S.C.C. NO: 35246

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

BETWEEN:

HER MAJESTY THE QUEEN **APPELLANT**

- and -

FREDERICK ANDERSON **RESPONDENT**

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TABLE OF CONTENTS

Part I – Concise Overview of Position

1. A proper factual basis is essential in order to appropriately consider *Charter* issues. The absence of evidence is not sufficient to establish proof on a balance of probabilities. The Newfoundland and Labrador Court of Appeal erred in law by drawing an adverse inference against the Crown and by inferring a *Charter* violation in the absence of evidence.

2. This error led the Court of Appeal to inappropriately infringe on prosecutorial discretion and violate the separation of powers between the executive, legislative and judicial branches of government, concepts which are hallmarks of our legal tradition.

> **Reference:** *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras. 28-31 [hereinafter *CLAO*]; Appellant's Book of Authorities, Tab 3 [hereinafter ABA].

3. Given the constitutional necessity of maintaining the independence of the Court and the Crown, this appeal engages the proper balance between the courts and the executive and concerns the point at which it becomes improper for the Court to review discretionary prosecutorial decisions absent an allegation of abuse of process.

4. The Court of Appeal's decision fails to recognize that even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give deference to the legislative and executive branches, as the other branches will be better placed to make discretionary decisions within the range of constitutional options.

> **Reference:** *CLAO* at para. 31; ABA, Tab 3.

5. The Appellant respectfully submits that the Court of Appeal erred by inferring a *Charter* breach in the absence of evidence, erred in its approach to the review of prosecutorial discretion and erred in its application of s. 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46.

The Background Circumstances

6. The facts are not in dispute.

> **Reference:** Respondent's initial Factum dated March 28, 2011 at pp. 1-4; Appellant's Record [hereinafter AR], Tab 13, pp. 66-70.

7. On June 9, 2009, the Respondent, an aboriginal person for the purposes of s. 718.2(e) of the *Criminal Code*, was arrested and charged with impaired driving and driving with an excess of 80 milligrams of alcohol in 100 milliliters of blood contrary to ss. 253(1)(a) and (b) of the *Criminal Code*.

> **Reference:** Sentencing Judge's decision on the *Charter* Application dated June 30, 2011 at para. 3; [hereinafter decision on *Charter* Application]; AR, Tab 2, p. 3.

8. The Respondent pled guilty to his fifth impaired driving related offence. The Respondent's blood alcohol concentration at the time of the analysis was 120 milligrams of alcohol in 100 milliliters of blood.

> **Reference:** Sentencing Judge's reasons for sentence dated December 2, 2011 at paras. 3-5 [hereinafter reasons for sentence]; AR, Tab 3, pp. 19-20.

9. The Respondent's prior convictions were dated May 24, 1988, January 18, 1991, February 5, 1996 and April 28, 1997.

> **Reference:** Respondent's Criminal Record; AR, Tab 16, pp. 230-242.

10. The Crown served the s. 727 *Criminal Code* Notice of Intention to Seek Greater Punishment [hereinafter s. 727 Notice] and intended to tender it at the sentencing hearing.

11. The combination of the number of prior convictions, and ss. 255 and 727 of the *Criminal Code* required a minimum period of imprisonment of 120 days.

12. However, prior to the sentencing hearing, the Respondent filed a *Charter* application, arguing that the mandatory minimum sentence in s. 255 (1) of the *Criminal Code* violated ss. 7 and 15 of the *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 the *Charter*] and requested that the sentencing scheme for repeat offenders be declared to be of no force and effect under s. 52(1) of *Constitution Act, 1982.*

Reference: *Charter Application*; AR, Tab 8, pp. 50-53.

13. During oral arguments, the Respondent's counsel clarified that the declaration of no force and effect was only sought with respect to aboriginal offenders.

Reference: Transcript of Proceedings, April 29, 2011 at pp. 5-6; AR, Tab 14, pp. 75-76.

The Decision of English P.C.J.

14. The sentencing Judge found that the combined effect of ss. 255(1) and 727(1) of the *Criminal Code* was to "transfer what is a judicial function to the prosecutor, namely, the setting of the floor or minimum sentence in a given case." As a result, the sentencing Judge found that the sentencing scheme violated s. 7 of the *Charter.*

Reference: Decision on *Charter* Application at paras. 21-25; AR, Tab 2, pp. 8-10.

15. Similarly, the sentencing Judge found that s. 15 of the *Charter* was violated "by the statutory sentencing scheme that would impose a minimum mandatory sentence on an aboriginal accused without any opportunity to argue for a non-custodial sentence that may be appropriate for him."

Reference: Decision on *Charter* Application at para. 37; AR, Tab 2, p. 14.

16. The sentencing Judge then considered whether the sentencing scheme could be saved under s. 1 of the *Charter,* ultimately finding that it could not be saved. He concluded that taking the "broad and far reaching effects" of s. 718.2(e) of the *Criminal Code* away from aboriginal persons was not a minimal effect as it amounted to the elimination of certain types of sentences that may well be appropriate on "a cultural or practical basis for such offenders".

Reference: Decision on *Charter* Application at para. 43; AR, Tab 2, p.15.

17. Despite his finding that the statutory scheme violated ss. 7 and 15 of the *Charter,* the sentencing Judge refused to strike down the statutory provisions. Instead, the sentencing Judge concluded that the appropriate remedy was judicial "supervision" of the prosecutor's decision to tender the s. 727 Notice.

Reference: Decision on *Charter* Application at paras. 46-47; AR, Tab 2, p. 16.

18. The sentencing Judge concluded: "until the prosecutor sets out, for the Court's review, the reasons for filing the notice and relying upon that Notice, the case should proceed as if no notice had been filed and relied upon".

Reference: Decision on *Charter* Application at para. 48; AR, Tab 2, p. 16.

19. As the s. 727 Notice had been set aside, the sentencing Judge found that the mandatory minimum 120 day sentence set out in the *Criminal Code* was inapplicable and instead imposed a 90 day intermittent sentence. The sentencing Judge also imposed two years probation and a five year driving prohibition.

Reference: Reasons for Sentence at paras. 26-28; AR, Tab 3, p. 26.

The Court of Appeal's Decision

20. The Crown's appeal to the Newfoundland and Labrador Court of Appeal was dismissed, although for different reasons than those articulated by the sentencing Judge. The Court of Appeal found that the sentencing Judge erred in his analytical approach and proceeded to conduct its own analysis.

Greene C.J.N.L. & Rowe J.A.

21. The majority of the Court of Appeal relied on *R. v. Gill*, 2012 ONCA 607 and held that the decision to tender the s. 727 Notice was not a "core prosecutorial function" and that it could be reviewed under s. 7 of the *Charter* to determine if the decision met the principles of fundamental justice. The majority concluded that the applicable standard of review for non-core functions concerned whether a decision resulted in unfairness of the

proceedings or undermined the integrity of the administration of justice and included "notions of arbitrariness and gross disproportionality of a limit on the accused's liberty interest."

Reference: *R. v. Anderson,* 2013 NLCA 2 at paras. 46-49 [hereinafter Court of Appeal Decision]; AR, Tab 4, pp. 42-44.

22. According to the majority, it was "difficult to countenance" expanding the range of core prosecutorial functions because doing so "would increase those situations in which prosecutors can act in an arbitrary way without review by the courts."

Reference: Court of Appeal Decision at para. 50; AR, Tab 4, pp. 44-45.

23. While the majority agreed with the law set out in *Gill,* they also agreed with the application of the law to the facts as set out by Welsh J.A. in paras. 30-41 of her concurring reasons for decision.

Reference: Court of Appeal Decision at para. 51; AR, Tab 4, p. 45.

Welsh J.A. (concurring)

24. Welsh J.A. framed the issue under appeal as "whether the Crown, in exercising its discretion to request the mandatory minimum terms of imprisonment, is required, by virtue of sections 7 and 15 of the *Charter*, to consider the offender's aboriginal status."

Reference: Court of Appeal Decision at para. 9; AR, Tab 4, p. 29.

25. Welsh J.A. held that the decision to tender the s. 727 Notice was a "core prosecutorial function" that could be reviewed under s. 7 of the *Charter* despite there being no allegation of abuse of process. In reaching this conclusion, Welsh J.A. drew the analogy between the decision to seek a mandatory minimum sentence and choosing to proceed by indictment or summary conviction or to accept a plea to a lesser offence.

