SCC Court File No.: 40882

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

BETWEEN:

ATTORNEY GENERAL OF QUEBEC and HIS MAJESTY THE KING

Appellants

- and -

LOUIS-PIER SENNEVILLE and MATHIEU NAUD

Respondents

- and –

RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN CENTRE FOR CHILD PROTECTION INC. and ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. The central issue in this appeal is the proper analytical framework to determine the constitutionality of mandatory minimum sentences under s. 12 of the *Canadian Charter of Rights and Freedoms*. This question deals directly with the most significant deprivation of liberty that the state can (lawfully) impose on its citizens: imprisonment. At its core, the consideration of mandatory minimums under s. 12 asks how long Parliament can constitutionally force individuals to spend in prison beyond what is just or proportionate in the circumstances.

2. This Court has developed and refined the analytical framework for assessing mandatory minimums going back to *R. v. Smith*.[1] The evolution of this framework has not always been linear, but at least since *Nur*,[2] this Court has held that the assessment of gross disproportionality is qualitative, not quantitative; that the sentence must provide for rehabilitation; and that the mandatory minimum must be proportionate to its sentencing goals. It has also repeatedly rejected attempts to inject irrelevant factors into the analysis, which would stray from and undermine proportionality and other core sentencing principles.

3. In its recent decisions in *Hills*[3] and *Hilbach*,[4] this Court reaffirmed the analytical approach: the court must compare the mandatory minimum to the proportionate sentence for either the actual offender before the court or the reasonable hypothetical offender and assess whether the gap between the mandatory minimum and the proportionate sentence is *grossly* disproportionate.[5]

4. This case — and the Appellant's arguments — demonstrate the need for this Court to further clarify which factors are relevant — and which are irrelevant — to this analysis.

5. On these appeals, the Canadian Civil Liberties Association ("CCLA"), makes three points regarding the s. 12 framework:

   a. Drawing on this Court's jurisprudence, core principles have emerged to assist courts in assessing whether a mandatory minimum is grossly disproportionate.

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[1] *R v Smith*, [1987] 1 SCR 1045.
[2] *R v Nur*, 2015 SCC 15 [***Nur***].
[3] *R v Hills*, 2023 SCC 2 [***Hills***].
[4] *R v Hilbach*, 2023 SCC 3 [***Hilbach***].
[5] See also: *R v Bertrand Marchand*, 2023 SCC 26 [***Bertrand Marchand***].

b. In order to determine the proportionate sentence, the court must assess the circumstances in which the offence was committed, not just its objective gravity.

c. The possibility of the offender obtaining parole through the exercise of the discretion of the Parole Board of Canada is entirely irrelevant to the constitutional analysis.

PART II - STATEMENT OF POSITION ON QUESTIONS IN ISSUE

6. The CCLA takes no position on the disposition of the appeals. The CCLA seeks to provide this Court with assistance in reaffirming and elaborating on the framework for determining whether a mandatory minimum sentence is grossly disproportionate.

PART III- STATEMENT OF ARGUMENT

A. Key Principles to Assess Gross Disproportionality

7. Key principles have emerged from this Court's jurisprudence to guide the assessment of whether a mandatory minimum is grossly disproportionate (rather than merely disproportionate, but constitutionally compliant). These principles include:

a. The assessment of gross disproportionality is not merely numerical, but takes into account the qualitative impact on the individual;

b. The ability of the sentence to account for the prospect of rehabilitation is necessary to its constitutionality; and

c. In determining whether a mandatory minimum violates s. 12, the courts must ask whether the mandatory minimum significantly exceeds what is necessary to accomplish its sentencing goals.

8. As the s. 12 case law demonstrates, the most challenging component to assess is whether the divergence (or "gap") between the mandatory minimum and the proportionate sentence (whether for the offender before the court or a reasonable hypothetical offender) is "grossly disproportionate" — and thus unconstitutional — rather than being merely unfit. According to this Court, a mandatory minimum sentence is only unconstitutional when it crosses the line from being disproportionate to *grossly* disproportionate.[6] Where that line lies is not always easy to discern.

