



SUPREME COURT OF CANADA

CITATION: R. v. Hilbach, 2023
SCC 3

APPEAL HEARD: March 22,
2022

JUDGMENT RENDERED:
January 27, 2023

DOCKET: 39438

BETWEEN:

His Majesty The King
Appellant

and

Ocean William Storm Hilbach and Curtis Zwozdesky
Respondents

- and -

**Director of Public Prosecutions, Attorney General of Ontario, Attorney
General of Saskatchewan, Canadian Civil Liberties Association, Canadian
Bar Association and British Columbia 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 111)

Martin J. (Wagner C.J. and Moldaver, Brown, Rowe and
Kasirer JJ. concurring)

CONCURRING Côté J.

REASONS:

(paras. 112 to 113)

JOINT DISSENTING Karakatsanis and Jamal JJ.

REASONS:

(paras. 114 to 165)

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His Majesty The King

Appellant

v.

**Ocean William Storm Hilbach and
Curtis Zwozdesky**

Respondents

and

**Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Saskatchewan,
Canadian Civil Liberties Association,
Canadian Bar Association and
British Columbia Civil Liberties Association**

Interveners

Indexed as: R. v. Hilbach

2023 SCC 3

File No.: 39438.

2022: March 22; 2023: January 27.

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 — Robbery — Accused convicted of robbery committed with restricted or prohibited firearm and of robbery committed with ordinary firearm — Accused challenging constitutionality of mandatory minimum sentence of five years' imprisonment prescribed for robbery committed with restricted or prohibited firearm and of mandatory minimum sentence of four years' imprisonment prescribed for robbery committed with ordinary firearm — Whether mandatory minimum sentences constitute cruel and unusual punishment — Canadian Charter of Rights and Freedoms, s. 12 — Criminal Code, R.S.C. 1985, c. C-46, ss. 344(1)(a)(i), (a.1).

After robbing a convenience store, H, an Indigenous 19-year-old, pleaded guilty to robbery using a prohibited firearm contrary to s. 344(1)(a)(i) of the *Criminal Code*. Section 344(1)(a)(i) prescribes a mandatory minimum sentence of five years' imprisonment for a first offence conviction of robbery committed with a restricted or prohibited firearm. At sentencing, H brought a challenge under s. 12 of the *Charter* to the mandatory minimum sentence, arguing that it was a grossly disproportionate sentence in regards to his circumstances and constituted cruel and unusual punishment. The sentencing judge concluded that the mandatory minimum sentence was grossly disproportionate and contravened s. 12. He decided that a fit and proportionate sentence for H was two years less a day.

In an unrelated case, Z robbed a convenience store and pleaded guilty to robbery with a firearm, contrary to s. 344(1)(a.1) of the *Criminal Code*. At that time, s. 344(1)(a.1) imposed a mandatory minimum sentence of four years' imprisonment for a conviction of robbery where an ordinary firearm was used. At sentencing, Z brought a challenge under s. 12 of the *Charter* to the mandatory minimum sentence, relying on a set of hypothetical scenarios. The sentencing judge concluded that the mandatory minimum sentence was not grossly disproportionate for Z. However, she concluded that it was grossly disproportionate in reasonably foreseeable hypothetical scenarios, and declared s. 344(1)(a.1) of no force or effect. She sentenced Z to three years' imprisonment.

The Crown's appeals in the cases of H and Z were heard together. The Court of Appeal dismissed the appeals on the constitutionality of the mandatory minimum sentence provisions, but added a year to H's sentence, concluding that three years' imprisonment was a fit and proportionate sentence. It declined to interfere with Z's sentence. The Crown appeals the declarations of unconstitutionality of the mandatory minimum sentence provisions to the Court.

Held (Karakatsanis and Jamal JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Moldaver, Brown, Rowe, **Martin** and Kasirer JJ.: The mandatory minimum sentences set out in s. 344(1)(a)(i) and the former s. 344(1)(a.1) are constitutional and do not constitute cruel and unusual punishment.

In the companion appeal of *R. v. Hills*, 2023 SCC 2, the Court affirmed and developed the framework applicable to challenges to the constitutionality of a mandatory minimum sentence under s. 12 of the *Charter*. In accordance with that framework, determining whether the mandatory minimum sentences for robbery are grossly disproportionate requires a two-stage inquiry. A court must first determine a fit and proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. The court must then ask whether the impugned provision requires it to impose a sentence that is grossly disproportionate when compared to the fit and proportionate sentence. Whether a mandatory minimum is grossly disproportionate will depend upon the scope and reach of the offence, the effects of the penalty on the offender, and the penalty and its objectives. 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.

Indigeneity should factor into the s. 12 analysis of gross disproportionality. Section 718.2(e) of the *Criminal Code* provides mandatory direction to consider the unique situation of Indigenous offenders for all offences in sentencing. Sentencing judges must consider the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts and the types of sentencing procedures and sanctions which may be appropriate in the circumstances for that offender. When engaged, s. 718.2(e) applies at three different parts of the s. 12 analysis. First, courts must consider *Gladue* when sentencing the individual offender; the failure to consider *Gladue* factors is an error that can lead to a

finding that a sentence is unfit. Second, when crafting reasonably foreseeable hypotheticals, a court may consider scenarios involving Indigenous offenders. Lastly, Indigeneity is relevant at the second stage of the s. 12 inquiry. The assessment of whether a mandatory minimum sentence is grossly disproportionate depends, in part, on the penalty's effect on individual offenders, including Indigenous offenders, and its reflection of valid penal purposes and recognized sentencing principles, which include *Gladue*'s framework for applying s. 718.2(e).

In H's case, the five-year mandatory minimum sentence prescribed by s. 344(1)(a)(i) does not infringe s. 12 of the *Charter*. With respect to the first stage of the inquiry, determining a fit and proportionate sentence for the offence, three years' imprisonment is a fit and proportionate sentence for H. It is the starting point adopted for an unsophisticated armed robbery of small commercial establishments and in the absence of physical harm. H's offence not only involved a prohibited firearm, but also resulted in physical harm to store clerks. Moreover, H pointed the rifle at two employees. He was on probation and was subject to a prohibition order at the time of the offence, and he involved a 13-year-old youth in a violent crime. The two-year sentence imposed by the sentencing judge, which was a full year below the starting point, was demonstrably unfit.

With respect to the second part of the two-stage inquiry, determining whether a sentence is grossly disproportionate, the mandatory minimum sentence, while harsh and close to the line, is not grossly disproportionate in H's case. First,

considering the scope and reach of the offence, the minimum sentence is not so wide that it encompasses conduct that poses relatively little risk of harm. The gravity of the robbery offence and the culpability of offenders convicted of it is relatively high. Robbery is a serious offence based on the requisite *actus reus* of the use or threat of violence or force in stealing or attempting to steal property. Adding a firearm to the equation simply increases the gravity of the offence. The harmful consequences of using a restricted or prohibited firearm in a robbery are readily identified: there is the risk of death or life-altering physical injury for victims and bystanders, and, even if the weapon is not fired, exposure to this threat carries the risk of profound psychological harm. The use of an unloaded prohibited firearm does not substantially reduce the offence's gravity, as the presence of a firearm creates a highly volatile and dangerous situation. The mental elements required for the minimum sentence to apply suggest a relatively high degree of culpability. An offender who commits robbery with a restricted or prohibited firearm must intend to steal and intend to use violence or force (or the threat thereof). The offence does not involve an inadvertent decision to put public safety at risk but a conscious choice to put another person's safety at great risk. Though H's personal circumstances attenuate his culpability somewhat, his actions constitute a grave offence with high moral blameworthiness.

Second, considering the effects of the penalty on the offender, a five-year term of imprisonment would have detrimental implications for H's rehabilitation, given the sentencing judge's finding that a penitentiary term increased the likelihood that H would re-entrench in gang involvement. Many Indigenous offenders may serve harder

time as Indigenous offenders are often more severely affected by incarceration and treated in discriminatory ways in custodial environments. Further, incarceration itself can be a culturally inappropriate consequence for wrongdoing for Indigenous offenders. These effects must carry significant weight.

With respect to the penalty and its objectives, courts must first consider which sentencing objectives Parliament prioritized in enacting the mandatory minimum penalty and, second, assess whether the minimum sentence goes beyond what is necessary for Parliament to achieve its objectives. In H's case, Parliament's decision to prioritize denunciation and deterrence is justifiable. The mandatory minimum sentence captures conduct that clearly warrants deterrence and the strong denunciation that a substantial prison sentence signals. Parliament is entitled to enact mandatory minimum sentences that signal that a disregard for the life and safety of others in handling firearms is simply not acceptable. There is also a need for general deterrence when a person endangers the safety of others in wielding a firearm. H's actions are precisely the conduct that Parliament sought to deter. Greater deference to Parliament's choice to enact a minimum sentence is therefore warranted. Further, the mandatory minimum sentence in H's case is not totally out of sync with sentencing norms for an offence of this nature. While a five-year mandatory minimum arguably sits above what H would receive, it does not far exceed what is necessary for Parliament to achieve its sentencing objectives. The difference between the mandatory minimum sentence and H's individual circumstances does not outrage standards of decency.

In Z's case, five hypothetical scenarios have been advanced. However, these scenarios are insufficient to establish that s. 344(1)(a.1) is grossly disproportionate. The mandatory minimum does not shock the conscience or is not so excessive as to outrage standards of decency. While the punishment is severe, the high threshold for gross disproportionality is not met.

First, of the five scenarios, only two are reasonably foreseeable. Reasonably foreseeable scenarios are situations that may reasonably be expected to arise as a matter of common sense and judicial experience, as outlined in *Hills*. The first reasonably foreseeable scenario involves a 21-year-old Indigenous man who suffers from alcoholism and fetal alcohol spectrum disorder, is extremely intoxicated and face down in a snowbank when a good Samaritan stops to help him. He grabs the woman, reaches into his waistband, flashes a BB gun, and snatches her purse. The BB gun is operable and capable of taking an eyeball out, but it is unloaded. The second reasonably foreseeable scenario involves a 26-year-old Indigenous man who suffers from a drug addiction and schizophrenia and has a short criminal record. When meeting his drug dealer in a parking lot, he produces an airsoft pistol, points it at his dealer, and takes some methamphetamines.

In addition, two hypotheticals drawn from reported decisions are reasonably foreseeable. Both cases involved youthful offenders involved in convenience store robberies: an 18-year-old Indigenous woman, who pled guilty as a

party to the robbery where the principal used an imitation firearm; and an 18-year-old youthful offender who used a BB gun in the commission of a robbery and pled guilty.

With respect to the first stage of the inquiry, two years' to two and a half years' imprisonment is a fit and proportionate sentence in these reasonably foreseeable scenarios. These scenarios involved street muggings, an offence with a sentencing range around 12 to 18 months, along with the use of a weapon and, in particular, a firearm, which is an aggravating factor. Furthermore, they involved the application of force to the victim, a degree of planning and a prior criminal record. There is also the serious public safety risk involved in using a firearm to settle a drug dispute, a consideration that supports a significant sentence. Nevertheless, the moral blameworthiness of offenders is attenuated when mental health and addiction issues underlay their actions, as well as any applicable *Gladue* considerations.

With respect to the second part of the two-stage inquiry, the mandatory minimum is not grossly disproportionate in these reasonably foreseeable scenarios. Regarding the scope and reach of the offence, the scenarios do not demonstrate the mandatory minimum sentence casts too broad of a net and captures offenders with low culpability. The offence's *mens rea* and *actus reus* apply to a relatively narrow set of violent behaviours, and conviction requires a deliberate and specific act with a defined harm. From the standpoint of public safety, there is not a dramatic difference between robbing a person with a conventional firearm and an air-powered firearm. Z's scenarios do not establish s. 344(1)(a.1) applies in circumstances involving little or no danger to

the public or little or no fault. The distinctions between the lethality of the firearms involved, or the fact of party liability, do not establish dramatically different degrees of severity in the context of this offence. In all these scenarios, in order to steal, an offender makes a conscious choice to place another person at risk of life-altering injury and significant psychological trauma. However, the effects of the penalty on the offender are severe. The individual circumstances of the hypothetical offenders indicate the period of incarceration required under s. 344(1)(a.1) would likely result in severe detrimental effects. Finally, an inquiry into the penalty and its objectives reveals the analysis for s. 344(1)(a.1) and s. 344(1)(a)(i) is similar. Parliament chose to impose the strong moral condemnation that a substantial prison sentence signals, which is reasonable given the offenders' choice to put public safety at risk offends basic moral values. Greater deference to Parliament's decision to enact the mandatory minimum is therefore warranted.

Per Côté J.: There is agreement with the majority's disposition of the appeal. However, for the reasons outlined in the dissent in *Hills*, there is disagreement with the majority's new three-part test for gross disproportionality at the second stage of the established framework. Applying this established legal framework, the mandatory minimum sentences prescribed by s. 344(1)(a)(i) and s. 344(1)(a.1) are not so excessive as to outrage standards of decency or shock the conscience of Canadians.

Per Karakatsanis and Jamal JJ. (dissenting): The appeal should be dismissed. Sections 344(1)(a)(i) and 344(1)(a.1) of the *Criminal Code* violate the

constitutional guarantee against cruel and unusual punishment under s. 12 of the *Charter*. They cannot be saved under s. 1, and should be declared of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

The five-year sentence set out in s. 344(1)(a)(i) is grossly disproportionate for H. The sentencing judge correctly considered the facts, case law, and relevant sentencing objectives to determine that two years less a day was a fit and proportionate sentence in H's circumstances. This determination is owed deference. In assessing a fit sentence, courts must not indiscriminately adhere to starting points, completely eliminate the prospect of rehabilitation, or distort the gravity of the offence by dismissing relevant facts (such as whether a firearm was loaded). The sentencing judge balanced the serious aggravating factors on H's sentence against his tragic personal circumstances, including abandonment by his parents, being raised by his paternal grandparents (both residential school survivors), and a childhood and adolescence marked by poverty, a fractured family unit, physical abuse, and substance dependency. These circumstances are precisely the kind of background or systemic factors that the Court has recognized as having a mitigating effect in sentencing, and it is imperative that sentencing judges appropriately consider the unique social issues facing Indigenous peoples in Canada. It shocks the conscience to send a youthful Indigenous offender to prison for five years when, as the sentencing judge determined, doing so would harm both the offender and society. Moreover, a sentence that is double or nearly double a fit sentence is grossly disproportionate in violation of s. 12 of the *Charter*. It is hard to fathom how such a sentence would not shock the conscience of Canadians.

A five-year sentence does not accord with a purposive reading of s. 12, nor is it alive to the profound consequences of any incarceration on an offender's life and liberty, let alone the secondary impacts on the offender and the offender's family. Even if a fit sentence for H were three years in jail, a sentence of five years would still be grossly disproportionate.