Reference: Court of Appeal Decision at paras. 25-30; AR, Tab 4, pp. 35-38.

26. Welsh J.A. determined that the s. 7 *Charter* analysis was the same regardless of whether the decision complained of was a core or non-core function. Having concluded that the analysis was the same, Welsh J.A. accepted that the analytical framework set out in *Gill* was an appropriate method of determining whether the Crown's discretion was exercised in accordance with the principles of fundamental justice.

Reference: Court of Appeal Decision at para. 31; AR, Tab 4, p. 38.

27. Welsh J.A. referred to the Crown policy with respect to tendering the s. 727 Notice and determined that the policy "is intended to reduce the possibility that the discretion would be exercised in a manner that may be inconsistent with the principles of fundamental justice."

Reference: Court of Appeal Decision at para. 16; AR, Tab 4, p. 31; *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador,* chapter 13 – "Impaired Driving Cases: Notice to Seek Greater Punishment" [hereinafter Crown Policy]; AR, Tab 20, pp. 251-255.

28. Welsh J.A. held that it is necessary for the Crown to consider the offender's aboriginal status in determining whether to request a mandatory minimum sentence of imprisonment.

Reference: Court of Appeal Decision at para. 36; AR, Tab 4, p. 40.

29. Welsh J.A. found that the current language of the policy was sufficiently broad to allow the Crown prosecutor to consider aboriginal status. However, because aboriginal status was not specifically mentioned in the policy, the absence of an explanation by the Crown resulted in an inference being drawn that aboriginal status was not taken into account. Welsh J.A. found that including a reference to aboriginal status in the policy would have had the effect of assuring the Court that, in the absence of evidence to the contrary, aboriginal status had been taken into account.

Reference: Court of Appeal Decision at paras. 37-40; AR, Tab 4, pp. 40-41.

30. Welsh J.A. concluded that a failure to consider aboriginal status was a violation of s. 7 of the *Charter.* As a result, Welsh J.A. dismissed the Crown's appeal. The majority of the

Court of Appeal concurred with her reasons for doing so, although they disagreed with Welsh J.A.'s analysis on the core/non-core issue.

Reference: Court of Appeal Decision at paras. 40 and 51; AR, Tab 4, p.41 and p. 45.

31. Welsh J.A. also concluded that, provided aboriginal status is taken into account when making the decision to tender the s. 727 Notice, s. 15 of the *Charter* would not be engaged.

Reference: Court of Appeal Decision at para. 43; AR, Tab 4, p. 42.

32. The Appellant now appeals to this Honourable Court.

Part II – Questions in Issue

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

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

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

Issue II – Standard of review of prosecutorial discretion

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

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

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

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

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

Part III – Statement of Argument

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

39. The majority of the Court of Appeal agreed with Welsh J.A. when she held that absent an explanation from the Crown, the Court could infer the *Charter* breach from the failure to take aboriginal status into consideration when deciding to tender the s. 727 Notice. This reverses the onus of establishing a *Charter* violation.

40. Although the Court of Appeal explicitly relied on *Gill* in reaching its conclusion, the Newfoundland and Labrador Court of Appeal's position on the onus is directly contrary to the position Doherty J.A. expressed in *Gill.*

41. In commenting on the onus, Doherty J.A. stated as follows:

> It is important to bear in mind that it was not for the prosecutor to prove that he did not act arbitrarily. It was incumbent on the respondent to establish a breach of s. 7 by demonstrating arbitrariness in the sense that the prosecutor's decision bore no relationship to the objectives of the policy. The record offers no support for that assertion.
>
> **Reference:** *Gill* at para. 70; ABA, Tab 17.

42. The inference of arbitrariness in the present case is also contrary to the Court of Appeal's previous jurisprudence. In *R. v. Furlong,* Hoegg J.A. stated:

> Proof on the balance of probabilities requires evidence. If there is no evidence respecting whether an accused has been informed of his or her right to counsel, including whether he or she has been informed of the availability of Legal Aid and how to contact it,

> then there is no proof that the crucial aspect of the *Charter* right was provided or not. In the absence of such evidence, a court cannot conclude that the information provided to Ms. Furlong was deficient and that her s. 10(b) right was breached.

Reference: *R. v. Furlong,* 2012 NLCA 29 at para. 23 [underlining added]; ABA, Tab 16.

43. The onus for establishing a *Charter* violation rests with the party alleging the infringement.

Reference: *R. v. Collins*, [1987] 1 S.C.R. 265 at pp. 277 and 280; ABA, Tab 10.

44. The importance of a proper factual basis for considering *Charter* violations has also been repeatedly stated in this Honourable Court's jurisprudence. *Charter* violations should not be considered in a factual vacuum.

Reference: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at pp. 361-62 and 366; ABA, Tab 2; *Ref. re Same-Sex Marriage*, 2004 SCC 79 at para. 51. ABA, Tab 41.

45. The Respondent initially requested a declaration of invalidly of the sentencing scheme, not a finding of improper exercise of prosecutorial discretion. The Respondent did not allege that the decision to tender the s. 727 Notice was an abuse of process, nor did the Respondent allege any inappropriate Crown conduct. During oral argument, the Respondent's counsel noted that they "don't take any objection with the conduct of the Crown in that matter" with respect to service of the s. 727 Notice.

Reference: Transcript of Proceedings, April 29, 2011 at p. 28; AR, Tab 14, p. 98.

46. As a result, the reasons for the decision to tender the s. 727 Notice were not discussed at first instance. Welsh J.A. tried to reconstruct the possible reasons for the decision to tender the s. 727 Notice and then drew an adverse inference against the Crown based on the non-articulation of the reasons for the decision.

Reference: Court of Appeal Decision at para. 39; AR, Tab 4, p. 41.

47. However, given that Welsh J.A. found that the applicable Crown policy is broad enough as worded to include a consideration of the accused's aboriginal status, the Appellant respectfully submits that the Court of Appeal erred in law by inferring a *Charter* violation. The Court of Appeal effectively reversed the burden for proving a *Charter* breach by requiring the Crown to justify its decision, without first requiring the Respondent to prove the existence of a violation.

48. In *R. v. Lyons*, Justice La Forest was clear that no such adverse inferences are warranted:

> [...] I have no doubt that, if and when it is alleged that a prosecutor in a particular case was motivated by improper or arbitrary reasons in making a Pt. XXI application, a s. 24 remedy would lie. However, I do not think there is any warrant for presuming that the executive will act unconstitutionally or for improper purposes.

Reference: *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 348 [underlining added]; ABA, Tab 24.

49. The issue of whether such an adverse inference is appropriate or even permissible has also been addressed by Canadian appellate courts. In *R. v. Ng,* the trial judge ordered a judge-alone trial for a murder charge despite s. 473 of the *Criminal Code* which required Crown consent for a non-jury trial for a s. 469 offence. The Crown refused to provide reasons for withholding consent and as a result, the trial judge drew an adverse inference against the Crown and proceeded to hold a judge alone trial. On appeal, the Alberta Court of Appeal reversed the decision and ordered a new trial. The Court concluded that:

> [...] The Crown is not required to articulate the reasons for its decision. There must be an admission or evidence or an allegation with an offer of proof to warrant an inquiry into whether the exercise of discretion met the required standard. No admission or evidence was tendered, nor was an allegation with an offer of proof made in this case.

Reference: *R. v. Ng*, 2003 ABCA 1 at para. 68, leave to SCC refused [2004] 1 S.C.R. xii (note); ABA, Tab 27.

50. In addition to *Gill*, the Ontario Court of Appeal also dealt with a similar issue in *R. v. Durette* and *R. v. E. (L.)*. In *Durette*, the Court held that the accused bears the burden of making a tenable allegation of *mala fides* on the part of the Crown which must be supported by the record. Absent such an allegation, the Court is entitled to assume that

the Crown exercised its discretion properly. In *E. (L.)*, the Court concluded that there must be something on the record to show improper conduct before the Court could examine whether there was an abuse of process.

