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The Charter versus the Government's Crime Agenda

Kent Roach*

I. INTRODUCTION

At the 25th anniversary of the *Canadian Charter of Rights and Freedoms*,¹ I posed a “Charter reality check” and asked how relevant the Charter was to the justness of our criminal justice system. After examining rates of imprisonment, pre-trial detention, imprisonment of Aboriginal people, crime victimization and wrongful convictions, I concluded that “Parliament deserves much of the credit or blame for the state of our criminal justice system”.² Despite the important changes that the Charter has brought to the criminal justice system,³ the Charter played a minimal role in explaining why Canada did not move towards American-style reliance on imprisonment. What was in 2008 something of an academic exercise has taken on a new relevance and urgency in 2012, given the ability of the majority Conservative government to enact a dizzying array of new crime control measures.

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² Kent Roach, “A Charter Reality Check: How Relevant Is the Charter to the Justness of Our Criminal Justice System?” in J. Cameron & J. Stribopoulos, eds. (2008) 40 S.C.L.R. (2d) 717, at 719.

³ Despite recent changes, the Court continues to enforce a quite robust constitutional exclusionary rule. See *R. v. Côté*, [2011] S.C.J. No. 46, [2011] 3 S.C.R. 215 (S.C.C.). The Charter has also abolished constructive murder and some restrictive defences, and may have prevented the re-introduction of the death penalty: *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 63 (S.C.C.). But for arguments that the Court has been less robust in constitutionalizing fault under the Charter than under the common law, see Kent Roach, “Mind the Gap: Canada’s Different Constitutional and Common Law Standards of Fault” (2011) 61 U.T.L.J. 545 [hereinafter “Roach, ‘Mind the Gap’”]. On the death penalty, see *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.). For arguments that the Court could have done more under the Charter to recognize the dangers of wrongful convictions, see Kent Roach, “The Protection of Innocence under Section 7 of the Charter” in J. Cameron, P. Monahan & B. Ryder, eds. (2006) 34 S.C.L.R. (2d) 249.

In this paper, I will provide a preliminary assessment of the interaction of the Charter and the government's crime agenda. After the Court's *Insite* decision requiring the Minister of Health to grant an exemption from drug laws to allow a safe injection site to operate,⁴ and to a lesser extent after an Ontario judge struck down a mandatory minimum sentence for a firearm offence,⁵ there has been talk about coming confrontations between the courts and the government over crime policy.⁶ I have no doubt that there will be some such conflicts in the coming years. I must, however, sound a note of caution about how much judges enforcing the Charter will restrain the government's "tough on crime" policy.

Many of the new laws shrewdly capitalize on the deference of courts to the exercise of prosecutorial and sentencing discretion. Although courts may intervene in egregious examples of misuse of such discretion, they will probably remain quite deferential with respect to most of the government's initiatives. Even though most Charter litigation involves the criminal justice system, and many on both the right and the left have expressed concerns about the growth of judicial power in Canada, a majority government can still enact radical change in the justice system if it is smart enough to focus on empowering prosecutors and limiting the sentencing discretion of judges.

The second part of this paper will examine the use of the Charter to challenge the exercise of prosecutorial discretion, and in particular how the government's crime agenda provides prosecutors with *de facto* sentencing power. It will suggest that the Charter will not effectively supervise the discretion of prosecutors to elect between prosecutions by summary conviction and by indictment, even though such decisions will be critical in determining what level of mandatory minimum sentences will apply and whether conditional sentences will be available. The third part of this paper will examine a variety of Charter arguments that can be used against new mandatory minimum sentences, including innovative new section 7 arguments that such penalties may be arbitrary and/or grossly disproportionate, and more traditional arguments that mandatory

⁴ *Canada (Attorney General) v. PHS Community Services Society*, [2001] S.C.J. No. 44, [2011] 3 S.C.R. 134, (S.C.C.) [hereinafter "*Insite*"].

⁵ *R. v. Smickle*, [2012] O.J. No. 612, 2012 ONSC 602 (Ont. S.C.J.) [hereinafter "*Smickle*"].

⁶ Kirk Makin, "Landmark *Insite* decision threatens peace between judges and legislators" *The Globe and Mail* (October 10, 2011); Adrian Humphreys, "Tory gun laws in jeopardy after judge rejects 'outrageous' mandatory sentence" *National Post* (February 13, 2012).

sentences may impose disproportionate punishment for particular offenders who commit crimes in extenuating circumstances.

II. JUDICIAL DEFERENCE AND PROSECUTORIAL DISCRETION

1. The Crown's Discretion to Elect to Prosecute by Summary Conviction or Indictment

One of the key provisions in the recently enacted Bill C-10 provides that conditional sentences will not be available where a number of offences, including theft over \$5,000, motor vehicle theft, breaking and entering a place other than a dwelling house, and arson for a fraudulent purpose, are prosecuted by way of indictment.⁷ This follows the pattern of other laws that provide for mandatory minimum sentences or higher mandatory minimum sentences when hybrid offences are prosecuted by way of indictment as opposed to summary conviction.⁸

The Crown's discretion whether to prosecute by indictment or by summary conviction has long been accepted as a core element of prosecutorial discretion and it is difficult to review directly. Indeed, Canadian law under the Charter is not far removed from what it was when in 1971 the Supreme Court of Canada rejected a claim under the *Canadian Bill of Rights*⁹ by Conn Smythe, then President of the Toronto Maple Leafs. Mr. Smythe, represented by no less an advocate than J.J. Robinette, argued that the Crown's election to prosecute income tax evasion by way of indictment as opposed to summary conviction violated equality before the law. Chief Justice Fauteux rejected this *Bill of Rights* claim, stressing that "[e]nforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power."¹⁰

Judicial deference towards the exercise prosecutorial discretion persists under the Charter. To be sure, there have been some changes, such as the recognition of the ability to bring malicious prosecution lawsuits

⁷ *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 34, amending s. 742.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁸ See, for example, *Standing Up for Victims of White Collar Crime Act*, S.C. 2011, c. 6 with respect to certain fraud prosecutions, and *Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 8 with respect to possession of a loaded weapon offence.

⁹ S.C. 1960, c. 44.

¹⁰ *R. v. Smythe*, [1971] S.C.J. No. 62, [1971] S.C.R. 680, at 686 (S.C.C.) [hereinafter "*Smythe*"].

against prosecutors¹¹ and a recognition of the power of courts to stay proceedings in cases of abuse of process.¹² These doctrines, however, have been interpreted quite restrictively and, in any event, only provide remedies against specific instances of proven misconduct. There is nothing in Charter jurisprudence that encourages courts to review the substantive fairness of new laws that effectively transfer sentencing discretion from judges to prosecutors. In *R. v. Power*,¹³ for example, the Court warned of the dangers of “second guessing” the exercise of prosecutorial discretion and cautioned that such review “would be conducive to a very inefficient administration of justice”, and that it might even threaten the impartiality of the courts as an arbiter between the Crown and the accused as adversaries.

2. The *Nixon* Case

This relatively deferential view of prosecutorial discretion was recently re-affirmed by a unanimous Supreme Court in *R. v. Nixon*.¹⁴ The Court affirmed the right of an assistant deputy Attorney General to withdraw a plea agreement to careless driving with a joint sentence recommendation of an \$1,800 fine in a car accident in which two people were killed and charges of impaired and dangerous driving causing death were laid. Justice Charron for the Court held that the decision to repudiate the plea agreement was a matter of prosecutorial discretion and that the judge below had erred in evaluating the reasonableness of the exercise of the discretion. She stressed that by

straying into the arena and second-guessing the decision, the reviewing court effectively becomes a supervising prosecutor and risks losing its independence and impartiality. Due regard to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions puts such decisions “beyond the legitimate reach of the court” ... Thus, the court does not assess the reasonableness or correctness of the decision itself; it only looks behind the decision for “proof of the requisite prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate”.¹⁵

¹¹ *R. v. Nelles*, [1989] S.C.J. No. 86, [1989] 2 S.C.R. 170 (S.C.C.).

¹² *R. v. Jewitt*, [1985] S.C.J. No. 53, [1985] 2 S.C.R. 128 (S.C.C.).

¹³ [1994] S.C.J. No. 29, [1994] 1 S.C.R. 601 (S.C.C.) [hereinafter “*Power*”].

¹⁴ [2011] S.C.J. No. 34, [2011] 2 S.C.R. 566 (S.C.C.) [hereinafter “*Nixon*”].

¹⁵ *Id.*, at para. 52.

