

CANADA / JUDGMENT

Quebec (Attorney General) v. Senneville

2025 SCC 33

COURT

Supreme Court of Canada

DECIDED

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Quebec (Attorney General) v. Senneville

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40882

Judges

Wagner, Richard; Karakatsanis, Andromache; Côté, Suzanne; Rowe, Malcolm; Martin, Sheilah; Kasirer, Nicholas; Jamal, Mahmud; O'Bonsawin, Michelle; Moreau, Mary

On appeal from

Quebec

Subjects

Constitutional law

Notes

Case in Brief SCC Case Information

Decision Content

SUPREME COURT OF CANADA

Citation: Quebec (Attorney General) v. Senneville, 2025 SCC 33

Appeal Heard: January 20, 2025

Judgment Rendered: October 31, 2025

Docket: 40882

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 (Ontario),

Canadian Civil Liberties Association,

Canadian Centre for Child Protection Inc. and

Association québécoise des avocats et avocates de la défense

Interveners

Official English Translation

Coram: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

Reasons for Judgment:

(paras. 1 to 118)

Moreau J. (Karakatsanis, Martin, Kasirer and Jamal JJ. concurring)

Joint Dissenting Reasons:

(paras. 119 to 265)

Wagner C.J. and Côté J. (Rowe and O'Bonsawin JJ. concurring)

Note: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Attorney General of Quebec and

His Majesty The King Appellants

v.

Louis-Pier Senneville and

Mathieu Naud Respondents

and

Raoul Wallenberg Centre for Human Rights,

Criminal Lawyers' Association (Ontario),

Canadian Civil Liberties Association,

Canadian Centre for Child Protection Inc. and

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Indexed as: Quebec (Attorney General) v. Senneville

2025 SCC 33

File No.: 40882.

2025: January 20; 2025: October 31.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

on appeal from the court of appeal for quebec

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Sentencing — Mandatory minimum sentence — Child pornography — Accused persons pleading guilty to possession of child pornography and accessing child pornography — Accused persons challenging constitutionality of mandatory minimum sentence of one year's imprisonment prescribed for these offences as indictable offences — 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, s. 163.1(4)(a), (4.1)(a).

S pleaded guilty to one count of possession of child pornography and to one count of accessing child pornography, offences set out in s. 163.1(4)(a) and s. 163.1(4.1)(a), respectively, of the Criminal Code. In a separate case, N pleaded guilty to one count of possession of child pornography. At the sentencing proceedings stage, they both challenged the constitutionality of the minimum sentences facing them.

The judge who sentenced S and N found that the mandatory minimum sentences of one year's imprisonment associated with the offences of possession of child pornography and accessing child pornography were grossly disproportionate in comparison with the appropriate sentences for S for those offences and for N for the offence of possession of child pornography. He declared that those minimum sentences were of no force or effect against S and N and that they were unconstitutional under s. 12 of the Charter. The Court of Appeal also found that the minimum sentences violated s. 12 of the Charter, by reason, however, of their reasonably foreseeable application to offenders other than S and N, and that they were of no force or effect under s. 52 of the Constitution Act, 1982.

Held (Wagner C.J. and Côté, Rowe and O'Bonsawin dissenting): The appeal should be dismissed.

Per Karakastanis, Martin, Kasirer, Jamal and Moreau JJ.: A mandatory minimum sentence does not necessarily violate s. 12 of the Charter. However, when the application of a mandatory minimum sentence is broad and covers a wide range of circumstances, the sentence is constitutionally vulnerable because it leaves no choice but to impose a grossly disproportionate sentence on certain offenders. In the instant appeal, by assessing a reasonably foreseeable scenario, the minimum sentences set out in s. 163.1(4)(a) and (4.1)(a) of the Criminal Code are contrary to s. 12 of the Charter and are not saved by s. 1. They are declared of no force or effect in accordance with s. 52(1) of the Constitution Act, 1982.

In order to determine whether a mandatory minimum sentence complies with s. 12 of the Charter, a two-stage contextual and comparative analysis is required. The first stage consists in determining a fit and proportionate sentence for the offender in question and possibly other reasonably foreseeable offenders. This analysis must be carried out having regard to the sentencing objectives and principles established by the Criminal Code, whose central tenet is proportionality. The second stage of the analysis requires a comparison between the sentence that was determined at the first stage and the mandatory minimum sentence, which involves assessing the extent of the disparity between these two sentences and determining whether that disparity is such that it meets the constitutional standard of gross disproportionality. To guide the courts in this analysis, it is important to consider the following three crucial components: (1) the scope and reach of the offence, (2) the effects of the penalty on the offender and (3) the penalty, including the balance struck by its objectives. Each of these three components plays a distinct and necessary role in the analysis.

The possibility of using reasonably foreseeable scenarios in the analysis under s. 12 of the Charter is essential to the rule of law. Constitutional certainty for all, independent of one's ability to bring a legal proceeding, is paramount to the Charter and is essential to ensure true access to justice. The use of reasonably foreseeable scenarios is indispensable to effective constitutional review, because the objective is to ensure that it applies to all citizens, and not only to the person in a position to challenge the validity of a law. *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, confirmed the importance of reasonably foreseeable scenarios in the s. 12 analysis. It unequivocally rejected the argument that reasonably foreseeable scenarios should be abandoned and that the primary or exclusive focus ought to be on the offender before the court. The case law

has characterized what constitutes a reasonably foreseeable scenario. It must first be established that the circumstances of the offence under consideration are captured by the minimum conduct caught by the offence. Then, the representative offender must have personal characteristics that are reasonably foreseeable. Characteristics like age, poverty, race, Indigeneity, mental health issues and addiction should not be excluded from consideration. A reasonably foreseeable scenario need not be common or likely. The best way to distinguish the circumstances of the commission of the offence that are reasonable from those that are not is to look to the virtues of the adversarial process. The parties' submissions ensure that the process is fair and transparent. When the Crown and the defence agree on the foreseeable scenario the court should use to undertake the analysis, this is a strong indication that the foreseeable scenario is reasonable.

Requiring a certain connection between the facts of a case and a reasonably foreseeable scenario would frustrate the possibility of assessing the constitutionality of a minimum sentence in light of certain reasonably foreseeable scenarios, including those that reflect conduct at the low end of the gravity scale and that nevertheless trigger the application of the mandatory minimum sentence. The circumstances will not be reasonably foreseeable if they are fanciful, outlandish, far-fetched, merely speculative or marginally imaginable.

For the purposes of the instant appeal, the reasonably foreseeable scenario chosen is that in which an 18-year-old receives on his cell phone, from his friend of the same age, a "sext" originally from the friend's girlfriend, who is 17 years old. This individual keeps the image on his cell phone and looks at the photograph during a brief period of time, knowing that it constitutes child pornography. In the age of digital communication, it is not far-fetched that an 18-year-old receives from a friend an image corresponding to the definition of child pornography. The fact that the representative offender is 18 years old and has no criminal record is also foreseeable. Concerning the first stage of the constitutional analysis, although the acts committed by the representative offender are serious and deserve to be denounced, they fall at the lowest end of the gravity scale for the crimes of accessing and possession of child pornography. Furthermore, the offender's youth and the absence of a criminal record invite restraint. Concerning the second stage, imposing a sentence of one year's imprisonment on the young 18-year-old representative offender when a fit sentence would be a conditional discharge with strict probationary terms would be grossly disproportionate.

The application of the offence of possession of child pornography covers a very wide range of circumstances and they can be transposed, with the necessary adaptations, to the crime of accessing child pornography. The harm that a sentence of one year's imprisonment causes to a representative offender should not be underestimated; imprisonment risks being very harmful to the representative offender without promoting his awareness and his rehabilitation. Furthermore, although the impugned mandatory minimum sentences contribute to the prioritization of the objectives of denunciation and deterrence, they also have the effect of removing judges' discretion to impose sentences other than imprisonment in the appropriate circumstances. The fact that the crimes of accessing and possession of child pornography are hybrid offences supports the position that the impugned mandatory minimum sentences go

beyond what is necessary to attain Parliament's objectives.

Per Wagner C.J. and Côté, Rowe and O'Bonsawin JJ. (dissenting): The appeal should be allowed. It has not been shown that the minimum sentences provided for in s. 163.1(4)(a) and (4.1)(a) of the Criminal Code constitute cruel and unusual punishment within the meaning of s. 12 of the Charter. The impugned provisions are constitutionally valid and operative.

The censure of society and the law must be reflected consistently and rigorously in the sentences imposed on offenders who are guilty of sexual offences against minors. Through the imposition of more severe sentences, the justice system expresses society's deep and rightful indignation. A fit and proportionate sentence is one that is consistent with the teachings of *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, and that gives effect to Parliament's intention that sexual offences against children be punished more heavily.

Section 12 of the Charter grants the right not to be subjected to any cruel and unusual treatment or punishment by the state. This protection against cruel and unusual punishment has two prongs. The first prong is concerned with the severity of the punishment. The second prong is concerned instead with the method of punishment. The first prong of s. 12 is normally used to analyze the constitutionality of a minimum sentence. There are two ways to challenge the constitutionality of a minimum sentence. First, the challenge may be based on the circumstances of the offender before the court. Second, the challenge may be based on the circumstances of an offender in a reasonable hypothetical scenario. The challenge may also combine the two approaches. Where the constitutional challenge is based on the circumstances of a representative offender in a hypothetical scenario, the court will conduct a three-stage inquiry. First, the court will select a reasonable hypothetical scenario as the basis for its analysis. Second, the court will consider what a fit and proportionate sentence would be for the representative offender in the reasonable hypothetical scenario selected, having regard to the objectives and principles of sentencing established by the Criminal Code (ss. 718 et seq.). Third, the court will consider whether the impugned minimum sentence requires the imposition of a sentence that is grossly disproportionate to the fit and proportionate sentence.

The Court's jurisprudence is cautious in delineating what is meant by a "reasonable hypothetical scenario". There are limits on the range of hypothetical scenarios that can in fact be characterized as reasonable. These limits are fundamental and help to maintain the integrity of the justice system and public confidence in the administration of justice. A reasonable scenario is not one that is far-fetched, fanciful, unrealistic, outlandish, based on mere speculation or extreme, nor is it a remote scenario. A remote hypothetical scenario is a scenario that cannot be considered to determine the constitutionality of a legislative provision. The court must look at the connection between the case before it, on the one hand, and the hypothetical scenario proposed by one of the parties to the proceedings, on the other. That connection must be sufficient from both a factual and a legal standpoint. One must not postulate and imagine a hypothetical situation that is too far from the actual facts of the case at hand. The claimant must propose a hypothetical scenario based on the same offence as the one of which the offender before the court has been found guilty, either by taking the situation before the court as the

starting point but changing certain features of it, or by taking an actual reported case as the starting point and adapting it until it has more than a remote connection with the case. It is possible to change certain characteristics of the offender in the reasonable hypothetical scenario, including Indigeneity, provided that the scenario still has more than a remote connection with the case.

Here, the five hypothetical scenarios considered by the Court of Appeal have only a remote connection with the cases before the Court. The same is true of the sixth hypothetical scenario proposed by S and N in their additional submissions to the Court of Appeal. Some examples are also too extreme. Accordingly, the constitutional challenge must fail from the outset, and there is no need to move on to the next stages of the s. 12 test, that is, determining the fit and proportionate sentence and assessing whether the minimum sentence is grossly disproportionate to that fit and proportionate sentence.

Nevertheless, it is important to reiterate that the objectives of denunciation and deterrence must take priority in the case of child pornography offences. Sentencing judges must not overemphasize denunciation and deterrence to the detriment of proportionality. At the same time, one also cannot ignore the changing mores of society, which necessarily influence the understanding of what is proportionate and, consequently, of the fit and appropriate sentence. In this regard, the country's appellate courts are expected to set new directions in their respective jurisdictions to reflect changing societal and judicial knowledge and attitudes about such offences and those who commit them.

In addition, the constitutional standard of a "grossly disproportionate" sentence is a demanding standard that requires the exercise of normative judgment. A sentence that is merely excessive does not cross the constitutional line; it must be so excessive as to be incompatible with human dignity. A sentence that is merely disproportionate also does not cross the constitutional line; it must be so grossly disproportionate that Canadians would find it abhorrent or intolerable. A sentence that is merely unfit does not cross the constitutional line either; the severity of the sentence imposed must be such as to shock the conscience of Canadians in order to cross the constitutional line. When a court engages in normative reasoning to determine whether a sentence for child pornography is so long that it becomes grossly disproportionate, the court must necessarily bear in mind the profound wrongfulness and harmfulness of these crimes. These heinous offences call for strong condemnation; the court owes greater deference to Parliament's decision to enact the mandatory minimum.

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APPEAL from a judgment of the Quebec Court of Appeal (Vauclair, Ruel and Bachand JJ.A.), 2023 QCCA 731 (sub nom. Procureur général du Québec v. Terroux), 430 C.C.C. (3d) 1, [2023] AZ-51944041, [2023] J.Q. no 5080 (Lexis), 2023 CarswellQue 14733 (WL), confirming two decisions of Tremblay J.C.Q., 2020 QCCQ 1204, [2020] AZ-51679158, [2020] J.Q. no 1974 (Lexis), 2020 CarswellQue 2911 (WL), and 2020 QCCQ 1202, [2020] AZ-51679156, [2020] J.Q. no 1982 (Lexis), 2020 CarswellQue 2910 (WL). Appeal dismissed, Wagner C.J. and Côté, Rowe and O’Bonsawin JJ. dissenting.

Audrey-Anne Blais, Sylvain Leboeuf and Julie Dassylva, for the appellant the Attorney General of Quebec.

Maya Gold-Gosselin and Joanny St-Pierre, for the appellant His Majesty The King.

Stéphanie Pelletier-Quirion and Camille Langlois-Émond, for the respondents.

Angela Marinos, for the intervener Raoul Wallenberg Centre for Human Rights.

Samara Sector and Cassandra Richards, for the intervener Criminal Lawyers’ Association (Ontario).

Spencer Bass and Nader R. Hasan, for the intervener Canadian Civil Liberties Association.

Samantha Hale and Amy Goudge, for the intervener the Canadian Centre for Child Protection Inc.

Hugo Caissy, for the intervener Association québécoise des avocats et avocates de la défense.

English version of the judgment of Karakatsanis, Martin, Kasirer, Jamal and Moreau JJ. delivered by

Moreau J. —

I. Introduction

- [1] Canadian judges recognize that sentencing is a delicate exercise. Each sentence imposed is the result of an individualized process that seeks to answer the complex question: “For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code?” (R. v. Parranto, 2021 SCC 46, [2021] 3 S.C.R. 366, at para. 36, quoting R. v. Gladue, [1999] 1 S.C.R. 688, at para. 80 (emphasis in original)).

This complexity is inherent in sentencing law and is also at the heart of our jurisprudence on the right not to be subjected to any cruel and unusual treatment or punishment (s. 12 of the Canadian Charter of Rights and Freedoms). The resolution of this appeal once again requires a nuanced approach.

- [2] The appellants challenge the declarations of unconstitutionality made by the majority of the Quebec Court of Appeal with respect to the mandatory minimum sentences of one year's imprisonment provided for upon conviction for the offences of possession of child pornography (s. 163.1(4)(a) of the Criminal Code, R.S.C. 1985, c. C-46 ("Cr. C.)) and accessing child pornography (s. 163.1(4.1)(a)).[1] Before this Court, the argument centred exclusively on the constitutionality of these minimum sentences by reference to situations other than those of the respondents.
- [3] This appeal provides an opportunity to reiterate the importance of the possibility for the courts to consider reasonably foreseeable scenarios in the analysis under s. 12 of the Charter. This possibility can avoid invalid laws remaining in force indefinitely, prevent them from having indirect effects in the context of plea bargaining and promote legal certainty and real access to justice. In short, as this Court has consistently repeated, recourse to reasonably foreseeable scenarios is an essential tool for ensuring effective constitutional review.
- [4] By assessing a reasonably foreseeable scenario put forward by the parties, I come to the conclusion that the minimum sentences set out in s. 163.1(4)(a) and (4.1)(a) violate the protection against cruel and unusual punishment guaranteed by s. 12 of the Charter. While the teachings of *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, are fully applicable to child pornography offences, which often warrant the imposition of severe penalties, it must be recognized that these offences can be committed in different ways, under different circumstances and by different offenders.
- [5] Our case law is categorical: a mandatory minimum sentence does not necessarily violate s. 12 of the Charter (*R. v. Hills*, 2023 SCC 2, at para. 38; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1077). However, when the application of a mandatory minimum sentence is broad and covers a wide range of circumstances, the sentence is "constitutionally vulnerable" (*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 3; *R. v. Hilbach*, 2023 SCC 3, at para. 52) because it leaves no choice but to impose a grossly disproportionate sentence on certain offenders.
- [6] A thorough analysis reveals that this is the case for the mandatory minimum sentences contested in this appeal. The offences with which they are associated cover a very wide range of circumstances. They capture both the well-organized offender who, over the years, has accumulated thousands of files showing prepubescent victims, and the young 18-year-old offender who, one day, keeps and views a file showing a 17-year-old victim that was sent to the offender without them having requested it.

- [7] This last reasonably foreseeable scenario was at the centre of the debate before this Court. The facts of this scenario “are . . . captured by the minimum conduct caught by” (R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 68; Hills, at paras. 79-80 and 83) the offences of possession of child pornography and accessing child pornography. In the age of digital communication, this scenario is not uncommon, and no aspect of our jurisprudence justifies excluding it for the purposes of the analysis under s. 12 of the Charter. In light of the principles of sentencing, the appropriate sentence for such an offender could be a conditional discharge. The disparity between this non-carceral penalty and the mandatory minimum sentences of one year’s imprisonment easily meets the constitutional standard of gross disproportionality. The impugned minimum sentences thus violate s. 12 of the Charter, and the appellants did not argue that they can be saved by s. 1. The appeal should therefore be dismissed.

II. Background and Judicial History

A. Court of Québec (Tremblay J.)

- [8] While the respondents’ cases were separate, the decisions on their sentences were rendered the same day by the same judge.
- [9] Louis-Pier Senneville pleaded guilty to one count of possession of child pornography (s. 163.1(4)(a) Cr. C.) and to one count of accessing child pornography (s. 163.1(4.1)(a)). He admitted having been in possession of 475 files, including 317 images of children constituting child pornography. Of those images, 90 percent were of young girls between 3 and 6 years of age, some showing victims being subjected to acts of penetration and sodomy committed by adults and minors. Mr. Senneville admitted that he had acquired these images through specialized sites and that he had possessed them for 8 months. He accessed these images for 13 months. Mr. Senneville is a former soldier who was 28 years old and had no criminal record at the time of the sentencing decision. The decision noted that he cooperated with the authorities and complied with strict release conditions. He had no [translation] “pedophilic or hebephilic sexual interests”, and a specialized assessment in sexual offending showed that he was at low risk to reoffend (2020 QCCQ 1204, at para. 41). The sentencing judge found that in addition to having admitted the facts alleged against him, Mr. Senneville was sincerely remorseful and was aware of the harm caused.
- [10] Mathieu Naud pleaded guilty to one count of possession of child pornography (s. 163.1(4)(a) Cr. C.) and to one count of distribution of child pornography (s. 163.1(3)). He admitted having been in possession, for 13 months, of 531 images and 274 videos of child pornography, most of which were of children from 5 to 10 years of age being subjected to sexual abuse, such as fellatio and vaginal and anal penetration, by adults. Mr. Naud used specialized software to access that material, make it available and wipe out any traces of it. The sentencing judgment notes that Mr. Naud was in his thirties and had no criminal record, had low self-confidence, a tendency to be avoidant, an inability to define his identity and a defeatist attitude. He said that he had been depressed for a long time and experienced

suicidal ideation. He had had a string of [translation] “small jobs” without much motivation. [translation] “[H]is life revolved around his computer and his consumption to the point of intoxication. He consumed cannabis, hashish and alcohol. On his computer, he listened to music, informed himself, communicated a bit and accessed adult and child pornography” (2020 QCCQ 1202, at para. 7). The sentencing judge noted that [translation] “the accused’s depressive state and isolation marginalized him” (para. 38). In addition to Mr. Naud having admitted the facts alleged against him, the judge noted that Mr. Naud was very ashamed and had embarked on two types of group therapy.

