SCC File No. 39338

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

JESSE DALLAS HILLS

Respondent

- and -

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PART I - OVERVIEW

1. The imprisonment of a human being is a perhaps the most significant infringement on liberty that the State can (lawfully) impose on its citizens. In addition to depriving an individual of their freedom of movement, imprisonment violates their privacy, isolates them from familial and social supports, damages relationships, and prevents them from providing financial support to their families. At times, imprisonment can expose them to violence, trauma and other inhumane conditions.[1] Our society has slowly come to recognize the impact that carceral sentences have on the mental and physical wellbeing of prisoners, their families, and the broader community. Our laws have also come to recognize that for imprisonment to be lawful and justifiable, it must respect the inherent human dignity of the prisoner.[2]

2. Section 718.1 of *Criminal Code* enshrines the principle of proportionality as *the* fundamental principle of sentencing.[3] The proportionality principle says that a sentence *must* be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of restraint, an aspect of proportionality, says that imprisonment should be no longer than necessary. Section 12 of the *Charter* adds a layer of constitutional protection to these principles, proscribing grossly disproportionate sentences.

3. In separate concurring decisions in *R. v. Hills*, Justices Wakeling and O'Ferrall do not simply ask the Court to revisit its approach to assessing the constitutionality of mandatory minimum sentences.[4] In addition to asking this Court to overturn *R. v. Nur*,[5] a relatively recent precedent, they have also asked this Court to further roll back the clock and completely overhaul Canadian sentencing law.

4. First, Justices Wakeling and O'Ferrall ask this Court to reduce proportionality from the fundamental principle of sentencing to merely one factor among many, which can be sacrificed at the altar of denunciation and deterrence. This approach is not only inconsistent with both the

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[1] *Corporation of the Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243 at paras 27, 126; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at paras 10, 11, 14, 83, 84, 90.
[2] *Miller et al v The Queen*, [1977] 2 SCR 680 at para 73; *Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805 at para 272.
[3] *Criminal Code*, RSC 1985, c C-46, s 718.1 [***Criminal Code***].
[4] *R v Hills*, 2020 ABCA 263 [***Hills***].
[5] *R v Nur*, 2015 SCC 15 [***Nur***].

Criminal Code and decades of this Court's jurisprudence, but it would also necessarily lead to unjust sentences, with all the attendant harms these punishments create.

5. Second, Justices Wakeling and O'Ferrall propose to eradicate section 12's protection against grossly disproportionate sentences, advocating for an interpretation of "cruel and unusual punishment" drawn from a defunct and discredited line of U.S. case law.

6. The Canadian Civil Liberties Association (the "**CCLA**") asks this Court to reject this radical proposal to change sentencing law and section 12 of the *Charter*, and to reaffirm both the principle of proportionality and the protection against gross disproportionality under the *Charter*.

PART II - ISSUES

7. The CCLA address the following issues:

(a) The fundamental role of proportionality in guarding against unjust sentences;

(b) The necessity of the gross disproportionality principle of s. 12 of the *Charter* as a constitutional protection against legislative overreach and unduly harsh sentences.

PART III - STATEMENT OF ARGUMENT

A. The Primacy of the Proportionality Principle Must Be Re-Affirmed

8. This Court has repeatedly recognized the paramountcy of the proportionality principle in sentencing.[6] The proportionality principle is enshrined explicitly in section 718.1 of the *Criminal Code* under the heading "Fundamental Principle", which states that "[a] sentence *must* be proportionate to the gravity of the offence and the degree of responsibility of the offender."[7] The proportionality principle is also reflected throughout section 718, including through the requirement that sentencing courts consider both aggravating and mitigating factors as required by section 718.2(a), the requirement the consecutive sentences should not be unduly long or harsh, as set out in section 718.2(c), and that rule that courts should exercise restraint in imposing imprisonment (sections 718.2(d) and (e)).[8]

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[6] *Nur*, *supra* note 5 at para 43; *R v Nasogaluak*, 2010 SCC 6 at paras 40-42 **[*Nasogaluak*]**; *R v Pham*, 2013 SCC 15 at paras 6-7; *R v Ipeelee*, 2012 SCC 13 at para 36 **[*Ipeelee*]**.
[7] *Criminal Code*, *supra* note 3, s 718.1
[8] *Nur*, *supra* note 5 at para 41.

