

CANADA / JUDGMENT

R. v. Penner

2023 BCCA 191

COURT

British Columbia Court of Appeal

DECIDED

8 May 2023

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2023 BCCA 191 R. v. Penner

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Penner,

2023 BCCA 191

Date: 20230508

Docket: CA48442

Between:

Rex

Appellant

And

Kayne Sabbe Penner

Respondent

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Marchand

The Honourable Madam Justice Horsman

On appeal from: Orders of the Supreme Court of British Columbia, dated
January 14, 2022 (R. v. Penner, 2022 BCSC 175, Prince George Docket 45525),
and July 6, 2022 (R. v. Penner, 2022 BCSC 1859, Prince George Docket 45525).

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Place and Date of Hearing:

Vancouver, British Columbia

February 7, 2023

Place and Date of Judgment:

Vancouver, British Columbia

May 8, 2023

Written Reasons by:

The Honourable Madam Justice Horsman

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Justice Marchand

Summary:

The Crown appeals the sentencing judge's declaration that s. 236(a) of the Criminal Code, which imposes a minimum four-year sentence for manslaughter committed with the use of a firearm, violates s. 12 of the Charter of Rights and Freedoms. Held: Appeal allowed. The judge erred in mischaracterizing the gravity of the offence and in assessing the respondent's moral culpability. A fit and proportionate sentence for the respondent's offence is three years' imprisonment. The four-year mandatory minimum is not grossly disproportionate to the three-year sentence. Given the extenuating delay in this proceeding and the severe negative effects of reincarceration on the respondent's rehabilitation, the execution of the post-appeal portion of the sentence is stayed.

Reasons for Judgment of the Honourable Madam Justice Horsman:

- [1] The Crown appeals the sentencing judge's declaration that s. 236(a) of the Criminal Code, R.S.C. 1985, c. C-46, which imposes a minimum four-year sentence for manslaughter committed with the use of a firearm, constitutes cruel and unusual punishment and violates s. 12 of the Charter of Rights and Freedoms. The judge determined that in the respondent's circumstances, a fit sentence would be imprisonment for 18 months to two years less a day.
- [2] A jury convicted the respondent of manslaughter on the basis that he caused the death of his fiancée, April Johnson, in December 2012 through an unlawful act, the careless use of a firearm contrary to s. 86 of the Criminal Code. At the time of the offence, the respondent was handling a .22 calibre semiautomatic rifle in the kitchen of a friend's trailer. The rifle discharged and a bullet struck Ms. Johnson, causing her death.
- [3] On appeal, the Crown alleges that the judge mischaracterized the gravity of the offence and erred in his assessment of the respondent's moral blameworthiness. The Crown emphasizes that the conduct caught by the mandatory minimum in s. 236(a) of the Criminal Code involves the careless use of a firearm that leads to a person's death. There is, the Crown says, no foreseeable offender who does not have a high level of culpability. The Crown says that the judge's ruling is inconsistent with the jurisprudence upholding the constitutionality of the mandatory minimum in s. 236(a) of the Criminal Code.
- [4] The respondent answers that the judge was correct to find that s. 236(a) of the Criminal Code captures a range of conduct, with varying levels of moral culpability. He says that the judge's assessment of the respondent's moral culpability, and his determination of a proportionate sentence, is entitled to deference on appeal. The respondent says the Crown has not established that the judge erred in law or principle or made a palpable and overriding error of fact.
- [5] After the trial judgment in this case, and shortly before the hearing of this appeal, the Supreme Court of Canada rendered judgment in two cases concerning the constitutionality of mandatory minimum sentences: *R. v. Hills*, 2023 SCC 2 and *R. v. Hilbach*, 2023 SCC 3. At the hearing of this appeal, the parties addressed the two judgments in oral submissions and provided the Court with brief written submissions. *Hills* and *Hilbach* provide additional guidance on the analytical framework for assessing a constitutional challenge to mandatory minimum sentences, particularly in the context of firearms offences. This guidance was not available to the judge at the time of the decision under appeal.

Procedural history

- [6] The respondent was initially convicted of unlawful act manslaughter by a jury in March 2017. At the respondent's subsequent sentencing, he challenged the mandatory minimum sentence in s. 236(a) of the Criminal Code as contrary to s. 12 of the Charter. The sentencing judge found that, absent the statutory minimum, a term of three years' imprisonment was a fit sentence. He held that the three-year sentence was not grossly disproportionate when compared to the four-year minimum sentence: 2017 BCSC 1688 [Penner #1].

- [7] This Court overturned the respondent's original conviction due to deficiencies in the jury instructions, and ordered a new trial: *R. v. Penner*, 2019 BCCA 76 [Penner BCCA].
- [8] At the second trial, a jury convicted the respondent of unlawful act manslaughter on March 6, 2021.
- [9] Following the respondent's conviction, he again brought a constitutional challenge to the mandatory minimum sentence in s. 236(a) of the Criminal Code on the basis that it violated s. 12 of the Charter. The Charter application was argued before the judge in September 2021. In oral reasons for judgment issued on January 14, 2022, the judge concluded that s. 236(a) violates s. 12 of the Charter. He declared the provision to be of no force and effect: 2022 BCSC 175 [Charter Ruling]. This is the order that the Crown appeals.
- [10] In his subsequent reasons for sentence issued on July 6, 2022, the judge imposed a conditional sentence of 23 months: 2022 BCSC 1859.

The Charter Ruling

- [11] The judge first determined the "rough scale" of a proportionate sentence for the respondent in the absence of the statutory minimum sentence, and then considered whether imposing the statutory minimum would result in a grossly disproportionate sentence.

