The (Re)Discovery of the Proportionality Principle in Sentencing in Ipeelee: Constitutionalization and the Emergence of Collective Responsibility

Marie-Eve Sylvestre
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I. INTRODUCTION

Proportionality in sentencing, which requires that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender,¹ has repeatedly been recognized as the fundamental principle of sentencing by Canadian courts.² Despite its long-established

¹ Section 718.1 of the Criminal Code, R.S.C. 1985, c. C-46 [hereinafter “Code”].
² R. v. Proulx, [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61, at para. 54 (S.C.C.): “For instance, the principle of proportionality, set out in s. 718.1 as the fundamental principle of sentencing, directs that all sentences must be proportional to the gravity of the offence and the degree of responsibility of the offender”; R. v. Nasogaluak, [2010] S.C.J. No. 6, [2010] 1 S.C.R. 206, at paras. 40-41 (S.C.C.) [hereinafter “Nasogaluak”]: “Thus, whatever weight a judge may wish to accord to the objectives listed above [referring to s. 718 Code], the resulting sentence must respect the fundamental principle of proportionality ... It is clear from these provisions that the principle of proportionality is central to the sentencing process” (the emphasis is LeBel J.’s); R. v. Pham, [2013] S.C.J. No. 100, 357 D.L.R. (4th) 1, at paras. 6-7 (S.C.C.) [hereinafter “Pham”]. On the interpretation of s. 718.1 of the Code as the fundamental principle of sentencing, see André Jodouin & Marie-Eve Sylvestre, “Changer les lois, les idées, les pratiques: réflexions sur l’échec de la réforme de la détermination de la peine” (2009) 50 C. de D. 519, at 529 [hereinafter “Jodouin & Sylvestre”].
status, however, I suggest in this paper that the Supreme Court of Canada may very well have rediscovered the proportionality principle in the Ipeelee/Ladue\(^4\) decisions. It did so by recognizing this principle for the first time as a principle of fundamental justice under section 7 of the Canadian Charter of Rights and Freedoms,\(^5\) and by giving more substance to the notion of degree of responsibility, the too often neglected second component of the proportionality principle.

Ipeelee and Ladue dealt with the sentencing of Aboriginal offenders convicted of breach of a long-term supervision order (“LTSO”).\(^6\) Both offenders had addiction problems and long criminal records. Ipeelee, an Inuk man from Iqaluit, Nunavut, was 39 years old when the Court released its decision. His mother was an alcoholic and froze to death when he was five years old. Ipeelee began consuming alcohol at 11 years old and quickly became addicted. He accumulated approximately three dozen convictions for property offences (breaking and entering and theft) and offences against the administration of justice (failures to comply with a court order and breaches of probation orders) as a youth offender. As an adult, he was further convicted of 24 offences of the same type, as well as violent crimes including aggravated assault causing bodily harm, aggravated assault, sexual assault and sexual assault causing bodily harm, before being designated as a long-term offender in 2001 and sentenced to a 10-year LTSO which came into effect in 2007 upon his release from Kingston Penitentiary.\(^7\) His LTSO was suspended and therefore Mr. Ipeelee was sent back into custody on four occasions for violating the conditions of his order, including sleeping in the living room contrary to house rules, behaviour problems, and being agitated and refusing urinalysis. He was finally charged with being found intoxicated and in possession of two bottles of alcohol contrary to his LTSO, pleaded guilty and was sentenced to three years’ imprisonment less six months of pre-sentence custody in 2009.\(^8\)

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\(^3\) Nasogoluak, id., at para. 41. According to LeBel J., the importance of the principle of proportionality predates the 1996 amendments to the Criminal Code.


\(^6\) In accordance with Part XXIV of the Code (Dangerous Offenders and Long-Term Offenders); see s. 752ff.

\(^7\) Ipeelee/Ladue, supra, note 4, at paras. 3-11.

\(^8\) Id., at paras. 12-14.
Mr. Ladue is a member of the Ross River Dena Council Band in Yukon, a community that suffered numerous physical and sexual abuses from the U.S. Army established in the area in the 1940s to build a pipeline. His parents were both alcoholics and died when Ladue was very young. At five years old, Ladue was sent to residential school, where he suffered “physical, sexual, emotional and spiritual abuse”. Upon his return to his community at nine years old, he felt alienated and began drinking heavily. He subsequently began consuming opiates while incarcerated in a federal penitentiary. He was convicted of 40 criminal offences related to property (theft, mischief), alcohol and administration of justice (failures to comply with court orders). He was also convicted of violent offences including robberies, assaults and sexual assaults. In 2003, he was convicted of breaking and entering and sexual assault, designated as a long-term offender and sentenced to a seven-year LTSO which began in 2006. His LTSO was suspended many times for breaches of his conditions, in particular the one prohibiting his use of intoxicants. He was finally convicted of breaching his order in 2010 after he provided a sample of urine that tested positive for cocaine. He was sentenced to three years’ imprisonment less five months of pre-sentence custody.

