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R v Hills and *R v Hilbach* and Section 12 of the *Charter*: The Twelfth Dimension of Sentencing

By: Lisa Silver

Cases commented on: *R* v *Hills*, 2023 SCC 2 (CanLII); *R* v *Hilbach*, 2023 SCC 3 (CanLII)

Editors' Note: This is the third in our series of posts to mark Equity, Diversity, and Inclusion Week at the University of Calgary, which deals with the impact of mandatory minimums sentences on the *Charter* rights of Indigenous persons.

We live in four dimensions of space, famously described by the space-time continuum imagined by Albert Einstein. In legal terms, a courtroom is an example of this kind of space we perceive when practicing law. If we look outside of law and further into the field of physics, even more dimensions are possible – upwards of 26 according to the Closed Unoriented Bosonic String Theory. This article is concerned with a previously unacknowledged dimension of the law, found within the confines of the sentencing hearing. In the recent Supreme Court of Canada decisions of *R* v *Hills*, 2023 SCC 2 (CanLII) and *R* v *Hilbach*, 2023 SCC 3 (CanLII) a new dimension of the sentencing hearing is revealed through the application of s 12 of the *Charter*, which protects the right "not to be subjected to any cruel and unusual treatment or punishment". Specifically, in *Hills* and *Hilbach* this section is engaged by the minimum terms of imprisonment mandated by the offence provisions, both of which involve firearms. The subsequent s 12 inquiry is, like the dimensions conjured by string theory, not necessarily perceived by everyone in every sentencing hearing but is an ever-present reminder of core sentencing principles, like proportionality and parity, which ensure the continual presence of human dignity in the sentencing process. Although this twelfth dimension has been revealed by virtue of the *Hills* and *Hilbach* decisions, the s 12 inquiry itself reveals much about the limits of sentencing and the frailties of our system of justice.

Background

In a previous post on these decisions, "Does the Punishment Fit the Crime?", I outlined the facts of these two cases, and what was at stake constitutionally. In *Hills*, the offence was the reckless discharging of a firearm into a place, namely a home, for which the mandatory minimum punishment was four years in jail. The majority of the Supreme Court of Canada, under the authorship of Justice Sheilah Martin, overturned the Alberta Court of Appeal's finding that the punishment was constitutional, reinstating the three-and-a-half-year sentence imposed by the sentencing judge. In *Hilbach*, the nineteen-year-old Indigenous offender was sentenced on a charge of robbery using a prohibited firearm, which carried a mandatory minimum of five years imprisonment. In the companion case of *Zowdesky*, jointly decided with *Hilbach*, the charge was robbery while using a firearm, which attracted a of minimum four years incarceration. The majority

of the Supreme Court of Canada, again as authored by Justice Martin, found the mandatory minimums to be constitutional and not contrary to s 12 of the *Charter*.

In the *Hills* decision, Justice Martin, writing in her usual clear and accessible manner, clarifies, but does not modify, the s 12 analysis. In doing so, she provides a stage-by-stage analytical framework for front-line judges to apply in considering s 12 challenges. She also confronts the many criticisms around s 12 principles, firmly dismissing such commentary. When applying the framework to the mandatory minimum of four years for reckless discharge of a firearm into a home, she finds the mandatory minimum sentence to be grossly disproportionate and contrary to s 12 of the *Charter*. In *Hilbach*, Justice Martin also comments on the overlay of mandatory minimums in cases involving sentencing of Indigenous offenders. Although this direction was needed, Ocean Hilbach's Indigeneity coupled with his individual circumstances were not enough to render the 5-year minimum sentence unconstitutional under s 12.

Introduction to the Analytical Framework

To appreciate the novelty of Justice Martin's approach to s 12, the analytical framework must be understood. To be clear, the novelty is not found in the framework itself, but in the placement of that framework into the sentencing hearing in such a singular way that the *Charter* analysis seems to flow effortlessly from that hearing. This is unique. Typically, when a *Charter* right has been violated, it involves an extraordinary event (such as an illegal detention) or a concern with the enabling law, which would not otherwise attract courtroom attention. Often, there is a trial within the trial (*voir dire*) to re-focus the trial on the *Charter* breaches alleged. Many times, the evidence heard on a *Charter voir dire* is different than the evidence that would usually be proffered at the trial proper. For instance, in a s 8 search and seizure challenge, the *voir dire* would elicit evidence of the reasonableness of the officer's suspicion for a protective search, which would not be relevant to whether the substantive offence has been proven. However, in examining the constitutionality of the mandatory minimum sentence under s 12, both the offender and the reasonably foreseeable offender come into sharp focus, both in terms of who they are and what the fit and appropriate sentence should be for them. This activity is the essence of the sentencing hearing using sentencing tools. In this way, the s 12 analysis is not just injected into the hearing with its own parameters and reflections but seems to be a seamless part of the sentencing hearing proper.