A fit and proportionate sentence for the respondent

Circumstances of the offence

- [12] The judge self-instructed that s. 724(2)(a) of the Criminal Code required him to "accept as proven all facts, express or implied, that are essential" to the jury's verdict. If the factual implications were ambiguous, he had to make his own independent determination of the relevant facts. The judge cited *R. v. Ferguson*, 2008 SCC 6 at para. 18, for the proposition that he need only find the facts that were necessary to deal with the issues on sentencing: at para. 8.
- [13] The judge found that the jury's verdict indicated that they were satisfied beyond a reasonable doubt that the respondent had used, carried or handled the rifle in a careless manner or without reasonable precautions for the safety of other persons, and that his conduct was a marked departure from the standard of care of a reasonable person in all the circumstances: at para. 6. Beyond these general conclusions, the specific facts regarding the degree of the respondent's carelessness would "strongly influence" the characterization of the aggravating and mitigating factors and the degree of the respondent's moral blameworthiness: at para. 7.
- [14] Certain facts were not in dispute. On the evening of December 20, 2012, the respondent and Ms. Johnson visited the respondent's friend Richard Borne at Mr. Borne's trailer in Vanderhoof, BC. Mr. Borne's then-girlfriend Gail Heichert was also present. The respondent and Ms. Johnson planned to use Mr. Borne's rifle to do some recreational shooting at a farm property belonging to Mr. Borne's parents. Because the rifle had jammed on a previous

occasion, Mr. Borne took it outside and test-fired a shot into a nearby tree. The rifle fired properly. Mr. Borne then brought it back inside and leaned it against a cupboard in front of the kitchen stove. The butt of the rifle was touching the ground and the barrel was pointing up: at paras. 10-14.

- [15] While he was in the kitchen, the respondent handled the rifle. There was some inconsistency in the evidence as to whether Mr. Borne handed the rifle to the respondent, or the respondent picked it up from where Mr. Borne had placed it. In any event, the rifle discharged while the respondent was handling it. Ms. Johnson was standing nearby. A bullet struck her in the abdomen, leading to her death.
- [16] At trial, the Crown adduced in evidence a video-taped statement that the respondent gave to police. The respondent told the police that he thought the rifle was unloaded. He stated that he was "checking it", and when he was pulling it back the gun "kinda just slipped and hit the counter and then it went off". The respondent stated that he was familiar with the rifle, knew that it was a semi-automatic, and had fired it "lots" before: at paras. 36-42.
- [17] The respondent, and the others present in Mr. Borne's trailer, had consumed alcohol prior to the shooting. The Crown did not seek a finding that the respondent was impaired by alcohol while using the rifle. Rather, the Crown relied on the general consumption of alcohol as part of the context for the respondent's carelessness: at paras. 43-51.
- [18] The Crown tendered expert evidence from a former conservation officer, Cameron Hill, regarding the standard of care to be expected of a reasonable person handling the rifle in this case. At para. 58 of his reasons, the judge reviewed Mr. Hill's evidence regarding the basic rules of safe handling of the rifle. The rules were:
- (1) assume the firearm is loaded, no matter what you are told about it;
 - (2) control the direction in which it is pointed at all times--either upwards at an angle away from anyone, or towards the ground;
 - (3) do not have your finger on the trigger or trigger guard unless aiming for a target;
 - (4) "see that it is safe" by having the action, which is the part of the firearm that loads, fires, and ejects a cartridge, open so you can look into it.
- [19] Mr. Hill also testified that from a safety perspective, the combination of firearm use and alcohol consumption is absolutely forbidden: at para. 64.
- [20] The Crown and the defence agreed on a number of deficiencies in the respondent's safe handling practice: he did not confirm that the rifle was unloaded or that the safety was engaged before receiving it, he did not remove the magazine, and he did not control the direction of the muzzle. The defence also conceded that the respondent had received enough firearms training to know that he should proceed on the assumption that the rifle was loaded: at para. 74. The judge concluded he could "readily find" the surrounding breaches of safe handling practice on which counsel agreed: at para. 82.

- [21] The parties did not agree on the critical question of whether the respondent had his finger on the trigger of the rifle at the time of the shooting. The Crown conceded that this was an aggravating fact that had to be proved beyond a reasonable doubt: at para. 83. The judge found that the circumstantial evidence established beyond a reasonable doubt that the rifle discharge occurred because the respondent applied force to the trigger of the rifle with his finger. He was of the view that this likely occurred after the respondent mistakenly concluded that the rifle was empty through an inadequate process of checking it: at para. 92. Accordingly, the judge did not accept the respondent's statement to the police that the rifle discharged after he inadvertently dropped it.

Circumstances of the offender

- [22] The respondent was 25 years old at the time of the offence. At the time of sentencing, he had been in a common law relationship for eight years. He is the father of two children. The respondent had no prior criminal record at the time of the offence. In 2016, he breached a condition of his bail order in this proceeding by consuming a beer. He received a conditional discharge with a six-month probation period.
- [23] The respondent's close contacts described him as being very depressed and threatening suicide after Ms. Johnson's death. In a written statement to his probation officer, the respondent expressed remorse for the consequences of his actions. He acknowledged that he should not have been handling a firearm while consuming alcohol. In his remarks to the Court, the respondent also expressed his remorse, and acknowledged in a "sincere and straightforward manner" the harm done to Ms. Johnson and her family: at para. 110.

The judge's findings on the appropriate range of sentence

- [24] At trial, the Crown submitted that the range of sentence for an offence of this nature was three to seven years. The defence sought a sentence of two years less a day, to be served in the community.
- [25] There was no dispute at trial that the primary emphasis in this case was on the sentencing objectives of general deterrence and denunciation. However, as noted by the judge, the principle of restraint required that these objectives be tailored to what was necessary to address them properly on the facts of the case: at para. 149. He stated that the most significant consideration was the proportionality of the sentence to the gravity of the offence and the degree of responsibility of the offender: at para. 150.
- [26] The judge reasoned that in manslaughter cases involving the unintentional discharge of a firearm, blameworthiness will usually arise from the manner in which the risk of discharge is created by the conduct of the offender, including the number and duration of their careless acts leading to the discharge, and the overall context in which it occurred: at para. 151.