The four-year mandatory minimum sentence under s. 344(1)(a.1) is also grossly disproportionate. It is unconstitutionally broad and foreseeably applies to a wide range of situations, including those where the offender may be young, substance dependent, assisting the principal offender, or using a firearm like a BB gun. Applying that mandatory minimum in some of these situations would be so excessive as to outrage standards of decency. A four-year sentence reaches beyond the classic instance of robbery with a firearm and captures less egregious conduct. While the objective gravity of robbery with a firearm is always serious, the gravity of the particular offence committed depends on the circumstances surrounding the offence and varies considerably. A wide range of people commit armed robberies. Considering personal characteristics and circumstances sheds light on the reasonably foreseeable scope of the law and reflects the inherently individualized nature of sentencing and how proportionality involves an assessment of both the gravity of the offence and the blameworthiness of the offender. This ensures that s. 12 responds to the everyday composition of offenders in the criminal justice system. Given the breadth of the definition of a firearm (including BB guns, paintball guns, and nail guns), the range of conduct captured by the offence (including the degree and nature of involvement in the

crime, the level of violence, and the level of sophistication), as well as the prevalence of important, often intersecting, personal circumstances (including Indigeneity, youth, substance dependency, and rehabilitation efforts), it is reasonably foreseeable that a four-year penitentiary sentence would be grossly disproportionate for some offenders.

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By Côté J.

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By Karakatsanis and Jamal JJ. (dissenting)

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ABQB 526, 75 Alta. L.R. (6th) 359, 414 C.R.R. (2d) 327, [2018] A.J. No. 861 (QL), 2018 CarswellAlta 1350 (WL). Appeal allowed, Karakatsanis and Jamal JJ. dissenting.

APPEAL from a judgment of the Alberta Court of Appeal (Wakeling, Strekaf and Feehan JJ.A.), 2020 ABCA 332, 14 Alta. L.R. (7th) 245, 394 C.C.C. (3d) 179, [2021] 1 W.W.R. 637, 473 C.R.R. (2d) 107, [2020] A.J. No. 987 (QL), 2020 CarswellAlta 1681 (WL), affirming a declaration of unconstitutionality of s. 344(1)(a.1) of the *Criminal Code* and a sentence entered by Yungwirth J., 2019 ABQB 322, 95 Alta. L.R. (6th) 386, [2020] 5 W.W.R. 305, 434 C.R.R. (2d) 45, [2019] A.J. No. 553 (QL), 2019 CarswellAlta 829 (WL). Appeal allowed, Karakatsanis and Jamal JJ. dissenting.

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

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

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

MARTIN J. —

I. Introduction

[1] This appeal questions whether the mandatory minimum sentences for robbery imposed in s. 344(1)(a)(i) and (a.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, constitute cruel and unusual punishment under s. 12 of the *Canadian Charter of Rights and Freedoms*. Specifically, Mr. Hilbach challenges the minimum of five years' imprisonment prescribed under s. 344(1)(a)(i) where a robbery is committed with a restricted or prohibited firearm, arguing that it is a grossly disproportionate

sentence in regards to his circumstances. Mr. Zwozdesky relies on a set of hypothetical scenarios to challenge the minimum of four years' imprisonment previously imposed by s. 344(1)(a.1) where an ordinary firearm is used. The mandatory minimum sentence prescribed in s. 344(1)(a.1) was repealed after this appeal was heard. Despite this legislative change, these reasons examine the impugned mandatory minimum as previously enacted.

[2] In the companion appeal *R. v. Hills*, 2023 SCC 2, this Court affirmed and developed the framework applicable to challenges to the constitutionality of a mandatory minimum sentence under s. 12 of the *Charter*. Whether a mandatory minimum is grossly disproportionate will depend upon the scope and reach of the offence, the effects of the penalty on the offender, and the penalty and its objectives. Under this rubric, classic features of offences that lie at either end of the spectrum can be discerned and may provide guidance. For example, some offences, while potentially very serious, can be committed in a wide range of circumstances by a wide range of offenders, including circumstances that are all but innocuous and offenders who are all but morally blameless. As such, they fall within a class of offences for which mandatory minimum sentences are particularly vulnerable to being struck down under s. 12 of the *Charter* as cruel and unusual punishment. This is so because the prescribed mandatory minimum punishment may, in some instances, be so severe and the effects so pronounced, that it results in a grossly disproportionate sentence to the appropriate sentence in a given case (see, e.g., *Hills*; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130).

[3] By contrast, some offences that may carry with them significant mandatory minimum sentences, such as four to five years of imprisonment, are framed in such a way that they cannot be committed in innocuous circumstances by offenders who are all but morally blameless. On the contrary, they are almost always serious and committed by offenders who bear a high degree of moral blameworthiness. Offences that come within this class are narrowly defined and limited in scope, subject and *mens rea*. They regularly involve acts of violence, threats of violence, or conduct that is inherently dangerous, in circumstances that give rise to a real risk of death or serious bodily harm. Additionally, they require a high level of moral blameworthiness on the part of offenders, be they principals or parties, to sustain a conviction.

[4] For this class of offences, the mandatory minimum sentence could, applying normal sentencing principles, be considered to be too high and demonstrably unfit in some cases. For these offences there is, however, little risk of imposing a sentence that would meet the test for gross disproportionality so long as the mandatory minimum sentence is not grossly disproportionate to sentences that would be appropriate, applying normal sentencing principles, for conduct that could reasonably be expected to fall within its ambit (see, e.g., *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. McDonald* (1998), 40 O.R. (3d) 641 (C.A.); *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332 (Que. C.A.); *R. v. McIvor*, 2018 MBCA 29, [2018] 5 W.W.R. 139).

[5] Of course, not all offences will fall neatly into one or the other of these two classes of offences, and they are not intended to establish any preconditions. Rather, these categories may serve as departure points when deciding whether a particular mandatory minimum sentence is or is not constitutional.

[6] This appeal, and its companion appeal, provide classic examples of these two classes of offences. In *Hills*, the impugned provision imposed a mandatory minimum of four years' imprisonment for an offence that can be committed in a wide range of circumstances by a wide range of offenders. By contrast, the present offence is narrowly defined and limited in scope, subject and *mens rea*. The impugned mandatory minimum sentences apply to conduct that poses a significant risk to the safety of victims and the public. The risk of violence and psychological trauma from *any* robbery involving a firearm is acute. Unlike the offence that was subject to the mandatory minimum sentence at issue in *Hills*, the spectrum of conduct captured by robbery with a firearm is not so wide that the minimums apply in circumstances that involve little danger or moral fault.

[7] Applying the framework in *Hills*, I conclude that neither s. 344(1)(a)(i) nor the former s. 344(1)(a.1) are grossly disproportionate. In enacting the mandatory minimum sentences here, Parliament was free to prioritize deterrence and denunciation. Accordingly, I would allow the appeal in respect of each provision.

II. Legislative Background

[8] The respondents bring challenges under s. 12 of the *Charter* to the mandatory minimum sentences prescribed in s. 344(1)(a)(i) and (a.1) of the *Criminal Code*. The mandatory minimum sentences at issue arise from the commission of the offence of robbery contrary to s. 343 of the *Criminal Code*. Section 343 of the *Criminal Code* defines four ways that the offence of robbery can be committed:

343 Every one commits robbery who

- (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
- (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
- (c) assaults any person with intent to steal from him; or
- (d) steals from any person while armed with an offensive weapon or imitation thereof.

[9] While there are four ways in which robbery may be committed, the *actus reus* and *mens rea* requirements make robbery rather distinct: as an offence, it combines an offence against property with one against the person, despite the fact it is included in Part IX of the *Criminal Code*, “Offences Against Rights of Property”. In terms of *actus reus*, the use of violence or force is a prerequisite to a conviction under s. 343(a) to (c), and s. 343(d) requires that the offender be “armed” with an “offensive weapon”. Moreover, three of the four ways in which robbery may be committed (s. 343(a), (b) and (d)) require actual stealing. Its elements thus tend to restrict the offence to a relatively narrow range of serious conduct, which is generally treated severely in

sentencing (M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at ¶22.59).

[10] As for its mental elements, robbery carries a double *mens rea* requirement. First, the offender must intend to use violence or force, and in the case of s. 343(d) intend to carry the offensive weapon in question (*R. v. Pelletier* (1992), 71 C.C.C. (3d) 438 (Que. C.A.), at pp. 441-42; *R. v. Strong* (1990), 111 A.R. 12 (C.A.), at para. 33; *R. v. Nadolnick*, 2003 ABCA 363, 339 A.R. 348, at para. 21; *R. v. Roberts*, 2016 NLTD(G) 18, 377 Nfld. & P.E.I.R. 174, at paras. 152-54). Second, whether the robbery involved actual stealing (s. 343(a), (b) and (d)) or simply an intent to steal (s. 343(c)), the offender must have had the requisite *mens rea* for theft given that s. 2 of the *Criminal Code* defines “steal” as “to commit theft”. The *mens rea* requirement for theft involves a fraudulent intent, an absence of any colour of right over the property, and the intent to deprive an owner of their property (*Lafrance v. The Queen*, [1975] 2 S.C.R. 201; *R. v. Dorosh*, 2003 SKCA 134, [2004] 8 W.W.R. 613, at para. 14).

[11] Aside from s. 343(d), s. 343 does not create a distinct offence of “armed robbery”. However, where a firearm is used in a robbery under any of the modes in s. 343, s. 344(1) is engaged. Specifically, where a restricted or prohibited firearm is used, an offender is subject to a mandatory five-year term of imprisonment in the case of a first offence (s. 344(1)(a)(i)). Before recent amendments to the *Criminal Code* were enacted in 2022, where the firearm was neither restricted nor prohibited, a mandatory four-year term of imprisonment applied (s. 344(1)(a.1)):

344 (1) Every person who commits robbery is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

[12] A question which affects the scope of the impugned section arises as to whether s. 344(1) is an offence-creating provision or whether it relates to sentencing alone (*R. v. Watson*, 2008 ONCA 614, 240 O.A.C. 370, at para. 24; *R. v. D. (A.)*, 2003 BCCA 106, 173 C.C.C. (3d) 177, at para. 30). While nothing turns on this issue here, based on its wording and origins, Parliament appears to have modeled s. 344(1) on s. 85(1) of the *Criminal Code*, which makes it an offence to commit an indictable offence using a firearm, and s. 85(3), which previously prescribed a mandatory minimum punishment of one year of imprisonment. The mandatory minimum sentences in s. 344(1) must be interpreted similarly to s. 85(1) as a result. Section 85(1) reads as follows:

Using firearm in commission of offence

85 (1) Every person commits an offence who uses a firearm, whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm,

(a) while committing an indictable offence, other than an offence under [certain sections, including] 344 (robbery)

[13] Before s. 344’s enactment, robbery with a firearm was typically prosecuted by charging an offender with a principal offence, for example armed robbery under the former s. 302, and s. 83 (the then equivalent of s. 85, using a firearm in the commission of the robbery offence; see, e.g., *Lapierre*; *R. v. Covin*, [1983] 1 S.C.R. 725). Section 85(1) was enacted to ensure stiff penalties for offences commonly committed with firearms, like robbery (s. 85(3) of the *Criminal Code*; *McGuigan v. The Queen*, [1982] 1 S.C.R. 284, per Dickson J. (as he then was), at pp. 316-17 and 319, referring to the former s. 83).

[14] However, in 1995, after s. 344 was enacted, robbery was exempted from the list of indictable offences that could ground a conviction under s. 85(1) (*Firearms Act*, S.C. 1995, c. 39, ss. 139 and 149). Evidently, Parliament concluded that a penalty even harsher than the one-year minimum term prescribed by s. 85(3) was warranted where a firearm was used to commit robbery. Section 85’s text reinforces the conclusion that it served as the model for s. 344, considering the language of the two provisions is similar. Specifically, s. 85(1) refers to a “person . . . who uses a firearm . . . while committing an indictable offence”, while s. 344(1) applies where firearms are “used in the commission of [robbery]”.

[15] Given Parliament modelled s. 344 on s. 85, the “use” of a firearm ought to be defined consistently across ss. 344 and 85. In *R. v. Steele*, 2007 SCC 36, [2007] 3 S.C.R. 3, this Court observed that an offender “uses” a firearm within the meaning of s. 85(1) where the weapon is in the physical possession of the offender or readily at hand, *and* “to facilitate the commission of an offence or for purposes of escape, the offender reveals by words or conduct the *actual presence or immediate availability* of a firearm” (para. 32 (emphasis in original)).

[16] The requirement to “use” a firearm further narrows the scope of s. 344(1)(a)(i) and (a.1) and applies only where a firearm is used to threaten violence or force in a robbery. Mere possession of a firearm does not constitute “using” a firearm (*Steele*, at paras. 25-28). This precludes, for instance, the mandatory minimum sentences from applying where an offender merely possessed the firearm and was technically “armed” within the meaning of s. 343(d). Moreover, “use” implies a degree of subjective fault. The offender must intend to use the firearm while committing, or escaping after committing, the offence (*R. v. Purcell*, 2007 ONCA 101, 220 O.A.C. 207, at paras. 16-18).

[17] In addition, s. 344 incorporates the definition of a “firearm” in the *Criminal Code*, as well as the terms “prohibited firearm” and “restricted firearm”. A “firearm” is defined at s. 2 to mean “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”. “Prohibited firearms” and “restricted firearms” are two specific classes of

firearms subject to strict regulation under both the *Firearms Act* and the *Criminal Code*. Prohibited firearms include short-barrelled handguns, sawed-off rifles and shotguns, and automatic firearms (*Criminal Code*, s. 84(1); *Nur*, at para. 7). The possession of a prohibited firearm is unlawful, unless the individual possessed the firearm before the prohibition coming into force (*Firearms Act*, s. 12; *Nur*, at para. 7). Restricted firearms are “inherently dangerous and are commonly used in criminal activity”. They include any handgun that is not a prohibited firearm, some semi-automatic firearms, and some firearms that are less than a specified length (*Nur*, at para. 7; *Criminal Code*, s. 84(1)).

[18] Firearms that are neither prohibited nor restricted fall into a residual category of firearms that can be possessed with fewer constraints. This residual category includes ordinary firearms, like hunting rifles, that are subject to the licensing regime in the *Firearms Act*. Others are exempted from the *Firearms Act* under s. 84(3) of the *Criminal Code*, owing to their reduced muzzle velocity. Some exempted firearms include air-powered devices like paintball guns and BB guns. These air-powered devices constitute “firearms” within the meaning of the *Criminal Code* since they can still cause serious bodily injury (*Hills*, at paras. 13-14). The distinctions within Canada’s regulatory scheme for firearms underlie the arguments advanced by the parties before this Court on the constitutionality of the mandatory minimums.

[19] Having set out the legislative background of the mandatory minimum sentences at issue, I turn to the facts and judicial history that led to this appeal.

III. Judicial and Legislative History

A. *R. v. Hilbach*, Alberta Court of Queen's Bench, 2018 ABQB 526, 75 Alta. L.R. (6th) 359

[20] On June 9, 2017, Mr. Hilbach and a 13-year-old accomplice robbed a convenience store in Edmonton with an unloaded sawed-off rifle. With his face concealed, Mr. Hilbach pointed the rifle at two employees and demanded cash while his accomplice punched one employee and kicked the other. They left with \$290 in lottery tickets and were apprehended shortly after. At the time of the offence, Mr. Hilbach was 19 years old, on probation, and subject to a firearms prohibition order, having been convicted of and sentenced for several other offences 3 months earlier. In January 2018, Mr. Hilbach pleaded guilty to robbery using a prohibited firearm contrary to s. 344(1)(a)(i) of the *Criminal Code* and to violating s. 117.01(1) of the *Criminal Code*, which makes it an offence to possess a firearm while prohibited from doing so by a court order. At sentencing, Mr. Hilbach brought a challenge under s. 12 of the *Charter* to the five-year mandatory minimum sentence imposed pursuant to s. 344(1)(a)(i). Mr. Hilbach claimed the impugned provision was grossly disproportionate in his particular circumstances as an offender before the court.

