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Docket: 11/57
Citation: *R. v. Anderson*, 2013 NLCA 2

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

FREDERICK ANDERSON

RESPONDENT

Coram: Green C.J.N.L., Welsh and Rowe JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Happy Valley/Goose Bay

Appeal Heard: November 13, 2012

Judgment Rendered: January 10, 2013

Reasons for Judgment by Welsh J.A.

Concurring Reasons by Green C.J.N.L. and Rowe J.A.

Counsel for the Appellant: Sheldon Steeves

Counsel for the Respondent: Derek Hogan

Welsh J.A.:

[1] The *Criminal Code* authorizes the Crown to seek a mandatory minimum term of imprisonment if an offender, who is convicted of an alcohol related driving offence, has previous related convictions. At issue in this appeal is the effect of the offender's aboriginal status on the exercise of the Crown's discretion to request the mandatory minimum punishment.

BACKGROUND

[2] Frederick Anderson was convicted of driving while having a blood alcohol content in excess of .08 contrary to section 253(1)(b) of the *Criminal Code*. He was sentenced to ninety days imprisonment, to be served intermittently, followed by two years probation. The trial judge also ordered a five year driving prohibition.

[3] For purposes of sentencing, the Crown gave Mr. Anderson notice of intention to seek a greater punishment by reason of four previous convictions he had for alcohol related driving offences (section 727(1) of the *Criminal Code*). For that number of convictions, section 255(1)(a)(iii) of the *Code* provides for a minimum sentence of not less than 120 days imprisonment.

[4] Prior to imposing sentence, based on Mr. Anderson's aboriginal status, the trial judge determined that the mandatory minimum sentence resulting from the combination of the above provisions contravened section 7 of the *Canadian Charter of Rights and Freedoms*, the right not to be deprived of liberty except in accordance with the principles of fundamental justice, and section 15(1) of the *Charter*, the right to equal treatment.

[5] Regarding section 7, the trial judge concluded that the decision to proceed with a notice under section 727 of the *Criminal Code* was not a core prosecutorial function and was, therefore, subject to review on a standard of "reasonableness", as set out in the trial division decision in *R. v. Gill*, 2011 ONSC 1145, 273 C.C.C. (3d) 308. Relying on that decision, the judge in this case concluded that the combination of the relevant *Criminal Code* provisions infringed Mr. Anderson's right not to be deprived of liberty except in accordance with the principles of fundamental justice. However, after the trial judge's decision in this case, the decision in *Gill* was appealed and the reasonableness standard applied by the trial judge was rejected (2012 ONCA 607, at paragraphs 82 and 83).

[6] The trial judge in this case also concluded that the mandatory minimum sentence was discriminatory on the basis of race contrary to section 15 of the *Charter* because the court was precluded from considering a sanction other than imprisonment for an aboriginal offender.

[7] The trial judge then concluded that the infringements of sections 7 and 15 were not saved by section 1. By way of remedy for the violation of section 15, he declared that, when the Crown relies on the section 727 notice requesting greater punishment, “the statutory scheme is of no force and effect as it applies to aboriginal offenders” (paragraph 47). As to section 7, the trial judge found “that supervision of the notice procedure is all that is required to address that breach” (paragraph 48). In other words, the Crown would be required to give adequate reasons for relying on the section 727 notice. This latter remedy the trial judge said would also have applied in the case of non-aboriginal offenders.

[8] The trial judge concluded that Mr. Anderson should be sentenced on the basis that the minimum sentence requirement under section 255 of the *Criminal Code* would not apply, and that sanctions alternative to imprisonment would be available. Nonetheless, he sentenced Mr. Anderson to ninety days imprisonment, to be served intermittently. This was thirty days less than the minimum specified in the *Code*.

ISSUES

[9] At issue in this appeal is whether the Crown, in exercising its discretion to request the mandatory minimum term of imprisonment, is required, by virtue of sections 7 and 15 of the *Charter*, to consider the offender’s aboriginal status.

