*, 2008 ONCA 574, 268 O.A.C. 385, at para. 32; *R. v. T. (K.)*, 2008 ONCA 91, 89 O.R. (3d) 99, at paras. 41-42).

[162] As such, because the gravity of the offence and the culpability of the offender in this scenario are low, and the youthfulness of the offender acts as a mitigating factor, the fit and proportionate sentence is a suspended sentence of up to 12 months' probation.

(3) The Mandatory Minimum Is Grossly Disproportionate

[163] I turn now to stage two of the *Nur* analysis and consider whether the mandatory minimum at issue requires the court to impose a sentence that is grossly disproportionate to the fit sentence. Based on this reasonable hypothetical, I conclude that the four-year mandatory minimum term of imprisonment imposed by s. 244.2(3)(b) is grossly disproportionate. It would "shock the conscience" of Canadians to learn that an offender can receive four years of imprisonment for an activity that poses more or less the same risk to the public as throwing a stone through the window of a residential home.

[164] The first component is the offence. Like in *Nur* and *Lloyd*, the mandatory minimum sentence in this case applies to a wide spectrum of conduct. On one end of the spectrum, there is Mr. Hills' conduct, which poses a high risk of harm and

demonstrates an elevated degree of culpability. On the other, there is the foreseeable scenario raised by Mr. Hills, which presents little danger to the public and little fault. The wide scope of the minimum is due mainly to the *actus reus* for s. 244.2(1)(a). As noted, the definition of "firearm" encompasses devices capable of inflicting lethal harm as well as those designed to shoot projectiles at other people in recreational *sport*. The definition of "place" includes everything from a garden shed to a car, occupied or not. No person need be in the area where the firearm is shot. While I agree that firing a hunting rifle at a house is very severe and blameworthy conduct (as in Mr. Hills' case), the same cannot be said for the hypothetical scenario presented here. In the result, s. 244.2(1)(a) is at greater risk of being constitutionally infirm because it captures a broad range of disparate conduct that includes offences of varying gravity and degrees of offender culpability. The scope of the offence is wide.

[165] The second component is the effects of the punishment on the actual or reasonably foreseeable offender. A four-year term of imprisonment would have significant deleterious effects on youthful offenders, who are viewed by our criminal law as having high rehabilitative prospects. It follows that sentences for youthful offenders are often largely directed at rehabilitation. To prioritize rehabilitation, youthful offenders should benefit from the shortest possible sentence that is proportionate to the gravity of the offence (see *R. v. Brown*, 2015 ONCA 361, 126 O.R. (3d) 797, at para. 7; *R. v. Laine*, 2015 ONCA 519, 338 O.A.C. 264, at para. 85). This is because incarceration is often not a setting where the reformative needs of young people are met (Ruby, at §5.191). Youthful offenders in federal penitentiaries are often

bullied, recruited into adult gangs for protection and are vulnerable to placements in segregation (Office of the Correctional Investigator and Office of the Provincial Advocate for Children and Youth, *Missed Opportunities: The Experience of Young Adults Incarcerated in Federal Penitentiaries* (2017)). For the youthful offender at bar, the difference between a reformatory sentence served in community and a four-year period of incarceration would be profoundly detrimental.

[166] The mandatory minimum's effect is extremely severe in this case. Like the minimums at issue in *Nur* and *Lloyd*, its effect is to replace a probationary sentence with four years of imprisonment. Not only does the minimum mandate the punishment of "last resort", it imposes four years of incarceration. This weighs strongly against the minimum's constitutionality under s. 12.

[167] The third component is the penalty. A four-year custodial sentence is so excessive as to be significantly out of sync with sentencing norms and goes far beyond what is necessary for Parliament to achieve its sentencing goals for this offence. A four-year minimum term of imprisonment for a youthful offender shooting a BB gun at a residence is draconian. It is a sentence that far exceeds what is necessary to protect the public, condemn the offender's behaviour or discourage others from engaging in similar conduct. The need for denunciation is closely tied to the gravity of the offence (*Ipeelee,* at para. 37). Here, the offence's gravity is low and it is unreasonable to suggest an offender's conduct in this scenario greatly offends any basic moral values. General deterrence cannot support the minimum in this case either, since "a person cannot be

made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending" (*Nur*, at para. 45). While this Court has generally noted the importance of denunciation and deterrence in firearms offences (*Morrisey*, at para. 46), this does not imply that these aims can be emphasized in cases involving firearms, particularly given the wide definition of firearms and where the offence poses little or no danger (as *Nur* itself illustrates, at paras. 82-84). Nor does the minimum show any respect for the principles of parity and proportionality. A four-year sentence for what is, at most, a minor form of mischief is totally out of sync with sentencing norms. Unlike the mandatory minimum sentences in *Hilbach* (see paras. 72-73 and 95), there is no justification for emphasizing denunciation and deterrence to a great extent in this scenario.