The Court's approach does not render the exercise of prosecutorial discretion immune from Charter review. Indeed, the Court indicated that the repudiation of a plea agreement will satisfy the accused's threshold burden on an abuse of process application, and as such will require the prosecutor to "explain why and how it made the decision not to honour the plea agreement".¹⁶ At the same time, however, the accused will bear the ultimate burden of establishing an abuse of process that causes harm to a fair trial or judicial integrity that cannot be repaired without a stay. In other words, the accused will have to establish "prosecutorial misconduct, improper motive or bad faith".¹⁷ This burden was not satisfied in *Nixon*. Even if the accused can establish an abuse of process in future cases, any judicial intervention will be episodic and limited to the facts of the case. There will not be judicial regulation of how prosecutors exercise the increased power they will have when electing between different mandatory sentences, or when an election determines whether a conditional sentence is available.

This approach to the judicial review of prosecutorial discretion will in almost all cases render the Crown's discretion to prosecute offences by summary conviction or indictment resistant to judicial review. As recognized in *Smythe*, the Crown's election is a routine and increasingly important part of the criminal justice system. Unlike the repudiation of a plea agreement, the Crown's discretion to prosecute by indictment will not satisfy the threshold requirement that allows prosecutorial discretion to be reviewed on abuse of process grounds. This is true even though under recent legislation, the Crown's decision to prosecute by way of indictment may preclude the option of a conditional sentence or produce a much higher minimum and maximum sentences than if the case were prosecuted by summary conviction. Given that the vast majority of accused plead or are found guilty, the Crown's power to elect means that in many cases, the prosecutor becomes the *de facto* sentencing judge.

3. The Importance of Crown Elections

My point is not to suggest that courts should supervise Crown elections or to suggest that Crown elections are necessarily made for improper or discriminatory purposes. There is no evidence that such is the case, and given the opaque nature of prosecutorial decision-making,

¹⁶ *Id.*, at para. 63.

¹⁷ *Id.*, at para. 68.

there is not likely to be evidence either way. Justice L'Heureux-Dubé in *Power*¹⁸ even went out of her way to suggest that Crown prosecutors keep their reasons for the exercise of prosecutorial discretion confidential, something that makes judicial review even on limited abuse of process grounds very difficult.¹⁹

It is possible that Crown elections to prosecute by summary conviction may mitigate a significant amount of the potential impact of Bill C-10 and other parts of the government's crime control agenda. Such mitigation could be defended on federalism grounds, as it allows provinces such as Quebec that are uneasy with the government's crime agenda to avoid some of its effects. It also means that provincial Crowns can adjust their election decisions when necessary to control rising prison populations. This all may be good, but my point is simply that the Charter will not restrain those crime control measures that give prosecutors more powers based on their election of the mode of trial. The pre-Charter precedent of *Smythe* remains good law on the matter of Crown elections even while Charter cases such as *Nixon* take pains to make the case that the exercise of prosecutorial discretion is not immune from Charter and abuse of process review. Judicial review may provide remedies in rare and egregious cases, but it will not constrain the enhanced role of prosecutors in sentencing decisions under many new crime laws, including Bill C-10.

4. Arbitrary Gaps between Punishment on Summary Conviction and by Indictment

In two recent cases, trial judges in Ontario have held that a two-year gap between the mandatory minimum sentence for a firearm offence when prosecuted by indictment and the maximum sentence available when the same offence is prosecuted by way of summary conviction violated section 7 of the Charter because no legitimate government purpose was served.²⁰ These decisions confirm that the statutory context in which Crown prosecutors exercise the discretion whether to proceed by indictment or through summary conviction is subject to Charter review, including review on grounds of arbitrariness. They also confirm

¹⁸ *Supra*, note 13.

¹⁹ For my previous criticisms of this approach, see Kent Roach, "The Attorney General and the Charter Re-visited" (2000) 50 U.T.L.J. 1.

²⁰ *Smickle, supra*, note 5; *R. v. Nur*, [2011] O.J. No. 3878, 2011 ONSC 4874 (Ont. S.C.J.) [hereinafter "*Nur*"].

that utterly irrational criminal legislation is vulnerable to section 7 invalidation on the grounds that it is arbitrary in relation to any legitimate governmental objective. Some might then conclude that courts will use arbitrariness and gross disproportionality review to control and invalidate much of the government's crime agenda.

The above conclusion would, however, be erroneous. The government can easily cure the Charter defects discussed above simply by raising the maximum penalty when offences are prosecuted under the more efficient summary conviction procedure so that there is no longer any arbitrary gap. The maximum penalties for offences that are prosecuted by summary conviction, as with most offences, have been increasing in any event. Such super summary convictions will be easier to process through the courts, as the accused will be unable to elect either a preliminary inquiry or trial by jury, and this, along with more frequent denial of bail, will put pressure on provincial prison populations. The recently enacted Bill C-10 carefully avoids arbitrary gaps by the expedient of raising maximum sentences in summary conviction offences to 18 and even 24 months' imprisonment. Such results confirm the pessimistic warning of critical criminologists such as Doreen McBarnet and the late Richard Ericson that due process can be used for crime control.²¹

It will be suggested in the next part of this paper that section 7 review for gross disproportionality and arbitrariness may often turn out to be a false start in Charter strategies to combat the government's new crime agenda. These doctrines build in much deference to governments and to some extent they mimic the unsuccessful strategies of the Opposition in Parliament to defeat the government's crime measures. Even if they are successful, as they were with respect to the arbitrary two-year gap in punishment found in *Nur* and *Smickle*, they may invite the government to respond, as it did in Bill C-10, by increasing maximum punishment for summary conviction offences.

III. JUDICIAL DEFERENCE AND SENTENCING DISCRETION

The *Safe Streets and Communities Act*, also known as Bill C-10, enacts a broad range of mandatory sentences. As will be discussed in more detail below, accused can raise a range of Charter challenges to these sentences. The most traditional argument will be to argue that the

²¹ Doreen McBarnet, *Conviction* (London: MacMillan, 1981); Richard Ericson, *The Constitution of Inequality* (Ottawa: Carlton University Press, 1983).

mandatory sentences constitute cruel and unusual punishment contrary to section 12 of the Charter. As will be seen, however, such arguments face a number of challenges, including the Supreme Court's deference towards mandatory sentences²² and the possibility that courts will require accused to demonstrate that the mandatory sentence is grossly disproportionate as applied to them rather than as applied to reasonable hypothetical offenders. Another challenge that accused will face under section 12 of the Charter is that the highest new mandatory sentence in Bill C-10 is five years' imprisonment for incest. Although it is easy to imagine a court striking down that sentence in a case involving truly consenting adults,²³ the Supreme Court in *R. v. Morrissey*²⁴ upheld a mandatory four-year imprisonment for criminal negligence causing death. Many of Bill C-10's new mandatory sentences are perhaps deliberately under four years in an order to "Charter proof" them or insulate them from review.

In addition to section 12 challenges, the accused can challenge mandatory sentences under section 7 of the Charter. A striking number of different section 7 challenges to mandatory sentences are possible, including arguments that mandatory sentences are arbitrary, that they produce costs that are grossly disproportionate to their benefits, and finally that they produce punishment that is disproportionate to the seriousness of particular crimes. These various strategies will be critically assessed below.

1. Crown Elections and Reasonable Hypotheticals Used to Strike Down Mandatory Sentences

The Supreme Court has so far only struck down one mandatory minimum sentence enacted by Parliament during the first 30 years of the Charter. In *R. v. Smith*²⁵ the Court struck down a seven-year mandatory minimum sentence for importing narcotics, not on the basis that it was

²² Kent Roach, "Searching for *Smith*: The Constitutionality of Mandatory Sentences" (2001) 39 Osgoode Hall L.J. 367 [hereinafter "Roach, 'Searching for *Smith*'"].

²³ Incest is a straight indictable crime. The Supreme Court has stressed that neither the consent nor age of the complainant is a factor in this crime: *R. v. R. (G.)*, [2005] S.C.J. No. 45, [2005] 2 S.C.R. 371 (S.C.C.). It has been challenged but upheld under the Charter: *R. v. S. (M.)*, [1996] B.C.J. No. 2302, 111 C.C.C. (3d) 467 (B.C.C.A.), leave to appeal refused 113 C.C.C. (3d) vii. There are other five-year mandatory minimums, but they apply to aggravated forms of sexual assault committed against children and can be avoided if the Crown elects to prosecute by summary conviction.

²⁴ [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.) [hereinafter "*Morrissey*"].