ANALYSIS

[10] As a preliminary matter, counsel for the Crown sought leave to file a copy of the Crown’s written policy as to when discretion should be exercised to request the court to impose the mandatory minimum sentence pursuant to sections 255 and 727 of the *Criminal Code*. Counsel for Mr. Anderson agreed that the document was necessary for the appeal and that, indeed, he intended to rely on it. While the policy should have been entered as an exhibit at trial, in the circumstances, the Court granted the requested leave because the policy information was necessary for a proper consideration of the appeal.

[11] Unfortunately, the trial judge did not have the benefit of considering the alleged *Charter* infringements in the context of the Crown's written policy. Further, I agree with the Ontario Court of Appeal in *Gill* that reasonableness is not the appropriate standard to apply to the Crown's exercise of discretion in deciding to seek the mandatory minimum punishment. In the result, the trial judge erred in the analytical approach he applied. It is necessary, then, to conduct the analysis in light of the additional information and within the appropriate analytical framework.

Section 7 of the *Charter*

[12] Section 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Because a term of imprisonment engages the right to liberty, it may only be imposed in accordance with the principles of fundamental justice.

[13] Section 255(1) of the *Criminal Code* provides for minimum terms of imprisonment based on an individual's previous convictions for alcohol related driving offences:

Every one who commits an offence under section 253 or 254 [driving while impaired or with a blood alcohol level exceeding .08] is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

(a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

...

(ii) for a second offence, to imprisonment for not less than 30 days, and

(iii) for each subsequent offence, to imprisonment for not less than 120 days;

...

[14] If the Crown intends to seek the imposition of the minimum punishment set out in section 255, section 727(1) of the *Criminal Code* requires the prosecutor to serve notice on the accused:

Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

It is clear from the language of section 727 that the Crown has a discretion in deciding whether to serve the notice and whether, ultimately, to request the mandatory minimum sentence.

[15] In this case, Mr. Anderson was served with the appropriate notice and the mandatory minimum sentence was requested. In considering Mr. Anderson's allegation that to impose the mandatory minimum sentence would infringe his rights guaranteed under the *Charter*, the trial judge referred to section 718.2(e) of the *Criminal Code*. Under that section, aboriginal status, which applies to Mr. Anderson, is to be taken into account as a factor in sentencing:

A court that imposes a sentence shall also take into consideration the following principles:

...

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The effect of section 718.2(e), requiring the sentencing judge to pay "particular attention to the circumstances of aboriginal offenders", is consistent with the principles of fundamental justice as contemplated by section 7 of the *Charter*.

[16] Mr. Anderson has not alleged that mandatory minimum sentences in general infringe the right guaranteed by section 7. Rather, in his submission, it is the exercise of discretion by the Crown in choosing to rely on the operation of sections 255 and 727 of the *Criminal Code* that is the subject of the inquiry. In assessing Mr. Anderson's submission, I accept that the Crown's written policy serves as a guide, providing parameters for the exercise of that discretion. Such a guide is intended to reduce the possibility that the discretion would be exercised in a manner that may be inconsistent with the principles of fundamental justice.

[17] The policy directs the prosecutor to proceed with a request for greater punishment where section 255 applies, with the following exceptions. The first exception applies where the previous offences occurred, one within, and one more than five years from the date of the current offence:

However, Crown Attorneys may exercise discretion *not* to prove service of the notice where

- the accused has one previous conviction which has been recorded within five years before the date of the current offence and one previous conviction which has been recorded more than five years before the current offence, and
- punishment would likely result in an unduly harsh consequence under the circumstances.

Counsel shall nonetheless still prove the relevant criminal record. The intention of permitting this narrow discretion is to recognize that there may be rare instances in which it might be unduly harsh to require a third time offender to serve the mandatory minimum sentence of ninety days' imprisonment.

[18] The second exception applies where all the previous offences occurred more than five years before the current offence:

Crown Attorneys may exercise discretion not to prove service of the notice where the accused has previous convictions, all of which have been recorded more than five years before the current offence. Counsel, however, shall still prove the relevant criminal record.

