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Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing

*Palma Paciocco**

The Supreme Court of Canada recently held that prosecutors are not constitutionally obligated to consider the principle of proportionality when exercising their discretion in a manner that narrows the range of available sentences: since only judges are responsible for sentencing, they alone are constitutionally required to ensure proportionality. When mandatory minimum sentences apply, however, judges have limited sentencing discretion and may be unable to achieve proportionality. If the Court takes the principle of proportionality seriously, and if it insists that only judges are constitutionally bound to enforce that principle, it must therefore create new tools whereby judges can avoid imposing disproportionate mandatory minimums. Its best avenue for doing so is to reconceive of the s. 12 Charter standard for cruel and unusual punishment as it applies to mandatory minimums. Furthermore, although prosecutors are not constitutionally obligated to consider proportionality when exercising their discretion, they are ethically bound to do so.

La Cour suprême du Canada a récemment statué que les procureurs ne sont pas constitutionnellement obligés de tenir compte du principe de proportionnalité lors de l'exercice de leur pouvoir discrétionnaire d'une manière qui réduit l'éventail des peines proposées. Étant donné que seuls les juges sont responsables de la détermination de la peine, eux seuls sont constitutionnellement tenus de garantir la proportionnalité. Toutefois, lorsque des peines minimales obligatoires s'appliquent, les juges ont un pouvoir discrétionnaire limité à l'égard de la déter-

* Of the Bar of Ontario and the New York State Bar. The ideas expressed in this article were developed in part through my participation as a presenter at the International Society for the Reform of Criminal Law's Young Justice Professionals Program, held on June 24, 2014 in Vancouver. I am grateful to the conference organizers, especially the Honourable Justice Elizabeth A. Bennett and the Honourable Justice Gregory J. Fitch, for inviting me to participate as a presenter; to the program participants; and, especially, to my co-presenters, M. Joyce DeWitt-Van Oosten Q.C. and Elizabeth T. W. France, with whom I enjoyed fruitful conversations about *R. v. Anderson* and prosecutorial discretion. The opinions expressed herein (and, of course, any errors) are mine alone. I am also grateful to the editors of this journal, especially Justice Patrick Healy, for insightful comments on an earlier draft; to Jeremy Opolsky for generous and helpful feedback; and to the Social Sciences and Humanities Research Council Doctoral Fellowship program for funding support. This article, including the postscript, states the law as of October 1, 2014.

mination de la peine et peuvent être dans l'impossibilité de respecter le principe de proportionnalité. Si la Cour prend le principe de proportionnalité au sérieux, et si elle insiste sur le fait que seuls les juges sont constitutionnellement tenus d'appliquer ce principe, elle doit donc créer de nouveaux outils permettant aux juges d'éviter d'imposer des peines minimales obligatoires disproportionnées. La meilleure façon d'y parvenir est de repenser l'article 12 de la Charte canadienne des droits et libertés à l'égard des châtiments cruels et inusités, comme il s'applique aux peines minimales obligatoires. De plus, bien que les procureurs ne sont pas constitutionnellement obligés de tenir compte de la proportionnalité dans l'exercice de leur pouvoir discrétionnaire, ils sont tenus de s'y plier d'un point de vue éthique.

1. INTRODUCTION

Our criminal justice system is increasingly characterized by mandatory minimum sentences.¹ Mandatory minimums prohibit judges from handing down sentences that fall below a predetermined floor, even if those sentences would otherwise be called for by competing rules and principles. The competing rules and principles include, most notably, the principle of proportionality.² That principle, which is discussed in detail below and is enshrined in the *Criminal Code*, stipulates that “[a] sentence must be proportionate to” — that is, calibrated to reflect — “the gravity of the offence and the degree of responsibility of the offender.”³ By precluding certain sentences, mandatory minimums limit judicial discretion at the sentencing phase. At the same time, they increase the scope and significance of prosecutorial discretion because they are activated by prosecutors’ decisions. Prosecutors can trigger mandatory minimums by charging crimes that carry those sentences; by proving certain aggravating factors at sentencing; by refusing to ac-

¹ While it is still the case, as the Supreme Court noted in 2000, that “[m]andatory minimum sentences are not the norm in this country,” (*R. v. W. (L.W.)*, 2000 SCC 18, [2000] 1 S.C.R. 455, 143 C.C.C. (3d) 129, 2000 CarswellBC 750, 2000 CarswellBC 749, 32 C.R. (5th) 58 at para.18 [“Wust”]), they are becoming increasingly prevalent. Writing in 2012, Debra Parkes observed that “the number of mandatory sentences approaches 100,” adding that “[t]here are other ways to count that would yield a higher or lower number, but the key point is that we have witnessed a rapid proliferation of mandatory sentences, beginning in 1996 and escalating from 2006-present.” Debra Parkes, “From *Smith* to *Smickle*: The Charter’s Minimal Impact on Mandatory Sentences” (2012), 57 *S.C.L.R.* (2d) 149, 150 & note 4 [“Parkes”]. That number has since risen, and there are currently new bills before Parliament that would further increase both the number and the severity of mandatory minimum sentences in Canada. See *infra* note 40. See also Benjamin L. Berger, “A More Lasting Comfort? The Politics of Mandatory Minimum Sentences, the Rule of Law and *R. v. Ferguson*” (2009), 47 *S.C.L.R.* (2d) 101, 105-06 [“Berger”].

² Justice Arbour, writing for a unanimous Court in *Wust*, *supra* note 1 at para.18, remarked: “Mandatory minimum sentences [. . .] depart from the general principles of sentencing expressed in the [*Criminal*] Code, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the [*Criminal*] Code: the principle of proportionality.”

³ *Criminal Code*, R.S.C., 1985, c. C-46, s. 718.1 [“*Criminal Code*”].

cept guilty pleas to lesser offences that do not carry mandatory minimums; or by electing to proceed summarily or by indictment where that election entails a particular mandatory minimum. In short, the prosecutor's charging decisions — as opposed to the judge's proportionality analysis — can largely determine the offender's sentence.

Claimants who wish to challenge the constitutionality of mandatory minimum sentences have traditionally done so via s. 12 of the *Charter*, which prohibits cruel and unusual punishment or treatment.⁴ Their claims have, however, been met with only modest success because Supreme Court case law sets a very high bar for s. 12 claims. Among other things, the Court has insisted that only *grossly* disproportionate sentences contravene s. 12; “mere” disproportionality is not enough to ground a claim.⁵ It is in fact so difficult for claimants to challenge mandatory minimums under s. 12, commentators describe that *Charter* provision as a “dead end” and a “‘faint hope’ guarantee of sorts.”⁶

Faced with the s. 12 “dead end” and burdened by harsh sentences resulting from mandatory minimums, claimants have begun looking for new ways to frame their cases. In the recent case of *R. v. Anderson*, the claimant — who faced a mandatory minimum sentence for an impaired driving offence — did not rely on s. 12 of the *Charter* at all.⁷ Instead, he contended the prosecutor's discretionary decision to invoke the *Criminal Code* provision that triggered the mandatory minimum sentence in his case was unconstitutional under s. 7 of the *Charter*, because that decision did not give due consideration to the claimant's status as an Aboriginal offender.⁸ The claimant also sought a judicial review of the prosecutor's decision on non-*Charter* grounds. A unanimous Supreme Court rejected both arguments and applied the mandatory minimum sentence.

Arguably, the Court's *Anderson* decision does not change much of anything. It clarifies, but does not substantially revise, the law on the judicial review of prosecutorial discretion. It signals that *Charter* challenges to mandatory minimum sentences should continue to be brought via s. 12 claims; and since s. 12 was not litigated in *Anderson*, the decision does not directly affect the law in that area at all. The Court declined the invitation to recognize a new s. 7 principle of fundamental

⁴ *Canadian Charter of Rights and Freedoms, s. 12, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*“Charter”*].

⁵ “The test for review under s. 12 of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive.” *R. v. Smith*, 1987 CarswellBC 198, 1987 CarswellBC 704, 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, [1987] 1 S.C.R. 1045, 1072 [*“Smith”*].

⁶ Marie-Eve Sylvestre, “The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility” (2013) 63 *S.C.L.R.* (2d) 461, 466 [*“Sylvestre”*]; Jamie Cameron, “Fault and Punishment under Sections 7 and 12 of the Charter” (2008) 40 *S.C.L.R.* (2d) 554, 583 [*“Cameron”*].

⁷ *R. v. Anderson*, 2014 SCC 41, 11 C.R. (7th) 1, 2014 CSC 41, 2014 CarswellNfld 167, 2014 CarswellNfld 166 at para. 35 (S.C.C.) [*“Anderson, S.C.C.”*].

⁸ Section 7 states, “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.” *Charter, supra* note 4.

justice that could underpin an alternative *Charter* claim, and it did not otherwise impose new obligations on prosecutors. To the contrary, it extended its trend of affording substantial deference to prosecutors and to Parliament in the area of criminal sentencing policy. Yet, the decision is noteworthy precisely because it does so little to advance the law on mandatory minimum sentences, even as the facts in *Anderson* illustrate that this area of the law is increasingly insensitive to the realities of our contemporary criminal justice system.

As we will see, the Court's *Anderson* analysis is grounded in its understanding of judges' and prosecutors' distinct roles: judges sentence, prosecutors do not; hence only the former can be obliged to apply sentencing principles like the principle of proportionality. In what follows, I will argue that there is, in fact, a striking disconnect between this account and the actual practice of criminal sentencing. Quite simply, when mandatory minimums apply, judges cannot ensure proportionality. More precisely, they cannot ensure proportionality unless they are empowered to evade mandatory minimums that would obligate them to impose disproportionate sentences. At present, judges are not so empowered, thanks in large part to the Court's parsimonious s. 12 jurisprudence. *Anderson* has not provided the answer to this conundrum, but it has underlined the question: how might the Court give judges the tools they need to ensure proportionate sentences in the face of mandatory minimums? This article addresses that question by offering two non-mutually exclusive recommendations about how the principle of proportionality can be better respected in a criminal justice system that is increasingly characterized by mandatory minimum sentences. The first bears on the obligations of prosecutors, while the second relates to the role of judges in upholding the *Charter*.