- [11] At the sentencing proceedings stage, both respondents challenged the constitutionality of the minimum sentences facing them.
- [12] With respect to the crime of possession of child pornography, the sentencing judge found that the appropriate sentences for Mr. Senneville and Mr. Naud were 90 days’ imprisonment to be served intermittently and 9 months’ imprisonment, respectively. Given those findings, the judge determined that the mandatory minimum sentence of one year’s imprisonment associated with the offence of possession of child pornography (s. 163.1(4)(a) Cr. C.) was grossly disproportionate in comparison with the appropriate sentences for the respondents. The constitutionality of this minimum sentence was not considered by reference to reasonably foreseeably scenarios.
- [13] For the offence of accessing child pornography, the sentencing judge concluded that the appropriate sentence for Mr. Senneville was also 90 days’ imprisonment to be served intermittently and that the mandatory minimum sentence of one year’s imprisonment (s. 163.1(4.1)(a) Cr. C.) was grossly disproportionate in comparison with the appropriate sentence for the respondent. The judge also found that it was unnecessary to consider the constitutionality of that minimum sentence by reference to reasonably foreseeable scenarios.

B. Quebec Court of Appeal, 2023 QCCA 731 (Vauclair, Ruel and Bachand JJ.A.)

- [14] On appeal, the appellants challenged the fitness of the sentences imposed on the respondents as well as the judge’s findings as to the constitutionality of the minimum sentences provided for in s. 163.1(4)(a) and (4.1)(a) Cr. C.
- [15] The three Court of Appeal judges who heard the appeal each wrote their own reasons.
 - (1) The Fitness of the Sentences Imposed
- [16] In Mr. Senneville’s case, a majority of the Court of Appeal (Ruel and Bachand JJ.A.) allowed the appeal in order to substitute a sentence of one year’s imprisonment for the sentence of 90 days’ imprisonment to be served intermittently. Bachand J.A., correctly in my opinion, noted that the sentence imposed was demonstrably unfit [translation] “principally because of the nature of the images involved and the teachings of Friesen” (para. 232).

[17] In Mr. Naud's case, a majority of the Court of Appeal (Vauclair and Bachand JJ.A.) dismissed the sentence appeal.

(2) The Constitutionality of the Minimum Sentences

[18] Regarding the constitutionality of the minimum sentences set out in s. 163.1(4)(a) and (4.1) (a) Cr. C., a majority of the Quebec Court of Appeal (Vauclair and Bachand JJ.A.) found that they violate s. 12 of the Charter by reason of their reasonably foreseeable application to offenders other than the respondents.

(a) Vauclair J.A.

[19] In his reasons, Vauclair J.A. referred to the analysis conducted in *R. v. John*, 2018 ONCA 702, 142 O.R. (3d) 670 (at para. 148, quoting John, at paras. 29-31 and 38-40), but he focused particularly on two reasonably foreseeable scenarios that, for present purposes, constitute reported cases. The first case discussed by Vauclair J.A. was *R. v. Gangoo-Bassant*, 2018 QCCQ 11080:

[translation] Certainly, Gangoo-Bassant remains the case that illustrates the point more clearly. A sincerely contrite 34-year-old father — with no criminal record, a stable job, for whom a specialized report showed no particular deviancy or difficulties — had, on a single occasion, sent a single photograph of child pornography that he possessed to just one person via a social network. According to the AGQ, this isolated and limited act warranted nothing but the minimum sentence of one year. With all due respect, this case, which is not hypothetical, unequivocally demonstrates the cruel and unusual nature of the minimum sentence. [Emphasis added; para. 154.]

[20] Vauclair J.A. then described *R. v. Duclos*, 2019 QCCQ 5680, where the offender had been in possession of 103 photographs of prepubescent children, some of which showed [translation] “sexual acts (masturbation, fellatio and penetration) committed between them or with adult men” (para. 156, quoting Duclos, at para. 14). Among other things, the sentencing judge noted that the offender suffered from various mental disorders: [translation] “They showed that the accused has Asperger syndrome, generalized anxiety disorders with obsessive features, Tourette syndrome, and a mild intellectual disability by reason of his very low non-verbal ability, his poor adaptive skills and developmental dyspraxia of a visuospatial nature” (para. 156, quoting Duclos, at para. 24). Vauclair J.A. then implicitly approved, particularly given the offender's vulnerability, the suspension by the judge of [translation] “the passing of sentence and imposed, inter alia, a period of three years' probation” (para. 156).

[21] It is apparent from Vauclair J.A.'s reasons that, in his view, those situations, which are distinct from those of the respondents, clearly demonstrate the unconstitutionality of the minimum sentences for the offences of possession of and accessing child pornography (para. 160).

(b) Bachand J.A.

[22] In his reasons, Bachand J.A. agreed with the Ontario Court of Appeal's analysis in John, which led him to declare the minimum sentence provided for in s. 163.1(4)(a) unconstitutional. Bachand J.A. also agreed with Vauclair J.A.'s analysis regarding the application of that minimum sentence to reasonably foreseeable cases (para. 231). Lastly, Bachand J.A., like his colleague Vauclair J.A., was of the opinion that the declaration of unconstitutionality [translation] "must extend to the minimum sentence provided for in section 163.1(4.1)(a) Cr. C." (para. 232).

(c) Ruel J.A.

[23] Ruel J.A. dissented with respect to the constitutionality of the minimum sentences. He would not have examined reasonably foreseeable scenarios. According to him, because the appropriate sentences for Mr. Senneville and Mr. Naud were equivalent to the impugned mandatory minimum sentences, [translation] "this would put an end to the debate" (para. 206, citing R. v. Daudelin, 2021 QCCA 784, at para. 78).

[24] Ruel J.A. nevertheless continued his analysis and, in his review of the applicable law, mentioned that [translation] "far-fetched scenarios or scenarios that are only remotely related to the case in question must be excluded" (para. 213, citing Nur, at paras. 62 and 88). In his view, the reasonably foreseeable scenarios referred to by the respondents and considered by Vauclair J.A. could not [translation] "ground a constitutional challenge to the minimum sentences" (para. 216).

[25] For example, he wrote that Gangoo-Bassant was [translation] "miles away from the facts of the present cases" and that there was no justification for "expanding this marginal scenario to found a general declaration of unconstitutionality for everyone and in all cases to come" (para. 217). Similarly, he considered it inappropriate to choose one of the reasonably foreseeable scenarios set out in John, that is, the one involving [translation] "a young man 18 years of age who receives a sext from a friend showing a nude 17-year-old young woman and who keeps the photo on his phone instead of deleting it" (para. 220, citing John, at para. 29). This was the case, he said, because that scenario [translation] "seems . . . extremely remote from the facts in the Senneville and Naud cases, unrealistic and unlikely to occur" (para. 220).

[26] In short, in the view of the dissenting judge, [translation] "it is not even necessary to proceed to the disproportionality analysis, based on the cases or hypotheticals presented by the respondents" (para. 221). Ruel J.A. therefore refrained from ruling on the constitutionality of the minimum sentences.

III. Preliminary Comments

A. Two Comments

- [27] I make two preliminary comments that I find important to highlight concerning the reasons that follow.
- [28] First, this appeal is exclusively about analyzing the constitutionality of the mandatory minimum sentences. Indeed, in their joint factum, the appellants specify that their appeal concerns neither the sentences that were imposed on the respondents nor the cruel and unusual nature of the minimum sentences in relation to them (A.F., at para. 15). These reasons therefore do not address the appropriateness of the sentences imposed on the respondents, notably in light of the teachings of Friesen. Furthermore, given the parties' submissions, the constitutional analysis will be limited to offenders in reasonably foreseeable scenarios.
- [29] Second, the appellants did not pursue the argument that the minimum sentences can be saved by s. 1 should they be contrary to s. 12 of the Charter. I therefore need not address this issue (see *Hills*, at para. 170).

B. The Serious Social Harm Caused By Child Pornography Offences and the Teachings of Friesen

- [30] The ubiquity of the Internet and computer technologies in our lives has changed a good many things, sometimes for the better, sometimes for the worse. In the latter case, it cannot be ignored that new technologies “have accelerated the proliferation of child pornography because they make it easier to produce, distribute and access material in partial anonymity” (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 114, per Deschamps J., dissenting, citing Y. Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (2008), at pp. 1-8; see also Friesen, at para. 47; *R. v. Régnier*, 2018 QCCA 306, at para. 57). Incidents of child pornography reported by the police have increased (Friesen, at para. 46), and there is no doubt that crimes related to child pornography today present “serious and pressing social harm” (*R. v. Bykovets*, 2024 SCC 6, at para. 11), sexual offences against children being “among the most profoundly immoral acts an individual can commit” (*R. v. Sheppard*, 2025 SCC 29, at para. 1).
- [31] Regarding, more specifically, the offence of possession of child pornography, Tulloch C.J. detailed the harm caused by this offence (*R. v. Pike*, 2024 ONCA 608, 173 O.R. (3d) 241, at paras. 144-56). I agree with his comments, some of which I will refer to.
- [32] People who possess child pornography — just like those who access it — participate in the serious violation of children’s dignity, in that they perpetuate “the exploitation originating from the production of the images” and infringe “their right not to have the permanent record of their abuse and exploitation viewed by adults” (*Pike*, at para. 147, citing *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 92, 158 and 169, and A. Rogers, “The Dignitary Harm of Child Pornography — From Producers to Possessors”, in C. Byrne Hessick, ed., *Refining Child Pornography Law: Crime, Language, and Social Consequences* (2016), 165, at pp. 177-80; see also Friesen, at para. 51). The possession and accessing of child

pornography feed the vicious circle of its production, because its production “is fueled by the market for it, and the market in turn is fueled by those who seek to possess it” (Sharpe, at para. 92). Child pornography denies “children’s humanity”, autonomy and dignity and propagates “the false view that children are appropriate sexual partners and that they are sexual objects to be used for the sexual gratification of adults” (para. 183, per L’Heureux-Dubé, Gonthier and Bastarache JJ.; see also Pike, at para. 155). It trivializes and encourages the sexual exploitation of children, and is particularly harmful for this reason, whether or not it depicts real children (Sharpe, at para. 38; Pike, at para. 169). It is disturbing to note that child pornography can now be generated on a very large scale using artificial intelligence (see, e.g., *R. v. Larouche*, 2023 QCCQ 1853, at paras. 68-70) and that the production of deepfakes is “a present and growing danger for children worldwide” (I.F., Canadian Centre for Child Protection Inc., at para. 17; see also A.F., at para. 105).

- [33] People who possess child pornography and who access it also participate in the “extreme violation” of the privacy interests of the children it depicts (Sharpe, at para. 241, per L’Heureux-Dubé, Gonthier and Bastarache JJ.). The criminalization of possession of child pornography is intended, among other things, to bring an end to this violation of children’s privacy by incentivizing the destruction of “pornographic representations which already exist” (*ibid.*). However, those who choose to possess such material frustrate that objective and, as stated by Tulloch C.J., they act instead as receivers of stolen goods, acquiring “stolen recordings whose production and distribution children cannot consent to, thus robbing children of control over to whom, and in what context, to disclose their abuse and exploitation” (Pike, at para. 148). Moreover, people who possess child pornography and who access that content “make the challenging path of recovery for children much steeper by transforming the initial exploitation and violence of the production into a continuing violation” (para. 149). Victims of child pornography have varying life trajectories and recover at their own pace from the crimes committed against them, but all of them are condemned to spend the rest of their lives “with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone” (Sharpe, at para. 92; see also *R. v. Snowden*, 2023 ONCA 768, 432 C.C.C. (3d) 52, at para. 93).
- [34] The crimes of possession of and accessing child pornography thus cause serious social harm and victimize “the most vulnerable members of our society” (Friesen, at para. 1). The guidance provided in Friesen is fully applicable to these crimes. In that case, this Court noted that it is important that “sentences for sexual offences against children correspond to Parliament’s legislative initiatives and the contemporary understanding of the profound harm that sexual violence against children causes” (para. 107; see also *R. v. Bertrand Marchand*, 2023 SCC 26, at para. 31; *R. v. R.P.A.*, 2025 ABCA 300, at para. 104). As I explain later, the sentences imposed for the offences of possession of and accessing child pornography must reflect the fact that Parliament has increased the maximum sentences for these crimes and indicated that the objectives of denunciation and deterrence must be given primary consideration for such offences (s. 718.01 Cr. C.). This provision has the effect

of limiting the discretion of sentencing judges, although they can give “significant weight” (Friesen, at para. 104) to other objectives, including “restorative sentencing goals” (see Gladue, at para. 43) such as rehabilitation (Bertrand Marchand, at para. 28, citing *R. v. Rayo*, 2018 QCCA 824, at paras. 102-8).

- [35] Proportionality, whose constitutional dimension is enshrined in s. 12 of the Charter (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 41; *R. v. Bissonnette*, 2022 SCC 23, [2022] 1 S.C.R. 597, at para. 52), nevertheless remains the central tenet of sentencing. “[W]hatever weight a judge may wish to accord to the objectives [listed in s. 718], the resulting sentence must respect the fundamental principle of proportionality” (*Nasogaluak*, at para. 40 (emphasis in original); see also *R. v. J.W.*, 2025 SCC 16, at para. 42). As the principle of proportionality requires only consideration of the gravity of the offence and the degree of responsibility of the offender, it performs a limiting function with respect to the objectives of sentencing. It therefore has the effect of limiting the pursuit of other objectives (*Nasogaluak*, at para. 42). In other words, these other objectives do not render a sentence more proportional or less proportional; rather, proportionality imposes a limit on their pursuit.
- [36] It must also be remembered that “criminal justice responses alone cannot solve the problem of sexual violence against children” (Friesen, at para. 45). The protection of children is one [translation] “of the essential and perennial values” of our society (*R. v. L. (J.-J.)* (1998), 126 C.C.C. (3d) 235, at p. 250; Friesen, at para. 42), but it would be unwise to believe that the infliction of punishment, which occurs after the harm is done, can on its own protect children from the dangers of child pornography. The Criminal Code also provides that “[t]he 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” (s. 718). In light of that indication from Parliament, Vauclair J.A. was entirely correct in observing the following in *V.L. v. R.*, 2023 QCCA 449:

[translation] . . . it is doubtful that the role of the courts is to eradicate any kind of criminal conduct Setting an unrealistic and unattainable objective can only undermine public confidence in the administration of justice. It must be remembered that the courts are first and foremost only a link in the chain of interventions meant to protect society. Once again, the courts participate, along with crime prevention initiatives, in maintaining a just, peaceful and safe society. Their role, if it must be identified, is to impose just sanctions. [Emphasis in original; para. 41.]

- [37] I agree with my colleagues that child pornography is a scourge that is profoundly wrongful and harmful towards children. However, I conclude this section by noting this Court’s recognition that there is no incongruity between emphasizing the severe harms and wrongfulness associated with sexual offences against children and finding that minimum sentences are unconstitutional (see Bertrand Marchand, at para. 167). The finding that the mandatory minimum sentences challenged in this appeal cover a wide range of

circumstances and in some cases require the imposition of cruel and unusual punishment is at the heart of the constitutional debate before us. It has no effect on the scope of the guidance provided in *Friesen* or on the fact that crimes related to child pornography, like other sexual offences against children, are serious crimes that often justify severe penalties.

IV. The Applicable Principles

A. The Two-Stage Inquiry for Determining Whether a Mandatory Minimum Sentence Complies With Section 12 of the Charter

- [38] The law surrounding the interaction between mandatory minimum sentences and s. 12 of the Charter has been the subject of much discussion in recent decisions of this Court. In order to determine whether a mandatory minimum sentence complies with s. 12 of the Charter, a two-stage contextual and comparative analysis is required.
- [39] The first stage consists in determining a fit and proportionate sentence for the offender in question “and possibly other reasonably foreseeable offenders” (*Bertrand Marchand*, at para. 104; see also *Hills*, at para. 40). This requires “careful adherence to established sentencing principles” (*Bertrand Marchand*, at para. 122). The analysis must therefore be carried out having regard to the sentencing objectives and principles established by the Criminal Code, whose central tenet is proportionality (s. 718.1 Cr. C.; *Hills*, at paras. 56-61). This fundamental principle performs a limiting function (*Hills*, at para. 57; *Bissonnette*, at para. 51; *Nasogaluak*, at para. 42). It seeks to ensure that the sentence reflects — without, however, going beyond — the gravity of the offence and the moral blameworthiness of the offender (*Nasogaluak*, at para. 42; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37). As stated by LeBel J., “[i]n the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other” (*Ipeelee*, at para. 37). In this sense, “there is no proportionate sentence that only takes into account the offence and ignores the offender” (*Hills*, at para. 61). Judges must, at the first stage of the s. 12 analysis, exercise their discretion and determine with precision the sentence that is appropriate either for the offender before them or for an offender in a reasonably foreseeable scenario (paras. 63-66).
- [40] To properly understand the second stage of the analysis, it is important to remember that s. 12 of the Charter “is meant to protect human dignity and respect the inherent worth of individuals” (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 51; see *Hills*, at para. 32). Human dignity cannot be respected through the imposition of a grossly disproportionate sentence, because it would have the effect of denying the intrinsic worth of the individual on whom it is imposed (see *Bissonnette*, at para. 59; *Hills*, at para. 32).
- [41] The second stage of the analysis therefore requires a comparison between the sentence that was determined at the first stage and the mandatory minimum sentence. This involves assessing the extent of the disparity between these two sentences and determining whether that disparity is such that it meets the constitutional standard of gross disproportionality. It

has been consistently emphasized that this standard is a particularly high bar (Lloyd, at para. 24; Bissonnette, at para. 70; Hills, at paras. 109 and 115). The comparative analysis must establish that the sentence is “so excessive as to outrage standards of decency” (Bertrand Marchand, at para. 109, quoting Hills, at para. 109). Put another way, the sentence must shock the conscience or be abhorrent or intolerable (Hills, at paras. 109-10). This is assessed not on the basis of what a court believes to be the views of Canadian society, but rather “through the values and objectives that underlie our sentencing and Charter jurisprudence” (para. 110).

- [42] To guide the courts in this comparative analysis, Hills stressed the importance of considering “three crucial components”: (1) the scope and reach of the offence; (2) the effects of the penalty on the offender; and (3) the penalty, including the balance struck by its objectives (para. 122). These components were thoroughly explained by Martin J. (at paras. 122-46) and will be applied below to the impugned minimum sentences.
- [43] But before proceeding further, a clarification is warranted. My colleagues state that “once the court has selected a reasonable hypothetical scenario, the scope and reach of the offence are of little relevance” (para. 257). Respectfully, this statement is out of step with the case law of this Court noting that “[t]he scope and reach of the offence remains a major feature in the gross disproportionality analysis” (Hills, at para. 125). This principle was reiterated in Hilbach (at para. 52) and Bertrand Marchand (at para. 104) and follows from previous decisions on s. 12 of the Charter, including Lloyd (at para. 24), Nur (at para. 82) and Smith (at p. 1078).
- [44] It is essential to consider these three components in the same manner to ensure that a contextual and exhaustive analysis is conducted. The first two components focus on the proportionality of the sentence; the first, relating to the scope and reach of the offence, is used to assess variations in the gravity of conduct and in the degree of culpability, while the second, relating to the effects of the penalty, is used to assess the severity of the sentence and to determine whether its “effect . . . is to inflict mental pain and suffering on an offender such that the offender’s dignity is undermined” (Hills, at para. 133). The third component consists in determining whether the sentence is excessive in light of the legislative objectives of sentencing for the offence in question, having regard to “the legitimate purposes of punishment and the adequacy of possible alternatives” (para. 138, quoting Smith, at pp. 1099-1100). Each of these three components therefore plays a distinct and necessary role in the analysis. If little importance is given to the first component, it will not be possible to fully grasp the variations in the gravity of conduct and in the degree of culpability for the offence in question.
- [45] The two stages of the analysis are therefore well established. In the following section, I will address the aspect of our case law at the heart of my disagreement with my colleagues, namely, the framework for the use of reasonably foreseeable scenarios.