[19] Mr. Anderson would fall within the latter category since his previous convictions all occurred more than five years before the current offence. In that circumstance, the policy provides additional guidelines for the exercise of the Crown's discretion:

In the situations involving discretion noted above, service of the notice should be considered in all cases, in light of all circumstances of the offence and the background and circumstances of the offender. Service of the notice will likely be appropriate if any of the following circumstances exist:

- the current offence involves a fatality, significant accident or personal injury caused by the accused;
- the degree of intoxication and the nature of operation of a motor vehicle, ... demonstrated a significantly enhanced risk of injury or property damage;

- the accused has already been incarcerated for a previous related offence;
- there is evidence that the concentration of alcohol in the blood of the offender at the time when the offence was committed exceeded one hundred and sixty milligrams of alcohol in one hundred milliliters of blood;
- during or after the commission of the current offence, the accused attempted to flee from the police; or
- the totality of the circumstances of the current offence suggests a need to protect the public by incarcerating the accused for at least the minimum period which would ordinarily follow proof of serving the notice.

In the exercise of discretion not to prove service of the notice to seek greater punishment, Crown Attorneys may weigh such factors as:

- the relative strength or weakness of the Crown's case if the matter proceeded to trial;
- any plea of guilt proffered; and
- any agreement with defence counsel in terms of submissions pertaining to the appropriate range of sentence.

Crown Attorneys, when exercising discretion not to prove service of the notice to seek greater punishment, must be careful to ensure that the reasons for the decision are stated in court. Where the criminal record disclosed only one prior conviction more than five years before, this task is not difficult. Other cases may require a more thorough explanation to the court.

(Emphasis added.)

[20] Mr. Anderson submits that the policy is deficient insofar as no reference is made to consideration of the offender's aboriginal status. Crown counsel responds that the policy clearly indicates that discretion is to be exercised in light of the background and circumstances of the offender, which, although not specifically stated, would include aboriginal status. In making his submissions, Mr. Anderson relied on the decision in *R. v. Gill*, 2012 ONCA 607, which discussed issues related to the nature of the Crown's prosecutorial discretion and the appropriate approach when considering an appeal against the exercise of that discretion. I begin with a discussion of the nature of the Crown's prosecutorial discretion before turning to the proper approach to an appeal.

[21] The operation of the Crown's prosecutorial discretion is discussed in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120. Binnie J., for the majority, quoting from the decision in *R. v. Beare*, [1988] 2 S.C.R. 387, explained:

[134] ... The *Criminal Code* provides enormous discretion to government officials and the police in matters that directly affect *Charter* rights, yet as La Forest J. pointed out at p. 411:

...

This Court has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice; see *R. v. Lyons*, [[1987] 2 S.C.R. 309], at p. 348; see also *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 303-4. The Court did add that if, in a particular case, it was established that a discretion was exercised for improper or arbitrary motives, a remedy under s. 24 of the *Charter* would lie, but no allegation of this kind had been made in the present case.

(Emphasis added.)

[22] In *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, Iacobucci and Major JJ., for the Court, discussed prosecutorial discretion in the context of an allegation of bad faith or dishonesty made against a Crown prosecutor for failure to disclose information to an accused. The Justices began with a review of the rationale underpinning prosecutorial discretion, commenting:

[32] The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process – rather than the conduct of litigants before the court – is beyond the legitimate reach of the court. ...

[23] The Court identified a non-exhaustive list of what are described as core prosecutorial functions. These include the discretion to bring a prosecution, to enter a stay of or withdraw from proceedings, to accept a guilty plea to a lesser charge, to proceed by way of indictment or summary conviction, and to appeal a decision (paragraphs 46 and 48). The Justices explained further:

[47] Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decision as to whether a prosecution

should be brought, continued or ceased, and what the prosecution ought to be for. *Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion.* Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

(Underlining in original. Italics added.)

