S.C.C. NO: 35246

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

FREDERICK ANDERSON

RESPONDENT

RESPONDENT'S FACTUM

IAIN R. W.L HOLLETT
Special Prosecutions Office
4th Floor, Atlantic Place
215 Water Street
St. John's, NL
A1C 6C9

Telephone: (709) 729-4229
Facsimile: (709) 729-1135
E-mail IAINHOLLETT@gov.nl.ca

Counsel for the Appellant

ROBERT HOUSTON
Burke-Robertson
70 Glouchester Street
Ottawa, ON
K1A 0A2

Telephone: (613) 236-9665
Facsimile: (613) 567-4689
E-mail: RHouston@burkerrobertson.com

Ottawa Agent for Counsel for the Appellant

DEREK HOGAN
Suite 300
251 Empire Avenue
St. John's, NL
A1C 3H9

Telephone: (709) 753-7860
Facsimile: (709) 753-0026
E-mail: derekhogan@legalaid.nl.ca

Counsel for the Respondent

HAROLD GELLER
McBride Bond Christian LLP
100-85 Plymouth St
Ottawa, ON
K1S 3E2

Telephone: (613) 233-4474 ext. 290
Facsimile: (613) 233-8868
E-mail: hgeller@doucetmcbride.com

Ottawa Agent for Counsel for the Respondent

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PART I – OVERVIEW AND FACTS

Overview

1. The respondent's principal argument is that consideration of aboriginal status in sentencing is a principle of fundamental justice protecting his liberty under s. 7 of the *Canadian Charter of Rights and Freedoms*. The crown's failure to consider aboriginal status in its policy on whether to prove notice mandating a minimum prison term for impaired driving offenses ("notice") violates this principle of fundamental justice and therefore constitutes a flagrant impropriety and an abuse of process in breach of s. 7, despite the absence of bad faith by the crown – see *R. v. Keyowski* [1988] 1 S.C.R. 657 at p. 659, para 3 Respondent's Book of Authorities Tab 9 [hereinafter RBA], *R. v. O'Connor* [1995] 4 S.C.R. 411 at p. 467, para 79 Appellant's Book of Authorities Tab 29 [hereinafter ABA] and *R. v. Nixon* [2011] 2 S.C.R. 566 at p. 589, para 40 ABA Tab 28 ruling that evidence of misconduct or improper motive by the crown is not necessary to establish abuse of process. In the alternative, the respondent will argue that the crown's discretion may be reviewed on a lower standard of abuse of process because proof of notice is not a core prosecutorial function.

2. While an applicant must establish a *Charter* breach and a remedy under s. 24 on the balance of probabilities, the burden of proof may shift to the crown because some issues are within its "peculiar knowledge" and because the crown is "functionally responsible for the maintenance of the administration of justice" - see *R. v. Bartle* [1994] 3 S.C.R. 173 at para 51 RBA Tab 7 addressing the burden of proof under s. 24(2) of the *Charter* and quoting *The Law of Evidence in Canada*, Sopinka Lederman and Bryant at p. 397. Similarly, the crown bears the burden to establish that a warrantless search complies with s. 8 of the *Charter* because the grounds for the search are within the peculiar knowledge of the crown *R. v. Collins* [1987] 1 S.C.R. 265 at p. 278 ABA Tab 10; and in *Nixon* at para 60, Charron J. ruled for the court that "evidence that a plea agreement has been entered into and subsequently reneged by the crown meets the requisite threshold"

for a review of crown discretion under s. 7 of the *Charter*. Moreover, in *R. v Gladue* [1999] 1 S.C.R. 688 at p. 724, para 66 ABA Tab 18 and in *R. v.* Ipeelee [2012] 1 S.C.R. 13 at para 59 ABA Tab 19, this court ruled that the circumstances of aboriginal offenders are unique and that sentence procedures and sanctions must address these unique circumstances. These "Gladue factors" apply to "all decision makers who have the power to influence the treatment of aboriginal offenders in the justice system." *United States v. Leonard* 2012 ONCA 622 at para 85 RBA Tab 13. Hence, the crown has a legal duty to consider aboriginal status in sentencing.