There is a two-stage contextual inquiry under s 12 that considers whether the severity of the punishment produces a grossly disproportionate effect in comparison with the appropriate punishment (*Hills* at paras 35 and 40; *R* v *Bissonnette*, 2022 SCC 23 (CanLII) at para 62). The "animating purpose" of s 12 is to safeguard, protect, and respect human dignity and each individual's "intrinsic worth" (*Hills* at paras 32 and 35). The right does not preclude punishment, but it does set tolerable societal parameters around such punishment. The sentencing hearing is not just concerned with punishing an offender but also with an appropriate punishment that is just, fair, and consistent with legal principles. Section 12, as a prohibition against grossly disproportionate sentences, may not always be engaged in every sentencing hearing but it is continually at work during such hearings to keep the sentencing process focused on both content and outcome. Unlike the other *Charter* rights in the trial context, s 12 is an appropriate companion to the sentencing process.

The First Stage of the Analytical Framework

The first stage in the s 12 inquiry is the sentencing hearing itself. The judge assesses what the fit and appropriate sentence would be in accordance with sentencing principles and objectives (*Hills* at para 40). In other words, the judge must do what they are required to do in sentencing an offender. Indeed, "no sentencing objective should be applied to the exclusion of others" (*Hills* at para 54). This requires the court to review all the objectives of sentencing such as deterrence and denunciation as well as rehabilitation. Proportionality is also a key aspect of the sentencing determination. There is a direct and incontrovertible connection between the proportionality principle and a grossly disproportionate sentence. Proportionality is in place to "prevent unjust punishment" and serves an important "limiting function" (*Hills* at para 57). Proportionality tethers the sentencing concepts of gravity of the offence and the offender's culpability to the sentence imposed. These concepts also form the foundation for the mandatory minimum sentence created by Parliamentary lawmakers, who would be attuned to the seriousness of the offence and the level of culpability required to commit it.

The inquiry may also involve a consideration of the reasonably foreseeable offender, and not just the offender before the court. This ability to anchor the *Charter* challenge to others outside of the court's purview has been controversial, leading to critical debate on the efficacy of basing such a challenge on a "make believe" scenario as opposed to a real person truly impacted by the law (*Hills* at para 28). But Chief Justice Beverley McLachlin in *R* v *Nur*, 2015 SCC 15 (CanLII) , anticipating this controversy, explained, "[i]f the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely" (*Nur* at para 51). The reasonably foreseeable offender is not a disembodied creation but "rooted in the realities of people's lives" (*Hills* at para 86). The scenario should reflect lived experiences, tangible impacts, and be reflective of the people who would be actually adversely captured by the imposition of the mandatory minimum sentence.

Here too, the sentencing judge must "sentence" the reasonably foreseeable offender in the first stage of the inquiry. This sentence acts as a bridge between stage one and stage two of the s 12 determination, carving out the boundaries of the scope of the constitutionality of the mandatory minimum sentence (*Hills* at para 95). To ensure this constitutional scope, the sentence used to compare with the mandatory minimum must be "the lowest fit sentence that is reasonably foreseeable" (*Hills* at para 95). The sentencing hearing may take on the 'twelfth' dimension in doing so but it remains firmly within the four walls of the courtroom.

Whether the judge is considering either the offender before them, the reasonably foreseeable offender or both, the task in the first stage of this *Charter* enhanced sentencing hearing is not to merely imagine the appropriate sentence but to clearly articulate one. The sentence must be precise, specific, and well-defined (*Hills* at para 65). To assist in this task when considering a reasonably foreseeable offender, Justice Martin offers a panoply of characteristics to consider in an effort to crystallize the image of this offender and to connect them to the specificities of the offence (*Hills* at paras 77, 83, and 85). The reasonably foreseeable offender, like any offender before the court, may have "legal" personal characteristics relating to "age, poverty, race, Indigeneity, mental health issues and addiction" (*Hills* at paras 86 – 87). Through these characteristics, the reasonably foreseeable offender is "rooted in the realities of people's lives" to ensure 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 paras 86 and 89). But the reasonably foreseeable offender is only one part of the scenario, the other being the circumstances of the offence, which must also be reasonably depicted. In the end, the "scenario as a whole" must be reasonably foreseeable in its totality (*Hills* at para 92). As with any sentencing hearing, depending on the circumstances, the reasonably foreseeable scenario may require the calling of evidence (*Hills* at para 93).