[168] A comparison between punishments imposed for other crimes of similar gravity and the mandatory minimum set in this case reveals great disproportion. Consider, for example, *R. v. Pretty*, 2005 BCCA 52, 208 B.C.A.C. 79, *R. v. Schnare*, [1988] N.S.J. No. 118 (QL), 1988 CarswellNS 568 (WL) (C.A.), and *R. v. Cheung, Gee and Gee* (1977), 5 A.R. 356 (S.C. (Trial Div.)), where in each case firing a pellet gun at a property was charged as a mischief offence and the offender received a sentence far below the mandatory minimum sentence mandated under s. 244.2(3)(b) (suspended sentence in *Pretty*; two months of incarceration, two years of probation and restitution in *Schnare*; and a suspended sentence and restitution in *Cheung*). The appellant in *Pretty* was a youthful offender who held animosity towards his neighbour and fired a BB gun at his neighbour's home. The sentencing judge suspended the passing of

sentence and placed the offender on probation for 12 months. The British Columbia Court of Appeal dismissed the sentence appeal. In *Schnare*, the appellant was a young man who went on a shooting spree with a pellet gun and caused damage to several houses and moving vehicles. He was sentenced to two months of incarceration, two years of probation and several thousand dollars in restitution. The Nova Scotia Court of Appeal upheld his sentence. Finally, the three young defendants in *Cheung* were involved in the firing of a pellet gun at a business and nearby vehicles. Each received a 12-month suspended sentence and a restitution order. These comparable cases lead me to the same conclusion as the sentencing judge — a suspended sentence with up to 12 months' probation would be a fit sentence for the hypothetical offender (Court of Queen's Bench decision, at para. 19). A four-year mandatory minimum would be a grossly disproportionate punishment considering the nature of the offence committed by the reasonably foreseeable offender as compared to other crimes of similar gravity.

[169] For the above reasons, I find that s. 244.2(3)(b) is grossly disproportionate. It applies to an offence that captures a wide spectrum of conduct, ranging from acts that present little danger to the public to those that pose a grave risk. Its effect at the low end of the spectrum is as severe as the minimums in *Nur* and *Lloyd*. Denunciation and deterrence alone cannot support such a result. The punishment shows a complete disregard for sentencing norms and the mandatory prison term would have significant deleterious effects on a youthful offender. In light of these considerations, I agree with Mr. Hills that it would outrage Canadians to learn that an offender can receive four years of imprisonment for firing a paintball gun at a home.

[170] As the Crown does not advance any argument or evidence to demonstrate that this is one of the rare cases in which cruel and unusual punishment under s. 12 may be justified under s. 1 of the *Charter*, I need not address this issue.

F. *Did the Court of Appeal of Alberta Err in Failing to Consider Mr. Hills' Gladue Report and his Métis Status in Re-Sentencing Him?*

[171] Mr. Hills argues that the Court of Appeal failed to consider his *Gladue* report and his Métis status in re-sentencing him. He is asking this Court to reinstate the three-and-a-half-year sentence imposed by the sentencing judge.

[172] As I conclude that the sentencing judge did not err in finding that s. 244.2(3)(b) was unconstitutional, I see no basis to interfere with the sentence imposed on Mr. Hills by the sentencing judge. The parties do not argue the sentencing judge's sentence is demonstrably unfit, nor that he made any other error in principle which impacts the sentence. Moreover, sentencing decisions are entitled to a high level of deference on appeal (*Lacasse*, at paras. 11 and 67). As the Court of Appeal interfered with the sentencing judge's sentence after having found that s. 244.2(3)(b) was constitutional, it is therefore unnecessary to address this part of its reasons.

[173] In conclusion, the sentencing judge's sentence is reinstated and it is unnecessary to consider whether the Court of Appeal erred in failing to assess Mr. Hills' *Gladue* report and his Métis status.

G. *Remedy*

[174] Having concluded that s. 244.2(3)(b) infringes s. 12 and the infringement is not justified under s. 1 of the *Charter*, the mandatory minimum set out in this provision is immediately declared of no force or effect under s. 52(1) of the *Constitution Act, 1982*. The parties made no submissions on alternative remedies under the *Charter* when a breach of s. 12 occurs, such as those considered in *Boudreault* (at para. 103) and *Bissonnette* (at paras. 135-36).

VI. Conclusion

[175] For these reasons, I would allow the appeal. The judgment of the Alberta Court of Appeal is set aside. The mandatory minimum set out in s. 244.2(3)(b) of the *Criminal Code* is grossly disproportionate. It infringes s. 12 of the *Charter* and is not saved by s. 1. It is immediately declared of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, and the declaration applies retroactively. The three-and-a-half-year sentence imposed on Mr. Hills by the sentencing judge is reinstated.

The following are the reasons delivered by

CÔTÉ J. —

I. Introduction

[176] I agree with my colleague Martin J.'s affirmation of the two-stage framework for determining whether a mandatory minimum sentence violates s. 12 of the *Canadian Charter of Rights and Freedoms*. However, I respectfully disagree with her attempt to clarify the established framework through a new three-part test for gross disproportionality. I further disagree with her interpretation of s. 244.2(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, and her application of it to the hypothetical scenario posed by Mr. Hills at trial. In my view, the four-year mandatory minimum formerly imposed by s. 244.2(3)(b) of the *Criminal Code* does not violate s. 12.

II. Legal Framework

[177] The two-stage inquiry for determining whether a mandatory minimum sentence violates s. 12 of the *Charter* is well-established. It was affirmed eight months ago by a unanimous Court in *R. v. Bissonnette*, 2022 SCC 23. First, the court must determine "what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*" (*Bissonnette*, at para. 63, quoting *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 46). Second, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is "grossly disproportionate" to the sentence that would be fit and proportionate, either for the actual offender or for another offender in a reasonable hypothetical case (*Bissonnette*, at para. 63; *Nur*, at para. 46; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 23).

[178] In these companion appeals, my colleague endorses this two-stage "*Nur*" framework (Martin J.'s reasons, at paras. 3 and 40; *R. v. Hilbach*, 2023 SCC 3, at para. 34). But in seeking to provide "further guidance, direction and clarity" (Martin J.'s reasons, at para. 3), she has, in my respectful view, introduced regrettable uncertainty and confusion. At stage two of the *Nur* framework, my colleague sets out three "components that must be assessed": (1) the scope and reach of the offence; (2) the effects of the punishment on the offender; and (3) the "penalty" and its objectives (para. 122). Each of these considerations is relevant to determining a fit and proportionate sentence at stage *one* of the *Nur* framework. They do not tell us whether the statutorily-imposed minimum sentence is "grossly disproportionate", beyond merely excessive, in comparison to the length of what would be a fit and proportionate sentence for the offence.

