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The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-representation of Aboriginal People in Prisons

Marie Manikis[*]

I. The Rise of Mandatory Minimum Sentences in Canada and their Detrimental Consequences in the Criminal Justice System

Mandatory minimum sentences in Canada have multiplied over the years and continue to rise.[1] There are approximately 100 mandatory minimum sentences available in Canada[2] and many more to be proposed in Parliament. This is a huge increase since the Supreme Court's first decision on the constitutionality of mandatory minimum sentences in 1987, where only nine mandatory minimum sentences were included in legislation.

Mandatory minimum sentences have had detrimental effects on the criminal justice process, including on the principle of proportionality at sentencing, as well as the over-representation of Aboriginal people in prisons. Indeed, it has contributed to the erosion of the principle of proportionality[3] of sentences by making it impossible for judges to fully

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[*] Faculty of Law, McGill University. I would like to thank Benjamin Berger and the organizers of the 2014 Osgoode Hall Constitutional Cases Conference for providing an opportunity to discuss this important issue. Many thanks to Palma Paciocco for previous discussions in this area, as well as Lisa Kerr, Hamish Stewart, Patrick Healy and Suzan Fraser for their input on this panel.

[1] *R. v. Anderson*, [2014] S.C.J. No. 41, [2014] 2 S.C.R. 167 (S.C.C.) [hereinafter "*Anderson*"].

[2] Debra Parkes, "From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences" in B.L. Berger, J. Stribopoulos, eds. (2012) 57 S.C.L.R. (2d) 149, at 149.

[3] The importance of proportionate sentences has been recognized as a leading principle in many jurisdictions, including Canada, England and Wales and the United States. According to this principle, a sentence must be proportionate to the gravity of the offence and the level of blameworthiness of the offender (see s. 718.1 *Criminal Code*, R.S.C. 1985, c. C-46). It is worth

account for mitigating factors in cases where that would require judges to go below these mandatory minimums. A section 12 Charter[4] challenge declaring the provision creating the mandatory minimum unconstitutional would be an appropriate solution, but the courts have repeatedly highlighted that the standard to meet for a provision that gives rise to cruel and unusual punishment is one of gross disproportionality, which makes this challenge very difficult.[5]

In a recent and very thoughtful piece written by Paciocco,[6] the author highlights the clear disconnect between the required proportionality standard in sentencing as a principle of fundamental justice protected under section 7, and the higher standard of gross disproportionality required for section 12 challenges, including challenges of mandatory minimum provisions. These disconnects will indeed affect the principle of proportionality and give rise to constitutional inconsistencies by maintaining a regime of disproportionate sentences due to the higher standard required under section 12. Paciocco rightfully argues in favour of a less stringent standard for the section 12 analysis that is closer to the regular proportionality analysis protected under section 7.

In addition to eroding principles of sentencing as well as creating constitutional inconsistencies, mandatory minimum regimes have also given rise to legislative inconsistencies and contradictions with the legislative provisions related to mitigating factors. Indeed, section 718.2(a) mandates sentencing judges to take into consideration mitigating

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noting that the Canadian concept of proportionality has been interpreted in a more flexible and open-ended fashion than its traditional definition by expanding the concept of mitigating factors to include elements that are not directly linked to the gravity of the offence and the level of blameworthiness of the offender in relation to the crime itself. For instance, it has been expanded to include elements related to the offender's background, despite its less evident connection to the offence. (See *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.) [hereinafter "*Gladue*"] with its analysis in Philip Stenning & Julian V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask. L. Rev. 137; *R. v. Ipeelee*, [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433 (S.C.C.) [hereinafter "*Ipeelee*"], as well as state abuses (see *e.g.*, *R. v. Nasogaluak*, [2010] S.C.J. No. 6, [2010] 1 S.C.R. 206 (S.C.C.).) This area of research on proportionality merits further time and space and thus will be left for another day.

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

[5] See *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.); *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.); *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15 [hereinafter "*Nur*"]. More recently, the Supreme Court of Canada in *Nur* did not revise its stringent standard in order to provide consistency with the standard required for proportionality as a principle of fundamental justice under s. 7.

[6] Palma Paciocco, "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 18 Can. Crim. L. Rev. 241.

circumstances relating to the offence or the offender. With the presence of mandatory minimums, judges lose their ability to weigh in these factors in the event that including them in the quantum of the sentence would result in a sentence that goes below the mandatory minimum.

A particular and greater cause for concern that will be addressed in this article is the inconsistency between the mandatory nature of mandatory minimum sentences of imprisonment and the legislative duty under section 718.2(e) that mandates sentencing judges to pay particular attention to the unique background of Aboriginals during sentencing, in order to accurately assess their level of blameworthiness in the context of proportionality and consider alternatives to imprisonment. This duty was enacted to address the national crisis of over-incarceration of Aboriginal offenders in Canada, which continues to grow.[7] For instance, in 2010-2011, while forming only 11.9 per cent of the overall population in Saskatchewan, Aboriginal offenders represented 77.6 per cent of the prison population.[8] In this same period, in Manitoba, while Aboriginal people constituted 12.9 per cent of the overall population, they nevertheless represented 69.1 per cent of the prison population. In Ontario, Aboriginals form 1.8 per cent of the population and 11.4 per cent of the prison population. Finally in Quebec, while Aboriginal people form 1.3 per cent of the population, they represent 4.4 per cent of the prison population. It is worth noting that percentages of Aboriginal offenders in custody may be even higher, since these statistics exclude admissions to custody in which Aboriginal identity was unknown.

Indeed, section 718.2(e) requires judges to consider Aboriginal status and take into account this relevant background as an element that can diminish the level of blameworthiness of the offender and ultimately affect the quantum and nature of the sentence. The Supreme Court in *Gladue*[9] and more recently in *Ipeelee*[10] has made clear that section 718.2(e) is a remedial provision that mandates a different framework of analysis for

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[7] Truth and Reconciliation Commission of Canada, "What We Have Learned: Principles of Truth and Reconciliation" (Winnipeg: the Commission, 2015), at 110. This report highlighted that nationally, by 2011-2012, 28 per cent of all admissions to sentenced custody were formed by Aboriginal people, while they make up only 4 per cent of the Canadian adult population. The over-incarceration of women is even more disproportionate: 43 per cent of admissions of women to sentenced custody were Aboriginal.