The Ipeelee/Ladue cases provided an opportunity for the Court to revisit its decisions in R. v. Gladue and R. v. Wells with respect to the sentencing of Aboriginal offenders, especially in light of the national tragedy of their over-representation in the criminal justice system, and in particular in prisons. More specifically, the appeals raised the issue of whether the interpretative framework set out in these previous decisions applied in the context of determining a fit sentence for a breach of an

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9 Id., at para. 21.
10 Id., at para. 19.
11 Id., at paras. 22-25.
12 Id., at paras. 26-27.
15 See Statistics Canada, Adult correctional services 2010-2011 (Mia Dauvergne) (Ottawa: Canadian Centre for Justice Statistics, 2012), online: <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm>, at 11. In 2010-2011, Aboriginal, Inuit and Métis people of Canada accounted for 20 per cent of federal admissions in custody whereas they represented approximately 3 per cent of the adult population as a whole. The disproportion is even higher among female Aboriginal offenders, who represented 41 per cent of all federally incarcerated women. At the provincial level, Aboriginal people are being incarcerated up to 10 times more than their proportion in the population, accounting respectively for 77.6 per cent and 11.4 per cent of provincial admissions in custody in Saskatchewan and Ontario whereas they represented 11.9 per cent and 1.8 per cent of the population.
LTSO. In many respects, this decision is welcome as it represents a real effort on the part of the Court to address even the harshest criticisms raised against its previous decisions, as well as to produce meaningful change for Aboriginal offenders. This paper will focus on two specific elements. First, I discuss the implications for sentencing theory and practice of the recognition of proportionality in sentencing as a principle of fundamental justice under section 7 of the Charter by a majority of the Supreme Court judges. Second, I suggest that these cases may have given rise to the emergence of a concept of shared or collective responsibility for crime grounded in the notion of “degree of responsibility”.

II. THE RECOGNITION OF PROPORTIONALITY IN SENTENCING AS A PRINCIPLE OF FUNDAMENTAL JUSTICE UNDER SECTION 7 OF THE CHARTER

In Ipeelee/Ladue, the Supreme Court of Canada formally recognized for the first time that “proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the Charter”. This short statement was made without any further elaboration on the part of the Court or any consideration of its implications for sentencing and criminal law litigation. As a matter of fact, this issue was never argued by the parties in their factum or before the Court.

The recognition of the constitutional character of the proportionality principle in sentencing by a majority of the Supreme Court judges appears at first to be a cause for celebration. Almost 30 years after the

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16 See Ipeelee/Ladue, supra, note 4, at paras. 63-87.
18 Ipeelee/Ladue, supra, note 4, at para. 36.
20 To be sure, in previous cases and most recently in Nasogahuak, supra, note 2, at para. 41, the Court held that the principle of proportionality in sentencing had a “constitutional dimension, in that s. 12 of the Charter forbids the imposition of a grossly disproportionate sentence that would
Court’s foundational judgment in the *B.C. Motor Vehicle Reference*, it is indeed remarkable that section 7 has not been a more important element in the development of sentencing theory.

Yet, given that the Court does not develop its argument in any way or refer to any previous cases for guidance, many questions remain unanswered. First, which aspects of the proportionality principle in sentencing have been constitutionalized? To understand what is at stake, it is helpful to refer to a conceptual framework developed by Professor Desrosiers in a recent article on mandatory minimum sentences. Building on a distinction made by Lamer J. between the “effect of punishment” and “the process by which the punishment is imposed” in *Smith*, Desrosiers argues that section 12 is only concerned with the assessment of the actual sentence or the result of the sentencing process, leaving untouched its conditions of production or the principles according to which such a result is achieved, which would fall rather in the realm of section 7. She goes on to suggest that the proportionality principle in sentencing entrenched in section 7 has two components: the principle of judicial discretion and the rational connection between the punishment and the objectives pursued by Parliament. In Desrosiers’ opinion, the recognition of the proportionality principle in sentencing in *Ipeelee* has in fact given a constitutional status to the first component, namely, judicial discretion, by recognizing that in the sentencing *process* and regardless of the end
result, judges must keep sufficient discretion to impose a sentence that reflects the gravity of the offence and the degree of responsibility of the offender. In other words, the Court’s decision in *Ipeelee* was primarily concerned with the process by which punishment is imposed and not by the effect of punishment or the result of the sentencing process.

In that sense, we should acknowledge the importance of the Court’s recognition of this new principle of fundamental justice in the context of the proliferation of mandatory minimum sentences that completely annihilate judicial discretion. Justice LeBel may very well have provided scholars and criminal lawyers with the long-awaited way out of the dead end of section 12 jurisprudence. 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* (now on appeal) than the issue of Crown discretion at stake in the analysis of the arbitrariness of the contested legislative scheme.

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26 Id., 140-42. See also Debra Parkes, "Ipeelee and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences" (2012) 33:3 For the Defence 22-27. Parkes pointed out that the Court’s emphasis on the “highly individualized” sentencing process is clearly at odds with the adoption of mandatory minimum sentences.

27 Drawing from a comparative analysis of mandatory minimum penalties in France and in the U.K., Desrosiers interestingly suggests that the courts should distinguish between mandatory minimum sentences that do not make room for judicial discretion and that would be unconstitutional, and those that would preserve such discretion: id., at 142.