[24] Further discussion of prosecutorial discretion is found in *R. v. Nixon*, 2011 SCC 34, [2011] S.C.R. 566. The issue in that case was the Crown's decision to resile from a plea agreement. Charron J., for the Court, explained:

[30] ... As aptly put by Paperny J.A., in determining whether any impugned decision falls within the core of prosecutorial discretion, it is useful to ask: "... is it a decision as to whether a prosecution should be brought, continued or ceased, and if so, what it should be for?" (para. 32). ... Prosecutorial discretion was not spent with the decision to initiate the proceedings, nor did it terminate with the plea agreement. So long as the proceedings are ongoing, the Crown may be required to make further decisions about whether the prosecution should be continued and, if so, in respect of what charges.

[25] A similar analysis may apply in limited circumstances in sentencing. The application of a mandatory minimum term of imprisonment, based on a section 727 notice relied upon at the discretion of the Crown, sets a floor in imposing sentence. The effect of constraints imposed on a trial judge in respect of sentencing is discussed in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206:

[45] The discretion of a sentencing judge is also constrained by statute, not only through the general sentencing principles and objectives enshrined in ss. 718 to 718.2 articulated above but also through the restricted availability of certain sanctions in the *Code*. ... Parliament has also seen fit to reduce the scope of available sanctions for certain offences through the enactment of mandatory minimum sentences. A relatively new phenomenon in Canadian law, the minimum sentence is a forceful expression of governmental policy in the area of criminal law. ... Absent a declaration of unconstitutionality, minimum sentences must be ordered where so provided in the *Code*. A judge's discretion does not extend so far as to override this clear statement of legislative intent.

[26] While the examples of core prosecutorial functions enumerated in *Krieger* relate to the prosecution of a charge, decisions as to sentencing may, depending on the nature of the issue, be encompassed within the same rationale and considered in an analogous way. In particular, the decision to rely on a notice requesting greater punishment, involving a mandatory minimum sentence, would fall within “what the prosecution ought to be for” and “decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it” (*Krieger*, at paragraph 47). A decision to seek a mandatory minimum sentence does not relate to tactics or conduct before the court which would be subject to the inherent jurisdiction of the court to control its own processes (paragraph 23, above).

[27] The above analysis leads to a different conclusion from that of the Court in *R. v. Gill, supra*, in which Doherty J.A., for the Court, took the position that:

[56] It seems to me that counsel for the appellant’s characterization of the prosecutor’s decision to prove the notice as an exercise of core prosecutorial powers is more a reflection of the nature of the impact of the decision on the accused rather than the nature of the decision itself. In almost any case, the prosecutor will have to decide what evidence to lead on sentence. This will include evidence of potentially aggravating factors. Some aggravating factors are specifically identified in the *Criminal Code*. For example, s. 718.2 identifies several circumstances that must be taken as aggravating if proved by the Crown. The Crown has a discretion as to whether to lead evidence of the facts referred to in s. 718.2 on sentencing. I do not think it could be argued that the prosecutor, in electing to prove a s. 718.2 aggravating factor, e.g. racial bias, was engaged in the exercise of a core element of prosecutorial discretion. The Crown’s decision to prove the notice is qualitatively no different than its decision to prove other aggravating factors on sentence. The nature of the decision does not change because the notice triggers a minimum penalty whereas proof of other aggravating factors does not. A decision to prove an aggravating fact on sentence, regardless of its impact on the range of available sentencing decisions, is a litigation decision made in the prosecutor’s exercise of his or her discretion concerning the conduct of the proceedings on behalf of the Crown.

[28] The underlying rationale in that analysis is that a decision to proceed with a request for a mandatory minimum sentence is simply a decision as to an aggravating factor and is no different from a decision with respect to any other aggravating factor. I do not agree. The Crown’s decision to seek a mandatory minimum sentence is analogous to choosing, for example, whether to proceed by indictment or summary conviction or to accept a guilty plea to a lesser charge. Those decisions, subject to proof by evidence,

provide the parameters within which the judge may act. A mandatory minimum sentence specified in the *Criminal Code* sets a floor. Aggravating factors, in general, do not have this effect. Rather, they provide information on which the judge exercises discretion in determining a fit sentence.