9. Nevertheless, throughout this Court's s. 12 jurisprudence, certain important principles have

[6] *R v Safarzadeh-Markhali*, 2016 SCC 14, at paras 71-73.

emerged, which can assist courts in determining whether the mandatory minimum is not merely disproportionate, but also *grossly* disproportionate. Applying these principles ensures that the analysis is reasoned, principled, and consistent. Aside from providing helpful direction to sentencing courts, these principles also provide useful guidance to Parliament in drafting constitutionally-compliant mandatory minimum sentences. For these important reasons, this Court should reaffirm these principles.

10. **First**, the assessment is not merely numerical but has a qualitative dimension.

11. There is no magic ratio by which a mandatory minimum exceeds the proportionate sentence that renders it unconstitutional. The analysis does not depend solely on whether the mandatory minimum is 1.5 times or double or triple what is proportionate — or, for that matter, whether the mandatory minimum is only slightly longer than the proportionate sentence. Gross disproportionality cannot be assessed in absolute numbers alone. It is not about a certain number of days, weeks, or months. As Martin J. explained in *Hilbach*, "there is no hard number above or below which a sentence becomes grossly disproportionate".[7] Likewise, in *Hills*, "[t]he effects of a sentence are not measured in numbers alone".[8]

12. As such, the analysis is qualitative, not quantitative.[9] It is a normative question.[10] The court must consider the qualitative effects of the mandatory penalty on the offender. While the absolute length of the sentence is undoubtedly a key factor in this consideration, it is only a piece of it.

13. Beyond a numerical comparison of the sentences, the assessment must account for the collateral consequences of the sentence and the effect on the individual.[11] Accordingly, a mandatory minimum sentence may be grossly disproportionate even if it only exceeds the proportionate sentence by a matter of weeks or months.

14. **Second**, a constitutionally-compliant mandatory minimum must account for rehabilitation. A mandatory minimum sentence that completely sacrifices the prospect of rehabilitation at the altar of other sentencing principles like deterrence and denunciation will be constitutionally unsound.

15. This principle rests on the deep link between rehabilitation and human dignity, the latter of

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[7] *Hilbach*, at para 60.
[8] *Hills*, at para 136.
[9] *Hilbach*, at para 63.
[10] *Hills*, at para 110.
[11] *Hilbach*, at para 62.

which sits at the core of s. 12. While this Court has not endorsed a stand-alone constitutional status for rehabilitation, it has emphasized the "strong connection" between rehabilitation and human dignity.[12] Human dignity "underlies the protection conferred by s. 12 of the *Charter*".[13]

16. It is for this reason that this Court has explained: "To ensure respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance".[14]

17. In *Hills*, Martin J. further elaborated:

> The objective is not to have rehabilitation prevail over other sentencing objectives but rather to ensure it remains a component "in a penal system based on respect for the inherent dignity of every individual" (*Bissonnette*, at para. 88). It follows then, that in order to be compatible with human dignity, and therefore respect s. 12, punishment or sentencing must take rehabilitation into account. As noted by one intervener: "A person who has been found guilty of a crime is not simply a canvas on which to paint society's condemnation, but remains a human being and a rights-holder endowed with human dignity and legal rights" (see I.F., Canadian Civil Liberties Association, at para. 25). The application of any mandatory minimum sentence that has the effect of excluding or completely disregarding rehabilitation will be grossly disproportionate as it is incompatible with human dignity.[15]

18. This Court struck down the mandatory minimum for child luring in *Bertrand Marchand* because it "prioritized denunciation and deterrence to the near complete exclusion of rehabilitation".[16]

19. Thus, a sentence that disregards the prospect of rehabilitation will necessarily be grossly disproportionate.

20. **Third**, the key test for determining whether a sentence is grossly disproportionate is whether it "far exceeds what is necessary" to accomplish the legitimate goals of sentencing.[17]

21. In *Hills*, this Court explained that, in considering gross disproportionality, the court must compare the mandatory minimum against what is ***necessary*** to achieve Parliament's objectives in

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[12] *Hills*, at para 141.
[13] *R v Bissonnette*, 2022 SCC 23 [***Bissonnette***] at para 81.
[14] *Bissonnette*, at para 85.
[15] *Hills*, at para 142 (emphasis added); see also: *Hilbach*, at para 38.
[16] *Bertrand Marchand*, at para 159.
[17] *Hills*, at para 167.

enacting it.[18] In other words, if the stated purpose of the mandatory minimum is to denounce a particular type of criminal conduct, the court must ask whether such an onerous sentence is in fact *necessary* to unambiguously denouncing that conduct, or whether a lesser, proportionate sentence would equally succeed in roundly denouncing the conduct at issue.