28 Since *Smith*, the courts have upheld all mandatory minimum sentences challenged under s. 12’s protection against cruel and unusual punishment and considerably limited the scope of this provision: see Kent Rouch, “Searching for Smith: The Constitutionality of Mandatory Minimum Sentences” (2001) 39 Osgoode Hall L.J. 367. In *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R 96 (S.C.C.) [hereinafter “Ferguson”], the Supreme Court further held that a constitutional exemption was not an appropriate remedy for a s. 12 violation. As a result, legislation imposing minimum sentences should either be declared unconstitutional based on the facts of the case or on reasonable hypotheticals and inconsistent with the Charter, or it should be found constitutional. While some scholars criticized *Ferguson* as imposing an additional limitation on s. 12 (see, e.g., 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), others argued that *Ferguson* put new constitutional pressure on minimum sentences by inviting sentencing judges to strike them down precisely because constitutional exemptions are not available anymore (e.g., Benjamin Berger, “A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and R. v. Ferguson” (2009) 47 S.C.L.R. (2d) 101).

29 *R. v. Smickle*, [2012] O.J. No. 612, 110 O.R. (3d) 25, at paras. 94-95 (Ont. S.C.J.). In that case, Molloy J. relied on Code J.’s analysis in *R. v. Nur*, [2011] O.J. No. 3878, 275 C.C.C. (3d) 330, at paras. 121-143 (Ont. S.C.J.), and found that the legislative scheme for the offence of possession of a loaded firearm contrary to s. 95(1) of the Code was arbitrary and in violation of s. 7 of the Charter because of a two-year gap between the sentences that can be imposed on summary convictions (maximum one year) and on indictment (minimum three years) in the case of a first offence. According to Molloy J., at para. 92, “by eliminating the entire range of sentences between one year
But, there might be other (perhaps unintended) consequences to recognizing proportionality in sentencing as a principle of fundamental justice. In doing so, the Court may have also subjected the assessment of the quality of punishment (i.e., the actual result of the sentencing process) to section 7 scrutiny. In addition to subjecting Parliament-imposed punishment to Charter control, it may have also opened the door to control judicially imposed sentences. In *Smith*, Lamer J. made a distinction between “grossly disproportionate” sentences that trigger constitutional protection under section 12 and “merely excessive” sentences that should be left to the usual sentencing appeal process. In a concurring opinion, McIntyre J. further stressed that “while section 7 set out broad and general rights which often extend over the same ground as other rights set out in the Charter”, it could not be read so broadly as to impose “greater restrictions on punishment than section 12 — for example by prohibiting punishments which were merely excessive”. If it were to do so, section 12 would not serve any practical purpose. This was apparently confirmed by the Court in *R. v. Malmo-Levine*, where the Court stated that both section 12 and section 7 included the same “gross disproportionality” standard in order to preserve the Charter’s internal consistency:

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 of 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.

Recent cases including *Ipeelee* may, however, allow us to reconsider this relation of correspondence between section 7 and section 12. First, in various cases including *Malmo-Levine*, the Court held that the Charter and three years, the effect of the legislation is to constrain the flexibility of the hybrid procedure and significantly limit Crown discretion” as well as “emasculate[ing] the safety valve that the Crown discretion to proceed by summary conviction supposedly represents”.


31 *Smith*, supra, note 19, at 1107 (McIntyre J., concurring).

provisions should be “mutually reinforcing” and that the “content of section 7 was not limited to the sum of sections 8 to 14 of the Charter”. Moreover, there are other indications that the Court is open to reconsider the respective scope of both section 7 and section 12. For instance, in Nasogaluak, the Court accepted the sentencing judge’s finding that the police’s excessive use of force against the defendant did not amount to a section 12 breach, but constituted a violation of section 7 of the Charter.

More fundamentally, the distinction between “grossly disproportionate” sentences that could trigger constitutional protection under section 12 and “merely excessive” sentences that would be shielded from constitutional review and would instead be dealt with through the appeal process is highly questionable. How can a sentence be “merely” excessive? The expression itself is an oxymoron. Excessive, by definition, describes a degree that exceeds what is normal, reasonable or tolerable. But what is normal or reasonable when it comes to sentencing? For instance, should sentences be compared to the general ranges of sentences for particular offences, or to their departure from the more controversial “starting points”, or to societal standards of decency or humanity such as those

