January 2016

Reconsidering the Constitutionality of Mandatory Minimum Sentences Under Section 231(5)(e) Post-Luxton

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Abstract
Section 231(5)(e) of the *Criminal Code* elevates murder to first-degree murder when a death is caused while committing unlawful confinement per s. 279 of the *Criminal Code*. The corresponding mandatory sentence is life imprisonment with no eligibility for parole until 25 years have been served. The Supreme Court of Canada held that this provision was constitutional in *R v Luxton*, since it did not violate the principles of fundamental justice and was not considered cruel and unusual punishment, contrary to s. 7 and 12 of the *Canadian Charter of Rights and Freedoms*, respectively.

However, lower courts ought to reconsider the constitutionality of s. 231(5)(e) due to significant changes in the law since *Luxton* was decided. The purpose of this paper is to inspire defence counsel to challenge the constitutionality of this provision. This paper will demonstrate how the elimination of the Faint Hope Clause, changes in the Aboriginal sentencing process, and changes to the judicial interpretation of s. 12 of the *Charter* provide lower courts with the authority to reconsider the constitutionality of s. 231(5)(e).

Keywords
constitutional law, mandatory minimums, Charter violations, homicide, cruel and unusual punishment, sentencing principles, sentencing, aboriginal offenders, faint hope clause, Gladue, forcible confinement

Cover Page Footnote
Laura Metcalfe is a third year law student at the University of Ottawa. She owes special thanks to Lorne Goldstein for inspiring this paper.

This article is available in Western Journal of Legal Studies: https://ir.lib.uwo.ca/uwojls/vol6/iss2/2
RECONSIDERING THE CONSTITUTIONALITY OF MANDATORY MINIMUM SENTENCES UNDER SECTION 231(5)(e) POST-LUXTON

LAURA METCALFE*

INTRODUCTION

The Honourable Justice Paciocco, a leading jurist for the Ontario Court of Justice, articulated in a recent paper why lawyers and judges need to be concerned with the interaction between mandatory minimum laws and the Canadian Charter of Rights and Freedoms,¹ as well as the fundamental principles of sentencing. In particular, the Honourable Justice Paciocco argued that:

Not only do minimum sentencing provisions reduce judicial sentencing discretion, but they also require outcomes that do not reflect familiar if not fundamental principles of sentencing, and require the imposition of harsher penalties than a judge would otherwise find fit.

... [I]ndividual laws do not exist in a vacuum. They form part of a larger system of laws that the judge is equally required to apply. Those laws include constitutional rules that can invalidate individual laws that breach fundamental principles, and a range of sentencing rules that do not sit easily with minimum sentencing provisions. Judges have a responsibility to determine how individual laws, including minimum sentencing provisions, operate within the network of rules.²

This paper will focus on the mandatory minimum sentence imposed by s. 231(5)(e) of the Criminal Code³ and how it operates within the protections guaranteed by the Charter.

Section s. 231(7) of the Criminal Code states that, "All murder that is not first-degree murder is second-degree murder."⁴ The parole eligibility for a person convicted of first-degree murder is 25 years. Under second-degree murder, the trial judge has the

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³ RSC 1985, c C-46 [Criminal Code].
⁴ Ibid, s 231(7).
discretion to impose a period of parole eligibility anywhere between 10 and 25 years. ⁵
Section 231 of the *Criminal Code* is designed to “impose the longest possible term of
imprisonment without eligibility for parole upon those who commit the most grievous
murders. It is concerned with [...] those who murder while committing crimes of
domination.” ⁶

Section 231(5) of the *Criminal Code* lists the crimes of domination that
Parliament deems to be of such moral blameworthiness as to elevate a murder charge
from second-degree to first-degree:

(5) Irrespective of whether a murder is planned and deliberate on the part of any
person, murder is first degree murder in respect of a person when the death is
caused by that person while committing or attempting to commit an offence under
one of the following sections:
(a) section 76 (hijacking an aircraft);
(b) section 271 (sexual assault);
(c) section 272 (sexual assault with a weapon, threats to a third party or
causing bodily harm);
(d) section 273 (aggravated sexual assault);
(e) section 279 (kidnapping and forcible confinement); or
(f) section 279.1 (hostage taking). ⁷