[179] First, if the "scope and reach of the offence" is broad, there will be a wider range of fit sentences. At issue, for constitutional purposes, is the lowest fit sentence for conduct which could reasonably be expected to fall under the impugned minimum. Indeed, in this case, the "wide spectrum of conduct" captured under my colleague's interpretation of s. 244.2(1)(a) leads to her conclusion that a non-carceral sentence would be fit and proportionate for the hypothetical offender raised by Mr. Hills at trial (paras. 5, 164 and 169). But this is irrelevant to the subsequent determination, at stage two of the *Nur* framework, of whether four years is beyond merely excessive but "grossly disproportionate" *in relation to that specific sentence*. The "scope and reach

of the offence" simply establishes the low end of the range of fit and proportionate sentences for a particular offence.

[180] Second, my colleague focuses on the effects of incarceration. Again, with respect, this is confusing for two reasons. The first is that these effects — and the objective of rehabilitation — are directly relevant to determining a fit and proportionate sentence at stage one of the *Nur* framework. Indeed, as my colleague states, "[c]ourts should consider the effect of a sentence on the *particular* offender . . . where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate" (Martin J.'s reasons, at para. 135 (underlining added)). This is simply stage one of the established framework. The second reason is that the effects of incarceration are considered not in isolation but in relation to a particular offence (see *Bissonnette*, at para. 49). That a "four-year term of imprisonment would have significant deleterious effects on youthful offenders" (Martin J.'s reasons, at para. 165) is not disputed. But this may be equally true for those who commit murder or other more serious offences. We are willing to tolerate longer punitive sentences — despite what may be similarly devastating effects of imprisonment — for those who commit more severe crimes. As my colleague notes, "[t]o prioritize rehabilitation, youthful offenders should benefit from the shortest possible sentence that is proportionate to the gravity of the offence" (para. 165 (emphasis added)).

[181] Third, my colleague focuses on the "penalty" and its objectives. I agree that courts should always consider the interplay between deterrence and denunciation

and other sentencing objectives. But this third "component" is the crux of the entire inquiry — to determine whether Parliament exceeded constitutional bounds in punishing certain offenders. In her analysis, my colleague largely returns to the same principles of sentencing that are directly relevant to determining the fit and proportionate sentence at stage one of the *Nur* framework, including the gravity of the offence and the degree of responsibility of the offender (see para. 167). At the second stage, her conclusion still turns on whether the difference in length between the four-year minimum and the lower "fit" sentence would "outrage Canadians" (para. 169).

[182] As such, and while I appreciate the difficulty in deciding whether a minimum sentence rises to the level of being grossly disproportionate, my colleague's new three-part approach does not assist in this determination. It simply duplicates considerations relevant to determining the low end of the range of fit and proportionate sentences at stage one of the *Nur* framework. At the second stage, whether a minimum sentence is grossly disproportionate to the fit sentence — i.e., whether it is a sentence that is beyond merely excessive but "so excessive as to outrage standards of decency" (*R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072, citing *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 688, per Laskin C.J.; *Lloyd*, at para. 24); would "shock the conscience" of Canadians (*Lloyd*, at para. 33); be "abhorrent or intolerable" to society (*R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 126, citing *Lloyd*, at para. 24; *Smith*, at p. 1072; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at

para. 26); or be "incompatible with human dignity" (*Bissonnette*, at para. 60) — remains a normative judgment (Martin J.'s reasons, at para. 110).

[183] This is exemplified in the companion appeal. Notwithstanding her new three-part test, Martin J.'s ultimate conclusions in *Hilbach* turn on whether the five- and four-year minimums for robbery with a restricted or prohibited firearm or with an ordinary firearm, respectively, would "shoc[k] the conscience" or be "so excessive as to outrage standards of decency" in comparison to the fit sentence of two to three years (*Hilbach*, at paras. 81 and 108). In contrast, Justices Karakatsanis and Jamal view the same gap differently. They find that it is "hard to fathom how a sentence nearly double the amount of a proportionate sentence would not shock the conscience of Canadians" (*Hilbach*, at para. 145; see also paras. 118 and 161). On both sides, this is a matter of judgment as to when an additional period of imprisonment becomes *so* excessive that it constitutes cruel and unusual punishment.

[184] I do not dispute that a four-year sentence would be grossly disproportionate in relation to a non-carceral sentence. I simply disagree that probation would ever be a proportionate sentence in a reasonably foreseeable application of s. 244.2(1)(a). Properly interpreted, and for the reasons below, s. 244.2(1)(a) does not capture conduct which involves "little danger to the public" or "little moral fault" (Martin J.'s reasons, at paras. 5, 125, 164 and 169; *Nur*, at para. 83). Rather, intentionally shooting a life-threatening firearm into or at a building or other place, knowing of or being reckless as to occupants, is highly culpable and blameworthy conduct.

III. Analysis

[185] Mr. Hills does not challenge the constitutionality of s. 244.2(3)(b) in relation to his own circumstances. Rather, he does so on the basis of a hypothetical offender put forth at trial. As such, it is necessary to begin by interpreting the scope of the charging provision, s. 244.2(1)(a), to determine the scope of conduct reasonably captured by the offence.