[8] Statistics Canada, "Aboriginal adult admissions to custody, by province and territory, 2010/2011", Juristat (2012), online: Statcan.gc.ca <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715/c-g/desc/desc07-eng.htm>.

[9] *Gladue*, *supra*, note 3.

[10] *Ipeelee*, *supra*, note 3.

sentencing Aboriginal offenders, taking into account "the distinct situation of Aboriginal peoples in Canada" including:

> (1) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

Hence, this duty imparts upon sentencing judges a duty to consider the offender's background, particularly their Aboriginal status, prior to sentencing. If in light of the offender's background, his or her level of blameworthiness is diminished, this background can be considered a factor that will affect the sentence and as much as possible help to consider alternative sanctions to imprisonment. As reiterated in *Ipeelee*, "the Gladue approach does not amount to reverse discrimination but is, rather, an acknowledgment that to achieve real equity, sometimes different people must be treated differently".[11] In the event that this duty is ignored, a party can appeal the sentence. This framework will be referred to as the *Gladue* principle or framework throughout this article.

Despite this legislative duty, the presence of mandatory minimum sentences does not allow for judges to find alternatives to incarceration or go below the legislated minimum — effectively denying judges the ability to adequately take into account specific background as a mitigating factor. This remains a severe problem, since the impact of mandatory minimum sentences on Aboriginal people in Canada has been particularly acute and has been a direct cause for their over-representation in Canadian prisons.[12] These provisions are in direct conflict with one another and therefore cannot logically coexist within a coherent and principled sentencing

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[11] *United States of America v. Leonard*, [2012] O.J. No. 4366, at para. 52, 2012 ONCA 622 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 490 (S.C.C.) [hereinafter "*Leonard*"], citing *Ipeelee*, *supra*, note 3, at para. 71.

[12] For example, research has highlighted the severe impact of mandatory minimum sentences on the problem of over-incarceration of Aboriginal people in prisons. See, *e.g.*, Larry N. Chartrand, "Aboriginal Peoples and Mandatory Sentencing" (2001) 39 Osgoode Hall L.J. 449; 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. Further, based on similar findings, the Truth and Reconciliation Commission of Canada, "Calls to action" (Winnipeg: the Commission, 2015), at 3 recommended in its recent report that amendments are brought to the *Criminal Code* to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.

regime. For these reasons, this article suggests that *Gladue* should be expanded and also apply beyond sentencing judges to prosecutors.

II. MANDATORY MINIMUMS AND THE TRANSFER OF POWER TO PROSECUTORS WITHOUT ADDITIONAL OBLIGATIONS AND ACCOUNTABILITY

A notable consequence of mandatory minimum sentences that is central to the main argument of this article is the degree of power that they transfer to prosecutors with regards to sentencing. Indeed, in many ways, while judicial discretion is limited by mandatory minimum sentences, conversely, prosecutors are placed in a position where they are given a wide and almost unfettered discretion to trigger these mandatory minimums that can ultimately affect the sentence. Prosecutors can trigger them in many ways, including by charging crimes that carry those sentences, by refusing to accept guilty pleas to lesser offences that do not carry mandatory minimums, by electing to proceed by indictment (rather than by summary proceedings) where that election entails a particular mandatory minimum, or by sending appropriate notice of an intention to seek greater punishment prior to any plea by reason of previous convictions.[13] In light of this particular context, defendants have been creative in trying to find ways to have prosecutors take into account Aboriginal status and proportionality by increasing oversight by the judiciary. As recently shown in *Anderson*, constitutional arguments have been unsuccessful.

In the case of *Anderson*, Anderson, an Aboriginal person, was charged with impaired driving under section 253 of the *Criminal Code*. This provided the prosecutor with the discretion under section 255 to trigger a mandatory minimum sentence in cases of previous convictions, by notifying the accused of its intention to seek greater punishment prior to any plea.[14] The Crown filed the appropriate Notice to the accused of its intention to seek a greater punishment by reason of the accused's four previous impaired driving convictions. This triggered a mandatory minimum sentence of not less than 120 days' imprisonment.

The Crown policy manual in Newfoundland and Labrador, to which the prosecutor presumably referred to, directs Crown Attorneys to

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[13] See *e.g.*, *Anderson*, *supra*, note 1. Mirko Bagaric, "Proportionality in Sentencing: its Justification, Meaning and Role" (2000) 12 Current Issues Crim. Just. 143.

[14] *Criminal Code*, ss. 255(1)(a)(iii) and 721(1).

request greater punishment under section 255 except in certain cases. It also states that prosecutors *may* exercise their discretion not to pursue an enhanced penalty, if all the prior convictions occurred more than five years before the current offence, as was the case for Anderson. The policy then lists a list of factors for Crown to consider when making this discretionary decision, but does not explicitly mention Aboriginal status. In this situation, before sentencing, Anderson challenged section 255 and section 727(1), arguing that Crown prosecutors were constitutionally required under section 7 to consider the Aboriginal status of the accused when making decisions that limit the sentencing options available to judges, in this case in the context of a mandatory minimum. More specifically, the argument highlighted that the principle of proportionality of sentences was a principle of fundamental justice under section 7 of the Charter and this principle also applied to prosecutors in a context where a provision (in this case mandatory minimums) reduced the sentencing options available to judges in the sentencing of Aboriginal offenders.[15] The Crown argued that there was no such obligation and that the terms "the background and circumstances of the offender" included Aboriginal status.

The Provincial Court of Newfoundland and Labrador accepted Anderson's argument and highlighted that in order to ensure compliance with section 7, the Crown must in all cases, including those involving non-Aboriginal offenders, provide justification for relying on the Notice. Having determined that he was not bound by the mandatory minimum, the judge sentenced Anderson to a 90-day intermittent sentence followed by two years' probation and a five-year driving prohibition.