[29] However, whether the Crown's exercise of discretion to seek the mandatory minimum sentence constitutes a core prosecutorial function or not, the analytical framework for assessing an alleged infringement under section 7 of the *Charter* is the same. While the Court in *Krieger* concluded that core prosecutorial discretion is reviewable only on the basis of abuse of process, what constitutes abuse of process, as applied to the principles of fundamental justice, will depend on the context in which the issue arises. This principle is discussed in the subsequent decision in *Nixon*. Charron J. explained:

[35] Initially, the common law doctrine of abuse of process was viewed as analytically distinct from *Charter* considerations since its focus was more on maintaining confidence in the integrity of the judicial system than on protecting individual rights. The common law and *Charter* analyses were also kept separate because of the different burdens of proof to successfully make out an abuse of process claim under the two regimes. For an applicant to establish a violation under the *Charter*, the burden of proof was the balance of probabilities standard. For an applicant to successfully invoke the court's common law power to stay proceedings for abuse of process, the burden of proof was the more onerous "clearest of cases" standard.

[36] Ten years later in *R. v. O'Connor*, [1995] 4 S.C.R. 411, the Court noted that there was much overlap between the *Charter* and the common law doctrine of abuse of process, as the latter had found application in circumstances involving state conduct touching upon both "the integrity of the judicial system and the fairness of the individual accused's trial" (para. 73). Consequently, L'Heureux-Dubé J., writing for a unanimous Court on this point, held that the two regimes should be merged under s. 7 of the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged by the alleged abuse of process and thus some claims may be better addressed by reference to the specific procedural guarantee. For example, "where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b)" (para. 73). The Court identified two categories of abuse of process which would be caught by s. 7 of the *Charter*: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (para. 73).

(Emphasis added.)

[30] In *Gill*, after determining that a request for imposition of a mandatory minimum sentence is not a core prosecutorial function, Doherty J.A. proceeded to consider relevant constituent elements of the principles of fundamental justice:

[59] ... The applicable principles of fundamental justice will depend on the context. A prosecutor's decision to prove the notice will run contrary to these principles of fundamental justice and, therefore, violate an accused's s. 7 rights if it:

- undermines the integrity of the administration of justice;
- operates in a manner that renders the sentencing proceedings fundamentally unfair;
- is arbitrary; or
- results in a limit on the accused's liberty that is grossly disproportionate to the state interest in proving the notice.

[31] While, contrary to the decision in *Gill*, I am satisfied that a request for imposition of a mandatory minimum sentence is a core prosecutorial function, the above criteria set out in *Gill* provide an appropriate analytical framework for considering whether the Crown's discretion was exercised in accordance with the principles of fundamental justice as required under section 7 of the *Charter*. The criteria identified in *Gill* are consistent with the analysis set out in *Nixon* (paragraph 29, above). Regarding the question of arbitrariness, Doherty J.A. commented:

[64] Arbitrariness, a well recognized principle of fundamental justice, also applies to the exercise of prosecutorial discretion: see *PHS Community Services Society* [2011 SCC 44, [2011] 3 S.C.R. 134], at paras. 126-132. A decision will be arbitrary and contrary to the principles of fundamental justice if the decision bears no relationship to the objective of the relevant legislation: *Canada (A.G.) v. Bedford*, 2012 ONCA 186, 109 O.R. (3d) 1, at paras. 143-147. ...

[65] The objective of the sentencing regime established under s. 255 is obvious. The mandatory minimum jail terms for second and subsequent drinking and driving offences speak to Parliament's resolve to reflect the community's denunciation of conduct that is both inherently dangerous and one of Canada's most pressing social problems. The statutory regime further demonstrates Parliament's determination to deter the repetition of that conduct by the promise of certain incarceration.

