



Case in Brief: ***R. v. Hilbach***

Judgment of January 27, 2023 | On appeal from the Court of Appeal of Alberta
Neutral citation: 2023 SCC 3

The Supreme Court rules the mandatory minimum sentences for robbery using either a prohibited or ordinary firearm do not constitute cruel and unusual punishment.

On June 9, 2017, Mr. Ocean William Storm Hilbach and a 13-year-old accomplice robbed a convenience store in Edmonton, Alberta with an unloaded sawed-off rifle. With his face concealed, Mr. Hilbach pointed the rifle at two employees and demanded cash while his accomplice punched one employee and kicked the other. They left with \$290 in lottery tickets and were apprehended shortly after. At the time, Mr. Hilbach was 19 years old, on probation and subject to a firearms prohibition order, having been sentenced for several other offences three months earlier.

In January 2018, Mr. Hilbach pleaded guilty to robbery using a prohibited firearm contrary to section 344(1)(a)(i) of the *Criminal Code*. At sentencing, Mr. Hilbach brought a challenge under section 12 of the *Canadian Charter of Rights and Freedoms* to the five-year mandatory minimum sentence. Section 12 of the *Charter* guarantees the right not to be subjected to cruel and unusual punishment. Mr. Hilbach claimed section 344(1)(a)(i) was grossly disproportionate to him as an Indigenous person and member of the Ermineskin Cree Nation. Before the sentencing judge, Mr. Hilbach filed a *Gladue* report, which indicated that members of his family attended residential schools, struggled with addictions to alcohol or other substances, and suffered financial difficulties. The *Gladue* report gets its name from the Supreme Court of Canada's 1999 ruling in *R. v. Gladue*, which established factors that courts must take into account when sentencing Indigenous offenders. In the case of Mr. Hilbach, the sentencing judge decided that the mandatory minimum sentence was grossly disproportionate and violated section 12. He sentenced Mr. Hilbach to two years less a day.

On September 13, 2016, in an unrelated case, Mr. Curtis Zwozdesky and two masked accomplices robbed a convenience store in Caslan, Alberta. One of the accomplices pushed an employee, pointed a sawed-off shotgun at her, and demanded cash. A shot was fired into a shelf. Mr. Zwozdesky never entered the store during the robbery, but drove the accomplices to and from the store. Mr. Zwozdesky pleaded guilty to robbery with a firearm contrary to section 344(1)(a.1) of the *Criminal Code*. At that time, the law imposed a mandatory minimum sentence of four years in prison. At sentencing, Mr. Zwozdesky challenged the mandatory minimum sentence under section 12 of the *Charter*. The sentencing judge found that the mandatory minimum sentence was not grossly disproportionate for Mr. Zwozdesky and sentenced him to three years' imprisonment. However, she concluded that it would be grossly disproportionate in reasonably foreseeable hypothetical scenarios and declared the law of no force or effect.

Alberta's Court of Appeal heard the two cases together and dismissed the appeals. It also added a year to Mr. Hilbach's sentence. It did not change Mr. Zwozdesky's sentence. The Crown then appealed both cases to the Supreme Court of Canada.

The Supreme Court allowed the appeals.

The mandatory minimum sentences at issue are constitutional.

Writing for a majority of the judges, Justice Sheilah L. Martin ruled that the mandatory minimum sentences for Mr. Hilbach and Mr. Zwozdesky do not constitute cruel and unusual punishment. She applied the framework set out in the companion appeal of *R. v. Hills* for challenges to the constitutionality of a mandatory minimum sentence under section 12 of the *Charter*. In regard to Mr. Hilbach, Justice Martin added that the section 12 analysis makes it mandatory for judges to consider the unique situation of Indigenous offenders for all offences in sentencing.

Breakdown of the decision: *Majority:* Justice Sheilah L. [Martin](#) allowed the appeals, finding the mandatory minimum sentences at issue constitutional (Chief Justice [Wagner](#) and Justices [Moldaver](#), [Brown](#), [Rowe](#) and [Kasirer](#) agreed) | *Concurring:* Justice [Côté](#) agreed with the majority’s disposition of the appeal but not with its three-part test for gross disproportionality at the second stage of the section 12 *Charter* analysis | *Dissenting:* Justices [Karakatsanis](#) and [Jamal](#) would have dismissed the appeals, finding the mandatory minimum sentences at issue unconstitutional

More information: [Decision](#) | [Case information](#) | [Webcast of hearing](#)

Lower court rulings: [Sentencing of Mr. Hilbach](#) (Court of Queen’s Bench of Alberta) | [Sentencing of Mr. Zwozdesky](#) (Court of Queen’s Bench of Alberta) | [Appeal](#) (Court of Appeal of Alberta)