The article proceeds as follows: sections 2 and 3 sketch out the current state of the law by analyzing the recent *Anderson* decision, focusing on that decision's implications for the future of the proportionality principle under the *Charter*; section 2 offers a brief summary of the decision, which readers familiar with *Anderson* may wish to skip; and section 3 considers the separate roles of judges and prosecutors in the context of mandatory minimum sentences, both as envisaged by the *Anderson* Court and as those roles play out in reality. I find a disconnect here. Per *Anderson*, judges have the sole constitutional responsibility to ensure proportionate sentences. Yet, as the facts in *Anderson* illustrate, judges are sometimes incapable of discharging this responsibility in practice due to mandatory minimums. I conclude that, if the Court takes the principle of proportionality seriously, as it should, then it needs to fashion new tools whereby judges can avoid applying disproportionate mandatory minimum sentences. The balance of the article suggests how we might design such tools.

Section 4 identifies a way of promoting proportionality within the jurisprudential *status quo*. It argues that, while *Anderson* made it clear prosecutors are not *constitutionally* bound to consider proportionality when exercising their discretion in a way that binds sentencing judges, they should nevertheless regard themselves as *ethically* bound to do so. I urge prosecutors to consider proportionality principles when they exercise their discretion, and I suggest that prosecutors' offices should incorporate those principles into their Crown policy manuals. Section 4 acknowledges, however, that this suggestion is of limited value because prosecutors' ethical obligations are difficult to enforce, and because they do not necessarily entail remedies for criminal defendants who are affected by ethical breaches.

Section 5 considers what can be done to ensure claimants have meaningful remedies when they face disproportionate sentences as a result of mandatory minimums. It provides a brief overview of the state of the law on s. 12 to explain why that provision does not, at present, offer such remedies. It then considers how the s. 12 law might evolve, particularly in light of the *Anderson* Court's affirmation that proportionality is a principle of fundamental justice under s. 7. Finally, the Conclusion of the article anticipates future Supreme Court litigation on s. 12 and mandatory minimum sentences, including the upcoming case of *R. v. Nur*, which may give the Court an opportunity to implement the changes suggested in section 5.⁹

2. R. v. ANDERSON

On July 9, 2009, Frederick Anderson was charged with impaired driving and driving with over eighty milligrams of alcohol in one hundred millilitres of blood.¹⁰ Before he entered his plea, and pursuant to s. 727 of the *Criminal Code*, the Crown served notice of its intent to seek a greater punishment in light of Mr. Anderson's five prior impaired driving related convictions. Section 727 stipulates that, where the *Criminal Code* contemplates a greater punishment by reason of previous convictions, that punishment cannot be imposed unless the Crown notifies the offender of its intention to seek the greater punishment before the offender makes his or her plea.¹¹ In Mr. Anderson's case, the Crown's decision to file the notice triggered a mandatory minimum sentence of 120 days under s. 255(1) of the *Criminal Code*, which sets out escalating punishments for recidivist impaired drivers. The combined effect of ss. 255(1) and 727 is that the Crown can elect to trigger a harsher mandatory minimum sentence in some cases by filing a timely notice.

Mr. Anderson is Aboriginal. Special considerations inform the sentencing of Aboriginal offenders. Section 718(2)(e) of the *Criminal Code* states:

A court that imposes a sentence shall also take into consideration the following principles [. . .] 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.¹²

As the Supreme Court noted in *R. v. Gladue* and again in *R. v. Ipeelee*, s. 718(2)(e) is remedial in nature: it was enacted to address the staggering overrepresentation of

⁹ *R. v. Nur*, 2014 CarswellOnt 1486 (S.C.C.) [*"Nur, S.C.C."*].

¹⁰ He was charged under ss. 253(1)(a) and (b) of the *Criminal Code*, *supra* note 3.

¹¹ *Criminal Code*, *ibid.* at s. 727(1) states: "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."

¹² *Criminal Code*, *ibid.* at s. 718(1).

Aboriginal people in our prisons and to encourage judges to employ more culturally appropriate restorative approaches when sentencing Aboriginal offenders.¹³

The Crown policy manual for prosecutors in Newfoundland and Labrador, to which the prosecutor in Mr. Anderson's case presumably referred, directs Crown Attorneys to request greater punishment under s. 255 except in certain cases. It states that Crown Attorneys *may* exercise their discretion not to pursue an enhanced penalty if, *inter alia*, all the prior convictions occurred more than five years before the current offence, as was the case for Mr. Anderson.¹⁴ The policy then lists a number of factors for Crowns to consider when exercising their discretion in this regard. As Mr. Anderson pointed out in his submissions, Aboriginal status is not among those factors. The Crown replied that Aboriginal status is encompassed by one of the listed factors, namely "the background and circumstances of the offender."¹⁵ The Crown maintained, further, that the other factors militated in favour of triggering the greater sentence in Mr. Anderson's case.¹⁶

Mr. Anderson pled guilty to an impaired care and control charge. Before he was sentenced, he challenged s. 255(1) of the *Criminal Code* under ss. 7 and 15 of the *Charter*.¹⁷ The Provincial Court of Newfoundland and Labrador found in his

¹³ *R. v. Gladue*, 1999 CarswellBC 778, 1999 CarswellBC 779, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, 23 C.R. (5th) 197 at para. 93 (S.C.C.) ["*Gladue*"]; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, 2012 CarswellOnt 4376, 2012 CarswellOnt 4375, 280 C.C.C. (3d) 265, 91 C.R. (6th) 1 at paras. 56–59 ["*Ipeelee*"]. In *Gladue* the Court noted that, in 1997, Aboriginal peoples represented about three percent of the Canadian population but twelve percent of federal inmates. *Id.* at para. 58. Despite the introduction of s. 718(2)(e) and its interpretation in *Gladue*, the disparity has worsened. In *Ipeelee* the Court reported that, even following *Gladue*, s. 718(2) "has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system." The Court attributed some of this failure to ongoing misunderstandings about the application of s. 718(2) and the *Gladue* decision, both of which the Court sought to clarify in *Ipeelee*. *Id.* at para. 63. As of February 2013, Aboriginal people constituted four percent of the Canadian population but just over twenty-three percent of the federal inmate population. Government of Canada Office of the Correctional Investigator, *Background: Aboriginal Offenders — A Critical Situation* (September 16, 2013), online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>>.

¹⁴ *R. v. Anderson*, 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308, 295 C.C.C. (3d) 262, 2013 CarswellNfld 11 at para. 17; varied 2014 CSC 41, 2014 SCC 41, 2014 CarswellNfld 166, 2014 CarswellNfld 167, 11 C.R. (7th) 1 (S.C.C.) ["*Anderson*, N.L.C.A."]. Mr. Anderson's convictions occurred between 1988 and 1997.

¹⁵ *Ibid.* at paras. 19–20.

¹⁶ *Ibid.*, at para. 39. In particular, the Crown relied on the fact that Mr. Anderson had been incarcerated for a previous related offence. The Court of Appeal was unimpressed by this explanation and noted that the other Crown policy factors seemed to militate against triggering the mandatory minimum sentence. The Supreme Court did not address this issue in light of its holdings on the *Charter* claims and the applicable standard of review, which are discussed below.

¹⁷ *Charter*, ss. 7 & 15(1), *supra* note 4. Section 7 states: "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." Section 15(1) states: "Every individual is equal before and under the law and has the right to the equal protection

favor on both issues and declared he would be sentenced on the basis that no minimum sentence applied.¹⁸ The Court of Appeal dismissed the Crown's appeal.¹⁹

The Crown appealed to the Supreme Court of Canada. Justice Moldaver, writing for a unanimous Court, allowed the appeal. He first considered Mr. Anderson's claim that there is a s. 7 principle of fundamental justice whereby Crown prosecutors must consider an accused's Aboriginal status when making discretionary decisions that limit judges' sentencing discretion, including the decision to file a notice of the Crown's intent to seek greater punishment. Justice Moldaver rejected this claim on two grounds. First, he found it conflated the distinct roles of prosecutors and judges: the duty to impose a proportionate sentence (including the duty to consider Aboriginal status) applies only to judges, not to prosecutors.²⁰ Second, he found the principle articulated by Mr. Anderson did not qualify as a principle of fundamental justice.²¹ To the contrary, it conflicts with "a long-standing and deeply rooted approach to the division of responsibility between the Crown prosecutor and the courts."²² The Court has consistently limited the judicial review of prosecutorial discretion, yet the proposed principle would entail sweeping judicial review of prosecutors' decisions. This is so because prosecutors have myriad opportunities to limit sentencing judges' oversight: the choices they make when selecting charges, making elections in the case of hybrid offences, and proving aggravating factors at sentencing can all determine whether a mandatory minimum will apply.

Having rejected the s. 7 claim, Justice Moldaver considered whether the Crown's decision to seek notice could be reviewed on other grounds. To this end, he clarified the scope of prosecutorial discretion. In *Krieger v. Law Society of Alberta*, the Supreme Court had distinguished the exercise of "core prosecutorial discretion" from other prosecutorial decision-making.²³ The former encompasses "de-

and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The section 15 argument was not pursued before the Supreme Court of Canada.

¹⁸ *R. v. Anderson*, 2011 NLPC 1709A00569 ["Anderson, Prov. Ct. N.L."].

¹⁹ *Anderson*, N.L.C.A., *supra* note 14.

²⁰ *Anderson*, S.C.C., *supra* note 7 at para. 25. See text accompanying *infra* note 34.

²¹ To qualify, the principle must: (i) "be a legal principle"; (ii) "enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate"; and (iii) "be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person." *Anderson*, S.C.C., *ibid.* at para. 29, citing *R. v. B. (D.)*, 2008 SCC 25, [2008] 2 S.C.R. 3, 56 C.R. (6th) 203, 231 C.C.C. (3d) 338, 2008 CarswellOnt 2709, 2008 CarswellOnt 2708 at para. 26; and *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, 180 C.C.C. (3d) 353, 2004 CarswellOnt 253, 2004 CarswellOnt 252, 16 C.R. (6th) 203 at para. 8. The proffered principle failed to meet the second requirement: it does not enjoy consensus that it is fundamental to the way in which the legal system ought fairly to operate.

²² *Anderson*, S.C.C., *supra* note 7 at para. 30.