B. The Use of Reasonably Foreseeable Scenarios

(1) The Importance of Effective Constitutional Review

- [46] The possibility of using reasonably foreseeable scenarios in the analysis under s. 12 of the Charter is essential to the rule of law. When a mandatory minimum sentence is challenged on the basis that it is unconstitutional because of its effects on third parties, the proceedings take on a dimension that extends beyond the interests of the offender concerned: it is then “the nature of the law, not the status of the accused, that is in issue” (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 314, quoted in *Nur*, at para. 51). Section 52 of the Constitution Act, 1982 does not create a personal remedy: a person can challenge the validity of a legislative provision even if their own rights have not been violated (*Nur*, at para. 51, quoting *Big M Drug Mart Ltd.*, at p. 314; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 58-66; see also *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 96; P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 59:6). Thus, “[a] claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties” (*Ferguson*, at para. 59, citing *Big M*, P. Sankoff, “Constitutional Exemptions: Myth or Reality?” (1999-2000), 11 N.J.C.L. 411, at pp. 432-34, and M. Rosenberg and S. Perrault, “Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada” (2002), 16 S.C.L.R. (2d) 375, at pp. 380-82).
- [47] Without recourse to reasonably foreseeable scenarios, the judiciary’s capacity to ensure effective constitutional review would be undermined. Among other things, “bad laws might remain on the books indefinitely” (*Nur*, at para. 51), exposing each and every individual to the consequences of the application of unconstitutional laws. Yet the rule of law requires, inter alia, that no one “be sentenced under an invalid statute” (*Lloyd*, at para. 16; see also *Hills*, at para. 73). These principles were vigorously affirmed by McLachlin C.J. in *Nur*:

Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the Charter and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order. The protection of individuals’ rights demands constitutional review that looks not only to the situation of the offender before the court, but beyond that to the reasonably foreseeable reach of the law. Testing the law against reasonably foreseeable applications will prevent people from suffering cruel and unusual punishment in the interim until the mandatory minimum is found to be unconstitutional in a particular case.

Refusing to consider an impugned law’s impact on third parties would also undermine the prospect of bringing certainty to the constitutionality of legislation, condemning constitutional jurisprudence to a wilderness of single instances. Citizens, the police and government are entitled — and indeed obliged — to know what the criminal law is and whether it is constitutional. Looking at whether the mandatory minimum has an unconstitutional impact on others avoids the chilling effect of unconstitutional laws remaining on the statute books. [Emphasis added;

paras. 63-64.]

- [48] The position adopted by this Court reflects the principle that the rule of law, enshrined in s. 52(1) of the Constitution Act, 1982, cannot depend on the expectation that each individual faced with an unconstitutional law will have the resources or the will needed to challenge its validity. This position also promotes certainty and avoids “impair[ing] the right of citizens to know what the law is in advance and govern their conduct accordingly — a fundamental tenet of the rule of law” (Ferguson, at para. 72; see also *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 71). However, beyond the rule of law, constitutional certainty for all, “independent of one’s ability to bring a legal proceeding, is paramount to the Charter” and is essential to ensure true access to justice (P. Daly et al., “The Effect of Declarations of Unconstitutionality in Canada” (2022), 42 N.J.C.L. 25, at p. 44). The Court has repeatedly emphasized the inextricable link between the rule of law and access to justice (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 39). Neither principle can exist without the other, as otherwise “the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice” (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). The use of reasonably foreseeable scenarios is therefore indispensable to effective constitutional review, because the objective is to ensure that it applies to all citizens, and not only to the person in a position to challenge the validity of a law.
- [49] This is especially so given that the presence of unconstitutional minimum sentences can influence the dynamics of plea bargaining. There can be an “almost irresistible” incentive for an accused to enter a guilty plea in order to avoid a long mandatory minimum sentence (Nur, at para. 96). For this reason, these sentences “[are] shaping outcomes in ways that are not only insulated from judicial review but entirely invisible to the court” (L. Kerr and M. Perlin, “A New Justification for Section 12 Hypotheticals and Two Rules for Constructing Them” (2025), 5 S.C.L.R. (3d) 179, at p. 191). This additional observation illustrates the importance of using reasonably foreseeable scenarios to assess the constitutionality of mandatory minimum sentences “rather than leaving them on the books” (p. 192).
- [50] Our case law also seeks to prevent a multiplicity of identical legal challenges within the same jurisdiction, an objective that encourages the effective use of judicial resources (Hills, at para. 73). When a court empowered to make formal declarations of inoperability under s. 52(1) of the Constitution Act, 1982 (see *Lloyd*, at para. 15) declares that a minimum sentence is unconstitutional, “[t]he doctrine of stare decisis extends the effect of that judgment beyond the parties to the case, erga omnes within the province at least — subject to the limits of the doctrine itself” (Sullivan, at para. 55). It follows that, as Vaclair J.A. noted in *Griffith v. R.*, 2023 QCCA 301, when a court empowered to make such a declaration [translation] “can rule on the constitutionality of a mandatory minimum sentence, it should do so, since declining to decide an issue ‘would . . . cost other courts and justice system participants additional resources in the longer term’” (para. 64, quoting *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 24 (emphasis in original deleted), and citing *Hills*, at

para. 73; see also *R. v. E.O.*, 2019 YKCA 9, 374 C.C.C. (3d) 338, at para. 38).

[51] In short, Nur confirmed the importance of reasonably foreseeable scenarios in the s. 12 analysis. It unequivocally rejected “the argument that reasonable hypotheticals should be abandoned and that the primary or exclusive focus ought to be on the offender before the court” (*Hills*, at para. 71, citing Nur, at paras. 48-64, and C. Fehr, “Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the Charter” (2021), 25 Can. Crim. L.R. 235, at p. 240). *Hills* affirmed this principle. Bertrand Marchand is the most recent reiteration of this.

[52] In this appeal, neither the parties nor the courts below called into question the use of reasonably foreseeable scenarios in the s. 12 analysis. Yet my colleagues, like Ruel J.A., propose an interpretation of the law that would have the effect of considerably limiting their use. As I will explain, in my respectful view, this approach is not consistent with the jurisprudence of this Court.

(2) Clarifying the Terminology

[53] The terms “scenario” and “hypothetical” have been used interchangeably by this Court.

[54] I suggest giving preference to the expression “reasonably foreseeable scenario”. Even though the term “hypothetical” is not in itself erroneous, setting it aside could better reflect the idea that the exercise involves determining “the reasonable reach of a law[, which] is essentially a question of statutory interpretation” (Nur, at para. 61; see also *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at paras. 170-71, per Karakatsanis J., concurring). The identification of a reasonably foreseeable scenario must never turn into fanciful speculation. It must instead result from a meticulous interpretative exercise that is grounded in “judicial experience and common sense” (Nur, at para. 62).

(3) The Characteristics of a Reasonably Foreseeable Scenario

[55] When the analysis is conducted with the assistance of a situation other than that of the offender challenging the constitutionality of a minimum sentence, it can be difficult to decide on a particular scenario. Useful guidance has, however, been provided by this Court:

(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.

(*Hills*, at para. 77)

[56] Given the view of the law proposed by my colleagues, it appears necessary to review the way in which our case law has characterized what constitutes a reasonably foreseeable scenario. In the context of an analysis under s. 12 of the Charter, the term “scenario” encompasses both the circumstances of the commission of the offence and the personal characteristics of the accused. These two elements must be reasonably foreseeable. I will examine each of them in turn.

(a) The Circumstances of the Offence Must Be Reasonably Foreseeable

[57] It must be established that the circumstances of the offence under consideration “are . . . captured by the minimum conduct caught by the offence” (Nur, at para. 68; see also Hills, at paras. 79-80 and 83). The range of conduct caught by the offence with which the minimum sentence is associated is determinative, because it is permissible to identify circumstances of the commission of the offence that are at the low end of the gravity scale and that, accordingly, “test” the constitutionality of the minimum sentence associated with it (Hills, at para. 82; Nur, at para. 103). The circumstances underlying the scenario identified will not be reasonably foreseeable if they are fanciful, outlandish, far-fetched, merely speculative or marginally imaginable (R. v. Goltz, [1991] 3 S.C.R. 485, at p. 505-6; Nur, at para. 54; Hills, at paras. 78, 83 and 92). All of these qualifiers used over the years call upon the ability of judges to interpret the law and to assess the scope of an offence using their common sense and judicial experience (Nur, at para. 62).

[58] From this perspective, the consideration of reported cases often proves useful, because they “illustrate the range of real-life conduct captured by the offence. . . . Not only is the situation in a reported case reasonably foreseeable, it has happened” (Nur, at para. 72; see also Hills, at para. 81). The best way to distinguish the circumstances of the commission of the offence that are reasonable from those that are not is to look to the virtues of the adversarial process (Hills, at para. 93). The parties’ submissions also ensure that the process is fair and transparent (ibid.). When the Crown and the defence agree on the foreseeable scenario the court should use to undertake the analysis, this is a strong indication that the foreseeable scenario is reasonable.

(b) The Representative Offender Must Have Personal Characteristics That Are Reasonably Foreseeable

[59] In keeping with Nur, Lloyd and R. v. Boudreault, 2018 SCC 58, [2018] 3 S.C.R. 599, Hills confirmed that “characteristics that are reasonably foreseeable for offenders in Canadian courtrooms, like age, poverty, race, Indigeneity, mental health issues and addiction, should not be excluded from consideration” (para. 86; see also paras. 87 et seq.). This position logically follows from the cardinal principle of proportionality (s. 718.1 Cr. C.). It makes it imperative to take into account both the gravity of the offence and the moral blameworthiness of the offender, which is determined, among other things, on the basis of the offender’s particular circumstances (Hills, at para. 86, citing Nasogaluak, at para. 42, and Ipeelee, at para. 38). For the purposes of the s. 12 analysis, it would be completely artificial —

and contrary to sentencing law — to ignore the fact that persons who commit crimes have different personal characteristics that may cause their degree of moral blameworthiness to vary, in particular because of their disadvantaged circumstances, including marginalization or systemic discrimination (Hills, at paras. 89-90).

[60] That being said, the personal characteristics used for the s. 12 analysis must “present a reasonably foreseeable offender” (Hills, at para. 91 (emphasis deleted), citing Nur, at para. 75). This is an important limit that prohibits the selection of an offender who would be “the most . . . sympathetic . . . imaginable” (Nur, at para. 75). In all cases, the exercise is grounded in the common sense and experience (paras. 62 and 75; Hills, at para. 92) of judges, who are familiar with the wide range of offender profiles they encounter in their courtroom on a daily basis. The exercise may be facilitated by the use of reported decisions and the submissions of counsel.

(c) The Expression “Remote” (“n’ayant qu’un faible rapport avec l’espèce”)

[61] The dissenting judge of the Court of Appeal refused to consider the reasonably foreseeable scenarios submitted by the respondents for the purposes of the s. 12 analysis. He deemed all of them too [translation] “far removed” from the facts in the cases of Mr. Senneville and Mr. Naud (paras. 217-19). For the same reason (at para. 220), he refused to consider a situation in John. Since no scenario satisfied that factual proximity test, the dissenting judge found that it “is not even necessary to proceed to the disproportionality analysis” (para. 221). My colleagues adopt a similar approach. According to them, courts should disregard reasonably foreseeable scenarios that are “remote” (para. 203). Respectfully, I am unable to agree with their view.

[62] Our disagreement originates in a phrase in the French version of Goltz (“sur le fondement d’exemples extrêmes ou n’ayant qu’un faible rapport avec l’espèce”) that has been repeated on several occasions by this Court. It is helpful to reproduce the paragraph in which this phrase appeared for the first time. The English version reads as follows:

A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility. While the Court is unavoidably required to consider factual patterns other than that presented by the respondent’s case, this is not a licence to invalidate statutes on the basis of remote or extreme examples. Laws typically aim to govern a particular field generally, so that they apply to a range of persons and circumstances. It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the Charter (Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, at p. 1099, and MacKay v. Manitoba, [1989] 2 S.C.R. 357, at pp. 361-62). Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life. [Emphasis added; pp. 515-16.]

[63] The underlined passage in this excerpt from Goltz was repeated in *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 30, then in *Nur*, where McLachlin C.J. stated the following:

The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are “remote” or “far-fetched” are excluded: Goltz, at p. 515. Contrary to what the Attorney General of Ontario suggests there is a difference between what is foreseeable although “unlikely to arise” and what is “remote [and] far-fetched”: A.F. (Nur), at para. 66. Moreover, adoption of the likelihood standard would constitute a new and radically narrower approach to constitutional review of legislation than that consistently adhered to since *Big M*. The Court has never asked itself whether a projected application of an impugned law is common or “likely” in deciding whether a law violates a provision of the Charter. To set the threshold for constitutional review at common or likely instances would be to allow bad laws to stay on the books. [Emphasis added; para. 68.]

[64] This phrase also appears in *Hills* (paras. 77-79) and *Hilbach* (paras. 87-88).

[65] Despite its continuous presence in our case law, I note that the exact meaning of the French expression “faible rapport avec l’espèce” has never been discussed. In the English version of Goltz, the words “sur le fondement d’exemples extrêmes ou n’ayant qu’un faible rapport avec l’espèce” were rendered by “on the basis of remote or extreme examples”. The adjective “remote” was used generally, without establishing a relationship of proximity with specific cases. The ambiguity arising from the difference between the English and French versions can easily be eliminated by prioritizing a true contextual reading of our case law.

[66] In the above-quoted excerpt from Goltz (pp. 515-16), the expression “on the basis of remote or extreme examples” is used just after the sentence stating that “[a] reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility”. That is the central idea of the above-quoted passage, which is rephrased a few lines later: “The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life” (p. 516). Gonthier J. in no way suggested that the “rapport” (connection) of a reasonably foreseeable scenario to the specific circumstances of the offender is an independent test that may limit what could be “imaginable circumstances”.

[67] Similarly, in the above-quoted excerpt from *Nur*, the ambiguous passage from Goltz was quoted in a paragraph stating that a reasonably foreseeable scenario need not be “common” or “likely” (para. 68; see also *Hills*, at para. 79). The rejection of such criteria is necessary in order for the constitutional review to be carried out on the basis of all the “circumstances that are foreseeably captured by the minimum conduct caught by the offence” (*Nur*, at para. 68). With respect, the factual “connection” test focused on by my colleagues is inconsistent with this approach, because it centres the analysis on the specific case of the offender rather than on the nature of the impugned legislative provision. It is clear that in relying on Goltz,

McLachlin C.J. did not wish to limit reasonably foreseeable scenarios to those that are similar to the situation of the offender challenging the constitutionality of a mandatory minimum sentence. The ambiguous passage from Goltz was instead cited to convey the idea that a reasonably foreseeable scenario cannot be far-fetched. Any other reading is in tension with McLachlin C.J.'s emphasis on the importance that courts ask themselves "what situations may reasonably arise" (para. 68).

[68] Respectfully, the interpretation of Goltz advanced by my colleagues is also inconsistent with Hills. The factual proximity test they propose undermines this Court's direction that the incorporation of personal characteristics into reasonably foreseeable scenarios is meant to ensure that everyone, without exception, is able to benefit from the protection of s. 12 of the Charter. Thus, it is appropriate "that the effects of a mandatory minimum be scrutinized based not only on the reach of the law and the length of the sentence selected, but also on the breadth of the population to which it is made to apply" (Hills, at para. 89). The Court has reiterated that characteristics that are reasonably foreseeable for offenders before the courts, as a whole, should not be excluded from consideration (paras. 84-90).

[69] Three additional reasons support the rejection of the position taken by my colleagues.

[70] First, considering the effect of mandatory minimum sentences by reference to reasonably foreseeable scenarios is essential to effective constitutional review. Requiring a certain connection between the facts of a case and a reasonably foreseeable scenario would frustrate the possibility of assessing the constitutionality of a minimum sentence in light of certain reasonably foreseeable scenarios, including those that reflect conduct at the low end of the gravity scale but that nevertheless trigger the application of the mandatory minimum sentence. This would increase the possibility of invalid laws remaining in force (Nur, at para. 51) and would thereby reduce the scope of the protection afforded by s. 12 of the Charter. It would become a superfluous limit on the constitutional analysis, because, as I earlier noted, when the use of reasonably foreseeable scenarios proves necessary, it is "the nature of the law, not the status of the accused, that is in issue" (Big M, at p. 314, quoted in Nur, at para. 51).

[71] Second, the position adopted by my colleagues is contradicted by the reasonably foreseeable scenarios that this Court very recently considered. For example, the reasonably foreseeable scenarios assessed in Bertrand Marchand, where the impugned mandatory minimum sentences related to the offence of child luring, were as follows:

- The representative offender is a first-year high school teacher in her late 20s with no criminal record. The offender has been diagnosed with bipolar disorder. One evening, she texts her 15-year-old student to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. The two meet that same evening in a private location where they both participate in sexual touching. The offender does not engage inappropriately with the student on any further occasions. The offender pleads guilty and expresses remorse on sentencing. See Hood, at para. 150.

...

- The representative offender is an 18-year-old who is in a romantic and sexual relationship with a 17-year-old. In one text message, the offender asks her to send him an explicit photo. She does, and he then forwards that photo to his friend without his girlfriend's knowledge. This friend, who is also 18, does not transmit this photo to anyone, but retains it on his mobile phone. See *John*, at para. 29. [paras. 116 and 119]
- [72] The specific facts of the offences committed by Mr. Bertrand Marchand were very different from these scenarios (*Bertrand Marchand*, at paras. 17-19). Mr. Bertrand Marchand was nine years older than his victim, was in telecommunication contact with her for several months, exchanged hundreds of messages with his victim and had illegal sexual intercourse with her on four separate occasions. It is clear that these facts do not have a particularly strong "connection" with the scenarios that were retained for the purposes of the constitutional analysis.
- [73] Another example can be taken from *Hills*. Mr. Hills had fired several rounds from a hunting rifle into a residential home, knowing that or being reckless as to whether it was occupied. He challenged the four-year mandatory minimum sentence set out in s. 244.2(3)(b) Cr. C. by relying on a reasonably foreseeable scenario, one "where a young person intentionally discharges an air-powered pistol or rifle at a residence that is incapable of perforating the residence's walls" (*Hills*, at para. 150). The Crown had rightly conceded the reasonableness of that scenario (see paras. 151-54). Here too, some might doubt the strength of the factual "connection" between the use of a hunting rifle and the use of an air-powered pistol.
- [74] The scenarios chosen by this Court in *Hills* and *Bertrand Marchand* confirm that my colleagues are isolating the word "remote" from the rest of our case law. Our jurisprudence has consistently taught that it is the reasonably foreseeable nature of the scenario that is important, in light of the range of conduct caught by the offence with which the minimum sentence is associated.
- [75] In short, the s. 12 analysis does not require factual proximity between the reasonably foreseeable scenario and the case at hand.
- [76] In their reasons, my colleagues maintain that they are simply clarifying the law on s. 12 (para. 201). In my view, the test that they introduce constitutes a significant departure from our precedents that risks rendering illusory the use of reasonably foreseeable scenarios. Even as early as 2015, McLachlin C.J. stated that "excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would run counter to the settled authority of this Court and artificially constrain the inquiry into the law's constitutionality" (*Nur*, at para. 49; see also *Hills*, at para. 71; *Bertrand Marchand*, at para. 114). According to my colleagues, the six reasonably foreseeable scenarios raised in this appeal cannot be used for the purposes of the constitutional analysis, because they all have only a "remote connection with the cases before us" (para. 235). I note, however, that the parties did not call into question the reasonably foreseeable nature of these scenarios. It

must be inferred from my colleagues' reasons that only scenarios similar to the respondents' situations would be valid, which eliminates the usefulness of reasonably foreseeable scenarios when the constitutionality of a mandatory minimum sentence is challenged. Respectfully, that approach cannot be reconciled with the importance that our case law places on the ability of courts to conduct effective constitutional review and undermines the doctrine of stare decisis. If it were to prevail, it would significantly diminish the scope of s. 12 of the Charter by allowing invalid laws to remain in force and to affect individuals being sentenced in Canada.