Similarly, the Court of Appeal rejected the Crown's appeal and all members of the Court held that where the Crown tenders the Notice at the sentencing hearing without considering the accused's Aboriginal status, this renders the sentencing hearing fundamentally unfair, leading to a section 7 breach. Interestingly, the Court noted that there would not be a breach of section 7 if the Crown's policy manual regarding the decision to tender the Notice included a *specific* direction to consider the offender's Aboriginal status. The fact that it referred to the "background and circumstances of the offender" was not sufficient, and therefore the lack of clear direction, coupled with the lack of explanation on the part of

[15] Mr. Anderson also argued that the statutory scheme violated s. 15(1) of the Charter because it deprived an Aboriginal person of the opportunity to argue for a non-custodial sentence in an appropriate case. Although this argument was accepted by the Provincial Court of Newfoundland and Labrador, it was not presented at the higher instances.

the Crown for its decision to tender the Notice in this case, led the Court to conclude that section 7 of the Charter had been breached.

The Supreme Court of Canada disagreed with these judgments. Despite the real effect of mandatory minimum sentences transferring sentencing powers to prosecutors, the Court made clear on the constitutional question that prosecutors have no constitutional duty under section 7 of the Charter[16] to consider Aboriginal status when making decisions that would trigger mandatory minimum sentences and reduce judicial sentencing options.

First, it emphasized that the role of prosecutors is distinct from the role of judges and that there is no legal basis to support their equating roles in the sentencing process. To preserve the division of functions, it made clear that "it is the *judge's* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged."[17]

Second, the Court found that the claim that prosecutors must consider the Aboriginal status of the accused prior to making decisions that limit a judge's sentencing options does not meet the test that governs principles of fundamental justice,[18] more specifically the second requirement that requires popular consensus that the principle is fundamental to the way in which the legal system ought to fairly operate. It highlighted that recognizing such a principle would instead be contrary to the long-standing and deeply rooted division of responsibility between the Crown prosecutor and courts by expanding the scope of judicial review.

Rooting its decision in the division of responsibility between the Crown prosecutors and judges, it is clear that the major concern behind the Court's decision is the resistance towards increasing judicial oversight of prosecutorial decisions. Indeed, the Court concluded:

> The principle advanced by the accused does not meet the second requirement as it is contrary to a long-standing and deeply-rooted approach to the division of responsibility between the Crown prosecutor and the courts. It would greatly expand the scope of judicial review of discretionary

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16 Charter, *supra*, note 4.

17 *Anderson*, *supra*, note 1, at para. 25 (emphasis in original).

18 This test was reiterated in *R. v. B. (D.)*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3 (S.C.C.) which stated at para. 46 that in order to be recognized as a principle of fundamental justice, a principle must (1) be a legal principle; (2) enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought to fairly operate and (3) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

> decisions made by prosecutors and put at risk the adversarial nature of our criminal justice system by inviting judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis.[19]

Having ruled on the constitutional question, it then concluded that the decision to tender the Notice is part of the wide category of prosecutorial discretion, which cannot be reviewed unless there is evidence of abuse of process.

III. THE QUASI-ABSOLUTE PROSECUTORIAL DISCRETION IN CANADA

The conclusion in *Anderson* on the constitutional question is not surprising considering the wider Canadian trend towards protecting prosecutorial power and decision-making from judicial oversight. Indeed, if the Court had recognized proportionality as a constitutional principle of fundamental justice that applies to prosecutors, it would have extended judicial oversight by allowing Charter challenges to various ways by which prosecutors can trigger mandatory minimums. More specifically, it would have required that prosecutors disclose the reasons behind their decisions and consider the defendant's Aboriginal status prior to triggering a mandatory minimum. Judges would have been able to oversee this prosecutorial decision to make sure it conformed to the Charter and enabled appropriate remedies in case of breach. Further, a lower standard of review would have been applicable than the abuse of process doctrine.

The vast majority of prosecutorial decisions are part of what is recognized as "prosecutorial discretion". These decisions, which are not considered to be governed by the Charter and are not considered as "tactics or conduct before the court", remain almost unfettered by the judiciary.[20]

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[19] *Anderson*, *supra*, note 1, headnote.

[20] See *R. v. Boucher*, [1954] S.C.J. No. 54, [1955] S.C.R. 16, at 23 (S.C.C.) [hereinafter "*Boucher*"]; More recently, in *Anderson*, *supra*, note 1, the Supreme Court of Canada recognized two forms of prosecutorial powers, namely exercises of prosecutorial discretion and tactics/conduct before the court. Prosecutorial discretion, is defined as an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (*Krieger v. Law Society of Alberta*, [2002] S.C.J. No. 45, at para. 47, [2002] 3 S.C.R. 372 (S.C.C.) [hereinafter "*Krieger*"]). Although not exhaustive, this includes a number of influential decisions, including the decisions to prosecute a charge laid by the police, enter a stay of proceedings in private and public prosecutions, accept a guilty plea to a lesser charge, withdraw from criminal proceedings altogether and take control of a private prosecution. This also includes the decisions to enter into and repudiate plea agreements as seen in *R. v. Nixon*, [2011] S.C.J. No. 34, [2011] 2 S.C.R. 566 (S.C.C.) [hereinafter "*Nixon*"] and can only be reviewed in exceptional circumstances where there is abuse of

In common law jurisdictions, as a vestige of the principle of Crown immunity and concepts such as "the King can do no wrong", prosecutorial discretion has historically been heavily protected from judicial oversight. While some common law jurisdictions have recognized greater room for oversight, Canada has largely managed to insulate prosecutorial decisions from oversight with some exceptions, notably with the recognition of Charter obligations.

Indeed, the Charter contributed to some additional judicial oversight in areas of traditionally unfettered prosecutorial discretion — most notably in the area of prosecutorial disclosure of evidence to the accused.[21]

Despite this opening, the Supreme Court has recently strengthened its protection of prosecutorial discretion, confirming its largely insulated function in the name of prosecutorial independence.[22] This shielded power enables prosecutors to make a number of decisions about the course of proceedings without having to provide any explanation or being routinely second-guessed — effectively isolating prosecutors from review by any other body, unless the doctrine of abuse of process can be successfully invoked, which remains a very difficult standard to meet.[23] The standard of review required to show abuse of process in such cases

process. The category of "tactics or conduct before the court" includes "such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum" (*Krieger*, *id.*, at para. 47). Hence, it relates to ensuring that the machinery of the court functions in an orderly and effective manner.

