

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Anderson**,** 2014 SCC 41, [2014] 2 S.C.R. 167 | **Date:** 20140606  **Docket:** 35246 |

Between:

Her Majesty The Queen

Appellant

and

Frederick Anderson

Respondent

and

Director of Public Prosecutions of Canada,

Attorney General of Ontario,

Attorney General of New Brunswick,

Attorney General of British Columbia,

David Asper Centre for Constitutional Rights and

**Aboriginal Legal Services of Toronto Inc.**

Interveners

**Coram:** McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 65) | Moldaver J. (McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. concurring) |

r. *v.* anderson, 2014 SCC 41, [2014] 2 S.C.R. 167

Her Majesty The Queen Appellant

v.

Frederick Anderson Respondent

and

Director of Public Prosecutions of Canada,

Attorney General of Ontario,

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David Asper Centre for Constitutional Rights and

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**Indexed as:** R. ***v.*** Anderson

2014 SCC 41

File No.: 35246.

2014: March 19; 2014: June 6.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for newfoundland and labrador

*Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Criminal law — Sentencing — Aboriginal offenders — Mandatory minimum sentence — Accused convicted of impaired driving for fifth time — Crown prosecutor seeking mandatory minimum sentence — Whether s. 7 of the Charter requires the Crown to consider Aboriginal status of accused when seeking minimum sentence for impaired driving — Whether consideration of Aboriginal status is a principle of fundamental justice — Whether decision to seek mandatory minimum sentence is a matter of core prosecutorial discretion — Standard of review for Crown decision making — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 253(1)(b), 255(1)(a)(iii), 727(1).*

The accused was convicted of impaired driving. The offence of impaired driving carries with it a minimum sentence of 30 days’ imprisonment for a second offence and 120 days’ imprisonment for a subsequent offence. These mandatory minimum sentences apply only if the Crown notifies the accused of its intention to seek a greater punishment prior to any plea. Crown counsel served a Notice of intent to seek greater punishment by reason of the accused’s four previous impaired driving convictions. The trial judge held that Crown counsel breached s. 7 of the *Canadian* *Charter of Rights and Freedoms* by tendering the Notice without considering the accused’s Aboriginal status. The accused was sentenced to a 90-day intermittent sentence. The Court of Appeal dismissed an appeal from sentence.

*Held*: The appeal should be allowed and a term of imprisonment of 120 days should be substituted, with service of the remainder of the sentence stayed in accordance with the concession of the Crown.

This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused’s Aboriginal status when making decisions that limit the sentencing options available to a judge — here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of “core” prosecutorial discretion, and if so, the standard by which it may be reviewed.

*No constitutional obligation*

Crown prosecutors are not constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving for two reasons.

First, while it is a principle of fundamental justice that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender, the duty to impose a proportionate sentence rests upon judges, *not* Crown prosecutors. The proportionality principle requires judges to consider systemic and background factors, including Aboriginal status, which may bear on the culpability of the offender. There is no basis in law to support equating the distinct roles of the judge and the prosecutor in the sentencing process.

Second, the principle of fundamental justice that the accused asks this Court to recognize does not meet the test which governs principles of fundamental justice. A principle of fundamental justice must be a legal principle, enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate, and be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. 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 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.

*Prosecutorial discretion*

Decisions by Crown prosecutors are either exercises of prosecutorial discretion or tactics and conduct before the court. Subsequent to this Court’s decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by “prosecutorial discretion” and the law has become cloudy. In particular, the use of the word “core” in *Krieger* has led to a narrow definition of prosecutorial discretion. The present appeal provides an opportunity for clarification.

“Prosecutorial discretion” is an expansive term. It covers all decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it. Prosecutorial discretion is entitled to considerable deference. It must not be subjected to routine second-guessing by the courts. Judicial non-interference is a matter of principle based on the doctrine of separation of powers. In contrast, tactics and conduct before the court are governed by the inherent jurisdiction of the court to control its own processes. Deference is not owed to counsel who behave inappropriately in the courtroom, but a high degree of deference is accorded to the tactical decisions of counsel. Abuse of process is not a precondition for judicial intervention in relation to a party’s tactics and conduct before the court.

Prosecutorial discretion is reviewable for abuse of process. The abuse of process doctrine is available where there is evidence that the Crown’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.