The Second Stage of the Analytical Framework

The stage one determination fixes the context in which the comparative analysis is done under stage two. It is in this second stage where the impugned punishment is measured against the fit and appropriate one. The sentencing hearing of an offender, or of a reasonably foreseeable one, now encompasses the provision itself. This means all the sentencing principles and objectives utilized in stage one are revisited in the assessment of whether the mandated sentence is grossly disproportionate. By their nature, mandatory minimum sentences will depart from sentencing principles, including the fundamental principle of proportionality (*Hills* at para 46). The measurement requires a high standard to preserve parliamentary deference. It is only those punishments that are grossly disproportionate to the otherwise fit one that will render a punishment unconstitutional. The *Charter* does not demand perfection, but it does provide a baseline for comparison.

In the second stage of the inquiry, the *Charter* review within the sentencing context may produce a prism-like continuum of fit, tolerable, excessive, and grossly disproportionate sentences, which the sentencing judge would be familiar with and well-placed to consider. This expertise flows from the sentencing judge's need to delicately balance circumstances, principles, objectives, norms, and other relevant sentencing indicators in creating a fit and appropriate sentence. The sentencing judge, by knowing how to sentence, knows a fit sentence when they see it, and understands the nuances of the potential sentencing continuum. Just as there is deference to parliamentary punishment decisions for offences, there is deference to the sentencing judge's imposition of punishment on the offender within those parliamentary boundaries.

Similarities can be found between a sentencing hearing and the second stage of the s 12 inquiry. In a sentencing hearing, the court also pivots from the individual to a consideration of generalities, such as sentencing ranges and case comparators. This focus ensures parity of sentence, which is a dimension of the proportionality principle. So too, the stage two s 12 analysis scrutinizes parity's flip side or the disparity between the fit sentence and the mandatory one (*Hills* at para 106). That disparity is then weighed through the lens of the effects caused by that disparity, keeping in mind the difference must be grossly disproportionate (*Hills* at para 107). This may be where the sentencing hearing and the s 12 inquiry part company. The court in a sentencing hearing is concerned with proportionality proper. Although the *Charter* standard of proportionality is a higher bar, the assessment draws parallels with a sentencing appeal in which the appellate standard involves "demonstrably unfit" sentences (*Hills* at paras 108 – 109).

The s 12 assessment is a familiar inquiry with which the sentencing judge is "comfortable" (*Hills* at para 108). What may seem unfamiliar is the animating constitutional concern with whether the

mandatory minimum sentence is so grossly disproportionate that it "'outrage[s] standards of decency', is abhorrent or intolerable, 'shock[s] the conscience' or undermines human dignity" (*Hills* at para 110). Even so, in crafting the appropriate sentence, the sentencing judge is concerned with human dignity and societal values. According to Justice Martin, in the s 12 inquiry, the normative constitutional component is assessed "through the values and objectives that underlie" the sentencing regime as well as *Charter* principles (*Hills* at paras 110 – 113). Of course, the fundamental sentencing principle engaged here is proportionality as the yardstick for a fair and just sentence (*Hills* at paras 111 – 112). In this way, the s 12 inquiry is subsumed and folded into the sentencing hearing. We have come full circle.

The constitutional dimension expressed by a grossly disproportionate sentence is indeed a dimension of the sentencing hearing, but there is a gap between a fit and appropriate sentence that should be imposed on the offender and a grossly disproportionate one that would engage *Charter* scrutiny. The gap is filled by parliamentary deference in which lawmakers have the authority to signal the level of approbation for criminal behaviour through the sentencing regime (*Hills* at para 113). We will return to this gap later in this post in considering the personal circumstances of Ocean Hilbach and his Indigeneity.