9. The separate opinions of Justices Wakeling and O'Ferrall in this case, and the opinion of Justice Wakeling in *R v. Hilbach*[9] (for which leave to this Court has also been granted), propose to reduce the principle of proportionality from the fundamental principle of sentencing to merely one factor among many, capable of being sacrificed in the name of greater certainty, general deterrence and denunciation.[10] Indeed, Justice O'Ferrall's decision specifically endorses sentences that are unduly harsh where they serve the goals of denunciation or general deterrence even if it means that they are disproportionate.[11]

10. Justice O'Ferrall attempts to undermine the primacy of the proportionality principle by arguing that the proportionality principle is the *fundamental principle* of sentencing but not the *fundamental purpose* of sentencing.[12] But Justice O'Ferrall's approach reveals a misapprehension about how Canadian sentencing law works and how the various principles and goals of sentencing interact with each other to form a coherent and just approach to sentencing.

11. Section 718 of the *Criminal Code*, which sets out the fundamental purpose of sentencing and lists sentencing objectives, explicitly confirms that the fundamental purpose of sentencing is to "impos[e] just sanctions".[13]

12. As this Court has repeatedly held, proportionality is the *sine qua non* of a just sanction and drives the determination of a fit and just sentence.[14] This Court has at times even suggested that the proportionality principle may be a principle of fundamental justice.[15] As this Court wrote in *Ipeelee*, "[w]hatever weight a judge may wish to accord to the various objectives and other

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[9] *R v Hilbach*, 2020 ABCA 332 [***Hilbach***].
[10] *Hills, supra* note 4 at para 118.
[11] *Ibid*.
[12] *Ibid* at para 117, O'Ferrall JA ("proportionality is important. It has been described as the 'fundamental principle' of sentencing. However, it is not the "fundamental purpose" of sentencing").
[13] *Criminal Code, supra* note 3, s 718.
[14] *Ipeelee, supra* note 6 at para 37, quoted in *Nur, supra* note 5 at para 43; *R v Proulx*, 2000 SCC 5 at para 82; *R v Malmo-Levine*, 2003 SCC 74 at para 163; *Nasogaluak, supra* note 6 at paras 40-42; *Pham, supra* note 6 at para 7.
[15] *R v Smith*, [1987] 1 SCR 1045 at para 91 [***Smith***]; *Ipeelee, supra* note 6 at para 36. *Contra R v Safarzadeh-Markhali*, 2016 SCC 14 at para 21 (holding that proportionality simpliciter was *not* a principle of fundamental justice within the meaning of s 7 of the *Charter*).

principles listed in the *Code*, the resulting sentence ***must*** respect the fundamental principle of proportionality."[16]

13. Proportionality is a check on other sentencing goals. Courts have wide discretion to maximize the goals of sentencing, including denunciation and deterrence where appropriate, but the proportionality principle requires that the sentencing judge consider whether the punishment "*goes beyond what is necessary* for the achievement of a valid social aim."[17] In this way, this Court has repeatedly emphasized that the proportionality principle "serves a *limiting* or *restraining* function"[18] and ensures that the sentence "punishes the offender *no more than is necessary*".[19] Proportionality means that the question for the sentencing judge is not simply whether a sentence serves a valid penal purpose, but rather, whether the sentence is *necessary to achieve* that valid penal purpose.

14. The concurring judges' proposal would render Canadian sentencing law rudderless and unchecked. It would be akin to designing a car without brakes. To demote the proportionality principle from the paramount principle of sentencing to merely one factor among many — as the concurrences prescribe — would remove a vital check and inevitably result in unjust sentences.[20]

B. The Concurrence's Proposed Approach Would Gut s. 12 of the *Charter*

(i) A relic of U.S. jurisprudence that was overtaken decades ago

15. Justices O'Ferrall and Wakeling argue that this Court should excise the principle against gross disproportionality from the protection of s. 12 of the *Charter*.[21] They say that unduly harsh