²⁵ [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) [hereinafter "*Smith*"].

grossly disproportionate as applied to the particular accused, who imported seven-and-a-half ounces of cocaine, but on the basis that it would be unconstitutional if applied to a teenaged first-time offender who brought a joint of marijuana back to Canada after a spring vacation in Florida. The Court's approach in the 1987 *Smith* decision reflected its enthusiasm for deciding Charter issues in the early years even if they were not squarely presented on the facts of the case.²⁶ In subsequent years, the Court retreated from *Smith* and in *R. v. Goltz*²⁷ and *Morrissey*²⁸ stressed that reasonable hypothetical offenders had to be common examples of offenders being sentenced in order to be used by the courts under section 12 in deciding whether a mandatory minimum sentence might have unconstitutional effects. The one post-*Smith* case that succeeded under section 12 involved a real and not a hypothetical offender.²⁹

Justice Code's recent decision in *Nur*³⁰ suggests that accused who seek to challenge most of the new mandatory minimum sentences may not even be able to use reasonable hypothetical analysis. In refusing to strike down a three-year mandatory minimum for a gun offence if prosecuted by indictment, Code J. observed that the ability to prosecute by way of summary conviction "is a complete answer to all of the 'reasonable hypotheticals'" under section 12 of the Charter.³¹ He stressed that section 12 Charter review of the mandatory sentence should assume that the Crown's discretion to elect to proceed summarily or by indictment is both an "essential feature of the criminal justice system" and one that will "be exercised in a fair and objective way".³² At first blush, this conclusion seems at odds with both the established role that reasonable hypotheticals have played in the section 12 jurisprudence and the Court's warning in *Smith* that it was not willing to rely on prosecutorial discretion to avoid applying the seven-year penalty to a hypothetical young first offender. One difference, however, is that the offence examined in *Smith* was a straight indictable offence, whereas many of the new offences that carry mandatory sentences are hybrid offences.

²⁶ See Kent Roach, "Smith and the Supreme Court: Implications for Sentencing Reform and Policy" (1989) 11 S.C.L.R. 433.

²⁷ [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.).

²⁸ *Supra*, note 24.

²⁹ *Steele v. Mountain Institution*, [1990] S.C.J. No. 111, [1990] 2 S.C.R. 1385 (S.C.C.).

³⁰ *Supra*, note 20.

³¹ *Id.*, at para. 108. See also *R. v. Kumar*, [1993] B.C.J. No. 2266, 85 C.C.C. (3d) 417 (B.C.C.A.) to similar effect.

³² *Nur, id.*, at para. 114.

Justice Code warned that reliance on prosecutorial discretion as a “safety valve” for mandatory sentences for hybrid offences “is not without risks or costs”. It could lead to the invalidation of mandatory sentences under section 52 in cases where the Crown fails to elect or re-elect to the less severe summary conviction option and a sentence has cruel and unusual effects on a particular offender.³³ The truth of this proposition is illustrated by the subsequent decision of Molloy J. in *Smickle* to strike down the three-year mandatory sentence in a case where she concluded that a one-year sentence was appropriate for a first offender prosecuted by way of indictment for the offence of possessing a loaded firearm. At the same time, it affirms that courts will in the vast majority of cases not directly review the Crown’s election, but rather the consequences of that election through the relatively deferential lens of section 12.

Justice Code’s approach of assuming that the Crown will elect to proceed by summary conviction with respect to reasonable hypothetical offenders suggests that the higher mandatory sentences for indictable offences that have a summary conviction option will be immune from being struck down on the basis that they could have cruel and unusual effects as applied to reasonable hypothetical offenders. The American norm of “as applied” review to real offenders before the court will be required as it was in *Smickle*. Courts may well follow Code J. in assuming that even common reasonable hypothetical offenders will benefit from more lenient mandatory sentences because they will be prosecuted by summary conviction. In other words, judicial assumptions about the proper exercise of prosecutorial discretion may contribute to judicial reluctance to strike down mandatory sentences because they may have cruel and unusual effects as applied to reasonable hypothetical offenders. We are a long way from *Smith*.

2. The Importance of *Morrisey*

The most relevant case to the government’s crime agenda is *Morrisey*,³⁴ where the Court upheld a mandatory minimum sentence of four years for manslaughter committed with a handgun. The sentence in this case was part of 10 mandatory minimum sentences added to the *Criminal Code* by the Liberal government in 1995 gun control amendments.

³³ *Id.*, at para. 117.

³⁴ *Supra*, note 24.

In *Morrisey*, the Court held that the four-year sentence was not cruel and unusual as applied to a 35-year-old first offender who resumed having alcohol problems after his relationship with the victim's sister ended. The accused was suicidal and extremely intoxicated, and killed the victim, a friend of his, when a shotgun accidentally discharged while he was trying to get the victim's attention. He attempted suicide after the killing, was very remorseful and pleaded guilty to criminal negligence causing death and unlawfully pointing a firearm. In many ways, it is difficult to conceive of a more sympathetic killer who would be caught by the new mandatory sentence. In a case where four Attorneys General intervened in support of the mandatory sentence and no one other than the accused opposed it, the Supreme Court unanimously upheld the mandatory sentence.

The Court in *Morrisey* continued the trend to restraining the use of hypothetical examples to measure the effects of mandatory sentences by warning that both hypotheticals and even real cases should only be considered if they were reasonable and common. Justice Gonthier stressed that the hypotheticals should "be common examples of the crime rather than examples of common occurrences in day-to-day life"³⁵ and he even suggested that reported cases should be used with caution because the full facts may not be recorded. He discounted the trial judge's finding that the killing was unintentional by stressing that "[i]n addition to causing death using a firearm, the Crown must establish that the accused acted in a manner that was a marked departure from the standard employed by a reasonable person. Their actions must be wanton or reckless, and deserving of criminal liability."³⁶ In this way, the Court took a formal and thin approach to the seriousness of the crime. It did not really explore how the accused's drinking, suicidal tendencies, remorse and guilty plea may have mitigated the seriousness of his crime. As I have suggested elsewhere, the Court's approach in this regard reflected a "just deserts" approach to sentencing that also saw the Court accept that the minimum sentence served retributive and denunciatory purposes even though such punishment might not be required for either specific deterrence or rehabilitation.³⁷ As will be explored below, the Court's recent decision in *R. v. Ipeelee*; *R. v. Ladue*³⁸ reflects a thicker and more contextual understanding of proportionality. In that case, the Court is

³⁵ *Id.*, at para. 33.

³⁶ *Id.*, at para. 36.

³⁷ *Id.*, at paras. 47-48, 53. See also Roach, "Searching for *Smith*", *supra*, note 22.

³⁸ [2012] S.C.J. No. 13, 2012 SCC 13 (S.C.C.) [hereinafter "*Ipeelee*"].

concerned not only with the formal definition and fault level of the offence, but with offender characteristics as they relate to prospects for specific deterrence, rehabilitation and public protection. The Court accepts that offender characteristics in some cases may mitigate a particular offender's degree of moral blameworthiness for an offence, and thus affect what punishment is proportionate to the crime.

The Court in *Morrisey* was not oblivious to the mitigating factors in the case, but viewed them through the lens of its abstract and formal discussion of the seriousness of the offence. Justice Gonthier concluded that he was

not convinced that the mitigating factors offset the aggravating factors in this case. Nor am I convinced that the mitigating factors displace the gravity of the offence. The remorse demonstrated by the appellant is not at all surprising, given the nature of the offence. Nobody is alleging that the appellant intended to kill Mr. Teed; malice is neither alleged nor proven. In these circumstances, remorse is to be expected. The absence of a criminal record is also not surprising, given the nature of this offence. As the criminally negligent do not intend the results they cause, acts of criminal negligence are not generally committed as part of a pattern or a career of criminality.³⁹

If the fault of negligence was sufficient to justify the four-year penalty in *Morrisey*, then it may be difficult to overturn many of the new mandatory sentences in Bill C-10, which often require less than four years' imprisonment and also require subjective fault in relation to the crime.

3. *Smickle versus Stewart: How Deferential Will Judges Be to Mandatory Sentences?*

The above may be unduly pessimistic about the success of Charter challenges to new mandatory sentences. Justice Molloy of the Ontario Superior Court recently made headlines when she ruled that a mandatory minimum sentence of three years' imprisonment for possession of a loaded handgun was unconstitutional. Justice Molloy went beyond the fact that Mr. Smickle knowingly possessed a loaded handgun in concluding that a one-year sentence of imprisonment was appropriate and that the two additional years required by Parliament were grossly disproportionate. She examined Mr. Smickle's personal characteristics as an employed first-time offender with a fiancée and a young child, and

³⁹ *Morrisey*, *supra*, note 24, at para. 40.

stressed that a three-year penitentiary sentence was not necessary to deter or rehabilitate him.⁴⁰

Justice Molloy also carefully considered whether the mandatory sentence could be justified under section 1 of the Charter. She accepted that the mandatory sentence was rationally connected with the very important objective of deterring the use of firearms in crimes, but held that this could be done as effectively if Parliament used presumptive sentences subject to judicially justified and appealable exceptions, as is done in the United Kingdom and South Africa.⁴¹ She eloquently concluded that the offence

is not a “one-size-fits-all” type of offence. Therefore, some flexibility is required to deal with those exceptional circumstances where the imposition of a mandatory minimum sentence would run afoul of the *Charter*. The existing legislation is cast too broadly to prevent such abuse and does not meet the minimal impairment test provided for in *Oakes*.⁴²

She warned that the mandatory minimum sentence placed excessive pressure on the accused to plead guilty if possible to avoid the sentence, that it could contribute to prison overcrowding and that it could backfire in terms of rehabilitating by placing first-term offenders in a penitentiary environment.⁴³

The Crown in *Smickle* made the unexpected argument that the appropriate remedy in the case was not to strike down the mandatory minimum sentence under section 52(1), but rather to order it under section 24(1) to prosecute the case by summary conviction. The Crown somewhat ironically relied on the Supreme Court's *Insite*⁴⁴ decision as a justification for such a mandatory remedy. Reflecting the type of judicial deference discussed in the first part of this paper in cases such as *Smythe* and *Nixon*, Molloy J. concluded that there was no evidence of abuse in

⁴⁰ *Smickle, supra*, note 5, at paras. 80-82.