Tendering the Notice was a matter of prosecutorial discretion. In the complete absence of any evidence to support it, the accused’s abuse of process argument must fail.

**Cases Cited**

**Applied:** *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **explained:** *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423; **distinguished:** *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. v; **referred to:** *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. T. (V.)*, [1992] 1 S.C.R. 749; *R. v. Cook*, [1997] 1 S.C.R. 1113; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566; *R. v. O’Connor*, [1995] 4 S.C.R. 411; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688; *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 15(1).

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ss. 5, 6.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 92, 94, 95, 151, 152, 253(1), 255, 267(*b*), 271, 344, 718.1, 718.2, 727(1).

*Extradition Act*, S.C. 1999, c. 18, s. 44(1)(*a*).

**Authors Cited**

Code, Michael. “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009), 34 *Queen’s L.J.* 863.

Frater, Robert J. *Prosecutorial Misconduct*. Aurora, Ont.: Canada Law Book, 2009.

Vanek, David. “Prosecutorial Discretion” (1988), 30 *Crim. L.Q.* 219.

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Green C.J.N.L. and Welsh and Rowe JJ.A.), 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308, 1027 A.P.R. 308, 41 M.V.R. (6th) 194, 275 C.R.R. (2d) 127, 295 C.C.C. (3d) 262, [2013] 4 C.N.L.R. 209, [2013] N.J. No. 13 (QL), 2013 CarswellNfld 11, affirming a sentencing decision of English Prov. Ct. J., 2011 NLPC 1709A00569. Appeal allowed.

Iain R. W. Hollett, for the appellant.

Derek Hogan and Darlene Neville, for the respondent.

David Schermbrucker and Carole Sheppard, for the intervener the Director of Public Prosecutions of Canada.

Philip Perlmutter and Lorna Bolton, for the intervener the Attorney General of Ontario.

Kathryn A. Gregory and Cameron Gunn, Q.C., for the intervener the Attorney General of New Brunswick.

Joyce DeWitt-Van Oosten, Q.C., for the intervener the Attorney General of British Columbia.

Kent Roach and Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Jonathan Rudin and Emily Hill, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