3. In this case, the crown tendered a policy that omitted aboriginal status as a factor in whether to prove notice mandating a minimum prison term for impaired driving offenses. Because this issue was within the crown's "peculiar knowledge", and because consideration of aboriginal status qualified as a principle of fundamental justice in sentencing, the omission of aboriginal status in the policy passed the threshold for judicial review. The crown's response at the Court of Appeal was that its policy permitted discretion to be exercised "in light of the background and circumstances of the offender" (Decision of Welsh J.A., Appellant's Record, Tab 4, p. 33, para 20), which would include aboriginals. However, this response fails to ensure a rational and consistent approach by any prosecutor, much less by prosecutors generally across the province, in deciding whether to prove notice mandating minimum prison terms for aboriginal offenders. On the contrary, it invites an arbitrary approach.

4. For these reasons, the respondent will argue that this court should affirm the decision of the trial judge and of the Court of Appeal to set aside the notice and to impose a 90 day intermittent prison term. However, this court may prefer a remedy under s. 24(1) of the *Charter* rather than under s. 52(1) of the *Constitution Act, 1982* because the flawed crown policy moves the breach of s. 7 into the realm of "government acts" and the cure for the breach may require a change to crown policy, not to legislation. *R. v. Ferguson* [2008] 1 S.C.R. 96 at pp. 122 – 126,

paras 58 – 66 ABA Tab 15. Moreover, the breach of s. 7 satisfies the test under s. 24(1) – see *R. v. Nasogaluak* [2010] 1 S.C.R. 206 at p. 214, para 6 & p. 246, para 64 ABA Tab 26. The flawed crown policy constitutes a particularly egregious government act because it violates a principle of fundamental justice – that aboriginal status must be considered in sentencing.

Facts

5. The respondent accepts the appellant's summary of the facts in its factum as accurate except for one point: per p. 5, para 25, "Welsh J.A. held that the decision to tender s. 727 Notice was a 'core prosecutorial function' that could be reviewed under s. 7 of the *Charter* <u>despite there being no allegation of abuse of process</u>." (underlining added). While the respondent did not allege bad faith by the crown, he argued at the Court of Appeal that the crown's policy breached s. 7 of the *Charter* because it violated a principle of fundamental justice. Welsh J.A. agreed and therefore found an abuse of process – see her decision Appellant's Record, Tab 4, p. 34, para 22, p. 37, para 29, p. 38, para 31, & p. 41, para 40.

PART II – QUESTIONS IN ISSUE

6. As stated by the appellant, these are:

Issue I – Onus of Proof for a *Charter* violation

7. Did the Newfoundland and Labrador Court of Appeal err in law by inferring arbitrariness in the exercise of prosecutorial discretion because the Crown did not explain the reasons for the decision to tender the s. 727 Notice?

8. Did the Newfoundland and Labrador Court of Appeal err in law by reversing the onus of proof for a *Charter* violation?

Issue II – Standard of review of prosecutorial discretion

9. Did the Newfoundland and Labrador Court of Appeal err in law in its interpretation of the applicable standard for reviewing the exercise of prosecutorial discretion by applying a standard other than abuse of process?

10. Did the Newfoundland and Labrador Court of Appeal err in law in its interpretation and application of this Honourable Court's decision in *Krieger v. The Law Society of Alberta* 2002 SCC 65 by determining that tendering the s. 727 Notice was not a core prosecutorial function?

Issue III – Mandatory minimum sentences, s. 718.2(e) of the *Criminal Code* and the *Charter*

11. Did the Newfoundland and Labrador Court of Appeal err in law in its interpretation and application of s. 718.2(e) of the *Criminal Code*?

12. Did the Newfoundland and Labrador Court of Appeal err in law in its application of this Honourable Court's decision in *R. v. Nasogaluak*, 2010 SCC 6?