[21] See *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

[22] In addition to *Anderson*, recent cases have also reaffirmed the tendency towards the immunization of prosecutorial decisions by suggesting that the abuse of process doctrine should only be found in very exceptional circumstances; see, *e.g.*, *Nixon*, *supra*, note 20. Also, see the Court of Appeal's decision in *R. v. Bérubé*, [2012] B.C.J. No. 1705, 2012 BCCA 345 (B.C.C.A.), in which a plea agreement between the Crown and defence was repudiated due to the prosecutor's error, which was prejudicial to the defendant, but was not considered to meet the necessary egregiousness required for it to be considered an abuse of process. Further, even when an abuse of process by the Crown is found, the remedies attached to this are limited. For instance, in *R. v. Babos*, [2014] S.C.J. No. 16, [2014] 1 S.C.R. 309 (S.C.C.) the Court decided that a Crown who makes threats intended to bully an accused into foregoing his or her right to trial was a betrayal of her role as a Crown, reprehensible and unworthy of the dignity of her offices. Despite finding an abuse of process, the majority found that the remedy of a stay of proceedings was not appropriate since the seriousness of the misconduct needs to be weighed against the societal interest in having a trial.

[23] See *Boucher*, *supra*, note 20; more recently, in *Anderson*, *supra*, note 1. The abuse of process doctrine is available where there is evidence that the prosecutor's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision. Hence, where a claimant establishes a proper evidentiary foundation for an abuse of process claim, the evidentiary burden may shift to the Crown, who will be obliged to provide explanations for its decision.

is very high and has generally only been met in a minority of cases.[24] Indeed, abuse of process refers to conduct that is egregious and seriously compromises trial fairness and/or the integrity of the system. Further, more restrictions were announced in *Anderson* in terms of evidentiary burdens. In addition to the long-established onus on the accused to prove an abuse on a balance of probabilities, Stuart deplores the fact that even less transparency is required, since "the defence now also has an evidentiary burden to meet before the Crown has to give reasons for the exercise of its discretion"[25] when it alleges an abuse of power.

Hence, since there is a trend towards isolating prosecutorial decisions and ensuring that they remain one of the least transparent and most unfettered powers in this country, it is no surprise that the recognition of a prosecutorial obligation that would have opened the door to more judicial oversight of prosecutorial decisions was rejected.

Interestingly, however, in the recent case of *Nur*,[26] the majority of the Supreme Court of Canada does not explicitly disagree with the minority's conception of abuse of discretion even though it highlights that it remains a notoriously high bar. Justice Moldaver's minority judgment highlighted that the abuse of process doctrine should not be exceptional. It made clear that "[a]buse of process is typically characterized by intentional misconduct or bad faith",[27] but cites *Babos*[28] to suggest that situations may arise where the integrity of the justice system can be affected in the absence of misconduct. This includes situations where a prosecutor decides to proceed by indictment in order to use the threat of a mandatory minimum to extort a guilty plea, as well as situations where Crown election was influenced by discriminatory factors such as the race of the offender.[29] This recent decision might suggest more openness to changing the rigid definition of "abuse of process" in order to facilitate prosecutorial accountability, if not under section 12, perhaps under section 7. Despite

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[24] See, *e.g.*, *Krieger*, *supra*, note 20; *Nixon*, *supra*, note 20; *R. v. Power*, [1994] S.C.J. No. 29, [1994] 1 S.C.R. 601 (S.C.C.). These cases include generally situations where there has been a "flagrant impropriety" (*Krieger*, *id.*, at para. 49); the prosecutor acted "dishonestly", in "bad faith", "undermines the integrity of the judicial process"; for an "improper purpose" or with a lack of "objectivity"; or the misconduct amounted to an "abuse of process".

[25] Don Stuart, "*Anderson*: Continuing a Questionable March to Legal Immunity for Crown Attorneys" (2014) 11 C.R. (7th) 26.

[26] *Supra*, note 5.

[27] *Id.*, para. 164.

[28] *Supra*, note 22.

[29] *Nur*, *supra*, note 5, at paras. 168-169.

this noteworthy decision, it remains unclear whether courts will generally continue to recognize abuse of process in situations where there is intentional misconduct or bad faith.

IV. THE RATIONALES OF *GLADUE* AS A STAND-ALONE PRINCIPLE THAT EXPANDS TO PROSECUTORS

Following *Anderson*, can prosecutors ignore proportionality and Aboriginal status when their decisions limit sentencing options by triggering mandatory minimums? In *Anderson*, the Court found that there was no constitutional duty that imparts on prosecutors to consider proportionality and Aboriginal status, but did not explicitly address whether another type of duty may exist. The following section argues that prosecutors should have, at minimum, an ethical duty to consider Aboriginal status in light of *Gladue* as an arguably stand-alone principle that should also apply to prosecutors. Failing to respect this principle should be treated as an abuse of process, as defined in *Nur* that would give rise to adequate remedies.

Further, it rejects Paciocco's contention that the principle of proportionality in sentencing necessarily comprises the *Gladue* principle. Instead, it suggests that the consideration of Aboriginal status and contextual background, known as the *Gladue* principle, is different from the principle of proportionality, since its primary objective is to tackle systemic discrimination against Aboriginal people and their over-representation in Canadian prisons.

Despite this view, this piece partially relies on Paciocco's argument that prosecutors must consider Aboriginal status in their decisions, as part of their role as "ministers of justice". This argument however, is based on the *Gladue* rationale rather than the theory of proportionality at sentencing. Indeed, it argues that even if *Gladue* and the theory of proportionality were not recognized as constitutional duties that apply to prosecutors, prosecutors nevertheless have an ethical duty to consider Aboriginal status when triggering mandatory minimum sentences. Hence, it outlines how the role of prosecutors as ministers of justice fits with the consideration of Aboriginal background in light of the national crisis of Aboriginal over-incarceration.

In this respect, all decision-makers that can affect the liberty interests of Aboriginal people should consider *Gladue* principles, particularly prosecutors, considering their impact on these interests, as well as their

historical contribution to the over-representation of Aboriginal people in prisons.