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34 B.C. Motor Vehicle Reference, supra, note 21, at 502-503; Malmo-Levine, supra, note 32, at para. 169. See for instance the respective scope of s. 7 and s. 11(c) with respect to the right to silence: Desrosiers, supra, note 23, at 138.
35 Nasogaluak, supra, note 2, at para. 15. This finding had also been confirmed by the Court of Appeal ([2007] A.J. No. 1217, 229 C.C.C. (3d) 52, at para. 27 (Alta. C.A.)). See the Court of Queen’s Bench decision: [2005] A.J. No. 1741, 90 Alta. L.R. (4th) 294, at paras. 5-11 (Alta. Q.B.).
36 See Desrosiers, supra, note 23, at 133, n. 49.
37 Nasogaluak, supra, note 2, at para. 44 (in French: “fourchettes générales de peines applicables à certaines infractions”). According to LeBel J., however, general ranges should be understood as “guidelines rather than hard and fast rules”. A sentence falling outside such ranges can still be considered a fit sentence. See Pham, supra, note 2, at para. 18.
38 In R. v. Arcand, [2010] A.J. No. 1383, 264 C.C.C. (3d) 134 (Alta. C.A.) [hereinafter “Arcand"], a majority of the Court of Appeal of Alberta held that starting points should be used as sentencing tools to minimize unjustified disparity in sentencing (para. 118). This conclusion was adopted after Fraser C.J.A. summarized the sentencing process in Canada as follows in her reasons (at para. 8):

We must face up to five sentencing truths. First, it is notorious amongst judges, of whom there are now approximately 2,100 in this country at three court levels, that one of the most controversial subjects, both in theory and practical application is sentencing. That takes us to the second truth. The proposition that if judges knew the facts of a given case, they would all agree, or substantially agree on the result, is simply not so. The third truth. Judges are not the only ones who know truths one and two, and thus judge shopping is alive and well in Canada — and fighting hard to stay that way. All lead inescapably to the fourth truth. Without reasonable uniformity of approach to sentencing amongst trial and
developed in the context of section 12 in order to be found “merely excessive”? And how can “merely excessive” sentences not violate the right to life, liberty and security of the person protected by section 7 of the Charter?

After *Ipeelee*, the courts might be asked to distinguish “demonstrably unfit” sentences that would be dealt with through the appeal process from disproportionate sentences that would trigger Charter review under section 7 and “grossly disproportionate sentences that outrage society’s standards of decency”, which would be challenged under section 12. The standard of “arbitrarily disproportionate sentences” developed in the context of mandatory minimal sentences by lower courts could easily be adapted to sanction excessive sentences, allowing the courts to respect the principle of the sentencing judge’s discretion while protecting the rights of the accused against the kind of arbitrariness that makes a difference between long-term incarceration and community surveillance. In addition to preserving its own symbolic power by sanctioning grossly disproportionate sentences that outrage society’s standards of decency, section 12 would still remain relevant to declare unconstitutional cruel and unusual forms of punishment, such as the infliction of corporal punishment, “such as the lash”, the “lobotomisation of certain dangerous offenders”, “the castration of sexual offenders”, “the death penalty”.

appellate judges in Canada, many of the sentencing objectives and principles prescribed in the *Code* are not attainable. This makes the search for just sanctions at best a lottery and at worst a myth. Pretending otherwise obscures the need for Canadian courts to do what Parliament has asked: minimize unjustified disparity in sentencing while maintaining flexibility. The final truth. If the courts do not act to vindicate the promises of the law, and public confidence diminishes, then Parliament will.


An example of this is found in *R. v. Proulx*, [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61, at para. 130 (S.C.C.) [hereinafter “*Proulx*”], where Lamer J. held that while the trial judge had imposed a sentence of 18 months in prison, “were [he] a trial judge, [he] might have found that a conditional sentence would have been appropriate in this case”.

*Smith, supra*, note 19, at 1073-74, holding that these punishments and treatments “will always be grossly disproportionate and will always outrage our standards of decency ...”.

While referring to the debates held in the context of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (see, e.g., *R. v. Miller*, [1975] B.C.J. No. 1040, 24 C.C.C. (2d) 401 (B.C.C.A.)), the Supreme Court refrained from declaring that the death penalty would be a cruel and unusual
One last question remains to be dealt with: what does proportionality in sentencing mean in the context of section 7? The concept of proportionality has no content in and of itself. It needs to rely on some other theory or principle, or it remains a measuring instrument, reflecting a relationship between two parts, standing for a relation of correspondence, commensurateness, balance or harmony. Will the principle of proportionality recognized as a principle of fundamental justice in the context of section 7 serve as a moderating or restraining principle, or will it be used tonullify sentences on the ground that they are insufficiently afflictive? In other words, is proportionality a ceiling, requiring that a sentence not exceed what is just and appropriate, or can it also be a threshold, requiring that a sentence be imposed, and reflecting and condemning offenders’ participation to the offence and the harm caused?43

In cases such as *Proulx*44 and *R. v. Fice*,45 the Supreme Court clearly interpreted proportionality under section 718.1 of the *Criminal Code* as a threshold by endorsing just desert theory, which generally implies an obligation and a duty to punish in the first place as well as the idea that the punishment must be sufficiently afflictive in order to be just and appropriate.46

More recently, LeBel J. stated that the proportionality principle included these two perspectives — the restraining and the just desert perspectives, which “converged in a sentence that both speaks out against the offence and punishes the offender no more than is necessary”.47 This was confirmed in *Ipeelee*, where LeBel J. held that both components of the proportionality principle are important: “in the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other”.48

Can we expect the proportionality principle as a principle of fundamental justice under section 7 to follow the same interpretation that it was given pursuant to section 718.1 of the *Criminal Code*? If this were


44 *Supra*, note 40.


47 *Nasogoluak*, *supra*, note 2, at para. 42.