[21] Mr. Hilbach is Indigenous. He is a member of the Ermineskin Cree Nation. Before the sentencing judge, Mr. Hilbach filed a pre-sentence report and *Gladue* report, which established that his family had a history of residential school attendance, struggled with addictions to alcohol or other substances, and suffered financial difficulties. He has a Grade 10 education, had worked in the construction industry, and was working with an organization for youth and young adults at risk of gang

involvement and criminal activity. He has a daughter, who was 18 months old at the time of sentencing. He acknowledged an alcohol addiction and a criminal record for several offences, including uttering threats, assault, mischief, and breaches of recognizance. His personal history is marked by physical abuse, family violence, chronic unemployment, and gang involvement.

[22] The sentencing judge decided that a fit and proportionate sentence for Mr. Hilbach was two years less a day. In assessing gross disproportionality, the sentencing judge concluded that while the gravity of the offence was high, and deterrence and denunciation were important, the effects of a five-year penitentiary sentence were “severe”, as a longer sentence increased the likelihood of “a life of criminal and other anti-social behaviour” (para. 14). Mr. Hilbach’s rehabilitation was best served with a short period of incarceration. Further, his youth was mitigating and *Gladue* factors contributed to the offence. The most basic was Mr. Hilbach’s poverty, which prompted his actions and related to systemic factors that led to lower incomes among Indigenous peoples. The sentencing judge was satisfied these considerations would justify a sentence less than the three-year starting point established by the Alberta Court of Appeal for unsophisticated armed robbery for commercial outlets in *R. v. Johnas* (1982), 41 A.R. 183. Since a five-year sentence was more than double a fit and proportionate sentence, and because a penitentiary sentence was “qualitatively” different, he concluded that the mandatory minimum sentence was grossly disproportionate (para. 43). The Crown made no argument under s. 1 of the *Charter*, so the sentencing judge declined to consider it (para. 5).

B. *R. v. Zwozdesky, Alberta Court of Queen's Bench, 2019 ABQB 322, 95 Alta. L.R. (6th) 386*

[23] On September 13, 2016, Mr. Zwozdesky and two masked accomplices robbed a convenience store in Caslan, Alberta. One of the accomplices pushed an employee, pointed a sawed-off shotgun at her, and demanded cash. A shot was fired into a shelf. Mr. Zwozdesky was not the principal offender. He did not enter the store during the robbery, but drove the vehicle that brought his accomplices to and from the store. Mr. Zwozdesky pleaded guilty to robbery with a firearm contrary to s. 344(1)(a.1) of the *Criminal Code*, as well as a charge of robbery contrary to s. 344(1)(b) of the *Criminal Code* arising from a second incident. At sentencing, Mr. Zwozdesky brought a challenge under s. 12 of the *Charter* to the four-year mandatory minimum sentence in s. 344(1)(a.1).

[24] Mr. Zwozdesky was almost 56 years old at sentencing. He had a Grade 9 education and no criminal record. He was injured in several motor vehicle accidents, the last significant one having occurred in 2000. As a result, he suffered severe post-traumatic cognitive dysfunction, fibromyalgia, nerve damage and chronic pain and was incapable of working. To manage his pain, he relied on prescription drugs, along with hard and soft illegal drugs. He had no memory of the robbery on September 13, 2016, as he was under the influence of drugs. The sentencing judge found he may have participated in the robberies to support his addictions that resulted from chronic pain.

[25] The sentencing judge concluded that the impugned mandatory minimum sentence was not grossly disproportionate for Mr. Zwozdesky, since a sentence of three to four years was fit and proportionate for his offence. She went on to conclude, however, that the mandatory minimum sentence was grossly disproportionate in reasonably foreseeable hypothetical scenarios. Armed robberies could be committed in a wide variety of circumstances and by a wide range of offenders. The minimum sentence could be grossly disproportionate where offenders were young, Indigenous and/or suffering from addiction issues. In support of this conclusion, the sentencing judge referenced *R. v. Hilbach*, 2018 ABQB 526. As the Crown made no submissions under s. 1 of the *Charter*, the sentencing judge declined to consider whether the infringement was justified in a democratic and free society and declared s. 344(1)(a.1) of no force and effect. Having struck down the mandatory minimum sentencing provision, she sentenced Mr. Zwozdesky to three years' imprisonment for robbery with a firearm.

C. *Alberta Court of Appeal*, 2020 ABCA 332, 14 Alta. L.R. (7th) 245

[26] The Alberta Court of Appeal heard the Crown's appeals in Mr. Hilbach's and Mr. Zwozdesky's cases together. The majority, Strekaf and Feehan JJ.A., dismissed the Crown's appeals on the constitutionality of the mandatory minimum sentence provisions, but added a year to Mr. Hilbach's sentence. Wakeling J.A. wrote in dissent, concluding that both mandatory minimum sentence provisions were constitutional and the sentences imposed on each offender were inadequate.

[27] The majority concluded that a sentence of two years less a day was demonstrably unfit for Mr. Hilbach and instead concluded three years' imprisonment was a fit and proportionate sentence. Three years was the starting point for convenience store robberies established in *Johnas*, and a sentence of this length suited the gravity of Mr. Hilbach's offence. In going below three years' imprisonment, the sentencing judge had overemphasized Mr. Hilbach's *Gladue* factors and placed insufficient weight on deterrence and denunciation, as well as the offence's aggravating factors. However, s. 344(1)(a)(i) was still grossly disproportionate in Mr. Hilbach's case, as it precluded considering mitigating factors and elevated "denunciation and deterrence to such an extent as to minimize objectives of rehabilitation, the imposition of a just sanction, and special considerations for Indigenous offenders" (para. 53).

[28] The majority agreed with the sentencing judge that three years' imprisonment was a fit and proportionate sentence for Mr. Zwozdesky and declined to interfere with his sentence as a result. The majority, however, also agreed s. 344(1)(a.1) was grossly disproportionate in five reasonably foreseeable scenarios, including where the offender was young, Indigenous, suffering from mental health issues and addiction, and committed the robbery with an air-powered pistol. In these scenarios, the mandatory minimum might be more than double a fit and proportionate sentence. The Crown did not advance an argument to save the legislation under s. 1 of the *Charter*.

[29] Wakeling J.A. in dissent would have set aside the declarations that ss. 344(1)(a)(i) and 344(1)(a.1) are grossly disproportionate. Wakeling J.A. reiterated

his view, expressed in *R. v. Hills*, 2020 ABCA 263, 9 Alta. L.R. (7th) 226, that this Court's s. 12 jurisprudence is unsound and ought to be revisited. Even so, Wakeling J.A. noted that these are not "one of those extraordinary cases" (para. 89) that satisfies the test for gross disproportionality developed in *Smith*. Wakeling J.A. would have also increased Mr. Hilbach's and Mr. Zwozdesky's sentences beyond the mandatory minimums.

[30] In September 2021, Mr. Zwozdesky passed away after the Court granted leave to the Crown to appeal. After Mr. Zwozdesky's counsel applied to continue the appeal pursuant to s. 76 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, the Court granted standing to his counsel to appear as *amici curiae* under r. 92 of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

D. *Legislative Amendments*

[31] 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, and repealed the mandatory minimum sentence prescribed in s. 344(1)(a.1). When an ordinary firearm is used to commit robbery, it no longer attracts a mandatory minimum. While I acknowledge this legislative change, these reasons examine the provision as previously enacted with the applicable mandatory minimum terms. The parties do not rely on Parliament's choice to repeal this measure in their arguments and as such, I will not address this issue further.

IV. Issue

[32] The issue on this appeal is whether the mandatory minimum terms of imprisonment prescribed in s. 344(1)(a)(i) and (a.1) of the *Criminal Code* infringe s. 12 of the *Charter*.

V. Analysis

[33] In the reasons for judgment in *Hills*, rendered simultaneously with this case, this Court reiterated the well-established s. 12 framework and provided further clarity as to how it applies in respect of a challenge to a mandatory minimum sentence provision. I begin with a brief restatement of those principles before applying those principles in this appeal.

A. *The Test for an Infringement of Section 12*

(1) The Framework

[34] Determining whether the mandatory minimum sentences for robbery are grossly disproportionate requires a two-stage inquiry. A court must first determine a fit and proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code* (*Hills*, at para. 40; *R. v. Bissonnette*, 2022 SCC 23, at para. 63; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 46; *Nur*, at para. 46). The court must then ask whether the impugned provision requires it

to impose a sentence that is grossly disproportionate when compared to the fit and proportionate sentence (*Hills*, at para. 40; *Bissonnette*, at para. 63; *Nur*, at para. 46; *Smith*, at p. 1072). This two-part assessment may proceed on the basis of either (1) the actual offender before the court, as it will for Mr. Hilbach, or (2) another offender in a reasonably foreseeable case, as proposed by Mr. Zwozdesky (*Hills*, at para. 41; *Bissonnette*, at para. 63; *Nur*, at para. 46).

[35] At both stages of the analysis, courts are called upon to be scrupulous (*Hills*, at paras. 50-52). Analytical rigour at the first stage, and fixing as specific a sentence as possible, ensures that the comparative exercise at the second stage is not distorted. In some cases, the evaluation of gross disproportionality may be more apparent where the fit sentence fixed at the first stage is not carceral in nature — for example, where it would have involved probation rather than imprisonment as was the case in *Hills* (para. 156). But the same principled process of comparison applies when comparing terms of imprisonment to determine if and when the length of a carceral sentence becomes grossly disproportionate.

[36] The framework for the second stage of the s. 12 analysis is outlined in the companion case, *Hills*, beginning at para. 122, and involves consideration of the scope and reach of the offence, the effects on the offender, and the penalty. Either one component alone or the combination of multiple components may lead to a finding of gross disproportionality. Mandatory minimum penalties that capture a range of conduct of varying gravity and differing levels of offender culpability will be constitutionally

suspect (*Hills*, at para. 125; *Lloyd*, at para. 24; *Boudreault*, at para. 45; *Smith*, at p. 1078). The broader the scope of the offence, the more likely the mandatory minimum may prescribe a grossly disproportionate term of imprisonment on conduct that involves low risk to public safety and low moral culpability (*Hills*, at para. 125; *Nur*, at para. 83). In these circumstances, the minimum penalty is more likely to capture conduct that is grossly disproportionate.

[37] At the second component, courts must also take into account the impacts that the mandatory minimum may have on the individual offender. This analysis requires an inquiry into how the punishment may affect the actual or reasonably foreseeable offender — both generally and based on their specific characteristics and qualities (*Hills*, at para. 133). Offender characteristics including Indigeneity, race, gender, age and mental health factors may be relevant to this component (*Hills*, at para. 135).

[38] The third component requires an analysis of the penalty imposed under the mandatory minimum (*Hills*, at para. 138). Courts must assess the severity of the sentence imposed and ask whether the prescribed penalty goes beyond what is necessary to achieve Parliament’s sentencing objectives “having regard to the legitimate purposes of punishment and the adequacy of possible alternatives” (*Smith*, at pp. 1099-1100). Parliament may mandate sentences according to its punishment objectives, including those of denunciation and deterrence, within constitutional limits. However, no individual sentencing objective can be applied to the exclusion of all

others (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43). Rehabilitation must form part of the calculus of all criminal punishment, as a punishment that completely disregards rehabilitation is incompatible with human dignity (*Bissonnette*, at para. 85; *Hills*, at para. 141). Courts should examine whether there are alternatives to the mandatory penalty that would also fulfill Parliament’s sentencing objectives. Where a mandatory minimum provides no discretion to impose a sentence other than imprisonment where imprisonment is not required, the penalty will be constitutionally suspect and require careful scrutiny (*Hills*, at para. 144). All punishment should be considered in light of the principles of parity and proportionality (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paras. 32-33; *Hills*, at para. 145).

(2) Mandatory Minimum Sentences and Indigenous Offenders

[39] Section 718.2(e) of the *Criminal Code* provides mandatory direction to consider the unique situation of Indigenous offenders for all offences in sentencing (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 93; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 84-85). It directs that “all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” The principles relating to the consideration of *Gladue* reports are settled: these considerations must be applied in all cases where they are relevant, including where the offence charged is serious. Sentencing judges must consider the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the

courts and the types of sentencing procedures and sanctions which may be appropriate in the circumstances for that offender (*Ipeelee*, at paras. 59-60).

[40] Certain parties and interveners raised questions regarding the way Indigeneity should factor into the s. 12 analysis of gross disproportionality. The Attorney General of Ontario, for instance, submitted that it should be treated as a “generic” mitigating circumstance that is excluded from the scope of reasonable hypotheticals. These arguments were rejected in *Nur* when the Court found “the 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).

[41] When engaged, s. 718.2(e) applies at three different parts of the analysis.

[42] First, in conducting a s. 12 analysis, courts must consider *Gladue* when sentencing the individual offender. The failure to consider *Gladue* factors is an error that can lead to a finding that a sentence is unfit (*Ipeelee*, at paras. 86-87). Hence, where the offender is Indigenous, like Mr. Hilbach, a court will necessarily need to take into account *Gladue* principles in order to fix a sentence that is fit and proportionate at the first stage.

[43] Second, a court may consider scenarios involving Indigenous offenders in crafting reasonably foreseeable hypotheticals (*Hills*, at para. 86). Given the statistics concerning the imprisonment of Indigenous persons, it is reasonably foreseeable that a

hypothetical offender could be Indigenous, and the consideration of a hypothetical offender's Indigeneity, in the context of a reasonable hypothetical scenario, aligns with the imperative statutory guidance provided by Parliament in s. 718.2(e). Indigenous people dealing with poverty, precarious housing, or disabilities and addictions appear with "staggering regularity in our provincial courts" and are therefore reasonably foreseeable (*Boudreault*, at para. 55).

[44] Lastly, Indigeneity is relevant at the second stage of the s. 12 inquiry. This Court has long affirmed that the assessment of whether a mandatory minimum sentence is grossly disproportionate depends, in part, on its reflection of valid penal purposes and recognized sentencing principles (*Boudreault*, at para. 48; *Smith*, at p. 1072; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 500; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at para. 86; *Morrissey*, at para. 28). *Gladue*'s framework for applying s. 718.2(e) has been a core part of Canada's sentencing principles since 1999. The methodology called for under s. 718.2(e), as well as the norms it embodies, are well-established components of our sentencing jurisprudence, as much as parity and proportionality. Section 718.2(e) is necessarily relevant in a s. 12 framework that requires courts to assess the effects of mandatory minimum sentences in light of sentencing norms and objectives. Moreover, as *Boudreault* illustrates, the impact of a punishment on Parliament's objectives in s. 718.2(e) can support striking down a sentencing measure under s. 12. Accordingly, there is no reason to exclude consideration of s. 718.2(e) of the *Criminal Code* from either stage of the gross disproportionality framework.