Finally, having examined the different prosecutorial guidelines, this section argues that the current Canadian context is unsatisfactory, since Aboriginal background is generally not explicitly accounted for in these guidelines. It argues in favour of the recognition of such explicit duties in prosecutorial guidelines and reflects on the enforcement of these duties by proposing a possible remedial mechanism that can respond to ethical breaches without resorting to additional judicial oversight of prosecutorial decisions, while increasing transparency and promoting understanding of prosecutorial decisions.

1. The Distinction between the *Gladue* Principle and the Principle of Proportionality

As highlighted above, in order to reject the recognition of a constitutional duty for prosecutors to consider proportionality that includes consideration of Aboriginal status, the Supreme Court emphasized the distinctive functional roles between the judiciary and prosecutors, mainly to avoid judicial oversight. More specifically, it highlighted that proportionality and consideration of Aboriginal background was associated with the sentencing function which is a function performed by judges and not prosecutors.

This stringent dichotomy related to the division of functions was criticized by Paciocco, who argued that if proportionality is to be taken seriously, Aboriginal background, which is part of proportionality, should not only be the exclusive responsibility of sentencing judges, but also applicable to prosecutors.[30]

Contrary to Paciocco's claim, the Supreme Court rightfully decided that prosecutors and judges have separate duties and that judges are the ones who are responsible for applying the principle of proportionality as part of their sentencing function. Indeed, the principle of proportionality that *Anderson* referred to is a principle that has been traditionally recognized in sentencing theory and practice, and has therefore been associated with that specific stage of the process implemented by judges.[31]

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[30] Paciocco, *supra*, note 6.

[31] See s. 718.1 *Criminal Code*; Mirko Bagaric, "Proportionality in Sentencing: its Justification, Meaning and Role" (2000) 12 Current Issues Crim. Just. 143; Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005).

Proportionality is imbedded in notions of fairness and posits that the severity of the sentence must be proportionate to the gravity of the offence and to the level of blameworthiness of the offender. Since it is part of the sentencing process, judges are the ones responsible of the implementation of this principle even if its exact definition and breadth may vary between the different common law jurisdictions.[32]

In Canada, elements of *Gladue* have been considered as a component of the principle of proportionality in sentencing, but it would be an error to equate *Gladue* to proportionality. Indeed, as highlighted earlier, it was made clear in *Ipeelee* that Aboriginal background can indeed affect a person's level of moral blameworthiness and for this reason can effectively be considered as a mitigating factor within the proportionality framework.[33] However, the offender's level of blameworthiness is merely one component of proportionality[34] as well as the *Gladue* principle. Indeed, the *Gladue* principle's rationale goes beyond merely considering the level of blameworthiness of the offender in sentencing, and actually serves a wider remedial purpose of reducing the overall Aboriginal prison population by recognizing the historical and current systemic discriminatory practices by state agencies against Aboriginal people that continue to plague the criminal justice process. In order to reach this important remedial objective,[35] it will be shown below that this principle needs to be expanded beyond sentencing and recognized as a stand-alone principle that also applies to all decision-making processes by criminal justice agencies that have the power to restrict an Aboriginal person's liberty.

Consequently, instead of relying on the theory of proportionality to argue in favour of considering Aboriginal background and status, it would have been more principled to argue *Anderson* in light of *Gladue* as a wider stand-alone principle that should apply to all actors of the criminal justice process, including prosecutors, when their actions and decisions limit the liberty interests of Aboriginal people. The next section argues in favour of

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[32] Marie Manikis, "Decalibrating the scales of justice: prosecutorial discretion and mandatory sentences" (Criminal law conference, University of Ottawa, May 1, 2015); Further, in Canada, its application to the judiciary has been recognized as a principle of fundamental justice in several noteworthy decisions, including *Ipeelee*, *supra*, note 3, at para. 36; *Anderson*, *supra*, note 1, at para. 21.

[33] *Ipeelee*, *id.*, at paras. 37-39, 73.

[34] In addition to the offender's level of blameworthiness the gravity of the offence, measured by the level of harm is the other essential component of proportionality.

[35] Truth and Reconciliation Commission of Canada, "Calls to action" (Winnipeg: the Commission, 2015), at 3.

this expansion and suggests that if the rationales of *Gladue* and *Ipeelee* are to be taken seriously, this framework should also be taken into account by prosecutors as part of their role as ministers of justice when making decisions that can impact on the liberty of Aboriginal people, including the triggering of mandatory minimum sentences.

2. Expanding *Gladue* beyond Sentencing

The national crisis of Aboriginal over-representation in Canada is in great part due to several actors in the justice process, and therefore special consideration to the unique circumstances and background of Aboriginal offenders should be taken into account by all the responsible agencies that have an impact on over-incarceration, which, as will be seen below, includes prosecutors. Adopting a mutually exclusive practice that only applies the *Gladue* framework to sentencing judges, would exacerbate the problem of Aboriginal over-representation and be contrary to the way in which our legal system ought to fairly operate. Since the over-representation of Aboriginal offenders in prison is a systemic reality that involves the responsibility of different agencies, it makes sense that the ethos of *Gladue* should apply to all actors of the criminal justice system that may contribute to the over-incarceration of Aboriginal offenders.[36] Further, in the wake of *Gladue*, Turpel-Lafond J. had also argued that if the analytical framework of *Gladue* were to have the desired effect, Crown counsel, defence counsel as well as the judiciary would all need to "adjust their practice to reflect the requirements of the decision".[37] This shared commitment seems fundamental to the way in which the legal system ought to fairly operate.

Indeed, the Court in *Gladue* adequately highlighted that the duty to take into account the status of Aboriginal offenders is not only a requirement that applies to sentencing judges, but also to *all* decision-makers who have the power to influence the treatment of Aboriginal people in the justice system. In order to support this shared commitment and responsibility towards these principles, the Court referred to the Aboriginal Justice Inquiry of Manitoba, which commissioned a great deal of research on the criminal justice system

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[36] Stenning & Roberts, *supra*, note 3.

[37] M.E. Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue" (1999) 43:1 Crim. L.Q. 34, at 37.

and Aboriginals, and found that Aboriginal over-representation in prison is attributable to a series of decisions by different actors of the criminal justice system. It noted:

> Aboriginal over-representation is the end point of a series of decisions made by those with decision-making power in the justice system. An examination of each of these decisions suggests that the way that decisions are made within the justice system discriminates against Aboriginal people in virtually every point.[38]

In this respect, if the focus is merely on the sentencing process, *Gladue*'s aims and ethos will not be met. A widespread procedural adaptation would be needed that applies to all actors in the criminal justice system that can have an impact on the Aboriginal person's freedoms, and this should be reflected in ethical duties and guideline manuals.