48 *Ipeelee/Ladue*, *supra*, note 4, at para. 37.
the case, the constitutionalization of the proportionality principle could
represent good news for the Crown who has a more limited basis of
appeal in sentencing and might now be allowed to challenge a dispropor-
tionate sentence on the basis that it is insufficiently afflictive under
section 7 of the Charter.49

The answer to this question, however, lies in the interpretation of the
nature and purposes of the legal rights protected under section 7. The
constitutionalization of the proportionality principle may ultimately give
the courts the opportunity to reaffirm that section 7’s legal rights were
not meant to protect the state, societal interests or more specifically vic-
tims of crimes, but to protect the accused whose life, security and liberty
interests are threatened by the state in the context of the criminal trial,50
departing from cases such as Cunningham v. Canada,51 in which it held
that the principles of fundamental justice are also concerned with the
protection of society. In doing so, the Court would give priority to the
limiting and restraining perspective over the just desert perspective of the
proportionality principle, and would justify the existence of a distinct
challenge for arbitrarily disproportionate sentences under section 7 of the
Charter on solid interpretative grounds.

III. THE EMERGING CONCEPT OF SHARED OR COLLECTIVE
RESPONSIBILITY IN SENTENCING OR TAKING “DEGREE(S) OF
RESPONSIBILITY” SERIOUSLY

Ipeelee also allows us to think about shared or collective responsibility
in Canadian criminal law as an integral part of the proportionality principle,
and in particular grounded in the concept of “degree of responsibility”.

Of course, individual responsibility is one of the most fundamental
principles, if not the most fundamental principle, governing our criminal
law. When it comes to culpability, we simply take for granted that
responsibility is imposed on individuals — one at a time based on their

49 Sections 676 and 687 of the Criminal Code, not to mention the restricted standard of
(S.C.C.) [hereinafter “M. (C.A.)”].

50 André Jodouin, “La Charte canadienne et la nouvelle légalité” in E. Mendes & G.

This is so fundamental that we cannot even imagine that responsibility could be allocated differently.

In *R. v. Nette*, Arbour J. stated that “criminal law does not recognize contributory negligence, nor does it have any mechanism to apportion responsibility for the harm occasioned by criminal conduct, except at sentencing when causation has been established”. Sentencing principles allegedly provide balance to otherwise inflexible culpability decisions structured around dichotomies and calling for exclusive decisions such as guilty or not guilty, reasonable or unreasonable, morally voluntary or morally involuntary, which do not allow for any shades of grey. Arguably then, degrees of responsibility should be considered at the sentencing stage.

However, the multiplication of mandatory minimal sentences alluded to in the second part of this article and the emphasis put by recent *Criminal Code* modifications on utilitarian objectives such as denunciation and deterrence have considerably limited judicial discretion in the past decades. Moreover, despite the explicit recognition of degrees of responsibility in section 718.1 of the *Criminal Code* since 1995, the courts have not been clear on their meaning. In some cases, “degree of responsibility” seems to merely duplicate the analysis conducted at the culpability stage, referring to the *mens rea* or to defences which might not have been accepted to negate criminal liability but are still relevant to assess the overall moral blameworthiness of the offender. In other cases, “degree of responsibility” has been linked to “any relevant aggravating or mitigating circumstances relating to the offender” pursuant to


53 [2001] S.C.J. No. 75, [2001] 3 S.C.R. 488, at para. 49 (S.C.C.). In contrast, in both civil liability and tort law, there are mechanisms for apportionment of fault in accordance with the parties’ share of responsibility, including that of the victims.

54 See Marie-Eve Sylvester, “Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity and the Logic of Practice” (2010) 55 McGill L.J. 771, at 811ff. [hereinafter “Sylvester”], where I argue that we should recognize degrees of responsibility at the culpability stage, among other things because the balanced nature of criminal law (i.e., inflexible culpability decisions and flexible sentencing decisions) was foremost a legal fiction.

55 See, e.g., ss. 718.01, 718.02 and 742.1 of the Code. This is, of course, not to say that retributivism or just desert theory cannot produce extremely repressive results, quite the contrary: see James Q. Whitman, “A Plea against Retributivism” (2003-2004) 7 Buff. Crim. L.R. 85. See also *M. (C.A.), supra*, note 49, at para. 80.

section 718.2(a) of the Code. But generally speaking, the courts have mostly undermined the degree of responsibility aspect of the proportionality principle in favour of the assessment of the gravity of the offence, or have emphasized the importance of balancing this principle with that of the parity of sentences. In that sense, the balanced nature of criminal law theory was mostly a false and empty promise and we have fallen short of really discussing what degrees of responsibility could mean if we were, for instance, to think about shared responsibility or responsibility in collective terms, beyond individual and personal responsibility.

I want to suggest that things may have started to change in Ipeelee as the Supreme Court created some space for considering social, economic and political aspects of crime in recognizing the responsibility of state agents (and eventually of the state) in the perpetration of crime.