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[16] *Ipeelee*, *supra* note 6 at para 37 (emphasis added).
[17] *Smith*, *supra* note 15 at para 94 (emphasis added).
[18] *Ipeelee*, *supra* note 6 at para 37 (emphasis added); *Nasogaluak*, *supra* note 6 at para 42.
[19] *Nasogaluak*, *supra* note 6 at para 42 (emphasis added).
[20] *R v M(CA)*, [1996] 1 SCR 500 at para 80; *R v Boudreault*, 2018 SCC 58 at para 48.
[21] *Hills*, *supra* note 4 at para 116 per O'Ferrall JA ("It has been said by the Supreme Court that a grossly disproportionate sentence (but not a proportionate sentence) constitutes cruel and unusual punishment. With respect, I say, perhaps not"); *Hills*, *supra* note 4 at para 135 per Wakeling JA ("The *Smith* Court never asked the obvious question – can a prison sentence ever be a 'cruel and unusual punishment'? Had it done so, it would have been exceedingly difficult for it to conclude that a prison sentence can be an unusual punishment when a prison term is the sanction for every offence in the current *Criminal Code* and has been the punishment for most crimes since 1867").

mandatory minimum sentences enacted by Parliament should no longer be reviewable on constitutional grounds. These are dangerous ideas, which this Court ought to forcefully reject.

16. This proposed new approach would reduce s. 12 of the *Charter* to a relic of a foregone age.[22] Indeed, their proposed approach is based on a line of cases that the U.S. Supreme Court rejected decades ago.

17. In 1980, in *Rummel v. Estelle*, a majority of the U.S. Supreme Court held that a life sentence for a property related offence was not cruel and unusual punishment because the Eighth Amendment did not protect against excessively long (grossly disproportionate) prison sentences, but only against "barbarous" modes of punishment.[23] Mr. Rummel had been convicted of three minor property offences (fraudulent use of credit card to obtain $80 in services; a forged cheque for $28.36; and false pretenses in the amount of $120.75). Under Texas' "three strikes law", the mandatory minimum sentence upon his third conviction was life imprisonment with no chance of parole for 12 years. Despite the cruelty of the result, the U.S. majority upheld the sentence. Justice Rehnquist (as he then was), writing for the majority, held that the Eighth Amendment did not protect against a grossly long prison sentence because the "[t]he length of the sentence actually imposed is purely a matter of legislative prerogative."[24] According to Justice Rehnquist, the U.S. Constitution must be interpreted in line with the framers' intent, and the framers were concerned only with proscribing cruel and unusual modes of punishment (e.g. torture) — not unduly long prison sentences.

18. Justice Powell's powerful dissent in *Rummel* pointed out that even on an "originalist" approach to the Eighth Amendment (which he did not endorse), the majority's view did not hold. The Eighth Amendment and its historical antecedents, including the *Magna Carta* of 1215 and the English *Bill of Rights* of 1689, had always included a prohibition against grossly excessive prison sentences. This can be seen in the language of the *Magna Carta* itself:

> A free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined]

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[22] *Hills, supra* note 4 at paras 116-118, 135.

[23] *Rummel v Estelle*, 445 US 263 (1980) at 288 (Life sentence for three offences defrauding others a total of $230 was not cruel and unusual punishment).

[24] *Ibid* at 274.

according to its gravity.[25]

19. This is the language of proportionality — a crime should be punished "according to its gravity". Further, U.S. Supreme Court jurisprudence through the twentieth century had affirmed the principle against grossly disproportionate prison sentences.[26] Further, regardless of the historical origins of the Eighth Amendment, the evolving standards of decency means that society's standards should not be frozen in time.

20. Subsequent U.S. cases have rejected the majority view from *Rummel* and adopted Justice Powell's dissent. In *Solem v. Helm*,[27] a majority of the U.S. Supreme Court held that the Eighth Amendment proscribes grossly disproportionate sentences.[28] Today, it is beyond dispute that the Eighth Amendment protects against grossly disproportionate sentences.[29] Justice Wakeling appears to begrudgingly acknowledge this reality at para. 196 of his concurrence. In reality, in an unbroken line of U.S. Supreme Court cases since 1983, a majority of that Court has recognized that the prohibition against cruel and unusual punishment also proscribes grossly disproportionate sentences, with some dissenting "originalist" judges continuing to hold onto their outdated, ahistorical view of what they believe the Eighth Amendment should be.[30]

(ii) Gross disproportionality is a necessary component of s. 12

21. The idea that s. 12 of the *Charter* protects against torture and other cruel modes of punishment but not against grossly disproportionate prison sentences has never gained traction in Canada. Contrary to Justice Wakeling's suggestion, this is not because our judges were unaware of the U.S. debate, but rather because the U.S. debate was over long before *R. v. Smith*, the seminal decision on the interpretation s. 12 of the *Charter*, reached the Supreme Court of Canada. Justice

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[25] *Ibid* at 290 Powell J, dissenting (citing Magna Carta, 1215).
[26] *Ibid* at 289 (citing *Weems v United States*, 217 US 349 (1910), in which the Court held that the Eighth Amendment "proscribes punishment grossly disproportionate to the severity of the crime").