²³ *Krieger v. Law Society (Alberta)*, [2002] S.C.R. 372, 2002 CarswellAlta 1134, 2002 CarswellAlta 1133, 168 C.C.C. (3d) 97, 4 C.R. (6th) 255, 2002 SCC 65.

cisions regarding the nature and extent of the prosecution and the Attorney-General's participation in it."²⁴ It includes, but is not limited to, decisions to: prosecute a charge laid by police; take control of a private prosecution; charge multiple offences; negotiate, accept, or repudiate a plea agreement; prefer a direct indictment; proceed summarily or by indictment; pursue a dangerous offender application; enter a stay of proceedings; withdraw from criminal proceedings; or initiate an appeal. An exercise of core discretion is only reviewable for abuse of process, defined as "Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system."²⁵ Decisions that fall outside this category — namely, tactics and conduct before the court — are subject to more expansive review pursuant to the court's inherent jurisdiction to control its own processes.²⁶

Justice Moldaver noted confusion among lower courts attempting to apply *Krieger*, which he attributed in part to the term "core" discretion. That term implies a rather select class of discretionary decisions. In order to dispel confusion by underscoring the category's expansive scope, Justice Moldaver preferred the terms "prosecutorial discretion" and "tactics and conduct before the court." It appears, then, that what has sometimes been called "core prosecutorial discretion" or the "core elements of prosecutorial discretion" should now be referred to simply as "prosecutorial discretion."²⁷

Justice Moldaver held that the Crown's decision to file the notice falls within the scope of prosecutorial discretion. In his view, that decision "fundamentally alters the *extent* of prosecution — specifically, the extent of the jeopardy facing the accused."²⁸ It is analogous to the decision to pursue a charge carrying a mandatory minimum sentence, or to proceed by indictment where doing so will attract a mandatory minimum. The decision to file notice is therefore only reviewable for abuse of process. The claimant bears the burden of showing an abuse of process. Here, Mr. Anderson failed to discharge that burden, having offered no evidence to support an abuse of process claim.²⁹ Justice Moldaver therefore allowed the Crown's appeal, set aside the original sentence, and substituted the mandatory minimum penalty of 120 days (though he stayed service of the remainder of the sentence, per the Crown's concession).

3. PROPORTIONALITY AND THE RESPONSIBILITIES OF JUDGES AND PROSECUTORS

The balance of this article considers *Anderson's* implications for the principle of proportionality. That principle is codified in s. 718.1 of the *Criminal Code*, which stipulates that a criminal sentence "must be proportionate to the gravity of

²⁴ *Ibid.* at paras. 30–32.

²⁵ *Anderson*, S.C.C., *supra* note 7 at paras. 36 and 50.

²⁶ *Ibid.* at para. 36.

²⁷ *Ibid.* at para. 35.

²⁸ *Ibid.* at para. 62 (emphasis in the original).

²⁹ *Ibid.* at para. 63.

the offence and the degree of responsibility of the offender,”³⁰ and it has been recognized as a principle of fundamental justice.³¹ For Aboriginal offenders, the *Gladue* factors must inform the proportionality analysis since those factors bear on the issue of what sentence is fit and appropriate. As Justice Moldaver observed in *Anderson*, “[t]he failure of a sentencing judge to consider the unique circumstances of Aboriginal offenders thus breaches both the judge’s statutory obligations, under ss. 718.1 and 718.2 of the *Code*, and the principle of fundamental justice that sentences be proportionate.”³² Yet, despite the Court’s vigorous and consistent affirmation of the proportionality principle, it has done little to encourage that principle’s effective enforcement. Indeed, its *Anderson* ruling closes off a possible avenue of enforcement by finding that prosecutors have no constitutional obligation to consider proportionality when making decisions that bind sentencing judges’ hands, even if those decisions prevent sentencing judges from issuing proportionate sentences.

The *Anderson* Court relied heavily on the different roles of prosecutors and judges to support both of its key conclusions — namely, that prosecutorial discretion is an expansive category that attracts minimal review; and that the exercise of prosecutorial discretion is not encumbered by a s. 7 obligation to ensure proportionality. These twin holdings reflect a common view of the structure of the criminal justice system, yet read together, they reveal a significant tension.

The Court’s s. 7 analysis turned on its view that judges and prosecutors have different institutional roles that must be kept separate. Justice Moldaver wrote:

Mr. Anderson’s argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process. It is *the judge’s* responsibility to impose sentence; likewise, it is *the judge’s* responsibility, within the applicable legal parameters, to craft a proportionate sentence.³³

The Court feared that collapsing these roles by obligating prosecutors to consider proportionality, and thereby subjecting their discretionary decisions to greater judicial review, would “put at risk the adversarial nature of our criminal justice system by hobbling Crown prosecutors in the performance of their work” and would be “contrary to our constitutional traditions.”³⁴

The Court’s analysis of the scope of prosecutorial discretion likewise turned on the prosecutor’s distinct institutional role. The Court insisted prosecutorial discretion is “expansive” and must be insulated from most types of review: “The many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by courts.”³⁵ It reasoned that judicial second-guessing would upset the separation of

³⁰ *Criminal Code*, *supra* note 3 at s. 718.1.

³¹ *Anderson*, S.C.C., *supra* note 7 at paras. 21-22; and *Ipeelee*, *supra* note 13 at paras. 36-37.

³² *Anderson*, *ibid.* at para. 24.

³³ *Ibid.* at para. 25 (emphasis in the original).

³⁴ *Ibid.* at paras. 31 and 32.

³⁵ *Ibid.* at paras. 44 and 46.

powers between the Attorney General and his or her agents, on the one hand, and the courts on the other; that it would reduce trial efficiency; and that in any event, prosecutors are more competent than judges when it comes to the exercise of their discretion.³⁶

The Court observed, further, that the more expansive judicial review sought by Mr. Anderson would open the proverbial floodgates by subjecting many more prosecutorial decisions to review: “As the Crown has pointed out, the situations where Crown decisions have the potential to limit the sentencing judge’s options and therefore the judge’s ability to take s. 718(2)(e) into account are many.”³⁷ In the Court’s view, the large number of prosecutorial decisions that impact sentencing outcomes makes robust judicial review impractical. In essence, then, the Court found that prosecutors cannot be constitutionally required to ensure proportionality precisely because there are so many cases in which proportionality turns on their decisions. By extension, judges must be solely responsible for achieving proportionate sentences even though (or indeed, because) there are so many situations in which they might be prevented from achieving proportionate sentences. This reasoning puts judges in an untenable position. Concretely, it means judges are supposed to unilaterally ensure proportionate sentences, even though prosecutors’ decisions — which are not burdened by the proportionality requirement — frequently hamper their ability to do so. One can be forgiven for asking, in response to the Supreme Court’s avowal that “it is *the judge’s* responsibility [. . .] to craft a proportionate sentence,” how judges can effectively discharge this duty.

This problem is significant because the Court is absolutely right when it notes the significant number of prosecutorial decisions that impact sentencing outcomes. The Canadian criminal justice system is increasingly characterized by mandatory minimum sentences. There are now, by some counts, around 100 mandatory minimum sentences on the books in Canada.³⁸ This represents about a tenfold increase since the Supreme Court released its flagship decision on the constitutionality of mandatory minimums in 1987.³⁹ Much of the increase has occurred within the past ten years, and the trend continues today with new legislation coming down the pipe that would further increase mandatory minimum sentences.⁴⁰ With increased

³⁶ *Ibid.* at paras. 46-47.

³⁷ *Ibid.* at para. 31.

³⁸ See Parkes, *supra* note 1 at 149.

³⁹ *Ibid.* at 149-50: “In 1987, when the Supreme Court of Canada decided *R. v. Smith* [*supra* note 5], the foundational case interpreting section 12 of the Canadian Charter of Rights and Freedoms, the right to be free from ‘cruel and unusual treatment or punishment’, there were just nine mandatory minimum sentences on the books” (citations omitted).

⁴⁰ See, for example, Bill C-10, *An Act to amend the Criminal Code (trafficking in contraband tobacco)*, 2nd Sess, 41st Parl, 2013, (Committee Report Presented in the House of Commons, 12 February 2014); Bill C-26, *An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2013, (Introduction & First Reading in the House of Commons, 26 February 2014); Bill C-217, *An Act to amend the Criminal Code (mischief relating to war memorials)*, 2nd Sess, 41st Parl, 2013, (Committee Report Present-

mandatory minimum sentences comes enhanced prosecutorial power. As we have seen, prosecutors play a key role in deciding whether mandatory minimums will apply, and hence in determining the scope of judicial discretion at the sentencing phase. In this climate, if we truly value the principle of proportionate sentencing, we must establish some mechanism for ensuring proportionate sentencing outcomes in the context of prosecutor-driven mandatory minimum sentences. The Court has treated the sheer number of prosecutorial decisions that impact sentencing outcomes as a reason why expansive judicial review is impractical; but if we take the principle of proportionality seriously, then that same fact is a reason why expansive judicial review is crucial.

Moreover, we *should* take proportionality seriously. As the *Anderson* Court itself stated, quoting *Ipeelee*, “[p]roportionality is the *sine qua non* of a just sentence.”⁴¹ Indeed, proportionality is central to how we justify the institution of criminal punishment in the first place. In 1984, Canada established the Canadian Sentencing Commission (“the Sentencing Commission”), which recommended that Parliament articulate a uniform national sentencing policy.⁴² At the time the Sentencing Commission made this recommendation, the principle most frequently invoked to justify criminal punishment was deterrence. Commentators expressed concern, however, that extreme and outrageous punishments are often justified on the basis of deterrence, and that it is fundamentally unfair to visit harm upon one person just to influence how another will act in the future. The Sentencing Commission therefore recommended a sentencing policy that would synthesize utilitarian considerations like deterrence with the principle of retributivism.⁴³ Retributivism casts punishment in terms of “just desserts.” Because it insists that the offender must “deserve” the punishment, it operates to limit the scope of permissible penalties: any additional measure of punishment beyond what is deserved by the offender’s moral blameworthiness is illegitimate. Retributivist sentencing theory thus cashes out as the principle of proportionality, which serves to limit utilitarian punishment goals like deterrence. As Justice Lebel, writing for the Court in *R. v. Nasogaluak*, explained, proportionality “requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function.”⁴⁴

ted to the Senate, 4 March 2014); Bill C-239, *An Act to amend the Criminal Code (peace officers)*, 2nd Sess, 41st Parl, 2013, (Reinstated from Previous Session, 16 October 2013); Bill C-394, *An Act to amend the Criminal Code and the National Defence Act (criminal organization recruitment)*, 2nd Sess, 41st Parl, 2013, (In Committee (Senate) as of 1 April 2014); and Bill C-570 *An Act to amend the Criminal Code (mandatory minimum sentences for rape)*, 2nd Sess, 41st Parl, 2013, (Second Reading in the House of Commons, 29 January 2014).

⁴¹ *Anderson*, S.C.C., *supra* note 7 at para. 21, quoting *Ipeelee*, *supra* note 13 at para. 36.

⁴² The Honourable Justice Morris J. Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment” (2008) 28:1 *Oxford Journal of Legal Studies* 57, 67.