To be sure, this movement was initiated to some extent before Ipeelee. In Nasogaluak, the Court clarified the case law with respect to the relationship between state misconduct and mitigation of sentences. Nasogaluak was a case of police brutality in which the accused, a man of Inuit and Dene descent, suffered broken ribs and a collapsed lung as a result of his violent arrest and detention. The trial judge refused to stay the proceedings, but nonetheless agreed to reduce the sentence to a conditional discharge to remedy the Charter breaches.

Justice LeBel, writing for the Court, held that when a Charter breach is established, a reduction of sentence constitutes an appropriate remedy.

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59 Section 718.2(b) of the Code: “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”. See, e.g., Popowich, supra, note 17, at para. 17.

60 To be sure, in some cases, the courts have taken into account the relative degree of responsibility amongst parties to a crime distinguishing between the leader of the group or followers: see, for instance, R. v. Overacker, [2005] A.J. No. 855, 198 C.C.C. (3d) 472, at para. 23 (Alta. C.A.); Arcand, supra, note 38, at para. 60; Setz, supra, note 57; and R. c. Demers, [2008] J.Q. no 9499, at paras. 8-13 (Que. C.A.). While this is an interesting development, it does not go as far as considering the responsibility of parties who have not been accused of any crime — in some cases, the difference between the victim and the offender is a matter of considering when the police arrived at a crime scene, or who survived an accident — or the state’s responsibility as a contributing party in a conflictual situation.

for state misconduct related to the circumstances of the offence or the offender in the context of section 24(1) of the Charter. But more importantly perhaps, he stated that it was “neither necessary nor useful” to invoke section 24(1) of the Charter to obtain a reduction of sentence. Police violence or other state misconduct related to the circumstances of the offence or the offender, including but not limited to state misconduct that amounts to a Charter breach, are also relevant factors in crafting a fit and proportionate sentence following the statutory sentencing regime established in the *Criminal Code*. The Court even goes as far as to suggest that in some exceptional cases the judge could impose a sentence reduction outside statutory limits or, in other words, a sentence that could not comply with mandatory minimums and other provisions prohibiting certain forms of sentences, for “some particularly egregious form of misconduct by state agents”.

In *Nasogaluak*, LeBel J. also reviewed several other cases, including pre-Charter cases, in which state misconduct was considered as a mitigating factor in sentencing. These include cases of police violence, excessive but not unconstitutional delays attributable to the police or to the prosecution, and unlawful searches. In all these cases, a reduction of sentence appears to have been imposed because the courts were of the opinion that the defender had already suffered some kind of punishment (either physically or as a result of the criminal process). None of these cases, however, except maybe one in which the police were involved in the offender’s actions although not enough to trigger the application of the defence of entrapment, reconsidered the degree of responsibility of the offender or addressed the issue of the role of the state in the perpetration of the crime.

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63 *Nasogaluak*, id., at paras. 2-4, 53-55. See *R. v. Knockwood*, [2012] O.J. No. 1592, 286 C.C.C. (3d) 36, at paras. 57, 72-73 (Ont. S.C.J.), where the sentencing judge reduced the offender’s sentence for importation of heroin from the normal range of 12 to 17 years of incarceration to six years of incarceration for state misconduct. In this case, Quebec probation services prepared a delayed sentencing report that had no *Gladue* (see supra, note 13) content in it, and submitted it in French only even though the accused did not speak or read French.

64 *Nasogaluak*, id., at paras. 5-6, 55. This statement also goes to strengthen the position taken by Desrosiers, supra, note 23.

65 *Nasogaluak*, id., at paras. 53-54.

66 The fact that courts considered physical infliction of pain as an equivalent of punishment is questionable.

This is precisely where the *Ipeelee/Ladue* decisions take us. This case is unique for two reasons. First, it goes beyond the context of police violence or other rights violations that may or may not amount to Charter breach that can be considered as mitigating circumstances in sentencing to consider the responsibility of state agents and of the state in the perpetration of crime. Most specifically, the Court examines the role of the criminal justice system itself, as well as that of the state more generally, in violating fundamental human rights and creating conditions of social and economic deprivation that may create conflicts that are criminalized. Second, such a discussion is grounded in the concept of “degree of responsibility”.

The linkage between state misconduct and the concept of degree of responsibility appears clearly in both the majority and the dissent opinions. In dissent, Rothstein J. discusses the sentencing of Mr. Ladue who was charged with breaching his LTSo for having consumed opiates. At the time of his arrest, Mr. Ladue had been designated by the Correctional Service of Canada (“CSC”) to be sent to Linkage House in Kamloops, where he was to have received culturally specific rehabilitative support, but he was instead sent to the Belkin House in downtown Vancouver.

Justice Rothstein writes that while he does not “absolve Mr. Ladue of responsibility for his own conduct”, it was the CSC’s error that “caused him to be placed in an environment where, having regard to his known addiction, he was especially vulnerable to breaching his LTSo”. Therefore, “this is not a situation where the offender failed to take up an opportunity that the criminal justice system had given him to rehabilitate. Rather, the system’s bureaucratic error deprived him of that opportunity. The CSC must bear some ‘degree of responsibility’ for Mr. Ladue’s breach.”