For an accused to be found guilty under s. 231(5)(e), the Crown must establish
beyond a reasonable doubt that (1) the accused was guilty of the underlying crime of
forcible confinement or attempting to commit that crime; (2) the accused was guilty of
the death of the victim; (3) the accused participated in the death in such a manner that
he or she was a substantial cause of the victim’s death; (4) there was no intervening act
which resulted in the accused no longer being substantially connected to the death of the
victim; and (5) the forcible confinement and death were part of the same series of
events. ⁸ If the essential elements of s. 279 of the *Criminal Code* are not met, the
accused will be guilty of second-degree murder. As such, the trial judge will have the
discretion to determine the period of parole ineligibility. In exercising this discretion,
the trial judge will consider the accused’s individual moral blameworthiness, along with
the aggravating and mitigating factors relating to the offence and the accused. ⁹

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⁵ *R v Harbottle*, [1993] 3 SCR 306 at 314 [*Harbottle*].
⁶ *Ibid*.
⁷ *Criminal Code, supra* note 3 at s 231(5) [*supra*] at emphasis added).
⁸ *Harbottle, supra* note 5 at 308.
⁹ *Criminal Code, supra* note 3, s 718.
The significant effects of the 25-year mandatory parole ineligibility imposed by s. 231(5)(e) are illuminated when analyzing the decisions in *R v Luxton* and *R v White*\(^\text{10}\). In *White*, the accused was celebrating his eighteenth birthday with a group on the date of the offence. The group formed a common plan to rob the victim of his headphones, which escalated to fatally stabbing the victim. The accused’s charge was elevated to first-degree murder since he roughly and tightly held the victim during the attack.\(^\text{11}\) If the essential elements of forcible confinement had not been established, the accused would have been guilty of second-degree murder.\(^\text{12}\) If that were the case, the mandatory ineligibility for parole imposed by s. 231(5)(e) would not have applied, providing the trial judge with discretion to determine a just and appropriate period of parole eligibility. This would allow the trial judge to account for the accused’s individual circumstances, moral blameworthiness, and young age.\(^\text{13}\) It is difficult to imagine that Mr. White would have received a parole ineligibility period close to the maximum of 25 years required by s. 231(5)(e). For this reason, it is necessary to consider whether the mandatory parole ineligibility of 25 years imposed by s. 231(5)(e) is constitutional.

In *Luxton*, it was argued that this mandatory minimum sentence amounted to cruel and unusual punishment, contrary to s. 12 of the *Charter*. This was premised on the idea that the punishment was grossly disproportionate to the crime. The appellant further submitted that s. 231(5)(e) violated s. 7 of the *Charter*. It was argued that this violation is contrary to the principles of fundamental justice, as it failed to individualize the sentences imposed on each accused.\(^\text{14}\) The Supreme Court of Canada (SCC) rejected both of these submissions.

While the decision in *Luxton* would generally be binding, the SCC has recently held that lower courts can depart from authoritative precedents where “new legal issues are raised as a consequence of significant developments in the law, or there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.”\(^\text{15}\) In the recent SCC decision of *Carter v Canada (AG)*, the court reaffirmed that the principle of “*stare decisis* is not a straitjacket that condemns the law to stasis.”\(^\text{16}\) As there have been significant developments in the law since *Luxton*, it is appropriate to reconsider the constitutionality of s. 231(5)(e). The purpose of this paper is to demonstrate that the repeal of s. 745.6 of the *Criminal Code*, known as the Faint Hope Clause (FHC), the recent changes in Aboriginal sentencing law, and the recent changes

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10 [1990] 2 SCR 711 [*Luxton*]. Note: In this decision, the Supreme Court refers to s 214(5)(e) and s 669 of the *Criminal Code* which reads the same as the current s 231(5)(e); *R v White*, 2014 ONCA 64, leave to appeal refused [*White*].
11 *White*, supra note 10 at paras 80-84.
13 *Criminal Code*, supra note 3, s 718.1.
15 *Canada (AG) v Bedford*, 2013 SCC 72 at para 42 [*Bedford*].
16 *Carter v Canada (AG)*, 2015 SCC 5 at para 44 [*Carter*].
in s. 12 jurisprudence, provide lower courts with the authority to depart from the decision in *Luxton*.

I. ELIMINATING THE FHC PERMITS A LOWER COURT TO RECONSIDER THE CONSTITUTIONALITY OF SECTION 231(5)(e)

The first material change in the law since *Luxton* is that s. 745.6 of the *Criminal Code* was repealed on December 2, 2011. This section allowed a person serving a sentence greater than fifteen years to apply for early parole eligibility. The SCC relied on the FHC in *Luxton* when upholding the constitutionality of s. 231(5)(e). The SCC reasoned that the relief this clause made available to persons convicted of first-degree murder ensured that a sentence could take into account the individual circumstances of each accused.