- [77] The doctrine of stare decisis, or of precedent, is essential to the legitimacy of the courts, in that it “furthers basic rule of law values such as consistency, certainty, fairness, predictability, and sound judicial administration” (Sullivan, at para. 64, citing *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 137, and *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.), at paras. 118-21) and “helps ensure judges decide cases based on shared and general norms, rather than personal predilection or intuition” (ibid.). This Court’s case law on the doctrine of precedent is clear: it is permissible to depart from precedent only where there exists “a compelling reason to do so, including if the precedent was inconsistent with a binding authority or statute, it has proven unworkable, or its rationale has been eroded by significant social or legal change” (*Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 98, citing *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44). It follows that a decision to depart from precedent must be carefully considered and justified.
- [78] Here, there is no compelling reason to depart from the precedent established by the Court’s jurisprudence on reasonably foreseeable scenarios, and no party has asked us to do so. My colleagues do not appear to acknowledge that they are doing so and, accordingly, do not address the considerations that are essential to a departure from precedent.
- [79] Third, their constitutional analysis poses a significant risk for the review of mandatory minimum sentences in the case of Indigenous offenders. Limiting the analysis to personal characteristics very similar to those of the offender in the case at hand amounts to excluding the possibility of assessing whether a mandatory minimum sentence is cruel and unusual in relation to other offenders in reasonably foreseeable scenarios.
- [80] Yet the Court emphasized in *Hills* that Indigeneity is a relevant personal characteristic for reasonably foreseeable scenarios, particularly in view of the fact “that Indigeneity is an offender characteristic that is more than ‘theoretically possible’” (para. 87). The need to include Indigeneity in the analysis is based on the requirements of s. 718.2(e) Cr. C. and the historic and systemic disadvantage experienced by Indigenous offenders, as noted in *Gladue* in relation to sentencing, that reduce their moral blameworthiness (see also *Boudreault*, at para. 83). These factors therefore require particular attention. Significantly discounting the impact of mandatory minimum sentences on Indigenous offenders solely because Indigeneity appears to have only a remote factual connection with the case would be contrary to these principles, recognized and reiterated by the Court time and again, and

could further contribute to their overincarceration.

(d) The Expression “Extreme Examples”

- [81] My colleagues also observe that certain foreseeable scenarios cannot be reasonable because they constitute examples that are “too extreme” (para. 219). They propose, among other things, to exclude the scenarios described in *John and R. v. Delage*, 2019 QCCQ 1125, because they are, in their opinion, extreme, in addition to being remote, as separate criteria. In light of the foregoing, I do not see how this meaning can be attributed to the expression “on the basis of remote or extreme examples” (Goltz, at pp. 515-16). As indicated earlier, central to this expression is the notion that a reasonably foreseeable scenario must consist of imaginable circumstances and cannot be far-fetched. The word “extreme” is used to better underscore this notion. My colleagues also do not explain how these scenarios are extreme and simply state, in the case of the scenario taken from *John*, that it “is meant to be ‘the most . . . sympathetic . . . imaginable’” (para. 229, quoting *Nur*, at para. 75; *Hills*, at para. 91; *Hilbach*, at paras. 88-89). However, far from being far-fetched, this scenario simply illustrates the lower end of the scale of conduct that may be caught by the offence, which is essential in assessing the constitutionality of the mandatory minimum sentence. Furthermore, the principle that all reported cases, such as *Delage*, can be considered reasonably foreseeable scenarios is well established (*Hills*, at para. 81; *Nur*, at para. 72). The logic lies in the fact that these cases actually happened and therefore necessarily show the range of real-life conduct captured by the offence even if they “represent an uncommon application of the offence” (*Nur*, at para. 72).

V. Application

A. The Reasonably Foreseeable Scenario Chosen

- [82] It is not disputed that the mandatory minimum sentences of one year’s imprisonment provided for in s. 163.1(4)(a) and (4.1)(a) Cr. C. do not impose punishment that is grossly disproportionate for the respondents. This appeal strictly concerns the constitutionality of these mandatory minimum sentences by reference to reasonably foreseeable scenarios. For the purposes of the analysis, it is necessary to first determine which scenario should be chosen.
- [83] One reasonably foreseeable scenario in particular was addressed by the parties in their factums and during the hearing before the Court. It was also examined by the three appellate judges and is derived from *John*, at para. 29:
- An 18-year-old receives on his cell phone, from his friend of the same age, a “sext” originally from the friend’s girlfriend, who is 17 years old. The “sext” in question is a photograph of that 17-year-old that satisfies the definition of child pornography (s. 163.1(1) Cr. C.). The 18-year-old decides to keep the image on his cell phone.

- [84] Assuming, for the purposes of this appeal, that the 18-year-old (“representative offender”) also looked at the photograph during a brief period of time while knowing that it constituted child pornography. He has no criminal record.
- [85] The representative offender consequently committed the offences of possession of child pornography (s. 163.1(4)(a) Cr. C.) and accessing child pornography (s. 163.1(4.1)(a)).
- [86] This scenario may be used for the analysis under s. 12 of the Charter. First, the circumstances of the commission of the crimes are foreseeable. The phenomenon of “sexting” among teenagers is well known and documented (Bertrand Marchand, at para. 121, citing L. Karaian and D. Brady, “Revisiting the ‘Private Use Exception’ to Canada’s Child Pornography Laws: Teenage Sexting, Sex-Positivity, Pleasure, and Control in the Digital Age” (2019), 56 Osgoode Hall L.J. 301, at p. 306). In the age of digital communication, it is not far-fetched that an 18-year-old receives from a friend — who commits the offence set out in s. 163.1(3) Cr. C. in doing so — an image corresponding to the definition of child pornography. Second, the fact that a single photograph forms the basis for the convictions reflects the range of conduct caught by the crimes of accessing and possession of child pornography. Lastly, the fact that the representative offender is 18 years old and has no criminal record is foreseeable, as the crimes of accessing and possession of child pornography can be committed by persons in any age category, including minors (see, e.g., *R. v. X.*, 2016 CanLII 81303 (N.L. Prov. Ct.), and *R. v. M.L.*, 2020 MBPC 30, where the young offenders were 16 years old; *R. v. B.M.S.*, 2016 NSCA 35, 373 N.S.R. (2d) 298, where the young offender was 14 years old).
- [87] Importantly, it is the appellants who brought the contours of this scenario to the Court’s attention (A.F., at para. 89), and the Attorney General of Quebec’s representative confirmed at the hearing that the scenario from John constitutes, in their opinion, a reasonably foreseeable scenario (transcript, at p. 33). The respondents had an opportunity to structure their analysis premised on this scenario (R.F., at para. 62). A real adversarial debate therefore took place. Moreover, in that same case, Crown counsel were of the same view (para. 33). Unless the situation is exceptional, the agreement of the parties reflects the reasonably foreseeable nature of a scenario. In short, all of the conditions have been met to choose the scenario described in John and set out above. It is on the basis of this scenario that I will proceed to the two-stage analysis under s. 12 of the Charter.

B. The First Stage: The Appropriate Sentence for the Representative Offender

- [88] The 18-year-old representative offender accessed child pornography and deliberately kept it on his cell phone. In doing so, he contributed to the serious violation of the privacy and dignity of the victim, who could suffer significant and irreversible consequences on a personal level as a result. Without diminishing in any way the harm that child pornography causes to society, it must be recognized that, by accessing and retaining a single image of a victim one year younger than him, the commission by the representative offender of the offences of accessing and possession falls at the low end of the gravity scale for the offence

and degree of moral blameworthiness. The offender's youth and the fact that he received a photograph without requesting it and has no criminal record are significant mitigating circumstances.

- [89] The appellants argue, without elaborating, that [translation] “this representative offender should be given an unconditional term of imprisonment” (A.F., at para. 93). The same point of view was repeated during the hearing (transcript, at pp. 34-35). This perspective is disconcerting for two reasons.
- [90] First, it neglects the teaching of *Hills* according to which it is important to determine with precision the appropriate sentence (paras. 63-65). Given a premise as imprecise as that the appropriate sentence is “an unconditional term of imprisonment”, it is impossible to conduct the s. 12 analysis in a coherent and structured fashion.
- [91] Second, postulating the inevitability of an unconditional term of imprisonment for the representative offender undermines the principles of sentencing.
- [92] Certainly, for offences involving the abuse of children, including crimes related to child pornography, the objectives of denunciation and deterrence must be given “primary consideration” (s. 718.01 Cr. C.). This Court has acknowledged that this direction from Parliament limits the discretion of a sentencing judge, “such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority” (Friesen, at para. 104, citing *Rayo*, at paras. 103 and 107-8; *Bertrand Marchand*, at para. 28).
- [93] While complying with these requirements, sentencing judges retain “discretion to accord significant weight to other factors (including rehabilitation and Gladue factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality” (Friesen, at para. 104; see also *Bertrand Marchand*, at para. 28). In this regard, the Court has noted that the “strong statements in Friesen about the inherent wrongfulness and harmfulness of sexual violence against children . . . should not be taken as a direction to disregard relevant factors that may reduce the offender’s moral culpability” (*Bertrand Marchand*, at para. 171 (emphasis added); see also *Courchesne v. R.*, 2024 QCCA 960, at para. 52; *R. v. A.L.*, 2025 ONCA 9, 100 C.R. (7th) 176, at paras. 17-18). Here, taking these factors into account points to imprisonment being an excessive punitive measure given the gravity of the offence and the moral blameworthiness of the offender.
- [94] Martin J.’s comments in *Bertrand Marchand*, where the impugned mandatory minimum sentence was for the offence of child luring, are entirely applicable to the representative offender:

. . . the criminalized conduct in this case indicates a lack of guidance or adult mentorship more than it does the offender’s criminal intent (para. 161). Rehabilitation and individual deterrence are primary sentencing objectives when sentencing youthful first offenders. Even though an 18-year-old offender falls outside the scope of the youth criminal justice system, his lack of maturity remains an important consideration (*R. v. Priest* (1996), 30 O.R. (3d) 538 (C.A.), at pp.

543-44; R. v. Tan, 2008 ONCA 574, 268 O.A.C. 385, at para. 32; R. v. T. (K.), 2008 ONCA 91, 89 O.R. (3d) 99, at paras. 41-42). It is crucial that all other dispositions be explored before imposing custodial sentences on youthful first offenders (R. v. Stein (1974), 15 C.C.C. (2d) 376 (Ont. C.A.), at p. 377). [Emphasis added; para. 132.]

(See also Hills, at para. 161.)

- [95] An offender's youth is generally a mitigating factor, and "when sentencing youthful first-time adult offenders, judges must practice restraint, prioritize rehabilitation and account for immaturity, which may mitigate culpability even when it does not excuse the offence" (R. v. Wesley, 2025 ONCA 51, 175 O.R. (3d) 166, at para. 100, citing R. v. Habib, 2024 ONCA 830, 99 C.R. (7th) 110, at para. 31; see also C. C. Ruby, *Sentencing* (10th ed. 2020), at §5.187).
- [96] The principle of restraint, embodied in s. 718.2(d) and (e) Cr. C. (R. v. Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 100), is of increased importance in the case of a youthful first offender (Marien Frenette v. R., 2024 QCCA 207, at para. 38; Bérubé-Gagnon v. R., 2020 QCCA 1382, quoting R. v. Brisson, 2014 QCCA 1655, at paras. 22-23). In enacting these provisions, Parliament [translation] "introduced a hierarchy in the choice of sentencing measures and positioned imprisonment as a measure of last resort" (H. Parent and J. Desrosiers, *Traité de droit criminel*, t. III, *La peine* (4th ed. 2024), at p. 574).
- [97] The appellants' argument disregards those considerations and implies that, for certain crimes, regardless of the circumstances and the characteristics of the offender, the severity of a sentence is [translation] "exclusively a feature of imprisonment", which is not the case in Canada, as the Quebec Court of Appeal has often reiterated (Casavant v. R., 2025 QCCA 20, at para. 64; R. v. Houle, 2023 QCCA 99, at para. 46; Nadeau v. R., 2020 QCCA 445, at para. 55; Harbour v. R., 2017 QCCA 204, at para. 81; Charbonneau v. R., 2016 QCCA 1567, at para. 18).
- [98] I note that, like the appellants, the respondents did not suggest a specific sentence for the representative offender and instead merely stated that it is clear that the minimum sentence of one year's imprisonment would be grossly disproportionate (R.F., at para. 62).
- [99] Although the acts committed by the representative offender are serious and deserve to be denounced, they fall at the lowest end of the gravity scale for the crimes of accessing and possession of child pornography. Furthermore, the offender's youth and the absence of a criminal record invite restraint. In these circumstances, the appropriate sentence for the representative offender may be of the same order as that identified in Bertrand Marchand for a similar representative offender, that is, a conditional discharge with strict probationary terms (para. 133), a penalty that provides appropriate supervision and increases the offender's awareness of his crime.

C. The Second Stage: The Threshold of Gross Disproportionality Is Met

[100] Imposing a sentence of one year's imprisonment on the young 18-year-old representative offender when a fit sentence would be a conditional discharge with strict probationary terms would constitute a grossly disproportionate sentence. The Ontario Court of Appeal in *John* came to this conclusion using essentially the same reasonably foreseeable scenario at a time when the mandatory minimum sentence of imprisonment for the crime of possession of child pornography was half as severe:

I am of the view that the application of the mandatory minimum sentence to the offender in the third hypothetical is grossly disproportionate. Most members of the community would consider a six-month jail sentence a substantial interference with individual liberty and would find it intolerable that such a punishment could be applied to this behaviour, especially given the number of images/videos involved (one single image), the nature of the image in question (lawfully self-created), the manner of acquisition (passive recipient) and the nature of the offender (young adult).

(*John*, at para. 39 (emphasis added))

[101] I agree with this observation. As is demonstrated by these cases, the grossly disproportionate nature of the impugned minimum sentences is clear. Consideration of the “three crucial components” described by Martin J. in *Hills* confirms this.

(1) The Reach of the Offence With Which the Mandatory Minimum Sentence Is Associated

[102] Parliament is free to create mandatory minimum sentences, but these sentences are constitutionally vulnerable when they are associated with crimes that encompass a wide range of conduct. This is the case for the crimes of possession of and accessing child pornography.

[103] There is no question that the crime “of possession of child pornography is extremely broad” (*R. v. Swaby*, 2018 BCCA 416, 367 C.C.C. (3d) 439, at para. 97). First, given the definition of child pornography (s. 163.1(1) Cr. C.), this Court has already noted that Parliament criminalized “the possession of a substantial range of materials posing a risk of harm to children”, including writings (*Sharpe*, at para. 72). The scope of the materials caught is nevertheless narrowed by the “limits inherent in the s. 163.1(1) definition” (para. 73), the defences provided for in s. 163.1(5) and (6) as well as the two categories of material excluded from the interpretation of s. 163.1(4) according to *Sharpe* (paras. 115-27).

[104] Second, and most importantly, there are a “wide variety of circumstances in which the possession offence can be committed” (*Pike*, at para. 175). Indeed, this crime captures both the well-organized offender who, over the years, has accumulated thousands of files, and the offender who, one day, keeps a file that was sent to the offender without them requesting it. The mandatory minimum sentence must also be imposed regardless of the content of the child pornography.

[105] These observations are sufficient to understand that the application of the offence of possession of child pornography covers a very wide range of circumstances. They can be transposed, with the necessary adaptations, to the crime of accessing child pornography. The mandatory minimum sentences apply to certain conduct that is at such a low level on the gravity scale that this component alone can lead to the conclusion that they are grossly disproportionate (Hills, at para. 124).

(2) The Effects of the Penalty on the Offender

[106] The harm that a sentence of one year's imprisonment causes to a representative offender should not be underestimated. The experience of prison is likely to be particularly harmful to a young adult. As this Court has recognized, "incarceration is often not a setting where the reformatory needs of young people are met" (Hills, at para. 165, citing Ruby, at §5.191). What is more, incarcerated youthful offenders are often "bullied, pressured to join adult prison gangs, and are vulnerable to segregation placements" (Bertrand Marchand, at para. 152, citing Hills, at para. 165, and Office of the Correctional Investigator and Office of the Provincial Advocate for Children and Youth, *Missed Opportunities: The Experience of Young Adults Incarcerated in Federal Penitentiaries* (2017)). The imposition of a sentence of one year's imprisonment therefore risks being very harmful to the representative offender without promoting his awareness and his rehabilitation.

[107] Even though the representative offender chosen does not have mental health issues, I note that, in a number of real cases that have come before the courts, it has been found that prison would be an intolerable experience for certain vulnerable offenders. For example, in *Swaby*, the offender had cognitive and mental health issues, and the two psychologists who evaluated him "agreed on the deleterious effect that incarceration would have on him" (para. 67). Generally, this Court has recognized that the principle of proportionality requires that the effects of a sentence of imprisonment be considered in light of the characteristics of a particular person, for example the fact that they have a disability (Hills, at para. 135, citing *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 48, and B. L. Berger, "Proportionality and the Experience of Punishment", in D. Cole and J. Roberts, eds., *Sentencing in Canada: Essays in Law, Policy, and Practice* (2020), 368, at p. 368).

[108] The mandatory application of a minimum sentence of imprisonment for criminal conduct for which the fit sentence is not imprisonment is a strong indicator of its unconstitutionality given the "profound qualitative difference between a community-based penalty and imprisonment" (Kerr and Perlin, at p. 189; see Hilbach, at para. 75). In fact, imprisonment is particularly stigmatizing in nature and can have a profound impact on the offender (see Hills, at para. 134), notably because of the separation from society it entails and the realities of the prison setting. It is therefore no surprise that, in the context of a constitutional challenge to a minimum sentence of imprisonment, the gross disproportionality test will be more easily met when the fit sentence determined at the first stage of the analysis is non-carceral, as is the case here.

(3) The Sanction and Its Objectives

- [109] In 2005, Parliament passed the Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, and introduced mandatory minimum sentences of 45 days for the offences under s. 163.1(4)(a) and (4.1)(a). One of the purposes of this measure was to put an end to the possibility of imposing a conditional sentence for these offences (see J. Benedet, “Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences” (2019), 44 Queen’s L.J. 284, at pp. 291-92). In 2012, Parliament enacted the Safe Streets and Communities Act, S.C. 2012, c. 1, which increased the minimum sentences for these offences to six months’ imprisonment (s. 17). In 2015, the Tougher Penalties for Child Predators Act doubled the length of the mandatory minimum sentences, which increased to one year’s imprisonment (s. 7(2)). The maximum sentences of imprisonment were also doubled, going from 5 years to 10 years (s. 7(3)). Quite recently, Parliament enacted the Act to amend the Criminal Code and to make consequential amendments to other Acts (child sexual abuse and exploitation material), S.C. 2024, c. 23. This change in terminology does not change how the law is applied but serves as a reminder that this material is not consensual and is neither entertainment nor art.
- [110] These initiatives demonstrate Parliament’s intention to ensure that crimes related to child pornography lead to sentences that emphasize denunciation and deterrence. This choice is consistent with other measures taken by Parliament — including the enactment of s. 718.01 Cr. C. — to ensure that these objectives are prioritized in the case of sexual offences against children. This change also reflects the fact that protecting “children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the Criminal Code” (Friesen, at para. 42).
- [111] This Court has acknowledged the paradigm shift initiated by Parliament. In Friesen, it stated that sentences imposed for sexual offences against children must “correspond to Parliament’s legislative initiatives and the contemporary understanding of the profound harm that sexual violence against children causes” (para. 107). In particular, the Court stated that “Parliament’s decision in 2015 to increase maximum sentences for sexual offences against children should shift the range of proportionate sentences as a response to the recognition of the gravity of these offences. Sentences should increase as a result of this legislative initiative” (para. 109, citing Rayo, at para. 175). This statement was aimed at, among other things, sentences imposed on offenders who committed crimes related to child pornography.
- [112] In this context, the impugned mandatory minimum sentences go beyond what is necessary to attain their objectives. Parliament’s other initiatives and the state of the case law since Friesen ensure the imposition of severe sentences prioritizing denunciation and deterrence for crimes related to child pornography.