Such a statement, made by the same judge who held in *British Columbia v. Zastowny* that inmates are not entitled to compensation for lost wages resulting from their incarceration because they are personally responsible for their acts and their consequences, regardless of the fact

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66 To be sure, this is not the first time that courts discuss systemic and background factors in sentencing in the context of the proportionality principle, but *Ipeelee/Ladue* has the merits of making the connection with the State particularly explicit. See Marie-Eve Sylvestre, “The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-economic Context in Criminal Law and in the Adjudication of Rights” (2011) 42 Ottawa L. Rev. 389 [hereinafter “Sylvestre, ‘The Redistributive Potential’”].
67 *Ipeelee/Ladue, supra*, note 4, at para. 154.
68 *Id.*, at para. 156 (emphasis added).
that in that case, Zastowny’s incarceration was directly related to him being sexually assaulted by a state agent (a prison guard),\textsuperscript{71} should not be underestimated. It should also be read in the context of the Correctional Investigator of Canada’s report stating that the federal government has failed to meet its obligations pursuant to the \textit{Corrections and Conditional Release Act} and to provide Aboriginal-specific facilities, rehabilitative programs and financial support.\textsuperscript{72} This should finally be read in a context of prisons overcrowding across the country and the issuance of a double-bunking cell capacity directive.\textsuperscript{73}

Justice LeBel, who writes for the majority, agrees that this “bureaucratic error” should have been considered in sentencing, but he goes much further. First, he notes that Mr. Ladue’s breach is directly connected to the fact that he is addicted to opiates, a form of drug which “he first began using while incarcerated in a federal penitentiary”.\textsuperscript{74} In doing so, LeBel J. points to the impact of incarceration and of the criminal justice system itself in the perpetration of crime. The connection between incarceration and crime is well documented. In fact, prisons and the criminal justice system have been denounced as failures since their inception. Foucault convincingly showed that the history of imprisonment did not follow a linear progression with first its establishment, then its critiques and successive reforms. Instead, the institution was unanimously criticized from the very beginning for being ineffective in reducing crime rates, for causing recidivism and for producing (and reproducing) delinquents.\textsuperscript{75} Justice LeBel further recognized the role played by the criminal justice system and in particular by some sentencing decisions in the increased crime rates, when he suggested that judges should make sure sentences effectively rehabilitate offenders and address the “ongoing systemic racial discrimination”.\textsuperscript{76}

It is finally no coincidence that the \textit{Ipeelee} and \textit{Ladue} cases dealt with breaches. In fact, administration of justice charges, including failure to appear in court, breaches of probation and failure to comply with a court order, are \textit{the} most frequent federal statute charges and account for

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\textsuperscript{73} Commissioner’s Directive, Inmate Accommodation, 2013-02-05: “[T]he Institutional Head … may increase double-bunking cell capacity”.

\textsuperscript{74} \textit{Id.}, at para. 96.


\textsuperscript{76} \textit{Ipeelee/Ladue, supra}, note 4, at para. 67.
21 per cent of charges before adult criminal courts in Canada.\textsuperscript{77} The significance of such process offences\textsuperscript{78} is particularly troubling because they often end up criminalizing behaviour that would not have been regarded as criminal if it were not included in a court order, such as in the case of Mr. Ladue and Mr. Ipeelee, consumption of alcohol, sleeping in the living room contrary to house rules or being agitated. There is a strong case for arguing that the criminal justice system (i.e., prosecutors and judges) is responsible for keeping certain offenders under constant judicial surveillance, thus creating the conditions for the perpetration of crime. This is particularly true when one considers the historical and political explanations of alcohol abuse among Aboriginals.

This brings us directly to LeBel J.’s consideration of systemic and historical factors. In his opinion, systemic factors “shed some light on [the offender]’s level of moral blameworthiness”. In referring to the “degree of responsibility” component of the proportionality principle, LeBel J. suggests that the “legacy of colonialism\textsuperscript{79} as well as the existence of “social and economic deprivation with a lack of opportunities and limited option” should be taken into account in crafting a proportionate sentence.\textsuperscript{80} In doing so, he opens the door to the adoption of a broader understanding of crime and responsibility: a conception of responsibility that socializes individual choice,\textsuperscript{81} emphasizes the collectivization of risks and draws moral condemnation to the social, economic and political order in which social conflicts are embedded.\textsuperscript{82} Problematic situations or conflicts that the state chooses to criminalize\textsuperscript{83} are not merely the result of actions undertaken by individuals who have immediate personal interests, but instead are the result of relationships and interactions embedded


\textsuperscript{79} Ipeelee/Ladue, supra, note 4, at para. 77.

\textsuperscript{80} Id., at para. 73.

\textsuperscript{81} Norrie, supra, note 52, at 36.


\textsuperscript{83} It is clear that there are multiple conflicts which the state chooses not to criminalize by referring to other normative systems such as regulatory and administrative law, civil law, etc.: see Joao Gustavo Vieira Velloso, “Beyond Criminocentric Dogmatism: Mapping Institutional Forms of Punishment in Contemporary Societies” (2013) 15 Punishment and Society 166.
In social and economic systems, dynamics of power, political and cultural resistance, as well as daily survival. In reconsidering moral blameworthiness in this light, sentencing judges should then be open to reduce and indeed nullify some offenders’ sentences based on their actual degree of responsibility.