- [27] Viewed in this light, the judge found that the cases cited by the Crown in support of its proposed range involved "meaningfully higher" degrees of moral blameworthiness than the respondent's. He compared the respondent's conduct to that of the offender in *R. v. McMath*, 2015 BCSC 440, a case on which the sentencing judge in *Penner #1* had placed reliance. The judge stated that in *McMath*, the offender was the "creator" of the risk of unintentional discharge of a firearm in that he had loaded the gun and placed it in a location where it could be immediately used. Further, in *McMath* the offender had retrieved the firearm and attempted to unload it in unsafe circumstances: at para. 152.
- [28] By way of contrast, the judge noted that in this case, the rifle was presented to the respondent by Mr. Borne--whether Mr. Borne had handed the rifle to the respondent or merely left it for him--and the respondent's moral blameworthiness arose only from his "inept and ultimately fatal efforts" to render the rifle safe: at para. 153. The judge stated:
- [154] For this reason, I must respectfully disagree with the original sentencing judge's conclusion about Mr. Penner's degree of moral blameworthiness. I conclude instead that Mr. Penner's blameworthiness falls towards the lower end of the range that can be found in cases of this nature. I am satisfied that the sentencing judge did not carry out an accurate analysis of Mr. Penner's actual level of moral blameworthiness in comparison to other cases, and in particular that he drew too close a parallel between the circumstances of this case and those of *McMath*. Most importantly, he did not identify the key distinction between those two cases: that Mr. Penner was not the original creator of the dangerous situation that existed - he was presented with it by Mr. Borne and failed to address it with adequate care from that point. This relieves me from any obligation to follow the conclusion of the original sentencing judge on moral blameworthiness that might otherwise have been imposed on me by the principles of judicial comity.

[Emphasis added.]

- [29] The judge found that a meaningful period of imprisonment was required to give proper effect to the principles of general deterrence and denunciation in light of the serious circumstances. However, he concluded that the factors moderating the respondent's moral blameworthiness meant those goals could be achieved by a sentence of imprisonment in the range of 18 months to two years less a day. This constituted the "rough scale of a proportionate sentence" in this case: at para. 155.

Gross disproportionality

- [30] Having determined the appropriate range of sentence, the judge turned to consider whether the mandatory four-year minimum was grossly disproportionate.

- [31] The judge rejected the Crown's position that the mandatory minimum was not grossly disproportionate because any case involving criminally careless discharge of a firearm leading to death involves significant moral culpability. He found that the Crown's submission would require the court to effectively cast aside the individualized nature of the sentencing process: at para. 177. The judge's finding on gross disproportionality is captured in the following passage:
- [181] The Supreme Court of Canada in *Nur and Lloyd* did not engage in the more structured analysis of gross disproportionality found in *Morrissey*, but rather considered that question at large. Cast within the *Morrissey* framework, I would express my conclusion as being that despite the acknowledged gravity of the offence and the valid penological goals of deterring and denouncing it, and recognizing that Mr. Penner's very positive background or the effect of the minimum sentence on him would be insufficient in themselves to displace those considerations, the circumstances of the offence as they affect his moral blameworthiness nonetheless lead to a conclusion that the minimum will operate with gross disproportionality here.
- [32] In light of this conclusion, it was not necessary for the judge to consider two reasonable hypotheticals that the respondent had put forward. In any event, he would have concluded that the reasonable hypotheticals lacked sufficient clarity and specificity to support the necessary analysis: at para. 182.
- [33] The Crown did not advance a s. 1 defence to the s. 12 Charter challenge. As such, the judge concluded that the mandatory minimum sentence in s. 236(a) of the Criminal Code constitutes an unjustified infringement of s. 12. He declared the provision to be of no force and effect: at para. 186.

Issue on appeal

- [34] The sole issue on appeal is whether the judge erred in finding that the four-year mandatory minimum sentence in s. 236(a) of the Criminal Code infringes s. 12 of the Charter as applied to the respondent. The parties also disagree on the applicable standard of review.

The law

Legal framework for s. 12 challenges to mandatory minimum sentences

- [35] Section 12 of the Charter guarantees everyone's right "not to be subjected to any cruel and unusual treatment or punishment".
- [36] The Supreme Court of Canada most recently addressed the framework for a s. 12 Charter challenge of a mandatory minimum sentence in *Hills and Hilbach*. *Hilbach* concerned a constitutional challenge to the minimum sentences associated with the use of a firearm in a robbery under s. 344(1)(a)(i) (five years where a restricted or prohibited weapon is used), and s. 344(1)(a.1) (four years where an ordinary firearm is used). *Hills* concerned the four-year mandatory minimum sentence imposed by s. 244.2(3)(b) of the Code, in relation to the

offence of intentional discharge of a firearm into or at a place, knowing or being reckless as to whether another person is present, and intentional discharge of a firearm while being reckless as to the life or safety of another person. The four-year mandatory minimum in s. 244.2(3)(b) applied where the firearm was not restricted or prohibited.

- [37] The mandatory minimum sentences in s. 344(1)(a.1) and s. 244.2(3)(b) were repealed after the appeals were heard. The judgments of the Supreme Court of Canada address the provisions as previously enacted.
- [38] In *Hills*, the Supreme Court of Canada reiterated the established s. 12 framework, and provided further clarity on its application. At para. 40 of *Hills*, Martin J., writing for the majority, set out the two-stage inquiry to assess whether a mandatory minimum sentence violates s. 12 of the Charter. A court must:
- (1) assess what constitutes a fit and proportionate sentence having regard to the objectives and principles of sentencing in the Criminal Code, and
 - (2) consider whether the impugned provision requires the imposition of a sentence that is grossly disproportionate, not merely excessive, to the fit and proportionate sentence.
- [39] This two-part assessment may proceed on the basis of the actual offender before the court, or another offender in a reasonably foreseeable case or hypothetical scenario: *Hills* at para. 41.
- [40] When the constitutional challenge is based on the particular circumstances of the individual offender, the task for the court at stage one of the s. 12 challenge is "a familiar one", namely, determining a fit and proportionate sentence for the particular offender by reference to the general principles of sentencing in the Criminal Code and the relevant common law: *Hills* at paras. 52-53. Proportionality is a central principle of sentencing. It mandates that the offender's punishment be proportionate to the gravity of the offence and the offender's moral blameworthiness: *Hills* at para. 57. In *Hills*, Martin J. stated that moral blameworthiness is measured by:
- [58] gauging the essential substantive elements of the offence including the offence's mens rea, the offender's conduct in the commission of the offence, the offender's motive for committing the offence, and aspects of the offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity ...
- [41] At stage two of the s. 12 analysis, the court must compare the fit sentence with the punishment imposed by the impugned provision. This comparative process bears a resemblance to what occurs when a sentence on appeal is challenged as being "demonstrably unfit": *Hills* at para. 108. However, the constitutional standard for invalidating a mandatory minimum sentence is that of gross disproportionality. To meet this threshold, the mandatory minimum sentence must be more than merely excessive, unfit or disproportionate. It must be "so excessive as to outrage standards of decency": *Hills* at para.