Recently, in line with this rationale, the Court of Appeal of Ontario in *Leonard*,[39] where leave to appeal was refused by the Supreme Court, illustrated a broader application of *Gladue* in a context where the Minister of Justice is given wide ministerial discretion. In this case, the Minister of Justice signed separate extradition surrender orders for two Aboriginal offenders for them to face trial in the United States on drug charges, where their Aboriginal background will not be taken into account in sentencing, and the mandatory minimums for the crimes committed would have been drastically longer than the sentences they would have faced in Canada. These individuals suffered from disadvantaged backgrounds caused by Canada's history of discrimination and neglect in relation to Aboriginal people, including their membership to families that were survivors of the residential school system. As well, both came from homes where addictions of both drugs and alcohol were present from a very young age. The issue in this case was whether the Minister erred in law by failing to adequately consider the defendants' Aboriginal status with respect to the *Gladue* principles when surrendering the defendants. It was decided that surrender in this case would be "unjust or oppressive" under section 44 of the *Extradition Act*[40]

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[38] Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People. *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1 (Winnipeg: Queen's Printer, 1991) [hereinafter "Manitoba Inquiry"], chapter 4. See online: <http://www.ajic.mb.ca/volumel/chapter4.html>.

[39] *Supra*, note 11.

[40] S.C. 1999, c. 18.

and would "shock the conscience" under section 7 of the Charter. In this respect, the Court in *Leonard* made clear that *Gladue* principles not only apply to sentencing judges but also towards a multitude of situations where Aboriginal people generally "interact with the justice system", including when a Minister of Justice exercises discretion and must consider the severity of the sentence the accused is likely to receive in each jurisdiction.[41] Finally, it reminded that the *Gladue* factors are not limited to criminal sentencing by judges, but need to be considered by all "decision-makers who have the power to influence the treatment of aboriginal offenders in the criminal justice system",[42] as well as whenever an Aboriginal person's liberty is at stake in criminal and related proceedings.

Based on this rationale, it will be seen in greater depth below that prosecutors should also apply the *Gladue* framework since they are decision-makers who have the power to influence the treatment of Aboriginal offenders and can indeed contribute to their over-incarceration when making important decisions. Further, it will be seen below that this role also ties in with their role as ministers of justice.

3. The Consideration of Aboriginal Status as Part of the Role of Prosecutors as "Ministers of Justice"

In common law jurisdictions, prosecutors have an important role to play as "ministers of justice" with a duty to ensure that the criminal justice system operates fairly towards all participants, including the accused, victims of crime and the public. Indeed, prosecutorial decisions should be made independently without any external pressure or influences, in an objective way — devoid of passions, emotions or prejudices — and with a lack of animus towards the suspect or the accused.

Although prosecutors are part of an adversarial system and need to remain strong and effective advocates for the prosecution,[43] as ministers of justice they must also perform a special function in ensuring that

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[41] In this respect "*Gladue* clearly has a bearing on the question of the severity of the sentence the accused is likely to receive in each jurisdiction. Any reasonable evaluation of the severity of the likely sentence in each jurisdiction must take into account the possible effect of *Gladue*" (*Leonard*, *id.*, note 11, at para. 84).

[42] *Gladue*, *supra*, note 3, at para. 65.

[43] *R. v. Cook*, [1997] S.C.J. No. 22, [1997] 1 S.C.R. 1113 (S.C.C.).

justice is served, and for this reason cannot adopt a purely adversarial role towards the defence. The role of Crown counsel as advocates has historically been characterized as more a part of the court than an ordinary advocate, and therefore the Crown's actions should be fair, dispassionate, and open to the possibility of the innocence of the accused while avoiding "tunnel vision".[44]

It has been highlighted numerous times in Canadian case law that the complex role of the prosecutor is not to win or lose, nor is it to seek the highest sentence possible — or indeed to pursue convictions, but rather to ensure that justice is done.[45]

Crown counsel also have a responsibility to ensure that every prosecution is carried out in a manner consistent with the public interest. An aspect of this duty that needs to be highlighted is the leadership role that Crown counsel has, as a key participant in the criminal justice system, to work towards overcoming any forms of discrimination and ensuring that the various forms of discrimination are not reflected in the criminal justice system.

As part of this role, prosecutors have an important role to play in remedying the national crisis of Aboriginal over-representation in Canadian prisons that is a result of systemic discriminatory practices at different stages of the criminal justice process, not merely sentencing. For these reasons, prosecutors should pay particular attention to Aboriginal background and thus apply the principles developed in *Gladue*.

Further, research has shown that prosecutors have also contributed to the systemic problem of Aboriginal over-representation in Canadian prisons. For instance, the aforementioned Manitoba Inquiry found that in a similar context, Aboriginal accused are more likely to be charged with multiple offences than are non-Aboriginal accused. It further concluded that "the over-representation of Aboriginal people occurs at virtually every step of the judicial process, from the charging of individuals to their sentencing."[46]

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[44] *The Commission on Proceedings Involving Guy Paul Morin*, The Hon. Fred Kaufman, Commissioner (Toronto: Queen's Printer, 1998), at 1136.

[45] *Boucher*, *supra*, note 20.

[46] Manitoba Inquiry, *supra*, note 38, ch. 4, the over-representation of Aboriginal people occurs at virtually every step of the judicial process, from the charging of individuals to their sentencing.