A. *Interpretation of Section 244.2(1)(a)*

[186] As this Court held in *Nur*, determining the reasonable reach of an impugned law is essentially a question of statutory interpretation (para. 61). For the majority, McLachlin C.J. elaborated:

> At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality. [Emphasis added; para. 61.]

[187] To determine the reasonable reach of s. 244.2(1)(a), I must read the words of the provision in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Criminal Code*, its object, and the intention of Parliament (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 2.01(1)). This modern approach is supplemented by the presumption that Parliament intended to enact legislation in conformity with the *Charter*. If a provision can be read both in a way that

is constitutional and in a way that is not, the former reading should be adopted (Sullivan, at § 16.01; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 33). The "real intention of the legislature must be sought, and the meaning compatible with its goals applied" (*R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413, citing P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991); see also Sullivan, at § 2.01(2)).

[188] Unlike s. 244.2(1)(b), the text of s. 244.2(1)(a) does not expressly require an offender to be "reckless as to the life or safety of another person". However, for the reasons below, I conclude that *both* offences under s. 244.2(1) require, at minimum, a subjective appreciation of potential harm or danger to others. Contrary to the broad interpretation favoured by my colleague, the impugned provision is sufficiently narrow in scope to exclude grossly disproportionate sentences for the kind of conduct the law may reasonably be expected to catch.

(1) Legislative Intent

[189] Section 244.2 of the *Criminal Code* was enacted in 2009, as part of Parliament's response to the intentional and reckless discharge of firearms. The Minister of Justice described the purpose of s. 244.2 as follows:

> We also are proposing that a new offence be added to the Criminal Code which would target drive-by and other intentional shootings involving reckless disregard for the life or safety of others.
>
> . . .

> Currently offences available to prosecute these kinds of cases include careless use of a firearm or discharge of a firearm with intent to cause bodily harm. The negligence based offences do not appropriately capture the severity of a drive-by scenario which involves consciously reckless conduct.
>
> Section 244 on the other hand requires proof that the firearm was discharged at a particular person with a specific intent to cause bodily harm, and this is not good enough. While more appropriate if the shooter does have a particular target, it can sometimes be difficult to prove a drive-by shooting scenario where the intent is to intimidate a rival gang, or in many cases the shooter may just be firing wildly without any particular target.
>
> Our proposed offence [s. 244.2] will fill a gap in the Criminal Code and provide a tailored response to this behaviour. This new offence requires proof that the accused specifically turned his or her mind to the fact that discharging his or her firearm would jeopardize the life or safety of another person, and appreciating this fact, the accused still went ahead. Quite simply, these individuals just do not care. [Emphasis added.]
>
> (*House of Commons Debates*, vol. 144, No. 29, 2nd Sess., 40th Parl., March 12, 2009, at pp. 1687-88)

[190] As such, Parliament intended to target an offender who "specifically turned his or her mind to the fact that discharging his or her firearm would jeopardize the life or safety of another person". This was confirmed throughout the legislative debates:

> This offence is aimed at those who would intentionally discharge their firearm with a reckless attitude toward the life or safety of another person. In other words, it does not focus on any specifically intended consequences but rather targets the deliberate disregard for another person's safety.
>
> There is something particularly disturbing to me about a situation in which someone specifically turns their mind to the fact that the shooting of a firearm would put the lives of others at risk, but in spite of this fact goes ahead and shoots anyway. This activity cries out for a strong response, and Bill C-14 delivers it. [Emphasis added.]

> (*House of Commons Debates*, March 12, 2009, at p. 1702 (Ms. Dona Cadman))
>
> Bill C-14 proposes amendments in four broad areas.
>
> . . .
>
> Second, it creates a new offence to target reckless shootings involving the intentional disregard for the life or safety of another person. [Emphasis added.]
>
> (*House of Commons Debates*, vol. 144, No. 45, 2nd Sess., 40th Parl., April 24, 2009, at p. 2675 (Mr. Daniel Petit); see also similar comments made in *Debates of the Senate*, vol. 146, No. 31, 2nd Sess., 40th Parl., May 5, 2009, at pp. 732-33 (Hon. John D. Wallace).)

[191] As a preliminary matter, then, it is clear that Parliament did not intend s. 244.2 to capture the reckless discharge of firearms generally, or in situations which otherwise present "little danger to the public" (Martin J.'s reasons, at paras. 5, 164 and 169). Rather, in both s. 244.2(1)(a) and s. 244.2(1)(b), it targeted shootings involving the "intentional disregard" for the lives or safety of others, in situations that "put the lives of others at risk".

(2) The Elements of Section 244.2(1)(a)

[192] Against this legislative backdrop, I turn to the elements of s. 244.2(1)(a). The *actus reus* of the offence is not disputed, requiring that an offender discharge a firearm into or at a "place", broadly defined in s. 244.2(2) to include any building or structure. I agree with Martin J. that the *actus reus* does not require any person to be present at the "place" where the firearm is discharged (paras. 8 and 156-59). However,

we part ways on the "wide" scope of the offence, which she says is "due mainly to the *actus reus*" (para. 164). In my view, the scope of the offence is narrowed significantly by the accompanying mental element, as I explain below.

(a) *Double Mens Rea*

[193] Section 244.2(1)(a) has a double *mens rea* requirement: (1) the *intentional* discharge of a firearm; and (2) *knowledge* of or *recklessness* as to the presence of occupants. Accordingly, an offender cannot know, or even think, that "nobody is around" or be "thoughtless as to whether anyone is present" (Martin J.'s reasons, at paras. 159-60 (emphasis in original deleted)) when he intentionally discharges a firearm into or at a building or other place. Rather, he must know it is occupied or be reckless, which requires "knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur" (*Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584). The culpability in recklessness is justified by consciousness of risk and proceeding in the face of it, a positive state of mind compared to negligence-based offences or "thoughtless[ness]" (Martin J.'s reasons, at para. 160). At minimum, then, an offender under s. 244.2(1)(a) must have knowledge of the risk of occupants and nonetheless proceed, in the face of that risk, to intentionally shoot into or at a building or other place.