[27] *Solem v Helm*, 463 US 277 (1983) [***Solem***]; *Harmelin v Michigan*, 501 US 957 (1991) **[*Harmelin*]** at 998; *Ewing v California*, 538 US 11 (2003) **[*Ewing*]** at 23-24, 28; *Graham v Florida*, 560 US 48 (2010) **[*Graham*]** at 2021-2022; *Ramirez v Castro*, 365 F (3d) 755 at 757 (9th Cir 2004) **[*Ramirez*]**.
[28] *Solem, supra* note 27 at 284-290.
[29] *Harmelin, supra* note 27 at 998, Kennedy J; *Ewing, supra* note 27 at 23-24, 28; *Graham, supra* note 27 at 2021-2022; *Ramirez, supra* note 27 at 757 (9th Cir 2004).
[30] *Harmelin, supra* note 27 Kennedy J; *Ewing, supra* note 27.

Lamer (as he then was) in *Smith* was keenly aware of the Eighth Amendment jurisprudence and specifically cited *Solem v. Helm*, the leading U.S. authority at the time.[31]

22. But in many respects, the old U.S. debate is a red herring. The question is not simply whether one can trace the origins of gross disproportionality to the *Magna Carta*, but whether a 21st century approach to the constitutional prohibition on cruel and unusual punishment should proscribe grossly disproportionate sentences. This question is not a historical exercise but an exercise of constitutional interpretation, drawing on the values and principles the *Charter*, and of the modern criminal justice system that Canadian courts are meant to uphold. In Canada, the Constitution is indisputably a "living tree" to be given a "progressive interpretation" which accommodates and addresses modern life.[32]

23. Justice *Wakeling* asserts that this Court in *Smith* never explained the link between "cruel and unusual punishment" and "gross disproportionality." This Court did in fact ask and answer that question in *Smith.* As Justice Lamer explained:

> …In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J.C. in *Miller*, supra, where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J.C. in *Miller*, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.[33]

24. Put another way, grossly disproportionate sentences are:

> …cruel and unusual in their disproportionality in that no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity either by him or by them. It shocked the communal conscience. It was "unusual" because of its extreme nature…, it was so unusual as to be cruel and so cruel as to be unusual.[34]

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[31] See *Smith*, *supra* note 15 at para 89.
[32] *Reference re Same-Sex Marriage*, 2004 SCC 79, at para 22.
[33] *Smith*, *supra* note 15 at para 86, Lamer J, See also para 6, McIntyre J, dissenting.
[34] *Smith*, *supra* note 15 at para 111, Wilson J, concurring on this point.

25. The constitutional protection against grossly disproportionate sentences is anchored in respect for human dignity.[35] A grossly disproportionate sentence is gratuitous punishment. Treating human beings as human beings means that we do not lock someone in jail and throw away the key just because some government objective could be accomplished by doing so. A person who has been found guilty of a crime is not simply a canvas on which to paint society's condemnation, but remains a human being and a rights-holder endowed with human dignity and legal rights. That is the central idea animating s. 12, and indeed, the *Charter* itself. Just as torture offends these principles because it treats human beings as instrumentalities rather than ends in themselves, so too does a sentence that is entirely unmoored from the principle of proportionality. People should never be solely used to accomplish the legislature's utilitarian goals. Respect for human dignity requires a constitutional check on that power. That check is the gross disproportionality principle enshrined in s. 12 of the *Charter*.

26. By saying that s. 12 should not protect against grossly disproportionate sentences, Justices Wakeling and O'Ferrall are really saying that the legislature should be free to impose sentences on any individual for any length of time. If the Legislature so chose, a life sentence for a minor property offence would pass constitutional muster. (This, of course, was the result in *Rummel*.) On this view, someone who commits a single crime of poverty can spend the rest of their life in prison. Outcomes like *Rummel* are a stain on the U.S. criminal justice system and a cautionary tale. This Court should not be replicating these excesses.