Critics have argued that the individualized and particularized sentencing process set out in *Ipeelee* for Aboriginal offenders runs the risk of appropriating and essentializing indigenous communities and individuals. They suggest that we cannot solve the problem of over-representation of Aboriginal people in the criminal justice system by emphasizing and perpetuating difference and discrimination. Instead, they propose that we should resist portraying Aboriginals as addicts and violent criminals. In doing so, the courts are denying them their human dignity and depriving them of agency over their own lives.

These are indeed important critiques, some of which are addressed by LeBel J. in *Ipeelee*. I agree that there is clearly no causal relation between crime and poverty or crime and Aboriginal identity: after all, Aboriginal people do not all commit crime. Moreover, such specious associations between crime and Aboriginal people divert attention away from the race and class biases in crime prosecution. For instance, studies have shown how law enforcement strategies have a disparate impact on the poor, minorities and Aboriginal people, in particular as the police target some people based on prejudices and discriminatory attitudes.

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87 With respect to the appropriateness of the judicial forum to address Aboriginal over-representation in Canada’s prisons, see *Ipeelee/Ladue, supra*, note 4, at paras. 65-70.


self-reported surveys about criminality, surprisingly high numbers of people (from 75 per cent to 90 per cent), regardless of their social class or ethnicity, admit having committed illegal acts without having being charged or prosecuted.90 This being said, we cannot deny the impact of poverty, racism and the legacy of colonialism on Aboriginal people’s living conditions and thus, potentially on life opportunities. The recognition that human action and behaviour is embedded in socio-economic contexts does not deny Aboriginal people’s autonomy and free will. On the contrary, it rather acknowledges the objective structural constraints in which individual choices are made and it emphasizes the role of the state in perpetuating these living conditions.91

To understand how we can at once recognize human agency and take social, economic and political structures and constraints into account, it might be helpful to refer to the distinction between agency and freedom of choice put forward by Garland.92 According to Garland, agency is a universal attribute possessed in the abstract by human beings, while freedom of choice is the ability to choose and exercise one’s free will when faced with concrete situations and is therefore always a question of degree:

The idea of agency refers to the capacity of an agent for action. ... Agency is a universal attribute of (socialized) human beings ..., freedom generally refers to a capacity to choose one’s actions without external constraints. Freedom (unlike agency) is necessarily a matter of degree — it is the configured range of unconstrained choice in which agency can operate.93

Speaking of structural constraints in the case of Aboriginal offenders, the state must bear its share of responsibility for the violence and gross human rights violations it forced upon Aboriginal communities through colonialism, the imposition of the residential schools program and the

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91 See Knockwood, supra, note 17, for a good example of how a sentencing judge assessed an Aboriginal offender’s degree of moral blameworthiness in context.
93 David Garland, “Governmentality and the Problem of Crime: Foucault, Criminology, Sociology” (1997) 1 Theoretical Criminology 173, at 196-97. See also Sylvestre, supra, note 54, where I discuss Bourdieu’s notion of habitus as avoiding the pitfalls of the dichotomies between structure and agency.
current social and economic conditions in which Aboriginal people live. It should also be held responsible for discriminatory law enforcement practices, which make it more likely for some individuals or groups to end up in the criminal justice system. Mr. Ladue and Mr. Ipeelee’s lives are embedded in such institutional violence and systemic discrimination: Mr. Ladue, for example, was sent to residential school at five years old and suffered serious abuse there, and comes from a community whose members also suffered abuse from the U.S. Army some decades ago. Mr. Ipeelee saw his mother freeze to death at a young age and he was an alcoholic at the age of 12. This reasoning should finally be extended to other non-Aboriginal offenders undergoing state violence and systemic discrimination such as poor and homeless people, immigrants and racial minorities.

Finally, the consideration of historical and systemic factors in sentencing will be more secured and less subject to criticism such as that arising in the aftermath of Gladue and addressed by the Court in Ipeelee, for example, referring to race-based exemptions or automatic reduction of sentences, if it is grounded in the concept of degree of responsibility and the possibility of shared or collective responsibility for crime.

IV. CONCLUSION

In Ipeelee/Ladue, the Court may very well have rediscovered the proportionality principle in sentencing. First, by giving it a new constitutional status, it has struck a (hopefully fatal) blow to mandatory minimum sentences imposed by Parliament that are incompatible with the judicial discretion needed by the sentencing exercise, and it has provided an opportunity to strike a new balance between sections 7 and 12 of the Charter in cases of arbitrarily disproportionate sentences imposed by a diverse body of sentencing judges. Second, by opening the door to a

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94 Ipeelee/Ladue, supra, note 4, at para. 19.

discussion of shared and collective responsibility for crime, *Ipeelee* has brought some fresh air to scholars and criminal lawyers who hope to introduce considerations of social, economic and political factors in sentencing and has sent a clear invitation to sentencing judges to assess the state’s responsibility in the perpetration of crimes and to reduce or nullify offenders’ sentences based on their degree of responsibility.