109, citing *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1072.

- [42] There are three crucial components that must be assessed at stage two of the analysis: (1) the scope and reach of the offence; (2) the effect of the penalty on the offender; and (3) the penalty, including the balance struck by its objectives: *Hills* at para. 122.
- [43] In relation to the scope and reach of the offence, a mandatory minimum sentence is "more exposed to challenge where it captures disparate conduct of widely varying gravity and degrees of offender culpability": *Hills* at para. 125. As explained by Martin J. in *Hills*:
- [125] the wider the scope of the offence, the more likely there is a circumstance where the mandatory minimum will impose a lengthy term of imprisonment on conduct that involves lesser risk to the public and little moral fault (*Nur* at para. 83). In those cases, the sentence is liable to capture conduct that clearly does not merit the mandatory minimum.
- [44] In *R. v. Nur*, 2015 SCC 15, the Supreme Court of Canada invalidated the three- and five- year mandatory minimums for the possession of a prohibited or restricted firearm when the firearm is loaded or kept with readily accessible ammunition. As explained in *Hills*, this was because the offence at issue in *Nur* covered a wide range of potential conduct, including violations that created little risk of public harm "and were instead little more than licensing infractions": *Hills* at para. 127. This may be contrasted with offences that necessarily result in serious harm to a person or include a "grave mens rea": *Hills* at para. 130. Justice Martin explained as follows:
- [131] When the impugned minimum is attached to a provision that requires a particular act with a defined harm, the court will assess the scope of the provision and the seriousness of that harm in its gross disproportionality analysis. For example, *Luxton* concerned first degree murder and parole ineligibility. *Ferguson* dealt with manslaughter in which an RCMP officer shot a detainee. *Latimer* involved a father killing his child who had cerebral palsy, and *Morrissey* involved the death of a friend through horseplay with a firearm. The actus reus of these offences involved the death of a person: a specific realized harm, and one of the utmost gravity. This can be expected to carry significant weight in the assessment of gross disproportion.
- [Emphasis added.]
- [45] The second component of the gross disproportionality analysis looks at the effects of the sentence on the particular offender: *Hills* at para. 135. The effects of the sentence are a composite of many factors, including the conditions under which a sentence will be served. For example, the supports available to an offender serving a conditional sentence in the community versus a custodial sentence in a federal institution may be relevant to the analysis: *Hills* at para. 136.
- [46] The third component of the gross disproportionality analysis requires the court to assess the severity of the punishment mandated by Parliament. The court must determine whether and to what extent the minimum sentence goes beyond what is necessary to achieve

Parliament's sentencing objectives: Hills at para. 138. Where the consequences of the offence clearly offend Canadians' "basic code of values" and call for strong condemnation, the Supreme Court of Canada has accorded Parliament greater deference in enacting mandatory minimum sentences: Hills at para. 139. However, deference is not unlimited. In enacting mandatory minimums, Parliament can prioritize certain sentencing objectives, but no single objective can be applied to the exclusion of others: Hills at para. 140.

Mandatory minimum sentences for firearms offences

Pre-Hills and -Hilbach cases

- [47] As the Crown emphasizes, there is a long line of jurisprudence upholding the constitutionality of minimum sentences for the offences of criminal negligence causing death and unlawful act manslaughter committed with a firearm.
- [48] In *R. v. Morrisey*, 2000 SCC 9, the Supreme Court of Canada dismissed a s. 12 Charter challenge to the four-year mandatory minimum sentence in s. 220(a) of the Criminal Code for the offence of criminal negligence causing death with a firearm. The mens rea of this offence is wanton and reckless disregard for human life and safety. The accused in *Morrisey*, while intoxicated and holding a loaded rifle, attempted to jump on the lower bunk of a bunkbed in order to wake a sleeping friend who was on the upper bunk. The accused lost his footing and fell. The rifle discharged, and a bullet struck and killed the sleeping friend.
- [49] The accused conceded that the four-year minimum sentence would not be cruel and unusual as applied to his circumstances, and instead focussed his constitutional challenge on reasonable hypothetical offenders. Justice Gonthier, writing for the majority in *Morrisey*, identified two reasonable hypothetical scenarios that could be gleaned from the reported cases: (1) an individual playing with a gun who, believing it not to be loaded, discharges it, resulting in the death of another person, and (2) the unintentional death of a person in a hunting accident: *Morrisey* at paras. 51-52. Justice Gonthier concluded that in both of these hypotheticals, a four-year sentence of imprisonment would not constitute cruel and unusual punishment.
- [50] Justice Gonthier considered that the hypothetical of an offender playing with a gun to be particularly egregious. He stated:
- [53] Firearms are not toys. There is no room for error when a trigger is pulled. If the gun is loaded, there is a sufficient probability that any person in the line of fire could be killed. The need for general deterrence is as great (if not greater) for the hypothetical offenders playing with guns as it is for people such as the appellant.
- [51] As to the hunting accident hypothetical, Justice Gonthier stated:
- [54] The four-year minimum sentence equally sends a message to people who are in a position to harm people to take care when handling their weapon. Hunting accidents occur all too easily. When individuals with weapons are hunting in such a degree of proximity, extra steps

are necessary to ensure that other hunters are not harmed. Therefore, when hunting, before hunters pull the trigger on their guns, they must form a reasonable belief that the object they are shooting at is not another human. Extra vigilance is necessary with guns, and while society would expect people to take precautions on their own, unfortunately people do not always do so. Consequently, Parliament has sent an extra message to such people: failure to be careful will attract severe criminal penalties. The sentence represents society's denunciation, having regard to the gravity of the crime; it provides retributive justice to the family of the victim and the community in general; and it serves a general deterrent function to prevent others from acting so recklessly in the future.

[Emphasis added.]