PART III – STATEMENT OF ARGUMENT

Issue I – Onus of Proof for a Charter Violation

13. In arguing that the Court of Appeal effectively reversed the onus of proof for a *Charter* breach, the appellant relies in part on *MacKay v. Manitoba* [1989] 2 S.C.R. 357 at p. 366 ABA Tab 2 and *Ref. re Same-Sex Marriage* 2004 SCC 79 at para 51 ABA Tab 41 to the effect that *Charter* violations "require a proper factual basis" and they "should not be considered in a factual vacuum." Appellant's Factum, p. 9, para 44. However, the respondent's aboriginal status provides a factual basis. In addressing sentencing for aboriginal offenders in accordance with s. 718.2(e) of the *Criminal Code,* this court stated in *Galdue* at p. 731, para 83 that: "In all instances it will be necessary for the judge to take judicial notice of the systematic or background factors and the approach to sentencing which is relevant to aboriginal offenders." The court added at p. 734, para 88 that: "… it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by Aboriginal peoples within the criminal justice system." In *Ipeelee,* LeBel J. stated for the majority at para 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." It is on this factual basis that a court can decide whether the crown's policy breaches s. 7 of the *Charter* by omitting aboriginal status as a factor in whether to prove notice mandating a minimum prison term for impaired driving offenses.

14. The appellant further argues that, before the court may review crown discretion, "the accused bears the burden of making a tenable allegation of *mala fides* on the part of crown which must be supported by the record" quoting *R. v. Durrette* 1992 CarswellOnt 955 (C.A.) at para 39 ABA Tab 13, reversed on other grounds

[1994] 1 S.C.R. 469 and citing *E. v. E.* (*L.*) 1994 CarswellOnt 215 (C.A.) at para 27 ABA Tab 14. Appellant's Factum, p. 10 – 11, para 50. However, this court ruled in *Keyowski*, at p. 659, para 3, *O'Connor* at p. 467, para 79, and *Nixon* at p. 589, para 40 that evidence of misconduct or improper motive by the crown is not necessary to establish abuse of process as a basis for a review of crown discretion; and the Ontario Court of Appeal ruled in *E.* (*L.*) at para 27 that the court may review crown discretion if it has been exercised arbitrarily – "I would think that there would have to be some showing before the trial judge that the crown had exercised its discretion arbitrarily, capriciously, or for some improper motive so as to invite examination as to whether there was an abuse of process under s. 7 of the *Charter*." (underlining added) To the same effect, Doherty J.A. ruled for the court in *R. v. Gill* 2012 ONCA 607 at para 67 ABA Tab 17 that: "Arbitrariness, a well-recognized principle of fundamental justice, also applies to the exercise of prosecutorial discretion" and that, in this respect, the crown policy on whether to prove notice mandating a minimum prison term for an impaired driving offense was relevant to the "arbitrariness inquiry under s. 7." (see para 67). Doherty J.A. cited *PHS Community Services Society v. Canada* (*Attorney General*) [2011] 3 S.C.R. 134 at paras 126 – 132 RBA Tab 5 and added at para 67 that: "A decision by an individual prosecutor that bears no relationship to the objectives underlying the policy… would, in my view, be arbitrary and contrary to the principles of fundamental justice."

15. In the case at bar, the crown did not file its policy in the hearing before English P.C.J. and, therefore, he had no means to assess the mandatory minimum sentence in relation to the objectives underlying the policy. At the Court of Appeal, the crown filed a policy that omitted consideration of aboriginal status in its decision on whether to prove notice, a consideration that, the respondent will argue, is itself a principle of fundamental justice in light of "the staggering injustice currently experienced by Aboriginal peoples within the criminal justice system." *Galdue* at p. 731, para 83. Therefore, the omission of aboriginal status provides the necessary threshold to review the exercise of crown discretion. The

appellant's response – that the wording in the policy is wide enough to include aboriginal status – does not establish that its discretion will be applied rationally and consistently to aboriginals in the province. Instead, the discretion is so broad as to be "unrestrained or unprincipled" *R. v. Singh* 2012 ONSC 30 at para 188 ABA Tab 37. There are no criteria by which to asses compliance by a crown prosecutor with the appellant's stated goal. In failing to distinguish between aboriginals and other offenders, the crown's policy can also be faulted for "overbreadth", a principle of fundamental justice that is related to arbitrariness *Canada* (*Attorney General*) v. *Bedford* 2013 SCC 72 at paras 112 – 119 RBA Tab 1. Hence, the Court of Appeal properly inferred arbitrariness and did not reverse the onus of proof for a *Charter* violation.