⁴¹ Justice Molloy concluded, *id.*, at para. 113, that

it is possible to impose a presumptive sentence for possession of a loaded weapon, while still preserving a judicial discretion to be exercised in those rare circumstances where the presumptive sentence would be grossly disproportionate given the circumstances of the offender and the offence. In every case where such a judicial discretion is exercised, there would be a right of appeal, thus providing supervision of the proper use of the discretion. This would still further the objectives of the legislation without breaching the s. 12 right to be free from cruel and unusual punishment.

⁴² *Id.*, at para. 117.

⁴³ *Id.*, at para. 121.

⁴⁴ *Supra*, note 4.

the Crown's election and that it would not be appropriate to order that the Crown elect to proceed by summary conviction.⁴⁵ Following the Supreme Court's decision in *R. v. Ferguson*,⁴⁶ which held that the appropriate response to unconstitutional mandatory sentences would be to strike them down in their entirety under section 52(1), Molloy J. then struck down the sentence for all offenders, holding that a suspended declaration of invalidity was not appropriate.⁴⁷ As Benjamin Berger has suggested,⁴⁸ the Court's use of the section 52 remedy may speed up dialogue and confrontation between courts and Parliaments. Indeed, the *Smickle* decision is being appealed to the Ontario Court of Appeal and may eventually reach the Supreme Court of Canada. In general, the Crown will have more incentives to appeal the section 52 invalidation of mandatory sentences as opposed to the limited impact of the individual section 24(1) remedy that the Crown unsuccessfully urged on Molloy J. It may fight section 52(1) battles longer and harder than more limited section 24(1) cases.⁴⁹

The *Smickle* decision is bold and important, but it is not part of a tidal wave of court decisions invalidating mandatory minimum sentences. In *Nur*,⁵⁰ Code J. held that the same mandatory minimum sentence of three years' imprisonment for possessing a loaded weapon would not be cruel and unusual given his finding that the young first-time offender in that case deserved a sentence of two-and-a-half years' imprisonment considering the aggravating and gang-related circumstances of the possession of the firearm. In the course of dismissing challenges to Crown discretion to seek mandatory sentences in drunk

⁴⁵ Justice Molloy concluded that "[t]here was nothing unconstitutional, or even improper, about the exercise of the Crown's discretion and no basis for awarding a remedy based on the Crown's conduct. It is the legislation itself that imposes the cruel and unusual punishment in this case, not anything that was done by the Crown Attorney." *Smickle*, *supra*, note 5, at para. 139. She then added that

in any event, *mandamus* requiring the Crown to exercise its discretion in a particular way is simply not a workable remedy here. That ship has sailed. The Crown has already exercised its discretion to proceed by indictment. The trial is over. A conviction has been entered. It is too late now to do the whole thing over again as a summary conviction trial, even if I had jurisdiction to make such an order, which in my view I do not.

Id., at para. 145.

⁴⁶ [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.).

⁴⁷ *Smickle*, *supra*, note 5, at para. 151.

⁴⁸ Benjamin L. Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*" in J. Cameron, P. Monahan & B. Ryder, eds. (2009) 47 S.C.L.R. (2d) 101.

⁴⁹ The Crown may be inclined to commission and present expert evidence in order to avoid invalidation of a mandatory sentence.

⁵⁰ *Supra*, note 20.

driving cases by serving notices of prior offences, Hill J. of the same Court stated:

While mandatory minimum sentences have become increasingly more common, the decision to enact criminal law policy in this way is constitutionally assigned to Parliament. These type of sentences constitute the law of Canada and agreement or disagreement with the wisdom of such legislation is not a justiciable matter.⁵¹

There was no direct challenge to the mandatory sentences in those cases, which for a second offence is 30 days and for subsequent offences is 90 days.⁵²

Some trial judges who see the real-life effects of mandatory sentences in their courtrooms on a regular basis may, as Molloy J. did, find that mandatory sentences are cruel and unusual punishment. Others with an eye on the Supreme Court's precedents in this area and their Courts of Appeal may not. A troubling recent example is the *Stewart* case from British Columbia. Both the trial judge and the British Columbia Court of Appeal had little trouble applying a mandatory one-year sentence to April Ann Stewart, a 44-year-old woman in rural British Columbia with no prior convictions who supported two children. While in possession of a firearm, a 22-calibre rifle, she committed the indictable offence of being unlawfully in a dwelling house when she confronted and assaulted another woman with whom Stewart's husband of 23 years was apparently having an affair. Ms. Stewart was intoxicated at the time of the offences, did not point or fire the firearm, and left shortly after the confrontation.

Both the trial judge and the British Columbia of Appeal dismissed Ms. Stewart's constitutional challenge to the mandatory one-year sentence of committing an indictable offence with a firearm. The trial judge recognized the harmful effect that the one-year sentence would have on Ms. Stewart and her family, including two children who remained at home, but stressed that unlawfully being in a dwelling house was a serious offence and "given Ms. Stewart's lack of a record and the availability of early release through parole and earned remission, I anticipate that she will be back with her family and community well before the end of any sentence I impose upon her".⁵³ The British Columbia Court of

⁵¹ *R. v. Mohla; R. v. Singh*, [2012] O.J. No. 388, 2012 ONSC 30, at para. 134 (Ont. S.C.J.), reconsideration allowed [2012] O.J. No. 799, 2012 ONSC 1210 (Ont. S.C.J.).

⁵² *Criminal Code*, R.S.C. 1985, c. C-46, s. 255.

⁵³ *R. v. Stewart*, [2008] B.C.J. No. 259, 2008 BCSC 1741, at para. 41 (B.C.S.C.).

Appeal unanimously dismissed the accused's appeal. Justice Frankel concluded, "it is beyond question that Parliament can require mandatory punishments to be imposed unless it can be shown that a particular punishment violates s. 12 of the *Charter*". He then ruled that considering all the circumstances, "including the deference owed to Parliament, I am unable to conclude that Ms. Stewart has established that the one-year sentence imposed on her is grossly disproportionate".⁵⁴ For every *Smickle* there may be more cases like *Stewart*. Those who challenge many of the government's new mandatory sentences under the Charter will face an uphill battle, especially to the extent that the Crown relies on precedents such as *Morrisey*.

4. Reading the Tea Leaves about the Supreme Court's Approach to Mandatory Sentences

It remains to be seen what stance the Supreme Court will take when it reconsiders mandatory sentences, perhaps in *Smickle*. As suggested above, its decision in *Morrisey* suggests that it may be quick to defer to mandatory sentences. The Court may acknowledge that mandatory sentences are controversial, but stress that the choice of criminal justice policy is up to Parliament. The Court took this approach in *R. v. Latimer* when it stated: "The choice is Parliament's on the use of minimum sentences, though considerable difference of opinion continues on the wisdom of employing minimum sentences from a criminal law policy or penological point of view."⁵⁵ In my view, such an approach would be unfortunate because it avoids the reality that only courts are in a position to see the actual effects of mandatory penalties on real offenders such as Mr. Smickle and Ms. Stewart. Our trial judges should be prepared to sound an alarm when mandatory sentences force them to do an injustice.

Justice Molloy's section 1 analysis in *Smickle* also suggests that courts can accept the deterrent and denunciatory objectives of mandatory sentences as legitimate, yet still ask the hard question of whether these objectives could be pursued in other ways that infringe rights less. Indeed, even if the government candidly argues that one of the objectives of mandatory sentences is to curtail judicial discretion and the court

⁵⁴ *R. v. Stewart*, [2010] B.C.J. No. 528, 2010 BCCA 153, at paras. 38, 41 (B.C.C.A.).