- [52] Accordingly, the Court in *Morrissey* held that the minimum four-year sentence in s. 220(a) of the Criminal Code did not violate s. 12 of the Charter as applied to the accused, or to any reasonable hypothetical offender.
- [53] *Morrissey* was applied by the Supreme Court of Canada in *Ferguson* in dismissing a constitutional challenge to the four-year mandatory minimum sentence for manslaughter with a firearm in s. 236(a) of the Criminal Code. Chief Justice McLachlin, writing for the Court, noted the "considerable overlap" between the offence of unlawful act manslaughter and the offence of criminal negligence causing death: *Ferguson* at para. 11. She found that the accused had not identified a hypothetical case where the offender's minimum level of moral culpability for unlawful act manslaughter using a firearm would be less than in the reasonable hypotheticals considered in *Morrissey*: *Ferguson* at para. 30.
- [54] As the Crown notes, the present case is the only decision in which a court in Canada has found that the four-year mandatory minimum sentence in s. 236(a) of the Criminal Code constitutes cruel and unusual punishment contrary to s. 12 of the Charter. In addition to *Ferguson*, the lower court decisions dismissing constitutional challenges to the mandatory minimum include: *Penner #1*; *McMath*; *R. v. Walcot*, 2001 BCCA 342; *R. v. Birchall*, 2001 BCCA 356; and *R. c. Lacroix*, 2016 QCCQ 12410.
- [55] In *Nur*, by way of contrast, the Supreme Court of Canada allowed a constitutional challenge to the mandatory minimum sentences imposed by s. 95(2)(a)(i) and (ii) of the Criminal Code for the offence of unlawful possession of prohibited or restricted firearms when the firearm is loaded or kept with readily accessible ammunition (s. 95(1)). Three years was the minimum sentence for a first offence, and five years for a second or subsequent offence. The majority in *Nur* held that these minimum sentences constituted cruel and unusual punishment as applied to reasonable hypothetical offenders.
- [56] In relation to the three-year minimum sentence for first time offenders, the reasonable hypothetical offender was a gun owner who holds a valid licence for a restricted firearm and mistakenly stores their firearms with ammunition in an unauthorized location. Chief Justice McLachlin, writing for the majority in *Nur*, stated:

[83] Given the minimal blameworthiness of the offender in this situation and the absence of any harm or real risk of harm flowing from the conduct (i.e. having the gun in one residence as opposed to another), a three-year sentence would be grossly disproportionate. Similar examples can be envisaged. A person inherits a firearm and before she can apprise herself of the licence requirements commits an offence. A spouse finds herself in possession of her husband's firearm and breaches the regulation. We need not focus on a particular hypothetical. The bottom line is that s. 95(1) foreseeably catches licensing offences which involve little or no moral fault and little or no danger to the public. For these offences three years' imprisonment is grossly disproportionate to a fit and fair sentence. Firearms are inherently dangerous and the state is entitled to use sanctions to signal its disapproval of careless practices and to discourage gun owners from making mistakes, to be sure. But a three-year term of imprisonment for a person who has essentially committed a licensing infraction is totally out of sync with the norms of criminal sentencing set out in the s. 718 of the Criminal Code and legitimate expectations in a free and democratic society. As the Court of Appeal concluded, there exists a "cavernous disconnect" between the severity of the licensing-type offence and the mandatory minimum three-year term of imprisonment: para. 176. Consequently, I conclude that s. 95(2)(a)(i) breaches s. 12 of the Charter.

[Emphasis added.]

[57] Similarly, the Court in Nur found that the five-year minimum sentence was grossly disproportionate for a hypothetical repeat offender who breached a probation order while on bail, and years later innocently came into possession of a restricted or prohibited firearm without a licence, together with ammunition. Chief Justice McLachlin commented that a five-year mandatory minimum sentence for such an offender would go "far beyond" what is necessary to protect the public, express moral condemnation, and discourage others from engaging in similar conduct: Nur at para. 104. She emphasized that an offender in these circumstances "has not caused harm, nor is there a real risk of harm to the public": Nur at para. 104.

[58] In concluding that the minimum sentences in s. 95(2) of the Criminal Code violated s. 12, the Court in Nur distinguished the firearms possession offence from the offence of criminal negligence causing death that was at issue in Morrissey. Chief Justice McLachlin noted that s. 95(1) captures less serious conduct than other gun-related crimes that attract mandatory minimum sentences. Unlike criminal negligence causing death, s. 95(1) does not require proof of harm, rather it is a "simple possession offence": Nur at para. 84.

Hills and Hilbach

[59] The Supreme Court of Canada most recently considered mandatory minimum sentences for firearms offences in Hills and Hilbach.

- [60] In *Hills* the Supreme Court of Canada held that the four-year mandatory minimum sentence in s. 244.2(3)(b) of the Criminal Code violates s. 12 of the Charter. The Court found that a four-year sentence constituted cruel and unusual punishment for the hypothetical young offender who discharges an air-powered pistol (which could include a "BB" or paintball gun) at a house when the ammunition is incapable of perforating a residential wall.
- [61] Justice Martin noted that minimum sentences can be and have been attached to various types of firearms prohibitions from licensing offences to true crimes. She stated:
- [130] In the case of regulatory offences or licensing infractions, courts would expect corresponding penalties to be less severe. Conversely, courts may expect harsher penalties to attach to offences that result in serious harm or include a grave mens rea.
- [62] Justice Martin referred to *Morrissey* and *Ferguson*, among other cases, as examples of offences in which the actus reus "involved the death of a person: a specific realized harm, and one of the utmost gravity". She found that this could be expected to "carry significant weight in the assessment of gross disproportion": *Hills* at para. 131.
- [63] By contrast, Martin J. described the facts of the hypothetical scenario in *Hills*--a young offender shooting a BB or paintball gun at a residence where there was little risk to public safety--as "akin to a minor mischief offence" where probation or a suspended sentence may be appropriate: *Hills* at para. 156. Thus the offence at issue captured a wide spectrum of conduct, ranging from conduct that posed a high risk of harm and an elevated degree of culpability to the conduct of the hypothetical offender who presents "little danger to the public and little fault": *Hills* at para. 164. The Court found that a four-year minimum term of imprisonment for a young offender shooting a BB or paintball gun at a residence far exceeded what was necessary to protect the public, condemn the offender's behaviour, or deter others from engaging in similar conduct: *Hills* at para. 167.
- [64] In the companion case of *Hilbach*, the Court dismissed a s. 12 Charter challenge to the mandatory minimum sentences associated with the offence of use of a firearm in a robbery. Justice Martin noted that "some offences that may carry with them significant mandatory minimum sentences, such as four to five years of imprisonment, are framed in such a way that they cannot be committed in innocuous circumstances by offenders who are all but morally blameless": *Hilbach* at para. 3. In *Hilbach*, Martin J. described this category of offence as follows:
- [3] Offences that come within this class are narrowly defined and limited in scope, subject and mens rea. They regularly involve acts of violence, threats of violence, or conduct that is inherently dangerous, in circumstances that give rise to a real risk of death or serious bodily harm. Additionally, they require a high level of moral blameworthiness on the part of offenders, be they principals or parties, to sustain a conviction.
- [65] Justice Martin distinguished the offence in issue in *Hilbach* from the offence in *Hills*. She stated:

- [6] The impugned mandatory sentences apply to conduct that poses a significant risk to the safety of victims and the public. The risk of violence and psychological trauma from any robbery involving a firearm is acute. Unlike the offence that was subject to the mandatory minimum sentence at issue in *Hills*, the spectrum of conduct captured by robbery with a firearm is not so wide that the minimums apply in circumstances that involve little danger or moral fault.
- [66] Justice Martin emphasized the "harmful consequences" of using a restricted or prohibited firearm in a robbery: Hilbach at para. 54. These include "the risk of death or life-altering physical injury for victims and bystanders", and the "risk of profound psychological harm" as a result of exposure to this threat: at para. 54. Justice Martin noted that using an unloaded prohibited firearm would not substantially reduce the offence's gravity, as:
- [55] The presence of a firearm, even an unloaded one, "in and of itself creates a highly volatile and dangerous situation" (*Al-Isawi*, at para. 57 (emphasis in original)). A loaded firearm can easily be mistaken for an unloaded firearm, not least by the offenders themselves. A sentencing discount for wielding unloaded firearms also overlooks the very real risk of an offender accidentally discharging a firearm the offender believed was unloaded.
- [67] Given the gravity of the offences at issue in *Hilbach*, Martin J. found that the mandatory minimum sentence captured conduct that clearly warrants deterrence and strong denunciation:
- [71] The use of a restricted or prohibited firearm in a robbery poses grave risk to public safety. As this Court wrote in *Morrissey*, Parliament is entitled to enact mandatory minimum sentences that signal that a disregard for the life and safety of others in handling firearms is "simply not acceptable" (para. 47 (emphasis in original)). The mandatory minimum sentence therefore applies to a category of conduct that calls for strong condemnation.
- [72] General deterrence also has a role here. As this Court recognized in *Morrissey*, "[i]t cannot be disputed that there is a need for general deterrence" when a person endangers the safety of others in wielding a firearm (para. 46). Like the mandatory minimum sentence in that case, this minimum sentence "dictates that those who pick up a gun must exercise care when handling it" (*Morrissey*, at para. 46).
- [68] Justice Martin observed that in this context, courts have emphasized the need for denunciation and deterrence "both to convey our society's abhorrence of gun violence and to communicate to potential offenders that a significant sentence accompanies the use of a gun to commit violence": *Hilbach* at para. 73.

Analysis

Standard of review

- [69] The respondent argues that the judge's analysis at both stages of the s. 12 inquiry rested on his factual assessment of the respondent's conduct and his moral culpability. He cites *R. v. Badhesa*, 2019 BCCA 70 at para. 26, in support of the proposition that a finding as to "[w]here an offender falls on the spectrum of individual moral culpability is a question of fact", and thus entitled to deference on appeal absent palpable and overriding error. By contrast, the Crown says that the constitutionality validity of a statute is a question of law. It argues that the judge's decision to invalidate a statutory provision cannot be insulated from effective appellate review via deference to the judge's findings.
- [70] The first stage of the analytical framework reiterated in *Hills* requires a judge to determine a fit and proportionate sentence having regard to the objectives and principles of sentencing in the Code. In *Hills*, Martin J. described this inquiry as a "familiar task" for a trial judge, and stated that "[t]he goal should be to determine as specific a punishment as would emerge from a traditional sentencing hearing": at para. 50. Justice Martin also noted that "[s]entencing is a highly individualized and discretionary endeavour" and called on judges to "exercise their discretion in each case and fix a specific and defined punishment": *Hills* at paras. 62-63.
- [71] The case law indicates that deference is owed to a trial judge's determination of a fit sentence for an actual offender at the first stage of the s. 12 analysis. The dissenting judgments in *Hills* (per Côté J. at para. 155) and *Hilbach* (per Karakatsanis and Jamal JJ. at para. 131) hold that the usual standard of appellate deference applies to a sentencing judge's determination as to a fit and proportionate sentence for an actual offender at the first stage of the s. 12 inquiry. The applicable standard of review is not expressly addressed in the majority judgment in either case. However, Martin J.'s judgment in *Hilbach* is consistent with the application of a deferential standard of review to the sentencing decision. Justice Martin determined that the sentence imposed on Mr. Hilbach was "demonstrably unfit" as a result of errors by the trial judge: *Hilbach* at para. 50. This Court took the same approach in *R. v. Scofield*, 2019 BCCA 3 at para. 33.
- [72] At the second stage of the s. 12 framework, the question is whether the mandatory minimum sentence is grossly disproportionate. Appellate deference is owed to the factual findings of a sentencing judge, such as in relation to the assessment of the moral blameworthiness of the offender, that are relevant to the second stage of the inquiry. However, the application of the constitutional standard of gross disproportionality is primarily a question of law on which no deference is owed: *R. v. Bernarde*, 2018 NWTCA 7 at para. 5; *R. v. J.E.D.*, 2018 MBCA 123 at para. 38.

Did the judge err in his determination of a fit and proportionate sentence for the respondent?