Issue II – Standard of Review of Prosecutorial Discretion

16. The importance of prosecutorial discretion is well established and any standard for judicial review of this discretion must be onerous. The respondent submits that the standard Welsh J.A. adopted in her concurring judgment respects these principles as it shows considerable deference to prosecutorial discretion by setting a high threshold for review – that the conduct of the crown must violate a principle of fundamental justice. This standard overlaps the standard for abuse of process and can apply to all conduct by the crown, whether part of its core functions or of its tactics. In the alternative, if this court finds that that Welsh J.A.'s standard cannot equate with a strict application of abuse of process, the respondent submits that proof of notice is not a core prosecutorial function and that the standard for judicial review that Green C.J. and Rowe J.A. adopted for the majority should apply.

Abuse of Process

17. In ruling that the crown's decision to prove notice under s. 727(1) of the *Criminal Code* was not a core prosecutorial function in this case and could be reviewed on

a "reasonableness standard", English P.C.J. adopted the reasoning of Kiteley J. in *R. v. Gill* 2011 ONSC 1145 – see Appellant's Record, Tab 2, p. 9 – 10, paras 22 – 25. In the crown appeal of *Gill* to the Ontario Court of Appeal, Doherty J.A. for the court agreed that the decision to prove notice concerned crown tactics rather than a core prosecutorial function – see *Gill* at paras 54 – 56. However, he rejected the "reasonableness standard" of review as "unsupported in the case law, inconsistent with the recognized standards of review under s. 7 [of the *Charter*], and incompatible with the recognized roles of the prosecutor and the trial judge." (para 83). One could add that, since reasonable people can disagree, the "reasonableness standard" can be no standard at all.

18. Doherty J.A. ruled at para 59 that a crown's decision to prove notice would be reviewed when it breaches the "principles of fundamental justice, and, therefore, violates an accused's s. 7 rights" and the decision:

> - 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.

19. In moving the standard for review of crown tactics to higher ground, Doherty J.A. staked out a clear boundary between his standard and the "reasonableness standard" – the crown conduct must be arbitrary, not simply unreasonable per *PHS Community Services Society* at paras 126 – 132. However, the boundary is not clear between his standard and the ostensibly more onerous standard for abuse of process to review a core prosecutorial function – either standard may be invoked if the crown conduct deprives the acccused's liberty in violation of a principle of fundamental justice. As LeBel J. stated for the majority in *R. v. Regan* [2002] 1 S.C.R. 297 at p. 327, para 51 ABA Tab 33: "Under the *Charter*, the

violation of specific fair trial rights may also constitute an abuse of process, as will a breach of the more general right to fundamental justice (see *O'Connor*, at para 73)." Moreover, a violation of a principle of fundamental justice is always egregious. In reviewing the decision of the federal minister to order the extradition of two aboriginals, Sharpe J.A. at para 56 in *Leonard* quoted *United States v. Burns* [2001] 1 S.C.R. 283 at para 68 RBA Tab 12: "The rule is <u>not</u> that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will <u>always</u> shock the conscience." (underlining in original). Hence, there is not a hierarchy on top of a hierarchy - that the court must not only establish that a principle is of fundamental justice, not simply of justice, it then must decide that the principle is so fundamental that its violation would undermine the integrity of the administration justice. Instead, as Welsh J.A. ruled in her concurring judgment by quoting Charron J. in *Nixon* at para 36, who cited *O'Connor*, an abuse of process includes "prosecutorial conduct that 'contravenes fundamental notions of justice and thus undermines the integrity of the judicial process'" Appellant's Record, Tab 4, p. 37, para 29.

20. In these respects – per *Regan* at para 51, *Burns* at para 68, and *Nixon* at para 36 - Doherty J.A.'s standard for review of crown tactics based on a violation of a principle of fundamental justice is indistinguishable from the standard for abuse of process. Moreover, this court has long held that arbitrary conduct by the crown can constitute an abuse of process (*R.* v. *Beare* [1988] 2 S.C.R. 387 at p. 411 ABA Tab 5), another factor that Doherty J.A.'s standard applies to a review of crown tactics.