[194] The double *mens rea* required under s. 244.2(1)(a) must also be interpreted in light of the object and purpose of the section. Through s. 244.2(1), Parliament intended to capture the discharge of firearms *in situations which jeopardized the lives*

or safety of others. It did so by enacting two offences, in paras. (a) and (b): first, where an offender intentionally shoots into or at a building or other place, knowing of or being reckless as to the presence of occupants; and second, in other situations where an offender intentionally shoots while being reckless as to the lives or safety of others. In my view, s. 244.2(1)(a) is an enumerated example of a shooting — into or at a building or other place, with knowledge of or recklessness as to the presence of occupants — which jeopardizes the lives or safety of others.

[195] A subjective appreciation of potential harm or danger may be easier to establish in classic "drive-by" scenarios, or when an offender otherwise intentionally shoots into or at a building or other place under s. 244.2(1)(a), than in the case of reckless shootings generally under s. 244.2(1)(b). But it would be nonsensical, and contrary to Parliament's expressly stated intent, to interpret s. 244.2(1)(a) to apply to shootings where an offender does not, at minimum, subjectively and recklessly disregard the possibility of risk to the lives or safety of others. In my view, knowledge of or recklessness as to the mere presence of occupants is insufficient to attract liability. Rather, both prongs of s. 244.2(1) were intended to target shootings in which the offender has turned his mind to the fact that he is placing others at risk.

(b) *Previous Interpretations of Section 244.2(1)(a)*

[196] My interpretation of the scope of s. 244.2(1)(a), narrower than that of my colleague, is consistent with that of appellate courts which have considered the provision. In *R. v. Oud*, 2016 BCCA 332, 339 C.C.C. (3d) 379, the Court of Appeal for

British Columbia held that the offence targets "all intentional discharges of firearms in situations highly dangerous to others, with knowledge or recklessness" (para. 35 (emphasis added)). While it is true that the court did not have the benefit of expert firearms evidence to evaluate a hypothetical scenario similar to that posed by Mr. Hills in this case, it nonetheless *interpreted* the elements of the offence restrictively, finding that s. 244.2(1)(a) is "sufficiently specific in its application" and that it "does not cast an overly broad net" (para. 32). I could not agree more.

[197] My colleague Martin J. focuses on the import of the expert evidence introduced in this case, which, according to the sentencing judge, "cured" the "evidentiary gap" in *Oud*; namely, whether firing a projectile from a pellet or air-powered gun is far less serious than discharging a regular gun (Martin J.'s reasons, at paras. 151 and 158). However, the court in *Oud* concluded that "[t]he offence is narrowly cast and the gravity of the offence puts this mandatory minimum sentence within the range of proportionate sentences for every reasonabl[y] foreseeable hypothetical" (para. 51 (emphasis added)).

[198] Similarly, in *R. v. Itturiligaq*, 2020 NUCA 6, the Nunavut Court of Appeal held that a four-year sentence was not grossly disproportionate for a man who intentionally fired a hunting rifle at the roofline of a house he knew to be occupied. The single bullet exited the roof and caused no injuries. As in *Oud*, the court found the offence to be targeted at the "deliberate and dangerous conduct of firing a gun into an open space or place . . . knowing, or being reckless as to whether, others may be

present" (para. 48 (CanLII)). Parliament's purpose was to "create an offence that prohibited the intentional discharge of a firearm in circumstances where the shooter turned their mind to the fact that firing the gun could put the life or safety of other persons at risk" (para. 47 (emphasis added)).

(3) Conclusion on the Ambit of Section 244.2(1)(a)

[199] In my view, s. 244.2(1) should not be interpreted to capture a person "firing a paintball gun at a house when *nobody* is around" (Martin J.'s reasons, at para. 159 (emphasis in original)). With respect, this broad interpretation of the scope of the conduct falling within s. 244.2(1) is divorced from the legislative context and the object and purpose of the provision. Interpreted correctly, the double *mens rea* requirement of s. 244.2(1)(a) captures only offenders who intentionally discharge a firearm into or at a building or other place with knowledge of or recklessness as to the presence of occupants — and thus, who have turned their mind to the fact that shooting the firearm could put the lives or safety of others at risk. This interpretation gives effect to the presumption of constitutional compliance and the real intention of Parliament, which explicitly targeted offenders with a subjective appreciation of the fact that discharging their firearm would jeopardize lives or safety.

(4) Effect of the Crown's Concession

[200] Before applying my interpretation of s. 244.2(1)(a) to the hypothetical posed by Mr. Hills at trial, I wish to briefly address the nature of the concession made by the Crown during the *voir dire* submissions:

> . . . I think it's fair to say, without -- as my friend puts it -- without outright conceding that the hypothetical itself could give rise -- I think it's fairly clear that the hypothetical proposed a young person with a pellet gun shooting at a structure where homeless people are known to sometimes be, it would be a grossly disproportionate sentence in the circumstances in light of the expert evidence which was presented by my friend.
>
> (A.R., vol. I, at p. 252)

[201] The Crown further noted that the defence, through its firearms expert, had "perfected the loose hypothetical as was before the Court in British Columbia in the *Oud* case", which it summarized as "not supported in the evidence in terms of whether or not that would constitute a firearm at law, what the likelihood of harm from that weapon would be" (p. 252).