While lower courts should be reluctant to depart from precedent, recent jurisprudence indicates that the threshold to do so is not high. The elimination of the FHC represents a fundamental change in the parameters of the debate regarding the constitutionality of s. 231(5)(e) and is sufficient to permit a lower court to reconsider this issue. This is because the SCC relied on two points in upholding the constitutionality of s. 231(5)(e): (1) Parliament’s authority to define certain offences as inherently grave; and (2) the existence of the FHC, which protected the exceptions to Parliament’s general rule that persons who commit murder deserve the harshest sentence that the *Criminal Code* offers.

**The History and Purpose of the FHC**

The FHC was introduced in 1976 following the abolition of the death penalty. The FHC permitted prisoners serving a sentence of at least fifteen years to make an application to the Chief Justice of the province where the conviction occurred for a reduction in their parole eligibility. The prisoner must have served at least fifteen years prior to making such an application. The FHC was added as an incentive for inmates serving life sentences to rehabilitate themselves to obtain early parole release.
Unlike most inmates serving fixed sentences, those serving life sentences are not entitled to statutory release. Instead, they must be granted parole before they may be released from custody, subject to the supervision of Correctional Services of Canada and other parole conditions. As the name suggests, it is difficult to be granted parole early under the FHC. However, if prisoners take exceptional rehabilitative measures and are considered low-risk, it is generally considered contrary to the public interest to keep them incarcerated.

The enactment of the FHC implies that Parliament was aware that other countries have lower periods of parole ineligibility for persons convicted of first-degree murder. The average parole ineligibility period for persons convicted of murder received in other Western countries is fifteen years. Canada is the world leader among Western countries for the average time spent in custody while serving a sentence for first-degree murder.

To seek a reduction in parole eligibility, the prisoner must first apply to the Chief Justice of the province in which his or her conviction took place. The Chief Justice, or a designated Superior Court Justice, then determines whether the applicant has shown that there is a reasonable prospect that the application will succeed. This determination is based on the following criteria: (1) the character of the applicant; (2) the applicant’s conduct while serving the sentence; (3) the nature of the offence for which the applicant was convicted; (4) any information provided by a victim; and (5) any other matters that the judge considers relevant in the circumstances. If the Chief Justice decides that there is a reasonable prospect of success, then a twelve-person jury from the community where the applicant resides must unanimously decide whether to grant a prisoner early parole. At the screening stage, the Chief Justice will consider information such as the prisoner’s personal education and employment history, marital status, adult and juvenile criminal history, medical history, disciplinary evaluations, relationships with staff, family, and community are generally considered by the Chief Justice at the screening stage. The jury will then consider this information.

If the jury finds that the prisoner’s sentence ought to be reduced, the length of the accused’s parole ineligibility period may also be lowered. Despite this opportunity, the “onerous nature of the process likely accounts for the high rate of eligible prisoners

25 MacKay, supra note 21 at 2.
27 MacKay, supra note 21 at 2.
28 John Howard, supra note 24 at 4; ibid at 5-6.
29 MacKay, supra note 21 at 3; Criminal Code, supra note 3, s 745.6.
30 John Howard, supra note 24 at 8.
31 Stein, supra note 26 at 3.
self-selecting out of the process entirely.\textsuperscript{32} A study by Correctional Services Canada carried out between 1987 and 2013 revealed that 1,635 prisoners had cases that were eligible for a Judicial Review Hearing under the FHC.\textsuperscript{33} While 827 of those prisoners were eligible for a Judicial Review Hearing, only 139 of them have been released on early parole since 1987.\textsuperscript{34} The prisoners who were successful under this process were granted early release by the National Parole Board, which is a Board composed of ordinary Canadians “who are arguably not pre-disposed to feeling sympathy for convicted murderers, [yet] feel that justice is not necessarily being served by keeping the low-risk applicants who make it through the screening process imprisoned for the long-term.”\textsuperscript{35} The FHC process is difficult in order to ensure that only low-risk, rehabilitated prisoners succeed in the multi-stage process to maintain the safety of the community and confidence in the administration of justice.\textsuperscript{36}

Public demands for the repeal of the FHC stemmed from contentious, high-profile applications. For example, when the infamous serial-killer Clifford Olson applied under the FHC, “the media and public backlash was immediate and intense, although little attention was paid to the celebrity [sic] of the rejection of his application by the empanelled jury.”\textsuperscript{37} The John Howard Society, a non-profit charity whose mission is to seek “effective, just and humane responses to the cause and consequences of crime,”\textsuperscript{38} submitted to Parliament that the elimination of the FHC was unjust and inhumane.\textsuperscript{39} The FHC was repealed by Bill C-6 and is no longer available to prisoners found guilty after December 2, 2011.\textsuperscript{40} This change in circumstances gives lower courts the authority to reconsider the constitutionality of s. 231(5)(e), specifically because the SCC relied heavily on the existence of the FHC in its decision to uphold the constitutionality of s. 231(5)(e).