Reference: *R. v. Durette,* 1992 CarswellOnt 955 (C.A.) at para. 39, reversed on other grounds, [1994] 1 S.C.R. 469; ABA, Tab 13; *R. v. E. (L.)*, 1994 CarswellOnt 215 (C.A.) at para. 27; ABA, Tab 14.

51. As a result, the Appellant respectfully submits that the Newfoundland and Labrador Court of Appeal erred by inferring the *Charter* violation in the absence of evidence.

Issue II – Standard of review of prosecutorial discretion

Overview: The fundamental importance of prosecutorial discretion and the separation of powers

52. Although not explicitly set out in the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, this Honourable Court has recognized that the separation of powers exists between the legislature, the executive and the judiciary. In its simplest terms, the role of the judiciary is to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; and the role of the executive is to administer and implement that policy.

Reference: *R. v. Power,* [1994] 1 S.C.R. 601 at p. 620; ABA, Tab 31; *CLAO* at para. 28; ABA, Tab 3.

53. The principle of judicial non-interference with prosecutorial discretion originates from the separation of powers and the rule of law.

Reference: *Power* at pp. 620-21; ABA, Tab 31.

54. Non-interference with prosecutorial discretion is also justified because of the unique role the Crown Attorney occupies in the criminal justice system. A Crown Attorney is not simply an advocate for a party in a trial. The Crown Attorney must act as a quasi-minister of justice, who must be more concerned with the integrity of the process than simply the result of a particular case. The role of the Crown was eloquently described by Justice Rand in *R. v. Boucher*:

> [...] The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. [...].

Reference: *R. v. Boucher*, [1955] S.C.R. 16 at p. 24; ABA, Tab 8.

55. This principle was recently reaffirmed by this Honourable Court:

> The Attorney General is not an ordinary party. This special character manifests itself in the role of Crown attorneys, who, as agents of the Attorney General, have broader responsibilities to the court and to the accused, as local ministers of justice (see *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24, *per* Rand J.; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at pp. 191-92, *per* Lamer J.).

Reference: *CLAO* at para. 37; ABA, Tab 3.

56. The special character of the Crown Attorney is reflected in the discretion given to Crown Attorneys. As a general principle, this Court recognized that:

> [...] for our system of criminal justice to function well, the Crown must possess a fair deal of discretion. Moreover, this discretion extends to all aspects of the criminal justice system. [...].

Reference: *R. v. Cook,* [1997] 1 S.C.R. 1113 at para. 19; ABA, Tab 11; see also *R. v. Beare*, [1988] 2 S.C.R. 387 at pp. 410-11; ABA, Tab 5.

<u>The law pre *Krieger v. The Law Society of Alberta,* 2002 SCC 65</u>

57. This Court has recognized that the existence of discretion conferred by statute does not offend the principles of fundamental justice. Prosecutors necessarily engage in the exercise of discretion when they make a multitude of decisions including whether to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction or launch an appeal.

Reference: *R. v. T. (V.),* [1992] 1 S.C.R. 749 at p. 758-61; ABA, Tab 39; *Cook* at para. 21; ABA, Tab 11.

58. This Honourable Court has long recognized the difficulties associated with judicial supervision of prosecutorial discretion. In *Power,* Justice L'Heureux-Dubé stated:

> Moreover, should judicial review of prosecutorial discretion be

allowed courts would also be asked to consider the validity of various rationales advanced for each and every decision, involving the analysis of policies, practices and procedure of the Attorney General. The court would then have to "second-guess" the prosecutor's judgment in a variety of cases to determine whether the reasons advanced for the exercise of his or her judgment are a subterfuge. This method of judicial review is not only improper and technically impracticable, but, as Kozinski J. observed in *United States v. Redondo-Lemos* , 955 F.2d 1296 (9th Cir. 1992), at p. 1299:

> Such decisions [to charge, to prosecute and to plea-bargain] are normally made as a result of a *careful professional judgment as to the strength of the evidence* , the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated. Even were it able to collect, understand and balance all of these factors, a court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases. We would be left with *prosecutors not knowing when to prosecute and judges not having time to judge*. [Emphasis added.]

Such a situation would be conducive to a very inefficient administration of justice. Furthermore, 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. Judicial review of prosecutorial discretion, which would enable courts to evaluate whether or not a prosecutor's discretion was correctly exercised, would destroy the very system of justice it was intended to protect (*United States v. Redondo-Lemos* , supra, at p. 1300).

Reference: *Power* at pp. 626-627 [underlining added]; ABA, Tab 31.

59. Prosecutorial discretion is not absolute – it is appropriately subject to Court review for abuse of process.

Reference: *Cook* at para. 20; ABA, Tab 11; *T. (V.)* at pp. 758-761; ABA, Tab 11.

60. In *R. v. O'Connor*, this Honourable Court recognized the overlap between the common law doctrine of abuse of process and the rights protected by the *Charter* and subsequently merged both regimes under s. 7 of the *Charter*.

Reference: *R. v. O'Connor*, [1995] 4 S.C.R. 411; ABA, Tab 29.

61. Justice L'Heureux-Dubé noted two categories of abuse of process which are caught by s. 7 of the *Charter:* (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. The merger of the common law and *Charter* reflected the understanding that there are different remedies available under s. 24(1) of the *Charter* - a stay being one of them - which may be appropriate in different cases. Therefore, there was no need to consider the "clearest of cases" basis for a stay of proceedings at both the breach and remedy stages.

Reference: *O'Connor* at paras. 69-73; ABA, Tab 29.

62. However, despite this Honourable Court's decisions in *Cook* and *Power* and the noted difficulties with judicial oversight of prosecutorial discretion, the majority of the Court of Appeal held that such judicial oversight is necessary so as not to increase the situations in which prosecutors can act arbitrarily without review by the courts.

Reference: Court of Appeal Decision at para. 50; AR, Tab 4, p.44.

63. The Appellant submits that this broadening review of prosecutorial discretion is a result of a misinterpretation of this Honourable Court's decision in *Krieger v. The Law Society of Alberta,* 2002 SCC 65 and is contrary to this Honourable Court's decisions in *Cook* and *Power*.

<u>The law post *Krieger*</u>

64. The distinction between prosecutorial functions was highlighted in this Honourable Court's decision in *Krieger*.

65. According to *Krieger,* the term "prosecutorial discretion" is a term of art. It does not refer to any discretionary decision made by a Crown Attorney, but rather to the use of those powers that constitute the core of the Attorney General's office which are protected from improper political influence and other vitiating factors by the principle of independence.

Reference: *Krieger* at para. 43; ABA, Tab 1.

66. Prosecutorial decisions that do not lie at the core of prosecutorial authority are said to involve "tactics or conduct before the court".

Reference: *Krieger* at para. 47; ABA, Tab 1.

67. The distinction outlined in *Krieger* between "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" versus "tactics or conduct before the court" has created confusion and requires clarification.

68. The Appellant respectfully submits that *Krieger* has been misinterpreted in that *Krieger* was not meant to establish hierarchical levels of prosecutorial discretion which are reviewable in the context of an ongoing criminal prosecution on differing standards.

69. The Appellant submits that it is important to place the decision in *Krieger* in context. *Krieger* concerned who could properly review Crown conduct, not specifically with which decisions could be reviewed by the Court or with the appropriate standard of review. The issue in that case was whether a Crown Attorney's conduct in the context of a criminal prosecution could be reviewed by a law society and then whether the law society could discipline a Crown Attorney for breach of the law society's rules. This is far different from the issue in the present case where the Court granted a *Charter* remedy on the basis of an alleged improper exercise of prosecutorial discretion.

70. The Appellant submits that all discretionary prosecutorial decisions are reviewable by the Court for abuse of process, but certain "core prosecutorial functions" are not reviewable outside of that process. In this respect, a complaints committee of a provincial law society has no authority to review a complaint alleging that a prosecutor acted improperly in exercising a core prosecutorial function.

71. As Iacobucci and Major JJ. explained:

> As discussed above, these powers emanate from the office-holder's role as legal advisor of, and officer to, the Crown. 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, as well as statutory bodies like provincial law societies.

Reference: *Krieger* at para. 45; ABA, Tab 1.