[45] The types of considerations that may be raised under s. 718.2(e) in a s. 12 challenge to a mandatory minimum sentence include, for instance, whether a probationary sentence would have otherwise been a valid alternative to incarceration as a result of *Gladue* principles. Or, as in *Boudreault*, the effects of a sentencing measure may be particularly severe when circumstances affecting Indigenous offenders are considered (para. 94). This Court has identified, for instance, that Indigenous offenders may be more adversely affected by incarceration than non-Indigenous offenders (*Gladue*, at para. 68). Courts may identify these concerns as grounds that support the conclusion that a minimum sentence is grossly disproportionate, keeping in mind that a breach of s. 12 remains a high threshold to meet and a punishment is not grossly disproportionate due to the presence or absence of a single sentencing principle.

[46] I turn now to Mr. Hilbach’s and Mr. Zwozdesky’s s. 12 challenges.

B. *Application*

[47] I first address Mr. Hilbach’s appeal, in which he argues that s. 344(1)(a)(i) is grossly disproportionate as it concerns his own actual circumstances. I will then turn to Mr. Zwozdesky, who concedes the proportionality of the mandatory minimum sentence imposed by s. 344(1)(a.1) as it applies to his case, but relies on a set of hypotheticals to challenge the mandatory minimum sentence provision.

(1) Application to Mr. Hilbach’s Case

[48] The Crown submits that the Court of Appeal majority erred in concluding s. 344(1)(a)(i) was grossly disproportionate in Mr. Hilbach's case, as they overlooked the gravity of Mr. Hilbach's offence and failed to recognize deterrence and denunciation were valid penal goals as a result. I agree. The mandatory minimum sentence as applied to Mr. Hilbach is a harsh punishment. However, upon consideration of (1) the scope and reach of the offence; (2) the effects of the punishment on the offender; and (3) the penalty, I am not satisfied the mandatory minimum reaches the high threshold of gross disproportionality.

(a) *Three Years' Imprisonment Is a Fit and Proportionate Sentence for Mr. Hilbach*

[49] The Court of Appeal majority overturned the sentencing judge's sentence of two years less a day and instead concluded that a fit sentence for Mr. Hilbach was three years' imprisonment. Neither party challenges the Court of Appeal's finding that a three-year sentence is a fit and proportionate sentence for Mr. Hilbach. No reasonable hypothetical was proffered at first instance, and we need not create one here. The s. 12 analysis will proceed based solely on the facts of Mr. Hilbach's case.

[50] By imposing a sentence that was a full year below the starting point for offences of this nature in Alberta, the sentencing judge failed to adequately weigh the gravity of the offence and the significant aggravating factors in this case. As the majority stated (at paras. 11 and 46), three years' imprisonment was the starting point adopted for an unsophisticated armed robbery of small commercial establishments

“with modest or no success” and “in the absence of actual physical harm” recognized in *Johnas*, at para. 19 (emphasis added). Mr. Hilbach’s offence not only involved a prohibited firearm, but also resulted in physical harm as his accomplice was physically violent with both store clerks in the course of the robbery. Moreover, Mr. Hilbach pointed the rifle at two employees. He was on probation and was subject to a prohibition order at the time of the offence. He also involved a 13-year-old youth in a violent crime. These are aggravating factors that could support a sentence above the starting point in *Johnas*. While I accept the mitigating factors identified by the sentencing judge, I agree with the Court of Appeal majority that a sentence that is a full year below the starting point in *Johnas* would be demonstrably unfit.

(b) *The Mandatory Minimum Is Not Grossly Disproportionate in Mr. Hilbach’s Case*

[51] This Court has repeatedly affirmed that the threshold for establishing a grossly disproportionate sentence under s. 12 is high (*Lloyd*, at para. 24). The mandatory minimum sentence must be more than merely excessive, unfit or disproportionate. It must be “so excessive as to outrage standards of decency” (*Hills*, at para. 109, citing *Boudreault*, at para. 45; *Lloyd*, at para. 24, citing *Morrissey*, at para. 26; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 4, citing *Smith*, at p. 1072). 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 v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417). As I explain below, a mandatory minimum of five years, while harsh and close to the line, is not grossly disproportionate in Mr. Hilbach’s case. The

minimum sentence at issue is not so wide that it encompasses conduct that poses relatively little risk of harm. Though Mr. Hilbach's personal circumstances attenuate his culpability somewhat, his actions constitute a grave offence with high moral blameworthiness. While the effects of imprisonment on Mr. Hilbach, an Indigenous offender, will be severe, five years' imprisonment in his case is not totally out of sync with sentencing norms. As a result, proportionality and parity are not compromised to the extent seen in *Nur*, *Lloyd* and *Hills*. Parliament's sentencing objectives and decision to prioritize denunciation and deterrence is justified for this offence. Greater deference to Parliament's choice to enact a minimum sentence is therefore warranted.

(i) The Scope and Reach of the Offence

[52] As this Court has repeatedly affirmed, mandatory minimum sentences are more vulnerable constitutionally where they apply to a wide range of circumstances (*Nur*, at paras. 81-82; *Lloyd*, at paras. 3, 24, 27 and 35-36). The wider the scope of the offence subject to the minimum sentence, the more likely there is a circumstance where the minimum will impose a lengthy term of imprisonment on conduct that involves little risk to the public and little moral fault (*Hills*, at para. 125; *Nur*, at para. 83). Thus, a court should consider the variation in the offence's gravity and the culpability involved and consider whether the sentence captures conduct that does not merit the mandatory minimum.

[53] Here, the robbery offence does not cast too broad of a net as to capture conduct that carries low moral fault or little risk to public safety. The gravity of the

offence and the culpability of offenders convicted of it is relatively high. To start, even when committed without a firearm, robbery is a serious offence based on the requisite *actus reus* of the use or threat of violence or force in stealing or attempting to steal property. Adding a firearm to the equation simply increases the gravity of the offence. Further, mere possession of the firearm is not sufficient for conviction. The offender must *use* the firearm in the commission of the offence. As this Court wrote in *R. v. Felawka*, [1993] 4 S.C.R. 199, when a firearm is used to threaten or intimidate, it “presents the ultimate threat of death to those in its presence” (p. 211). Prohibited firearms are among the most potent tools in the commission of crime. For example, sawed-off rifles are capable of deadly force, while being easier to conceal, transport, and maneuver in close quarters, like convenience stores.

[54] The harmful consequences of using a restricted or prohibited firearm in a robbery are readily identified. There is the risk of death or life-altering physical injury for victims and bystanders if the weapon is discharged. Even if the weapon is not fired, exposure to this threat carries the risk of profound psychological harm. It can be expected that store clerks who are victims of offences like the one perpetrated by Mr. Hilbach will suffer psychological harm. In *R. v. Al-Isawi*, 2017 BCCA 163, 348 C.C.C. (3d) 524, the accused used an imitation firearm to rob 10 small pharmacies and was convicted of 10 counts of robbery pursuant to s. 85(2) of the *Criminal Code*. Five of the victims reported feelings of hypervigilance, trauma and fear for their personal safety (para. 29). Beyond the immediate threats to victims, there are wider risks to the community. Wielding a firearm in a store can reasonably provoke force in response,

either by police responding to the robbery in progress or bystanders who attempt to intervene. The risk of escalating violence is, as a result, acute.

[55] The use of an unloaded prohibited firearm does not substantially reduce the offence's gravity. The presence of a firearm, even an unloaded one, "*in and of itself* creates a highly volatile and dangerous situation" (*Al-Isawi*, at para. 57 (emphasis in original)). A loaded firearm can easily be mistaken for an unloaded firearm, not least by the offenders themselves. A sentencing discount for wielding unloaded firearms also overlooks the very real risk of an offender accidentally discharging a firearm the offender believed was unloaded. It also, for practical reasons, overlooks the difficulty of proving whether or not a firearm was loaded, even if the firearm in use was recovered. Moreover, an unloaded firearm is used for the same reason as a loaded firearm: to instill "the ultimate threat of death to those in its presence" (*Felawka*, at p. 211). Victims of robbery offences do not know whether the firearm is loaded or unloaded. The same is true for bystanders or police responding to robberies (*R. v. Stewart*, 2010 BCCA 153, 253 C.C.C. (3d) 301, at para. 37; *R. v. Uniat*, 2015 ONCA 197, at para. 5 (CanLII)). Regardless of whether the firearm is capable of deadly force at the time of the offence, "[t]he use of a firearm in the commission of a crime exacerbates its terrorizing effects, whether the firearm is real or a mere imitation. Indeed, they share that very purpose" (*Steele*, at para. 23). The psychological trauma involved in a robbery with an unloaded firearm is therefore comparable to a robbery with a loaded one (*R. v. Breese*, 2021 ONSC 1611, at para. 34 (CanLII); *R. v. John*, 2016 ONSC 396, at para. 27 (CanLII); *R. v. Stoddart*, [2005] O.J. No. 6076 (QL), 2005

CarswellOnt 6523 (WL) (S.C.J.), at para. 6, *aff'd* 2007 ONCA 139, 221 O.A.C. 108; *R. v. Asif*, 2020 ONSC 1403, at para. 40 (CanLII); *R. v. Charley*, 2019 ONSC 6490, at para. 45 (CanLII)). So too is the risk of escalating violence.

[56] The mental elements required for the minimum to apply suggest a relatively high degree of culpability. An offender who commits robbery with a restricted or prohibited firearm must intend to steal *and* intend to “use” violence or force (or the threat thereof). A conscious *choice* must be made to employ violence or force. For the mandatory minimum sentence to apply, that choice extends to the decision to use a particular firearm to commit the offence — the offender must *intend* to employ the weapon. The offence does not involve an inadvertent decision to put public safety at risk but a conscious choice to put another person’s safety at great risk.

[57] There is some breadth to the offence. At the high end of the spectrum, s. 344(1)(a) captures, for example, offenders who organize elaborate, coordinated robberies on large institutions using automatic weaponry and cause serious injuries or death. On the low end of the spectrum, the section captures individuals like Mr. Hilbach, conducting unsophisticated hits on gas stations using unloaded prohibited firearms. This range in gravity and levels of culpability are appropriately reflected in differing sentencing outcomes above the minimum. However, the thread that connects each case is the intent to both steal and to benefit from the deep terror that comes with the threat of a firearm at a proximate range. In each case, the offender uses a firearm to induce fear for their victim in service of their own benefit. While the individual

circumstances of the accused and the motivations for their conduct vary, these two elements remain constant. It is this specificity of conduct that Justice Proulx referred to in *Lapierre*, which aggravates the offence and subjects offenders to this minimum (p. 344).

[58] Unlike the hypotheticals considered in *Nur*, individuals who offend s. 344(1)(a) commit “true crime[s]” (*R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, at paras. 205-6, aff’d 2015 SCC 15, [2015] 1 S.C.R. 773). It is not the case that the offence involves little or no moral fault and little or no danger to the public (*Nur*, at paras. 82-83). Individuals found guilty under this section are not akin to the hypothetical proffered in *Smith*, of a young person caught with their first “joint of grass” on their way home to Canada (p. 1053). Unlike the hypothetical scenario relied upon to invalidate the provision at issue in *Hills* — namely, a situation involving a young person using a paintball gun that *could not perforate* the wall of a typical residence — there is no removing the immediacy of personal threat that is inherent to the offence. The nature and scope of the offence requires the presence of victims. Indeed, there are two real victims of Mr. Hilbach’s offence. For this reason, it has not been demonstrated that this mandatory minimum is so wide that it extends to circumstances that pose relatively little risk of harm (as in *Smith*, *Nur*, *Lloyd* or *Hills*).

(ii) The Effects of the Penalty on the Offender

[59] The second component requires courts to consider the effects of the mandatory penalty on the particular offender. If it inflicts mental pain and suffering on

an offender through degrading and dehumanizing treatment or punishment, the punishment is constitutionally vulnerable to the extent that the offender's dignity is undermined (*Hills*, at para. 133; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at para. 51).

[60] In assessing the effects — and therefore the impact — that flow from the prescribed sentence on the actual or hypothetical offender, a court should consider the additional years of imprisonment imposed by the mandatory minimum sentence. Section 12, however, involves a contextual analysis and there is no hard number above or below which a sentence becomes grossly disproportionate. A court may consider the conditions experienced by the offender in serving the mandatory sentence, including whether the mandatory minimum sentence substitutes imprisonment for a probationary sentence, as well as any characteristics or circumstances that enhance the severity of the punishment in the offender's case (*Hills*, at para. 133). It bears repeating that the focus is on the sentence, not the possible availability of parole into the assessment of a minimum's effects (*Hills*, at para. 104, citing *Bissonnette*, at paras. 37 and 41, and *Nur*, at para. 98).

[61] The sentencing judge identified two significant effects. At five years, the mandatory minimum sentence was more than double a fit and proportionate sentence. The sentence was also qualitatively worse, given it was to be served in a penitentiary.

[62] I accept the sentencing judge's conclusion that the effects of the five-year mandatory minimum sentence are "severe" in Mr. Hilbach's case. A five-year term of

imprisonment would have detrimental implications for Mr. Hilbach's rehabilitation, given the sentencing judge's finding that a penitentiary term increased the likelihood that Mr. Hilbach would re-entrench in gang involvement. It is reasonable in this case to conclude that a five-year mandatory minimum sentence is relatively more severe and, like many Indigenous offenders, Mr. Hilbach would serve harder time as a result (*Gladue*, at para. 68). Indigenous offenders are more severely affected by incarceration and are often treated in discriminatory ways in custodial environments. Indigenous people are more likely to experience use-of-force incidents in federal penitentiaries and are provided limited access to culturally appropriate programming (Office of the Correctional Investigator, *Annual Report 2021-2022* (2022)). Further, incarceration itself is often a culturally inappropriate consequence for wrongdoing for Indigenous offenders (*Gladue*, at para. 68).

[63] These considerations ultimately support the conclusion that a *fit and proportionate* sentence would fall below the mandatory minimum sentence, notwithstanding the serious violence involved in his offence. Assessed from a purely quantitative standpoint, additional imprisonment beyond a fit and proportionate sentence is not negligible. Indeed, this Court in *Lloyd* struck down a mandatory minimum sentence of one year's imprisonment (para. 6). No one would reasonably volunteer for an extra year or two years in jail beyond what a judge considers just as such additional periods of incarceration will result in significant hardship for an offender and their loved ones. These effects must therefore carry significant weight.

(iii) The Penalty and Its Objectives

[64] In this component, courts must first consider which sentencing objectives Parliament prioritized in enacting the mandatory minimum penalty and, second, assess whether the minimum sentence goes beyond what is necessary for Parliament to achieve its objectives (*Hills*, at para. 138). Denunciation and deterrence are established sentencing principles that Parliament may use to demonstrate the state’s disapproval of serious offences (*Hills*, at para. 139). While forms of punishment that completely disregard rehabilitation are incompatible with human dignity and violate s. 12 (*Bissonnette*, at para. 85), no single sentencing objective can be applied to the exclusion of all others (*Nasogaluak*, at para. 43).