Justice Martin also outlines the three factors to consider in assessing whether the mandatory minimum is grossly disproportionate (*Hills* at para 122). In her view, this is a "regrouping" of the components of that assessment based on a survey of the law (*Hills* at para 122). The three components, which either alone or in combination can ground the determination that the mandatory minimum is grossly disproportionate, involve the "scope and reach" of the offence, the effects on the offender, and the mandatory minimum itself (*Hills* at para 122).

This post will not discuss the specifics of each component other than to comment on the intersections with sentencing factors. For instance, in reviewing the scope and reach of the offence, the judge may look to sentencing ranges and starting points, analytical tools used in determining proportionality and parity (*Hills* at para 132). Again, the s 12 inquiry reaches into a sentencing hearing using its analytical framework to assist in measuring the features of what could be a grossly disparate mandatory sentence. In reviewing the effects the mandatory sentence has on the offender, the judge must also take note of the principle of proportionality (*Hills* at para 135). The harsher the effects of a sentence of imprisonment of the kind proposed, the more likely a lower sentence, below the minimum, may be required. The mandatory minimum is also scrutinized through the lens of sentencing principles and objectives like deterrence and rehabilitation (*Hills* at para 140). In the case of rehabilitation, which reflects the human capacity to change and overcome those obstacles that may lead to criminal behaviour, a mandatory minimum "excluding or completely disregarding" rehabilitation will be grossly disproportionate (*Hills* at para 142).

The Impact of Indigeneity

At paragraph 87 in *Hills*, Justice Martin connects the "mandatory" sentencing principle found under s 718.2(e) of the *Criminal Code* to consider "all available sanctions, other than imprisonment" for Indigenous offenders to the characteristics of the reasonably foreseeable offender. The provision was enacted to "address the overincarceration of Indigenous people" who are disproportionately represented in the justice system (*Hills* at para 87). This specific inclusion

of what we now call the *Gladue* principle, engaging the systemic and historic discrimination impacting Indigenous peoples, is critically important when assessing the effects of the mandatory minimum sentence under stage two, where, as in *Hills* and *Hilbach*, the mandatory minimum is a significant jail sentence. In Justice Martin's view, it is "an unfortunate truth" that an Indigenous offender is more than "theoretically possible" considering they are "vastly overrepresented" in the jails (*Hills* at para 87).

In light of this "unfortunate truth," accounting for Indigeneity in the s 12 assessment applies to more than just the reasonably foreseeable offender and is also essential to stage two (*Hilbach* at paras 41 – 44). The focus of stage two, and really the entire inquiry, is whether the mandatory minimum sentence is grossly disproportionate. According to Justice Martin, the *Gladue* framework arising from s 718.2(e) is a "core part" of sentencing principles as much as parity and proportionality (*Hilbach* at para 44), and therefore is engaged in the assessment of gross disproportionality. Justice Martin referenced a previous Supreme Court ruling on s 12, *R v Boudreault*, 2018 SCC 58 (CanLII), as an example of how s 718.2(e) principles can "support striking down a sentencing measure under s 12" (*Hilbach* at para 44). *Boudreault* was a case involving the mandatory imposition of a victim fine surcharge upon conviction. Among several reasons, Justice Martin, writing for the majority, found the mandatory victim surcharge would "undermine" the ameliorative efforts to reduce the Indigenous overrepresentation in the jails (*Boudreault* at para 83). The sanction would disproportionately impact Indigenous people, who are disproportionately overrepresented in prisons, and would disproportionately default in payment of the fines, resulting in possible loss of liberty. In fact, Indigenous offenders are grossly disproportionately represented in the jails. According to the most recent reports of the Correctional Investigator, upwards of 50% of all women in federal penitentiaries are Indigenous. This dimension of gross disproportionality must be anchored together with the entire s 12 inquiry.

In the case of *Hilbach*, involving a youthful Indigenous offender, the s 12 inquiry truly is his sentencing hearing. This duality of gross disproportionality, involving Indigeneity and the s 12 inquiry, will have significant and lasting impact on his life. Justice Martin in *Hills* acknowledges the "ripple effect" that jail, as a total loss of liberty, can have on a person's life including "physical and mental health, employability, children and community" (at para 101). These "heavy costs" and the "potentially devastating" impact on a person's future adds a dimension to the s 12 inquiry that is particularly meaningful for an Indigenous youthful offender like Ocean Hilbach (*Hills* at para 102). Even though the *Hills* and *Hilbach* decisions are replete with references to the grossly disproportionate impact of the justice system on Indigenous peoples and the significant impact the sentence would have on Mr. Hilbach personally, this truth does not translate into gross disproportionality of the 5-year mandatory minimum sentence for use of a prohibited weapon in a robbery (*Hilbach* at para 51).