[202] In my view, the Crown clearly conceded the validity of the hypothetical: that "there are classes of firearms [as defined in the *Criminal Code*] which are incapable of penetrating a very simple structure" (p. 252), based on the accepted evidence of the defence expert. As an *evidentiary* matter, it stated that there was "no further evidence that needs to be presented in order to further establish the hypothetical" (p. 253). However, the Crown did not, in my view, concede that the elements of the offence would be established in the defence's hypothetical. The Crown subsequently clarified

that the "Crown's submission, obviously, is that it can be dealt with by reading down" (p. 254).

[203] As such, whether the Crown conceded that shooting at a barn "where homeless people are known to sometimes be" may result in a grossly disproportionate four-year sentence is largely irrelevant, and not disputed. The primary effect of the concession was the Crown's acceptance of the fact that certain firearms could not penetrate a residential wall. However, I do not view the Crown's position to be that the *mens rea* of the offence would be established in the barn scenario, without more, or that such a scenario would be a reasonably foreseeable *application* of s. 244.2(1)(a). Regardless, on a proper interpretation of s. 244.2(1)(a), shooting at a barn would be excluded absent knowledge of or recklessness as to the presence of occupants, and thus a subjective appreciation of a risk to the lives or safety of others.

B. *Application of the Two-Stage Nur Framework*

(1) <u>What Is a Fit and Proportionate Sentence for the Section 244.2(1)(a) Offence?</u>

[204] For the reasons below, I would reject Martin J.'s view that a "suspended sentence of up to 12 months' probation" (para. 162) would ever be a fit and proportionate sentence under s. 244.2(1)(a). The question becomes whether, on a proper interpretation of the elements of the offence, s. 244.2(1)(a) nonetheless captures reasonably foreseeable cases for which a four-year sentence would be grossly

disproportionate (*Oud*, at para. 50). I conclude that it does not. While potentially excessive, the impugned minimum is not so excessive as to outrage standards of decency or be abhorrent or intolerable to Canadian society.

(a) *Mere Probation Is Not a Proportionate Sentence*

[205] Martin J.'s disposition of this appeal turns on the hypothetical case put forth by Mr. Hills at trial described as a "young person intentionally discharg[ing] an air-powered pistol or rifle . . . at a residence" (2018 ABQB 945, 79 Alta. L.R. (6th) 161, at para. 14). She would find this to be a reasonably foreseeable scenario within the scope of s. 244.2(1)(a), for which a sentence of probation would be appropriate. I disagree. This scenario, without more, does not involve the kind of conduct that the law may reasonably be expected to catch (*Nur*, at para. 61). I say this for three reasons.

[206] First, the young offender put forth by Mr. Hills is crafted primarily on the offence's *actus reus*. There is no sufficient basis on which to conclude that the requisite *mens rea* would be satisfied. Missing from the hypothetical is whether the offender turned his mind to the presence of occupants, and the corresponding risk to lives or safety, when choosing to intentionally shoot at a building. I do not dispute that the *actus reus*, on its own, would extend to a wide range of conduct, including the air-powered pistol or rifle hypothetical framed by defence counsel. But it is s. 244.2(1)(a)'s double *mens rea* requirement that serves to limit the scope of conduct properly caught within its ambit. This double *mens rea* renders offenders highly culpable and blameworthy.

[207] Second, the majority's position is premised on the notion that the "foreseeable" scenario raised by Mr. Hills presents "little danger to the public". I disagree. On a proper interpretation of s. 244.2(1)(a), an offender must have turned his mind to the fact that discharging the firearm would jeopardize the lives or safety of others. Moreover, a firearm, *by definition*, must be "capable of causing serious bodily injury or death to a person" (*Criminal Code*, s. 2). Regardless of whether firearms include certain air-powered devices, s. 244.2(1)(a) targets only the use of those air-powered rifles or pistols which are capable of inflicting serious or deadly consequences. As discussed, it does not capture a person "firing a paintball gun at a house when *nobody* is around" (Martin J.'s reasons, at para. 159), which an accused does not know when he pulls the trigger. The seriousness of the offence, aimed at deliberately *reckless* conduct, would be entirely different if an accused knew at the time of commission of the offence that he was shooting at an empty building.

[208] My colleague's position depends, in effect, on the presence of a residential wall to protect occupants. With respect, this ignores or minimizes other risks inherent when a person chooses to intentionally discharge a life-threatening firearm at a building. At the Court of Appeal, Antonio J.A. discussed these risks, including the possibility that bullets could go through a window or door, psychological effects on occupants or neighbours, the risk of a violent reaction from a target or bystander, and more broadly, the impact on the feeling of safety in communities (2020 ABCA 263, 9 Alta. L.R. (7th) 226, at paras. 80-82). In the companion case of *Hilbach*, my colleague cites similar risks, including the "risk of life-altering physical injury when air-powered

firearms are used in the course of a robbery", and states that the "risk of psychological trauma arising from the use of an air-powered rifle remains similar to that of a conventional firearm" (para. 98). She further notes the possibility of escalating violence and the difficulty in distinguishing between air-powered and conventional weapons. In my view, these same considerations apply in cases of intentional *shootings* under s. 244.2(1)(a).