[65] So long as Parliament does not completely exclude rehabilitation from its calculus, the legislature may justifiably prioritize some objectives, like denunciation and deterrence, over others in enacting a minimum sentence. Denunciatory sentences express a “collective statement that the offender’s conduct should be punished for encroaching on our society’s basic code of values” (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81). Where the consequences of the offences clearly offend Canadians’ “basic code of values” and call for strong condemnation, this Court has afforded Parliament greater deference in enacting a mandatory minimum sentence that prioritizes denunciation (*Hills*, at para. 139, citing *Morrissey*, at para. 47). The need for denunciation is closely tied to the gravity of the offence (*Hills*, at para. 139, citing *Ipeelee*, at para. 37). Likewise, while deterrence cannot prevent a mandatory minimum

sentence from being cruel and unusual on its own, it can “support a sentence which is more severe while still within the range of punishments that are not cruel and unusual” (*Morrissey*, at para. 45).

[66] That said, deterrence and denunciation cannot be prioritized at all costs. Such an approach would justify sentences of unlimited length (*Hills*, at para. 140). Consequently, in assessing the mandatory minimum sentence’s valid penal purpose and its respect for sentencing objectives, a court should consider the extent to which the impugned sentence adheres to principles of proportionality and parity (*Hills*, at para. 145).

[67] Parity requires that a sentence “be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances” (s. 718.2(b)). Sentencing ranges and starting points are useful tools in assessing proportionality and parity as they reflect judicial consensus on an offence’s gravity and help reduce substantial disparities in sentencing (*R. v. Parranto*, 2021 SCC 46, at para. 20, citing *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 2). Mandatory minimum sentences, as well as the range of sentences set out by Parliament, for similar offences may also assist in this inquiry.

[68] In this case, the sentencing judge recognized that while deterrence and denunciation were important considerations, the mandatory minimum sentence put far too great an emphasis on these goals over rehabilitation and *Gladue* considerations.

The Court of Appeal majority agreed, drawing an analogy to mandatory victim surcharges in *Boudreault*.

[69] Both the sentencing judge and the Court of Appeal majority erred in concluding there was no valid penal purpose in this case. Mandatory minimum sentences, by their nature, emphasize deterrence, denunciation, and retribution over rehabilitation and other sentencing purposes (*Nur*, at para. 44). The question, therefore, is not simply whether the minimum sentence prioritizes these purposes. Instead, a court should consider whether the extent to which Parliament chose to prioritize denunciation and deterrence in setting the penalty is justified. In Mr. Hilbach’s case, Parliament’s decision to prioritize denunciation and deterrence is justifiable.

[70] As noted, the need for denunciation is closely tied to the gravity of the offence and the need to communicate our society’s condemnation of acts that infringe our basic moral values (*M. (C.A.)*, at para. 81; *Ipeelee*, at para. 37). Parliament is afforded deference in enacting denunciatory mandatory minimums where conduct, like robbing an individual at gunpoint, clearly offends our most basic values.

[71] In this case, the mandatory minimum sentence captures conduct that clearly warrants deterrence and the strong denunciation that a substantial prison sentence signals. As the sentencing judge acknowledged, denunciation and deterrence were “important” considerations in Mr. Hilbach’s case, given the gravity of the offence (para. 20). The use of a restricted or prohibited firearm in a robbery poses grave risk to public safety. As this Court wrote in *Morrissey*, Parliament is entitled to enact

mandatory minimum sentences that signal that a disregard for the life and safety of others in handling firearms is “simply not acceptable” (para. 47 (emphasis in original)). The mandatory minimum sentence therefore applies to a category of conduct that calls for strong condemnation.

[72] General deterrence also has a role here. As this Court recognized in *Morrissey*, “[i]t cannot be disputed that there is a need for general deterrence” when a person endangers the safety of others in wielding a firearm (para. 46). Like the mandatory minimum sentence in that case, this minimum sentence “dictates that those who pick up a gun must exercise care when handling it” (*Morrissey*, at para. 46). While *Smith* notes there may be little need to punish the “small” offender in order to deter the serious offender (at p. 1080), there are no “small” offenders in the way this Court conceived in *Nur*, *Smith*, and *Lloyd*. Mr. Hilbach’s actions, for example, are precisely the conduct that Parliament sought to deter. Consequently, short of cruel and unusual punishment, general deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual (*Morrissey*, at para. 45; *Nur*, at para. 45).

[73] My conclusion that Parliament was entitled to prioritize deterrence and denunciation here is consistent with the sentencing jurisprudence on robbery, which bears out the importance of these purposes in sentencing for this offence (C. C. Ruby, *Sentencing* (10th ed. 2020), at §23.494). It is also compatible with the greater emphasis on these purposes by courts in sentencing where a firearm is used to commit acts of

interpersonal violence (see, e.g., *R. v. Jones*, 2012 ONCA 609, at para. 12 (CanLII); *R. v. Maytwayashing*, 2018 MBCA 36, at para. 40 (CanLII); *R. v. Agin*, 2018 BCCA 133, 361 C.C.C. (3d) 258, at para. 67; *R. v. D. (Q.)* (2005), 199 C.C.C. (3d) 490 (Ont. C.A.), at para. 78; *R. v. Marshall*, 2015 ONCA 692, 340 O.A.C. 201, at para. 49; *R. v. Bellissimo*, 2009 ONCA 49, at para. 5 (CanLII); *R. v. Brown*, 2010 ONCA 745, 277 O.A.C. 233, at paras. 13-14). In this context, courts have emphasized the need for denunciation and deterrence both to convey our society's abhorrence of gun violence and to communicate to potential offenders that a significant sentence accompanies the use of a gun to commit violence (*D. (Q.)*, at paras. 77-78; *Jones*, at para. 12; *R. v. Mark*, 2018 ONSC 447, at para. 24 (CanLII); *R. v. Thavakularatnam*, 2018 ONSC 2380, at para. 21 (CanLII)).

[74] In the case of offenders like Mr. Hilbach, with reduced moral culpability due to, for example, developmental delays or a substance use disorder, the five-year mandatory minimum may exceed what is necessary to achieve Parliament's sentencing objectives (*Hills*, at para. 138). In Mr. Hilbach's case, a five-year minimum term in custody is a harsh punishment considering his personal circumstances.

[75] Nevertheless, the sentencing judge overlooked that this case is distinguishable from *Nur*, *Smith* and *Lloyd* insofar as a substantial carceral sentence is a proportionate sentence in Mr. Hilbach's case. Indeed, as noted, the defence does not challenge that three years' imprisonment is a fit sentence. Thus, unlike *Nur*, *Smith* and *Lloyd*, the mandatory minimum sentence here does not impose a lengthy term of

imprisonment, the punishment of “last resort”, when such a sentence would not otherwise be possible, or even common. Mandatory minimum sentences are necessarily more vulnerable when they replace a probationary sentence with lengthy prison terms. While it nevertheless remains important to compare two sentences involving long terms of imprisonment, it can be more difficult to establish gross disproportionality in this scenario than those at issue in *Nur* and *Lloyd*.

[76] The mandatory minimum sentence for robbery with a restricted or prohibited firearm in Mr. Hilbach’s case is not totally out of sync with sentencing norms for an offence of this nature. To begin, sentences below two years’ imprisonment are relatively rare for robbery, which has no mandatory minimum sentence where it is committed with no weapon or a weapon other than a gun (Ruby, at §23.498). Where a weapon (other than a gun) is used in robberies of commercial establishments, as is the case here, the low end falls in the one-to-two-year range, with a mid-range between three and five years, and a high end of around eight years (Ruby, at §§23.521, 23.528 and 23.532). Even without a mandatory minimum sentence, the sentencing range for robbery with a restricted or prohibited firearm would skew higher, since the use of such a dangerous weapon is an aggravating factor. Thus, while a five-year mandatory minimum arguably sits above what Mr. Hilbach would receive and the low end that would likely otherwise develop, the minimum does not far exceed what is necessary for Parliament to achieve its sentencing objectives.

[77] Thus, Mr. Hilbach’s case does not show the mandatory minimum sentence departs from the principle of parity to the same extent as the minimums in *Smith*, *Nur*, *Lloyd* and *Hills*. As noted, substantial, multi-year carceral sentences are the norm for this offence. This distinguishes this case from *Nur*, where the mandatory minimum sentence at issue imposed three-year prison terms for what were essentially licensing infractions, a result that was “totally out of sync” with sentencing practices for licensing offences (para. 83). It cannot be said that, as in *Nur*, there is a “cavernous disconnect” between the mandatory minimum and Mr. Hilbach’s conduct (para. 83). Given the relationship between parity and proportionality, this supports a finding that the minimum sentence in this case is not grossly disproportionate.

[78] Moreover, the mandatory minimum sentence here is not wholly analogous to the mandatory victim surcharges considered in *Boudreault*. In that case, the penal purpose of mandatory victim surcharges was to raise funds for victim services and increase the accountability of offenders to individual victims and the community generally (para. 62). Neither penal purpose was likely to be realized for impecunious or impoverished offenders, who had no funds to spare (para. 63). Here, the penal purposes associated with the mandatory minimum are not unlikely to be realized, given Mr. Hilbach’s conduct is precisely what Parliament intended to denounce and deter. Moreover, proportionality and parity were compromised to a greater extent in *Boudreault*, since the surcharges effectively imposed indeterminate sentences on impecunious offenders, although such punishment is reserved only for Canada’s worst

offenders (para. 79). The minimum here is more in line with sentencing norms for an offence of this nature.

[79] That said, as in *Boudreault*, the minimum does not advance Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison, embodied in s. 718.2(e). Nor does it promote the objective of rehabilitation. A sentence that undermines Mr. Hilbach's ability to avoid gang life, and increases the likelihood of his recidivism as a result, does not foster rehabilitation. Though the minimum sentence may not aid Mr. Hilbach's rehabilitation, I do not find that the minimum completely disregards rehabilitation as a sentencing principle (*Hills*, at para. 34). Parliament has not selected a minimum punishment that prioritizes denunciation and deterrence to the exclusion of rehabilitation in Mr. Hilbach's case.

[80] Despite its effect viewed through the lens of s. 718.2(e), I am unable to conclude that the minimum sentence goes beyond what is necessary to achieve Parliament's purpose such that it fails to reflect rehabilitation entirely and undermines human dignity. As noted, Parliament was justified in prioritizing denunciation and deterrence over rehabilitation, given the nature of this offence. And while the minimum sentence departs from principles of parity and proportionality in Mr. Hilbach's case, it does not result in a sentence that is grossly disproportionate to the sentencing norms for this offence.

[81] I reiterate that gross disproportionality is measured at a high threshold: the sentence must be "so excessive as to outrage standards of decency" (*Hills*, at para. 109,

citing *Boudreault*, at para. 45; *Lloyd*, at para. 24, citing *Morrissey*, at para. 26; *Wiles*, at para. 4, citing *Smith*, at p. 1072). Only on “rare and unique occasions” does such a label attach to a sentence as the standard is “very properly stringent and demanding” and intended to reflect a measure of deference to Parliament in crafting sentencing provisions (*Hills*, at para. 115, citing *Steele v. Mountain Institution*, at p. 1417). The standard of gross disproportionality under s. 12 does not require the punishment 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). The difference between the mandatory minimum sentence and Mr. Hilbach’s individual circumstances does not “outrage standards of decency”. Concluding that the five-year mandatory minimum sentence is grossly disproportionate in the circumstances of Mr. Hilbach would erode away the high standard at the core of this Court’s s. 12 jurisprudence.

[82] For these reasons, the five-year mandatory minimum sentence prescribed by s. 344(1)(a)(i) does not infringe s. 12 of the *Charter*. Since Mr. Hilbach does not propose any reasonably foreseeable hypothetical scenarios where s. 344(1)(a)(i) is allegedly grossly disproportionate, I turn next to Mr. Zwozdesky’s challenge to s. 344(1)(a.1).

(2) Application in Mr. Zwozdesky’s Case

[83] The *amici curiae* for Mr. Zwozdesky concede that the impugned mandatory minimum sentence was not grossly disproportionate in his case. Instead, they advance five scenarios where they maintain the mandatory minimum sentence in

s. 344(1)(a.1) is grossly disproportionate. The Crown maintains that several of these scenarios are not reasonably foreseeable and, in any event, they do not illustrate the minimum is grossly disproportionate. In support of its claims, the Crown relies on the same concerns it raises in Mr. Hilbach's case, pointing out the gravity of the offence and the related need for denunciation and deterrence.

[84] The scenarios advanced by the *amici* raise circumstances not addressed in Mr. Hilbach's case, including party liability, unplanned or impulsive robberies, and the use of air-powered firearms. While these circumstances introduce a degree of reduced gravity and culpability compared to Mr. Hilbach's case, they are insufficient to establish that s. 344(1)(a.1) is grossly disproportionate. Parliament could justifiably prioritize deterrence and denunciation in these circumstances as well and, as in Mr. Hilbach's case, they do not show four years' imprisonment for robbery with a firearm is totally out of sync with sentencing norms. I begin with the scenarios advanced by Mr. Zwozdesky's *amici*.

(a) *What Reasonably Foreseeable Scenarios Involve the Impugned Mandatory Minimum Sentence Provision?*

[85] The *amici* raise five detailed scenarios where the mandatory minimum is allegedly grossly disproportionate. In each scenario, the offender pleaded guilty to robbery with a firearm. The scenarios are as follows:

- (1) Eric, a “knuckleheaded” 18-year-old hunter, confronts two other hunters skinning a deer on his land, whom he suspects of poaching based on “town gossip” about one of the hunters. The trespassers have tags for the deer. Eric raises his rifle at the hunters but does not directly point it at the two. The two hunters opt to leave the deer, and Eric finishes skinning the deer and takes it home.
- (2) Danielle, a 19-year-old street youth with a drug addiction, is trafficked in sex work by her boyfriend. Her boyfriend carries a gun, which she knows as he has recently used it to threaten her. They decide to shoplift cheese and razors from a grocery store. When stopped by a security guard, Danielle shouts, “Out of our way — he’s got a gun!” The gun is not produced, but police find the weapon in her boyfriend’s waistband when the pair are later arrested.
- (3) Chahid, a 19-year-old youth and refugee from a war-torn country, has learning difficulties and post-traumatic stress disorder. On a walk, his friend approaches two people at a bus stop, flashes a handgun in his waistband and demands their cellphone, which they turn over. Chahid was unaware his friend had a gun before this moment and unaware that his friend planned a robbery. Nevertheless, he keeps a “nervous lookout”. As it happens, the

police are nearby and move to intercede. Chahid tells his friend to run, but the two are arrested. At sentencing, Chahid has completed high school, entered a post-secondary trade program, and supports himself with manual labour. A sentence above six months would place him at risk of deportation. He pleads guilty as a party to the offence.

- (4) Brian, a 21-year-old Indigenous man, suffers from alcoholism and fetal alcohol spectrum disorder, is extremely intoxicated and face down in a snowbank when a good Samaritan stops to help him. He grabs the woman, reaches into his waistband, flashes a BB gun, and snatches her purse. The BB gun is operable and capable of taking an eyeball out, but it is unloaded.
- (5) Adam, a 26-year-old Indigenous man, suffers from a drug addiction and schizophrenia, and had a short criminal record. When meeting his drug dealer in a parking lot, he produces an airsoft pistol, points it at his dealer, and takes some methamphetamines. Before sentencing, he receives treatment for schizophrenia and his drug addiction.