[113] While it can be assumed that the impugned mandatory minimum sentences contribute to the prioritization of these objectives, they also have the effect of removing judges' discretion to impose sentences other than imprisonment in the appropriate circumstances. The Court has already indicated that there are solutions to this problem. Parliament may wish to maintain minimum sentences for certain crimes, but it must respect the limits imposed by the Charter. Although there is no single formula for doing so, Parliament could, among other things, limit the scope of mandatory minimum sentences to certain conduct (Bertrand Marchand, at para. 108) or "build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment" (Lloyd, at para. 36). A variety of approaches have been favoured in other countries (see Lloyd, at para. 36). As noted by the authors of a federal government working document, it seems entirely conceivable, "without denying the policy objectives pursued through the adoption of mandatory minimum penalties, to adopt a sentencing scheme where these penalties are affirmed as essentially presumptive rather than a strict framework from which deviations are not possible" (Y. Dandurand, with R. Timmerman and T. Mathison-Midgley, *Exemptions from Mandatory Minimum Penalties: Recent Developments in Selected Countries* (2017), at p. 49).

[114] As they presently stand, the impugned minimum sentences lead, in all cases where the offence is prosecuted by indictment, to the imposition of sentences of imprisonment of at least one year. For this reason, and as was found in Bertrand Marchand, certain objectives have been prioritized "to the near complete exclusion of rehabilitation" (para. 159). For example, the impugned minimum sentences preclude the possibility of imposing non-carceral penalties, including a conditional sentence (s. 742.1(b) Cr. C.), a sanction that still has the potential to "achieve the objectives of denunciation and deterrence as effectively as incarceration" (Proulx, at para. 100). Moreover, as Lamer C.J. observed, a conditional sentence has the following advantage:

It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot. [para. 99]

[115] The impugned minimum sentences also prevent the imposition of intermittent sentences, which are, in many instances, better suited to assist in rehabilitating an offender (see Bertrand Marchand, at para. 160).

[116] Finally, accessing and possession of child pornography are hybrid offences. Sections 163.1(4)(b) and 163(4.1)(b) Cr. C. specify that these offences may be prosecuted summarily and, on conviction, a minimum sentence of six months' imprisonment is to be imposed. The disparity in length between that sentence and the minimum sentences challenged in this appeal is "disquieting" (Bertrand Marchand, at para. 161). This disparity "clearly demonstrates that Parliament understood that, in certain circumstances, a sentence far below that required by the one-year mandatory minimum would be appropriate" (para. 161, quoting Morrison, at para. 185, per Karakatsanis J., concurring). Furthermore, "[t]he

Crown's election should not determine whether an offender receives a fit sentence or an excessive sentence" (para. 163). This flexibility in the Criminal Code supports the position that the impugned mandatory minimum sentences go beyond what is necessary to attain Parliament's objectives.

(4) Conclusion Regarding the Second Stage of the Analysis

[117] Considering the reach of offences with which the mandatory minimum sentences are associated, the objectives of these sanctions and their effects on offenders, a sentence of one year's imprisonment for the representative offender would be grossly disproportionate and therefore violates s. 12 of the Charter.

VI. Conclusion

[118] For these reasons, I would dismiss the appeal. The minimum sentences set out in s. 163.1(4) (a) and (4.1)(a) of the Criminal Code are contrary to s. 12 of the Charter and are not saved by s. 1. They should be declared of no force or effect, with immediate effect, in accordance with s. 52(1) of the Constitution Act, 1982.

English version of the reasons of Wagner C.J. and Côté, Rowe and O'Bonsawin JJ. delivered by The Chief Justice and Côté J. —

I. Overview

[119] Child pornography has unquestionably become a scourge both nationally and internationally. It destroys countless innocent lives. Each pornographic photograph, video or audio recording that involves a child is an act of exploitation that will leave the child with deep and lasting scars.

[120] Whether it depicts real or fictional children, child pornography normalizes the exploitation of minors and trivializes their objectification. By promoting the dissemination and acceptance of sexualized representations of children, the consumption of child pornography — in all its forms — encourages attitudes and behaviour that lead to irreversible harm.

[121] The message sent by this Court's decision in *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, could not be any clearer: the sentencing process must convey the profound wrongfulness and harmfulness of offences against children. As this Court noted again recently, "[s]exual offences against children are among the most profoundly immoral acts an individual can commit" (*R. v. Sheppard*, 2025 SCC 29, at para. 1). The censure of society and the law must be reflected consistently and rigorously in the sentences imposed on offenders who are guilty of sexual offences against minors. These sentences take into account the collective harm caused by such acts and the penological objectives of denunciation and deterrence, which are of paramount importance in such cases. Through the imposition of more severe sentences, the justice system expresses society's deep and rightful indignation. A fit and

proportionate sentence is one that is consistent with the teachings of Friesen and that gives effect to Parliament's intention that sexual offences against children be punished more heavily.

- [122] The recent legislative changes enacted by Parliament include increasing the maximum sentences for child pornography offences and, in the case of the offences of possession and accessing, deciding to also increase the minimum sentences, which since 2015 have been set at one year's imprisonment (Tougher Penalties for Child Predators Act, S.C. 2015, c. 23, s. 7).
- [123] The respondents, Louis-Pier Senneville and Mathieu Naud, who were convicted of various child pornography offences, rely on s. 12 of the Canadian Charter of Rights and Freedoms to challenge the constitutionality of the mandatory minimum sentences of one year's imprisonment provided for in the Criminal Code, R.S.C. 1985, c. C-46 ("Cr. C."), for the offences of possession of child pornography and accessing child pornography when prosecuted by indictment (s. 163.1(4)(a) and (4.1)(a)).
- [124] The respondents were successful in the courts below. The Quebec Court of Appeal declared the impugned provisions to be of no force or effect against all persons under s. 52(1) of the Constitution Act, 1982. A majority of the Quebec Court of Appeal found that the impugned provisions infringed the rights of representative offenders in reasonable hypothetical scenarios. It is this finding more specifically that the appellants are appealing to this Court.
- [125] We would allow the appeal and set aside the Quebec Court of Appeal's declaration that the impugned provisions are of no force or effect against all persons. It has not been shown that the minimum sentences provided for in s. 163.1(4)(a) and (4.1)(a) Cr. C. constitute cruel and unusual punishment within the meaning of s. 12. The impugned provisions are therefore constitutionally valid and operative.
- [126] When a constitutional challenge under s. 12 is based on a hypothetical scenario, as here, the hypothetical scenario chosen must still be "reasonable". *R. v. Goltz*, [1991] 3 S.C.R. 485, established that, to be "reasonable", the hypothetical scenario cannot be an extreme example and must have more than a remote connection with the case. This requires that it have a sufficient factual and legal connection with the case before the court. If a hypothetical scenario is not sufficiently related to the case in question, the court cannot consider it to determine the constitutionality of the impugned provision. Thus, while this Court can "consider factual patterns other than that presented by the . . . case [before the Court], this is not a licence to invalidate statutes on the basis of remote . . . examples" (p. 515). This requirement remains relevant to this day. Indeed, it plays an essential role in maintaining the integrity of the justice system and public confidence in the administration of justice.
- [127] Among all the hypothetical scenarios considered in the course of an adversarial process, none has a sufficient factual and legal connection with the two cases before us. Some are also too extreme. Consequently, none of them is a reasonable hypothetical scenario that

can be considered to determine the constitutionality of the impugned provisions. This suffices to end the s. 12 analysis. We do not have to determine what a fit and proportionate sentence would be for the representative offender in a hypothetical scenario or to decide whether the impugned minimum sentences require the imposition of grossly disproportionate punishment.

II. Background and Judicial History

A. Senneville Case, 2020 QCCQ 1204

- [128] The respondent Senneville entered two guilty pleas: the first on a count of possession of child pornography (s. 163.1(4)(a) Cr. C.) and the second on a count of accessing child pornography (s. 163.1(4.1)(a)). In both instances, the offence was prosecuted by indictment.
- [129] On the count of possession, the respondent Senneville admitted having possessed 475 files, including 317 images of children corresponding to the definition of “child pornography” in the Criminal Code (s. 163.1(1)). Of those 317 images, 90 percent were of young girls between 3 and 6 years of age having sexual relations with adults and minors. The sexual relations depicted involved penetration and sodomy. There were no videos. The respondent Senneville admitted that he had acquired the material in question on specialized sites by means of Internet searches. He also admitted that he had possessed that material for a period of 8 months.
- [130] On the count of accessing, he admitted having accessed the above-described child pornography material over a period of 13 months. He viewed the material primarily on his cell phone.
- [131] The respondent Senneville is a former soldier. He served in the Canadian Armed Forces for 10 years before being expelled following his guilty pleas. He had no criminal record and was 28 years old at the time of sentencing. He had cooperated with the authorities and complied with strict release conditions. Having grown up in a family environment that was strict, conflictual and not very warm, he had narcissistic and obsessive-compulsive traits. His risk of reoffending was categorized as low or even very low, with an absence of paraphilia. The respondent Senneville was trying to rebuild his life with the support of his spouse, his family and his friends. He had always been an asset to society and was taking steps to remain one. Further, he had asked for help and was open to the idea of receiving more. He said that he was more emotionally stable since having therapy sessions and that he had participated in an anger management clinic. The respondent Senneville was neither isolated nor lacking in social skills. He was sincerely remorseful and had realized the harm caused. He had no drinking or drug problem. The court proceedings had had a deterrent effect on him.

- [132] At the sentencing stage, the respondent Senneville brought a motion before the judge seeking to have the minimum sentences for the offences of possession of child pornography (s. 163.1(4)(a) Cr. C.) and accessing child pornography (s. 163.1(4.1)(a)), when prosecuted by indictment, declared to be of no force or effect against him. He argued both that the two minimum sentences infringed his rights and that they infringed the rights of an offender in a hypothetical scenario.
- [133] The judge granted the motion. Finding that the two provisions infringed the respondent's s. 12 rights and that the infringements were not justified under s. 1 of the Charter, the judge declared the two provisions to be of no force or effect against the respondent Senneville.
- [134] The judge reached that result by focusing exclusively on the circumstances of the offender before him. He held that the two minimum sentences infringed the rights of the respondent Senneville. However, he did not determine the constitutionality of the impugned provisions from the standpoint of reasonable hypothetical scenarios. The judge made a point of stating that [translation] "it appears unnecessary to look at reasonable hypotheticals" (para. 60).
- [135] The judge therefore imposed sentences of imprisonment without regard for the minimum sentences declared to be of no force or effect against the respondent Senneville. On the count of possession, he imposed a sentence of 90 days' imprisonment to be served intermittently. On the count of accessing, the judge imposed a sentence of 90 days' imprisonment to be served intermittently and concurrently with the sentence on the first count. He also ordered 24 months' probation with conditions.

B. Naud Case, 2020 QCCQ 1202

- [136] The respondent Naud entered two guilty pleas: the first on a count of possession of child pornography (s. 163.1(4)(a) Cr. C.) and the second on a count of distribution of child pornography (s. 163.1(3)). In both instances, the offence was prosecuted by indictment.
- [137] On the count of possession, the respondent Naud admitted having possessed 531 image files and 274 videos of child pornography. Most of the material depicted children from 5 to 10 years of age, mainly young girls, having sexual relations with adults. Those sexual relations included fellatio as well as vaginal and anal penetration with a penis, adult fingers or objects. Sometimes, more than one child was shown being subjected to sexual acts by an adult. The respondent Naud used specialized software to access the material and wipe out any trace. The offence period was 13 months.
- [138] On the count of distribution, the respondent Naud admitted to having made the above-described child pornography material available online through sharing software nearly every day for a period of 13 months.

- [139] The respondent Naud was a man in his thirties with no criminal record. He had low self-esteem and a difficult family history. The respondent Naud had no diploma or degree and no occupational stability. He took refuge in drinking, drugs and pornography, including child pornography. The period surrounding the commission of the offences had been characterized by isolation and avoidance. The respondent Naud had admitted the facts alleged against him, was sincerely remorseful and ashamed, had realized the harm caused and acknowledged the gravity of his acts. He had embarked on two types of therapy: one for his dependence on alcohol and drugs, and the other to increase his awareness of sexual abuse. The judicial and pre-sentencing process and the therapy completed had had a positive and deterrent effect on him. However, his risk of reoffending was above average.
- [140] At the sentencing stage, the respondent Naud brought a motion before the judge seeking to have the minimum sentence for the offence of possession of child pornography, when prosecuted by indictment (s. 163.1(4)(a) Cr. C.), declared to be of no force or effect against him. He argued both that the minimum sentence infringed his rights and that it infringed the rights of an offender in a hypothetical scenario.
- [141] The judge granted the motion. Finding that the provision infringed the respondent's s. 12 rights and that the infringement was not justified under s. 1, the judge declared the provision to be of no force or effect against the respondent Naud.
- [142] The judge reached that result by focusing exclusively on the circumstances of the offender before him. The judge held that the minimum sentence infringed the rights of the respondent Naud. However, he did not determine the constitutionality of the impugned provision from the standpoint of reasonable hypothetical scenarios. The judge made a point of stating that [translation] "it appears unnecessary to look at reasonable hypotheticals" (para. 64).
- [143] On the count of possession of child pornography, leaving aside the minimum sentence declared to be of no force or effect against the respondent Naud, the judge imposed a nine-month term of imprisonment.
- [144] On the count of distribution of child pornography, because he was bound by the minimum sentence provided for in s. 163.1(3) Cr. C., the judge imposed an 11-month term of imprisonment. That sentence corresponded to the minimum sentence of 12 months (s. 163.1(3)) less one month subtracted by the judge for the time the offender had spent in treatment, which the judge likened to time spent "in custody" within the meaning of s. 719(3).
- [145] Finally, the judge also ordered 24 months' probation, with supervision and conditions, and made a 4-year prohibition order under s. 161(1)(a) and (d) Cr. C.

C. Quebec Court of Appeal, 2023 QCCA 731

- [146] The Attorney General of Quebec and the Crown appealed the decisions rendered in the cases of the respondents Senneville and Naud.
- [147] In the respondent Senneville's case, the appellants challenged the declarations that s. 163.1(4)(a) and s. 163.1(4.1)(a) Cr. C. were of no force or effect against the respondent. The appellants also challenged the sentences imposed on the respondent for the offences of possession of and accessing child pornography.
- [148] In the respondent Naud's case, the appellants challenged the declaration that s. 163.1(4)(a) Cr. C. was of no force or effect against the respondent. They also challenged the sentence imposed on the respondent Naud for the offence of possession of child pornography. However, they did not challenge either the sentence imposed on the respondent for the offence of distribution of child pornography or the 12-month minimum sentence for that offence (s. 163.1(3)).
- [149] A majority of the Quebec Court of Appeal held that the minimum sentences in s. 163.1(4)(a) and (4.1)(a) are inconsistent with s. 12 of the Charter and are not saved by s. 1 because they infringe the rights of offenders in hypothetical scenarios. The majority declared the two minimum sentences to be of no force or effect against all persons, in accordance with s. 52(1) of the Constitution Act, 1982. The judge who dissented on this issue would have found that no one had shown that the impugned provisions infringed the rights of the respondents Senneville and Naud or that they infringed the rights of representative offenders in reasonable hypothetical scenarios.
- [150] In the respondent Senneville's case, a majority of the Quebec Court of Appeal set aside the imposed sentences of 90 days' imprisonment to be served intermittently, finding them to be demonstrably unfit, and substituted one-year terms of imprisonment to be served concurrently. The judge who dissented on this issue would have dismissed the appeal from the specific sentences imposed on the respondent Senneville. In the respondent Naud's case, a majority of the Quebec Court of Appeal dismissed the appeal from the specific sentence imposed for the offence of possession of child pornography. The judge who dissented on this issue would have substituted a one-year term of imprisonment, that is, the minimum sentence provided for by the Criminal Code.
- [151] In summary, the Quebec Court of Appeal's judgment concluded as follows: the minimum sentences in s. 163.1(4)(a) and (4.1)(a) Cr. C. are of no force or effect against all persons; the term of imprisonment imposed on the respondent Senneville for the offences of possession and accessing was 12 months; and the term of imprisonment imposed on the respondent Naud for the offence of possession was 9 months.

III. Issues

- [152] The appellants state in their appeal factum that the appeal is not about whether the impugned provisions infringe the s. 12 rights of the respondents Senneville and Naud. They add that they are not challenging the specific sentences imposed on the respondents (A.F., at para. 15).
- [153] The appellants are challenging the conclusion of a majority of the Quebec Court of Appeal to the effect that s. 163.1(4)(a) and s. 163.1(4.1)(a) Cr. C. are of no force or effect against all persons because they are inconsistent with s. 12 and not saved by s. 1. The judges making up the majority on this issue were of the view that the provisions would infringe the constitutional rights of representative offenders in hypothetical scenarios (C.A. reasons, at paras. 36, 41, 160-61 and 231-32). The appellants ask us to set aside that conclusion and to hold, as the judge dissenting on this issue did (at paras. 216 and 228-29), that the provisions are constitutionally valid and operative.
- [154] These reasons are divided into two parts: (A) we look at how the criminalization of child pornography in Canada has evolved; and (B) we consider the constitutionality of the minimum sentences set out in s. 163.1(4)(a) and (4.1)(a) Cr. C. in light of the protection against cruel and unusual punishment guaranteed by s. 12 of the Charter.
- [155] In our view, the respondents' constitutional challenge cannot succeed. The appeal record contains no hypothetical scenario that can be considered to determine the constitutionality of the impugned provisions. The respondents have not discharged their burden of proving an infringement of s. 12 (Goltz, at p. 520; R. v. E.J.B., 2018 ABCA 239, 72 Alta. L.R. (6th) 29, at para. 65; R. v. Plange, 2019 ONCA 646, 440 C.R.R. (2d) 86, at para. 31). We would therefore set aside the Court of Appeal's conclusion that s. 163.1(4)(a) and s. 163.1(4.1)(a) Cr. C. are of no force or effect. Our reasons follow.

IV. Analysis

A. Criminalization of Child Pornography in Canada

- [156] Before we move on to the sentencing stage, it is important to clearly understand the basis for the suppression of child pornography. To this end, we will present (1) the legislative history of the relevant provisions and (2) the various child pornography offences.

(1) Legislative History of the Child Pornography Provisions

- [157] The legislative evolution of the Criminal Code's child pornography provisions can be divided into four main phases: (a) the phase preceding the enactment of s. 163.1, when there were no provisions dealing specifically with child pornography; (b) 1993, when Parliament passed its very first provision on child pornography (s. 163.1); (c) the rest of the 1990s and the early 2000s, which were marked by the rise of the Internet and the prohibition against accessing child pornography; and, finally, (d) 2005 to 2015, when Parliament increased the minimum and maximum sentences in s. 163.1 several times.

(a) Period Preceding the Coming Into Force of Section 163.1 Cr. C.

[158] Canadian society has long been aware of the harm that child pornography causes to children and the community.