⁵⁵ [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3, at para. 88 (S.C.C.) [hereinafter "*Latimer*"]. The author represented the Canadian Civil Liberties Association, which argued that the penalty was unconstitutional as applied to Mr. Latimer.

accepted such an objective as sufficiently important to limit Charter rights, it could still point out the less rights-invasive option of sentencing guidelines. Both with respect to the effects of mandatory sentences on real offenders and with respect to less drastic policy measures, courts have important points to make in a dialogue with Parliament about mandatory sentences.

5. *R. v. Topp*

The Supreme Court has recently decided two cases which, while not directly dealing with mandatory sentences, may be of some relevance in how the Court will approach such issues. In *R. v. Topp*,⁵⁶ the Court affirmed that section 734(2) of the *Criminal Code* imposes a burden on a party seeking a fine to establish to the court that the offender has the ability to pay the fine. The case involved a Crown appeal after a trial judge refused to impose a \$4.7 million fine on an offender found guilty of defrauding customs of the same amount. The Court refused to hold that a judge was bound by law to infer that those involved in economic crimes still had the necessary funds to pay a fine. The Court noted that section 734(2) was remedial legislation enacted in 1995 to respond to evidence that a large number of offenders were being imprisoned for failure to pay a fine. The decision is difficult to criticize, but it reveals dilemmas in the sentencing of impoverished offenders. Parliament's progressive remedy in 1995 may in today's environment of restrictions on conditional sentences push judges towards using imprisonment.

Under the recently enacted Bill C-10, conditional sentences would no longer be available for either fraud or theft over \$5,000. Although it is possible that a judge might still order probation for such offences, such an approach would be inconsistent with the Supreme Court's decision that conditional sentences are a more severe sanction than probation.⁵⁷ In any event, Mr. Topp would now be subject to a mandatory minimum penalty of two years' imprisonment under the *Standing Up for Victims of White Collar Crime Act*⁵⁸ because he was convicted of a fraud of over \$1 million. Such legislation may be politically popular given understandable outrage over economic crimes. Like other forms of punitive forms of

⁵⁶ [2011] S.C.J. No. 43, [2011] 3 S.C.R. 119 (S.C.C.).

⁵⁷ *R. v. Proulx*, [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61 (S.C.C.).

⁵⁸ S.C. 2011, c. 6, s. 2.

victims' rights,⁵⁹ however, sentencing Mr. Topp to a two-year term in a federal penitentiary may pose something of a false promise to victims of white-collar crimes despite its promising title. The *Standing Up for Victims of White Collar Crime Act* requires a court to consider a restitution order, but courts will be reluctant to make such orders if the offender does not have the ability to pay. Offenders will be less likely to have the ability to pay if they are imprisoned. Part of the *Safe Streets and Communities Act*⁶⁰ is designed to assist victims of crime, namely, victims of terrorism, by allowing them to sue selected foreign states who sponsored terrorism. In both cases, however, the remedies are self-help remedies that will only benefit a small minority of crime victims fortunate enough to be eligible. Such punitive and neo-liberal mechanisms are no substitute for more generous victim compensation that should be available for all crime victims, not just the most visible or politically popular ones.

6. *R. v. Ipeelee; R. v. Ladue*

Another recent decision that may be of relevance to the Court's approach to mandatory sentence is *Ipeelee*⁶¹ concerning the sentencing of Aboriginal offenders. In both cases, the Court indicated that trial judges had erred in imposing sentences of three years' imprisonment for violating non-intoxicant requirements in long-term offender designations. The case is important with respect to the Court's reinforcement of the mandatory duty on trial judges under section 718.2(e) of the *Criminal Code* to consider the particular circumstances of Aboriginal offenders in light of the discriminatory and colonial treatment of Aboriginal people in Canada, and the growing and gross over-representation of Aboriginal people in jail.⁶² The case is also important for the Court's holding that even a long-term offender designation involves concern for rehabilitation as a means of achieving public safety. My focus here, however, will be

⁵⁹ The concept of punitive victims' rights being used as a new form of crime control that gives police and prosecutors more power, without giving victims more power or even compensation, is described in Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).

⁶⁰ S.C. 2012, c. 1, Part I.

⁶¹ *Supra*, note 38. The author represented the British Columbia Civil Liberties Association, which intervened in *Ladue* and which opposed the three-year sentence. For a fuller discussion of this case, see Jonathan Rudin, "Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in *R. v. Ipeelee*", in B.L. Berger & J. Stribopoulos, eds. (2012) 57 S.C.L.R. (2d) 375.

⁶² See Jonathan Rudin, *id.*

more limited. What does *Ipeelee* portend for the constitutionality of mandatory sentences?

Although the case was presented in the media as a case solely about Aboriginal offenders and so-called discounts for Aboriginal offenders,⁶³ the Court in *Ipeelee* had much to say about proportionality between crimes and penalties, an issue that will be central to Charter challenges to mandatory sentences. Justice LeBel stated:

The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.⁶⁴

Justice LeBel noted that proportionality was rooted in the justice system well before it was recognized as the fundamental principle of sentencing in 1996, when section 718.1 of the *Criminal Code* was enacted. He added that proportionality

also has a constitutional dimension, in that s. 12 of the *Canadian Charter of Rights and Freedoms* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. In a similar vein, proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*.⁶⁵

The approach to proportionality between crime and punishment in *Ipeelee* suggests that the Court may take a thicker and more contextual approach than previously taken in *Morrissey*. As discussed above, the

⁶³ “The Wrong Answer to Aboriginal Overincarceration” *The Globe and Mail* (April 5, 2012); Rod Mickleburgh, “Man who punched bus driver spared jail because of his native ancestry” *The Globe and Mail* (April 3, 2012).

⁶⁴ *Supra*, note 38, at para. 37.

⁶⁵ *Id.*, at para. 36.

Court in *Morrisey* focused on the *mens rea* requirement of criminal negligence causing death when judging the seriousness of that crime.⁶⁶ Mitigating factors such as the facts that the offender was a first-time offender, was intoxicated and was remorseful did not cause the Court to determine that the mandatory sentence of four years' imprisonment was grossly disproportionate. In contrast, LeBel J. in *Ipeelee* integrates offender characteristics and mitigating factors into his discussion of proportionality. He stresses that proportionality must not only denounce crimes and reflect concerns for victims, but also ensure justice for the offender.⁶⁷ In the context of Aboriginal offenders, this approach requires judicial notice of systemic factors, as well as Gladue reports that will explore the background circumstances that bring the offender before the court and the options available in the community for achieving all the purposes of sentencing. To the extent that the circumstances of Aboriginal offenders as persons are integrated into the discussion of proportionality in *Ipeelee*, the Court may be returning to a more contextual approach to proportionality that characterized *Smith*,⁶⁸ where the Court held that a seven-year sentence would be cruel and unusual as applied to a teenaged first-time offender bringing a small amount of marijuana across the border. The Court in *Smith* held that the mandatory penalty was grossly disproportionate not simply in relationship to the seriousness of the importing offence as measured by its requirement of subjective fault, but also because it was not necessary to deter or rehabilitate the particular offender and because of its severe effects on a first-time and young offender.

Justice Lamer in *Smith* also stressed that the mandatory sentence cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982*, which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.⁶⁹

⁶⁶ See *supra*, notes 34-39.

⁶⁷ *Supra*, note 38, at para. 37.

⁶⁸ *Supra*, note 25.

⁶⁹ *Id.*, at para. 69.

He also accepted that the mandatory sentence was rationally connected to the important objective of deterring and punishing the importation of illegal drugs, but held that the

net cast ... for sentencing purposes need not be so wide as that cast ... for conviction purposes. The result sought could be achieved by limiting the imposition of a minimum sentence to the importing of certain quantities, to certain specific narcotics of the schedule, to repeat offenders, or even to a combination of these factors.⁷⁰

It remains to be seen whether in the section 12 context, the Court will embrace the more contextual and offender-sensitive vision of proportionality in *Ipeelee*, or whether it will be drawn back to the approach in *Morrissey* which focuses more on the abstract seriousness of the offence. In my view, the Court should take a more generous approach that incorporates a range of offender characteristics and mitigating factors that Parliament cannot possibly imagine when it enacts a mandatory sentence. To be sure, such an approach will be greeted by critics on both the right and the left with their well-rehearsed charges of judicial activism and interference with legislative policy. The Court should not be swayed by such criticisms, especially at the level of interpreting the relevant Charter right. The government will have its day in court, so to speak, in justifying the law under section 1.

7. Is Proportionality between Crime and Punishment a New Principle of Fundamental Justice?

It is commonplace that the state of the principles of fundamental justice under section 7 is complex and for many confusing.⁷¹ In the recent *Bedford v. Canada (Attorney General)*⁷² case, the Ontario Court of Appeal applied three different principles of fundamental justice: (1) a requirement that a law not be arbitrary to its ends; (2) a requirement that it not be overbroad to its objectives; and (3) a requirement that there be no gross disproportionality between the effects of a law in achieving the government's objective and its impact on rights. The Supreme Court in

⁷⁰ *Id.*, at para. 72.