Moldaver J. —

1. Introduction
2. This appeal raises the following question: Are Crown prosecutors constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving? The answer, in my view, must be no. There is no principle of fundamental justice that supports the existence of such a constitutional obligation. Absent such an obligation, the prosecutor’s decision is a matter of prosecutorial discretion which is reviewable by the courts only for abuse of process.
3. The present appeal involves a scheme of escalating, mandatory minimum sentences for impaired driving convictions. These mandatory minimums are set out in s. 255 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Code*”). Section 727(1) of the *Code* states that the mandatory minimums set out in s. 255 are applicable only if the Crown, in advance of any plea, notifies the accused of its intention to seek a greater punishment by reason of previous convictions (the “Notice”) and tenders proof at the sentencing hearing that the Notice was served. It is the Crown’s discretionary decision to tender the Notice at the sentencing hearing that is the subject of the current debate.
4. The respondent, Mr. Anderson, submits that the Crown is constitutionally obligated under s. 7 of the *Canadian Charter* *of Rights and Freedoms* to consider the accused’s Aboriginal status in deciding whether or not to tender the Notice. According to Mr. Anderson, for sentencing purposes, consideration of Aboriginal status is a principle of fundamental justice. It follows that the Crown must consider it when making decisions that limit the sentencing options available to a judge.
5. The Crown denies the existence of any such obligation. The Crown submits that the decision to tender the Notice is a matter of prosecutorial discretion. As such, it can only be reviewed for abuse of process. The Crown further submits that if mandatory minimum sentences within a statutory scheme prevent a judge from imposing a fit and just sentence that accords with the fundamental principle of proportionality, it is the scheme that should be challenged, not the exercise of prosecutorial discretion that has triggered it.
6. For the reasons that follow, I conclude that Crown prosecutors are under no constitutional duty to consider the accused’s Aboriginal status when tendering the Notice. As a matter of prosecutorial discretion, the decision is only reviewable for abuse of process.
7. Background
8. Mr. Anderson was charged with the offence of driving with more than 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(1)(*b*) of the *Code*. Before pleading guilty, he was served with a Notice. He later learned that the Crown intended to prove the Notice at the sentencing hearing. As this was Mr. Anderson’s fifth impaired driving-related conviction, tendering the Notice meant that he would be subject to a mandatory minimum sentence of not less than 120 days’ imprisonment under s. 255(1)(*a*)(iii) of the *Code*.
   1. Provincial Court of Newfoundland and Labrador, 2011 NLPC 1709A00569
9. Prior to the sentencing hearing, Mr. Anderson filed a *Charter* application in which he argued that ss. 255(1) and 727(1) of the *Code* violate s. 7 of the *Charter* because “the combined effect of the [provisions] is to transfer what is a judicial function to the prosecutor, namely, the setting of the floor or minimum sentence in a given case” (motion judgment, at para. 21). He 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.
10. The trial judge, English Prov. Ct. J., accepted Mr. Anderson’s *Charter* arguments and concluded that the infringements of ss. 7 and 15(1) were not saved by s. 1 of the *Charter*. In order to ensure compliance with s. 7 of the *Charter*, he held that the Crown must in all cases, including those involving non-Aboriginal offenders, provide justification for relying on the Notice. As for the violation of s. 15(1), he declared the statutory scheme to be of no force and effect as it applied to Aboriginal offenders. Having determined that he was not bound by the minimums set out in s. 255(1), the trial judge sentenced Mr. Anderson to a 90-day intermittent sentence followed by two years’ probation. A five-year driving prohibition was also imposed.
    1. Newfoundland and Labrador Court of Appeal, 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308
11. The Newfoundland and Labrador Court of Appeal rejected the Crown’s appeal. 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 s. 7 *Charter* breach. According to the court, there would be no breach of s. 7 if the Crown’s policy statement[[1]](#footnote-1) regarding the decision to tender the Notice included a *specific* direction to consider the offender’s Aboriginal status. The absence of such a direction, and the lack of explanation on the part of the Crown for its decision to tender the Notice in this case, led the court to conclude that s. 7 of the *Charter* had been breached.
12. The court split on how the Crown’s decision to tender the Notice should be characterized. Welsh J.A. considered it to be a matter of “core” prosecutorial discretion; Green C.J.N.L. and Rowe J.A. maintained that it was “outside a core prosecutorial function”: para. 49 (emphasis deleted). In the end, this difference of opinion did not affect the result and the Crown’s appeal was dismissed.
13. Relevant Statutory Provisions
14. Section 253(1) of the *Code* sets out the offence of impaired driving:

**253.** (1) [Operation while impaired] Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(*a*) while the person’s ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(*b*) having consumed alcohol in such a quantity that the concentration in the person’s blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

1. Section 255 of the *Code* sets out the escalating mandatory minimum penalties for impaired driving. For the purposes of this appeal, the relevant portion of s. 255 is the following:

**255.** (1) [Punishment] Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

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

(i) for a first offence, to a fine of not less than $1,000,

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

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

1. Section 727(1) of the *Code* sets out the requirement to give notice to the accused of the Crown’s intention to seek the mandatory minimum punishment:

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

1. Section 718.2(*e*) of the *Code* states:

**718.2** [Other sentencingprinciples] A court that imposes a sentence shall also take into consideration the following principles:

. . .