22. This type of analysis is analogous to the "minimal impairment" prong of the *Oakes* test under s. 1 of the *Charter*, which focuses on whether an infringement of the *Charter* right is greater than what is necessary to achieve the legislature's pressing and substantial objective.

23. In the context of s. 12, the analysis looks at whether the mandatory minimum "goes far beyond what is necessary for Parliament to achieve its sentencing goals" or "far exceeds what is necessary to protect the public, condemn the offender's behaviour or discourage others from engaging in similar conduct".[19]

24. This "far exceeds" standard can act as a useful guidepost for courts applying the gross disproportionality test under s. 12.

B. The Court Must Examine the Circumstances of the Offence

25. In considering the proportionate sentence, the court must take into account the circumstances in which the offence was committed. The Appellant's approach on these appeals would undermine this crucial plank of the Canadian sentencing framework.

26. In this case, the sentencing judge and Vauclair J.A. at the Quebec Court of Appeal identified various factors to determine a proportionate sentence for the offences at issue, to compare against the mandatory minimum. These factors included (but were not limited to) the number of photographs, the specific nature of the images, whether they exclusively concern child pornography, the duration of the possession, and whether the accused also contributed towards their distribution.[20] Notably, the Crown at the sentencing hearing for both offenders relied on many of these same factors to justify the sentence for which it was advocating.[21]

27. Under the Appellant's approach, none of these factors are relevant to determine a

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[18] *Hills*, at para 138.
[19] *Hills*, at para 167; See also: *Hilbach*, at para 76.
[20] *Procureur général du Québec c Terroux*, 2023 QCCA 731, at para 143; *R c Senneville*, 2020 QCCQ 1204 [***Senneville***], at para 34; *R c Naud*, 2020 QCCQ 1202 [***Naud***], at paras 30, 42.
[21] *Senneville*, at para 19; *Naud*, at para 16.

proportionate sentence for the gross disproportionality analysis. Instead, the Appellant argues that the consideration of these factors trivializes the offences. It submits that the analysis should be largely (if not exclusively) driven by the objective seriousness of the elements of the offence.

28. This flawed approach is completely inconsistent with decades of this Court's jurisprudence.

29. As set out in *Hills*, the first part of the s. 12 analysis involving mandatory minimums is to assess a fit and proportionate sentence, "having regard to the objectives and principles of sentencing in the *Criminal Code*".[22]

30. This Court has frequently considered the purposes and principles governing criminal sentencing.[23] It has repeatedly recognized proportionality as *the* fundamental principle or "the cardinal principle" of sentencing.[24] Indeed, this concept is enshrined explicitly in s. 718.1 of the *Criminal Code* that a sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender". However, this has been a "central tenet of the sentencing process" long before Parliament added s. 718.1 to the *Criminal Code*.[25] Proportionality is the *sine qua non* of a just sanction.[26]

31. A proportionate sentence is one that is proportionate to the gravity of the offence and the degree of responsibility of the offender (taking into account the circumstances of the offender). All other sentencing principles, including separation from society, deterrence, retribution, rehabilitation, restorative justice, reparation for harm, and promoting a sense of responsibility for harm done, are captured by and work in service to this concept when they are properly balanced.

32. The objective seriousness of the offence clearly has a role to play in the proportionality analysis. It is a component of the "gravity of the offence". However, it cannot be permitted to completely overwhelm the analysis. As this Court recently outlined in *Hills*, "[t]he 'gravity of the offence' refers to the seriousness of the offence in a general sense and is reflected in the potential penalty imposed by Parliament and in any specific features of the commission of the crime".[27]

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[22] *Hills*, at para 40; See also: *Nur*, at para 40.
[23] See, for example: *R v Proulx*, 2000 SCC 5; *R v M (CA)*, [1996] 1 SCR 500; *R v Nasogaluak*, 2010 SCC 6; *R v Lacasse*, 2015 SCC 64; *R v Friesen*, 2020 SCC 9 [***Friesen***]; *Nur*; *R v Ipeelee*, 2012 SCC 13 [***Ipeelee***].
[24] *R v Morrisey*, [2000] 2 SCR 90, at para 44; *Friesen*, at para 30; *Bissonnette*, at para 50.
[25] *Ipeelee*, at para 36.
[26] *Ipeelee*, at para 37.
[27] *Hills*, at para 58 (emphasis added); See also: *Bissonnette*, at para 62; *Friesen*, at para 96.