⁴³ *Ibid.*

⁴⁴ *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, 2010 CarswellAlta 269, 2010 CarswellAlta 268, 251 C.C.C. (3d) 293, 72 C.R. (6th) 1 at para. 42 (emphasis in the original) [*“Nasogaluak”*].

Parliament adopted the Sentencing Commission's recommendations in 1996. Now, the *Criminal Code* specifies that criminal punishment has a utilitarian *purpose* — to contribute to respect for the law and to the maintenance of a just, peaceful, and safe society⁴⁵ — while the fundamental *principle* of sentencing is retributivist: all sentences must be proportionate to the gravity of the offence and to the offender's degree of responsibility.⁴⁶ In light of this principle, a sentence ought never to be disproportionate, irrespective of its deterrent effects. In *Nasogaluak*, Justice LeBel insisted that “whatever weight a judge may wish to accord to the objectives listed [in the *Criminal Code*, such as denunciation, general and specific deterrence, etc.], the resulting sentence *must* respect the fundamental principle of proportionality.”⁴⁷ He noted, further, that while this fundamental principle is enshrined in the *Code*, it predates it: proportionality has a “long history as a guiding principle in sentencing.”⁴⁸

From all this it follows that criminal sentences in Canada must be proportionate, even where those sentences are dictated by mandatory minimums. But, how can we ensure sentences are indeed proportionate in that context? The *Anderson* Court foreclosed one potential avenue: a s. 7 requirement that prosecutors consider proportionality when making discretionary decisions that limit the range of available sentences.⁴⁹ Its decision to do so is, I think, defensible. The Court is correct that the separation of powers, and the basic architecture of the adversarial system more generally, would be compromised by expansive judicial review of all the prosecutorial decisions that shape or limit sentencing ranges. To understand why, we need only imagine a system in which defendants could ask judges to rule on prosecutors' discretionary decisions to pursue certain charges, to accept or decline proposed plea agreements, to proceed summarily or by indictment, to prove particular aggravating factors at sentencing, and so forth. As the Court rightly notes, this sort of judicial oversight would hamper both the prosecutor and the judge. Prosecutors would be unable to make independent decisions about whether and how to proceed with prosecutions, while judges would be in the untenable position of hav-

⁴⁵ *Criminal Code*, *supra* note 3, s. 718.

⁴⁶ *Ibid.* at s. 718.1. The Court described the integrated, retributivist-utilitarian approach in *R. v. M. (C.A.)*, 1996 CarswellBC 1000F, 1996 CarswellBC 1000, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269, [1996] 1 S.C.R. 500, 559: “[I]t is important to stress that neither retribution nor denunciation alone provides an exhaustive justification for the imposition of criminal sanctions. Rather, in our system of justice, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for criminal punishment.”

⁴⁷ *Nasogaluak*, *supra* note 44 at para. 40 (emphasis in the original).

⁴⁸ *Ibid.* at para. 41.

⁴⁹ The Court specifically considered whether section 7 requires the Crown to take the accused's Aboriginal status into account when making decisions that limit the judge's sentencing options, but its reasoning would apply equally to a more general claim that the Crown should be constitutionally obligated to consider proportionality when making these types of decisions. The Court's comments on the nature of the prosecutorial role clearly indicate its unwillingness to promote proportionality through the judicial oversight of prosecutorial decision-making.

ing to oversee prosecutors' decisions about how to frame cases while simultaneously remaining neutral arbiters of those same cases.

The Court was arguably correct, then, to deny Mr. Anderson's section 7 claim. But, having foreclosed that option, it must do something else to ensure proportionality in a world of expanded prosecutorial power and limited judicial discretion. In the remainder of this article, I suggest two alternatives for realizing the principle of proportionality within the contemporary criminal justice system. These alternatives are not mutually exclusive. First, I suggest that, although prosecutors are not constitutionally required to consider proportionality, they should regard themselves as ethically bound to do so. The Crown's overarching ethical obligation to act as a minister of justice must, I argue, encompass an obligation to seek proportionate sentences. Second, I suggest the Court should relax the standards for demonstrating that a mandatory minimum sentence constitutes cruel and unusual punishment under s. 12, thereby giving judges an effective tool for avoiding disproportionate sentences that would otherwise be required by mandatory minimums. This latter solution would be compatible with the separation of powers envisaged in *Anderson*, and would alleviate the tension that *Anderson* creates.

I turn, first, to the issue of prosecutorial ethics.

4. PROPORTIONALITY AND THE PROSECUTOR AS MINISTER OF JUSTICE

Crown attorneys are "ministers of justice." As such, their role is not to seek the highest sentences possible — or indeed, to pursue convictions — but to ensure justice is done.⁵⁰ The Supreme Court has affirmed this principle on numerous occasions.⁵¹ In *R. v. Regan*, it identified three non-exhaustive facets of the "minister of

⁵⁰ *R. v. Boucher*, 20 C.R. 1, 1954 CarswellQue 14, 110 C.C.C. 263, [1955] S.C.R. 16, 23 ["*Boucher*"] ("It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime"). See also Graeme G. Mitchell, "'No Joy in This for Anyone': Reflections on the Exercise of Prosecutorial Discretion in *R. v. Latimer*" (2001), 614 *Sask. L. Rev.* 491, 495 ("It is trite to observe that 'Crown counsel's role within the criminal justice system is unique.' Indeed, the dual public functions performed by a prosecutor are well-known and have received considerable judicial and extra-judicial commentary" (citations omitted)) ["*Mitchell*"].

⁵¹ See e.g. *Boucher*, *ibid.* at 24 ("The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings"); *Nelles v. Ontario*, 1989 CarswellOnt 415, 1989 CarswellOnt 963, 71 C.R. (3d) 358, [1989] 2 S.C.R. 170 at 191 ("Traditionally the Crown Attorney has been described as a 'minister of justice' and 'ought to regard himself as part of the Court rather than as an advocate'" (quoting Morris Manning, "Abuse of Power by Crown Attorneys" [1979] *L.S.U.C. Lectures* 571, at p. 580, quoting Henry Bull, Q.C.)); *R. v. Stinchcombe*, 1991 CarswellAlta 192, 1991 CarswellAlta 559, 8 C.R. (4th) 277, 68 C.C.C. (3d) 1, [1991] 3 S.C.R. 326 at 341 ("The tradition of Crown counsel in this country carrying out their role as 'ministers of justice' and not as adversaries has generally been very high"); *R. v. Bain*, 1992 CarswellOnt 981, 1992 CarswellOnt 66, 69

justice” role: objectivity, i.e. “the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices”; independence, including from the police and the defence; and “lack of animus — either negative or positive — towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.”⁵² These duties underpin the core obligation to seek a just outcome in each case.

To seek a just outcome, the Crown Attorney must, of course, make a judicious and balanced charging decision at the outset.⁵³ The initial charging decision is especially crucial when it entails a mandatory minimum sentence, since it may dictate the ultimate sentence. The Crown Attorney’s obligation to act as a minister of justice also extends to the sentencing phase more generally. Thus, the Crown ought not to request the highest possible sentence in every case, but should rather seek a fit and proportionate sentence. As Justice Gray of the Ontario Superior Court of Justice recently remarked,

In many, if not most, cases, the accused will argue for the lowest possible sentence consistent with the requisites of the *Criminal Code* and appellate authority. On the other hand the Crown, as representative of the public interest, will not necessarily argue for the longest possible sentence. Counsel for the Crown, as a “Minister of Justice”, is expected to take a more balanced approach.⁵⁴

This more balanced approach requires Crown Attorneys to consider the principle of proportionality, particularly when making decisions that directly shape criminal sentences, such as those that trigger mandatory minimum sentences.⁵⁵ The obliga-

C.C.C. (3d) 481, 10 C.R. (4th) 257, [1992] 1 S.C.R. 91 at 118 (“The single-minded pursuit of convictions cannot be compatible with the responsibilities of Crown prosecutors” (per Gonthier J., dissenting on other grounds); and *R. v. Regan*, 2002 CarswellNS 62, 2002 CarswellNS 61, 161 C.C.C. (3d) 97, 49 C.R. (5th) 1, 2002 SCC 12, [2002] 1 S.C.R. 297 at para. 157 (“the duty of a Crown Attorney to respect his or her ‘Minister of justice’ obligations of objectivity and independence is [. . .] an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system”) [*Regan*]).

⁵² *Regan*, *ibid.* at para. 156.

⁵³ Mitchell, *supra* note 50 at 500 (“[D]uring the charging phase, the prosecutor is called upon to fulfill her quasi-judicial role in its purest form. No semblance of the adversarial stance the prosecutor will assume later in the process should intrude upon the initial decision whether to initiate a formal criminal charge and what particular charge to lay. So central is this decision to Crown counsel’s role as a ‘minister of justice’, a fact highlighted by the courts’s aversion to re-evaluating it on an application for judicial review, that a prosecutor is professionally and constitutionally obliged to make it with the greatest prudence and care.”).

⁵⁴ *R. v. Adamson*, 2013 ONSC 2365, 2013 CarswellOnt 5666 (S.C.J.) at para. 21.

⁵⁵ For empirical studies of how prosecutors use their charging discretion to lessen the effects of some mandatory minimums in the United States where mandatory minimum sentences are more common, see David Bjerk, “Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing” (2005) 48 *Journal of Law and Economics* 591; and Jeffery T. Ulmer, Megan C. Kurlychek &

tion falls squarely within their duty to act as ministers of justice. This is so even though to consider that principle it does not constitute an independent constitutional duty under s. 7.

Significantly, the *Anderson* Court's overarching rationale for denying a s. 7 obligation to consider proportionality — preserving prosecutorial discretion and independence — was based upon the Crown obligation to act as a minister of justice. The Court remarked:

[T]he fundamental importance of prosecutorial discretion [lies] not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfillment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as ministers of justice.⁵⁶

In essence, then, the Court declined to find that Crown Attorneys are constitutionally obligated to consider proportionality when exercising their discretion in a way that binds sentencing judges so as to enhance the ability of Crowns to act as ministers of justice. Yet, to act as ministers of justice, Crown Attorneys must consider proportionality when exercising their discretion in a manner that reduces judges' sentencing options.

In my view, prosecutors' offices should emphasize the Crown's obligation to act as a minister of justice by updating their Crown policy manuals to ensure the guidelines for triggering mandatory minimum sentences address proportionality considerations — including, of course, Aboriginal status.⁵⁷ In this way, they can reinforce and clarify Crown Attorneys' ethical duties while improving criminal justice outcomes.