[159] Even before there were specific provisions dealing with it in the Criminal Code, the conduct now prohibited by s. 163.1 fell within the scope of other offences, like the offences of possession, distribution and sale of obscene materials (s. 163; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 485, per Sopinka J., and p. 516, per Gonthier J.). The fact that the obscenity provisions were used to crack down on child pornography, even before it was specifically criminalized, illustrates the firm resolve of the justice system to suppress this scourge by all available legal means.

[160] In the mid-1980s, two reports recommended that Parliament reform the Criminal Code and increase protection for children by enacting specific “child pornography” provisions. The first report, published in 1984, was on the sexual exploitation of children (Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths* (1984)). The second report, published a year later in 1985, was on pornography and prostitution (Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (1985)). Their authors viewed the specific criminalization of “child pornography” as a tool for eradicating it from the Canadian market, providing children with better protection and reducing their sexual exploitation.

[161] In addition to those concerns within the country, Canada in 1991 ratified the United Nations Convention on the Rights of the Child, Can. T.S. 1992 No. 3. That document reflected the consensus of the international community on the need for better protection of children from various forms of harm, including violence (Article 19) and sexual exploitation (Article 34). By ratifying that convention, Canada made a commitment to prevent the spread of “pornographic” material and to impose criminal sanctions that reflected the gravity of the making, possession and distribution of such material (see *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 171, per L’Heureux-Dubé, Gonthier and Bastarache JJ.; *R. v. Hewlett*, 2002 ABCA 179, 167 C.C.C. (3d) 425, at para. 19; *R. v. Pike*, 2024 ONCA 608, 173 O.R. (3d) 241, at para. 145).

(b) Enactment of Section 163.1 Cr. C. in 1993

[162] In the wake of those developments, Parliament added s. 163.1 to the Criminal Code in 1993. At the time, this provision prohibited the making, publication, importing, distribution, sale and possession of child pornography (An Act to amend the Criminal Code and the Customs Tariff (child pornography and corrupting morals), S.C. 1993, c. 46, s. 2). When prosecuted by indictment, the offence of possession was punishable by imprisonment for a term not exceeding five years. Section 163.1 did not yet specify any minimum sentence.

(c) Enactment of the Offence of Accessing Child Pornography in 2002

[163] In the 1990s and early 2000s, the increase in the availability and use of computers and the Internet exacerbated the scourge of child pornography and jeopardized the dignity and safety of children in the face of the distribution and consumption of child pornography (Sharpe, at para. 166, per L’Heureux-Dubé, Gonthier and Bastarache JJ.; see also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 17; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, at para. 41).

[164] Those technological advances created new ways of consuming child pornography without necessarily “possessing” it within the meaning of s. 163.1. A person could intentionally view child pornography material on the Internet without having “possession” of it, thereby escaping the sanction of the criminal law (see *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 26-27). This was, so to speak, a blind spot in the offence of possession of child pornography.

[165] In 2002, Parliament filled this gap by creating the offence of accessing child pornography (Criminal Law Amendment Act, 2001, S.C. 2002, c. 13, s. 5). When prosecuted by indictment, the offence of accessing was, at the time, punishable by imprisonment for a term not exceeding five years. Section 163.1 did not yet specify any minimum sentence.

(d) Legislative Amendments to Section 163.1 Cr. C. Between 2005 and 2015

[166] Parliament amended s. 163.1 three times between 2005 and 2015. Through those amendments, Parliament provided for more severe sentences to address the continuing increase in the number of child pornography offences (*Morelli*, at para. 8, per Fish J., and para. 114, per Deschamps J., dissenting; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 102-3; *Friesen*, at paras. 47-49; *R. v. F. (D.G.)*, 2010 ONCA 27, 250 C.C.C. (3d) 291, at para. 22; *R. v. Inksetter*, 2018 ONCA 474, 141 O.R. (3d) 161, at paras. 22 and 26; *R. v. Daudelin*, 2021 QCCA 784, at para. 42; *Pike*, at paras. 144-45).

[167] First of all, on July 20, 2005, Parliament passed the Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32. For the offences of possession and accessing when prosecuted by indictment, the minimum sentence was set at 45 days and the maximum sentence of 5 years remained unchanged. For the offences of making and distribution when prosecuted by indictment, the minimum sentence was set at one year and the maximum sentence of 10 years remained unchanged.

[168] Next, on March 13, 2012, Parliament passed the Safe Streets and Communities Act, S.C. 2012, c. 1. For the offences of possession and accessing when prosecuted by indictment, the minimum sentence increased to 6 months and the maximum sentence of 5 years remained unchanged (s. 17).

[169] Lastly, on June 18, 2015, Parliament enacted the Tougher Penalties for Child Predators Act. For the offences of possession and accessing when prosecuted by indictment, the minimum sentence increased to one year and the maximum sentence increased to 10 years (s. 7(2)). For the offences of making and distribution, which could now be prosecuted only by indictment, the minimum sentence was one year and the maximum sentence was 14 years (s. 7(3)).

[170] In parallel with those legislative amendments, Parliament also passed the Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service, S.C. 2011, c. 4. That statute requires Internet service providers to report any use of their services for the commission of a child pornography offence.

(e) Conclusion

[171] The last three decades have been marked by significant efforts made by Parliament to give the criminal justice systems the necessary tools to fight more effectively against the growing scourge of child pornography, on the one hand, and to clearly signal its intention that higher and more severe sentences be imposed on offenders guilty of such offences, on the other.

(2) The Various Child Pornography Offences

[172] We will now look at the four distinct offences provided for in s. 163.1 Cr. C.: making, distributing, possessing and accessing child pornography.

[173] The expression “child pornography” found in s. 163.1(2) to (4.1) Cr. C. was defined in s. 163.1(1) (Sharpe, at paras. 35-59 and 72-75, per McLachlin C.J., and paras. 135 and 217-21, per L’Heureux-Dubé, Gonthier and Bastarache JJ.; L. Joyal et al., *Prosecuting and Defending Offences Against Children* (2nd ed. 2023), at pp. 225-38).

[174] A number of defences, both judge-made and statutory, are available to those charged with a child pornography offence (s. 163.1(5) and (6) Cr. C.; *R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326, at paras. 55-71; Sharpe, at paras. 60-71; *R. v. Barabash*, 2015 SCC 29, [2015] 2 S.C.R. 522, at paras. 1, 14-30 and 52-53; Joyal et al., at pp. 251-61). It is unnecessary to say anything further on this point, aside from noting that *R. v. Bertrand Marchand*, 2023 SCC 26, broadened the private use exception to make this defence available to an accused who is neither the maker of the child pornography material nor depicted therein (para. 131; see also paras. 119-21).

[175] Although they have a common purpose, the four offences in s. 163.1 Cr. C. are distinct. They have neither the same constituent elements nor the same objective gravity. Indeed, the offence of distribution is objectively more serious — and may require a more severe sentence — than the offences of possession and accessing (Sharpe, at para. 28; *R. v. Régnier*, 2018 QCCA 306, at paras. 28 and 50-61; Inksetter, at para. 27; Daudelin, at paras. 63 and 73-74). The same can be said of the offence of making, whose link with “harm to children is very strong” (Sharpe, at para. 92; see also para. 28; *R. v. H. (W.E.)*, 2002 ABCA 155, 166 C.C.C.

(3d) 392, at para. 30; R. v. Von Gunten, 2006 QCCA 286, at para. 14; R. v. Rhode, 2019 SKCA 17, 372 C.C.C. (3d) 442, at para. 94). It is therefore important that these four offences be properly distinguished at the sentencing stage. A court should refrain from punishing a possession or accessing offence as if it were a making or distribution offence (C. Dauda and D. McNabb, “Getting to Proportionality: The Trouble with Sentencing for Possession of Child Pornography in Ontario” (2021), 37 Windsor Y.B. Access Just. 278, at p. 309).

[176] This constitutional challenge concerns these offences when prosecuted by indictment (s. 163.1(4)(a) and (4.1)(a) Cr. C.). We note from the outset that possession and accessing are “separate crime[s], different” from each other (Morelli, at para. 25). The commission of one does not necessarily imply the commission of the other (paras. 14, 25-27 and 31; R. v. M.N., 2017 ONCA 434, 37 C.R. (7th) 418, at paras. 33-39). A clear understanding of their contours is important.

(a) The Offence of Possession of Child Pornography (Section 163.1(4) Cr. C.)

[177] Section 4(3) Cr. C. defines the term “possession”, and s. 163.1(4) described the hybrid offence of possession of child pornography:[2]

4 . . .

. . .

Possession

(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

. . .

163.1 . . .

. . .

Possession of child pornography

(4) Every person who possesses any child pornography is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

- (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[178] To be found guilty of the offence of possession, one must “knowingly acquire the underlying data files [for the images that constitute ‘child pornography’] and store them in a place under one’s control” (Morelli, at para. 66 (emphasis deleted); Joyal et al., at pp. 239-40). Possession is a [translation] “continuing offence” (Joly v. R., 2024 QCCA 1151, at para. 81) and a “continuing choice” (Pike, at para. 165).

[179] A certain degree of control over the child pornography material is necessary for a finding of “possession” within the meaning of ss. 4(3) and 163.1(4) Cr. C. This Court has established that “[p]ossession of illegal images requires possession of the underlying data files in some way” (Morelli, at para. 14 (emphasis deleted)). Saving underlying data files to the hard drive of a computer is one way of exercising control over them (para. 66; Joyal et al., at pp. 239-40).

[180] Section 4(3) Cr. C. identifies two forms of culpable possession for the purposes of the prohibition against possessing child pornography: personal possession (Morelli, at paras. 15-16; R. v. Villaroman, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 57) and constructive possession (Morelli, at paras. 15, 17 and 32-33; R. v. Choudhury, 2021 ONCA 560, at para. 19). For both forms of possession, “knowledge and control are essential elements” (Morelli, at para. 15 (emphasis deleted); see also R. v. Chalk, 2007 ONCA 815, 88 O.R. (3d) 448, at para. 19; R. v. Midwinter, 2015 ONCA 150, at para. 14).

- (b) The Offence of Accessing Child Pornography (Section 163.1(4.1) Cr. C.)

[181] The hybrid offence of accessing child pornography was set out in s. 163.1(4.1) and (4.2) Cr. C. in the following terms:[3]

Accessing child pornography

(4.1) Every person who accesses any child pornography is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Interpretation

(4.2) For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself.

[182] The offence of accessing prohibits any person from intentionally viewing child pornography (e.g., looking at images on the Internet: Morelli, at paras. 14 and 25-26; Joyal et al., at pp. 242-45) or intentionally causing child pornography material to be transmitted to himself or herself (s. 163.1(4.2) Cr. C.; Joyal et al., at pp. 242-45).

B. The Protection Against Cruel and Unusual Punishment Guaranteed by Section 12 of the Charter

[183] Parliament's objective of protecting children from the abuse and exploitation associated with child pornography also informs constitutional scrutiny of the impugned minimum sentences under s. 12. Both the crafting of a fit and proportionate sentence and the comparative exercise between the fit sentence and the mandatory minimum sentence must always be guided by this legislative objective. The imposition of a sentence is an important mechanism for protecting children from sexual violence and expressing society's abhorrence of such offences (Friesen, at para. 45; Bertrand Marchand, at para. 176, per Côté J., dissenting, but not on this point).

[184] Section 12 grants the right not to be subjected to any cruel and unusual treatment or punishment by the state (R. v. Bissonnette, 2022 SCC 23, [2022] 1 S.C.R. 597, at para. 56; R. v. Hills, 2023 SCC 2, at paras. 31-32). This protection against cruel and unusual punishment has two prongs (Bissonnette, at paras. 59-60 and 69-70; Hills, at paras. 35-36). The first prong is concerned with the severity of the punishment (Bissonnette, at paras. 61-63; Hills, at para. 35). The second prong is concerned instead with the method of punishment (Bissonnette, at paras. 64-68; Hills, at para. 36). The first prong of s. 12 is normally used to analyze the constitutionality of a minimum sentence (Hills, at para. 37).

[185] Our jurisprudence recognizes two ways to challenge the constitutionality of a minimum sentence. First, the challenge may be based on the circumstances of the offender before the court (Hills, at para. 41). Second, the challenge may be based on the circumstances of an offender in a reasonable hypothetical scenario (ibid.; R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 77; Bissonnette, at para. 63). The challenge may also combine the two approaches: arguing that the minimum sentence infringes the rights of the offender before the court and, in the alternative, the rights of the offender in a proposed hypothetical scenario. It is for the claimant to satisfy the court that the hypothetical scenario they propose is reasonable and therefore acceptable.

[186] The court will conduct a three-stage inquiry where, as here, the constitutional challenge is based on the circumstances of a representative offender in a hypothetical scenario. First, the court will select a reasonable hypothetical scenario as the basis for its analysis. Second, the court will consider what a fit and proportionate sentence would be for the representative offender in the reasonable hypothetical scenario selected, having regard to the objectives and principles of sentencing established by the Criminal Code (ss. 718 et seq.). Third, the court will consider whether the impugned minimum sentence requires the imposition of a sentence that is grossly disproportionate to the fit and proportionate

sentence (see *Hills*, at para. 40).

(1) First Stage: Selecting a Reasonable Hypothetical Scenario

[187] The first stage involves selecting a reasonable hypothetical scenario (see *Hills*, at paras. 76 et seq.). In keeping with the adversarial process, it is up to the claimant to satisfy the court that the proposed hypothetical scenario is reasonable (para. 93).

[188] It is worth noting that, up to now, each time this Court has declared a minimum sentence unconstitutional, it has done so on the basis of a hypothetical scenario and not on the basis of the circumstances of the offender before it (*Hills*, at para. 69; L. Kerr and M. Perlin, “A New Justification for Section 12 Hypotheticals and Two Rules for Constructing Them” (2025), 5 S.C.L.R. (3d) 179, at pp. 183-84).

[189] The first time a hypothetical scenario was used was in *R. v. Smith*, [1987] 1 S.C.R. 1045. That case concerned the seven-year minimum sentence for importing drugs. Lamer J., as he then was, declared the sentence unconstitutional because, in his view, it was inevitable and clear that, “in some cases”, the imposition of the minimum sentence would infringe s. 12 (pp. 1077-79).

[190] Nevertheless, the use of hypothetical scenarios was seriously called into question during the decades that followed, and the Court did not declare any minimum sentence unconstitutional on the basis of hypothetical scenarios following *Smith* (see Goltz; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90; Kerr and Perlin, at pp. 183-85).

[191] More than 25 years after *Smith*, the validity of the use of hypothetical scenarios was re-examined in *Nur*. Despite much criticism of them, the Court reaffirmed the use of hypothetical scenarios as an analytical tool under s. 12. In *Nur* (possession of loaded prohibited firearms) and, the following year, in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130 (possession of drugs for the purpose of trafficking), minimum sentences were struck down on the basis of hypothetical scenarios (Kerr and Perlin, at pp. 185-87).

[192] More recently, this Court also declared mandatory minimum sentences unconstitutional on the basis of reasonably foreseeable scenarios in *Hills* (reckless discharge of firearms) and *Bertrand Marchand* (child luring). However, *R. v. Hilbach*, 2023 SCC 3, upheld the validity of the minimum sentence for robbery (Kerr and Perlin, at pp. 187-90).

(a) “Reasonable” Nature of a Hypothetical Scenario

[193] A court must exercise caution when assessing the reasonableness of a proposed hypothetical scenario. The “reasonable hypothetical scenario” is a judicial construct that this Court has made a conscientious effort to circumscribe in its decisions since *Smith*. For this purpose, the Court has gradually established limits on the range of hypothetical scenarios that can in fact be characterized as “reasonable”.

- [194] These limits are fundamental. They help to maintain the integrity of the justice system and public confidence in the administration of justice. Without the respect and support of the community, the administration of criminal justice cannot properly fulfil its function (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). These limits reflect the courts’ respect for the separation of powers in our constitutional democracy. Professor C. Fehr rightly points out that it would be imprudent to “ignor[e] the middle-ground struck by the use of reasonable hypothetical scenarios in challenging mandatory minimum sentencing laws” (“Over the Hills: Section 12 of the Charter at 40” (2024), 102 Can. Bar Rev. 393, at p. 414). “At the heart of that balance”, he explains, “are two considerations: the need to protect citizens from grossly disproportionate treatments/punishments and affording Parliament sufficient constitutional space to influence the law of sentencing” (*ibid.*). It is therefore crucial that these limits be applied carefully to preserve that “middle-ground” and “that balance” referred to by Professor Fehr.
- [195] This Court has recognized that a reasonable hypothetical scenario is “an accepted and appropriate tool” (*Hills*, at para. 67; see also paras. 68-75). This “tool” helps to advance the Charter’s protective purposes (para. 73).
- [196] However, our jurisprudence is cautious in delineating what is meant by a “reasonable hypothetical scenario”. Since *Goltz*, this Court has carefully set boundaries around any claimant’s ability to challenge the constitutionality of a provision where that party’s rights are not infringed by the law, which is to say where the challenge is based on the provision’s unconstitutional effects on third parties. These boundaries are essential to prevent the test from upsetting the constitutional balance and offending the principle of separation of powers. It is a tool, not a weapon. Being “quick to invalidate sentences crafted by legislators” is out of place in Canada (*Goltz*, at p. 501; see also pp. 502-3). For Parliament to be able to exercise its prerogative of enacting laws of general application in a democratic society in order to address societal issues through broad measures in the public interest, the allowable scope for “the imagination of counsel” must be clearly circumscribed (*Hills*, at para. 83; *Hilbach*, at para. 89). Otherwise, it is warned, “lawyerly ingenuity would be the only limit to findings of unconstitutionality” (*Nur*, at para. 75).
- [197] Our colleague stresses the importance of the rule of law and access to justice in the application of the s. 12 test. While it is true that the rule of law is relevant to the analysis, any discussion around access to justice only moves us away from the heart of the debate. We will therefore focus on the former principle.
- [198] In *Lloyd*, McLachlin C.J. wrote that “no one [may] be sentenced under an invalid statute” (para. 16; see *Hills*, at para. 73). However, this principle is not the only one that must be considered in the analysis. If it were, this Court’s jurisprudence would not have gradually developed a range of reasoned limits on what might constitute a reasonable hypothetical scenario. Our jurisprudence — from *Smith* to the present day — instead reveals a constant effort to properly balance a number of principles, including the rule of law, the separation of powers and public confidence, in order to select an appropriate hypothetical

scenario. These reasoned limits serve to maintain the balance required in a constitutional democracy (see Fehr, at p. 414).

[199] The limits on the “reasonable hypothetical scenario” are many. The question is often formulated in the negative: it is generally asked what a “reasonable hypothetical scenario” is not. Broadly speaking, it is not a far-fetched scenario (Goltz, at pp. 505-6 and 515; Morrissey, at paras. 30 and 33; R. v. Wiles, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 5; Nur, at paras. 54, 68 and 75-76; Hills, at paras. 78 and 91; Hilbach, at para. 88); nor a marginally imaginable scenario (Goltz, at pp. 506 and 515-16; Morrissey, at para. 30; Wiles, at para. 5; Nur, at paras. 54, 56 and 75; Hills, at para. 78; Hilbach, at para. 88); nor a fanciful scenario (Nur, at para. 62; Hills, at para. 83; Hilbach, at para. 88); nor an utterly unrealistic scenario (Hills, at para. 91); nor an outlandish scenario (Hills, at para. 92; Hilbach, at para. 89); nor a scenario based on mere speculation (Nur, at para. 62; Hills, at para. 92); nor an extreme scenario (Goltz, at p. 515; Morrissey, at paras. 30 and 33; Wiles, at para. 5; Hills, at para. 78; Hilbach, at para. 88); nor a remote scenario either (Goltz, at p. 515; Morrissey, at para. 30; Wiles, at para. 5; Nur, at paras. 62, 68 and 76; Hills, at paras. 78-79 and 91; Hilbach, at para. 88).