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

1. Lastly, s. 7 of the *Charter* states:

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

1. Issues
2. This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused’s Aboriginal status when making decisions that limit the sentencing options available to a judge — here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of “core” prosecutorial discretion, and if so, the standard by which it may be reviewed.
3. Before analyzing these two issues, a brief explanation of how they are connected is warranted. The respondent argues that all state actors (including Crown prosecutors) must consider Aboriginal status where a decision affects the liberty interest of an Aboriginal person. He maintains that this is a principle of fundamental justice. If this argument is accepted, it matters not whether the decision is one of prosecutorial discretion. The principle of fundamental justice — perhaps more aptly described as a constitutional duty — would apply regardless. As will be discussed in greater detail, prosecutorial discretion provides no answer to the breach of a constitutional duty. If, on the other hand, the respondent’s argument is rejected, the distinction between prosecutorial discretion and tactics and conduct before the Court becomes important, as the categorization affects the standard of review to be applied to the decision.
4. Analysis
   1. Does Section 7 of the Charter Require the Crown to Consider an Accused’s Aboriginal Status When Making Decisions That Limit the Sentencing Options Available to a Judge?
5. Mr. Anderson submits that consideration of Aboriginal status in sentencing is a principle of fundamental justice that applies to all state actors, including Crown prosecutors. It follows that Crown prosecutors are constitutionally required to consider an accused’s Aboriginal status when making a discretionary decision that limits the sentencing options available to a judge, including the decision to tender the Notice. In support of this argument, Mr. Anderson relies on s. 718.2(*e*) of the *Code*, as well as this Court’s decisions in *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.
6. The Crown submits that Mr. Anderson’s argument stretches s. 718.2(*e*) of the *Code* beyond its intended purpose. According to the Crown, a statutory direction to sentencing judges cannot be transformed into a constitutional obligation on the Crown to take Aboriginal status into account when making a discretionary decision that limits a judge’s sentencing options.
7. In my view, there are two reasons why Mr. Anderson’s argument must fail. First, it conflates the role of the prosecutor and the sentencing judge by imposing on prosecutors a duty that applies only to judges — the duty to impose a proportionate sentence. Second, the principle of fundamental justice that Mr. Anderson seeks does not meet the test that governs such principles, set out in *R. v. D.B.*, 2008 SCC 25,[2008] 2 S.C.R. 3.
   * 1. Imposing a Proportionate Sentence Is the Judge’s Responsibility
8. As LeBel J., for the majority of this Court, stated in *Ipeelee*, “[p]roportionality is the *sine qua non* of a just sanction” and a principle of fundamental justice: paras. 36-37. Proportionality means that the sentence must be “proportionate to both the gravity of the offence and the degree of responsibility of the offender” (*Ipeelee*, at para. 39 (emphasis deleted); see also s. 718.1 of the *Code*). “[S]ystemic and background factors [which include Aboriginal status] may bear on the culpability of the offender, [that is, the degree of responsibility of the offender,] to the extent that they shed light on his or her level of moral blameworthiness”: *Ipeelee*, at para. 73.
9. The fundamental principle of proportionality has been codified. Section 718.1 of the *Code* states that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Section 718.2 of the *Code* lists numerous factors that sentencing judges must consider when crafting a fair and just sentence that accords with the fundamental principle of proportionality. Aboriginal status is one of these factors and is found in s. 718.2(*e*).
10. In *Gladue*, this Court discussed s. 718.2(*e*) of the *Code* at length, noting that it was enacted to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons and to encourage a restorative approach to sentencing: para. 93. The Court explained that “sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders” (*Gladue*, at para. 37 (emphasis deleted)). The Court held that, pursuant to s. 718.2(*e*), a judge must consider: “(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) [t]he 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”: *Gladue*, at para. 66.
11. Section 718.2(*e*) was also central to the discussion in *Ipeelee*. In that case, the Court noted that the *Gladue* principles bear on the ultimate question of what is a fit and proper sentence and assist the judge in crafting a sentence that accords with the fundamental principle of proportionality. The failure of a sentencing judge to consider the unique circumstances of Aboriginal offenders thus breaches both the judge’s statutory obligations, under ss. 718.1 and 718.2 of the *Code*, and the principle of fundamental justice that sentences be proportionate: *Ipeelee*,at para. 87.
12. Importantly, both *Gladue* and *Ipeelee* speak to the sentencing obligations of *judges* to craft a proportionate sentence for Aboriginal offenders. They make no mention of prosecutorial discretion and do not support Mr. Anderson’s argument that *prosecutors* must consider Aboriginal status when making a decision that limits the sentencing options available to a judge. Mr. Anderson’s argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process. It is *the judge’s* responsibility to impose sentence; likewise, it is *the judge’s* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged.
13. In so concluding, I have not ignored *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. v, a case upon which Mr. Anderson relies. In *Leonard*, the United States sought the extradition of two Aboriginal Canadians. Sharpe J.A. held that in deciding whether or not to surrender the accused, the Minister of Justice was required to consider their Aboriginal status, noting that

the *Gladue* factors are not limited to criminal sentencing but . . . should be considered by all “decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system” (*Gladue*, at para. 65) whenever an Aboriginal person’s liberty is at stake in criminal and related proceedings. That category includes extradition. [para. 85]