33. In sentencing, the objective seriousness of the offence is always relevant to craft a proportionate sentence. However, so too are the specific features of the offence as committed by the offender before the court. All offences exist on a spectrum of seriousness. A sentencing judge must evaluate the "circumstances of the commission of the offence" — *i.e.* the specific manner in which the offence was committed — in order to determine the proportionate sentence.[28]

34. Contrary to the Appellant's submissions, recognizing the relevance of these features does not ignore or trivialize the seriousness of the offence or the harm that it can inflict on its victims. Rather, it ensures that the sentence is truly proportionate and crafted to fit the specific offender.

35. This exercise was on full display in this Court's decision in *Bertrand Marchand*. In considering the proportionate sentence for child luring offences in that case — in order to assess the constitutionality of the mandatory minimum — Martin J. expressly highlighted a number of specific features of the commission of the offence, including the duration and frequency of the communications and the content of the communications.[29] For example, she noted that a large volume of persistent messages exacerbates the harms to victims and thereby increases the gravity of the offence.[30] Accounting for these factors was necessary to determine what sentence was proportionate. It did not minimize or ignore the serious harm that all instances of child luring can occasion, but it recognized that the proportionate sentence must be responsive to the manner in which the offence was committed.

36. Importantly, Martin J. explained that determining the proportionate sentence or striking down the mandatory minimum as grossly disproportionate does not diminish the very serious nature of sexual offences against children. She stated that there is "no incongruity between affirming the severe wrongfulness and harms that often accompany child luring offences and finding the mandatory minimums ascribed to these sentences unconstitutional".[31]

37. Further, the majority of this Court in *Hills* emphasized the importance in the s. 12 analysis of considering the scope of the offence, including the "range of conduct" that might be caught by the *mens rea* and *actus reus*; mandatory minimums are especially vulnerable where the offence

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[28] *Hills*, at para 50.
[29] *Bertrand Marchand*, at paras 77-79.
[30] *Bertrand Marchand*, at para 77.
[31] *Bertrand Marchand*, at para 167.

captures "disparate conduct of widely varying gravity and degrees of offender culpability".[32] These considerations necessarily recognize the different ways in which many offences can be committed, and how these specific features will impact the proportionate sentence in a given case.

38. The Appellant's submissions, if adopted, would undermine this well-established principle of proportionality and fundamentally alter the established test for s. 12 violations, as recently affirmed in *Hills*, *Hilbach*, and *Bertrand Marchand*.

39. Further, beyond the constitutional analysis under s. 12, such an approach would have a profound impact on sentencing if carried to their logical conclusion. If the specific circumstances of the commission of the offence cannot be properly accounted for to determine the proportionate sentence in the s. 12 analysis (because doing so trivializes the harm to victims), then they similarly cannot be considered by sentencing judges in crafting sentences. Such an approach would circumscribe a sentencing judge's discretion to consider all features of the offence and craft a proportionate sentence for the offender. It creates a substantial risk of disproportionate sentences, thereby undermining the fundamental principle of sentencing.

C. The Possibility of Parole is Irrelevant

40. Alongside disregarding relevant factors, the Appellant also seeks to reintroduce irrelevant factors into the s. 12 analysis. In particular, the Appellant argues that the courts should consider the availability of parole as a factor that mitigates against the harmful impacts of a mandatory minimum sentence. This factor was properly rejected in both *Nur* and *Hills*.

41. Justice Martin, writing for a majority of this Court in *Hills*, explained that "the possibility of parole cannot cure a grossly disproportionate sentence".[33] She stated:

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

[32] *Hills*, at paras 125, 129.
[33] *Hills*, at para 103; see also: *Hilbach*¸ at para 60.