[200] The last of these limits is at the heart of this appeal. It was the subject of disagreement between the majority and the dissent in the Quebec Court of Appeal’s decision (C.A. reasons, at paras. 148-56, 216-21 and 231-32). Furthermore, the parties had an opportunity to argue this point during the hearing before this Court (transcript, at pp. 33-34 and 72-73). It is therefore appropriate to explain the nature of this limit and to emphasize its importance.

(b) Continued Development and Clarification of Legal Principles

[201] This Court began making significant efforts to clarify the legal principles in Hills (para. 1). Without effecting any major methodological shift, the Court did provide greater clarity and more guidance on how to deal better with cases in which a party challenges the constitutionality of a minimum sentence provision under s. 12 (para. 49). For this purpose, the Court developed a framework and provided further guidance, direction and explanations (para. 3). Contrary to what our colleague maintains, we are not departing from the Court’s precedents. Rather, these reasons continue the efforts at clarification and guidance that began in Hills.

[202] For the purposes of these cases, we will look more specifically at the rule against “remote” hypothetical scenarios and extreme examples. The limit on scenarios that are “remote” (“n’ayant qu’un faible rapport avec l’espèce”) (Goltz, at p. 515) has been referred to extensively in the jurisprudence (Morrissey, at para. 30; Wiles, at para. 5; Nur, at paras. 62, 68 and 76), including in the recent decision in Hills (paras. 78 and 91). However, this Court has not yet had an opportunity to clearly define its content or scope on appeal.

(c) Scenario That Is “Remote” (“n’ayant qu’un faible rapport avec l’espèce”)

- [203] A hypothetical scenario that is “remote” (“n’ayant qu’un faible rapport avec l’espèce”) is a scenario that cannot be considered to determine the constitutionality of a legislative provision.
- [204] This limit originated in Gonthier J.’s majority reasons in *Goltz*. Gonthier J. recognized that a court can consider hypothetical scenarios that differ in some respects from the case of the offender before the court. However, he specified that there must be more than a “remote” connection between the hypothetical scenarios chosen and the case in question. This principle emerges very clearly from the French version of Gonthier J.’s reasons, which states: “Bien que la Cour se trouve inévitablement contrainte de prendre en considération des ensembles de faits qui diffèrent de ceux qui se présentent dans le cas de l’intimé, on ne saurait en prendre prétexte pour invalider des lois sur le fondement d’exemples extrêmes ou n’ayant qu’un faible rapport avec l’espèce” (p. 515). The English version reads as follows (pp. 515-16 (emphasis added)):

A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility. While the Court is unavoidably required to consider factual patterns other than that presented by the respondent’s case, this is not a licence to invalidate statutes on the basis of remote or extreme examples. Laws typically aim to govern a particular field generally, so that they apply to a range of persons and circumstances. It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the Charter (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life.

- [205] In our view, there is only one meaning to be given to the French expression “n’ayant qu’un faible rapport avec l’espèce”. It is the meaning that respects and gives full effect to Gonthier J.’s original intention in *Goltz*, a case that the Court has always cited with approval (*Morrissey*, at para. 30; *Wiles*, at para. 5; *Nur*, at paras. 62, 68 and 76; *Hills*, at paras. 78 and 91; *Hilbach*, at para. 88). *Hills* did not “upset” this rule (para. 3). To be sure, the use of the words “remote . . . examples” in English may create some ambiguity (see *R. v. M.R.M.*, 2020 ONCA 75, at paras. 10-11). That being said, a contextual and functional reading of Gonthier J.’s reasons in both official languages makes it possible to discern their true meaning: the court must look at the connection between the case before it, on the one hand, and the hypothetical scenario proposed by one of the parties to the proceedings, on the other.

(i) Comparative Analysis of the Scenario and the Case in Question

- [206] The rule against hypothetical scenarios that are “remote” (“n’ayant qu’un faible rapport avec l’espèce”) requires a comparative analysis of the case before the court and the proposed hypothetical scenario. The French term “rapport” refers to the connection, proximity and similarity between the two cases. A hypothetical scenario has “qu’un faible rapport avec l’espèce” when it is “remote” from the case before the court.
- [207] A number of Quebec Court of Appeal decisions clearly illustrate the nature of the comparative analysis the court must undertake. For example, in *Ayotte v. R.*, 2019 QCCA 1241, 56 C.R. (7th) 318, Gagnon J.A. wrote that hypothetical scenarios [translation] “that are only distantly related to the case” must be excluded (para. 33, citing Goltz, at pp. 505-6). He added that hypothetical scenarios that do not have a [translation] “sufficient factual and legal connection” with the case must not be considered (para. 93). Similarly, in *Procureur général du Québec v. C.M.*, 2021 QCCA 543, Ruel J.A. wrote that [translation] “hypotheticals . . . that are only remotely connected with the particular case before the court must in principle be excluded” (para. 104, citing, among others, Goltz, at p. 515). On this basis, Ruel J.A. excluded the proposed hypothetical scenarios (paras. 103 and 105).
- [208] The provincial courts are also weighing in on the matter in their jurisprudence (see, e.g., *R. v. Moquin*, 2015 QCCQ 2705, 338 C.R.R. (2d) 53, at paras. 45-50; *Directeur des poursuites criminelles et pénales v. Perron*, 2018 QCCQ 7557, at paras. 70-105; *R. v. Gagnon*, 2018 QCCQ 9569, at paras. 92-104; *R. v. Dawson*, 2022 ONCJ 540, at paras. 95-97; *R. v. Potvin-Morin*, 2024 QCCQ 6439, at paras. 157-58). That jurisprudence confirms that the courts responsible for administering criminal justice every day in their respective provinces are routinely applying the Goltz rule against “remote” scenarios.

(ii) Sufficient Factual and Legal Connection With the Case

- [209] The connection between the proposed hypothetical scenario and the particular case in question must be sufficient from both a factual and a legal standpoint. The claimant must show a “sufficient factual and legal connection” between the case before the court and the proposed hypothetical scenario (*Ayotte*, at para. 93; see, e.g., *Gagnon*, at paras. 92-104; *Perron*, at paras. 70-105). If this is not shown, the court cannot consider the proposed hypothetical scenario to determine the constitutionality of an impugned legislative provision.
- [210] As we said, the proposed hypothetical scenario must have a sufficient factual connection with the case. The burden of proof rests on the claimant. To discharge this burden, the claimant “should not postulate facts too far from the actual facts of the actual litigant” (*R. v. A. (S.)*, 2014 ABCA 191, 312 C.C.C. (3d) 383, at para. 118). Thus, “one must not postulate and imagine a hypothetical situation that is too far from the actual facts of the case at hand” (*Moquin*, at para. 46; see, e.g., *Dawson*, at paras. 95-97; *Potvin-Morin*, at paras. 157-58; *R. v. L. (M.)*, 2016 ONSC 7082, 367 C.R.R. (2d) 268, at para. 85: “. . . I have excluded those [cases] that are not similar to the circumstances of this case . . .”). In inquiring into the sufficiency of the factual connection, the court can, among other things, consider the

factors that are normally relevant in assessing the subjective gravity of the offence and the degree of responsibility of the offender.

- [211] Next, the proposed hypothetical scenario must have a sufficient legal connection with the case. The burden of proof rests on the claimant. To discharge this burden, the claimant must “marshal a reasonable example pertaining to the precise provision being challenged” (Goltz, at p. 519; *R. v. Brown*, [1994] 3 S.C.R. 749, at p. 751; see Kerr and Perlin, at pp. 202-3). The claimant must therefore propose a hypothetical scenario based on the same offence as the one of which the offender before the court has been found guilty (see, e.g., *E.J.B.*, at paras. 64-66). It must, of course, be a scenario that would lead to a conviction, not to an acquittal. In inquiring into the sufficiency of the legal connection, the court can, among other things, consider the mode of participation in the offence (ss. 21 to 24 Cr. C.) and the mode of commission of the offence.

(iii) Suggested Approach

- [212] A hypothetical scenario is to be “constructed with care” in a manner consistent with the adversarial process (Hills, at paras. 76 and 93). We suggest either one of the following options for constructing a “reasonable” hypothetical scenario. First, the claimant can take the situation before the court as the starting point and then change certain features of it, provided that the scenario still has more than a remote connection with the case. Second, the claimant can take an actual reported case as the starting point and then adapt it until it has more than a remote connection with the case (Morrissey, at para. 33). Contrary to what our colleague maintains, there is no risk of this approach having negative consequences for Indigenous offenders. As we have indicated, it is possible to change certain characteristics of the offender in the reasonable hypothetical scenario, including Indigeneity, as long as the proposed scenario retains a sufficiently close connection with the facts of the case. Indeed, “courts may modify the facts of a reported case” (Hills, at para. 81; see Nur, at para. 62). In any event, the idea remains the same regardless of the chosen starting point: an acceptable hypothetical scenario cannot be too remote (“lontain”) from the case.

(d) Need for a Carefully Prepared and Complete Record

- [213] As a general rule, this Court can consider a constitutional question from the standpoint of hypothetical scenarios in appropriate circumstances. To this end, the appeal record filed must be [translation] “carefully prepared” and “complete in order to decide the question” (*Griffith v. R.*, 2023 QCCA 301, at paras. 68 and 85). Subject to exceptions, a record that is “carefully prepared” and “complete” should, in principle, contain the following: notices to attorneys general under the rules of procedure; a factual matrix concerning the offender before the court; relevant submissions on reasonable hypothetical scenarios (which may include actual reported cases); and opposing arguments. The factual matrix concerning the offender before the court is important not only because a sentence has to be imposed but also because the court must consider whether there is a sufficient factual and legal connection between the proposed hypothetical scenario and the case in question.

- [214] Responsibility for proposing hypothetical scenarios lies with the claimant (Goltz, at p. 520; Plange, at paras. 31-33). Indeed, it was noted in *Hills* that “[i]t is up to the offender/claimant to articulate and advance the reasonably foreseeable hypothetical which forms the basis for the claim that the impugned provision is unconstitutional” (para. 93).
- [215] This Court may refuse to consider other hypothetical scenarios in the absence of sufficiently thorough submissions on those other scenarios. This is justified both for reasons of principle and for practical reasons. With regard to principles, this Court respects the adversarial process, which is part of an adversarial justice system based on the common law tradition (Bertrand Marchand, at paras. 114-15; *Hills*, at para. 93). On a practical level, this Court is not adequately equipped to deal with hypothetical scenarios that have not been proposed by the parties, examined previously by the trial or appeal court or even argued at the hearing before the Court. Consideration of such scenarios could lead to injustice (*Ménard v. R.*, 2024 QCCA 1359, at para. 82; Griffith, at paras. 68-69 and 85-86; *Bédard v. Directeur des poursuites criminelles et pénales*, 2021 QCCA 377, at para. 75; Plange, at paras. 30-37; *R. v. Cowell*, 2019 ONCA 972, 151 O.R. (3d) 215, at paras. 123-26; *R. v. E.O.*, 2019 YKCA 9, at para. 38: “. . . as long as the application is properly argued . . .”).
- (e) Application to the Instant Cases
- [216] We note, as a preliminary remark, that the first four hypothetical scenarios considered by the dissenting judge of the Court of Appeal were not treated as hypothetical scenarios by the trial judge. These hypothetical scenarios were drawn from actual reported cases. It is true that the trial judge considered these cases in determining the sentence to be imposed on the offenders before him (Naud, at paras. 33-37; Senneville, at paras. 36-40). However, the judge did not consider them in any way in assessing the constitutionality of the minimum sentences. The reason is simple: the judge did not deal at all with the constitutionality of the minimum sentences in relation to anyone other than the two offenders before him (Naud, at paras. 63-64; Senneville, at paras. 59-60).
- [217] Nevertheless, this did not prevent the judges of the Court of Appeal from considering the constitutionality of the impugned provisions on the basis of five hypothetical scenarios and requesting additional submissions from the parties for that purpose. However, the dissenting judge was the only one who applied the correct legal test by asking which proposed hypothetical scenario or scenarios had more than a remote connection with the present cases (C.A. reasons, at paras. 216-21).
- [218] A sixth hypothetical scenario was mentioned by the Court of Appeal without being examined at length. It is nonetheless possible for us to address it even without the benefit of analysis from the Court of Appeal on the subject.
- [219] The analysis that follows confirms that the constitutional challenge must fail. The five hypothetical scenarios considered by the Court of Appeal have only a remote connection with the cases before us. The same is true of the sixth hypothetical scenario proposed by the respondents in their additional submissions to the Court of Appeal. Some examples are

also too extreme. Absent any reasonable hypothetical scenarios that can be considered to determine the constitutionality of the two impugned provisions, we are of the view that the respondents have not established an infringement of s. 12.

(i) First Hypothetical Scenario

[220] First, the dissenting judge considered the hypothetical scenario drawn from *R. v. Gangoo-Bassant*, 2017 QCCQ 20157, and 2018 QCCQ 11080. The offender was a 34-year-old father with a stable job, no criminal record and no particular deviancy or difficulties. The offender had, on a single occasion, sent a single photograph of child pornography in his possession to just one person via the Facebook social network.

[221] This hypothetical scenario has only a remote connection with the cases before us. The dissenting judge was correct to find that [translation] “[t]hat is a situation miles away from the facts of the present cases” (C.A. reasons, at para. 217). The act was isolated, one-off and limited. The subjective gravity of the offence committed and the offender’s degree of responsibility bear almost no relation to the two cases before this Court. Such a remote scenario calls to mind *C.M.*, in which *Ruel J.A.* was justified in rejecting the two proposed scenarios because of the gulf between them and the case in question (paras. 103-5).

(ii) Second Hypothetical Scenario

[222] Second, the dissenting judge considered the hypothetical scenario drawn from *R. v. Delage*, 2019 QCCQ 1125. The offender was a 27-year-old man with relational and emotional deficits and a life trajectory marked by drug and alcohol use. One night, while at home and heavily intoxicated, the offender was chatting on his cell phone in a discussion forum. An individual emailed him 38 photographs depicting child pornography. The offender had them in his possession for a few minutes or a few hours. However, he did not remember this because of his state of intoxication. The same night, the offender sent the images back to the individual.

[223] This hypothetical scenario, in addition to being extreme, has only a remote connection with the cases before us. The dissenting judge was correct in finding that [translation] “[t]hose facts quite simply bear no relation to the situation in the [cases of the respondents] *Senneville and Naud*” (C.A. reasons, at para. 218). This scenario must be excluded for reasons similar to those given for excluding the scenario from *Gangoo-Bassant*. The act was isolated, one-off and very limited in time. The subjective gravity of the offence and the offender’s degree of responsibility were very different.

(iii) Third Hypothetical Scenario

[224] Third, the dissenting judge considered the hypothetical scenario drawn from *R. v. Lavigne-Thibodeau*, 2019 QCCQ 3824. The offender was a 21-year-old man with no criminal record who had low self-esteem, lacked self-confidence and had certain mental health issues (depression and anxiety). The offender admitted having accessed child pornography just once for a short period of two minutes at the most.

[225] This hypothetical scenario has only a remote connection with the cases before us. The dissenting judge was correct in noting that [translation] “the facts of th[at] cas[e] are also far removed from those in the [cases of the respondents] *Senneville* and *Naud*” (C.A. reasons, at para. 219). The scenario must be excluded for reasons similar to those given for excluding the scenarios from *Gangoo-Bassant* and *Delage*.

(iv) Fourth Hypothetical Scenario

[226] Fourth, the dissenting judge considered the hypothetical scenario drawn from *R. v. Duclos*, 2019 QCCQ 5680. The offender was a single, childless 30-year-old man with no criminal record who had always lived with his parents in the family home, having never worked and preferring to remain at home with a lifestyle centred around the virtual world (paras. 19 and 25). He had Asperger syndrome, Tourette syndrome, generalized anxiety disorders with obsessive-compulsive features, attention deficit disorder and a mild intellectual disability by reason of his very low non-verbal ability, his poor adaptive skills and developmental dyspraxia of a visuospatial nature (para. 24). Expert reports gave an account of his precarious pathological state and his delays in social and sexual development (paras. 24 and 43). The offender had been in possession of 103 images, which depicted very young children engaged in explicit sexual acts with adults and with one another, for a period of a year and a half (paras. 14 and 107). During the offence period, the offender’s mental and psychological state deteriorated further (paras. 27-29). The court found that [translation] “there is clearly a connection between the accused’s health issues and the commission of the crimes” (para. 89).

[227] This hypothetical scenario has only a remote connection with the cases before us, notably because of the offender’s significant developmental delays. The dissenting judge was correct to find that “the facts of th[at] cas[e] are also far removed from those in the [cases of the respondents] *Senneville* and *Naud*” (C.A. reasons, at para. 219). The degree of responsibility of the offender in *Duclos* is not commensurate with the degree of responsibility of each of the two respondents in this appeal. They are in no way comparable and they are not assessed in the same manner, in these specific circumstances.

(v) Fifth Hypothetical Scenario

[228] Fifth, the dissenting judge considered the hypothetical scenario on which the Ontario Court of Appeal had relied in *R. v. John*, 2018 ONCA 702, 142 O.R. (3d) 670, to declare the former s. 163.1(4)(a) Cr. C. unconstitutional (C.A. reasons, at para. 220). This hypothetical scenario involves “[a]n 18-year-old whose friend forwards him a ‘sext’ from the friend’s 17-year-old girlfriend without her knowledge. The 18-year-old doesn’t forward the ‘sext’ but keeps it on

his phone” (John, at para. 29; see also paras. 38-41). The majority also considered this hypothetical scenario (C.A. reasons, at paras. 147-48 and 231). However, as mentioned, only the dissenting judge applied the correct test by asking whether such a scenario had a sufficient connection with the present cases.

- [229] The connection between this hypothetical scenario and the two cases before us is at the heart of this appeal. However, the same was not true in *Bertrand Marchand*. In that decision concerning the offence of child luring, a majority of this Court adopted, with the necessary modifications, the scenario identified in *John* (*Bertrand Marchand*, at paras. 119-21). A majority of this Court then chose to accept the parties’ admission without actually looking at the connection between this hypothetical scenario and the case before the Court. Moreover, *Bertrand Marchand* was very different from this appeal, because here the connection between the scenario from *John* and the cases before us was the source of a disagreement among the judges of the Court of Appeal (C.A. reasons, at paras. 147-48, 220 and 231). In any event, the principle of *stare decisis* — even horizontal — does not apply to a finding that a proposed hypothetical scenario is or is not “reasonable”: this finding depends on the factual and legal connection between the scenario and the case in question. Moreover, contrary to what our colleague suggests, the fact that parties have or have not acknowledged the supposed reasonableness of a hypothetical scenario cannot be binding on a court, as this is a question of law (*R. v. Boulanger*, 2022 SCC 2, [2022] 1 S.C.R. 9, at para. 4; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 62; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45). Indeed, at no time “has the Court ever considered itself bound by a party’s interpretation of the law or by a ‘concession’ on a question of law” (*Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 89, per Deschamps J., dissenting).
- [230] The hypothetical scenario considered by the Ontario Court of Appeal in *John* has only a remote connection with the cases before us. The dissenting judge was correct: [translation] “This portrait seems . . . extremely remote from the facts in the [cases of the respondents] *Senneville* and *Naud* . . .” (C.A. reasons, at para. 220). It must be excluded for reasons similar to those given for excluding the scenarios from *Gangoo-Bassant*, *Delage* and *Lavigne-Thibodeau*. We would add two points. Unlike the two cases now before the Court, the proposed scenario does not even involve “‘conventional’ child pornography” (*R. v. Keough*, 2011 ABQB 312, 271 C.C.C. (3d) 486, at para. 74). In addition, it is an extreme example that, contrary to this Court’s teachings, is meant to be “the most . . . sympathetic . . . imaginable” (*Nur*, at para. 75; *Hills*, at para. 91; *Hilbach*, at paras. 88-89). For these reasons, the proposed hypothetical scenario is not reasonable.
- [231] At the hearing, counsel for the Attorney General of Quebec argued that the hypothetical scenario identified in *John* could be considered a reasonable hypothetical scenario in the present cases (transcript, at pp. 33-34). This Court is, of course, not bound by a party’s opinion on a question of law. Here, we are of the view that counsel is mistaken.