[86] Of the five, the Court of Appeal majority concluded that Adam and Brian were reasonably foreseeable hypothetical scenarios for the purposes of a s. 12 analysis and the others were not. I agree. Brian is based on a “real” offender, the facts of which

are reported in *R. v. Smart*, 2014 ABPC 175, 595 A.R. 266. As for Adam, the robbery of a drug dealer is a reasonably foreseeable scenario. That this offence would be committed by someone suffering mental health and addiction challenges is clearly foreseeable. While an air-powered pistol may be a relatively uncommon firearm to use for this offence, they are undoubtedly used in robberies (see, for instance, *R. v. Lodoen*, heard together with the appeal in *Johnas*).

[87] The scenarios involving Eric, Danielle and Chahid do not qualify as reasonable hypotheticals. As their name suggests, reasonably foreseeable scenarios are situations that may reasonably be expected to arise as a matter of common sense and judicial experience (*Nur*, at para. 74). The following are characteristics of a reasonable hypothetical as outlined in *Hills*, at para. 77:

- (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.

[88] As this Court reiterated in *Hills*, reasonable hypothetical scenarios ought not to be “far-fetched or marginally imaginable cases”, nor should they be “remote or extreme examples” (*Hills*, at para. 78, citing *Morrissey*, at para. 30, citing *Goltz*, at

pp. 506 and 515). Personal characteristics such as age, Indigeneity, mental health issues, and addiction are potentially relevant as they are common to offenders in Canadian courtrooms. However, such characteristics ought not be used to construct the most sympathetic offender imaginable (*Hills*, at para. 91; *Nur*, at para. 75). Common sense and judicial experience counsels that offenders with *only* mitigating personal characteristics are rare, and it is even more improbable to see such offenders in the most unlikely scenarios falling within the scope of an offence. Stacking mitigating factors and stretching every constituent element of an offence produces a hypothetical scenario that is fanciful and not reasonably foreseeable (*Hills*, at para. 91). A court is not obliged to address *every* hypothetical presented by counsel if it finds that some do not qualify as “reasonably foreseeable” scenarios.

[89] While technically within the scope of s. 344(1)(a.1), Eric’s scenario is far-fetched and marginal. Chahid barely satisfies the criteria of an aider or abettor under s. 21(1) of the *Criminal Code* and stretches the constituent elements of the offence (*R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 18). The scenario involves conduct that would likely fall outside the ambit of the provision. This Court in *Hills* found that while the scope of the offence may be tested to explore the breadth of the offence, straining every constituent element of the offence is not helpful (para. 83). The scenarios involving Danielle and Chahid stack multiple mitigating personal characteristics alongside the most marginal iterations of the offence to construct the “most sympathetic offender” imaginable. These hypotheticals may serve to demonstrate “more about the imagination of counsel” than the true scope of the

provision (*Hills*, at para. 83). There is little use in evaluating the impugned provision based on outlandish scenarios on the theory that the imagined scenarios may happen one day. Therefore, the scenarios involving Eric, Danielle and Chahid are not reasonably foreseeable.

[90] The majority also concluded two hypotheticals drawn from reported decisions, *R. v. Link*, 2012 MBPC 25, 276 Man. R. (2d) 157, and *Lodoen*, were reasonably foreseeable. Both cases dealt with youthful offenders involved in convenience store robberies. *Link* concerned an 18-year-old Indigenous woman, who pled guilty as a party to a convenience store robbery where the principal used an imitation firearm (paras. 1 and 7-22). The offender in *Lodoen* was an 18-year-old youthful offender who used a BB gun in the commission of a robbery and pled guilty (*Johnas*, at para. 68). Neither *Link* nor *Lodoen* involved the minimum sentence at issue here. I accept they are foreseeable, provided they are modified to fit within the scope of the minimum sentences.

(b) *Two Years' to Two and a Half Years' Imprisonment Is a Fit and Proportionate Sentence in Reasonably Foreseeable Scenarios*

[91] This leads me to the fit and proportionate sentences for Adam, Brian and the offenders in the scenarios based on *Link* and *Lodoen*. The Court of Appeal majority concluded that a fit and proportionate sentence for the reasonably foreseeable scenarios identified above would be around two years' imprisonment (para. 70). Neither the

Crown nor the defence challenge the majority's conclusion on this point. I, too, see no basis to interfere.

[92] Adam's and Brian's offences involved street muggings, an offence with a sentencing range around 12 to 18 months. Evidently, the use of a weapon and, in particular, a firearm is an aggravating factor in each case. Brian's offence also involved the application of force to the victim, while Adam's involved a greater degree of planning and a prior criminal record. In Adam's case, as well, there is the serious public safety risk involved in using a firearm to settle a drug dispute, a consideration that supports a significant sentence (*R. v. Delchev*, 2014 ONCA 448, 323 O.A.C. 19, at para. 20). This could support sentences significantly above this range. Nevertheless, the moral blameworthiness of both offenders is attenuated given the mental health and addiction issues that underlay their actions, as well as any applicable *Gladue* considerations. I therefore agree a sentence around two years would be fit and proportionate in these cases.

[93] Scenarios based on *Link* and *Lodoen* would similarly support sentences around 18 months' to 2 years' imprisonment. They are each convenience store robberies involving young, first-time offenders, so the three-year starting point from *Johnas* applies. While the offender in *Link* received a conditional sentence of 18 months, the offence involved an imitation firearm (para. 120). Further, the sentencing judge concluded she had no fault in using the firearm, as she was "shocked and surprised when a gun was produced" (para. 117). A carceral sentence would

therefore be warranted had Ms. Link gone into the robbery knowing a real firearm would be used. *Lodoen* resulted in a sentence of 18 months (para. 70). Assuming the gun meets the definition of a firearm, a sentence above 18 months may be warranted, given it is an aggravating factor. Thus, a sentence in around 18 months to 2 years would be appropriate.

(c) *The Mandatory Minimum Is Not Grossly Disproportionate in Reasonably Foreseeable Scenarios*

[94] The Court of Appeal majority concluded s. 344(1)(a.1) was grossly disproportionate in Adam’s and Brian’s cases, as well as in scenarios similar to *Link* and *Lodoen*, noting the minimum sentence resulted in roughly more than double a fit and proportionate sentence. In my view, the majority is in error. As with s. 344(1)(a)(i), having regard to (1) the scope and reach of the offence, (2) the effects of the penalty on the offender and (3) the penalty and its objectives, the four-year mandatory minimum for robbery does not “outrage standards of decency”.

[95] Regarding the scope and reach of the offence, as in Mr. Hilbach’s case, the scenarios raised here do not demonstrate the mandatory minimum sentence casts too broad of a net and captures offenders with low culpability. Mr. Zwozdesky advances three main factors that render these scenarios relatively less severe compared to Mr. Hilbach’s case: they involve air-powered pistols, they are unplanned (as in Brian’s case), and they involve a party to the offence (as in Ms. Link’s case). None of these

considerations, in my opinion, establishes the minimum is so wide it applies in circumstances involving little fault and little danger.

[96] Provincial appellate courts have repeatedly upheld the constitutionality of the mandatory minimum sentences for robbery, even in the face of sympathetic accused, because the offence’s *mens rea* and *actus reus* apply to a relatively narrow set of violent behaviours, and conviction requires a deliberate and specific act with a defined harm (*Hills*, at para. 131; *R. v. McIntyre*, 2019 ONCA 161, 429 C.R.R. (2d) 346; *McIvor*; *Lapierre*; *R. v. Wust* (1998), 125 C.C.C. (3d) 43 (B.C.C.A.); *McDonald*; *R. v. Bernarde*, 2018 NWTCA 7). Further, in *McDonald*, Justice Rosenberg found a four-year sentence would likely be a manifestly unfit sentence for the accused on an appellate review standard. However, the sentence did not reach the high threshold of being grossly disproportionate as it was open to Parliament to legislate harsh punishments for firearm offences. Considering the objective gravity of the offence, Justice Rosenberg found a four-year prison sentence did not shock the conscience or outrage standards of decency (pp. 666 and 669).

[97] Robbery constitutes a grave offence even when committed without a weapon, given the offence involves the use or threat of violence in stealing property. Moreover, each of the scenarios involves the use of a firearm. As discussed above, “firearm” in this context encompasses ordinary hunting rifles and shotguns subject to the *Firearms Act*’s licensing regime to barrelled devices that can be purchased without a licence, such as air-powered weapons like BB guns and airsoft pistols. Nevertheless,

to qualify as a firearm, at bottom, these devices must be capable of inflicting serious bodily injury, such as rupturing a person's eye. As I noted in Mr. Hilbach's case, the use of a firearm "presents the ultimate threat of death to those in its presence" (*Felawka*, at p. 211). That is equally true where an ordinary firearm is used, such as a hunting rifle and shotgun. While an air-powered rifle may be incapable of inflicting a fatal injury, an offender who uses such a device to intimidate exploits the fear that conventional firearms provoke and, at the very least, threatens to inflict life-altering injury. I am not satisfied that since the minimum sentence applies where an offender *merely* uses a firearm, as opposed to a restricted or prohibited one, there is little risk to public safety.

[98] It is important to consider the offence from the standpoint of the victims in the scenarios raised by Mr. Zwozdesky. Here, there is always a person placed at serious risk of injury, regardless of whether a conventional or air-powered firearm is used. For victims, there remains the risk of life-altering physical injury when air-powered firearms are used in the course of a robbery, a risk that is not present with imitation firearms. Further, the risk of psychological trauma arising from the use of an air-powered rifle remains similar to that of a conventional firearm. As the British Columbia Court of Appeal found in *Al-Isawi*, "whether an offender uses a real or imitation firearm does not impact the harm to the victim who would not know the difference" (para. 39). I am not persuaded that victims of a robbery, like the ones in Adam's and Brian's cases, will ordinarily have the presence of mind to distinguish between an air-powered rifle and a conventional one, any more than they can differentiate between a loaded or unloaded shotgun. There is, as a result, the risk of

escalating violence, as such an apparent deadly threat risks a dangerous response from bystanders and police responding to an incident. From the standpoint of public safety, as a result, there is not a dramatic difference between robbing a person with a conventional firearm and an air-powered firearm.

[99] The ever-present threat to victims and public safety distinguishes this offence from the one at issue in *Hills*. An essential element of robbery with or without the use of a firearm is the use of actual violence or the threat of violence *to a person* in the commission of the offence. There is an immediacy to the threat that distinguishes the offence from the hypothetical scenario raised in *Hills*. The offender must intend to strike fear in the heart of his victim. The offender chose to use a firearm, knowing that he may gain a material benefit due to the universal fear that firearms invoke for the public. In assessing the gravity of the offence, the threat to victims and the public in these scenarios cannot be downplayed or overlooked.

[100] Moreover, the culpability central to this offence does not profoundly differ from that of s. 344(1)(a)(i) and is consistent for all individuals charged under the offence. In order for s. 344(1)(a.1) to apply, an offender must intend to steal *and* intend to use violence or force (or the threat thereof). The offender must also *intend* to use the firearm. As a result, a conscious *choice* must be made to threaten a person's safety using a firearm. That is true whether or not the offence is perpetrated using a conventional or air-powered firearm. Like Mr. Hilbach's case, while there are undoubtedly mitigating personal circumstances that reduce an offender's culpability in

Mr. Zwozdesky's scenarios, there remains an essential degree of fault arising from the *choice* to threaten the safety of others.

[101] Mr. Zwozdesky nevertheless raises the possibility that parties to the offence may have reduced culpability, citing the example of *Link*. However, I am not persuaded that *Link* illustrates the notion that parties to the offence have little moral fault relative to principal offenders. The question of whether an offender's role as an aider or abettor plays a mitigating factor in sentencing is highly contextual (*R. v. Overacker*, 2005 ABCA 150, 367 A.R. 250, at paras. 23-26; *R. v. Hennessey*, 2010 ABCA 274, 490 A.R. 35, at para. 47). A sentencing discount *purely* because a party was an aider or abettor would go against the purpose of the party liability provisions in s. 21, which ensure an "individual will bear the same responsibility for the offence regardless of which particular role he or she played" (*R. v. Vu*, 2012 SCC 40, [2012] 2 S.C.R. 411, at para. 58 (emphasis added), citing *R. v. Thatcher*, [1987] 1 S.C.R. 652, at pp. 689-90). Where there is a disparity between the criminal records of the principal and the aider or abettor, or where there are aggravating circumstances, like assaultive behaviour, that apply to the principal but not the aider or abettor, then the latter offender's sentence may be lower than that of the principal (*McIvor*, at para. 29; *R. v. Price* (2000), 144 C.C.C. (3d) 343 (Ont. C.A.), at paras. 54-56). However, both are jointly responsible for the commission of the index offence. As a matter of principle and policy, finding otherwise would encourage offenders to act as aiders or abettors. Thus, the minimum sentence's mere application to aiders and abettors fails to establish its constitutional infirmity.

[102] For s. 344(1)(a.1) to apply, an aider or abettor under s. 21(1) must have knowledge or its equivalent in relation to the firearm's use. As noted, s. 344 is modelled on s. 85 of the *Criminal Code*. Nothing in the wording of s. 344 implies an intention on the part of Parliament to extend its application to offenders whose culpability was less than required for a conviction under s. 85. The "usual rules of complicity" for parties under s. 21 apply to s. 85 (*Steele*, at para. 33; see also *McGuigan*, at pp. 307-8). Thus, in a scenario like *Link*, the aider must intend to assist the principal knowing (or at least wilfully blind) that the principal intended to *use* the firearm in committing the robbery (*Briscoe*, at paras. 15-18). That is to say, one must consciously *choose* to provide assistance to the principal with knowledge or its equivalent that a firearm is used. For this reason, the oblivious offender in *Link* was not subject to the minimum. When this element is made out, I am not persuaded the offender has little culpability. As a party to the offence, the aider benefits from the threat of violence that emanates from the firearm. It offers each party protection and ensures the cooperation of victims, a result that benefits the aider and abettor as much as the principal.

[103] Moreover, without the contribution of each party, the robbery could not be pulled off at all, a result that supports treating principals and aiders alike. As the English Court of Appeal observed,

there is no distinction in a crime of this kind to be drawn [in sentencing] between those who actually use the violence and those who stand outside and though not using violence are ready to drive away, to kidnap, or perform whatever other task may be appropriate. If this Court or a trial judge is dealing with a case of armed robbery of a bank at gunpoint or with iron bars, or of a security van carrying large quantities of notes to a branch

of a bank, it does not normally stop to consider whether a particular prisoner actually held up the cashier or held up the guard, had a gun or had an iron bar or was the driver standing outside ready to drive away. All are equally guilty because without each playing his full part the crime could not be perpetrated.

(*R. v. Church* (1985), 7 Cr. App. R. (S.) 370, at p. 372)

[104] Mr. Zwozdesky also relies on the possibility of unplanned robberies. In Brian's case, for instance, the intention to commit the offence was not formed until the good Samaritan attempted to offer assistance. The degree of planning behind an offence can act as an aggravating factor in sentencing. In Brian's case, however, the lack of planning cannot be equated with a lack of culpability. The scenario involves the intentional use of force, snatching a purse, and threatening violence while brandishing a BB gun, which the offender opted to carry with him in public. What Brian shares with all other offenders charged under this section is that he saw the opportunity to benefit financially from another person's fear of firearms and capitalized on it. As a result, the essential element of culpability that I noted above equally applies to Brian. This scenario is, again, an instance where an offender *chose* to threaten the safety of others using a firearm.