21. Review of prosecutorial discretion based on a violation of a principle of fundamental justice is a stringent standard. "Claimants whose life, liberty or security of the person is put at risk are entitled to relief only to the extent that their complaint arises from a breach of an identifiable principle of fundamental justice. *The real control over the scope and operation of s. 7 is to be found in the*

requirement that the applicant identify a violation of a principle of fundamental justice." *Chaoulli c. Quebec* (*Procureur general*) [2005] 1 S.C.R. 791 at para 199 per Binnie, LeBel JJ. dissenting in the result RBA Tab 2 (italics in original). The principle of justice must be fundamental. In *Bedford*, McLachlin C.J. stated for the court at para 96 that "the principles of fundamental justice are about the basic values underpinning our constitutional order" and the "s. 7 analysis is concerned with capturing inherently bad laws: that is laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values." In this case, the respondent is not attacking the law per s. 255(1)(a) – s. 727(1) of the *Criminal Code.* Instead, the respondent argues that the crown's policy for proving notice under s. 727(1) is "inherently bad" as it "runs afoul of our basic values" by omitting aboriginal status as a consideration. Since the crown's policy puts the respondent's liberty at risk (see *Gill* at paras 38 & 67), the question is whether consideration of aboriginal status in sentencing is a principle of fundamental justice.

22. In *R. v. B.* (*D.*) [2008] 2 S.C.R. 3 RBA Tab 6, Abella J. for the majority at para 46 listed three criteria for assessing whether a principle qualified as principle of fundamental justice under s. 7 of the *Charter*. These are:

1. It must be a legal principle.

2. There must be consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.

3. It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

The respondent shall address each of these criteria.

23. Legal Principle – s. 718.2(e) of the *Criminal Code* mandates that "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." (underlining added). This section, as interpreted in *Gladue*, applies to the crown no less than to the court. *Leonard* at para 85 per Sharpe J.A. Hence, consideration of aboriginal status in the crown's policy is a legal principle.

24. Consensus that Principle Fundamental – In *Gladue*, Cory and Iacobucci JJ. stated for the court at p. 707, para 34 that s. 718.2(e) "creates a judicial duty to give its remedial purpose real force." Some thirteen years later, LeBel J. stated for the majority in *Ipeelee* at para 75:

> Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavor to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

To similar effect, Arbour J. stated for the court in *R. v. W.* (*L.W.*) [2000] 1 S.C.R. 455 at para 21 RBA Tab 11 that "[i]t is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case. *R. v. M.* (*C.A.*) [1996] 1 S.C.R. 500 at para 92 per Lamer C.J.; *R. v. Gladue* [1999] 1 S.C.R. 688 at para 93 per Cory and Iacobucci JJ." The omission of aboriginal status in sentencing breaches the fundamental duty to consider the unique circumstances of aboriginals.

25. LeBel J. stated in *Ipeelee* at para 36 that "proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*." He added at para 73 that the failure to take into account the circumstances of aboriginals "would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offense *and the degree of responsibility of the offender."* (italics in original). Hence, a consideration of aboriginal status in sentencing engages two principles of fundamental justice – that sentencing must be individualized and proportionate. Moreover, this court recognized in *Gladue* that aboriginals were victims of "widespread racism" and of "systematic discrimination in the criminal justice system." (see p. 721, para 61 quoting *R. v. Williams* [1998] 1 S.C.R. 1128 at para 58) and the courts should "ensure that they are not contributing to ongoing systematic racial discrimination" against aboriginals *Ipeelee* at para 67. A policy that omits aboriginal status in sentencing perpetuates this pre-existing disadvantage and denies the right of aboriginals to equality before the law. *Law v. Canada* (*Minister of Employment and Immigration* [1999] 1 S.C.R. 497 at para 63 RBA Tab 4. For these reasons, the respondent submits that there is a consensus that consideration of aboriginal status is fundamental to fairness in sentencing.

26. Manageable Standard – The application of the so called "Gladue principles" has been problematic and *Ipeelee* can be seen as a rebuke to lower court decisions which had, in part, nullified these principles. Nonetheless, *Gladue* and *Ipeelee*, in mandating the application of these principles, implicitly found that they embody a manageable standard.