Similarly, the *Royal Commission on the Donald Marshall, Jr, Prosecution* concluded that:

> Donald Marshall, Jr's status as a Native contributed to the miscarriage of justice that has plagued him since 1971. We believe that certain persons within the system would have been more rigorous in their duties, more careful, or more conscious of fairness if Marshall had been white.[47]

Some scholars have even argued that the issue of over-representation is not attributable to sentencing judges, but rather the result of prior decisions taken by other criminal justice agencies — including prosecutors and police — and therefore creative remedial solutions should be taken within those agencies.[48]

Indeed, the need to exercise prosecutorial duties with greater rigour, care and consciousness in the context of Aboriginal people should be implemented by ensuring that special consideration of Aboriginal status should expand to prosecutors. Considering that their actions and decisions heavily influence sentencing options and outcomes, particularly when triggering mandatory minimums, and have indeed directly contributed to Aboriginal over-representation in prisons, ethical duties in relation to Aboriginal offenders should be made explicitly clear as a reminder for prosecutors. Further, in many of their decisions, they are called upon to consider the "public interest", notably by considering factors that relate to the offender's background. In this context, the consideration of Aboriginal status and background in prosecutorial decision-making should explicitly be included as an additional reminder of the importance of this shared responsibility towards reducing discriminatory practices that have resulted in the over-representation of Aboriginal people in Canadian prisons.

Finally, failure to pay special attention to Aboriginal status should arguably be considered an abuse of process as defined by Moldaver J. in *Nur*, regardless of whether this failure is intentional or not. Indeed, as seen in *Nur* and reaffirmed by the Supreme Court in *Anderson*, Crown decisions, including Crown elections, motivated by prejudice against Aboriginal persons would certainly meet the standard of abuse of process by the Crown. A parallel can be made between this statement and the failure to apply the *Gladue* framework in prosecutorial decisions. Indeed, the failure to take into account the history and background of Aboriginal

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[47] Nova Scotia, *The Marshall Inquiry: Royal Commission on the Donald Marshall, Jr, Prosecution, Digest of Findings and Recommendations 1989* (Halifax: Province of Nova Scotia, 1989), at 162.

[48] Stenning & Roberts, *supra*, note 3.

people would contribute to further decontextualized and discriminatory practices, as well as imprisonment, which is arguably prejudicial to Aboriginal persons and thus would be considered an abuse of process by the Crown that would compromise trial fairness and/or the integrity of the justice system.

In brief, since prosecutorial decisions, particularly in the context of mandatory minimum sentences of imprisonment, can have an important impact on the ultimate sentencing outcome, it would be important for prosecutors to bear in mind their responsibility towards making their decisions as fair as possible by including guidance found within the *Gladue* framework. Indeed, their role fits well within the *Gladue* framework, which finds roots in the concepts of equality, fairness and restraint. Based on this account, it would also fall within the purview of prosecutors to consider elements within the framework of *Gladue*, including moral blameworthiness, but also the historical and contextual background of Aboriginal people, as well as the context of systemic discrimination and its effect on moral blameworthiness of these individuals.

V. A Preliminary Way Forward: The Recognition of Ethical Duties and Accountability as Part of Prosecutorial Guidelines

1. Prosecutorial Guidelines and the Need for Reform

The current state of ethical duties that imparts on prosecutors to consider Aboriginal status is arguably unsatisfactory. Prosecutorial guidelines available in each province and at the federal level were analyzed to determine the extent to which Aboriginal status of defendants should have been taken into account during prosecutorial decision-making. The guidelines revealed that in general, there are no explicit requirements for prosecutors to consider the Aboriginal status of defendants for most decisions. Ontario and Nova Scotia remain the exception by indicating that prosecutors should consider the unique and systemic or background factors that may have contributed to an Aboriginal person's criminal conduct, as well as relevant sanctions.[49]

[49] Ministry of the Attorney General, *Crown Policy Manual* (Toronto: Government of Ontario, 2005); Nova Scotia has a separate administrative policy for Aboriginal cases which ensures

A partial recognition that remains insufficient can be found in some guidelines in which prosecutors are directed to consider Aboriginal status for very specific types of offences, namely for sentencing impaired driving[50] or domestic violence cases.[51] A notable feature that is worth mentioning is that most provinces in the Prairies, where the issue of Aboriginal over-representation in prisons is the most acute, Aboriginal status is either rarely mentioned or not mentioned at all.[52] Further, some provinces refer to other mentioned criteria, such as the accused's background,[53] but as highlighted by the Court of Appeal in *Anderson*, an explicit directive should be included that instructs prosecutors to specifically take into account the offender's Aboriginal status.[54] A general reference to background, or state, without explicitly referring to Aboriginal background is vague and remains insufficient. Due to the unique status of Aboriginal offenders, clear and explicit instructions need to be drafted. Finally, it is well worth mentioning that Quebec fails to mention Aboriginal status as a relevant factor to consider for any prosecutorial decisions.

In addition to the fact that explicit mention of Aboriginal background consideration is generally lacking, there are also considerable inconsistencies and variations between the different provinces, which adds to the unsatisfactory state of ethical duties within the national scene. In light of the reality of Aboriginal over-representation in prisons and the partial role that prosecutors have played in this reality, it would be in the public interest to have generally uniform prosecution policies applicable across the country.

2. A Possible Road towards Greater Transparency and Accountability

Paciocco highlighted that one of the issues with ethical duties is that they are difficult to enforce and do not necessarily entail remedies for

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that the appropriate level of prosecutor expertise in Aboriginal issues is met, and has established an Aboriginal Law Working Group.

[50] Department of Justice, *Federal Prosecution Service of Canada Deskbook* (Ottawa: Government of Canada, 2014) [hereinafter "Federal guideline"].

[51] The Federal guideline, as well as prosecutorial guidelines in Prince Edward Island and in Newfoundland and Labrador, only refer to the status of Aboriginals for cases of domestic violence.

[52] For instance, the Manitoba Prosecution Policies only refer to Aboriginal status in decisions to use extra-judicial measures in a particular case; in Saskatchewan, there are no references to a person's Aboriginal status.

[53] These provinces include Alberta, British Columbia, Saskatchewan, Ontario, Prince Edward Island and Newfoundland and Labrador.

[54] This argument was interestingly addressed by the Court of Appeal of Ontario in *Anderson*.

individuals who are affected by ethical breaches.[55] Indeed, the lack of remedies traditionally associated with ethical duties is one of the reasons complainants may be tempted to have some of their interests recognized as legally enforceable rights. A possible way forward that does not involve expansive judicial oversight may be found in the experience of other common law jurisdictions that have elaborated administrative processes for reviewing certain prosecutorial decisions.