There is no doubt that in terms of the scope and reach of the offence, the lines are tightly drawn. The offence captures highly blameworthy and dangerous conduct requiring an elevated intention. On the other hand, the effects of a five year sentence on a youthful Indigenous person struggling with the historic, systemic, and personal effects of discrimination is severe and significant (*Hilbach* at paras 51 and 63). The "ripple effects" are evident in his future, his rehabilitative prospects, and on the Indigenous community itself. Even so, Justice Martin, in applying the principles to the five year mandatory minimum faced by Mr. Hilbach, finds the mandatory minimum "harsh and close

to the line" but not grossly disproportionate (*Hilbach* at para 52). This "almost there" theme of the assessment of the s 12 inquiry in Mr. Hilbach's case runs throughout the application paragraphs of the *Hilbach* decision. Justice Martin signals this through the moderate language she chooses in her assessment such as noting that Hilbach's circumstances "attenuate his culpability *somewhat*" (at para 51), that the five-year minimum is "*relatively* more severe" (at para 62), and that the mandatory minimum "*may*" exceed what is necessary to achieve parliament's objective considering the case of Mr. Hilbach (at para 74).

The decision also makes generous use of the negative. For example, Justice Martin finds that quantitatively the additional sentence beyond a fit and appropriate one, which the mandatory minimum represents, is "*not* negligible" and is "*not* totally" out of sync with sentencing norms (*Hilbach* at paras 63, 51, and 76). Then, using language which suggests that the line of gross disproportionality in the case is difficult to discern, Justice Martin suggests that although the mandatory minimum "*may not* aid" rehabilitation, neither does it "completely disregard it" (*Hilbach* at para 79 and *Hills* at para 34). This language feels inconclusive. It gives the assessment an uncertain air without explaining to what extent this mandatory minimum is not grossly disproportionate. For example, if the mandatory minimum does not aid rehabilitation but neither does it totally disregard it, what exactly does it do towards fulfilling it? This language suggests that for a mandatory minimum to be unconstitutional there needs to be a total absence of the possibility of rehabilitation or a complete negation of human dignity in its imposition. If so, then that is a difficult bar to exceed.

This approach also seems inconsistent with Justice Martin's position that one of the three components of gross disproportionality can render a mandatory minimum unconstitutional (at para 36). It is hard to understand in *Hilbach* how such a mandatory sentence, that has the potential of such negative impact on Indigenous life and community, is not unconstitutional, even with parliamentary deference and with scope and reach well-defined. Considering the outcome in *Hills*, it seems that what is needed is a combination of those components to overcome the high bar. The three component assessment will need to be tested further to see if the bar is actually pitched too high constitutionally.

Conclusion

What does this analysis say about the twelfth dimension of sentencing that the s 12 inquiry appears to be? It may suggest that there is a gap between sentencing the offender and concerns for a grossly disproportionate sentence that cannot be accounted for in the sentencing or appellate process. It confirms that proportionality, although it permeates the entire s 12 analysis and is fundamental to sentencing, has a very limited constitutional dimension that is beyond the reach of those offenders whose lives will be severely impacted by the mandatory minimum.

Mandatory minimum sentences can only be reviewed by challenging the constitutionality of the punishment. This *Charter* inquiry, although embedded in sentencing principles, cannot change a disparate sentence imposed by the mandatory minimum. The *Hills* and *Hilbach* decisions show that neither can the appellate courts. There are no other review mechanisms available to recover the loss of human dignity in such a process; ss 7 and 15 of the *Charter* were recently foreclosed in the *Sharma* decision (*R v Sharma*, 2022 SCC 39 (CanLII)). Indigenous offenders and other

racialized and marginalized groups must simply live with a form of punishment that may be harsh and excessive when compared to non-racialized and non-Indigenous offenders.

The s 12 inquiry is another dimension hovering behind the scenes in a sentencing process. It reminds us of the core principles leading to a fit and appropriate sentence such as human dignity and proportionality. It also reminds us of the limits of the *Charter* and the rule of law in the sentencing process.

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