27. For these reasons, the respondent submits that Welsh J.A. committed no error in ruling that the crown was required to consider aboriginal status before seeking a mandatory minimum sentence for an impaired driving offense; and that the failure to do so rendered the sentencing proceeding fundamentally unfair and in breach of s. 7 of the *Charter*. (see Appellant's Record, Tab 4, p. 40, para 36 – p. 41, para

41). The appellant argues that prosecutorial discretion cannot be reviewed "on a standard less than abuse of process in the sense of 'bad faith', 'flagrant impropriety', 'prosecutorial misconduct' or 'improper motive'…" Appellant's Factum, p. 18, para 79. Green C.J. and Rowe J.A. for the majority in the Court of Appeal adopted these criteria for abuse of process. Appellant's Record, Tab 4, p. 44, para 49 However, a violation of a principle of fundamental justice "will always shock the conscience" (*Burns* at para 68) and therefore may be seen as a flagrant impropriety; and, as stated, evidence of misconduct or improper motive by the crown is not necessary to establish abuse of process. *Keyowski* at p. 659, para 3, *O'Connor* at p. 467, para 79, and *Nixon* at p. 589, para 40. Although Iacobucci and Major JJ. ruled in *Krieger v. The Law Society of Alberta* [2002] 3 S.C.R. 372 ABA Tab 1 that prosecutorial discretion could be reviewed where there was evidence of "bad faith or dishonesty" (see p. 383, para 17), this requirement may be limited to actions against the crown in private law: e.g. a complaint to the law society per *Krieger* or a suit for malicious prosecution per *Kvello v. Miazga* [2009] 3 S.C.R. 339 at para 7 RBA Tab 3.

Lesser Standard for Review of Crown Discretion

28. Green C.J. and Rowe J.A. ruled for the Court of Appeal that the decision to file notice under s. 727(1) of the *Criminal Code* was not a core prosecutorial function. This court in *Kreiger* at para. 47 defined the core functions of prosecutorial discretion with beguiling simplicity: they involve "the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for" (underlining in original). The court added that these core functions refer to "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (para. 47). In contrast, "decisions that govern a crown prosecutor's tactics or conduct before the court" do not qualify as core functions. These contrasting functions were meant to capture the entire spectrum of prosecutorial decisions from the commencement to the conclusion of proceedings, with the nature and the extent of the prosecution at

one end of the spectrum and the crown's tactics and conduct at the other. It can be difficult to determine where a prosecutorial decision should be placed on this spectrum, as towards one end or the other, although the court in *Krieger* at para. 46 gave a non-exhaustive list of prosecutorial decisions falling within the core functions of its discretion. These decisions are whether to: prosecute a charge, stay it, accept a guilty plea to a lesser charge, withdraw a charge or assume control of a private prosecution. This court added in *Nixon* at para 30 that the crown's decision to repudiate a plea agreement was a core function.

29. In wrestling with the two categories in *Krieger* – core function versus tactics – the lower courts have not pinned down one category for the decision to file notice under s. 727(1) of the *Code* or one standard for judicial review of crown tactics: category e.g. – *R. v. Haneveld* (2008) 78 M.V.R. (5th) 305 (Alb. P.C) RBA Tab 8, *R. v. Schwartz* 2010 ONCJ 504 ABA Tab 35, and *Singh* – notice qualifies as core function; versus *R. v. King* 2007 ONCJ 238 ABA Tab 22 and *Gill* in the Ontario Court of Appeal – notice does not qualify as core function; standard of review of crown tactics e.g. – *King* – crown must satisfy the court that "it considered rational and appropriate reasons for serving notice…" (para 90), *Gill* – that proof of notice complies with the principles of fundamental justice (para 59), *Singh* in *obiter* – the decision to prove notice was not made "for improper or arbitrary reasons, although not amounting to abuse of process…" (para 189), and *R. v. R. (J.S.)* 2012 ONCA 568 ABA Tab 32 leave to appeal to SCC refused – that non-core functions "can only be challenged as abuse of process" although "the standard is somewhat less deferential to the Crown and does not require demonstrating flagrant impropriety in order to seek and obtain a remedy." (para 121). These cases illustrate the "judicial disparity and confusion" that the two categories in *Krieger* have spawned. *Reviewing Crown Discretion: The Need for a Unified, Principled Approach that Mandates Transparency*, Benjamin Snow (2013) 98 C.R. (6th) 143 at p. 9 RBA Tab 15.