That said, neither Crown policies nor an elaboration of prosecutors' ethical obligations is a panacea. Neither provides the transparency that characterizes the traditional sentencing process. When judges sentence, they are expected to articulate their rationales, and their decisions are subject to appeal. In contrast, prosecutorial decisions that restrict judicial sentencing discretion are private and, as the *Anderson* Court affirmed, are generally not subject to review. While Crown policies may, of course, be publicly available, prosecutors' decisions about how to apply those policies in individual cases are made privately: Crown Attorneys are generally not required to publicly articulate their decision-making processes or to

John H. Kramer, "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences" (2007) *Journal of Research in Crime and Delinquency* 427 (noting *inter alia*, that prosecutors' discretionary decisions to trigger mandatory minimum sentences were biased against racial minorities).

⁵⁶ *Anderson*, S.C.C., *supra* note 7 at para. 37, quoting *Kvello v. Miazga*, 2009 SCC 51, [2009] 3 S.C.R. 339, 2009 CarswellSask 718, 2009 CarswellSask 717 at para. 47 (quotation marks omitted).

⁵⁷ For a general discussion of the pros and cons of detailed, publicly available Crown policy manuals, see Michael Code, "The Attorney General in the 21st Century: A Tribute to Ian Scott: Judicial Review of Prosecutorial Discretion" (2009) 34 *Queen's L.J.* 863.

otherwise justify their discretionary decisions.⁵⁸ This lack of transparency reduces public scrutiny and makes it harder to prove an individual Crown has neglected his or her ethical obligations or ignored governing policy. Moreover, even if a deviation from policy or an ethical breach can be proved, it will not necessarily entail a remedy for the offender who receives a disproportionate sentence as a result.

Finally, even if a prosecutor abides by his or her ethical obligation to consider proportionality at the charging phase, the case could unfold in such a way that the ultimate sentence required by the prosecutor's charging decision will turn out to be disproportionate. An example of this problem is offered by Justice Molloy's analysis in *R. v. Smickle*, which was cited with approval by Justice Doherty in *R. v. Nur*.⁵⁹ Justice Molloy posited a hypothetical example of a grossly disproportionate sentence resulting from a mandatory minimum penalty, based on the true case of *R. v. Snobelen*.⁶⁰ The accused in *Snobelen* moved from a ranch in Oklahoma to Ontario, then had his personal property shipped to him. He eventually realized the shipped property included a restricted firearm and ammunition that was not licensed and registered in Canada. Before he disposed of the firearm, his wife, with whom he was having marital problems, reported it to the police. He was charged with possession of a loaded restricted or prohibited weapon. The Crown proceeded summarily and he received an absolute discharge. Justice Molloy noted that if, in addition to these facts, the Crown had a credible allegation the accused had used his possession of the firearm to intimidate his wife, then it could reasonably have decided to proceed by indictment at the initial charging phase, thereby triggering a three-year mandatory minimum sentence. If the accused were subsequently convicted of the possession offence but the allegations of intimidation were not proved, the judge would be obliged to impose the three-year sentence even though it would be disproportionate on the established facts. Notably, such a scenario could occur even if the Crown gave due consideration to the proportionality principle when making its initial charging decision. This hypothetical illustrates how the evidence that is relevant to the proportionality analysis may emerge and unfold over time.

⁵⁸ Where a claimant establishes a proper evidentiary foundation for an abuse of process claim, however, the evidentiary burden may shift to the Crown, which may then be obliged to explain its impugned decision. This shift may be required because the Crown is often the only party privy to the relevant information. If the Crown does not provide a satisfactory explanation, then that failure may weigh heavily in favour of the claimant. The claimant retains the ultimate burden of proving the abuse of process. In addition, Crown policy guidelines may be relevant to the court's analysis, although they are not themselves subject to *Charter* scrutiny in the abstract because they do not have the force of law. *Anderson*, S.C.C., *supra* note 7 at paras. 52–56, citing *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, 2011 CarswellAlta 989, 2011 CarswellAlta 988, 271 C.C.C. (3d) 36, 85 C.R. (6th) 1 at para. 63.

⁵⁹ *R. v. Smickle*, 2012 ONSC 602, 91 C.R. (6th) 132, 2012 CarswellOnt 1484 (S.C.J.), at para. 111, ; reversed 2013 ONCA 678, 2013 CarswellOnt 15936, 304 C.C.C. (3d) 371, 5 C.R. (7th) 359; reversed 2014 ONCA 49, 2014 CarswellOnt 620, 306 C.C.C. (3d) 351; *R. v. Nur*, 2013 ONCA 677, 303 C.C.C. (3d) 474, 5 C.R. (7th) 292, 2013 CarswellOnt 15898 at para. 159; leave to appeal allowed 2014 CarswellOnt 4607, 2014 CarswellOnt 4606 (S.C.C.) [*"Nur*, ONCA"].

⁶⁰ *R. v. Snobelen* (April 25, 2008), [2008] O.J. No. 6021, S. D. Brown J. (Ont. C.J.).

Thus, while the Crown's ethical obligation to consider proportionality when making discretionary decisions that limit the judge's sentencing options should be recognized and affirmed, it should not be regarded as a cure-all. Indeed, the Court has made clear that the existence of prosecutorial discretion cannot remedy an otherwise unconstitutional sentencing regime.⁶¹ In sum, recognizing that prosecutors are ethically bound to seek proportionate sentences is necessary to ensure that they act as ministers of justice, but it is not sufficient to ensure that offenders receive proportionate sentences.

5. DISPROPORTIONALITY AND GROSS DISPROPORTIONALITY UNDER THE CHARTER

What options remain, then, for ensuring the principle of proportionality enshrined in s. 718 of the *Criminal Code* — including the requirement that due consideration be given to Aboriginal status — is preserved in the era of mandatory minimum sentences? The *Anderson* Court pointed to the answer: “If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged.”⁶² In other words, the claimant ought not to attack the exercise of prosecutorial discretion that triggers the mandatory minimum sentence, but rather the mandatory minimum sentence itself. The traditional avenue for doing so — and the one we must assume the Court had in mind — is a claim that the mandated sentence violates the s. 12 *Charter* guarantee against cruel and unusual punishment or treatment.⁶³

There are, however, significant limitations built into the s. 12 jurisprudence that make it an ineffective tool for dismantling mandatory minimums resulting in disproportionate sentences. Indeed, it is noteworthy that Mr. Anderson expressly did *not* challenge the sentencing provisions under s. 12 of the *Charter* before any court, relying exclusively on the more novel and untested ss. 7 and 15 claims.⁶⁴ One can assume he did not expect a s. 12 challenge would succeed, even if he could prove his sentence was disproportionate insofar as it did not reflect his Aboriginal status (a claim that underpinned his ss. 7 and 15 *Charter* arguments).

In the remainder of this article, I will argue that if the Court views s. 12 as the appropriate basis for redressing disproportionate sentences (as *Anderson* suggests), and if it is committed to the core principle of proportionality for both Aboriginal and non-Aboriginal offenders (as *Anderson* also suggests), then it must revise its s.

⁶¹ *Smith*, *supra* note 5 at 1078 (“In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.”)

⁶² *Anderson*, S.C.C., *supra* note 7 at para. 25.

⁶³ Section 12 of the *Charter* states, “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” *Charter*, s. 12, *supra* note 4.

⁶⁴ *Anderson*, Prov. Ct. N.L., *supra* note 18 at para. 15.

12 jurisprudence. At present, s. 12 simply does not do enough to protect proportionality.

(a) Section 12 and mandatory minimum sentences

The test for determining whether a mandatory minimum sentence contravenes s. 12 was established in *R. v. Smith*.⁶⁵ It has two parts. First, the court must consider whether the impugned mandatory minimum sentence is “grossly disproportionate” in the case at hand, given the particular circumstances of the offence and the offender before the court. Second, if the mandated sentence is not grossly disproportionate in the case at hand, then the court must consider whether it would be grossly disproportionate in other cases; that is, whether it would result in gross disproportionality in “reasonable hypothetical” scenarios. The underlying logic is that, if the sentence would be grossly disproportionate as applied to some cases, then it is *ipso facto* unconstitutional and hence cannot be applied in *any* cases, including the case at hand. (Of course, the result could be a hollow victory for the claimant, since the court could strike down the mandatory minimum as unconstitutional but still affirm the claimant’s sentence on the basis that, while the sentence is no longer mandatory, it is justified in the claimant’s case by the usual sentencing principles.⁶⁶)

The gross disproportionality standard that animates both prongs of the test is a demanding one. A sentence will not satisfy that standard if it is “merely excessive”; rather, “[t]he sentence must be ‘so excessive as to outrage standards of decency’ and disproportionate to the extent that Canadians ‘would find the punishment abhorrent or intolerable.’”⁶⁷ Scholars have criticized the logic and justice of the gross disproportionality standard.⁶⁸ According to Jamie Cameron, the gross disproportionality standard “demands reexamination against the objectives of section 12.”⁶⁹ Allan Manson remarks, “we have not arrived at [the gross disproportionality stan-

⁶⁵ *Smith*, *supra* note 5.

⁶⁶ *Smith*, *ibid.* is illustrative. In that case, Justice Lamer (as he then was), writing for the majority, indicated that he would have dismissed the appellant’s appeal against his eight-year sentence, despite having found that the seven-year mandatory minimum sentence was unconstitutional, on the grounds that the Court of Appeal had affirmed the sentence was fit in the circumstances of the appellant’s case. He instead sent the case back for resentencing, however, because the Crown had conceded during oral argument that this would be the best course of action.

⁶⁷ *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, 228 C.C.C. (3d) 385, 54 C.R. (6th) 197, 2008 CarswellAlta 229, 2008 CarswellAlta 228 at para. 14 (citations omitted) [*Ferguson*].

⁶⁸ See e.g. Cameron, *supra* note 6; and Allan Manson, “Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences” (2012) 57 *S.C.L.R.* (2d) 173 [*Manson*]. For criticisms of the evolving application of the “gross disproportionality” standard in the context of mandatory minimums, see Kent Roach, “Mandatory Minimum Sentences: Law and Policy” (2001) 39 *Osgoode Hall L.J.* 367; and H el ene Dumont, “Disarming Canadians, and Arming Them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime. An Essay or an Apparent Contradiction” (2001) 39 *Osgoode Hall L.J.* 329.