72. The reference to "tactics" as the type of discretionary decision that falls outside the scope of a core function, and, according to the Court of Appeal, is therefore reviewable on a standard other than abuse of process, conflicts with this Honourable Court's previous jurisprudence. The Appellant submits that if truly tactical decisions somehow lie outside the "core" prosecutorial function, then it is difficult to reconcile the *Cook* and *Krieger* decisions unless all discretionary decisions are reviewable on the same abuse of process standard.

73. *Cook* held that deciding which witnesses to call in a particular case fell squarely within the realm of tactical decisions which should properly be left to the discretion of the individual Crown Attorney. This Honourable Court held that this tactical decision was subject to review only if that discretion was abused or exercised for an "oblique motive", which are merely other ways of stating that the test is abuse of process.

Reference: *Cook* at paras. 52 and 55-58; ABA, Tab 11.

74. The decision in *Cook* was re-affirmed by this Honourable Court in *R. v. Jolivet*. In that case, the Crown Attorney repeatedly stated his intention to call a corroborating witness, including in his opening address to the jury. However, the Crown Attorney changed his mind and decided not to call the witness. In assessing whether this reversal amounted to an abuse of process, Justice Binnie held:

> Apart from his concern about Bourgade's truthfulness, Crown counsel may have reasoned that Riendeau's evidence went into the record better than he expected and at that stage he had no desire to expose it to inconsistent

> statements (which may themselves have been untruthful) emanating from Bourgade. If this was a concern that entered into the exercise by Crown counsel of his discretion, it is a concern shared by any prudent counsel faced with running his case effectively in an adversarial system. It is not the duty of the Crown to bend its efforts to provide the defence with the opportunity to develop and exploit potential conflicts in the prosecution's testimony. This is the stuff of everyday trial tactics and hardly rises to the level of an "oblique motive". 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.* Where an element of prejudice results (as it did here), remedial action is appropriate.
>
> **Reference:** *R. v. Jolivet,* 2000 SCC 29 at para. 21 [underlining added]; ABA, Tab 21.

75. Both *Cook* and *Jolivet* stand as authority for the principle that tactical decisions made by Crown Attorneys in the course of a trial are reviewable only for abuse of process. The Appellant respectfully submits that if *Krieger* were meant to change the law set out in *Cook* and re-affirmed in *Jolivet,* then it would have done so explicitly; yet neither *Cook* nor *Jolivet* is referenced in *Krieger.*

76. The issue with respect to the proper interpretation of *Krieger* and how it relates to discretionary prosecutorial decisions was further considered by this Honourable Court in *R. v. Nixon.* Charron J. highlighted the issue:

> Attorneys General from three provinces intervened in support of the respondent's position. In particular, they submit that the approach adopted by the application judge runs afoul with the principle of independence affirmed in *Krieger*. The Attorney General of Ontario submits that this Court's decision in *Krieger* has been misinterpreted by lower courts. It asks this Court to confirm that *Krieger* was never intended to narrow the area of protected prosecutorial discretion, or to create a schism in threshold tests for finding an abuse of process depending on whether a decision is considered "core" or "non-core". All acts of prosecutorial discretion are immune from judicial supervision, subject only to the same high threshold for abuse of process.
>
> **Reference:** *R. v. Nixon,* 2011 SCC 34 at para. 26; ABA, Tab 28.

77. Unfortunately, the issue was not squarely addressed in *Nixon* as that decision was framed as considering whether repudiating a plea agreement constituted an abuse of process. The parties in *Nixon* acknowledged that the decision to enter into a plea agreement was a core prosecutorial function. The central question was whether the decision to repudiate the plea agreement should also be characterized that way. Justice Charron was quick to conclude that repudiating a plea agreement was also an act of core prosecutorial discretion subject to review for abuse of process. As a result, the implications for non-core functions were not addressed.

Reference: *Nixon* at paras. 29-30; ABA, Tab 28.

78. Accepting the merger of the common law concept of abuse of process and s. 7 *Charter* protections in *O'Connor* and *Nixon*, the Appellant respectfully submits that neither case alters the appropriate standard of review. As Charron J. stated:

> Thus, in defining what constitutes a *violation*, it is important to recall what kind of harm the common law doctrine of abuse of process was intended to address and, in turn, why this degree of harm called for a stay of proceedings as the *appropriate remedy*. In other words, while s. 24(1) of the *Charter* allows for a wide range of remedies, this does not mean that abuse of process can be made out by demonstrating a lesser degree of harm, either to the accused's fair trial interests or to the integrity of the justice system. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.

Reference: *Nixon* at para. 38 [underlining added]; ABA, Tab 28.

79. *Nixon* does not support the review of prosecutorial discretion on a standard less than abuse of process in the sense of "bad faith", "flagrant impropriety", "prosecutorial misconduct" or "improper motive", or in other words, conduct which undermines the integrity of the administration of justice or operates in a manner than renders the proceedings fundamentally unfair.

Reference: *Nixon* at paras. 64 and 68; ABA, Tab 28.

80. Welsh J.A. relied on the merger of the common law and *Charter* principles referenced in *Nixon* and *O'Connor* to conclude that there is no difference in the analytical framework for reviewing core and non-core functions under s. 7 of the *Charter*.

Reference: Court of Appeal Decision at para. 29; AR, Tab 4, p. 37, quoting from *Nixon* at paras. 35-36; ABA, Tab 28.

81. After concluding that there is only one standard of review applicable to reviewing prosecutorial discretion, Welsh J.A. chose the lower standard of review articulated by Doherty J.A. in *Gill.* Welsh J.A. would apply this lower standard of review to all prosecutorial decisions.

Reference: Court of Appeal Decision at para. 30; AR, Tab 4, p. 38; *Gill* at para. 59; ABA, Tab 17.

82. While the majority of the Court of Appeal disagreed with Welsh J.A.'s view on the core/non-core analysis, they do accept her analysis on the appropriate standard of review. The majority of the Court of Appeal agreed with using the lower standard as in their view the decision was not a core prosecutorial function.

Reference: Court of Appeal Decision at para. 51; AR, Tab 4, p. 45.

83. Apart from the continuing divergence in the jurisprudence, the Appellant submits that the danger of Welsh J.A.'s approach is that every discretionary prosecutorial decision becomes reviewable on the lower standard, increasing the instances of judicial intrusion into prosecutorial independence. The majority of the Court of Appeal supports this increasing judicial oversight.

84. While the Appellant agrees with Welsh J.A. that there is no difference in the analytical framework, the Appellant respectfully disagrees with her decision to apply a lower standard than abuse of process to all reviews of prosecutorial discretion. The Appellant submits that the majority of the Court of Appeal erred by applying a standard lower than abuse of process.

<u>The uniform approach: the need for certainty and clarity</u>

85. It does not appear that this Honourable Court has reviewed a Crown discretionary decision on a standard other than abuse of process. Prior to *Krieger* introducing the "core" and "non-core" language, the cases focused on whether the impugned decision constituted an abuse of process. Post *Krieger*, it does not appear that this Honourable

Court has considered a "non-core" discretionary decision. As a result, it is important for this Honourable Court to consider the principles governing such review.

86. The Appellant submits that the characterization of the decision as core or non-core is irrelevant to the applicable standard of review when that issue is raised in the context of an ongoing criminal prosecution. All prosecutorial discretionary decisions should be reviewed on the same standard by considering whether the decision in question constitutes an abuse of process.

87. Reviewing discretionary prosecutorial decisions as suggested by the Court of Appeal on a standard less than an abuse of process will create precisely the chaos this Honourable Court understood the need to avoid. Prosecutors will not know when to prosecute and Courts, by becoming *de facto* supervising Crown prosecutors, will cease to be impartial.

88. Contrary to the finding of the Court of Appeal, the Appellant submits that a court reviewing the exercise of prosecutorial discretion in the context of an ongoing criminal prosecution should apply the abuse of process doctrine in all circumstances. While this may negate the necessity of determining whether the impugned decision is a core or non-core function, the Appellant submits that it strikes a necessary and appropriate balance.

89. A number of reasons justify using abuse of process as the only standard to review allegations that a Crown Attorney has violated an accused's *Charter* rights in the context of an ongoing criminal prosecution.