1. Mr. Anderson submits that, like the Minister of Justice in *Leonard*, Crown prosecutors should be required to consider Aboriginal status as they are “decision-makers” who “have the power to influence the treatment of aboriginal offenders in the justice system” (*Gladue*, at para. 65). With respect, I cannot agree. The excerpt from *Leonard* upon which Mr. Anderson relies should not be taken out of context. Pursuant to s. 44(1)(*a*) of the *Extradition Act*, S.C. 1999, c. 18, the Minister of Justice must refuse to surrender an individual if “the surrender would be unjust or oppressive having regard to all the relevant circumstances”. As Sharpe J.A. notes, determining whether the surrender would be unjust or oppressive requires the Minister of Justice to compare the likely sentence that would be imposed in a foreign state *with the likely sentence that would be imposed in Canada* — a task which is impossible to do without reference to the *Gladue* principles. As Sharpe J.A. explained, the proper exercise of the Minister’s discretion in this context

requires an assessment of the likely result if the case were prosecuted domestically and a comparison of that result to the likely outcome in the foreign state if the individual sought were surrender[ed]. In the case of an Aboriginal offender, I fail to see how that assessment and comparison could be accomplished without reference to the *Gladue* principles. [para. 87]

1. It follows, in my view, that *Leonard* does not support the much broader application of *Gladue* that Mr. Anderson seeks.
   * 1. The *R. v. D.B.* Test Is Not Satisfied
2. There is a further reason why Mr. Anderson’s s. 7 argument must fail. The principle of fundamental justice that Mr. Anderson asks this Court to recognize — that Crown 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 which governs principles of fundamental justice. As Abella J. observed for the majority in *D.B.*, at para. 46, a principle of fundamental justice 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 fairly to 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. See also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8.
3. The principle contended for by Mr. Anderson does not meet the second requirement that it enjoy consensus as a principle that is fundamental to the way in which the legal system ought to fairly operate. In fact, the principle is contrary to a long-standing and deeply rooted approach to the division of responsibility between the Crown prosecutor and the courts.
4. We must begin by acknowledging that the principle advanced by Mr. Anderson would enormously expand the scope of judicial review of discretionary decisions made by prosecutors. In doing so, it puts at risk the adversarial nature of our criminal justice system by hobbling Crown prosecutors in the performance of their work and by inviting judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis. As the Crown has pointed out, the situations where Crown decisions have the potential to limit the sentencing judge’s options and therefore the judge’s ability to take s. 718.2(*e*) into account are many: A.F., at para. 145. These decisions include: proceeding with charges that attract a mandatory minimum sentence when other related offences have no mandatory minimum sentence (e.g. s. 95 as opposed to s. 92 or s. 94 of the *Code*); proceeding by indictment rather than summary conviction when different mandatory minimum sentences are required (e.g. ss. 151, 152 and 271 of the *Code*); and proceeding by indictment rather than by summary conviction when that decision precludes the possibility of a conditional sentence (e.g. s. 267(*b*) of the *Code*). Moreover, there are several provisions of the *Code* and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, where a mandatory minimum is triggered by the Crown’s decision to prove a particular aggravating factor — such as evidence of a firearm used in the commission of the offence (e.g. s. 344 of the *Code*; ss. 5 and 6 of the *Controlled Drugs and Substances Act*). As with the other examples provided, the decision to prove the aggravating factor limits the sentencing judge’s options.
5. Apart from the sheer volume of decisions that would be opened up for review, the Crown’s decision to seek the mandatory minimum penalty — as we shall see — is a matter of prosecutorial discretion. There has been a long-standing and deeply engrained reluctance to permit routine judicial review of the exercise of that discretion. As affirmed in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 411, the Court “has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice”. And, as L’Heureux-Dubé J., for the majority of this Court, noted in *R. v. Power*, [1994] 1 S.C.R. 601, “the Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it” (p. 627). The imposition of a sweeping duty that opens up for routine judicial review all of the aforementioned decisions is contrary to our constitutional traditions. It cannot be a principle that is considered fundamental to the way in which our legal system ought fairly to operate.
6. In sum, the principle of fundamental justice sought by Mr. Anderson must be rejected.
   1. Is the Crown’s Decision to Tender the Notice Against an Aboriginal Offender Reviewable?
7. Having concluded that the Crown is not under a constitutional obligation to consider the accused’s Aboriginal status when making a decision that limits the sentencing options available to a judge, the next question is whether the Crown’s decision to tender the Notice is reviewable in some other way, and if so, under what standard.