(iii) Section 12 of the Charter cannot be reduced to the whims of the majority

27. Justice Wakeling's real concern seems to be that the Supreme Court of Canada "has constructed a model for identifying cruel and unusual punishment that it knows will invalidate [mandatory minimum sentences]."[36] He laments this "sad state of affairs."[37]

28. But Justice Wakeling provides no reason why striking down mandatory minimum sentences is inappropriate. If Parliament has enacted sentencing laws that lead to unconstitutional sentences, then the courts are duty-bound to strike down those laws. Further, as various studies have found,[38]

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[35] *Quebec (Procureure generale) c 9147-0732 Quebec inc*, 2020 SCC 32, at paras 17 (Brown and Rowe JJ) and 96 (Abella J, concurring); *Smith*, *supra* note 15 at para 10, per McIntyre J, dissenting.
[36] *Hills*, *supra* note 4 at para 291, Wakeling JA.
[37] *Ibid* at para 292.
[38] Raji Mangat, "More Than We Can Afford: The Cost of Mandatory Minimum Sentencing" (2014) at 23-26, online (pdf): *British Columbia Civil Liberties Association* < https://bccla.org/wp-content/uploads/2014/09/Mandatory-Minimum-Sentencing.pdf>.

there is scant evidence that mandatory minimum sentences provide any social value. Specifically, there is no evidentiary basis for the myth that mandatory minimums contribute to deterrence any more than proportionate sentences. On the other hand, mandatory minimum sentences tie the hands of sentencing judges and unduly punish the most innocent offender (who would have gotten a sentence below the mandatory minimum if it did not exist), but have little to no impact on the most serious cases (where sentences would likely have exceeded the mandatory minimum in any event). They also shift sentencing discretion from the judge (where it belongs) to the prosecutor, who can drastically impact sentence by choosing or not choosing to charge an offence that carries a mandatory minimum sentence.[39] The current Government has acknowledged that based on all available evidence, mandatory minimum penalties "do not deter… crimes or keep people and communities safe." As the Honourable David Lametti stated in the House of Commons:

> Mandatory minimum penalties simply have not worked. We have focused in this bill on mandatory minimums that result in the over-incarceration of Black and Indigenous Canadians, in particular, and that have served to clog up the criminal justice system. They are not helping anybody. They were simply fuelling the ideological tough-on-crime narrative, which has not proven to be true empirically, has not served our communities, has not made us safer and not helped victims.[40]

29. To the extent that Justice Wakeling explained his distaste for this "sad state of affairs", it seems to be borne out of the theory that popular opinion would not support the Supreme Court of Canada's approach. In criticizing this Court's decision in *Lloyd*, he writes, that "[m]ost Canadians would probably conclude that a one-year prison sentence for these imagined drug traffickers is, if anything, far too lenient."[41]

30. This approach, however, misconceives the role of a constitutionally entrenched bill of rights and the court's role in evaluating whether a punishment is "so excessive as to outrage

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[39] *Nur*, *supra* note 5 at paras 86-87.
[40] Canada, Parliament, *House of Commons Debates*, 43rd Parl, 2nd Sess, Vol 150, No 075 (24 March, 2021) at 5201 (Hon David Lametti).
[41] *Hills*, *supra* note 4 at para 288, Wakeling JA. Indeed, in *Hilbach*, *supra* note 9 (in which Wakeling JA repeats many of these ideas), he relies overtly on a survey of Canadians that suggests that the general members of the public think sentences are too lenient. *Hilbach*, *supra* note 9 at para 86.

standards of decency."[42] Section 12 protects a set of normative values and principles, rooted in respect for human dignity, which cannot be reduced to a majority plebiscite.

31. Courts have long recognized that the Canadian public often adopts a negative and emotional attitude towards potential criminals, and reacts viscerally, impulsively and emotionally when asked about crime.[43] This Court has also taken judicial notice of the fact that the Canadian public is not always as well informed as they think they are on the subject.[44] As a result, this Court emphasized, specifically when applying the concept of public confidence in the context of bail hearings, that the analysis must be undertaken from the perspective of a reasonable member of the public, familiar with the fundamental values of our criminal justice system, *Charter* values and the actual circumstances of the case.[45]

32. The purpose of a constitutionally entrenched bill of rights is to carve out protection for certain rights from the whims of the majority. The question is not simply what the average person on the street believes. The question is whether a reasonable member of the public, familiar with the principle of proportionality, the values underpinning s. 12 of the *Charter*, and the actual impacts of a particular punishment, would find a sentence so grossly disproportionate such that it outrages their sense of decency. That reasonably informed person would understand that the punishment should fit the crime and would be offended by sentences that grossly depart from that principle. This Honourable Court should reject the concurrence's attempt to rewrite s. 12 of the *Charter*.