90. As this Court has recognized, clearly drawn constitutional lines are often necessary:

> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process - rather than the conduct of litigants before the court - is beyond the legitimate reach of the court. In *Hoem v. Law Society (British Columbia)* (1985), 20 C.C.C. (3d) 239 (B.C. C.A.), Esson J.A., for the court, observed, at p. 254, that:
>
> > The independence of the Attorney-General, in deciding fairly who should be prosecuted, is also a hallmark of a free

> society. Just as the independence of the bar within its proper sphere must be respected, so must the independence of the Attorney-General.
>
> We agree with these comments. 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. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.
>
> **Reference:** *Krieger* at para. 32 [underlining added]; ABA, Tab 1.

91. By confining the review of prosecutorial discretion to consideration of an abuse of process, the test remains true to the merger of the common law and *Charter* values Justice L'Heureux-Dubé noted in *O'Connor*. In that case, the two categories of abuse of process caught by s. 7 of the *Charter* were identified as: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

92. Similarly, in *R. v. Regan*, Justice LeBel characterized abuse of process by quoting from Justice McLachlin (as she then was) in *R. v. Scott*, where she stated:

> [...] abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively.
>
> **Reference:** *R. v. Scott,* [1990] 3 S.C.R. 979 at p. 1007, per McLachlin J. (as she then was); ABA, Tab 36; see also *R. v. Regan*, 2002 SCC 12 at para. 50; ABA, Tab 33.

93. If prosecutorial discretion is reviewable on a standard lower than abuse of process, it follows that the number of such applications would undoubtedly increase. Since the advent of the *Charter,* courts have been cognizant of the frequency and complexity of peripheral applications which have little to do with the ultimate issue in a criminal trial. Applying a standard less than abuse of process will only further add to the backlog of

criminal cases as the number of instances where the Courts are called upon to review prosecutorial discretion increases.

Reference: Michael 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 pp. 876-877 [hereinafter "Judicial Review of Prosecutorial Decisions"]; ABA, Tab 42.

94. The adversarial system gives wide latitude and accords a high degree of deference to counsel on both sides to conduct the case as they see best. As Code argues, "[...] there should be no special scrutiny of those aspects of the Crown's decision-making processes or tactics that simply reflect the ordinary workings of the system."

Reference: Code, "Judicial Review of Prosecutorial Decisions" at p. 884; ABA, Tab 42.

95. For the same reason, deference is afforded to defence counsel's tactical/strategic decisions and courts are reluctant to second guess those decisions in appeals based on the ineffective assistance of counsel.

96. Confining reviews of prosecutorial discretion to situations involving an abuse of process reflects the appropriate balance required in the adversarial process. As Justice Binnie noted in *R. v. Rose*, "[...] while Crown counsel are expected to be ethical, they are also expected to be adversarial."

Reference: *R. v. Rose,* [1998] 3 S.C.R. 262 at para. 22 per Binnie J., dissenting on other grounds; ABA, Tab 34.

97. When the prosecuting Crown Attorney is alleged to have violated the accused's *Charter* rights, it may be necessary for that Crown Attorney to provide evidence to refute the allegation. In the context of the adversarial process, allowing an accused to effectively "Crown shop" by requiring the prosecuting Crown Attorney to give evidence to refute allegations made on a lower standard than abuse of process impermissibly allows the accused some control over the assignment of Crown counsel.

98. Increasing the frequency of the Court's review of prosecutorial discretion is also contrary to the jurisprudence acknowledging that the courts are "[...] very slow to second guess the exercise of that discretion and do so only in narrow circumstances."

Reference: *Regan* at paras. 166-168 per Binnie J., dissenting on other grounds; ABA, Tab 33.

99. As this Honourable Court has said on numerous occasions, the review of prosecutorial discretionary decisions is not something that a court is particularly well suited to undertake as a Crown Attorney must factor a myriad of considerations into his or her decision.

Reference: *Power* at pp. 624-629; ABA, Tab 31; *Krieger* at para. 32; ABA, Tab 1.

100. One factor which is particularly difficult to measure is the role that public opinion plays in the exercise of prosecutorial discretion. As the majority of this Honourable Court noted in *Power:*

> Sixth, although the *pressure of public* opinion is a "wild card" factor which is difficult to evaluate, aggressive news coverage or oversight of specific criminal proceedings by special interests groups affects the exercise of discretion. *Hence, public opinion assumes an increasingly important position in the prosecutor's decisional matrix.* An interesting example is the change in prosecution policies that appeared when it became increasingly unpopular to convict draft evaders and protesters of the Vietnam War.

Reference: *Power* at pp. 628-629, quoting from Sidney I. Lezak and Maureen Leonard, "The Prosecutor's Discretion: Out of the Closet — Not Out of Control" (1984), 63 Or. L. Rev. 247, at p. 251 [emphasis in SCC decision]; ABA, Tab 31.

101. The law with respect to the review of prosecutorial discretion must clearly take into account the context in which such applications will arise. Crown Attorneys make numerous decisions in every prosecution which, by the very nature of the adversarial system, have the potential to conflict with the accused's interests.

102. In determining the scope of review, it is necessary to articulate principles which can have legitimate and widespread practical effect. As Justice La Forest recognized in *Lyons:*

> [...] However, as Holmes has reminded us, the life of the law has not been logic: it has been experience. The criminal law must operate in a world governed by practical considerations rather than abstract logic and, as a matter of practicality, the most that can be established in a future context is a likelihood of certain events occurring. [...]

Reference: *Lyons* at p. 364; ABA, Tab 24.

103. A uniform approach based on abuse of process is consistent with the principles set out in *Lyons* – the accused is entitled to a fair hearing, he or she is not entitled to the most favourable procedures that could possibly be imagined.

Reference: *Lyons* at pp. 362-363; ABA, Tab 24.

104. Michael Code advocated such a uniform approach noting that there should never be "routine complaining and second-guessing" of the opposing party's litigating decisions with the judge arbitrating the complaint.

Reference: Code, "Judicial Review of Prosecutorial Decisions" at p. 885; ABA, Tab 42.

105. Code concluded:

> If the above reasoning is correct, the Supreme Court should establish a deferential standard for judicial review of either defence counsel's or Crown counsel's "tactics or conduct before the court." The basic tenets of the adversarial system require deference on such matters, and it should discourage the kind of endless interruptions of the trial that can be seen in such cases as *Felderhof* and *Elliott*.
>
> The best way to achieve this result is for the Court to rethink its categorization of all prosecutorial decisions into one of the two *Krieger* sub-classes: that is, "core elements" and "tactics or conduct before the court."
>
> [...]
>
> There is no longer any functional need to revive the pre-*Jewitt* distinction between "core" and "non-core" decisions. They are all reviewable on the same standard. *Krieger* may have led to the inference that the old dichotomy has been revived, so that minor decisions (outside the "core") will now be reviewable on a less deferential standard. However, if this inference is drawn from *Krieger*, it makes little or no sense. The greater the magnitude of the particular Crown decision the stronger the

> justification for holding the Crown to a standard of correctness or reasonableness. The more minor the Crown's decision the stronger the justification for giving the Crown some leeway within a range of potential choices. Having decided in *Krieger* that the major "core" decisions, such as whether to prosecute, are to be treated with deference, there can be no justification for subjecting the hundreds of minor daily decisions, such as what election to make or what witness to call, to a more exigent standard of correctness or reasonableness.
>
> **Reference:** Code, "Judicial Review of Prosecutorial Decisions" at pp. 886-887; ABA, Tab 42.

106. The Appellant respectfully submits that applying the abuse of process doctrine to all reviews of prosecutorial discretion maintains confidence in the administration of justice while at the same time recognizing the need to balance a strong adversarial system with protecting the *Charter* rights of accused persons.

Tendering the s. 727 Notice – an exercise of core prosecutorial discretion

107. Even maintaining the core/non-core distinction in the present case, the Appellant submits that the decision to tender the s. 727 Notice is a core prosecutorial function, subject only to review only for abuse of process.

108. Courts across the country differ when considering whether tendering the s. 727 Notice is a core prosecutorial function. The present case and *Gill* have held that tendering the s. 727 Notice is not a core function. On the other hand, *R. v. Bolender,* 2010 ONCJ 622 (ABA, Tab 7); *R. v. Schwartz,* 2010 ONCJ 504 (ABA, Tab 35); and *R. v. Singh,* 2012 ONSC 30 (ABA, Tab 37); have held that tendering the s. 727 Notice is a core prosecutorial function (see also *R. v. Kumar* (1993), 85 C.C.C. (3d) 417 (B.C.C.A.) (ABA, Tab 23); and *R. v. Martin,* 2005 MBQB 185 (ABA, Tab 25); which have approached the issue without reliance on the core/non-core analysis).