Review of Crown Decision Making

1. There are two distinct avenues for judicial review of Crown decision making. The analysis will differ depending on which of the following is at issue: (1) exercises of prosecutorial discretion; or (2) tactics and conduct before the court.
2. All Crown decision making is reviewable for abuse of process. However, as I will explain, exercises of prosecutorial discretion are *only* reviewable for abuse of process. In contrast, tactics and conduct before the court are subject to a wider range of review. The court may exercise its inherent jurisdiction to control its own processes even in the absence of abuse of process.
   * + 1. Prosecutorial Discretion
3. This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: *Beare*, at p. 410; *R. v. T. (V.)*,[1992] 1 S.C.R. 749, at pp. 758-62; *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 19. In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 47, the fundamental importance of prosecutorial discretion was said to lie, “not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as ‘ministers of justice’”. More recently, in *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 27, this Court observed that “[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law”.
4. Unfortunately, subsequent to this Court’s decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by “prosecutorial discretion” and the law has become cloudy. The present appeal provides an opportunity for clarification.
5. In *Krieger*, this Court provided the following description of prosecutorial discretion:

“Prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence. [para. 43]

1. The Court went on to provide the following examples of prosecutorial discretion: whether to bring the prosecution of a charge laid by police; whether to enter a stay of proceedings in either a private or public prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings altogether; and whether to take control of a private prosecution (para. 46). The Court continued:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor’s tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis added; emphasis in original deleted; para. 47.]

1. Since *Krieger*, courts have struggled with the distinction between prosecutorial discretion, and tactics and conduct. The use of the word “core” in *Krieger* has led to a narrow definition of prosecutorial discretion, notwithstanding the expansive language used in *Krieger* to define the term, namely: “. . . decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it” (para. 47). Difficulty in defining the term has also led to confusion regarding the standard of review by which particular Crown decisions are to be assessed.
2. The current appeal presents a good illustration of both problems. As noted earlier, the Newfoundland and Labrador Court of Appeal split on the issue of how to characterize the Crown’s decision to tender the Notice. Welsh J.A. held that it was a matter of “core” prosecutorial discretion, whereas Green C.J.N.L. and Rowe J.A. (following *R. v. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423, at paras. 54-56), considered it to be a tactical decision and thus “outside [the] core” (para. 49).
3. The court also diverged on the applicable standard of review. Welsh J.A. held that the distinction between core decisions and decisions falling outside the core was of no consequence as both types of decisions were reviewable on the same standard — the standard articulated in *Gill*, in which the Ontario Court of Appeal held that the decision to tender the Notice was reviewable if it (1) undermined the integrity of the administration of justice; (2) operated in a manner that rendered the sentencing proceedings fundamentally unfair; (3) was arbitrary; or (4) resulted in a limit on the accused’s liberty that was grossly disproportionate to the state interest in pursuing a particular course of action (*Gill*, at para. 59). Green C.J.N.L. and Rowe J.A. disagreed. In their view, tactical decisions (decisions “outside the core”) were reviewable according to the *Gill* standard, whereas “core” prosecutorial discretion was reviewable solely for abuse of process. The diverging views present in this case, and in many others, demonstrate the unsatisfactory state of the law.
4. In an effort to clarify, I think we should start by recognizing that the term “prosecutorial discretion” is an expansive term that covers all “decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it” (*Krieger*, at para. 47). As this Court has repeatedly noted, “[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences” (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, “Prosecutorial Discretion” (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice.
5. In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making. That said, care must be taken to distinguish matters of prosecutorial discretion from constitutional obligations. The distinction between prosecutorial discretion and the constitutional obligations of the Crown was made in *Krieger*, where the prosecutor’s duty to disclose relevant evidence to the accused was at issue:

In *Stinchcombe*, *supra*, the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not, therefore, a matter of prosecutorial discretion but, rather, is a prosecutorial duty. [Emphasis added; para. 54.]