(vi) Sixth Hypothetical Scenario

[232] In their additional submissions to the Quebec Court of Appeal, the respondents proposed the following hypothetical scenario, which, in practical terms, is a variation on Caron Barrette v. R., 2018 QCCA 516 — an actual reported case on sexual interference (s. 151 Cr. C.) — that makes it relate to the offences of possession of and accessing child pornography:

[translation] The first scenario is inspired by Caron Barrette v. R. (2018 QCCA 516) and was formulated as follows: “. . . then in a romantic relationship that is prohibited, but known to and authorized by the parents, a young man 23 years of age has sex with his 14-year-old girlfriend. Within this actual reported factual framework, the offences could well have been combined with those of accessing and possession of child pornography, with the victim sending nude photographs of herself to her partner, who keeps them, thereby committing the offences with which we are concerned. The sentence would likely have been the same, that is, 90 days in custody to be served intermittently, in light of the offences with greater subjective gravity to which Mr. Caron Barrette pleaded guilty, and not the minimum sentence of one year in custody”. [Emphasis added.]

(A.F., at para. 94; see also paras. 95-96.)

[233] The judges of the Court of Appeal did not consider this scenario. The majority did not discuss it. As for the dissenting judge, he excluded Caron Barrette — as an actual reported case — without taking into account the changes made by the respondents to turn it into a new scenario (C.A. reasons, at para. 219).

[234] We would exclude the sixth proposed hypothetical scenario for two reasons. First, it would lead to an acquittal on the count of possession of child pornography. As mentioned, the majority reasons in Bertrand Marchand broadened the private use exception to make this defence available to an accused who is neither the maker of the child pornography material nor depicted therein. Thus, the accused in the proposed scenario “could not have been convicted” of the offence of possession because “the photo was for his own private use (see Sharpe)” (Bertrand Marchand, at para. 131). Second, and in any event, the proposed scenario has only a remote connection with the two cases before us. It must be excluded for reasons similar to those given for excluding the scenario from John.

(vii) Conclusion

[235] In short, the five hypothetical scenarios considered by the Quebec Court of Appeal have only a remote connection with the cases before us, and the same is true of the sixth hypothetical scenario. Accordingly, the respondents’ constitutional challenge must fail from the outset. Without any reasonable hypothetical scenario, we cannot move on to the next stages of the s. 12 test. This therefore ends the constitutional analysis.

(2) Second Stage: Determining a Fit and Proportionate Sentence

[236] Because the appeal record does not allow us to proceed to the second stage of the s. 12 test, our reasons will be limited to the following two points: (a) the objectives of denunciation and deterrence must take priority in the case of child pornography offences; and (b) we invite Canadian appellate courts to revise their child pornography guidelines upwards.

(a) Primacy of the Objectives of Denunciation and Deterrence (Section 718 Cr. C.)

[237] First, we reiterate “the primacy of denunciation and deterrence when sentencing offenders for sexual offences against children” (Bertrand Marchand, at para. 167). In the case of crimes of child pornography, the objectives codified in s. 718(a) and (b) Cr. C. must take priority over the other objectives listed in s. 718 (s. 718.01; Friesen, at paras. 101-5 and 122; Bertrand Marchand, at paras. 28 and 167; R. v. Woodward, 2011 ONCA 610, 107 O.R. (3d) 81, at para. 76; R. v. Rayo, 2018 QCCA 824, at paras. 103-9; R. v. Morris, 2021 ONCA 680, 159 O.R. (3d) 641, at para. 69; R. v. J. (T.), 2021 ONCA 392, 156 O.R. (3d) 161, at paras. 25-28; Pike, at para. 160; Courchesne v. R., 2024 QCCA 960, at paras. 49-54; R. v. Razon, 2021 ONCJ 616, at para. 35). However, s. 718.01 Cr. C. does not entitle courts to disregard the other penological objectives set out in s. 718. Subject to the legislative imperative of s. 718.01, courts have the discretion to determine the weight to be given to each objective (Bertrand Marchand, at paras. 28 and 123; Friesen, at para. 104; Rayo, at paras. 108-9; R. v. Bergeron, 2013 QCCA 7, at para. 37; R. v. Daoust, 2012 QCCA 2287, at para. 8).

[238] Our colleague is correct in saying that proportionality must always be reflected in sentencing. Indeed, sentencing judges must not overemphasize denunciation and deterrence to the detriment of proportionality. At the same time, one also cannot ignore the changing mores of society, which necessarily influence the understanding of what is proportionate and, consequently, of the fit and appropriate sentence (Friesen, at para. 35; Sheppard, at para. 68). The legislative message of s. 718.01 Cr. C. and the teachings of Friesen are unequivocal: child pornography offences must be punished more severely and more heavily (Bertrand Marchand, at para. 31; Friesen, at paras. 3, 5, 95 and 116; Pike, at para. 159). Of course, the implementation of these principles still remains subject to compliance with the principle of proportionality codified in s. 718.1 Cr. C., a “sine qua non of a just sanction” (R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37; R. v. J.W., 2025 SCC 16, at para. 43). The two aspects of the principle of proportionality are distinct and are to be assessed separately, without ever disregarding either of them (R. v. Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 83; R. v. Wells, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 46; Ipeelee, at paras. 37 and 39; J.W., at para. 43; see, e.g., R. v. Sharma, 2022 SCC 39, at para. 108, quoting R. v. Neary, 2017 SKCA 29, [2017] 7 W.W.R. 730, at para. 39; Morris, at para. 77; see also Hills, at para. 88).

(b) Guidelines for Child Pornography Offences

[239] Second, we invite provincial and territorial appellate courts to raise their guidelines — sentencing ranges or starting points — for child pornography offences in keeping with the guidance provided in Friesen. The country’s appellate courts are expected to set new

directions in their respective jurisdictions to reflect changing societal and judicial knowledge and attitudes about such offences and those who commit them (*R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366, at paras. 21-23 and 56-57; Friesen, at paras. 35 and 109; M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales* 2025 (32nd ed. 2025), at para. 47.35).

- [240] We note that certain appellate courts have revised their child pornography guidelines upwards. Our reasons will be confined to making observations; we take no position on the specific length of the sentencing ranges, since it is for appellate courts to establish guidelines that fit local realities (Friesen, at para. 106; *Parranto*, at para. 15; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 95; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92).
- [241] In Quebec, Bouchard J.A. found in *Régnier* that the sentencing range set out in *St-Pierre v. R.*, 2008 QCCA 894, at para. 9 — which specified a range of six months to two years for possession and distribution of child pornography — had become obsolete and had to be revised upwards (paras. 30, 40, 44-45, 49 and 78; see *Daudelin*, at para. 62).
- [242] In a recent work, Professors H. Parent and J. Desrosiers have compiled sentencing ranges for possession (s. 163.1(4) Cr. C.), making (s. 163.1(2)) and distribution (s. 163.1(3)) in the post-Friesen era (*Traité de droit criminel*, t. III, *La peine* (4th ed. 2024), at pp. 1086, 1093 and 1108-9).
- [243] These authors identify a three-part sentencing range for the offence of possession when prosecuted by indictment (s. 163.1(4)(a) Cr. C.): sentences of a few months to 12 months at the lower end; sentences of 12 to 36 months in the middle; and sentences of 36 months or more at the upper end (pp. 1099-1108). They also establish a three-part sentencing range for the offences of making and distribution: sentences of a few months to 12 months at the lower end; sentences of one to 3 years in the middle; and sentences of 3 to 5 years at the upper end (pp. 1108-20).
- [244] In Ontario, the decisions in *R. v. V. (M.)*, 2023 ONCA 724, 169 O.R. (3d) 321, and *Pike* indicate that the sentencing range from *R. v. Kwok*, 2007 CanLII 2942 (Ont. S.C.J.), at para. 5 — which specified a range of 6 to 18 months for possession of child pornography — has long been obsolete (*V. (M.)*, at paras. 56 and 94-98; *Pike*, at paras. 174-75). Also in *Pike*, *Tulloch C.J.* raised the upper end of the sentencing range for the offence of possession of child pornography to 5 years (paras. 176-78). However, he considered it more prudent not to set a lower end for the sentencing range for possession, given the many ways in which this offence can be committed (para. 176).
- [245] We acknowledge the efforts made by appellate courts that have updated their child pornography guidelines. Such an approach is consistent with the teachings of Friesen (paras. 108-14). Sentencing courts, and appellate courts that update their guidelines, will have to assess pre-Friesen precedents with caution (*Sheppard*, at para. 82; *R. v. M.A.C.*, 2023 ABCA 234, 60 Alta. L.R. (7th) 255, at para. 50; *R. v. L.A.*, 2023 SKCA 136, at para. 40; *R. v. Gargan*, 2023 NWTCA 5, [2023] 11 W.W.R. 31, at para. 19; *R. v. Williams*, 2020 BCCA 286, 396

C.C.C. (3d) 59, at para. 73). Lastly, we note that the guidelines developed in one province or territory have no binding legal effect elsewhere in Canada. Each appellate court can therefore fashion a response tailored to the social and criminal issues specific to its region (Vauclair, Desjardins and Lachance, at paras. 3.7 and 47.32).

(c) Conclusion

[246] The sentences imposed for child pornography must, first, reflect the primacy of the objectives of deterrence and denunciation and, second, convey the profound wrongfulness and harmfulness of child pornography offences, subject to the factors that attenuate the offender's degree of responsibility (R. v. Gladue, [1999] 1 S.C.R. 688; Ipeelee; Friesen, at paras. 91-92 and 104; Bertrand Marchand, at para. 171). At the same time, appellate courts are invited to revise their guidelines upwards with a view to "bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders" (Friesen, at para. 35; on the gravity of the offences, see Friesen, at paras. 75-86, and Pike, at paras. 157-60; on the degree of responsibility of the offenders, see Friesen, at paras. 87-92, and Pike, at paras. 161-65).

[247] This means that the minimum sentences provided for in s. 163.1(4)(a) and (4.1)(a) Cr. C. are much more likely to withstand challenges under s. 12. First of all, at the sentencing stage, the court will have to apply the teachings of Friesen, which call for higher and more severe sentences for child pornography. More often than not, the court should impose a sentence that is at least equal in length to or longer than the minimum sentence. Next, at the last stage of the s. 12 test, which we discuss below, there is little — or no — likelihood that the disparity (if any) between a fit and proportionate sentence and the minimum sentence will be so intolerable as to make the minimum sentence grossly disproportionate. We will see that, because of the normative judgment required by the s. 12 test, s. 163.1(4)(a) and s. 163.1(4.1)(a) Cr. C. are not particularly vulnerable to constitutional attack and, on the contrary, may well be immune from it.

(3) Third Stage: Gross Disproportionality Between the Minimum Sentence and a Fit and Proportionate Sentence

[248] The appeal record does not allow us to proceed to this stage of the s. 12 test. However, we will make two comments. First, we will emphasize the fact that a penalty may be excessive, disproportionate and unfit without crossing the constitutional line; the test for crossing this line is more stringent and demanding. A sentence that is excessive, disproportionate and unfit complies with s. 12. Second, we will reiterate that the s. 12 test involves the exercise of normative judgment. This means that the burden on the claimant is especially high where child pornography offences are concerned. What may be "grossly disproportionate" in certain specific cases will not necessarily be so with offences as heinous and dehumanizing as those involving child pornography.

(a) The Constitutional Line Is a Stringent and Demanding Test

- [249] The constitutional standard of a “grossly disproportionate” sentence is a demanding standard (Hills, at para. 109). The bar is high and will be met only rarely (Lloyd, at para. 24; Bissonnette, at para. 70; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417 (“The test . . . is very properly stringent and demanding. A lesser test would tend to trivialize the Charter.”); Hilbach, at para. 81).
- [250] A sentence that is merely excessive does not cross the constitutional line (Hills, at para. 47; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14). More is needed. The sentence imposed must be so excessive as to be incompatible with human dignity (Wiles, at para. 4; Smith, at p. 1072) and to outrage our sense of decency (Morrisey, at para. 26).
- [251] A sentence that is merely disproportionate also does not cross the constitutional line (Hills, at para. 47). A higher threshold is necessary. The sentence imposed must be so grossly disproportionate that Canadians would find it abhorrent or intolerable (Morrisey, at para. 26; Wiles, at para. 4; Hills, at paras. 109-10). The sentence imposed must be glaringly or inordinately disproportionate (Hills, at para. 107).
- [252] A sentence that is merely unfit does not cross the constitutional line either (Hills, at para. 47). The bar is much higher. The severity of the sentence imposed must be such as to shock the conscience of Canadians (Lloyd, at para. 33).
- [253] Finally, the appellants argue that the s. 12 test — particularly at the stage that involves considering the impact of the sentence on the offender — should take into account [translation] “the realistic possibility of parole” for the offender (A.F., at paras. 43-50, 93 and 112-14). The respondents and the intervener the Canadian Civil Liberties Association disagree with this argument (R.F., at paras. 44-47; I.F., at paras. 40-50).
- [254] We reject the appellants’ argument. The comparative exercise between a minimum sentence and a fit and proportionate sentence should not take into account the possibility of the offender being paroled (Nur, at para. 98; Hills, at paras. 103-5; Hilbach, at para. 60). The comparative exercise is focused on “the sentence itself” (Hills, at para. 103 (emphasis in original)). For example, a period of parole ineligibility forms part of the sentence itself (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at paras. 21-23; *M. (C.A.)*, at para. 63; Bissonnette, at para. 58). However, the same cannot said of the possibility — even where realistic — of an offender being paroled. To the extent that Morrissey suggests the contrary (at paras. 41-42 and 55), it no longer reflects the current state of the law since Nur. Being paroled involves an administrative process that is independent of and distinct from the judicial process of sentencing (Hills, at paras. 104-5).

(b) The Constitutional Line Requires the Exercise of Normative Judgment

- [255] A court exercises normative judgment when it determines whether a sentence is “grossly disproportionate” (Hills, at paras. 48 and 110). The court must weigh the views of Canadian society — which are constantly evolving (Bissonnette, at para. 65) — by reference to the values and objectives underlying our Charter and sentencing jurisprudence (Hills, at para. 110).
- [256] It is accepted that the broader the scope and reach of an offence, the more the minimum sentence for the offence is “potentially vulnerable to constitutional challenge” (R. v. Morrison, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 146).
- [257] That being said, once the court has selected a reasonable hypothetical scenario, the scope and reach of the offence are of little relevance. The court must craft a fit and proportionate sentence for the representative offender in the selected hypothetical scenario. Whether the scope and reach of the offence are broad or narrow, the court has already selected a representative offender on whom the analysis will be based. Thereafter, the court must focus on the disparity between the minimum sentence and a fit and proportionate sentence for that representative offender. The existence of other scenarios that could be selected therefore has little or even no importance. The purpose of the analysis is rather to determine whether the minimum sentence is cruel or unusual for that representative offender. It is this stage that involves the exercise of normative judgment.
- [258] First, the court must consider “the views of Canadian society” when it exercises its normative judgment (Hills, at paras. 48 and 110). Society has a better understanding today of the wrongfulness and profound harmfulness of sexual violence against children (Friesen, at paras. 5, 99 and 108; Pike, at paras. 144-56). This is why child pornography offences provoke so much outrage and revulsion. At the last stage of the s. 12 test, the court must therefore consider society’s growing condemnation and the recognition of the impact and the harm caused.
- [259] Second, the court must consider the values and objectives underlying our Charter and sentencing jurisprudence when it exercises its normative judgment (Hills, at para. 110). With regard to objectives, Parliament’s legislative choices and this Court’s jurisprudence require that higher and more severe penalties be imposed for sexual offences against children (Bertrand Marchand, at paras. 28-32). As for values, these include the right of children to dignity and equality and the protection of children from exploitation, victimization, objectification, degradation and the eroticization of their inferior status (Sharpe, at paras. 158, 185 and 203, per L’Heureux-Dubé, Gonthier and Bastarache JJ.; Bertrand Marchand, at paras. 175-76, per Côté J., dissenting, but not on this point). One of the most fundamental values in the administration of criminal justice — as a “system of values” (M. (C.A.), at para. 81) — is the protection of children (Friesen, at paras. 42 and 105, citing R. v. L. (J.-J.) (1998), 126 C.C.C. (3d) 235 (Que. C.A.), at p. 250; see also paras. 46 and 65). While we recognize that the imposition of more severe sentences cannot in itself guarantee protection for children, the fact remains that “sentencing . . . specifically [is one of the] important mechanisms that Parliament has chosen to employ to protect children

from sexual violence, to hold perpetrators accountable, and to communicate the wrongfulness of sexual violence against children” (Friesen, at para. 45).

[260] Thus, when a court engages in normative reasoning to determine whether a sentence for child pornography is so long that it becomes grossly disproportionate (Hills, at para. 48), the court must necessarily bear in mind the profound wrongfulness and harmfulness of these crimes. Because these heinous offences call for strong condemnation, the court owes “[g]reater deference to Parliament’s decision to enact the mandatory minimum” (Hilbach, at para. 107; see also para. 65; Hills, at para. 139).

[261] This means, in practice, that it may be more difficult for a party to establish that the constitutional line (grossly disproportionate) has been crossed when it comes to child pornography offences. The same disparity may be gross in some cases but not in others, as in the context of sexual offences against children (see, e.g., Morrison, at para. 153). The minimum sentence must in fact be “‘abhorrent or intolerable’ to society” (Lloyd, at para. 24 (emphasis added)). This is why the burden on the claimant is especially high where child pornography is concerned. After all, this is a “normative question” (Hills, at para. 110; see also para. 48).

(4) Conclusion

[262] The respondents have not shown that s. 12 is infringed by s. 163.1(4)(a) and (4.1)(a) Cr. C. The majority erred in declaring these provisions to be of no force or effect against all persons on the basis of representative offenders in hypothetical scenarios.

[263] The minimum sentences provided for in s. 163.1(4)(a) and (4.1)(a) Cr. C. are therefore constitutionally valid and operative, in keeping with the “presumption of constitutionality” (R. v. Sullivan, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 48).

[264] We express no opinion on whether there are reviewable errors tainting the specific sentences imposed on the respondents Senneville and Naud. As mentioned, the appellants stated that they were not challenging the specific sentences imposed (A.F., at para. 15). There was no argument before this Court concerning these sentences, whether from the standpoint of an error in principle that had an impact on the sentence or from the standpoint of a demonstrably unfit sentence.

V. Disposition

[265] The appeal should be allowed. The conclusion of the majority of the Quebec Court of Appeal declaring the minimum sentences in s. 163.1(4)(a) and (4.1)(a) Cr. C. to be of no force or effect should be set aside. These two provisions are constitutionally valid and operative.

Appeal dismissed, Wagner C.J. and Côté, Rowe and O’Bonsawin JJ. dissenting.

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- [1] We are aware that legislative amendments came into force on October 10, 2025, following the enactment of the Act to amend the Criminal Code and to make consequential amendments to other Acts (child sexual abuse and exploitation material), S.C. 2024, c. 23. The term “child pornography” has now been replaced with “child sexual abuse and exploitation material”. Given that these cases were argued using the former terminology, we will retain it throughout these reasons.
- [2] We are aware that legislative amendments came into force on October 10, 2025, following the enactment of the Act to amend the Criminal Code and to make consequential amendments to other Acts (child sexual abuse and exploitation material), S.C. 2024, c. 23. The term “child pornography” has now been replaced with “child sexual abuse and exploitation material”. Given that these cases were argued using the former terminology, we will use this earlier version of the Criminal Code.
- [3] See fn. 2.

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