[32] In this case, Mr. Anderson submits that, in the circumstances, to comply with the principles of fundamental justice, his aboriginal status must be factored into the Crown's decision to exercise its discretion to seek a mandatory minimum sentence. He points to Parliament's policy on sentencing evidenced by section 718.2(e) of the *Criminal Code* and the analytical approach endorsed by the Supreme Court of Canada, particularly in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; and *R. v. Gladue*, [1999] 1 S.C.R. 688.

[33] The importance of giving effect to section 718.2(e) of the *Code* is discussed in *Ipeelee*. While the analysis was directed to the duty of sentencing judges, when the *Criminal Code* grants the Crown discretion which will have the effect of limiting the judge's options in determining a fit sentence, the considerations set out in *Ipeelee* have application, by extension, to the Crown.

[34] In *Ipeelee*, LeBel J. reiterated the rationale for the requirement to consider an offender's aboriginal status:

[60] ... To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. ...

(Italics in original.)

[35] LeBel J. commented on the purpose of section 718.2(e) and the methodology set out in *Gladue*, summarizing:

[72] ... The methodology set out by this Court in *Gladue* is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. *Gladue* directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

[36] This approach to the Crown's responsibility in the exercise of its discretion to rely on a section 727 notice is consistent with the principles of fundamental justice under section 7 of the *Charter*. As noted above, those principles will be infringed if the Crown's decision to rely on the section 727 notice "operates in a manner that renders the sentencing proceedings fundamentally unfair" (*Gill*, at paragraph 59). To avoid such fundamental unfairness, applying the principles discussed in *Ipeelee* and *Gladue*, it is necessary for the Crown to consider the offender's aboriginal status in determining whether to request a mandatory minimum sentence of imprisonment.

[37] Including reference to consideration of the offender's aboriginal status in the policy guidelines, which establish the parameters for exercise of the Crown's discretion, would have the effect of assuring the court and the offender, in the absence of evidence to the contrary, that this important factor has been taken into account. As stated by Doherty J.A. in *Gill*:

[76] I do not mean to suggest that the prosecutor may never be required to explain its decision to prove the notice. If the accused, who carries the burden of persuasion on a s. 7 application, leads evidence of a violation of s. 7, the Crown must respond to that evidence. In doing so, it may be necessary to offer an explanation for its decision to prove the notice or face an adverse finding based on the evidence offered by the accused.

[77] I also do not intend to discourage the prosecutor from offering an explanation for its decision to prove the notice in those cases where that decision is not self-evident. By offering an explanation, the prosecutor clearly enhances the transparency of his or her decision making process and, hence, the fairness of the proceeding. Those positive consequences are a good reason for the prosecutor to offer an explanation. Those consequences do not, however, justify the conclusion that an explanation is constitutionally demanded by the *Charter*. In my view, the prosecutor is under no constitutional obligation to give reasons for the decision to prove the notice.

[38] In the case now before this Court, I accept that the language of the policy is sufficiently broad to permit the prosecutor to consider the offender's aboriginal status, along with any other of the offender's circumstances, including his background. However, the absence of specific reference to that factor in the policy, considered in light of the comments in *Ipeelee* and *Gladue* as to its importance, will, in the absence of an explanation by the Crown, result in an inference that the offender's aboriginal status was not taken into account.

[39] In Mr. Anderson's case, counsel indicated that, applying the criteria set out in the written policy, the factor relied upon by the Crown was that "the accused has already been incarcerated for a previous related offence". There was no evidence that his blood alcohol content at the time of the offence exceeded 160. Rather, his reading was 120. No motor vehicle accident or injury was caused. Rather, he was stopped after the police officer concluded that Mr. Anderson was traveling at 59 kilometers an hour in a 40 kilometer an hour zone. Mr. Anderson's convictions for a related offence occurred in May 1988, January 1991, February 1996 and April 1997. For the last two offences he was sentenced to sixty days and six months imprisonment, respectively. The offence on June 9, 2009, occurred more than twelve years after his most recent previous offence.