30. As the appellant correctly notes in its factum at pp. 16-17, paras 73-75, this court's decisions before *Krieger* in *R. v. Cook* [1997] 1 S.C.R. 1113 ABA Tab 11 and *R. v. Jolivet* [2000] 1 S.C.R. 751 ABA Tab 21 add another factor. *Cook* and *Jolivet* concerned the crown's decision whether to call a witness, a decision that L'Heureux-Dube J. described for the court in *Cook* as a "a tactical judgment" by the crown (para 52). In both cases, however, this court ruled that the crown's discretion could only be reviewed upon proof of oblique motive or abuse of process.

31. In ruling that the decision to prove notice was not a core prosecutorial function in this case, Green C.J. and Rowe J.A. adopted the reasoning of Doherty J.A. in *Gill* that this decision was analogous to proof of any aggravating factor on sentence and, therefore, the crown's characterization of proof of notice as a core function was "more a reflection of the nature of the impact of the decision on the accused rather than the nature of the decision itself." (Appellant's Record Tab 4, p. 44, para 48). The respondent would add two other reasons: 1) while a "core" decision by a crown to proceed by indictment can have the effect of increasing a minimum sentence, this decision concerns the nature and extent of the proceedings because the crown's election grants a corresponding right to the accused to elect mode of trial, whether in provincial court or in supreme by judge alone or by judge and jury with a preliminary inquiry, unless the offense is one of absolute jurisdiction under s. 553 of the *Code*; and 2) as Justice Marc Rosenberg commented in *The Attorney General and the Administration of Criminal Justice*, (2009) 34 Queen's L.J. 813 at p. 12 RBA Tab 14, core functions in *Krieger* only seem to encompass "a relatively small number of decisions…within the constitutionally protected sphere of prosecutorial discretion – those broadly speaking having to do with whether or not to continue a prosecution." In other words, "core" must be given some meaning - it cannot encompass all decisions by the crown during the course of litigation; and "core" should not be expanded to protect the crown from acting arbitrarily or in violation of the principles of fundamental justice since these acts would fall outside the crown's duty to act fairly as a quasi-minister of justice.

Hence, the respondent submits that Green C.J. and Rowe J.A. correctly ruled that the decision to prove notice under s. 727(1) of the *Code* is not a core prosecutorial function.

32. As to appropriate standard of review of crown tactics, Green C.J. and Rowe. J.A. adopted the standard that Doherty J.A. enunciated in *Gill*. The justices stated:

> 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.
>
> Appellant's Record, Tab 4, p. 44, para 49

33. The respondent has argued that the standard in *Gill* overlaps the strict application for abuse of process if one accepts that a violation of a principle of fundamental justice under s. 7 is a "flagrant impropriety." If one does not accept this, the standard can still be seen as abuse of process, although one that is "less deferential to the crown and does not require demonstrating flagrant impropriety in order to obtain a remedy." *R.* (*J.S.*) at para 121 per Feldman J.A. In the alternative, one can view the standard as less than abuse of process in the sense that Green C.J. and Rowe J.A. explained – that "an action taken or a decision made by a prosecutor may, for example, be arbitrary but not an abuse of power." However one characterizes the standard, it preserves crown discretion from unwarranted judicial review by imposing exacting grounds – that the crown's conduct must violate a principle of fundamental justice. In this case, the crown's

flawed policy violated a principle of fundamental justice and, therefore, the Court of Appeal committed no error in reviewing the crown's conduct.

Issue III – Mandatory minimum sentences, s. 718.2(e) of the Criminal Code and the Charter

34. The appellant argues that, by necessary implication, the Court of Appeal's decision in this case would constrain the crown's discretion in every case in which an aboriginal could be subject to a minimum sentence (Appellant's Factum pp. 32 – 33, paras 145 & 146). However, mandatory minimums that apply to all offenders are not the issue. Instead, it is the decision by the crown to seek mandatory minimum prison terms for some offenders and not others for a particular offense by proof of notice under s. 727(1) of the *Code*. As Taylor J.A. stated for the majority in *R. v. Kumar* (1993) 85 C.C.C. (3d) 417 (B.C.C.A.) at para 63 ABA Tab 23: "… a mandatory sentence subject to prosecutorial discretion is not in fact a 'minimum' at all, because it is entirely possible for a lesser sentence to be imposed." The crown cannot, of course, be faulted for its discretion whether to prove notice under s. 727(1) of the *Code* – parliament has granted it. The respondent simply argues that the crown has a legal duty to consider aboriginal status in deciding whether to prove notice mandating a minimum prison term for impaired driving offenses. This consideration is in compliance with s. 718.1(e) of the *Code*, which applies to the crown as well as the court (*Leonard* at para 85), and is a principle of fundamental justice.