⁶⁹ Cameron, *supra* note 6 at 584.

dard] by thoughtful reflection on the purposes and scope of section 12 and the ‘cruel and unusual’ concept. Instead, we are here essentially by default.”⁷⁰ Quite simply, it is hard to defend the Court’s insistence on *gross* disproportionality, which leaves “merely” disproportionate sentences intact, given the Court’s repeated affirmation that *proportionality* is the “*sine qua non* of a just sentence.”⁷¹

The *Smith* Court justified the gross disproportionality requirement on the grounds that a lower standard would result in too many sentences being struck down as unconstitutional, diminishing the significance of the *Charter* and interfering excessively with the legislature’s determinations about appropriate sentences. It concluded: “We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence.”⁷² Of course, the suggestion that disproportionate sentences can be reduced through the usual sentencing appeal process is fallacious in the context of mandatory minimum sentences, where that remedy is unavailable.

Despite the demanding gross disproportionality requirement, the *Smith* case seemed promising from the perspective of claimants seeking to challenge mandatory minimum sentences. This is so because the Court’s application of the second prong of the test, the “reasonable hypothetical” analysis, suggested that most mandatory minimums could in fact be characterized as grossly disproportionate. In *Smith*, the Court held that the seven-year mandatory minimum sentence at issue was not grossly disproportionate in the case before it, where the offender had imported seven and a half ounces of high-grade cocaine from Bolivia, but that this same sentence would be grossly disproportionate if applied to “a young person who, while driving back into Canada from a winter break in the U.S.A., [was] caught with only one, indeed, let’s postulate, his or her first ‘joint of grass.’”⁷³ In other words, the Court imagined “the most innocent possible offender,” then assessed whether the mandatory minimum sentence would be disproportionate in his or her case.⁷⁴

Justice Doherty recently observed that,

As described in *Smith*, the virtues of the hypothetical offender and the mitigating factors relevant to the commission of the offence seem limited only by the imaginations of counsel and judges. Unmodified, the hypothetical offender analysis described in *Smith* would have left very few, if any, mandatory minimum jail terms standing.⁷⁵

This is so because statutory criminal offences are drafted in such abstract, general terms that they normally apply to a wide range of scenarios. As such, it will usually

⁷⁰ Manson, *supra* note 68 174.

⁷¹ Anderson, S.C.C, *supra* note 7 at para. 21, quoting *Ipeelee*, *supra* note 13 at para. 36.

⁷² *Smith*, *supra* note 5 at 55.

⁷³ *Smith*, *ibid.* at 1053.

⁷⁴ Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (2007-Rel. 1), 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2007), at 53.3 [“Hogg”].

⁷⁵ Nur, ONCA, *supra* note 59 at para. 116. See also Hogg, *ibid.* at 53.4, noting that “no minimum sentence, however short, could possibly survive the relentless application of the most innocent possible offender principle.”

be easy to come up with at least one scenario wherein the facts of the case satisfy the elements of the offence, but the circumstances are so sympathetic or innocuous that the mandatory minimum sentence would be grossly disproportionate. Thus, following *Smith*, it seemed the reasonable hypothetical analysis would make the gross disproportionality standard quite attainable.

As Jamie Cameron notes, however, “[a]ny expectation that the [s. 12] jurisprudence would blossom after *Smith* was dashed by a series of decisions which, together, show that the Supreme Court regards section 12 as a ‘faint hope’ guarantee of sorts — one available only on rare occasions and in exceptional circumstances.”⁷⁶ Those decisions yanked the teeth out of the reasonable hypothetical analysis, making it harder for claimants to succeed on that basis. Most significantly, in *R. v. Goltz* and again in *R. v. Morrissey*, the Court held that the “reasonable hypothetical” must be “common.”⁷⁷ Remote or unlikely scenarios — including those based on the facts of real but unusual reported cases — are not to be considered.⁷⁸

Justice Gonthier on behalf of the Court in *Goltz* wrote: “The means and purposes of legislative bodies are not to be easily upset in a challenge under s. 12.”⁷⁹ And indeed, the mandatory minimums established by the legislature are not easily upset. Since *Smith*, the Court has denied every s. 12 challenge to mandatory minimum sentences that has come before it, and the Ontario Court of Appeal has a similarly parsimonious record.⁸⁰ Peter Hogg reports, “the Supreme Court, while never expressly disavowing anything said or done in *Smith*, has gradually become more and more deferential to Parliament when reviewing mandatory minimum

⁷⁶ Cameron, *supra* note 6 at 583. See also Kent Roach, “Searching for *Smith*: The Constitutionality of Mandatory Sentences”, (2001) *Osgoode Hall L.J.* 367, 408 (“The recent section 12 cases suggest that Parliament can create mandatory sentences without worrying very much that they may be invalidated on the basis of hypothetical best offenders”) [“Roach”].

⁷⁷ *R. v. Goltz*, 1991 CarswellBC 924, 1991 CarswellBC 280, 67 C.C.C. (3d) 481, 8 C.R. (4th) 82, [1991] 3 S.C.R. 485, 515; *R. v. Morrissey*, [2000] 2 S.C.R. 90, 148 C.C.C. (3d) 1, 36 C.R. (5th) 85, 2000 SCC 39, 2000 CarswellINS 256, 2000 CarswellINS 255 at para. 33.

⁷⁸ For a fuller description of the post-*Smith* changes to the reasonable hypothetical analysis, see esp. *Nur*, ONCA, *supra* note 59 at paras. 110–142.

⁷⁹ *Supra* note 77 at 501.

⁸⁰ Parkes, *supra* note 1 at 154; Roach, *supra* note 76 at 370; *Nur*, ONCA *supra* note 59 at 70 (noting that “[a]fter *Smith*, no decision of the Supreme Court of Canada or this court has declared a mandatory minimum jail term unconstitutional under s. 12,” but then finding a section 12 violation in the case at hand.)

sentences.”⁸¹ Don Stuart describes the Court’s post-*Smith* record as “one of retreat and timidity.”⁸²

(b) Reconsidering section 12 in light of mandatory minimum sentences

As we have seen, s. 12 only prohibits *grossly* disproportionate sentences; but notably, the *Anderson* Court affirmed that *proportionality* is a s. 7 principle of fundamental justice — albeit one that does not bind prosecutors.⁸³ This is not the first time the Court has identified proportionality as a s. 7 principle. In *Ipeelee*, it stated: “proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*.”⁸⁴ Read together with the Court’s s. 12 jurisprudence, these statements about s. 7 suggest that a “merely” disproportionate sentence contravenes s. 7 of the *Charter* but not s. 12. This result is not only bizarre and counterintuitive; it is inconsistent with the basic structure of the *Charter*. The Court has made clear that the *Charter* principles are “mutually reinforcing” and that ss. 7 and 12 should not result in competing standards.⁸⁵ In *Smith*, Justice McIntyre (dissenting, but not on this point) said:

While section 7 sets out broad and general rights which often extend over the same ground as other rights set out in the *Charter*, it cannot be read so broadly as to render other rights nugatory. If section 7 were found to impose greater restrictions on punishment than s. 12 — for example by prohibiting punishments which were merely excessive — it would entirely subsume s. 12 and render it otiose.⁸⁶

Similarly, in *R. v. Malmo-Levine*, the Court concluded that adopting different proportionality standards under ss. 7 and 12 “would render incoherent the scheme of interconnected ‘legal rights’ set out in ss. 7 to 14 the *Charter*,” adding that this result “would be unacceptable.”⁸⁷

Sections 7 and 12 should encompass the same rights and restrictions, then. But if this is so, then how ought we to reconcile the s. 12 gross disproportionality stan-

⁸¹ Hogg, *supra* note 74 at 53.4. Hogg appears to endorse this trend. For other, more critical accounts of the same trend, see e.g. Roach, *supra* note 76 at 370; Kent Roach, “The Charter versus the Government’s Crime Agenda” (2012) 58 *S.C.L.R.* (2d) 211, 226; Lisa Dufraimont, “*R. v. Ferguson* and the Search for a Coherent Approach to Mandatory Minimum Sentences under section 12” (2008) 42 *S.C.L.R.* (2d) 459, 472; and Don Stuart, “The Charter Balance against Unscrupulous Law and Order Politics,” (2012) 57 *S.C.L.R.* (2d) 13, 37 [“Stuart”].

⁸² Stuart, *ibid.* at 37.

⁸³ *Anderson*, S.C.C., *supra* note 7 at 21-22.

⁸⁴ *Ipeelee*, *supra* note 13 at 36.

⁸⁵ *Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429, 2002 SCC 84, 2002 CarswellQue 2706, 2002 CarswellQue 2707 at para. 144, citing *R. v. L. (T.P.)*, 1987 CarswellNS 342, 1987 CarswellNS 41, 61 C.R. (3d) 1, 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309 at p. 326; and *R. v. Tran*, 1994 CarswellNS 435, 1994 CarswellNS 24, 92 C.C.C. (3d) 218, 32 C.R. (4th) 34, [1994] 2 S.C.R. 951 at p. 976.

⁸⁶ *Smith*, *supra* note 5 at 1107.

⁸⁷ *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, 179 C.C.C. (3d) 417, 2003 CarswellBC 3134, 2003 CarswellBC 3133, 16 C.R. (6th) 1 at para. 160. Here is the

dard with the Court's statement that proportionality is a principle of fundamental justice? As I see it, the Court has four options. It could simply tolerate the inconsistency. This option is hardly viable as a jurisprudential position, however; it would, in essence, mean that the s. 7 principle of proportionality amounts to a right without a remedy; but "a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur."⁸⁸ Alternatively, the Court could abandon both the s. 7 proportionality principle and the s. 12 gross disproportionality requirement in favour of some alternative, consistent standard. This option is hardly viable either, and it is certainly unlikely, since it would destabilize basic sentencing principles and require an overhaul of two separate areas of *Charter* law.

More realistically, the Court could resolve the inconsistency by holding that both ss. 7 and 12 only prohibit grossly disproportionate sentences, or that they both prohibit disproportionate sentences. It could pursue the former option through a s. 7 balancing analysis. The Court has adopted an internal balancing approach to s. 7, stating: "Fundamental justice requires that a fair balance be struck between [individual and societal] interests, both substantively and procedurally."⁸⁹ Using this approach, it could conceivably identify principles of fundamental justice that militate in favour of Parliament's mandatory minimum sentencing schemes, such as public safety, to be balanced against the principle of proportionality. It could then reconcile the competing principles by concluding that s. 7, like s. 12, only prohibits gross disproportionality.