\textbf{The SCC’s Reliance on the FHC}

The SCC relied on the FHC when holding that s. 231(5)(e) of the \textit{Criminal Code} was not contrary to ss. 7 or 12 of the \textit{Charter}. Section 12 of the \textit{Charter} provides

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{32} John Howard, \textit{supra} note 24 at 6.
\item \textsuperscript{33} Public Safety Canada Portfolio Corrections Statistics Committee, \textit{Corrections and Conditional Release Statistical Overview 2013}, Catalogue No PS1-3/2013E-PDF (Ottawa: Public Works and Governmental Services Canada) at 101. It is worth noting again that the FHC applies retroactively to persons convicted prior to December 2, 2011.
\item \textsuperscript{34} \textit{Ibid}.
\item \textsuperscript{35} John Howard, \textit{supra} note 24 at 10.
\item \textsuperscript{36} \textit{Ibid}.
\item \textsuperscript{37} \textit{Ibid} at 6.
\item \textsuperscript{38} \textit{Ibid} at 2.
\item \textsuperscript{39} \textit{Ibid} at 13.
\item \textsuperscript{40} Bill S-6, \textit{An Act to amend the Criminal Code and another Act (Serious Time for the Most Serious Crime Act)}, 3rd sess, 40th Parl, 2010 (assented to 23 March 2011), SC 2011, c 2, online: <http://www.csc-scc.gc.ca/victims/003006-1001-eng.shtml>.
\end{itemize}
\end{footnotesize}
protection to individuals against sentences that are so excessive as to outrage society’s sense of decency. The test to determine whether a punishment is contrary to s. 12 of the *Charter* considers both the purpose of the punishment and the effect it has on the accused. When determining that s. 231(5)(e) was not contrary to s. 12 of the *Charter*, the SCC emphasized that the FHC provided an opportunity for prisoners to apply for early parole:

Even in the case of first degree murder, Parliament has been sensitive to the particular circumstances of each offender through various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole.

While the SCC also mentions the availability of escorted absences from custody and the Royal Prerogative Of Mercy, it was arguably the availability of the FHC that saved the constitutionality of s. 231(5)(e). The Royal Prerogative of Mercy is an academic construct only. The test is much more onerous than the FHC and there is no evidence available to suggest that any person guilty of murder in Canada has ever received clemency under this provision. Escorted absences during a life sentence similarly will not change the fact that a person convicted for murder under s. 231(5)(e) is ineligible for parole for a minimum of 25 years. Escorted absences are an essential part of rehabilitation during incarceration and do not have any impact on the length of a prison sentence. When looking at the jurisprudence governing s. 12 *Charter* claims, the only case in which the judiciary gave any consideration to escorted absences was in *Luxton*. The aforementioned legal constructs do not ultimately address the fundamental concern of the elimination of the FHC. The SCC explicitly relied on the FHC to justify the constitutionality of s. 231(5)(e) in *Luxton*.

Now that the FHC has been repealed, a person found guilty under s. 231(5)(e), but who did not plan the murder, no longer has hope for parole for at least 25 years. When reconsidering the constitutionality of s. 231(5)(e), it must be remembered that Canadians convicted of first-degree murder spent the highest average amount of time in custody when compared to other Western countries even before the FHC was repealed. The difference of fifteen years in parole eligibility that results from the

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42 *Ibid*.
43 *Luxton*, *supra* note 10 at para 12.
44 *White*, *supra* note 10.
46 *Luxton*, *supra* note 10 at para 12.
elimination of the FHC is therefore a substantial change that provides lower courts the authority to reconsider the constitutionality of section 231(5)(e).

The SCC also referred to the availability of the FHC in its finding that s. 231(5)(e) of the Criminal Code was not contrary to s. 7 of the Charter. The principles of fundamental justice require that the specific sentencing length for offences reflect differing degrees of moral blameworthiness. Further, the principles of fundamental justice require that sentencing be individualized based on the particular circumstances of the accused. In contrast, s. 231(5)(e) imposes the same mandatory life sentence, with no parole eligibility for 25 years, regardless of the individual characteristics of a accused or the facts surrounding the commission of the offence.

In the s. 7 Charter analysis of section 231(5)(e), the SCC emphasized that the FHC provided for sensitivity to the individual circumstances of each case:

> [E]ven in cases of first degree murder, [the FHC] provides that after serving 15 years the offender can apply to the Chief Justice in the province for a reduction in the number of years of imprisonment without eligibility for parole having regard for the character of the applicant, his conduct while serving the sentence, the nature of the offence for which he was convicted and any other matters that are relevant in the circumstances. This indicates that even in the cases of our most serious offenders, Parliament has provided for some sensitivity to the individual circumstances of each case when it comes to sentencing.