Gravity of the offence and assessment of moral culpability

- [73] I agree with the Crown that the judge's assessment of a fit sentence in this case was fundamentally driven by his characterization of the respondent's degree of carelessness within a continuum or range that minimized the inherent seriousness of the conduct of any offender convicted of killing another person due to the careless use of firearm. The judge's observation, at para. 151, that the moral culpability of an offender "can be significant" suggests that there are scenarios in which a criminally careless discharge of a firearm causing death does not involve significant moral culpability. His reasoning that significant blameworthiness "will usually arise" from the manner in which the risk is created suggests that, absent additional aggravating conduct by the offender, manslaughter using a firearm in a careless manner does not involve significant moral blameworthiness. This overlooks the inherent gravity of the conduct caught by the offence.
- [74] The gravity of the offence committed by the respondent is evident in the jurisprudence. In *Morrisey*, the Supreme Court of Canada held that the offence of criminal negligence causing death with a firearm captures only those "who have committed a particularly grave offence": at para. 37. The mens rea of the offence considered in *Morrisey* is wanton and reckless disregard for human life and safety. The mens rea for the offence committed by the respondent, unlawful act manslaughter, is that (1) his conduct in using the firearm was a marked departure from the standard of care of a reasonable person in the circumstances, and (2) there was objective foreseeability of the risk of bodily harm that was neither trivial nor transitory: *Penner* BCCA at paras. 30-31. In *Ferguson*, at para. 11, the Court noted the "considerable overlap" between the offence of unlawful act manslaughter and criminal negligence causing death. Both offences involve significant moral blameworthiness.
- [75] I also agree with the Crown that, in his focus on Mr. Borne's role in the creation of the risk, the judge erroneously minimized the respondent's moral culpability for the offence. This led the judge to reject sentences imposed in similar cases--*McMath* and *Penner* #1--as relevant precedents in determining a proportionate sentence.
- [76] The parity principle, which is codified in s. 718.2(b) of the Code, requires that similar offenders who commit similar offences in similar circumstances should receive similar sentences. It is an expression of the principle of proportionality--sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R. v. Friesen*, 2020 SCC 9 at paras. 30-32; *R. v. Parranto*, 2021 SCC 46 at paras. 10-12. Appellate intervention on the basis of parity is only warranted if there is a "substantial and marked departure" or "substantial disparity" that cannot be explained by factual differences or an emphasis on other sentencing factors: *R. v. L.M.*, 2008 SCC 31 at paras. 35-36; *R. v. Payne*, 2007 BCCA 541 at para. 25; *R. v. R.J.B.*, 2016 BCCA 428 at para. 14.

- [77] The sentencing judge in Penner #1 relied on the similarity between the respondent's circumstances and those of the offender in McMath in arriving at a fit sentence of three years' imprisonment. The judge justified his departure from both McMath and Penner #1 on the basis that the circumstances of the offence in McMath involved a meaningfully higher degree of moral blameworthiness than the respondent's offence.
- [78] The judge held that the offence in McMath was not "momentary inadvertence" but rather a chain of inherently dangerous actions and careless conduct: Charter Ruling at para. 134. He described the offender in McMath as the "creator of the risk that was eventually fulfilled": at para. 152. The judge placed the respondent's conduct towards the less serious end of the continuum based on his view that it was Mr. Borne, and not the respondent, who created the original risk. The judge observed that the respondent's criminal conduct occurred during the "brief period" after which he received the rifle and decided to check it without taking proper precautions: at para. 179.
- [79] The judge's focus on Mr. Borne's role as the "creator" of the risk is, in my respectful view, misplaced. Mr. Borne may have contributed to the dangerous situation by loading the rifle. However, it was the respondent who created the risk that materialized with Ms. Johnson's death. The respondent deliberately chose to handle the firearm in the kitchen of Mr. Borne's trailer in close proximity to three other people, he did not ensure that the safety was engaged, he did not control where the rifle was pointed, and he had his finger on the trigger. As the sentencing judge found in Penner #1, this was a "chain of inherently dangerous actions": at para. 90. Mr. Penner's conduct was careless and dangerous; it carried with it the foreseeable risk of grave harm to others.
- [80] The sentencing judge in McMath concluded that four years was within the "range of fit sentences" for the offender: at para. 105. The judge found, based on the fact that another individual had contributed to the dangerous situation, that the "rough scale" of a fit sentence for the respondent was approximately half of the sentence imposed in McMath--18 months to two years less a day: Charter Ruling at para. 155. This is a substantial disparity which is not adequately explained by the factual distinction made by the sentencing judge. In my view, the judge's analysis erroneously minimized the respondent's moral culpability by absolving him of responsibility for the creation of the risk.

Determining a fit sentence

- [81] The judge erred in principle. Consequently, this Court must determine a fit sentence without deference to the trial judge's sentence, "to the extent it was contaminated by the error": Scofield at para. 38. A trial judge has sentenced the respondent for his offence without making the errors at issue here. In Penner #1, the trial judge accurately compared the circumstances of McMath to the respondent's offence, and concluded that he would have imposed a three-year sentence. Three years' imprisonment is a fit and proportionate sentence for the respondent's offence.

Did the judge err in finding that the four-year mandatory minimum sentence was grossly disproportionate in the respondent's case?

[82] A mandatory minimum sentence is grossly disproportionate when it is "so excessive as to outrage standards of decency": Hills at para. 109, citing Smith at 1072.

The scope and reach of the offence

[83] The first of the three components to be assessed in the analysis of gross disproportionality is the scope and reach of the offence.

[84] Mandatory minimum sentences for firearms offences are more vulnerable to constitutional challenge where they foreseeably apply to offenders who are all but morally blameless and whose actions do not cause a risk to the public. For example, mandatory minimums have been struck down where their application foreseeably captures offenders who are guilty of conduct amounting to licensing infractions or minor mischief offences: Nur at para. 83; Hills at para. 167.

[85] The same is not true of firearms offences involving conduct that is inherently dangerous, in circumstances that give rise to a real risk of death or serious bodily harm. Such offences are "framed in such a way that they cannot be committed in innocuous circumstances by offenders who are all but morally blameless": Hilbach at para. 3. There is no question that it is more morally blameworthy for an offender to commit a gun offence deliberately as opposed to recklessly: Hills at para. 160. However, the Supreme Court of Canada has made it clear that even when a firearms offence has a mens rea of recklessness or carelessness, where the actus reus of the offence involves the death of a person, this will carry "significant weight" in assessing gross disproportionality: Hills at paras. 130-131. Consequently, causing death with a firearm in culpable circumstances is a "particularly serious crime": Morrissey at para. 37; Birchall at para. 9.