In my view, this approach would be a mistake. As we have seen, proportionality is not only a longstanding tenet in our criminal justice system; it is central to how we justify the institution of criminal punishment in the first place. According to this foundational principle, disproportionate sentences are, by definition, both unjust and unjustifiable. In this light, it is hard to see how the Court could treat a deprivation of liberty resulting from a disproportionate sentence as consistent with the principles of fundamental justice, even if disproportionality arguably serves competing societal interests such as public safety (which, I hasten to add, it likely does not: the empirical evidence overwhelmingly suggests that harsh mandatory minimums do not deter crime or enhance public safety).⁹⁰ A finding that only

Court's statement in full: "Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected 'legal rights' set out in ss. 7 to 14 the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable."

⁸⁸ *Nelles v. Ontario*, 1989 CarswellOnt 963, 1989 CarswellOnt 415, 71 C.R. (3d) 358, [1989] 2 S.C.R. 170, 196.

⁸⁹ *Cunningham v. Canada*, 1993 CarswellOnt 977, 1993 CarswellOnt 84, [1993] 2 S.C.R. 143 at pp. 151-52, 80 C.C.C. (3d) 492, 20 C.R. (4th) 57. See also *R. v. Mills*, [1999] 3 S.C.R. 668, 28 C.R. (5th) 207, 139 C.C.C. (3d) 321, 1999 CarswellAlta 1056, 1999 CarswellAlta 1055 at paras. 61-67.

⁹⁰ See esp. Anthony M. Doob & Cheryl M. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 *Crime and Justice* 143 (reviewing existing

grossly disproportionate sentences are inconsistent with s. 7 would result in a fundamental disjuncture between the principles that expressly animate and justify our criminal sentencing scheme and the principles of fundamental justice. It would therefore perpetuate the tensions and contradictions in the Court's jurisprudence and in Canadian law more generally.

The only remaining option is to revise the s. 12 test so that it accords with the s. 7 standard by abandoning the gross disproportionality requirement. This option would require the Court to overturn a well-established legal test. Yet, it is ultimately the most defensible option and indeed the most consistent with the Court's recent jurisprudence. In *Anderson* the Court made clear that the judge is responsible for ensuring a proportionate sentence. It also stressed that judges must pay heed to the particularities of Aboriginal offenders when sentencing them as part of the required proportionality analysis.⁹¹ By finding that disproportionate sentences are contrary to s. 12 of the *Charter*, the Court would not only reconcile ss. 7 and 12; it would also empower sentencing judges to discharge their duty to issue proportionate sentences for Aboriginal and non-Aboriginal offenders alike. As we have seen, judges are currently unable to fulfill this duty in some cases due to the operation of mandatory minimum sentences and prosecutorial discretion. At present, s. 12 offers no recourse where judges are bound to sentence offenders to disproportionate penalties, contrary to their institutional duties, to foundational sentencing principles, to the dictates of the *Criminal Code*, and to the principles of fundamental justice. This situation is insupportable. The most obvious "out" for the Court, in light of the *Anderson* decision, is to alter the s. 12 standard so that it actually reflects the s. 7 proportionality principle.

6. CONCLUSION

Two years ago, Don Stuart made the following prediction:

There will be clear challenges to the courts to dust off section 12 to put constitutional brakes on Parliament's new appetite for enacting minimum punishments at a time when the United States courts and policy-makers have become acutely aware of the danger, injustice and costs of such sentencing rigidity.⁹²

criminological studies and concluding that we should conditionally accept the "null hypothesis," according to which harsher sentences do not work to deter crime). See also *Berger*, *supra* note 1 at 106-07.

⁹¹ Of course, the factors that inform proportionality in the context of Aboriginal sentencing can and should be considered as part of the current gross disproportionality assessment. They would, however, be more readily protected if judges were empowered to strike down disproportionate sentences under s. 12. See Ryan Newell, "Making Matters Worse: The *Safe Streets and Communities Act* and the Ongoing Crisis of Indigenous Over-Incarceration," (2013) 51 *Osgoode Hall L.J.* 199.

⁹² Stuart, *supra* note 81 at 37.

Stuart has already been proven right: s. 12 challenges to mandatory minimums are coming thick and fast. In recent years, we have seen numerous such challenges, mostly to mandatory minimums associate with various firearms-related offences.⁹³

Recent decisions have also applied s. 12 to the victim surcharge, which is a specific, mandatory sentencing provision that is currently giving rise to much controversy and confusion in the lower courts. Section 737 of the *Criminal Code* states that an offender who is convicted of an offence (or discharged under s. 730 of the *Criminal Code*) “shall pay a victim surcharge, in addition to any other punishment imposed . . .”⁹⁴ The surcharge is calculated as 30 percent of any fine or \$100 for every summary conviction and \$200 for every indictable conviction. As of 2013, the victim surcharge is truly mandatory: judges can no longer waive it, even in cases of undue hardship.⁹⁵ Although its status as a criminal sentence or punishment

⁹³ Recent cases in which the accused challenged a mandatory minimum sentence for a firearms-related offence under section 12 of the *Charter* include: *R. v. Hammerstrom*, 2014 BCSC 1201, 2014 CarswellBC 1896; *R. v. Brown*, 2014 CarswellBC 1622, 2014 BCPC 113; *R. v. Abdullahi*, 2014 CarswellOnt 1805, 2014 ONSC 272 (S.C.J.); *R. v. MacDonald*, 2012 NSCA 50, 2012 CarswellNS 328, 317 N.S.R. (2d) 90, 283 C.C.C. (3d) 308; reversed in part 2014 CSC 3, 2014 SCC 3, 2014 CarswellNS 16, 2014 CarswellNS 17, [2014] 1 S.C.R. 37, 303 C.C.C. (3d) 113, 7 C.R. (7th) 229 (S.C.C.) (appealed to the Supreme Court, but not on the section 12 issue: *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, 2014 CarswellNS 17, 2014 CarswellNS 16, 7 C.R. (7th) 229, 303 C.C.C. (3d) 113; *R. v. Vandyke*, 2013 ABPC 347, 2013 CarswellAlta 2675; *R. v. Ball*, 2013 CarswellBC 3890, 2013 BCSC 2372; *R. v. Hailemolokot*, 2013 MBQB 285, 2013 CarswellMan 646; *Nur*, ONCA, *supra* note 59 (appeal to the Supreme Court granted: see *supra* note 9; *R. v. Rocheleau*, 2013 CarswellOnt 15484, 2013 ONCA 679, 5 C.R. (7th) 397; *R. v. Smickle*, 2013 ONCA 678, 304 C.C.C. (3d) 371, 5 C.R. (7th) 359, 2013 CarswellOnt 15936; *R. v. Charles*, 2013 ONCA 681, 2013 CarswellOnt 15470, 303 C.C.C. (3d) 352, 5 C.R. (7th) 370; leave to appeal allowed 2014 CarswellOnt 4609, 2014 CarswellOnt 4608 (S.C.C.); *R. v. Meszaros*, 2013 ONCA 682, 309 C.C.C. (3d) 392, 2013 CarswellOnt 15469, 5 C.R. (7th) 415; *R. v. Neault*, 2013 SKPC 174, 2013 CarswellSask 753; *R. v. McMillan*, 2013 MBQB 229, 2013 CarswellMan 556; *R. v. Adamo*, 2013 MBQB 225, 300 C.C.C. (3d) 515, 2013 CarswellMan 492, 4 C.R. (7th) 326; *R. v. Crockwell*, 2013 NLTD(G) 23, 2013 CarswellNfld 74; *R. v. Sheck*, 2013 BCPC 105, 2013 CarswellBC 1196; *R. v. Christensen*, 2012 BCPC 374, 2012 CarswellBC 3308; and *R. v. Cater*, 2012 NSPC 37, 2012 CarswellNS 309. Other recent challenges to mandatory minimum sentences include: *R. v. Lloyd*, 2014 BCCA 224, 2014 CarswellBC 1688 (s. 12 challenge to a one-year mandatory minimum sentence for possession of drugs for the purpose of trafficking); *R. v. S. (R.R.G.)*, 2014 CarswellBC 2269, 2014 BCPC 170 (s. 12 challenge to 90-day mandatory minimum sentence for touching a person under the age of 16 years for a sexual purpose); *R. v. Stapley*, 2014 CarswellOnt 5097, 2014 ONCJ 184 (s. 12 challenge to 90-day mandatory minimum sentence for child luring by means of a computer); and *R. v. Khan*, 2013 ONCJ 267, 2013 CarswellOnt 5942 (s. 12 challenge to a 14-day mandatory minimum sentence for invitation to sexual touching).

⁹⁴ *Criminal Code*, *supra* note 3 at s. 737.

⁹⁵ The victim surcharge was made truly mandatory by the *Increased Offenders' Accountability for Victims Act*, S.C. 2013, c. 11. Prior to the act, the surcharge was mandatory in the sense that it applied in all cases, but the law contemplated that the defendant

is currently contested,⁹⁶ the victim surcharge is at the very least akin to a mandatory minimum sentence — and arguably, it *is* a quintessential mandatory minimum sentence. It is imposed on the offender at sentencing. It is mandatory, meaning it applies without regard to the particular circumstances of the offence or the offender, including the offender's ability to pay.⁹⁷ And, like the mandatory minimum sentences discussed above, it increases the scope and impact of prosecutorial discretion while binding the sentencing judge, since the total surcharge depends in large part on how many charges or counts the prosecutor pursues, and on whether the prosecutor elects to proceed summarily or by indictment.

The mandatory victim surcharge has resulted in significant discrepancies within trial courts. First, there is disagreement about how the surcharge is to be applied: some judges use nugatory fines, lengthy payment periods, or other strategies to reduce the surcharge's impact, thereby giving effect to the principle of proportionality, while others reject these strategies.⁹⁸ Second, the mandatory surcharge has been challenged under s. 12 of the *Charter* as an instance of cruel and unusual punishment, with lower courts splitting on its constitutionality.⁹⁹ Third, there is disagreement about the precedential value of the s. 12 *Charter* decisions issued by lower courts, resulting in their uneven application, even within the same court-houses.¹⁰⁰ The result is intolerable from a rule of law perspective: offenders sen-

could be exempted upon request if he or she could show that the imposition of the surcharge would cause undue hardship. The act eliminated this possibility of exemption. See Tanya Dupuis, *Legislative Summary of Bill C-37: Increasing Offenders' Accountability to Victims Act* (February 27, 2013; revised April 11, 2013), online: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c37&Parl=41&Ses=1&source=library_prb&Language=E#5>.