[209] My colleague concedes that "firing a hunting rifle at a house is very severe and blameworthy conduct", as in Mr. Hills' case (para. 164). In my view, this is true irrespective of whether a bullet from that rifle could, in fact, go through the wall of a given home. The relevance of the residential wall distinction is undercut by the fact that even conventional weapons, including commonly used hunting rifles, may not be able to penetrate typical brick-based walls. In this case, the defence expert's report dealt "exclusively with wood-framed wall assemblies", but appended was a prior study which concluded that "typical walls constructed with brick or a brick veneer are highly resistant to bullet perforation from all conventional firearms, including handguns and common hunting rifles" (A.R., vol. I, at p. 393 (emphasis added)). These brick-based walls "could only be perforated with the very largest of conventional firearms", such as a .50 calibre Browning machine gun (p. 393). While air-powered rifles are undoubtedly less dangerous than conventional firearms, they remain capable of inflicting serious injury or death. Whether certain firearms can in fact penetrate a particular residential wall should not be the dispositive factor in assessing the constitutionality of s. 244.2(1)(a).

[210] Third, despite my colleague's focus on the "youthful" nature of the hypothetical offender (at paras. 161 and 165), the mandatory minimum punishments in the *Criminal Code* do not apply to youth offenders under the *Youth Criminal Justice Act*, S.C. 2002, c. 1, that is, offenders under the age of 18. While age may be a mitigating factor in determining a fit and proportionate sentence, and while rehabilitation remains an important principle in sentencing, my colleague's focus on "youthful offenders" must be placed in context.

[211] At bottom, intentionally shooting any firearm — which, by definition, must be capable of causing serious injury or death — into or at a building or other place, with knowledge of or recklessness as to the presence of occupants, is highly dangerous and culpable conduct. In such cases, the absence of serious injury or death will just be a matter of luck (*Oud*, at para. 61). I reject the notion that an offence committed under s. 244.2(1)(a), properly interpreted, could be "at most, a minor form of mischief" or that the offence otherwise poses "little or no danger" (Martin J.'s reasons, at para. 167), given the requisite *mens rea* and the gravity of the conduct.

[212] For these reasons, I conclude that mere probation is not a fit and proportionate sentence in a reasonably foreseeable application of s. 244.2(1)(a).

(b) *A Fit and Proportionate Sentence Requires, at Minimum, a Period of Incarceration*

[213] In the case of hypothetical offenders, courts need not, and cannot possibly, fix a sentence or range at a specific point. Rather, courts should "consider, even implicitly, the rough scale of the appropriate sentence" (*Lloyd*, at para. 23). The inquiry into cases that s. 244.2(1)(a) may reasonably be expected to capture must be grounded in judicial experience and common sense (*Nur*, at para. 62). This excludes the use of far-fetched or remote examples and the use of personal characteristics to construct the most innocent and sympathetic case imaginable (para. 75).

[214] On a proper interpretation of the impugned provision, I have difficulty conceiving of a reasonably foreseeable case in which less than a multi-year sentence would be fit and proportionate based on "the gravity of the offence and the degree of responsibility of the offender" under s. 718.1 of the *Criminal Code*. The fundamental principle of sentencing, proportionality, requires a sentence that is severe enough to denounce the offence but that does not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence (*Bissonnette*, at para. 50). Regardless of the ultimate consequences, s. 244.2(1)(a) targets deliberately reckless and dangerous *shootings*, with firearms that are by definition capable of causing life-threatening injury. It is the recklessness of the behaviour — the *potential* for harm, whether or not that risk materializes — which is severe and highly blameworthy, and which makes a period of incarceration a proportionate sentence.

[215] My colleague's comparison to the sentences imposed in *R. v. Pretty*, 2005 BCCA 52, 208 B.C.A.C. 79, *R. v. Schnare*, [1988] N.S.J. No. 118 (QL), 1988

CarswellNS 568 (WL) (C.A.), and *R. v. Cheung, Gee and Gee* (1977), 5 A.R. 356 (S.C. (Trial Div.)), helps illustrate the difference between s. 244.2(1)(a) and "mischief" offences which date back decades. It is more than unclear whether the pellet guns used in those cases would ever be classified as firearms and, more importantly, whether the offenders would satisfy the double *mens rea* required by s. 244.2(1)(a). Properly interpreted, s. 244.2(1)(a) captures only an accused who "specifically turned his or her mind to the fact that discharging his or her firearm would jeopardize the life or safety of another person, and appreciating this fact . . . still went ahead" (*House of Commons Debates*, March 12, 2009, at pp. 1687-88). I cannot agree that this constitutes a "minor form of mischief" (Martin J.'s reasons, at para. 167). There is no indication that offenders similar to those in *Pretty*, *Schnare*, or *Cheung* have ever been charged under s. 244.2(1)(a), nor would they be, on a proper interpretation of the elements of the offence.

[216] By way of more recent reference, the 19-year-old accused in *Nur* was sentenced to 40 months' imprisonment for mere *possession* of a loaded prohibited firearm (*R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, aff'd 2015 SCC 15, [2015] 1 S.C.R. 773). This is, understandably, lower than the s. 244.2(1)(a) sentences upheld in recent years by appellate courts for the intentional *shooting* of firearms in *Itturiligaq* (four years), *R. v. McMillan*, 2016 MBCA 12, 326 Man. R. (2d) 56 (four years), *Oud* (five years) and *R. v. Lyta*, 2013 NUCA 10, 561 A.R. 146 (five years). Those offences were all committed with conventional firearms. However, substituting air-powered firearms would not reduce the gravity of the offences and the culpability of the

offenders sufficiently to justify a sentence less than half the length of that deemed to be fit and proportionate in *Itturiligaq*, *McMillan*, *Oud* and *Lyta*. By definition, all firearms must be capable of causing serious bodily injury or death.

[217] In my view, a sentence of two years should properly be considered the low end of the range of fit and proportionate sentences in reasonably foreseeable applications of s. 244.2(1)(a).