[105] For these reasons, Mr. Zwozdesky's scenarios do not establish s. 344(1)(a.1) applies in circumstances involving little or no danger to the public or little or no fault. I am not persuaded the distinctions between the lethality of the firearms involved, or the fact of party liability, establish dramatically different degrees of severity in the context of this offence. At bottom, in all these scenarios, in order to steal,

an offender makes a conscious *choice* to place another person at risk of life-altering injury and significant psychological trauma. Like Mr. Hilbach’s offence, they are “true crime[s]”.

[106] The effects of the penalty on the offender are severe. For Indigenous offenders, the effects have the potential to be as severe as the mandatory minimum sentence in Mr. Hilbach’s case. These effects, as in Mr. Hilbach’s case, are significant and can be neither ignored nor minimized. As was noted in *Hills*, youthful offenders are subject to bullying, are susceptible to gang recruitment and are more vulnerable to segregation placements (para. 165). A term of imprisonment can result in a more severe penalty for an accused with a mental illness than it may for others. Courts have noted that individuals may not have access to appropriate treatment while incarcerated and, for some mentally ill offenders, any period of incarceration may be extremely harmful to their mental state (*R. v. Wallace* (1973), 11 C.C.C. (2d) 95 (Ont. C.A.), at p. 100; *R. v. Folino* (2005), 77 O.R. (3d) 641 (C.A.), at paras. 29-32). The individual circumstances of the hypothetical offenders indicate the period of incarceration required under s. 344(1)(a.1) would likely result in severe detrimental effects.

[107] An inquiry into the penalty and its objectives reveals the analysis for s. 344(1)(a.1) and s. 344(1)(a)(i) is similar. Parliament chose to impose the strong moral condemnation that a substantial prison sentence signals, which is reasonable given the offenders’ choice to put public safety at risk offends basic moral values. Greater deference to Parliament’s decision to enact the mandatory minimum is

therefore warranted. As in Mr. Hilbach’s case, general deterrence has a role, as “[i]t cannot be disputed that there is a need for general deterrence” when a person endangers the safety of others in wielding a firearm (*Morrissey*, at para. 46). At the same time, it is true that Parliament’s prioritization of general deterrence departs more seriously from sentencing norms in the case of offenders like Adam, who suffer from mental disorders, because these types of offenders are inappropriate mediums by which to discourage others (*Ruby*, at §5.316; *R. v. Dedekere*, 2017 ONCA 799, 15 M.V.R. (7th) 177, at para. 14; *R. v. Batisse*, 2009 ONCA 114, 93 O.R. (3d) 643, at para. 38). Even so, ultimately the minimum is not “totally out of sync” with sentencing norms for this offence, given the sentencing ranges discussed for robbery above. However, as the dissent noted, the mandatory minimum is effectively double what a fit and proportionate sentence would likely be for the hypothetical offenders had the mandatory penalty not applied.

[108] Nevertheless, as with s. 344(1)(a)(i), the disconnect between the mandatory minimum sentence and the individual circumstances of the offenders here does not render the sentence grossly disproportionate. I echo my comments that the gross disproportionality standard is a high bar that applies in rare instances. If the punishment at bar was being evaluated on the appellate standard, I would find the four-year minimum demonstrably unfit for the reasonable hypotheticals proffered by Mr. Zwozdesky. However, I am not persuaded that the mandatory minimum in this case “shock[s] the conscience” (*Lloyd*, at para. 33) or is “so excessive as to outrage standards of decency” (*Hills*, at para. 109, citing *Boudreault*, at para. 45; *Lloyd*, at para.

24, citing *Morrissey*, at para. 26; *Wiles*, at para. 4, citing *Smith*, at p. 1072). While the punishment is severe, the high threshold for gross disproportionality is not met here. For these reasons, I am satisfied that the four-year mandatory minimum term of imprisonment does not infringe s. 12 of the *Charter*.

[109] Having concluded neither mandatory minimum infringes s. 12 of the *Charter*, it is unnecessary to address whether the infringement may be saved under s. 1.

C. Conclusion

[110] The Crown's appeal is allowed. The mandatory minimum sentences set out in s. 344(1)(a)(i) and the former s. 344(1)(a.1) are constitutional and do not constitute cruel and unusual punishment. The Court of Appeal's judgments on this ground are set aside. No order is necessary in respect of Mr. Zwozdesky's sentence, owing to his passing.

[111] In respect of Mr. Hilbach's sentence, I am of the view that it is appropriate in this case to stay the execution of the post-appeal portion of the sentence. This was the approach taken by the Court of Appeal majority. In rare cases where appellate courts have imposed custodial sentences to comply with mandatory provisions of the *Criminal Code*, including mandatory minimum sentences, they have stayed the execution of the post-appeal portion of the sentence. A stay for a post-appeal sentence may be available where there is extenuating delay in the legal process, particularly at the appellate stage, through no fault of the offender (*R. v. Anderson*, 2014 SCC 41,

[2014] 2 S.C.R. 167; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. McMillan*, 2016 MBCA 12, 326 Man. R. (2d) 56; *R. v. Shi*, 2015 ONCA 646). Given over four years have lapsed since Mr. Hilbach was sentenced, I am satisfied this is such a case.

The following are the reasons delivered by

CÔTÉ J. —

[112] I agree with my colleague Martin J.’s disposition of the Crown’s appeal. However, for the reasons outlined in my dissent in the companion appeal *R. v. Hills*, 2023 SCC 2, I respectfully disagree with her new three-part test for gross disproportionality at the second stage of the established framework set out in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, and recently affirmed in *R. v. Bissonnette*, 2022 SCC 23, at para. 63.

[113] Applying this established legal framework, I agree that the mandatory minimum sentences prescribed by s. 344(1)(a)(i) and the former s. 344(1)(a.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, do not meet the high threshold for cruel and unusual punishment. While they have the potential to be excessive in reasonably foreseeable cases, they are not so excessive as to “outrage standards of decency” (*R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072) or “shock the conscience of Canadians” (*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 33). I would allow the appeal.

The following are the reasons delivered by

KARAKATSANIS AND JAMAL JJ. —

[114] Mandatory minimum sentences reflect Parliament’s determination that a crime is so serious that it must be met with a minimum punishment, regardless of the particular circumstances of the offence or the offender. When in place, there is no judicial discretion to impose a lesser sentence.

[115] Mandatory minimum sentences are, however, subject to scrutiny under s. 12 of the *Canadian Charter of Rights and Freedoms*, which guarantees everyone “the right not to be subjected to any cruel and unusual treatment or punishment”. They are more constitutionally vulnerable when they apply to an offence that can be committed in various ways, under a broad array of circumstances, and by a wide range of people (*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 3). Such provisions will be unconstitutional where they are, or could be on a reasonably foreseeable basis, grossly disproportionate to what would otherwise be a fit sentence in the circumstances.

[116] Between this appeal and its companion case, *R. v. Hills*, 2023 SCC 2, three mandatory minimum sentences are at issue. We agree with the reasons of our colleague Justice Martin in *Hills*. Section 244.2(3)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, which imposes a four-year mandatory minimum sentence on anyone convicted of intentionally discharging a firearm into or at a place, contrary to s. 244.2(1)(a), violates s. 12 of the *Charter* and has not been justified under s. 1.

[117] We part company, however, with our colleague’s conclusion on the constitutionality of the provisions at issue in this appeal: s. 344(1)(a)(i) of the *Criminal Code*, which imposes a five-year mandatory minimum sentence for a first offence of

robbery with a restricted or prohibited firearm; and s. 344(1)(a.1) of the *Criminal Code*, which imposes a four-year mandatory minimum sentence for the offence of robbery with a firearm. We note that Parliament recently repealed s. 344(1)(a.1) (*An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15).

[118] Armed robbery is a grave offence that typically warrants a penitentiary sentence. But in our view, the mandatory minimum sentences under both provisions cast an unconstitutionally wide net, capturing reasonably foreseeable cases for which the mandatory minimum sentence would be grossly disproportionate. For these cases, the mandatory minimum sentences are “so excessive as to outrage standards of decency” (*Lloyd*, at paras. 24 and 87, citing *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 688, per Laskin C.J.), violating the constitutional guarantee against cruel and unusual punishment under s. 12 of the *Charter*. They cannot be saved under s. 1, and therefore should be declared of no force and effect.

[119] We would, accordingly, dismiss the Crown’s appeal.

I. Background

A. *Ocean William Storm Hilbach*

[120] Mr. Hilbach is an Indigenous man from the Ermineskin Cree Nation. Nineteen years old and without the money to travel from the city to his reserve, he and

his 13-year-old accomplice robbed a convenience store with an unloaded sawed-off rifle. Mr. Hilbach covered his face with his shirt and pointed the gun at two store clerks, demanding cash. His accomplice punched one of the store clerks, and kicked the other. They fled with \$290 in lottery tickets and were apprehended soon afterwards.

[121] Mr. Hilbach pleaded guilty to robbery while using a prohibited or restricted weapon (s. 344(1)(a)) and possession of a firearm while prohibited (s. 117.01(1)). The sentencing judge held that a fit and proper sentence for Mr. Hilbach was two years less a day. He concluded that the five-year mandatory minimum sentence under s. 344(1)(a)(i) was grossly disproportionate to Mr. Hilbach's circumstances, contrary to s. 12 of the *Charter*, because it was more than double the length of a fit sentence and it would be served in a federal rather than provincial institution. Accordingly, he declared the provision of no force and effect (2018 ABQB 526, 75 Alta. L.R. (6th) 359).

[122] The Court of Appeal allowed the Crown's appeal in part. It held that the sentence imposed on Mr. Hilbach was unfit and substituted a sentence of three years for the robbery charge. But the court still concluded that the five-year mandatory minimum sentence would be grossly disproportionate for Mr. Hilbach, breaching s. 12. It could not be saved under s. 1 and was thus declared of no force and effect (2020 ABCA 332, 14 Alta. L.R. (7th) 245).

B. *Curtis Zwozdesky*

[123] At the time of the offence, Mr. Zwozdesky was 53 years old, unemployed, and struggling with drug addiction. He was the “getaway driver” for two robberies of rural convenience stores in Alberta. During the first robbery, he went inside the convenience store before returning to his car. Shortly after, his accomplices went inside with a modified shotgun. An accomplice pointed the gun at the clerk, demanded she fill a bag with money, and fired the shotgun into a shelf. No one was injured. The next robbery occurred a week later. Mr. Zwozdesky waited in the car as the two principal offenders went inside the store, brandished a shotgun, and sprayed a clerk with pepper spray before leaving, cash and cigarettes in hand.

[124] Mr. Zwozdesky confessed to the police and entered a guilty plea to one count of robbery with a firearm (s. 344(1)(a.1)), and one count of robbery *simpliciter* (s. 344(1)(b)).

[125] The sentencing judge concluded that the four-year sentence mandated by s. 344(1)(a.1) would not be grossly disproportionate for Mr. Zwozdesky. However, in considering other reasonably foreseeable applications of the law, she observed that armed robbery can occur in a wide variety of circumstances, including by youthful offenders acting impulsively, offenders with mental health issues, and offenders who played a more peripheral role in the offence. Reasoning that the mandatory minimum sentence could constitute cruel and unusual punishment for reasonably foreseeable offenders, and that it could not be saved under s. 1, she declared s. 344(1)(a.1) of no force and effect (2019 ABQB 322, 95 Alta. L.R. (6th) 386).

[126] The majority of the Court of Appeal agreed that s. 344(1)(a.1) could result in grossly disproportionate punishments and dismissed the Crown’s appeal.

II. Analysis

[127] Mr. Hilbach challenged the mandatory five-year sentence for robbery with a prohibited or restricted firearm (s. 344(1)(a)(i)), while Mr. Zwozdesky challenged the mandatory four-year sentence for robbery with a non-restricted firearm (s. 344(1)(a.1)). In our view, both provisions violate s. 12 of the *Charter*. In evaluating whether a mandatory minimum sentence infringes s. 12 of the *Charter*, a court engages in a two-step inquiry (*Hills*, at para. 40).

[128] 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*, including the fundamental principle of sentencing under s. 718.1: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” In assessing an offence’s gravity, courts may consider the consequences of the offender’s actions on victims and public safety, the harm caused by the offence, and, in some cases, the offender’s motivations (*Hills*, at para. 58). In assessing the degree of responsibility of the offender, a court should gauge “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” (*Hills*, at para. 58, citing *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 91; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 68; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 73).

[129] Second, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the otherwise fit sentence. In considering whether the mandatory minimum sentence is grossly disproportionate, a court must assess “three crucial components”: (1) the scope and reach of the offence; (2) the effects on the offender, “both generally and based on their specific characteristics and qualities”; and (3) the penalty and the balance struck by its objectives (*Hills*, at paras. 122-38).

[130] If the court concludes that a sentence is not grossly disproportionate for the offender in question, the court must then consider whether it would be grossly disproportionate in other reasonably foreseeable cases (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 65).

[131] In applying this framework, neither s. 344(1)(a)(i) nor s. 344(1)(a.1) pass constitutional scrutiny. The sentencing judge correctly considered the facts, case law, and relevant sentencing objectives to determine that two years less a day was a fit and proportionate sentence in Mr. Hilbach’s circumstances. This determination is owed deference. In assessing a fit sentence, courts must not indiscriminately adhere to starting points, completely eliminate the prospect of rehabilitation, or distort the gravity of the offence by dismissing relevant facts (such as whether a firearm was loaded).

Moreover, whether a fit sentence is two years or — as our colleague concludes — three years, a sentence that is double or nearly double a fit sentence is grossly disproportionate in violation of s. 12 of the *Charter*.

[132] The mandatory minimum sentence under s. 344(1)(a.1) is also grossly disproportionate. It is unconstitutionally broad and foreseeably applies to a wide range of situations, including those where the offender may be young, substance dependent, assisting the principal offender, or using a firearm like a BB gun. Applying the mandatory minimum sentence in some of these situations would be so excessive as to outrage standards of decency and thus would be unconstitutional (see *Lloyd*, at paras. 24 and 87).

[133] Neither provision can be saved under s. 1.

[134] We address each provision in turn.

A. *Section 344(1)(a)(i) of the Criminal Code*

[135] Section 344(1)(a)(i) applies when the offender commits robbery using a restricted or prohibited firearm. This appeal raises the question of whether the five-year sentence is grossly disproportionate for Mr. Hilbach or another reasonably foreseeable offender. We agree with both courts below and conclude that it would be for Mr. Hilbach. It is therefore unnecessary to consider other reasonably foreseeable applications of the law.

[136] We turn, then, to address a fit sentence for Mr. Hilbach. Although both courts below agreed that a mandatory five-year sentence was grossly disproportionate in light of the fit sentence for Mr. Hilbach, they disagreed on what would be a fit sentence. The sentencing judge concluded two years less a day was fit, with reference to the three-year starting point for convenience store robberies in *R. v. Johnas* (1982), 41 A.R. 183 (C.A.), at para. 19; while the Court of Appeal concluded that three years was fit, placing more emphasis on denunciation and deterrence. As we will explain, we see no reason to disturb the sentencing judge’s assessment.