⁹⁶ Cf. *R. v. Cloud*, 2014 QCCQ 464, 2014 CarswellQue 742, 8 C.R. (7th) 364 at para. 22 ["*Cloud*"], *R. c. Chaussé*, 2014 QCCQ 5234, 2014 CarswellQue 6779; leave to appeal allowed 2014 QCCA 1548, 2014 CarswellQue 8437, *R. c. Methot*, 2014 QCCQ 3833, 2014 CarswellQue 4865; leave to appeal allowed 2014 QCCA 1377, 2014 CarswellQue 7194 and *Saskatchewan (Attorney General) v. Torry*, 2014 SKQB 189, 2014 CarswellSask 431 ["*Torry*"]; and see *R. v. Michael*, 2014 CarswellOnt 10487, 2014 ONCJ 360 at paras. 3–17 ["*Michael*"].

⁹⁷ See *Cloud*, *ibid.* at para. 22.

⁹⁸ See esp. *Cloud*, *ibid.*

⁹⁹ Cf. *R. v. Flaro*, 2014 CarswellOnt 192, 7 C.R. (7th) 151, 2014 ONCJ 2, *Michael*, *supra* note 96, *R. c. Larocque*, 2014 ONCJ 428, 2014 CarswellOnt 12087 and *R. v. Javier*, 11 C.R. (7th) 43, 2014 ONCJ 361, 2014 CarswellOnt 10905 (unreported). See also *R. v. Tinker*, 2014 ONCJ 208, 2014 CarswellOnt 5589, striking down the surcharge under s. 7 of the *Charter* after incorporating the gross disproportionality assessment into the s. 7 analysis.

¹⁰⁰ See e.g. Andrew Seymour, "Judges divided on constitutionality of victim surcharge" *Ottawa Citizen* (August 7, 2014), online: <<http://ottawacitizen.com/news/local-news/judges-divided-on-constitutionality-of-victims-surcharge>>, noting "a growing split among the city's [Ottawa's] judiciary over the constitutionality of the controversial [victim surcharge] law," which has "created a situation where an offender may or may not be ordered to pay the surcharge depending on the judge who hears their case." See also *R. v. Sharkey*, 2014 ONCJ 437, 2014 CarswellOnt 11392 (Ont. C.J.).

tenced in different jurisdictions in Canada — or even in adjacent courtrooms in the very same courthouse — may or may not be ordered to pay the victim surcharge; and those who are ordered to pay it may or may not benefit from judicial strategies designed to remedy disproportionality.¹⁰¹ Moreover, the issue of whether and how to apply the surcharge arises in every single criminal case resulting in a conviction or a s. 730 discharge. Thus, despite the Court's insistence in *Ferguson* that if a mandatory minimum sentence contravenes s. 12, it must be struck across the board, the victim surcharge is applied in a patchwork fashion every single day.¹⁰² In these circumstances, clarification from the Supreme Court of Canada cannot come soon enough.¹⁰³

In December, the Court will hear a different *Charter* challenge to mandatory minimum sentences in *R. v. Nur*.¹⁰⁴ That case will give it occasion to reconsider how ss. 7 and 12 of the *Charter* apply in the mandatory minimum context. Admittedly, the Court's track record of showing immense deference to Parliament with respect to sentencing legislation does not bode well for those who hope *Nur* will create new remedies for offenders facing disproportionate mandatory minimums. But perhaps *Anderson's* insistence that judges are solely responsible for ensuring proportionate sentences, and that they are bound to do so, is cause for cautious optimism.¹⁰⁵ If the Court wishes to give real effect to this edict, it will need to give judges more tools for resisting disproportionate mandatory minimums.

¹⁰¹ In one case, a court granted an application by the Crown for a writ of *mandamus* ordering the sentencing judge to impose the victim surcharge. See *Torry*, *supra* note 96. That a court issued this rather extreme remedy is perhaps unsurprising given the pressing need for more clarity and consistency with respect to the surcharge. But unfortunately, the court in question did not have the opportunity to consider a constitutional challenge to the victim surcharge, nor did it have the opportunity to fully consider the non-constitutional aspects of the proportionality analysis as applied to the surcharge; hence, controversies surrounding the surcharge persist, even in the jurisdiction in question.

¹⁰² *Supra* note 67.

¹⁰³ This pressing issue could reach the Supreme Court of Canada through the regular appeals process, but this avenue would delay the Supreme Court's resolution of the issue, possibly for years. In some circumstances, the *Supreme Court Act*, (R.S.C. 1985, c. 5-26) contemplates an appeal *per saltum* on a question of law alone, with leave from the Court and upon consent of the parties, whereby a case can come before the Supreme Court directly from a provincial court. A *per saltum* appeal would be desirable in this case. Every day that we wait for an authoritative pronouncement on the victim surcharge, the surcharge is inconsistently applied — or not applied, as the case may be — to every single person across the country who is convicted of a criminal offence or granted a discharge under s. 730 of the *Criminal Code*, *supra* note 3. Moreover, it would be optimal if the Court could hear a joint appeal on the constitutional and non-constitutional aspects of the victim surcharge so that it could provide a complete answer to the current controversies surrounding that provision without having to wait for separate appeals.

¹⁰⁴ *Nur*, S.C.C., *supra* note 8.

¹⁰⁵ Sylvestre, *supra* note 6 at 466: "Justice LeBel [recognizing proportionality as a principle of fundamental justice in *Ipeelee*] may very well have provided scholars and criminal lawyers with the long-awaited way out of the dead end of s. 12 jurisprudence.

If the Court does choose to relax the s. 12 test for mandatory minimum sentences, it could do so in two (non-mutually exclusive) ways. First, it could loosen the standards for the reasonable hypothetical analysis. As we have seen, the “most innocent offender” application of the reasonable hypothetical analysis could potentially be used to strike down just about any law under s. 12.¹⁰⁶ A return to *Smith*-style hypotheticals would thus serve as a wink and a nudge to judges, permitting them to indirectly invalidate disproportionate sentences on the grounds that in some circumstances, those same sentences would be grossly disproportionate. This approach would make it easier for judges to discharge their responsibility to ensure proportionality. Moreover, the Court could adopt it without expressly repudiating its existing jurisprudence. Yet, this approach would ultimately leave intact the problematic notion that “merely” disproportionate sentences do not offend s. 12 of the *Charter*. As such, it would not actually reconcile ss. 7 and 12 in theory, even though it would reduce the gap between those *Charter* provisions in practice. I think the Court can do better.

The better alternative is to reconceive of s. 12 in light of s. 7 by abandoning the gross disproportionality requirement altogether. This move would signal a dramatic shift towards more judicial intervention in the sentencing sphere. But in my view, a dramatic change is needed to achieve both *Charter* consistency and just criminal sentences. The Court should not shy away from protecting basic constitutional principles like proportionality. If mandatory minimum sentencing schemes cannot survive the honest application of those principles, then they should not survive at all.

If the court does nothing, then offenders will continue to have a right to a just, proportionate sentence without a remedy, contrary to the most basic principles of our constitutional law. And judges will continue to be bound by an “ought” without a “can,” contrary to the most basic principles of fairness and logic. Ultimately, the Court’s approach in *Nur* and its follow-through on *Anderson* will reveal which principle it values more: deference to the legislature and the executive in the realm of criminal sentencing; or the principle of proportionality that justifies the institution of criminal sentencing in the first place.

POSTSCRIPT

The Supreme Court has clearly stated that proportionality is a principle of fundamental justice under s. 7 of the *Charter*. The forgoing article identifies four ways in which this statement can be reconciled with the s. 12 gross disproportionality standard. Since the article was written, the Court of Appeal for Ontario released *R.*

Moreover, the recognition of the proportionality principle may give the parties a more substantial and permanent, as well as less sensitive, basis to challenge mandatory minimum sentences in cases such as *R. v. Nur* and *R. v. Smickle*.”

¹⁰⁶ Cf. Parkes, *supra* note 1 at 164 (“Perhaps a more significant change [than altering the available remedies for s. 12 violations] would be for the Supreme Court to revisit the narrow approach to reasonable hypotheticals taken in *Goltz* and *Morrissey* authorizing consideration of a whole range of potential scenarios. However, if the high standard of ‘gross disproportionality’ continues to be applied, then such a change does little to address the fundamentally arbitrary nature of mandatory minimum sentences.”).

v. *Safarzadeh-Markhali*,¹⁰⁷ in which it applied a fifth, alternative approach to reconciling ss. 7 and 12. The court affirmed that the sentencing principle of proportionality is a principle of fundamental justice under s. 7 of the *Charter* (at paras. 73-80). It then specified that this principle “governs the sentencing *process*, while the standard of gross disproportionality [that applies to s. 12 claims] applies to the *result*” (at para. 82, emphasis in the original). Thus, s. 12 addresses sentencing outcomes and prohibits *grossly* disproportionate sentences; whereas the s. 7 principle of proportionality “prevents Parliament from making sentencing contingent on factors unrelated to the determination of a fit sentence. In this sense, the principle of proportionality is closely associated with the established principle that a law that violates life, liberty or security of the person cannot be arbitrary” (at para. 85).

Following the Court of Appeal’s analysis, it would appear that a “merely” disproportionate sentence is constitutional under ss. 7 and 12 of the *Charter*, so long as the process that culminated in that sentence was shaped by appropriate sentencing factors, per s. 7. In my view, this result is problematic. First, it is difficult to imagine a sentencing process that is truly governed by the principle of proportionality, but which nevertheless results in a disproportionate sentence. Arguably, a disproportionate sentence is proof positive that the sentencing process itself was somehow flawed. Second, in any event, the fact that a sentencing process respects the principle of proportionality is not worth very much if the resultant sentence is nonetheless disproportionate without constitutional consequences. As explained above, a disproportionate sentence is inherently unjust. This is so, regardless of how that disproportionate sentence was reached. I therefore maintain that, to give effect to the principle of proportionality, and to reconcile ss. 7 and 12 of the *Charter* in a meaningful way, the Supreme Court must do something that the Court of Appeal for Ontario is not empowered to do: it must reconsider its own jurisprudence and must replace the s. 12 gross disproportionality standard with a standard of disproportionality.

Lastly, during the final phases of this article’s production, new cases relating to the mandatory victim surcharge have arisen. I have updated the footnotes where possible to reflect these developments, but I anticipate that more cases are imminent. My hope is that these cases will soon culminate in a final ruling from the Supreme Court, one that will end the inconsistency, and the attendant unfairness, that now characterizes the imposition of the victim surcharge across Canada.

¹⁰⁷ 2014 ONCA 627, 2014 CarswellOnt 12258; affirming 2012 ONCJ 494, 2012 CarswellOnt 9292.