35. As to the remedy, the court may prefer one under s. 24(1) of the *Charter* rather than under s. 52(1) of the *Constitution Act, 1982* because the crown policy, a government act, is the subject of the breach and because the cure for the breach may require a change to the policy, not to legislation. *Ferguson* at paras 58 – 66. The test under s. 24(1) to impose a sentence less than a statutory minimum is onerous – that the government act is "particularly egregious". *Nasogaluak* at paras 6 & 64. The respondent submits that the facts in this case fulfill this test. A

government act that violates a principle of fundamental justice "will always shock the conscience" (*Burns* at para 68) and, therefore, qualifies as egregious. In this case, the crown not only failed to consider the respondent's aboriginal status, its policy on whether to prove notice did not consider the aboriginal status of any offender. The respondent submits that this pattern of disregard is particularly egregious. Therefore, the appropriate remedy is to set aside the notice, a remedy that, unlike a stay, does not require the clearest of cases as a pre-requisite. *O'Connor* at paras 69 – 73. The appropriate prison term is 90 days as this is the maximum that can be subject to an intermittent sentence per s. 732(1) of the *Code.* An intermittent sentence permitted the respondent to continue attendance at "Skills to Enhance Personal Success" (STEPS), an eleven month program conducted in his community – see Pre-Sentence Report, Appellant's Record, Tab 17, p. 247. In sentencing the respondent, English P.C.J. found that: "It would be a mistake to cause him to lose his current work and training opportunities for the sake of a jail term that is likely to add little, if anything to the deterrence of this offender or other potential offenders in the community." Appellant's Record, Tab 3, p. 26, para 25.

36. The wording of a revised crown policy should be left to the discretion of the crown so long as it is faithful to the spirit s. 718.1(e) of the *Code* and of *Gladue* and *Ipeelee*. However, the policy may stipulate that the crown should consider the contents of a "Gladue Report" before deciding whether to prove notice. This was the approach of the court in *R. v. Stone* 2013 ONCJ 490 at para 21 RBA Tab 10. Finally, if the court allows the appellant's appeal, the respondent requests that the court stay the imposition of the statutory minimum, a remedy that Doherty J.A. granted in *Gill* at para 85 and which the appellant requests (Appellant's Factum p. 38, para 172).

PART IV – SUBMISSIONS WITH RESPECT TO COSTS

37. N/A.

PART V – ORDER SOUGHT

38. Affirm the sentence imposed of 90 days' imprisonment intermittent, 2 years' probation, 5 years' driving prohibition and a $50.00 Victim Fine Surcharge; in the alternative, affirm the sentence imposed and stay the imposition of an additional 30 days imprisonment.

DATED at St. John's, in the Province of Newfoundland and Labrador this day of January, 2014.

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DEREK HOGAN
Respondent's Counsel

PART VI – TABLE OF AUTHORITIES

Tab Number		Paragraph in Factum
1	*Canada* (*Attorney General*) v. *Bedford* 2013 SCC 72	15, 21
2	*Chaoulli c. Quebec* (*Procureur general*) [2005] 1 S.C.R. 791	21
3	*Kvello v. Miazga* [2009] 3 S.C.R. 339	27
4	*Law v. Canada* (*Minister of Employment and Immigration* [1999] 1 S.C.R. 497	25
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14	*The Attorney General and the Administration of Criminal Justice*, Justice Marc Rosenberg (2009) 34 Queen's L.J. 813	31
15	*Reviewing Crown Discretion: The Need for a Unified, Principled Approach that Mandates Transparency,* Benjamin Snow (2013) 98 C.R. (6th) 143	29

PART VII – STATUES, REGULATIONS, RULES ETC.

39. N/A