[40] In the absence of an explanation by the Crown, the inference follows that Mr. Anderson's aboriginal status was not taken into account when the determination was made to seek the mandatory minimum sentence. In the circumstances, applying the principles set out in *Ipeelee* and *Gladue*, it cannot be said that the Crown's decision to request a mandatory minimum term of imprisonment complied with the principles of fundamental justice in accordance with section 7 of the *Charter*.

[41] The conclusion follows that, while the trial judge erred in the analytical approach that he applied, he did not err in concluding that Mr. Anderson's right under section 7 of the *Charter* had been infringed. In sentencing Mr. Anderson to a term of imprisonment to be served intermittently, the trial judge clearly took into account Mr. Anderson's aboriginal status. That sentence has been served and was not appealed by Mr. Anderson.

Section 15 of the *Charter*

[42] While comment on section 15 of the *Charter* is unnecessary for purposes of this appeal, the following is provided insofar as it may be useful in assessing an allegation under this provision in similar circumstances. Section 15(1) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, ...

[43] As stated in *Ipeelee* (paragraph 34, above), an offender's aboriginal status will "not necessarily justify a different sentence for Aboriginal offenders". Rather, it provides "the necessary *context* for understanding and evaluating the case-specific information presented by counsel". It follows that, provided the offender's aboriginal status is factored into the Crown's discretion, as required to meet the principles of fundamental justice under section 7 of the *Charter*, section 15 will not be engaged.

SUMMARY AND DISPOSITION

[44] In summary, pursuant to section 7 of the *Charter*, the Crown must comply with the principles of fundamental justice in exercising its discretion to seek a mandatory minimum term of imprisonment under section 255 of the *Criminal Code*. Those principles require the Crown to take into account the aboriginal status of an offender. While the trial judge erred in the analytical approach he applied, he did not err in concluding that the Crown, in exercising its discretion to seek the mandatory minimum sentence, failed to take account of Mr. Anderson's aboriginal status. Accordingly, the appeal is dismissed.

B. G. Welsh J.A.

Green C.J.N.L. and Rowe J.A.:

[45] We agree with our colleague Welsh J.A. that this appeal should be dismissed.

[46] Unlike our colleague, however, we are of the view that a decision by the Crown to serve a notice under s. 727(1) of the *Criminal Code* seeking imposition of the minimum punishment required by s. 255, is not a "core prosecutorial function" as that term is understood in *Krieger* and subsequent Supreme Court of Canada jurisprudence.

[47] In concluding that this type of decision does not involve a core prosecutorial function, we accept and rely on the reasoning of Doherty J.A. in *Gill* and, in particular, the following:

[37] There is nothing unique about the discretion given to the prosecutor where Parliament chooses to impose minimum penalties for second and subsequent offences. Prosecutorial discretion is an essential feature of the criminal justice system: *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 410. Parliament has chosen to impose greater penalties where a variety of aggravating factors exist. If an aggravating factor is not an essential element of the offence, it will inevitably fall to the Crown to decide whether it will choose to lead evidence to prove the aggravating factor and trigger the sentencing consequences prescribed by Parliament...

...

[54] ... Core prosecutorial decisions are those that are fundamental to the nature, commencement or continuation of the prosecution. Decisions that are made in the course of an ongoing proceeding and address the kinds of tactical issues that routinely arise in litigation are not part of the core prosecutorial discretion.

[55] Prosecutors, like all litigators, exercise discretion in a myriad of ways during a proceeding. Matters affected by the exercise of that discretion range from the mundane to the tactically crucial. In the exercise of what I would refer to as the prosecutor's litigation discretion, prosecutors routinely decide what evidence will be adduced in support of the Crown's position on sentence. In doing so, prosecutors are not making decisions regarding "the nature and extent of the prosecution and the Attorney General's participation in it": see *Krieger*, at para. 47. Rather, prosecutors are deciding how to put their case forward on sentence. Like the trial judge, at paras. 38-39 of his reasons, I would not characterize the decision to prove the notice as akin to a decision to commence, continue or cease a prosecution. Nor does the decision to prove the notice impact on any of those core prosecutorial responsibilities.