[137] The seriousness of the crime is evident from the circumstances, a fact not lost on the sentencing judge. He noted that Mr. Hilbach committed a “serious violent offence” with “the potential for great harm”, which would have a lasting impact on the victims and the community more broadly (para. 9). He also recognized that Mr. Hilbach’s prior criminal record and the breaches of his probation and firearm prohibition were serious aggravating factors on his sentence (paras. 10 and 12-13). These features made denunciation and deterrence “important considerations” (para. 20).

[138] The sentencing judge balanced these considerations against Mr. Hilbach’s tragic personal circumstances. Abandoned by his parents as an infant, Mr. Hilbach was raised by his paternal grandparents, both residential school survivors. His childhood and adolescence were marked by poverty, a fractured family unit, physical abuse, and substance dependency. These circumstances shaped Mr. Hilbach’s course in life, and

this crime was no different. For instance, Mr. Hilbach’s conduct was driven by poverty — he needed money to get home to his reserve but had none (para. 35). As the sentencing judge observed, “his personal, family and community history played a role in his actions that day” (para. 35).

[139] These circumstances are *precisely* the kind of background or systemic factors that this Court has recognized as having a mitigating effect in sentencing (*Ipeelee*, at para. 73; *R. v. Gladue*, [1999] 1 S.C.R. 688). Endemic poverty on reserves, intimately tied to the legacy of colonialism, is a common cause of crime for Indigenous peoples (*Gladue*, at para. 65). As the number of Indigenous offenders behind bars in Canada continues to soar, it is imperative that sentencing judges appropriately consider the unique social issues facing Indigenous peoples in Canada (see R. Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing* (2014), at pp. 30-34; I.F., Canadian Bar Association, at para. 24). The sentencing judge did not err in doing so.

[140] The sentencing judge also correctly considered the effect of the sentence on the offender and concluded that “any period of incarceration will have a profound impact on Mr. Hilbach” due to his youth and history of gang affiliation (para. 14). A five-year penitentiary sentence, in other words, would *undermine* Mr. Hilbach’s rehabilitation, with counterproductive implications for public safety down the line. Although rehabilitation is not a principle of fundamental justice, removing it altogether from consideration can result in gross disproportionality. As this Court unanimously

held in *R. v. Bissonnette*, 2022 SCC 23, “[t]o ensure respect for human dignity” — and therefore compliance with s. 12 of the *Charter* — “Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance” (para. 85). When a mandatory minimum compromises, rather than advances, the prospect of rehabilitation — as the sentencing judge found here — the result is a penalty unmoored from a basic tenet of our criminal justice system: respect for the inherent dignity of every individual (*Bissonnette*, at paras. 87-88). And quite simply, it shocks the conscience to send a youthful Indigenous offender to prison for five years when, according to the sentencing judge, doing so would harm both the offender and society (paras. 14 and 21).

[141] The Court of Appeal, however, concluded that the sentencing judge had erred in principle in failing to give sufficient weight to denunciation and deterrence and by overemphasizing *Gladue* factors (para. 49). The court concluded that an appropriate sentence was three years when appropriate weight was ascribed to those factors (para. 50).

[142] However, “an appellate court may not intervene simply because it would have weighed the relevant factors differently” (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 49; see also *Lloyd*, at paras. 52-53). We agree that denunciation and deterrence are important considerations, but there is no reason to interfere with the sentencing judge’s conclusion that a two-year prison sentence for a first-time offender would serve those objectives. Indeed, as this Court observed in *Bissonnette*, “the

objectives of denunciation and deterrence are not better served by the imposition of excessive sentences” (para. 94). Moreover, this Court recognized in *Boudreault* that denunciation and deterrence should not be elevated over the principle of proportionality, the objective of rehabilitation, and Parliament’s intent to ameliorate the overrepresentation of Indigenous peoples in prison under s. 718.2(e) of the *Criminal Code* (paras. 81-83). We would defer to the discretion of the sentencing judge as to which sentencing objectives in s. 718 (such as denunciation, deterrence, and rehabilitation) to prioritize — and how much weight to afford to the secondary sentencing principles in s. 718.2 (such as parity and restraint) (*Lacasse*, at paras. 54-55). We are not persuaded that he erred in exercising that discretion.

[143] Our colleague disagrees. She accepts that three years, or higher, would be fit and concludes that the sentencing judge erred by imposing a sentence that was a full year below the starting point for offences of this nature (paras. 50-51). But starting points do not answer the key question at this first stage, which is, in our colleague’s words: “. . . what specifically is the fit sentence for this individual offender?” (*Hills*, at para. 64). And starting points are tools, not straitjackets (*R. v. Parranto*, 2021 SCC 46, at para. 37; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paras. 36-37; *Lacasse*, at para. 57). Deviation from a starting point — “no matter the degree of deviation” — does not in itself justify appellate intervention (*Parranto*, at para. 29). By defaulting to the starting point in *Johnas*, our colleague’s approach departs from the recent jurisprudence of this Court in *Parranto*, *Friesen*, and *Lacasse*.

[144] Our colleague also notes that the “use of an unloaded prohibited firearm does not substantially reduce the offence’s gravity” (para. 55). While the use of an unloaded firearm may not *substantially* reduce an offence’s gravity — because either weapon inspires fear and is used for coercion — the two situations are not equivalent in terms of gravity or moral culpability. The use of an unloaded firearm necessarily poses a much lower risk to public safety. It is far more blameworthy to enter public spaces with a loaded gun, as this suggests an intention to resort to lethal force if necessary. The two situations, for the purpose of sentencing, cannot be equated.

[145] Even if our colleague and the Court of Appeal were correct and a fit sentence for Mr. Hilbach were three years in jail, we would still conclude, as did the Court of Appeal, that a sentence of five years was grossly disproportionate (para. 54). Our colleague’s conclusion otherwise is, with respect, untenable. It is hard to fathom how a sentence nearly double the amount of a proportionate sentence would not shock the conscience of Canadians. This does not accord with a purposive reading of s. 12, nor is it alive to the profound consequences of any incarceration on an offender’s life and liberty, let alone the secondary impacts on the offender and the offender’s family.

[146] Ultimately, we would not disturb the determination that a five-year penitentiary sentence would be grossly disproportionate in the circumstances. Since the mandatory minimum would be unconstitutional for Mr. Hilbach, it is unnecessary to consider reasonably foreseeable applications of the law.

B. *Section 344(1)(a.1) of the Criminal Code*

[147] The four-year mandatory minimum under s. 344(1)(a.1) applies if an offender commits robbery using a non-restricted or non-prohibited firearm. Before the Court of Appeal and this Court, Mr. Zwozdesky concedes that a four-year sentence was fit in his case. The question, then, is whether a four-year sentence is grossly disproportionate in other reasonably foreseeable cases. We conclude that it is.

[148] A four-year sentence reaches beyond the classic instance of robbery with a firearm and captures less egregious conduct. Section 344(1)(a.1) requires the offender to “use” the firearm during the offence. In *R. v. Steele*, 2007 SCC 36, [2007] 3 S.C.R. 3, this Court observed that the term “use”, in the context of other firearm offences, has been interpreted to include a wide range of behaviour including discharging the firearm, pointing the firearm, or even just revealing with words that a firearm is present (para. 27). To be “used”, the firearm need not have accessible ammunition (*R. v. Covin*, [1983] 1 S.C.R. 725, at p. 730), nor does it have to be in the offender’s physical possession if it is readily at hand (*Steele*, at para. 32).

[149] And not all firearms are highly regulated weapons. The definition of “firearm” captures any barrelled, projectile-firing device that can rupture an eye, which is the standard for determining whether the firearm can cause serious bodily injury or death (*R. v. Dunn*, 2013 ONCA 539, 117 O.R. (3d) 171, at para. 40, aff’d 2014 SCC 69, [2014] 3 S.C.R. 490). This includes firearms — like BB guns, paintball guns, or even nail guns — that can be obtained with relative ease at local commercial outlets.

[150] Thus, while the objective gravity of robbery with a firearm is always serious, the gravity of the particular offence committed — which depends on the circumstances surrounding the offence — varies considerably (see *Friesen*, at para. 96). For instance, just as s. 344(1)(a.1) captures offenders brandishing shotguns who invade a home and steal from its occupants (*R. v. Matwiy* (1996), 178 A.R. 356 (C.A.)), it would also capture an offender who snatches a purse from a stranger while armed with a BB gun (C.A. reasons, at para. 64; see also *R. v. Smart*, 2014 ABPC 175, 595 A.R. 266).

[151] Further, a wide range of people commit armed robberies. At one end of the spectrum stands the seasoned criminal, who, motivated by greed and contempt, serially orchestrates sophisticated robbery heists undeterred by criminal sanction. At the other end of the spectrum stands the first-time offender with a tragic upbringing, who, fuelled by drug addiction, turns to robbery once to satisfy his need for a quick fix, and then successfully rehabilitates before sentencing. A four-year penitentiary sentence may be proportionate, or even lenient, in the former example, but may well be grossly disproportionate in the latter.

[152] Considering such personal characteristics and circumstances sheds light on the reasonably foreseeable scope of the law (*Hills*, at paras. 58-61). It reflects the inherently individualized nature of sentencing and how proportionality involves an assessment of both the gravity of the offence and the blameworthiness of the offender (*Nur*, at para. 43).

[153] Such an approach also reflects common sense. Given the vast overrepresentation of Indigenous peoples in our justice system, for example, cases involving such offenders are, as a matter of logic, reasonably foreseeable (*Hills*, at paras. 86-87). Indeed, mandatory minimum sentences disproportionately impact Indigenous offenders (Mangat, at pp. 30-34). Similarly, offenders who are poor, precariously housed, substance dependent, mentally ill, or disabled “appear with staggering regularity in our provincial courts” (*Boudreault*, at paras. 49-55). Consideration of these personal characteristics can ensure s. 12 of the *Charter* responds to the everyday composition of offenders in the criminal justice system (I.F., Canadian Bar Association, at para. 24).

[154] That said, the types of foreseeable offenders a court may consider must not be stretched beyond reason to create far-fetched examples (*Nur*, at paras. 73-76). Extremely detailed hypotheticals, like those advanced by Mr. Zwozdesky, are ultimately unhelpful for this reason. Laws should not be set aside based on speculation. But so long as such examples are reasonable, this inquiry is central to the analysis: testing the reasonably foreseeable scope of a given punishment ensures that no individual is subject to an unconstitutional law, which in turn, allows s. 12 to be faithful to its purpose.

[155] Mr. Hilbach’s circumstances provide a reasonable hypothetical example. His conviction under s. 344(1)(a)(i) is more serious because it involved a prohibited firearm. But even then, the sentencing judge’s conclusion was that a fit sentence would

have been two years less a day — half of the mandatory four-year sentence under s. 344(1)(a.1), which would be served in a federal penitentiary. Even were we to accept our colleague and the Court of Appeal’s conclusion that three years would have been fit, it follows that Mr. Hilbach should have received a lesser sentence had he used a non-prohibited firearm and been convicted under s. 344(1)(a.1). While the court “need not fix the sentence or sentencing range at a specific point, particularly for a reasonable hypothetical case framed at a high level of generality”, it is helpful for the court to “consider, even implicitly, the rough scale of the appropriate sentence” (*Lloyd*, at para. 23). At most, a reformatory term would have been fit if Mr. Hilbach had committed his crime with a non-prohibited firearm. It follows that a four-year mandatory minimum would be more than merely excessive in the circumstances.

[156] Additionally, it is not uncommon for crimes, like robbery, to be committed by more than one offender — one need only consider, for instance, the “getaway driver” (as in this case) or the “lookout”. And because “Canadian criminal law does not distinguish between the principal offender and parties to an offence in determining criminal liability” (*R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 13), someone who assists or encourages the principal offender is guilty of the same offence and faces the same mandatory minimum sentence. This is so even if their assistance or encouragement was not preplanned or significant.

[157] Aiders and abettors may not automatically be entitled to a sentencing discount. But just because a party is criminally liable for the same offence as a principal

offender does not mean they deserve the same sentence. As always, what constitutes a proportionate sentence will depend on the circumstances (*Hills*, at para. 58), most notably the offender’s degree of participation. Considering this context in sentencing does not undermine the party liability provisions, nor incite offenders to assist or encourage crime. Rather, it reflects the fundamental principle of sentencing under s. 718.1: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[158] The Court of Appeal in *Hilbach* points out that secondary liability dramatically expands the scope of the offence even more, and further reveals that s. 344(1)(a.1) is constitutionally infirm (paras. 61 and 68). We agree that *R. v. Link*, 2012 MBPC 25, 276 Man. R. (2d) 157, is illustrative.

[159] Ms. Link, an Indigenous woman, was barely 18 years old and had no prior criminal record when she agreed to participate in a convenience store robbery. Her battle with drug and alcohol addiction began at age 13, and led her to become enmeshed in a “destructive set of friends” (para. 32). At the time of the offence, she was homeless and in her words “stealing to survive” (para. 53). Unbeknownst to Ms. Link, her accomplice had an imitation handgun in his possession, which he pointed at a clerk during the robbery. She continued to stuff cartons of cigarettes into her bag after the gun was produced. The clerk described her as an “accomplice maybe?” and “flustered, not really involved” (para. 15). She was cooperative with police, remorseful, and turned

her life around after the incident. The sentencing judge imposed an eight-month conditional sentence order.

[160] The Crown argues that *Link* is not a reasonably foreseeable application of the law: s. 344(1)(a.1) did not apply because an imitation handgun is not a “firearm”, and Ms. Link did not know her accomplice had the firearm on his person before the robbery. In our view, this argument misses the mark. The issue is whether the characteristics of the offender and their conduct can assist the court in its inquiry into reasonably foreseeable circumstances. While certain aggravating elements may have been missing in Ms. Link’s circumstances, we agree that the sentence imposed in Ms. Link’s case illuminates the nature of the offence of armed robbery, its broad sentencing range, and the kinds of people who commit it.

[161] Whether or not the *mens rea* could have been established, or whether a handgun is real or an imitation, the circumstances of *Link* are not far-fetched. And the difference between an imitation handgun and a real handgun cannot account for the wide gulf between an eight-month sentence served in the community and a four-year penitentiary sentence. Ms. Link’s example is further demonstration that a reformatory sentence — if not less — could be a proportionate sanction under s. 344(1)(a.1). Four years in a federal institution would be grossly disproportionate in comparison.

[162] Given the breadth of the definition of a firearm (including BB guns, paintball guns, and nail guns), the range of conduct captured by the offence (including the degree and nature of involvement in the crime, the level of violence, and the level

of sophistication), as well as the prevalence of important, often intersecting, personal circumstances (including Indigeneity, youth, substance dependency, and rehabilitation efforts), it is reasonably foreseeable that a four-year penitentiary sentence would be a grossly disproportionate sentence for some offenders.

[163] As a result, based on the reasonably foreseeable application of the law, we agree with the courts below that the mandatory minimum in s. 344(1)(a.1) contravenes s. 12 of the *Charter*.

C. *Section 1*

[164] The Crown does not advance any argument on s. 1 of the *Charter* and therefore has not discharged its burden of justifying the s. 12 infringement. The provisions cannot be saved under s. 1.

III. Disposition

[165] We would thus declare ss. 344(1)(a)(i) and 344(1)(a.1) of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*. We would dismiss the Crown's appeal and maintain the orders of the Court of Appeal.

Appeal allowed, KARAKATSANIS and JAMAL JJ. dissenting.

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