⁷¹ But see Hamish Stewart, *Fundamental Justice* (Toronto: Irwin Law, 2012), at 154 [hereinafter "Stewart"] for clear explanations of the relevant concepts.

⁷² [2012] O.J. No. 1296, 2012 ONCA 186 (Ont. C.A.) [hereinafter "*Bedford*"].

the *Insite* case⁷³ recognized, but did not resolve, disagreements within the Court on determining whether a law was arbitrary.

Justice LeBel in *Ipeelee* may have introduced yet another principle of fundamental justice into the mix when he stated that “proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*”.⁷⁴ The Court’s casual⁷⁵ recognition of proportionality between crime and punishment as a principle of fundamental justice is surprising given its findings in *R. v. Malmo-Levine*:

To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected “legal rights” set out in sections 7 to 14 of the *Charter* by attributing contradictory standards to sections 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.⁷⁶

Nevertheless, there is a strong case that proportionality between crime and punishment satisfies the three-part test for a principle of fundamental justice. It is a legal principle that was recognized by Parliament in 1996 as the fundamental principle of sentencing and, although there are different versions of proportionality, it can be defined with precision.⁷⁷ It is also possible that courts might be bolder in applying a separate section 7 principle of proportionality between a crime and a sentence. In particular, given the social consensus on proportionality, it might not require that a sentence shock the public conscience or public decency before it qualifies as a disproportionate sentence.

Justice LeBel’s reference to proportionality between crime and punishment as a principle of fundamental justice may open a door that the Court closed in *Malmo-Levine*⁷⁸ and allow a two-pronged approach when challenging mandatory penalties. The first would be gross disproportionality between the crime and punishment review under section 12 of the *Charter*. As suggested above, the Court has since *Smith*⁷⁹ been quite

⁷³ *Supra*, note 4.

⁷⁴ *Ipeelee*, *supra*, note 38, at para. 36.

⁷⁵ This line in the Supreme Court’s decision may possibly be classified as *obiter*. See the discussion in *Bedford*, *supra*, note 72, at paras. 58-60.

⁷⁶ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 160 (S.C.C.) [hereinafter “*Malmo-Levine*”].

⁷⁷ Morris Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment” (2008) 28 *Oxford J. Legal Stud.* 57 [hereinafter “*Fish*”].

⁷⁸ *Supra*, note 76.

⁷⁹ *Supra*, note 25.

deferential to Parliament in this review. In *Morrisey*,⁸⁰ the Court took an abstract approach to offence seriousness and in *Latimer*,⁸¹ the Court stressed deference to Parliament's decision to elevate some sentencing purposes over others when enacting mandatory sentences. The Court has also suggested that only commonly occurring reasonable hypotheticals should be used, and Code J.'s decision in *Nur*⁸² suggests that even common hypotheticals may not be considered if the Crown can avoid imposing a mandatory sentence by electing to proceed by way of summary conviction. A separate section 7 approach might avoid some of these restraints.

8. Templates for a Section 7 Requirement of Proportionality between Crime and Punishment

There are also some templates for a section 7 approach to proportionality between crime and punishment. The first is Wilson J.'s concurrence in *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*,⁸³ where she held that an absolute liability offence violated section 7 of the Charter because it resulted in a mandatory seven days' imprisonment that was disproportionate to the offence. Although she conceded that proportionality between punishment and crime cannot be determined "with mathematical precision", Wilson J. concluded that a fit proportion between crime and punishment was a principle of fundamental justice traditionally used by trial judges in the exercise of their sentencing discretion. In contrast to the narrow and formal approach taken in *Morrisey*, Wilson J. stressed the need to consider "many different factors" in determining the seriousness of the offence. In this way, she recognized both the breadth of many offences and the relevance of the different circumstances under which offences could be committed. She concluded that seven days' imprisonment for an absolute liability offence was "grossly excessive and inhumane. It is not required to reduce the incidence of the offence. It is beyond anything required to satisfy the need for 'atonement'".⁸⁴

⁸⁰ *Supra*, note 24.

⁸¹ *Supra*, note 55.

⁸² *Supra*, note 20.

⁸³ [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter "*B.C. Motor Vehicles*"].

⁸⁴ *Id.*, at paras. 128-129.

Justice Arbour in her dissent in *Malmo-Levine*⁸⁵ also stressed that the fit between a crime and its punishment should be assessed under section 7 as well as under section 12 of the Charter. She stressed the possibility of imprisonment for the offence of marijuana possession and was less convinced than the majority that the existence of sentencing discretion would prevent the use of imprisonment for marijuana possession. Both of these approaches are promising because they focus on whether mandatory penalties are arbitrary and unjust in particular cases. They suggest that mandatory penalties, even of a week or more in prison, may still be arbitrary and disproportionate when applied in particular cases, and even if they are not so excessive as to shock public conscience or decency. Both of these templates provide a starting point for thinking about a section 7 requirement of proportionality between crime and punishment that could be distinct and perhaps less demanding than the section 12 standard, which seems to require high levels of punishment that are shocking to a public that seems to be in a more fearful, mean and punitive mood.

9. Arbitrariness and Gross Disproportionality: Should the Focus Be on Individual Offenders or Broader Legislative Objectives?

Allan Manson draws on references to arbitrariness in *B.C. Motor Vehicles* to call for re-invigorated judicial review of mandatory sentences to focus on what he calls “arbitrary disproportionality”.⁸⁶ Debra Parkes makes a somewhat similar argument.⁸⁷ Professors Manson and Parkes cite in support the section 7 jurisprudence on arbitrariness in *Chaoulli v. Quebec (Attorney General)*⁸⁸ and in the *Insite* case⁸⁹ as support for a more robust approach to Charter review of mandatory sentences. I share the desires of both of my colleagues for more robust Charter review of mandatory sentences, but I am not enthusiastic about relying on *Chaoulli* and *Insite*. These section 7 cases speak to the relation between legislative objectives and impugned measures. Courts may well find that mandatory sentences are not arbitrary in relation to Parliament’s objective of deterring

⁸⁵ *Supra*, note 76, at para. 260.

⁸⁶ Allan Manson, “Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences”, in B.L. Berger & J. Stribopoulos, eds. (2012) 57 S.C.L.R. (2d) 173 [hereinafter “Manson”].

⁸⁷ Debra Parkes, “From *Smith* to *Smickle*: The Charter’s Minimal Impact on Mandatory Minimum Sentences”, in *id.*, 149 [hereinafter “Parkes”].

⁸⁸ [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter “*Chaoulli*”].

⁸⁹ *Supra*, note 4.

and punishing crime. Mandatory sentences are an attempt to increase the certainty and severity of punishment, two central elements of deterrence. In this sense, mandatory sentences may rarely be arbitrary to Parliament's purposes, especially with respect to crimes that are more serious than driving with a suspended licence or possession of marijuana. In section 1 language, there may often be a rational connection between the legislative objective of punishment and deterrence, and the mandatory sentence.

In my view, the real mischief of mandatory sentences is not so much in their macro relation to legislative purposes, but in their micro application to individual offenders. In exceptional cases, the imposition of a mandatory sentence on a particular offender may be arbitrary and not rationally connected to the aims of punishment, but only in that and similar cases. In many respects, the appropriate judicial remedy would be a constitutional exemption, but it appears after *Ferguson*⁹⁰ that such a tailored remedy will not be available. Although cases such as *Latimer*⁹¹ and *Ferguson* may direct courts to these larger policy questions, there is in my view a need to keep judges focused on the harmful effects that mandatory sentences will impose on particular offenders. It will be easier to focus on the individual offender under more traditional understandings of proportionality that examine the fit between punishment and particular crimes and offenders, than under more novel concepts of arbitrariness and gross disproportionality that focus on legislative objectives. In these difficult times, courts should stick to their traditional strengths.⁹²

⁹⁰ *Supra*, note 46.

⁹¹ *Supra*, note 55.

⁹² In the context of mandatory sentences, I thus have sympathy with Professor Jamie Cameron's argument about the strength of an approach that focuses on matters within the traditional domain of the judiciary rather than on broader policy issues. See Jamie Cameron, "Fault and Punishment under Sections 7 and 12 of the Charter" in J. Cameron & J. Stribopoulos, eds. (2008) 40 S.C.L.R. (2d) 553, at 583. That said, I do not necessarily reject the idea of more searching policy-based s. 7 review in other contexts, but I do caution that courts are most likely to use these broader concepts in relatively rare cases where legislative facts clearly support the idea that laws are arbitrary or have grossly disproportionate negative effects, and where they conclude that the remedies are judicially manageable. Thus my concern about *Chaoulli* was less with arbitrariness review, and more about the regressive effects of the Court's negative remedy of a declaration of invalidity and its reluctance to order positive remedies in other contexts where the government may have imposed arbitrary or grossly disproportionate restrictions on the provision of health care for those who cannot afford private health care and insurance. See Kent Roach, "The Courts and Medicare: Too Much or Too Little Judicial Activism?" in Colleen Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice* (Toronto: University of Toronto Press, 2005), at 193-200.