A notable and recent example can be found in England and Wales where a right to review has been recognized for victims of crime who may want to challenge prosecutorial decisions, including the decision not to prosecute and the decision to stop a prosecution. Indeed, in 2011, the Court of Appeal in *Killick*[56] recognized the right of a victim to seek a review of a Crown Prosecution Service ("CPS") decision not to prosecute. In light of this judgment, the CPS launched guidelines for the Victims' Rights to Review Scheme which makes it possible for victims to seek a review of a CPS decision not to bring charges or to terminate all proceedings.[57] This mechanism has recently recognized that victims can also play a crucial role in ensuring that prosecutorial decisions are explained and are also reviewed in cases of error.

First, this mechanism requires prosecutors to explicitly motivate their decisions to complainants. This act of transparency seems like a greater way to increase public confidence without interfering with prosecutorial independence. Indeed, as recommended by Justice Rosenberg a few years ago, in order to increase legitimacy and understanding of the process, prosecutorial decisions should be supported as much as possible with explicit explanations of the rationales behind their decisions.[58] This process does not disturb prosecutorial safeguards since it does not involve judicial oversight and enables greater transparency and understanding of prosecutorial decision-making by requiring prosecutors to provide interested parties with motives and explanations for reaching a specific decision.

Second, and more controversially, this mechanism enables complainants to seek review of specific prosecutorial decisions. This right to review recognizes that during prosecutorial decision-making,

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[55] Paciocco, s*upra*, note 6.

[56] *R. v. Killick*, [2011] EWCA Crim. 1608 (C.A.).

[57] The Crown Prosecution Service, United Kingdom Government, "Victims' Right to Review Scheme" (2014), online: Crown Prosecution Service <http://www.cps.gov.uk/victims_ witnesses/victims_right_to_review/>.

[58] The Honourable Marc Rosenberg, "The Attorney General and the Prosecution Function on the Twenty-First Century" (2009) 43 Queen's L.J. 813.

errors can occur. In this respect, interested parties can seek to obtain an entirely fresh examination of all the evidence and circumstances of a case, and if an error was made, the mistake will be redressed. The mechanism involves a two-tiered process within the Crown Prosecution Service that starts with (1) a local resolution process where the prosecutorial decision is reviewed by a prosecutor who has not been involved with the case. This stage will normally be completed within 10 days of receipt of the request for review and in the event where the complainant remains dissatisfied, (2) the "independent review" will take place, which comprises a reconsideration of the evidence and public interest element by a reviewing prosecutor independent of the original decision, who will look at the case afresh and determine whether it was wrong. This second step should take no longer than 30 working days. Regardless of outcomes, clear and detailed explanations of the decision are offered to the complainant.

This new mechanism aims at making the process more accountable by recognizing that public confidence in the system requires transparency and admission of possible errors or abuses of process. Accessibility is a key element to this process and does not require any formal legal action or legal costs, and is also meant to be quick.

Arguably, for cases where errors occur, this process can be considered a step forward from the Canadian *status quo*, where decisions are partially explained and hardly reviewable due to the high standard of abuse of process. Further, the current Canadian review process for abuse of process remains costly, which is less so the case for the administrative mechanism in England and Wales.

Another issue with the administrative review mechanism in England and Wales is its loosely defined standard of review. By adopting a standard of correctness, where mere error can be reviewed, it may arguably give rise to the fears expressed by the Court in *Anderson*, namely, opening the process to day-to day review of prosecutorial decisions.

A compromise between this mechanism and the process available prior to *Nur*, where abuse of process was exceptional, would be to adopt a standard of review based on reasonableness, where procedural encroachment by prosecutors that would meet the definition of abuse of process as defined by Moldaver J., in *Nur* could be reviewed.

Such a model can be adopted in Canada for prosecutorial decisions that limit freedoms of Aboriginal people, such as the triggering of mandatory minimum sentences that reduce sentencing options for Aboriginal offenders. This new model of internal review would be a way

to ensure that prosecutors take into account the unique circumstances and background of Aboriginal offenders by ensuring that prosecutors have taken note of this in their file and motivated their decision in this respect.

Review would only be possible in situations where prosecutors have failed to engage with the individual's Aboriginal background and status — in other words by failing to explicitly explain in the file, the ways in which the Aboriginal person's background has been relevant or not in reaching the specific prosecutorial decision. This form of review would not be a substantive review of the actual decision, but rather of the process itself to ensure that prosecutors have explicitly taken into account that person's Aboriginal status and background and highlighted the ways that this has impacted or not on their decision. Hence, reviews by interested parties would only be possible in cases where prosecutors fail to discuss the accused's Aboriginal status and background in the file and the ways this status has impacted on their prosecutorial decision. This form of review would limit and control the number of reviews and draw prosecutorial attention to Aboriginal status and background without opening the door to substantive reviews. It would also enable transparency and understanding by facilitating communication by prosecutors of the rationales behind their prosecutorial decisions.

VI. CONCLUSION

In conclusion, while there are numerous discussions about the role of judges in dealing with mandatory minimums, there is less discussion on the role and ethical duties that Crown prosecutors should have in a context of decision-making, which can restrict individual liberty and exacerbate the over-incarceration of Aboriginal people, including the triggering of mandatory minimum sentences. This article provides a first step towards this reflection. As highlighted by several reports, and more recently by the Truth and Reconciliation Commission of Canada, the plight of Aboriginal over-representation in prisons continues to plague the Canadian criminal justice process and to address this situation, all actors of the criminal justice process need to recognize their share of responsibility for this history of discrimination, including prosecutors. Following this recognition, a way forward would be to expand the *Gladue* principle to all actors in the criminal justice process who can limit Aboriginal people's freedoms and contribute to their over-representation in Canadian prisons. To achieve these goals, several changes can be made in prosecutorial

guidelines to explicitly highlight that prosecutors need to pay special consideration to Aboriginal people before making decisions that would affect their liberty and find alternatives to imprisonment whenever possible. Further, discussions around ways to increase transparency and accountability while maintaining some limits to judicial oversight of prosecutorial decisions should also be encouraged. Although this piece specifically addresses the importance of considering Aboriginal status and background in some prosecutorial decisions, there may be other decision-making contexts in which the *Gladue* principle should be expanded to contribute to a more just and equal process, in light of the history of systemic discrimination and abuse of process suffered by Aboriginal people in the criminal justice system.