> parole board's task is to determine whether an offender may safely be released into the community (*Nur*, at para. 98).[34]

42. She emphasized that the courts bear the constitutional obligation to ensure that sentences are not grossly disproportionate, not the parole board.[35]

43. Similarly, McLachlin C.J. explained in *Nur* that "[t]he discretionary decision of the parole board is no substitute for a constitutional law".[36] The goals of sentencing and parole are different. The role of the parole board is not to ensure that an offender serves a proportionate sentence; it is to ensure that the offender can be safely released into the community.[37]

44. Parole is distinct from the sentence imposed by the court. It is an exercise of the discretion of the executive. Just as the exercise of another form of executive discretion — prosecutorial discretion to proceed summarily — cannot cure an unconstitutional mandatory minimum,[38] the discretion of the parole board ought not to form any part of the consideration of whether a mandatory minimum sentence is grossly disproportionate.

45. There is no inconsistency between *Bissonnette* and *Hills* on this point. While *Hills* and *Bissonnette* both addressed challenges under s. 12 of the *Charter*, the context was fundamentally distinct. *Bissonnette* does not support the argument that courts should consider the possibility of parole in the gross disproportionality analysis.

46. The two cases addressed different aspects of s. 12. *Hills* — like this case — dealt with the first prong of s. 12: whether a sentence is grossly disproportionate. This prong accepts that certain types of punishments (like incarceration) can be constitutionally valid, but queries whether a specific sentence is so excessive as to be incompatible with human dignity.[39] On the other hand, *Bissonnette* considered the second prong of s. 12: punishments that are cruel and unusual by their nature. This prong considers punishments that, by their very nature, are "intrinsically incompatible with human dignity".[40] The relevance of parole in each of these scenarios is different.

47. In *Bissonnette*, this Court considered whether it was cruel and unusual, by its very nature,

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[34] *Hills*, at para 104.
[35] *Hills*, at para 105.
[36] *Nur*, at para 98.
[37] *Nur*, at para 98.
[38] *Nur*, at para 95.
[39] *Hills*, at para 35.
[40] *Bissonnette*, at para 60.

to completely remove the possibility of parole from an offender facing a life sentence by stacking periods of parole ineligibility. Ultimately, this Court ruled that such sentences were inherently unconstitutional because they were incompatible with human dignity. That is a fundamentally different question from whether a court should constitutionally permit a grossly disproportionate mandatory minimum sentence because an offender might be granted parole before it expires.

48. *Nur* and *Hills* rejected the relevance of considering parole in the s. 12 analysis because its actual availability depends on a discretionary decision of an administrative body. By contrast, *Bissonette* considered a scenario where that discretion was entirely precluded by legislatively mandated parole ineligibility. The latter scenario tells us little about the former.

49. Finally, this Court's characterization of parole in *Bissonnette* is entirely consistent with its approach from *Nur* and *Hills*. For example, Wagner C.J., writing for a unanimous Court, explained that the parole system "involves a process that is independent of and distinct from the sentencing process",[41] that actual parole availability is determined by an independent administrative tribunal,[42] and that parole is a statutory privilege, not a right.[43] Further, the Chief Justice sought to counter the "myth" that parole puts an end to an offender's sentence.[44] This Court would later echo many of these same principles in *Hills.*[45] In these ways, this Court's decision in *Bissonnette* is entirely *consistent* with the approach set out in *Nur* and *Hills*.

50. This Court should not overrule its very recent precedent on this point.

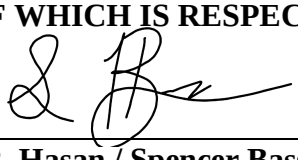
PART IV- SUBMISSIONS CONCERNING COSTS

51. The CCLA does not seek costs and asks that no costs be ordered against it.

PART V - ORDER SOUGHT

52. The CCLA takes no position on the disposition of the Appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November, 2024.



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[41] *Bissonnette*, at para 37.
[42] *Bissonnette*, at para 40.
[43] *Bissonnette*, at para 41.
[44] *Bissonnette*, at para 89.
[45] *Hills*, at paras 104-105.

PART VI - TABLE OF AUTHORITIES

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LEGISLATION	**Paragraph(s) Reference**
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (ss 1, 12) *Charte canadienne des droits et libertés*, partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11 (arts 1, 12)	1, 5, 8, 9, 15, 17, 22, 23, 24, 29, 37, 38, 39, 40, 45, 46, 48
Criminal Code (RSC, 1985, c C-46) (s 718.1) *Code criminel* (LRC (1985), ch C-46) (art 718.1)	29, 30