(2) Is a Four-Year Sentence Grossly Disproportionate to the Fit and Proportionate Sentence?

[218] The minimum four-year sentence imposed by s. 244.2(3)(b) would, at the floor of the range of fit and proportionate sentences, double the period of incarceration in reasonably foreseeable cases. The effects of this should not be minimized and may be devastating. However, I cannot conclude, as a *constitutional* matter, that this additional period of imprisonment would meet the high threshold established by this Court for cruel and unusual punishment.

[219] A sentence oversteps constitutional limits when it is grossly disproportionate, not merely excessive (*Bissonnette*, at para. 61). The sentence must be "so excessive as to outrage standards of decency" (*Smith*, at p. 1072, citing *Miller*, at p. 688, per Laskin C.J.; *Lloyd*, at para. 24), and "abhorrent or intolerable" to society (*Boudreault*, at para. 126, citing *Lloyd*, at para. 24; *Smith*, at p. 1072; *Morrisey*, at para. 26). As Chief Justice Wagner, writing for a unanimous Court, held more recently

in *Bissonnette*, it must be "so excessive as to be incompatible with human dignity" (para. 60).

[220] As a result, it is only on rare and unique occasions that a court will find, and has found, a sentence to be so grossly disproportionate that it violates s. 12 of the *Charter* (see *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417, per Cory J.; *Boudreault*, at paras. 127-128, per Côté J., dissenting, but not on this point; *Bissonnette*, at para. 70). Courts must properly show deference to Parliament's policy decisions with respect to sentencing (*Bissonnette*, at para. 70; *Lloyd*, at para. 45). In an oft-cited passage, Borins Dist. Ct. J. discussed such deference:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.
>
> (*R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.), at p. 238)

[221] In my view, a four-year sentence cannot be said to be "so excessive" as to "be incompatible with human dignity" or otherwise "outrage standards of decency". The s. 12 threshold is necessarily high in cases where the issue is the length of the punishment, in contrast to punishments which are cruel and unusual by nature, such as torture or castration. I agree with Martin J., writing in the companion appeal in *Hilbach*,

that Parliament is within its rights to emphasize the objectives of deterrence and denunciation in the context of firearms offences (para. 73). A firearm presents the "ultimate threat of death to those in its presence" (*R. v. Felawka*, [1993] 4 S.C.R. 199, at p. 211). This Court has repeatedly affirmed the denunciatory role of minimum sentences for conduct which offends our society's "basic code of values" (*Morrisey*, at para. 47; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81). The *intentional* shooting of such a life-threatening firearm into or at a building or other place, with knowledge of or recklessness as to the presence of occupants, is a clear example of conduct which offends Canadian society's basic code of values.

[222] I agree with the conclusions of the Nunavut Court of Appeal and the Court of Appeal for British Columbia, respectively, that s. 244.2(1)(a) "does not go beyond that which is necessary to achieve a valid penal purpose" (*Itturiligaq*, at para. 95) and "only captures conduct that in all circumstances will be highly blameworthy and antithetical to the peace of the community" (*Oud*, at para. 44). In emphasizing the high threshold under s. 12, La Forest J. explained that the word "grossly" reflects "this Court's concern not to hold Parliament to a standard so exacting . . . as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender" (*R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 344-45). I agree. In this case, I am "wary of second-guessing the [policy] choices of our elected representatives" (*Nur*, at para. 144, per Moldaver J., dissenting) based on a hypothetical scenario that is, in my view, unmoored from judicial experience and common sense.

[223] To my knowledge, the hypothetical scenario posed by the appellant has not resulted in a conviction under s. 244.2(1)(a) — nor would it, on my interpretation of the offence, unless the accused had turned his mind to the fact that discharging the firearm would jeopardize the lives or safety of others. The hypothetical is "more imaginary than real" and is not a sound basis on which to nullify Parliament's considered response to a serious and complex issue (see *Nur*, at para. 133, per Moldaver J., dissenting).

IV. Legislative Amendments

[224] Before concluding, I wish to briefly comment on *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15. The legislation, which received royal assent on November 17, 2022, amended the text of s. 244.2(3)(b) and repealed s. 344(1)(a.1) of the *Criminal Code* (at issue in *Hilbach*), thereby removing the four-year minimum at issue in this appeal for s. 244.2(1) offences committed with non-restricted or non-prohibited firearms.

[225] This legislation reflects a policy choice by the government which is not relevant in determining whether the former law infringed s. 12 of the *Charter* (*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 104). While the Minister of Justice acknowledged generally, in the context of introducing the legislation, that certain mandatory minimums have the potential to lead to sentences that may be viewed as grossly disproportionate, I agree with the Director of Public Prosecutions that this cannot be seen as an acknowledgment that any

specific provision or minimum is or was not *Charter*-compliant. As with the original enactment of s. 244.2 in 2009, it is within Parliament's mandate to regulate firearms-related offences as it sees fit. This includes balancing objectives of deterrence and denunciation with those of rehabilitation, proportionality, and judicial discretion in sentencing.

V. Conclusion

[226] Properly interpreted, s. 244.2(1)(a) captures offenders who intentionally shoot a firearm into or at a building or other place, knowing of or being reckless as to the presence of occupants, and who have thus turned their mind to the fact that discharging their firearm could jeopardize the lives or safety of others. In my view, a four-year minimum sentence for such conduct is not "so excessive as to outrage standards of decency" or "incompatible with human dignity" to rise to the level of cruel and unusual punishment under s. 12. I would dismiss Mr. Hills' appeal.

Appeal allowed, CÔTÉ J. *dissenting.*

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