109. This issue has not yet been addressed by this Honourable Court.

110. This Honourable Court has repeatedly recognized the "carnage" caused by impaired driving and the pressing societal interests in reducing impaired driving.

Reference: *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at paras. 16-19 per Cory J. concurring; ABA, Tab 6; *R. v. Orbanski,* 2005 SCC 37 at paras. 1 and 55; ABA, Tab 30; *R. v. St. Onge Lamoureux*, 2012 SCC 57 at para. 33; ABA, Tab 38.

111. Detection of impaired drivers through effective law enforcement, prosecution of those responsible, and general/specific deterrence achieved by sentencing those convicted of impaired driving related offences help to achieve this desired result.

112. Impaired driving offences are precisely the type of offences on which public pressure and media attention are focused. To draw upon the words cited by Justice L'Heureux-Dubé in *Power*, public opinion, and the public interest, are wildcard factors in the matrix of prosecutorial decision making applicable when exercising prosecutorial discretion to tender the s. 727 Notice. This makes the review of this exercise of prosecutorial discretion even more fraught with the dangers identified above.

113. The importance of combating impaired driving is also evident in the punishment that Parliament has seen fit to mandate for those convicted of impaired driving related offenses. Not only is there a mandatory minimum punishment for a first offence, but Parliament has mandated increasingly severe mandatory minimum terms of imprisonment for repeat offenders.

114. In the present case, the Respondent challenged the statutory scheme conferring the exercise of prosecutorial discretion. However, the existence of this particular prosecutorial discretion operates to the accused's benefit.

Reference: see for example, *Lyons* at pp. 348-349; ABA, Tab 24.

115. Parliament has mandated that repeat offenders serve mandatory minimum periods of incarceration. The general rule and expectation should be that repeat offenders will be incarcerated. As Justice Doherty noted in *Gill,* the objective of s. 255 of the *Criminal Code* is "crystal clear" and repeat offenders "must go to jail for at least the minimum set out in the section."

Reference: *Gill* at para. 28; ABA, Tab 17.

116. Parliament could make increasingly lengthy mandatory periods of incarceration based on the number of prior convictions operate as a matter of law. This would eliminate the ability to take into account such factors as the length of time since the last conviction or any other relevant mitigating factor. As Justice Doherty pointed out in *Gill,* it is doubtful that anyone would welcome that kind of legislation.

Reference: *Gill* at para. 36; ABA, Tab 17.

117. While the mandatory minimum sentence should generally be imposed on repeat offenders, Parliament has recognized that a mandatory period of incarceration may not always be appropriate and has thereby vested the Crown Attorney with discretion, through the application of s. 727 of the *Criminal Code*, to release the Court from having to impose the mandatory minimum period of incarceration in some cases.

118. The fact that the Crown can, and does, exercise its discretion to not tender the s. 727 Notice is a benefit to some accused persons that would not otherwise be available. It is not the Crown's decision to tender the s. 727 Notice which binds the Court's hands in imposing sentence – it is Parliament's intention that repeat offenders be sentenced to mandatory periods of incarceration. Rather, it is the Crown's decision to not tender the s. 727 Notice which frees the Court from the obligation to impose the mandatory minimum period of incarceration on all repeat offenders.

Reference: *Gill* at paras. 34, 47-49 and 66; ABA, Tab 17.

119. Tendering the s. 727 Notice is not simply a decision as to what submissions to make at a sentencing hearing. The decision to tender the s. 727 Notice gives the accused important knowledge as to the jeopardy he or she faces. This decision goes to the heart of the proceedings, what the prosecution should be for and the "nature and extent" of the Attorney General's participation in it. By deciding to tender the s. 727 Notice, the Crown Attorney has decided that the prosecution should be for an impaired driving related offence involving a repeat offender which engages the mandatory minimum penalty.

Reference: Court of Appeal Decision at para. 26, per Welsh J.A., although at para. 46, the majority of the Court of Appeal disagreed with Welsh J.A. on this point; AR, Tab 4, p. 36 and p. 42.

120. The decision to tender the s. 727 Notice is arguably the most important decision a Crown Attorney makes in the course of an impaired driving related prosecution, after deciding that the prosecution should proceed.

121. The myriad of factors which must be considered when deciding whether to tender the s. 727 Notice makes this exercise of prosecutorial discretion particularly incompatible with judicial review on any standard other than abuse of process. The Attorney General, through its prosecutors, is best suited to make this decision.

Reference: *CLAO* at para. 31; ABA, Tab 3.

122. The myriad of factors which must be taken into consideration also requires the applicable Crown Policy to be broadly worded to ensure that all appropriate considerations are taken into account.

123. For these reasons, the Appellant submits that the decision to tender the s. 727 Notice is a core prosecutorial function subject only to review for abuse of process.

The appropriate remedy

124. The Appellant submits that while uniformity is necessary in the test required to find a *Charter* breach, flexibility can be built in when deciding upon an appropriate remedy.

125. Under the common law, a stay of proceedings was used to remedy an abuse of process, a remedy that was only appropriate in the "clearest of cases". However, a number of potential remedies under s. 24(1) could be used to remedy a *Charter* violation.

Reference: *Nixon* at paras. 35-38; ABA, Tab 28.

126. In *O'Connor,* Justice L'Heureux-Dubé recognized that courts were becoming increasingly innovative in fashioning remedies in lieu of stays of proceedings for abuses of process. She found support in an article by Professor Stuesser where he noted that the authorities from the United Kingdom and Australia support the view that even under the common law, the remedy for an abuse of process is no longer limited to a stay of proceedings.

Reference: *O'Connor* at para. 66 citing Lee Stuesser, "Abuse of Process: The Need to Reconsider" (1994), 29 C.R. (4th) 92; ABA, Tab 29.

127. Absent the "clearest of cases" basis for a stay of proceedings, other remedies could be appropriate under s. 24(1) to remedy a s. 7 *Charter* violation.

Reference: *O'Connor* at paras. 76-82,; ABA, Tab 29.

128. The merger of the common law and *Charter* principles reflects the appropriate balance necessary in this case. The review of prosecutorial discretion should be undertaken using the stringent standard of abuse of process; however, by recognizing that not every abuse of process would necessarily satisfy the "clearest of cases" basis for a stay of proceedings, the flexible s. 24(1) analysis would allow the Court to craft an appropriate remedy where an abuse of process was established but a stay of proceedings was not warranted.

129. This flexible approach to the remedy should also allay concerns that the "clearest of cases" basis for a stay of proceedings is too stringent a test to give effect to the *Charter* protections.

130. The Appellant acknowledges that the flexible approach to determining the appropriate remedy could also include, in an appropriate case, setting aside the s. 727 Notice. However, the Appellant submits that this determination must first be based on the conclusion that the decision to tender the s. 727 Notice constituted an abuse of process.

131. In the circumstances of the present case, the Respondent conceded that they did not "take any objection with the conduct of the Crown in that matter" as it related to service of the s. 727 Notice.

Reference: Transcript of proceedings, April 29, 2011 at p. 28; see also pp. 45-46 where counsel indicated that they were not alleging an abuse of process; AR, Tab 14, pp. 98 and 115-116.

132. For these reasons, the Appellant submits that abuse of process should be the test used to review all exercises of prosecutorial discretion in the context of an ongoing criminal prosecution. If the core/non-core distinction remains relevant in this context, the

Appellant submits that the decision to tender the s. 727 Notice is a core prosecutorial function subject to review for abuse of process.

133. As the Respondent did not allege that the decision to tender the s. 727 Notice was an abuse of process, the Appellant respectfully submits that the Court of Appeal erred in finding a *Charter* violation.

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

134. The Appellant submits that the Court of Appeal erred in the imposition of a sentence falling below the mandatory minimum.