In an interesting extra-judicial speech, Justice Fish contrasted utilitarian and retributive approaches to sentencing and suggested that the principle of proportionality resides in the latter tradition. He took note of the increasing use of mandatory sentences in Canada and suggested that

Canadian judges are obliged by law to impose the stipulated minimum custodial terms of imprisonment even when they consider it unjust to do in view of the particular circumstances of the offence or the offender. In such instances, the sentence commanded by the specific provision of the law is plainly inconsistent with the principle of proportionality ...⁹³

These statements suggest that judges may believe that they are on firmer grounds in declaring that Parliament has unconstitutionally authorized disproportionate punishment for particular offenders who commit crimes in particular circumstances than in evaluating and appearing to second-guess the utilitarian value of mandatory sentences. It is also significant that Justice Fish, in line with the Court's 1987 decision in *Smith* and its subsequent decision in *Ipeelee*, described proportionality as a matter that focuses not simply on the crime, but also on the offender and the particular circumstances under which the offence was committed.

The broader policy analysis of whether mandatory sentences are arbitrary or grossly disproportionate to legislative objectives contemplated in *Malmo-Levine*, *Chaoulli* and *Insite* may only invite judicial deference. Courts may well hold that Parliament is entitled at a macro level to assume that mandatory sentences will fulfil legislative objectives and to decide to stress certain objectives such as deterrence over others such as rehabilitation and restraint. Even if they are successful, rulings that mandatory sentences are arbitrary or grossly disproportionate may only invite replies that simply re-assert that such mandatory sentences achieve broader legislative objectives and the commissioning of research designed to demonstrate such results. It will be suggested below that such broader policy analysis of the effectiveness and necessity of mandatory sentences should be restricted to section 1, where the government bears the burden of justification.

Although a full examination of gross disproportionality review is beyond the scope of this paper, I have doubts that gross disproportionality or arbitrariness review will nullify much of the government's crime agenda. The *Insite* case should be read carefully because the Court was

⁹³ Fish, *supra*, note 77, at 69.

evaluating the gross disproportionality not of a law itself, but only of the Minister's denial of an exemption to a particular safe injection site in Vancouver. The decision was actually more limited than those of the courts below, which addressed the constitutionality of the drug laws.⁹⁴ The majority of the Ontario Court of Appeal in *Bedford*⁹⁵ also demonstrates much caution in applying the new section 7 doctrines. It specifically warned about the dangers of underestimating the benefits of criminal law and the need for the harms of criminal law clearly to outweigh the benefits to justify a court striking the law down.⁹⁶ In some respects, gross disproportionality analysis seems to mimic the attempts by the parliamentary opposition to argue that the costs of mandatory sentences outweigh their benefits.

Gross disproportionality analysis may work in some cases such as *Bedford* where there may be extensive social science to call on in measuring the effects of criminal law, but it may be less useful in evaluating the deterrent effect of drug and other laws, given the difficulties of evaluating the effectiveness of such laws.⁹⁷ Indeed, the costs of Bill C-10 have been a moving target. They have ranged from the government's prediction of \$78 million to much higher estimates, and the parliamentary budget officer has encountered difficulties in costing the law.⁹⁸ The costs of Bill C-10 remain quite unclear despite the fact that the 2011 election was fought in part on the basis of the government's refusal to reveal the costs of its crime control initiatives. The effectiveness of Bill C-10 will be even more difficult to measure. Those who wish to challenge its mandatory sentences may be better advised to focus on its disproportionate effects on particular offenders rather than attempting to prove that the sentences are arbitrary or grossly disproportionate to its legislative objectives.

Gross disproportionality and arbitrariness review may often boil down to trials by social science experts. Although Charter applicants succeeded in both *Insite* and *Bedford*, the government has the deeper

⁹⁴ See Kent Roach, "The Supreme Court's Remedial Decision in the *Insite* Case" (2012) 5 J. Parliamentary & Political L. 246.

⁹⁵ *Supra*, note 72.

⁹⁶ *Id.*, at paras. 300-305.

⁹⁷ Even with respect to well-studied initiatives such as anti-drunk driving initiatives, deterrence is notoriously difficult to either establish or debunk: H.L. Ross, *Deterring the Drinking Driver*, 2d ed. (Washington: Lexington Books, 1989).

⁹⁸ Marianne White, "Controversial crime bill to cost Canadians 19 billion: Study" *Vancouver Sun* (December 8, 2011), online: <<http://www.vancouversun.com/Controversial+crime+bill+cost+Canadians+billion+study/5832700/story.html>>.

pockets when it comes to hiring and commissioning experts. If the government loses a case on arbitrariness and gross disproportionality, such as the arbitrary gap in punishment found in *Nur* and *Smickle*, it may respond simply by increasing punishment or devoting more resources to demonstrating the effectiveness of the measure. In contrast, a finding that a mandatory sentence is unconstitutional because of its effects on exceptional offenders may force the government to provide judges with the discretion to depart from the sentence in exceptional cases. Alternatively, it may force the government to reaffirm mandatory sentences by using the override under section 33.⁹⁹

Without dismissing gross disproportionality review entirely, I am more optimistic about traditional arguments that mandatory sentences will result in punishment that is grossly disproportionate to particular crimes committed by particular offenders. Evaluating the proportionality between the crime and the punishment is within the traditional domain and expertise of the courts.¹⁰⁰ Evaluating the degree to which mandatory sentences fulfil legislative objectives and balancing the social benefits against the social costs of laws is not within the judiciary's traditional domain of expertise, at least outside the section 1 context.

Courts do not need expert evidence to measure the proportionality of punishment imposed by Parliament against particular crimes committed by particular offenders. Trial judges are in an excellent position to see the nuances of offending behaviour, the tragic backgrounds of some offenders and the devastating harms that mandatory sentences will have on particular offenders and their families. The concrete adjudicative facts found by trial judges in cases like *Smickle* may be more compelling than speculative legislative facts based on the testimony of criminologists, political scientists, philosophers and economists about the government's legitimate objectives of deterring and punishing serious crimes and the social costs and benefits of such measures. That said, the courts' concerns about invalidating mandatory sentences under *Ferguson*, as well as the need to determine whether even unconstitutional mandatory sentences can be justified, may well force the accused to join the broader policy issues about the effectiveness of mandatory sentences. In my

⁹⁹ Parkes, *supra*, note 87. Public opinion research cited by Professor Parkes suggests that the public may have some sympathy with exceptional offenders affected by mandatory sentences.

¹⁰⁰ This concept was explained by Lamer J. in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) and has been defended by Jamie Cameron in "From the MVR to *Chaoulli v. Quebec: The Road Not Taken and the Future of Section 7*" in J. Cameron, P. Monahan & B. Ryder, eds. (2006) 34 S.C.L.R. (2d) 105.

view, the best place for the accused to fight such a battle is under section 1, where the government with all its superior resources bears the burden of justification.

10. Engaging the Government's Crime Agenda under Section 1: Who's Afraid of Section 1?

Justice Molloy's section 1 analysis in *Smickle* suggests that courts could respectfully engage with Parliament about the merits of mandatory minimum sentences. In *Smickle*, Molloy J. accepted that the government's objective of controlling gun violence was important enough to justify the limitation of Charter rights. She noted that no evidence was presented to establish the rational connection between this objective and the mandatory sentence, but she was prepared to assume that there was a rational connection. Justice Molloy then concluded that the mandatory sentence did not violate the Charter as little as possible because

it is possible to impose a presumptive sentence for possession of a loaded weapon, while still preserving a judicial discretion to be exercised in those rare circumstances where the presumptive sentence would be grossly disproportionate given the circumstances of the offender and the offence.¹⁰¹

She added that any judicial departures from the presumptive sentence could be appealed and that the presumptive sentence approach was consistent with approaches used in the United Kingdom and South Africa.

Moving to the last stage of the section 1 test, Molloy J. noted that while "every reasonable person would support reducing violent crime and protecting the public",¹⁰² there was no evidence that mandatory sentences were an effective deterrent. Justice Molloy then balanced the objectives of the law against its harmful effects, not only with respect to the violation of sections 7 and 12 but also with respect to

(1) the sentence inflation for persons who, although not deserving a sentence of less than a one year sentence, must now receive at least three years; (2) the danger of increased recidivism by incarcerating youthful first offenders for extended periods of time with hardened criminals; (3) contributing to the over-crowded conditions in our correctional facilities; (4) the systemic disincentive for guilty pleas and

¹⁰¹ *Smickle, supra*, note 5, at para. 113.