[56] It seems to me that counsel for the appellant's characterization of the prosecutor's decision to prove the notice as an exercise of core prosecutorial powers is more a reflection of the nature of the impact of the decision on the accused rather than the nature of the decision itself. In almost any case, the prosecutor will have to decide what evidence to lead on sentence. This will include evidence of potentially aggravating factors. Some aggravating factors are specifically identified in the [Criminal Code](#). For example, [s. 718.2](#) identifies several circumstances that must be taken as aggravating if proved by the Crown. The Crown has a discretion as to whether to lead evidence of the facts referred to in [s. 718.2](#) on sentencing. I do not think it could be argued that the prosecutor, in electing to prove a [s. 718.2](#) aggravating factor, e.g. racial bias, was engaged in the exercise of a core element of prosecutorial discretion. The Crown's decision to prove the notice is qualitatively no different than its decision to prove other aggravating factors on sentence. The nature of the decision does not change because the notice triggers a minimum penalty whereas proof of other aggravating

factors does not. A decision to prove an aggravating factor on sentence, regardless of its impact on the range of sentencing decisions, is a litigation decision made in the prosecutor's exercise of his or her discretion concerning the conduct of the proceedings on behalf of the Crown.

[48] While it is true, as our colleague points out at paragraph 28 of her reasons for decision, that the proof of most aggravating factors on sentencing does not have the effect of triggering the imposition of a mandatory minimum sentence, that does not differentiate, on a principled basis, the decision to prove a notice seeking a higher penalty from other decisions to prove other aggravating factors. The result may be different, or even more drastic, but that is simply the result of the sentencing scheme legislated by Parliament. That different result is no answer to Doherty J.A.'s observation in paragraph 56, above, that the prosecutor's decision to prove the notice is "more a reflection of the nature of the impact of the decision on the accused rather than the nature of the decision itself." In the end, it is simply a decision as to how to present evidence on sentence that will have an effect on the sentencing result. It is not, in the words of Iacobucci and Major JJ. in *Krieger*, a decision "regarding the nature and extent of the prosecution and the Attorney General's participation in it."

[49] In addition to the foregoing analysis, we would offer a further policy rationale in support of the position enunciated by Doherty J.A. The standard of review for actions taken within a core prosecutorial function is abuse of process (in the sense of "bad faith", "flagrant impropriety", "prosecutorial misconduct" or "improper motive": *Nixon*, paras. 64, 68). For actions by a prosecutor outside a core prosecutorial function, the standard of review is wider: surrounding the concept of abuse of process (i.e., unfairness of the proceedings and undermining the integrity of the administration of justice) is a penumbra consisting of notions of "arbitrariness" and "gross disproportionality" of a limit on the accused's liberty to the state's interest in proving the notice (*Gill*, paras. 58, 59). From the jurisprudence, it is clear that abuse of power is the narrower, more rigorous standard. Thus, an action taken or decision made by a prosecutor may, for example, be arbitrary, but not an abuse of power.

[50] While it is therefore settled law that some actions taken in an arbitrary way are beyond judicial review (e.g. the decision to prosecute because it amounts to a core prosecutorial function), it is difficult to countenance expanding the range of such actions. Thus, it is better not to add to the scope of core prosecutorial functions, as doing so would increase those

situations in which prosecutors can act in an arbitrary way without review by the courts.

[51] This difference of view as to whether the giving of a notice under s. 727 is a core prosecutorial function does not, of course, affect the result. We are nevertheless in agreement with our colleague, in the factual circumstances of this case and for the reasons enunciated by her in paras. 30 to 41 of her decision, that the Crown's decision to request a mandatory minimum term of imprisonment did not, in the circumstances of this case, comply with the principles of fundamental justice in accordance with section 7 of the *Charter*. We therefore agree with the summary and disposition in paragraph 44 of our colleague's reasons.

J. D. Green C.J.N.L.

M. H. Rowe J.A.