135. Mandatory minimum sentences are becoming increasingly common for criminal offences. The Court of Appeal's decision exempts aboriginal people from the imposition of the mandatory minimum sentence because the exercise of prosecutorial discretion precludes the sentencing judge from applying s. 718.2(e) of the *Criminal Code* in determining the appropriate sentence. Presumably, for the mandatory minimum to apply, the Crown must satisfy the Court that aboriginal status was taken into account in reaching the decision to tender the s. 727 Notice. Welsh J.A. held that, absent evidence to the contrary, reference to aboriginal status in the relevant Crown Policy would be sufficient to provide such assurance.

Reference: Court of Appeal Decision at para. 38; AR, Tab 4, p. 40.

136. Section 718.2(e) of the *Criminal Code* requires a sentencing judge to consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention given to the circumstances of aboriginal offenders.

137. Welsh J.A. held that where the *Criminal Code* grants discretion to the Crown which has the effect of limiting a sentencing judge's options in determining a fit sentence, then the considerations set out in *R. v. Ipeelee*, 2012 SCC 13 have application, by extension, to the Crown.

Reference: Court of Appeal Decision at para. 33; AR, Tab 4, p. 39.

138. Welsh J.A. cited no authority which would support this proposition. The majority of the Court of Appeal agreed with this portion of Welsh J.A.'s judgment.

139. The Appellant respectfully submits that this interpretation stretches the principles set out in *Ipeelee* and s. 718.2(e) of the *Criminal Code* beyond their intended purpose.

140. In *Ipeelee,* LeBel J. characterized s. 718.2 (e) as follows:

> Section 718.2(*e*) is therefore properly seen as a "direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, *to the extent that a remedy is possible through the sentencing process*" (*Gladue*, at para. 64 (emphasis added)). Applying the provision does not amount to "hijacking the sentencing process in the pursuit of other goals" (Stenning and Roberts, at p. 160). The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(*e*), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.
>
> **Reference:** *Ipeelee* at para. 68 [underlining added]; ABA, Tab 19; see also *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 77 & 88; ABA, Tab 18.

141. A similar conclusion was reached by Iacobucci J. in *R. v. Wells*:

> Let me emphasize that s. 718.2(*e*) requires a different *methodology* for assessing a fit sentence for an aboriginal offender; it does not mandate, necessarily, a different *result*. Section 718.2(*e*) does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. [...].
>
> **Reference:** *R. v. Wells,* 2000 SCC 10 at para 44 [underlining added]; ABA, Tab 40.

142. These decisions require a sentencing judge to take into account aboriginal status when crafting an appropriate sentence. However, this Court rejected the argument that the different approach mandated for aboriginal persons by s. 718.2(e) of the *Criminal Code*

created a two-tiered sentencing scheme. Sentencing judges are required to craft an appropriate sentence for the particular offender, who committed the particular offence, in the particular community. Section 718.2(e) is an important sentencing tool, designed with a specific purpose – to remedy the over-use of incarceration for aboriginal peoples.

Reference: *Gladue* at paras. 66-68; ABA, Tab18; *Ipeelee* at para. 71; ABA, Tab 19.

143. This Court also pointed out that the more serious the offence, the more likely that the resulting sentence would be the same for aboriginal and non-aboriginal offenders.

Reference: *Gladue* at paras. 33 and 79; ABA, Tab18; *Ipeelee* at paras. 85-86; ABA, Tab 19.

144. While the Appellant takes no issue with the principles set out in *Gladue* and *Ipeelee,* the Appellant submits that a statutory direction to sentencing judges cannot translate into a statutory obligation on the Crown to take aboriginal status into account when making any discretionary decision that may limit sentencing options. This is contrary to the plain meaning of the section.

145. There are numerous situations where prosecutorial discretion has the potential to limit the sentencing judge's options in imposing sentence and therefore their ability to take s. 718.2(e) into account. These 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 ss. 92 or 94 of the *Criminal Code*); proceeding by indictment rather than summary conviction when different mandatory minimum sentences are required (e.g. ss. 151, 152, and 271 of the *Criminal 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 *Criminal Code).*

146. Based on the Court of Appeal's decision in the present case, the Crown is now required to notify the Court that it considered the accused's aboriginal status when making these decisions. Without such notification on the record, all prosecutorial discretion could be inferred as arbitrary upon review by the Court. The inference of arbitrariness could result

in the Court declining to apply the clear requirements of the *Criminal Code* as a remedy for a *Charter* breach.

147. In many cases, the Crown will not know much of the relevant information contained in the *Gladue* report when making these decisions. Absent such information, how can a Crown Attorney properly consider aboriginal status when deciding how to make the Crown election, or in deciding which charges are appropriate in a given case? Each of these decisions has the effect of limiting sentencing options upon conviction and, according to the Court of Appeal, must include consideration of aboriginal status.

148. Using aboriginal status and s. 718.2(e) of the *Criminal Code* as the basis for electing to proceed by summary conviction the outset of proceedings, may impair an aboriginal offender's rights under s. 11(f) of the *Charter* by depriving them of the ability to elect a jury trial.

149. Parliament's laudable sentencing goals set out in s. 718.2(e) of the *Criminal Code* cannot be universally transferred to all discretionary decisions made by the Crown which may have the consequential impact of limiting sentencing options.

150. Further, the logical extension of the Court of Appeal's decision is to prohibit the imposition of all mandatory minimum sentences on aboriginal offenders. Mandatory minimum sentences, by their very nature, limit a sentencing judge's ability to apply s. 718.2(e) of the *Criminal Code*. Section 718.2(e) of the *Criminal Code* does not preclude the imposition of mandatory minimum periods of incarceration on aboriginal persons. That extension would be far beyond the scope of s. 718.2(e).

Reference: *R. v. Johnson,* 2013 ONCA 117 at para. 63; ABA, Tab 20; *R. v. Brooks,* 2012 ONCA 703 at para. 11; ABA, Tab 9; see also *R. v. B. (T.M.)*, 2013 ONSC 4019; ABA, Tab 4.

151. In addition, this Honourable Court has recently considered whether a sentencing judge could impose a sentence below a mandatory minimum because of a violation of a *Charter* right.

Reference: *R. v. Nasogaluak*, 2010 SCC 6; ABA, Tab 26.

152. Although sentencing judges enjoy wide latitude in crafting appropriate sentences, they do not enjoy unfettered discretion in choosing what sentence to impose in the particular circumstances of a case. This Honourable Court noted that a sentencing judge's discretion was fettered by case law and by the principle of parity (which sets general ranges for particular offences) as well as by statute, both in the principles of sentencing set out in the *Criminal Code* and through the restricted availability of certain sanctions.

Reference: *Nasogaluak* at paras. 44-45; ABA, Tab 26.

153. In considering whether a sentencing judge could impose a sentence below a mandatory minimum because of a violation of a *Charter* right, LeBel J., for a unanimous Court, held that:

> The discretion of a sentencing judge is also constrained by statute, not only through the general sentencing principles and objectives enshrined in ss. 718 to 718.2 articulated above but also through the restricted availability of certain sanctions in the *Code*. [...] Absent a declaration of unconstitutionality, minimum sentences must be ordered where so provided in the *Code*. A judge's discretion does not extend so far as to override this clear statement of legislative intent.
>
> **Reference:** *Nasogaluak* at para. 45 [underlining added]; ABA, Tab 26.

154. LeBel J. then concluded:

> [...] I do not foreclose, but do not need to address in this case, the possibility that, in some exceptional cases, sentence reduction outside statutory limits, under s. 24(1) of the *Charter*, may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and to the offender. In that case, the validity of the law would not be at stake, the sole concern being the specific conduct of those state agents.
>
> **Reference:** *Nasogaluak* at para. 64; ABA, Tab 26.

155. *Nasogaluak* made clear that *Charter* violations will be dealt with in the sentencing process through the usual balancing of aggravating and mitigating factors related to the offender and the commission of the offence. Justice LeBel held that a reduction in sentence could not be considered an appropriate remedy under s. 24(1) where the facts

underlying the breach bore no connection to the circumstances of the offence or the offender.

Reference: *Nasogaluak* at para. 4; ABA, Tab 26.

156. Justice LeBel also added that as a general rule, subject to the caveat quoted above, a sentence reduction outside the statutory limits does not constitute an appropriate remedy under s. 24(1) of the *Charter* unless the constitutionality of the statutory limit itself is challenged.