¹⁰² *Id.*, at para. 120.

early resolutions if the minimum sentence will be three years in prison for any offender charged with the indictable offence; and, (5) as the Supreme Court noted in *Smith*, the unfair advantage given to the Crown as an accused will be under pressure to plead guilty to a lesser included offence in order to avoid the risk of the mandatory minimum.¹⁰³

The section 1 analysis in *Smickle* suggests that there could be a genuine dialogue between courts and legislatures over crime control measures. In this dialogue, courts can defer to legislative crime control objectives while at the same time objectively assessing whether such objectives could be fulfilled by less drastic measures, such as the use of presumptive as opposed to mandatory sentences.

The dialogue that occurred between the Court and Parliament in *Smickle* might, however, seem weighted in the direction of rejecting the government's attempt to justify mandatory sentences, given that Molloy J. prefaced the section 1 analysis by doubting that violations of sections 7 and 12 could ever be justified under section 1.¹⁰⁴ The Ontario Court of Appeal similarly observed in *Bedford* that “[w]hile non-compliance with s. 7 can theoretically be justified under s. 1 of the Charter, in reality s. 1 will rarely, if ever, trump a s. 7 infringement.”¹⁰⁵ Both courts accurately reflected Supreme Court jurisprudence, which has never held that a violation of section 7 (or of section 12) is justified under section 1.¹⁰⁶ In my view, there is no need to place such a thumb on the section 1 balancing scales.

Section 1 is the real focus of dialogue or interaction between courts and legislatures.¹⁰⁷ The reluctance of the Supreme Court to hold that violations of either section 7 or section 12 of the Charter can ever be justified under section 1 of the Charter has arguably made the Court less generous when interpreting those rights because of the difficulty of governments justifying exceptions to those rights.¹⁰⁸ Indeed, it is possible

¹⁰³ *Id.* at para. 122.

¹⁰⁴ *Id.*, at paras 100-101.

¹⁰⁵ *Supra*, note 72, at para. 89.

¹⁰⁶ Stewart, *supra*, note 71, at ch. 6.

¹⁰⁷ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001). For important recent work on proportionality, see Aharon Barak, *Proportionality* (Cambridge: Cambridge University Press, 2012).

¹⁰⁸ For example, the Court under s. 7 has only constitutionalized common law requirements of subjective fault for murder, attempted murder and war crimes, in part because the Court must know that a general s. 7 principle of subjective fault might invalidate a whole range of crimes based on negligence because of the effective removal of the s. 1 safety valve. See Roach, “Mind the Gap”, *supra*, note 3. A willingness to allow some s. 1 justifications of s. 7 violations might also make courts less concerned about the existence of a social consensus before recognizing something as a

to argue that all mandatory penalties should infringe section 7 or section 12 on separation of powers grounds alone as infringing the right of judges to determine fit sentences, while also conceding that particular mandatory sentences might be justified by the government under section 1.

Courts should evaluate mandatory sentences straight up. In many cases, they may conclude, as the Court did in *Smickle*, that there are less drastic alternatives and that the effects of the mandatory sentences on offenders outweigh their often uncertain benefits in advancing the government's objectives, but there may be some cases where mandatory sentences can be justified. Such a dialogue should be conducted under section 1, where the government with its superior resources will have the burden of justification and uncertainties will be resolved against the government rather than through an interpretation of section 7 or section 12 of the Charter. Accused who seek to challenge mandatory sentences as arbitrary or grossly disproportionate will have to prove that the government has been irrational, whereas the government will have to justify mandatory sentences as rational and necessary governmental policy under section 1.

An open and full section 1 analysis may also allow the Court to speak more directly to the government and its supporters about their strongly held concerns about crime. As Molloy J.'s approach in *Smickle*¹⁰⁹ demonstrates, courts can cheerfully accept the legitimacy of the government's crime control objectives and even its objective in controlling judicial sentencing discretion, but still conclude that mandatory sentences are not necessary. A full section 1 analysis was conducted in many landmark section 7 cases, including *R. v. Vaillancourt*,¹¹⁰ *R. v. Martineau*¹¹¹ and *R. v. Charkaoui*,¹¹² and the judicial decisions were the better for it. In many cases, there will be a range of less rights-invasive means to pursue the various objectives in the government's crime agenda. Even in cases where there may be no reasonable alternatives, the harms of the new laws to Charter rights and particular offenders will

principle of fundamental justice. For criticism of such a requirement for s. 7 rights, see Peter Hogg, "The Brilliant Career of Section 7 of the Charter", in this volume. A willingness to hold that some violations of s. 12 could be justified under s. 1 might also make courts less concerned about finding that mandatory sentences outrage public decency or shock the conscience. For criticism of such requirements for s. 12 violations, see Manson, *supra*, note 86.

¹⁰⁹ *Supra*, note 5.

¹¹⁰ [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

¹¹¹ [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

¹¹² [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

often be great and certain compared to the uncertain social benefits of mandatory sentences.

IV. CONCLUSION

The *Safe Streets and Communities Act* relies on prosecutorial discretion and a general judicial reluctance to strike down mandatory sentences. The government has shrewdly capitalized on those areas of the law that will make it difficult for the accused to convince courts to strike down laws under the Charter. This is not to say that Charter challenges are impossible, only that they will be difficult. In particular, the use of reasonable hypothetical in section 12 analysis may be precluded by reliance on the assumption that longer mandatory sentences will not be applied because the Crown has the power to avoid such sentences by electing to prosecute the relevant crime by way of summary conviction. Courts will, as under the pre-Charter case of *Smythe*¹¹³ and as confirmed most recently by the Court in *Nixon*,¹¹⁴ be reluctant to review such exercises of prosecutorial discretion, and it will not be possible in most cases for accused to establish that an abuse of process has occurred.

The Supreme Court ultimately will have to decide whether it wishes to maintain the level of judicial deference towards mandatory sentences seen in cases such as *Morrisey*.¹¹⁵ The government has rarely exceeded four years in its new mandatory sentences. Some, but not all, lower courts have interpreted *Morrisey* as a sign that they should be extremely deferential to mandatory sentences. The section 12 jurisprudence and the new section 7 proportionality principle briefly mentioned in *Ipeelee*¹¹⁶ hinge on requirements that punishment be proportionate to crimes. There are resources in proportionality jurisprudence to focus not only on the abstract seriousness of the crime as measured by its *mens rea*, but on the particular circumstances of the offence and the offender. A seven-year mandatory penalty was struck down in *Smith*¹¹⁷ because of both the breadth of the importing narcotics offence and the fact that the offender the Court was concerned about was a young first-time offender. The facts in *Smickle*¹¹⁸ — a first-time offender who supported children and made a

¹¹³ *Supra*, note 10.

¹¹⁴ *Supra*, note 14.

¹¹⁵ *Supra*, note 24.

¹¹⁶ *Supra*, note 38.

¹¹⁷ *Supra*, note 25.

¹¹⁸ *Supra*, note 5.

stupid albeit criminal mistake — made all the difference to the court's conclusion. *Ipeelee* points towards a richer and more contextual understanding of moral blameworthiness that makes room for consideration of how the particular characteristics and background of offenders may affect what is necessary to punish, deter and rehabilitate them.

Despite this potential, proportionality analysis conducted under either section 7 or section 12 of the Charter could still be quite deferential to the new mandatory sentences, especially those that can be mitigated by the prosecutor's discretion to elect to proceed under less punitive summary conviction procedures and those that are of a shorter duration. The Court could stick with the deference towards Parliament's decision to use mandatory sentences seen in cases such as *Morrisey* and *Latimer*.¹¹⁹ Although the *Insite*¹²⁰ and *Bedford*¹²¹ cases produced Charter victories, it is far from clear that accused will be able to use those precedents to demonstrate that the new mandatory sentences are arbitrary or grossly disproportionate to the government's legislative objectives in deterring and punishing crimes or controlling judicial discretion. It is possible that the Canadian criminal justice system could be made much more punitive, harsher and meaner without violating Charter norms. The Charter may not save us from ourselves and the governments we elect. The very real possibility that the Charter will achieve little in curbing the government's crime agenda would confirm that judicial review of prosecutorial discretion and mandatory sentences remains a weak spot in Charter jurisprudence. This prospect dampens my celebration of the 30th anniversary of the Charter.

¹¹⁹ *Supra*, note 55.

¹²⁰ *Supra*, note 4.

¹²¹ *Supra*, note 72.