PART IV - COSTS AND ORDERS REQUESTED

33. The CCLA does not seek cost and asks that costs not be awarded against it.

34. The CCLA respectfully requests leave to present oral argument for no more than 10 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of August, 2021.

Nader R. Hasan / Ryann Atkins
Counsel for the Intervener,
Canadian Civil Liberties Association

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[42] *Smith*, *supra* note 15 at para 86.
[43] *R v St-Cloud*, 2015 SCC 27 at paras 75-77, quoting *R c Lamothe*, 1990 CanLII 3479 (QC CA) at 541.
[44] *Ibid* at para 82.
[45] *Ibid* at para 79.

PART V – TABLE OF AUTHORITIES

	Para(s) in Factum
CASE LAW	
Bacon v Surrey Pretrial Services Centre, 2010 BCSC 805	1
British Columbia Civil Liberties Association v Canada (Attorney General), 2019 BCCA 228	1
Corporation of the Canadian Civil Liberties Association v Canada (Attorney General), 2019 ONCA 243	1
Ewing v California, 538 US 11 (2003)	20
Graham v Florida, 560 US 48 (2010)	20
Harmelin v Michigan, 501 US 957 (1991)	20
Quebec (Procureure generale) c 9147-0732 Quebec inc, 2020 SCC 32	25
R v Boudreault, 2018 SCC 58	14
R v M(CA), [1996] 1 SCR 500	14
R v Hilbach, 2020 ABCA 332	9
R v Hills, 2020 ABCA 263	3, 9, 10, 15, 16, 27, 29
R v Ipeelee, 2012 SCC 13	8, 12, 13
R v Malmo-Levine, 2003 SCC 74	12
Miller et al v The Queen, [1977] 2 SCR 680	1
R v Nasogaluak, 2010 SCC 6	8, 12, 13
R v Nur, 2015 SCC 15	3, 8, 12, 28
R v Pham, 2013 SCC 15	8, 12
R v Proulx, 2000 SCC 5	12
R v Safarzadeh-Markhali, 2016 SCC 14	12
R v Smith, [1987] 1 SCR 1045	12, 13, 21, 23, 24, 25
R v St-Cloud, 2015 SCC 27	31
Ramirez v Castro, 365 F (3d) 755 (9th Cir 2004)	20

PART VI – LEGISLATION CITED

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11

Treatment or punishment

12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment

Cruauté

12 Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Criminal Code, .S.C., 1985, c. C-46

Purpose and Principles of Sentencing

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Objectif et principes

Objectif

718 Le prononcé des peines a pour objectif essentiel de protéger la société et de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

a) dénoncer le comportement illégal et le tort causé par celui-ci aux victimes ou à la collectivité;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes ou à la collectivité.

Fundamental principle

Principe fondamental

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence, or

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

Principes de détermination de la peine

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

(a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant :

(i) que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique, l'orientation sexuelle ou l'identité ou l'expression de genre,

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement soit de son partenaire intime soit d'un membre de la famille de la victime ou du délinquant,

(ii.1) que l'infraction perpétrée par le délinquant constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iii.1) que l'infraction a eu un effet important sur la victime en raison de son âge et de tout autre élément de sa situation personnelle, notamment sa santé et sa situation financière,

(iv) que l'infraction a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle,

section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and Conditional Release Act shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

(v) que l'infraction perpétrée par le délinquant est une infraction de terrorisme,

(vi) que l'infraction a été perpétrée alors que le délinquant faisait l'objet d'une ordonnance de sursis rendue au titre de l'article 742.1 ou qu'il bénéficiait d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte en vertu de la Loi sur le système correctionnel et la mise en liberté sous condition;

(b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

(c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

(d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

(e) l'examen, plus particulièrement en ce qui concerne les délinquants autochtones, de toutes les sanctions substitutives qui sont raisonnables dans les circonstances et qui tiennent compte du tort causé aux victimes ou à la collectivité.