Reference: *Nasogaluak* at para. 6; ABA, Tab 26.

157. In the present case, while the statutory limit itself was initially challenged, the limit was not struck down. The action found to constitute the *Charter* violation related to State conduct: the Crown Attorney's decision to tender the s. 727 Notice. While an abuse of process leading to the decision to tender the s. 727 Notice might, in an appropriate case, rise to the level of egregious State conduct, there is nothing in the factual context of the present case which would rise to that level.

158. If the sentencing scheme for repeat offenders violates the *Charter*, the appropriate remedy is to declare the legislative provisions to be of no force and effect. However, none of the judges who heard this case were prepared to take that action.

Reference: *R. v. Ferguson,* 2008 SCC 6; ABA, Tab 15.

159. Instead, the Courts below granted an individual constitutional exemption to the mandatory minimum sentence under the guise of judicial "supervision" of the Crown's discretion to tender the s. 727 Notice. In effect, the Court did indirectly what it could not, or chose not to, accomplish directly.

160. The Appellant submits that this decision is an error for a number of reasons. First, as this Honourable Court held in *Ferguson,* individual constitutional exemptions are not appropriate. Second, the Respondent did not argue that the mandatory minimum was "grossly disproportionate" so as to violate s. 12 of the *Charter.* Third, as a general rule,

Courts cannot impose a sentence below the mandatory minimum to remedy a *Charter* violation.

161. For these reasons, the Appellant submits that the Court of Appeal erred in law in transferring the requirements of s. 718.2(e) from the Court to the Crown and further erred in upholding the sentencing Judge's "supervision" of prosecutorial discretion which allowed him to impose a sentence below the mandatory minimum as a s. 24(1) *Charter* remedy.

Summary and application to the case at bar

162. The Appellant respectfully submits that since this Honourable Court's decision in *Krieger,* courts have moved away from the strong pronouncements in *Power* and *Cook* concerning the importance of deference to prosecutorial discretion, the difficulties of judicial oversight and need for the judiciary to be the arbitrator in our adversarial system rather than the supervising prosecutor.

163. As a result, there have been an increasing number of discretionary prosecutorial decisions that have been reviewed in the context of the criminal trial applying a standard less than abuse of process. For example: the decision to tender the s. 727 Notice (see *Gill; R. v. King,* 2007 ONCJ 238; ABA, Tab 22); the decision to require a jury trial under s. 568 of the *Criminal Code* (see *R. v. De Zen*, 2010 ONSC 974; ABA, Tab12); and the decision to require a jury trial under s. 67(6) of the *Youth Criminal Justice Act,* S.C. 2002, c.1 (see *R. v. R. (J.S.)*, 2012 ONCA 568, leave to appeal to SCC dismissed; ABA, Tab 32).

164. This increasing intrusion on the scope of prosecutorial discretion will lead to confusion as Crown Attorneys will not know when to prosecute and judges will become *de facto* supervising prosecutors. This evolution is wholly incompatible with the separation of powers and runs contrary to the fundamental role that prosecutorial discretion plays in the criminal justice system.

165. As a result, the Appellant submits that the core versus non-core distinction is unnecessary and confusing when the issue is raised by an accused person in the context of an ongoing

criminal proceeding. Abuse of process should be the standard by which all allegations that a Crown Attorney violated the accused's *Charter* rights are judged.

166. In the alternative, if the distinction between core and non-core function is maintained, the Appellant submits that the decision to tender the s. 727 Notice is a core function subject to review only for abuse of process. In the present case, there is nothing in the record to support that there was an abuse of process. No allegation of abuse of process was ever made. In fact, the Respondent specifically indicated that he took no issue with the Crown conduct with respect to tendering the s. 727 Notice.

Reference: Transcript of Proceedings, April 29, 2011 at pp. 28 and 45-46; AR, Tab 14, pp. 98, 115-116.

167. The Respondent offered no evidence to substantiate the alleged *Charter* violation. The Appellant submits that the Court of Appeal erred in inferring a breach in the absence of evidence.

168. The Appellant submits that the Court of Appeal erred in law by transferring the requirements of s. 718.2(e) from the sentencing judge to the Crown Attorney. Section 718.2(e) is not designed to preclude the application of a mandatory minimum sentence to aboriginal offenders. Further, the perceived failure of the Crown to adequately consider s. 718.2(e) of the *Criminal Code* does not constitute a *Charter* breach.

169. The Appellant further submits that the Court of Appeal erred in law in its treatment of mandatory minimum sentences in the context of this appeal. Absent a finding of unconstitutionality, mandatory minimum sentences create a floor below which a judge cannot go, regardless of the mitigating factors or sentencing principles, including s. 718.2(e), which otherwise would have been emphasized in the particular circumstances.

170. For all of the foregoing reasons, the Appellant respectfully submits that the Newfoundland and Labrador Court of Appeal's decision in this case fails to respect the balance contemplated by the *Charter,* impermissibly intrudes into prosecutorial discretion and violates the separation of powers – concepts which lie at the very heart of our criminal justice system.

Part IV – Submissions with Respect to Costs

171. The Appellant does not seek costs and further submits that this is not one of those rare criminal cases where costs should be awarded against the Crown.

Part V - Order Sought

172. While the Appellant does not seek the Respondent's re-incarceration, it is respectfully requested that the appeal be allowed, the Order of the Newfoundland and Labrador Court of Appeal upholding the finding of a *Charter* violation be set aside and a term of imprisonment of 120 days substituted with service of the remainder of the sentence stayed.

DATED at St. John's, Newfoundland and Labrador, this 8th day of November, 2013.

IAIN R.W. HOLLETT
Counsel for the Appellant,
Her Majesty the Queen in Right of the Province of Newfoundland and Labrador

Part VI – Table of Authorities

42. Michael 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 — 93,94,104,105

Part VII – Statutes, Regulations, Rules, etc.

1. *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

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.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

2. *Criminal Code*, R.S.C. 1985, c. C-46

253. (1) 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.	**253.** (1) Commet une infraction quiconque conduit un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire, ou aide à conduire un aéronef ou du matériel ferroviaire, ou a la garde ou le contrôle d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, que ceux-ci soient en mouvement ou non, dans les cas suivants : *a*) lorsque sa capacité de conduire ce véhicule, ce bateau, cet aéronef ou ce matériel ferroviaire est affaiblie par l'effet de l'alcool ou d'une drogue; *b*) lorsqu'il a consommé une quantité d'alcool telle que son alcoolémie dépasse quatrevingts milligrammes d'alcool par cent millilitres de sang.

255. (1) 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,	**255.** (1) Quiconque commet une infraction prévue à l'article 253 ou 254 est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire ou par mise en accusation et est passible :
(*a*) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,	*a*) que l'infraction soit poursuivie par mise en accusation ou par procédure sommaire, des peines minimales suivantes :
(i) for a first offence, to a fine of not less than $1,000,	(i) pour la première infraction, une amende inimale de mille dollars,
(ii) for a second offence, to imprisonment for not less than 30 days, and	(ii) pour la seconde infraction, un emprisonnement minimal de trente jours,
(iii) for each subsequent offence, to imprisonment for not less than 120 days;	(iii) pour chaque infraction subséquente, un emprisonnement minimal de cent vingt jours;
(*b*) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and	*b*) si l'infraction est poursuivie par mise en accusation, d'un emprisonnement maximal de cinq ans;
(*c*) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.	*c*) si l'infraction est poursuivie par procédure sommaire, d'un emprisonnement maximal de dix-huit mois.
718.2 A court that imposes a sentence shall also take into consideration the following principles:	**718.2** Le tribunal détermine la peine à infliger compte tenu également des principes suivants :
(*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.	*e*) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.
727. (1) 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.	**727.** (1) Sous réserve des paragraphes (3) et (4), lorsque le délinquant est déclaré coupable d'une infraction pour laquelle une peine plus sévère peut être infligée du fait de condamnations antérieures, aucune peine plus sévère ne peut lui être infligée de ce fait à moins que le poursuivant ne convainque le tribunal que le délinquant, avant d'enregistrer son plaidoyer, a reçu avis qu'une peine plus sévère serait demandée de ce fait.