[86] The respondent does not, in this case, rely on hypothetical scenarios to establish the s. 12 Charter violation. The only issue is the scope and reach of the offence as applied to the respondent's circumstances. I have already explained my reasons for concluding that the judge erred in his characterization of the gravity of the offence, and the moral blameworthiness of the respondent in committing it.

[87] The offence of unlawful act manslaughter requires objective foreseeability of the risk of bodily harm that is neither trivial nor transitory: R. v. Javanmardi, 2019 SCC 54 at para. 26. It therefore cannot be committed without the foreseeable risk of harm that has materialized. The offence is a particularly grave one when the unlawful act involves the use of a firearm, which "presents the ultimate threat of death to those in its presence": R. v. Felawka, [1993] 4 S.C.R. 199 at 211.

[88] The mandatory minimum is not so wide that it extends to circumstances that pose relatively little risk of harm: Hilbach at para. 58. The respondent's offence illustrates the inherent gravity of unlawful act manslaughter with a firearm. His actions created a foreseeable risk of

the harm that ultimately materialized. He is not akin to the hypothetical offender in Nur who commits a licensing infraction, or the hypothetical young offender in Hills who is guilty of mischief. He is not an offender who is all but morally blameless. The respondent was careless in handling a firearm, and he caused the death of a person.

The effects of the penalty on the offender

[89] I have determined that a term of imprisonment of three years is a fit and proportionate sentence for the respondent. This sentence is one year less than the four-year mandatory minimum. The mandatory minimum is not totally out of synch with sentencing norms for an offence of this nature: Hilbach at para. 74. This is not a case in which the mandatory minimum sentence imposes a lengthy term of imprisonment when such a sentence would otherwise not be possible or common: Hilbach at para. 75. Unlike the mandatory minimums in issue in Nur and Hills, its effect is not to replace a probationary sentence. That said, an additional one-year term of imprisonment would doubtless result in severe hardship for the respondent and his loved ones. This effect carries "significant weight": Hilbach at para. 63.

The penalty and its objectives

[90] The four-year mandatory minimum captures conduct that warrants general deterrence and strong denunciation. The careless use of a firearm poses grave risk to the public. Parliament is entitled to enact mandatory minimum sentences that signal that a disregard for the life and safety of others in handling firearms is "simply not acceptable": Hilbach at para. 71, quoting Morrissey at para. 47 (emphasis in the original); Morrissey at para. 54. In Hilbach, Martin J. observed that in this context, courts have emphasized the need for denunciation and deterrence "both to convey our society's abhorrence of gun violence and to communicate to potential offenders that a significant sentence accompanies the use of a gun to commit violence": at para. 73.

[91] The mandatory minimum sentence in s. 236(a) of the Criminal Code is not excessive in relation to Parliament's legitimate sentencing objectives. There are no reasonable alternatives that would fulfill Parliament's sentencing objectives of denunciation and deterrence given the gravity of the offence and the significant moral culpability of offenders who commit it. Parliament's prioritization of denunciation and general deterrence is justified in this context: Morrissey at para. 43; Hilbach at para. 71-72.

Is the four-year mandatory minimum sentence in s. 236(a) grossly disproportionate for the respondent?

[92] I conclude that the mandatory minimum does not result in a grossly disproportionate sentence for the respondent and thus does not infringe s. 12 of the Charter. The judge erred in holding otherwise. A sentence can be demonstrably unfit, disproportionate or excessive without meeting the constitutional threshold of gross disproportionality: Hills at paras. 114-115. The one-year difference between the mandatory minimum sentence and the fit and

proportionate sentence that would otherwise be imposed on the respondent does not meet this high bar. It does not "outrage standards of decency". Parliament was justified in prioritizing denunciation and general deterrence in this context, and the respondent's conduct is "precisely what Parliament intended to denounce and deter": Hilbach at para. 78.

Remedy

[93] The effect of setting aside the judge's declaration that s. 236(a) is of no force and effect is that the mandatory minimum sentence of four years' imprisonment is imposed on the respondent. The respondent says that if the declaration of invalidity is set aside, then the Court should stay the execution of the post-appeal portion of the respondent's sentence. The Crown takes no position on whether a post-appeal stay of sentence is appropriate.

[94] In Hilbach, the Court stayed the execution of the post-appeal portion of Mr. Hilbach's sentence. Justice Martin stated:

[111] ... In rare cases where appellate courts have imposed custodial sentences to comply with mandatory provisions of the Criminal Code, including mandatory minimum sentences, they have stayed the execution of the post-appeal portion of the sentence. A stay for a post-appeal sentence may be available where there is extenuating delay in the legal process, particularly at the appellate stage, through no fault of the offender

[Citations omitted.]

[95] In this case, there has similarly been extenuating delay in the legal process, particularly at the appellate stage, through no fault of the respondent. The offence occurred on December 20, 2012. Mr. Penner was first sentenced in Penner #1 on September 20, 2017. He has been out of custody on bail for a significant period of time since that date. Reincarceration would have a severe, negative impact on his rehabilitation.

[96] The respondent's crime is grave. However, the principles of denunciation and general deterrence can be satisfied through the sentence imposed on appeal, even where that sentence is stayed for the offender before the court: R. v. Dhillon, 2021 BCCA 271 at para. 48; R. v. Shi, 2015 ONCA 646 at para. 14. As the judge observed in the Charter Ruling at para. 148, the respondent does not require specific deterrence given the consequences he suffered as a result of the offence.

[97] In the unusual circumstances of this case, I consider it appropriate to stay the post-appeal portion of the respondent's sentence.

Disposition

[98] I would grant the Crown leave to appeal sentence, allow the appeal, and order that:

- (1) the judge's declaration that s. 236(a) of the Criminal Code violates s. 12 of the Charter and is of no force and effect be set aside;

- (2) a sentence of four years' imprisonment be substituted for the sentence imposed at trial; and
- (3) the execution of the post-appeal portion of the sentence be stayed.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Justice Marchand"

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Prepared on 29 October 2026 · Esheria