Manifestly, the Crown possesses no discretion to breach the *Charter* rights of an accused. In other words, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence.

* + - * 1. The Standard of Review for Prosecutorial Discretion

1. The many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts. The courts have long recognized that decisions involving prosecutorial discretion are unlike other decisions made by the executive: see M. Code, “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009), 34 *Queen’s L.J.* 863, at p. 867. Judicial non-interference with prosecutorial discretion has been referred to as a “matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice” which also recognizes that prosecutorial discretion is “especially ill-suited to judicial review”: *Power*, at p. 623. In *Krieger*, the Court discussed the separation of powers doctrine as a basis for judicial deference to prosecutorial discretion:

In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive . . . . [para. 45]

1. The Court also noted the more practical problems associated with regular review of prosecutorial discretion:

The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. [para. 32]

1. Manifestly, prosecutorial discretion is entitled to considerable deference. It is not, however, immune from all judicial oversight. This Court has repeatedly affirmed that prosecutorial discretion is reviewable for abuse of process: *Krieger*, at para. 32; *Nixon*, at para. 31; *Miazga*, at para. 46.
2. The jurisprudence pertaining to the review of prosecutorial discretion has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process. In *Krieger*, this Court used the term “flagrant impropriety” (para. 49). In *Nixon*, the Court held that the abuse of process doctrine is available where there is evidence that the Crown’s decision “undermines the integrity of the judicial process” or “results in trial unfairness” (para. 64). The Court also referred to “improper motive[s]” and “bad faith” in its discussion (para. 68).
3. Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard.
4. In sum, prosecutorial discretion is reviewable solely for abuse of process. The *Gill* test applied by the Newfoundland and Labrador Court of Appeal was developed at a time when courts were struggling with the post-*Krieger* “core” versus “outside the core” dichotomy. To the extent the *Gill* test suggests that conduct falling short of abuse of process may form a basis for reviewing prosecutorial discretion, respectfully, it should not be followed.
   * + - 1. The Threshold Evidentiary Burden
5. The burden of proof for establishing abuse of process lies on the claimant, who must prove it on a balance of probabilities: *Cook*, at para. 62; *R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 69, *per* L’Heureux-Dubé J.; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 19. However, given the unique nature of prosecutorial discretion — specifically, the fact that the Crown will typically (if not always) be the only party who will know *why* a particular decision was made ― this Court in *Nixon* recognized that where prosecutorial discretion is challenged, the Crown may be required to provide reasons justifying its decision where the claimant establishes a proper evidentiary foundation: para. 60.
6. In *Nixon*, this Court noted the following reasons as to why there must be a “proper evidentiary foundation” before the abuse of process claim should proceed:

. . . mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new: *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343. Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* (at para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. [Emphasis added; paras. 61-62.]

1. *Nixon* involved the Crown’s repudiation of a plea agreement. The Court held that the repudiation of a plea agreement was “a rare and exceptional event” that met the evidentiary threshold and justified an inquiry into the propriety of the Crown’s decision: *Nixon*, at para. 63. Indeed, the evidence in *Nixon* was that only two other plea agreements had been repudiated in Alberta’s history. As a result, the Court held that

to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and, as discussed earlier, the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim. [para. 63]

1. Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion respects the presumption that prosecutorial discretion is exercised in good faith: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 95. It also accords with this Court’s statement in *Sriskandarajah*,at para. 27, that “prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives” (emphasis added).
2. Finally, I note that the content of a Crown policy or guideline may be relevant when a court is considering a challenge to the exercise of prosecutorial discretion. Policy statements or guidelines are capable of informing the debate as to whether a Crown prosecutor’s conduct was appropriate in the particular circumstances. See R. J. Frater, *Prosecutorial Misconduct* (2009), at p. 259. For example, a decision by a Crown prosecutor that appears to contravene a Crown policy or guideline may provide some evidence that assists the claimant in establishing the threshold evidentiary foundation. However, as the intervener the Director of Public Prosecutions of Canada submits, Crown policies and guidelines do not have the force of law, and cannot themselves be subjected to *Charter* scrutiny in the abstract: see *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 45 (discussing police practices manuals).
   * + 1. Tactics and Conduct Before the Court
3. The second category in the framework for review of Crown activity was referred to in *Krieger* as “tactics or conduct before the court”: para. 47. As stated in *Krieger*, “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” (para. 47).
4. Superior courts possess inherent jurisdiction to ensure that the machinery of the court functions in an orderly and effective manner: *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; *Ontario* *v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 26. Similarly, in order to function as courts of law, statutory courts have implicit powers that derive from the court’s authority to control its own process: *Cunningham*,at para.18. This jurisdiction includes the power to penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings.
5. While deference is not owed to counsel who are behaving inappropriately in the courtroom, our adversarial system *does* accord a high degree of deference to the tactical decisions of counsel. In other words, while courts may sanction the conduct of the *litigants*, they should generally refrain from interfering with the conduct of the *litigation* itself. In *R. v.* *S.G.T.*,2010 SCC 20, [2010] 1 S.C.R. 688, at paras. 36-37, this Court explained why judges should be very cautious before interfering with tactical decisions:

In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel . . . . [C]ounsel will generally be in a better position to assess the wisdom, in light of their overall trial strategy, of a particular tactical decision than is the trial judge. By contrast, trial judges are expected to be impartial arbiters of the dispute before them; the more a trial judge second-guesses or overrides the decisions of counsel, the greater is the risk that the trial judge will, in either appearance or reality, cease being a neutral arbiter and instead become an advocate for one party. . . .

The corollary of the preceding is that trial judges should seldom take it upon themselves, let alone be required, to second-guess the tactical decisions of counsel. Of course, trial judges are still required to “make sure that [the trial] remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice”: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 68.

1. Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused: *Jolivet*, at para. 21. Likewise, as this Court recently held in *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, a judge may exceptionally override a Crown tactical decision in order to prevent a *Charter* violation.
2. Finally, as with all Crown decision making, courtroom tactics or conduct may amount to abuse of process, but abuse of process is not a precondition for judicial intervention as it is for matters of prosecutorial discretion.
3. Conclusion
4. Parliament has expressly conferred on the Crown the discretion to tender the Notice at the sentencing hearing through the governing provisions of the *Code*. This discretion is consistent with our constitutional traditions. As the Crown points out, tendering the Notice is not simply a decision as to what submissions will be made at a sentencing hearing (A.F., at para. 119). Tendering the Notice fundamentally alters the *extent* of prosecution — specifically, the extent of the jeopardy facing the accused. In this respect, the Crown’s decision to tender the Notice is analogous to the decision to proceed with charges that attract a mandatory minimum sentence when other related offences have no mandatory minimum sentence; the decision to proceed by indictment rather than summary conviction when different mandatory minimum sentences are involved; and the decision to proceed by indictment rather than by summary conviction when that decision precludes certain sentencing options.
5. For these reasons, I conclude that tendering the Notice is a matter of prosecutorial discretion. As a result, it is reviewable only for abuse of process. In the complete absence of any evidence to support it, Mr. Anderson’s abuse of process argument must fail.
6. As a final matter, I note that the s. 15(1) *Charter* challenge to the constitutionality of the statutory scheme was not pursued before this Court. These reasons should not be taken as endorsing the trial judge’s analysis or conclusion with respect to that issue.
7. Accordingly, I would allow the appeal. The order of the Newfoundland and Labrador Court of Appeal is set aside and a term of imprisonment of 120 days is substituted, with service of the remainder of the sentence stayed in accordance with the concession of the Crown.

*Appeal allowed.*

Solicitor for the appellant: Attorney General of Newfoundland and Labrador, St. John’s.

Solicitor for the respondent: Newfoundland and Labrador Legal Aid Commission, St. John’s.

Solicitor for the intervener the Director of Public Prosecutions of Canada: Public Prosecution Service of Canada, Halifax.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

*Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Legal Clinic, Toronto.*

1. Crown policy statements are designed to assist Crown prosecutors in the performance of their functions. In this case, there was a Crown policy statement pertaining to the decision of whether or not to tender the Notice. The policy statement stated that “service of the notice should be considered in all cases, in light of all circumstances of the offence and the background and circumstances of the offender” (Court of Appeal decision, at para. 19 (emphasis deleted)). The policy statement did not specifically reference Aboriginal status. [↑](#footnote-ref-1)