As a result of the revocation of the FHC, a sentence under s. 231(5)(e) can no longer be modified based on the specific circumstances of the accused or a particular offence, which is contrary to the principles of sentencing set out in s. 718.1 of the Criminal Code. This is significant because currently a court cannot consider, for example, whether weapons were used or if the accused was intoxicated or any other aggravating or mitigating circumstances in the commission of the offence. These differences between accused can be significant and thus warrant different sentences under s. 231(5)(e).

II. THE CHANGES IN LAW FOR SENTENCING ABORIGINAL OFFENDERS

Significant developments have also occurred with respect to sentencing Aboriginal accused since the SCC’s decision in Luxton. In 1996, Parliament amended the Criminal Code to codify the objectives of sentencing principles. Section 718.2(e)

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48 R v Ipeelee, 2012 SCC 13 at para 37 [Ipeelee].
50 Luxton, supra note 10 at para 9.
51 Criminal Code, supra note 3, s 718.1.
52 Ipeelee, supra note 48 at para 35.
now mandates that “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.” In 1999, the SCC in *R v Gladue* interpreted Parliament’s intent in enacting s. 718.2(e) of the *Criminal Code*:

> It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament’s 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.

The decision in *Gladue* advised courts to consider the unique systemic and background factors when determining the appropriate sentence, particularly for Aboriginal offenders. Although the accused in *Gladue* was Aboriginal, the court declined to apply any of the relevant factors. As a result, the lower courts struggled to consistently apply these factors. In response, in *Ipeelee* the SCC clarified the application of the *Gladue* factors by holding that a judge must consider the unique systemic or background factors which may have played a part in bringing the particular Aboriginal accused before the courts.

The SCC further held that systemic and background factors may have bearing on an Aboriginal accused’s moral culpability. Many Aboriginal accused find themselves in situations of social and economic deprivation that provide limited options for positive personal development. The reality is that these factors constrain the moral culpability of Aboriginal accused in certain circumstances. The SCC held that “[f]ailing to take these circumstances into account would violate the fundamental principle of sentencing—that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

Despite the requirement for judges to consider the systemic and background factors when crafting an appropriate sentence, this arguably has little practical effect for persons charged with first-degree murder under s. 231(5)(e). In *R v Wells*, for example, the SCC cited *Gladue* on this point:

53 *Criminal Code, supra* note 3, s 718.2(e).
54 [1999] 1 SCR 688 [*Gladue*].
55 *Ibid* at para 64.
56 *Ipeelee, supra* note 48 at para 59.
57 *Ibid* at para 73.
58 *Ibid*.
59 *Ibid* [emphasis in original].
Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.  

Moreover, there is ample case law to demonstrate the minimal effect the Gladue factors had on the sentence imposed. The more violent and serious the offence, for example, the more likely it is that the sentence for Aboriginals and non-Aboriginals will be similar. However, the courts must still apply systemic and background factors in all cases with Aboriginal persons. The Court of Appeal for Ontario held in both R v Jensen and R v Kakekagamick that the Gladue sentencing principles apply in cases involving Aboriginal persons and serious offences. This is consistent with the SCC’s unequivocal decision in Ipeelee that a judge must consider the unique systemic or background factors that may have brought the particular accused before the courts.  

The appellate court in R v Ladue, for example, found that the Gladue factors significantly affected what constituted a proportionate sentence. In Ladue, the Aboriginal accused was sentenced to three years’ imprisonment for breaching his long-term supervision order. He had 40 prior convictions, including a number of sexual offences. The British Columbia Court of Appeal reduced the sentence to “one year on the ground that the sentencing judge failed to give sufficient weight to [his] circumstances as an aboriginal [person]. [His] parents had died at a very young age, and at the age of five, he was sent to a residential school, where he suffered from psychical, sexual, emotional and spiritual abuse.”  

The decision in Ladue is irreconcilable with the SCC’s decision in Ipeelee, where the Court clearly recognized that some circumstances may reduce a person’s moral blameworthiness regardless of the crime. Nonetheless, s. 231(5)(e) prevents courts from considering any factors relating to an Aboriginal accused’s background circumstances. Despite the clear legislative intent in s. 718.2(e), and an even clearer

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60 R v Wells, [2000] 1 SCR 207 at para 42, citing Gladue, supra note 54 at para 79.
61 See R v Anaquod, [2005] 269 Sask R (Sask CA) where the Court held that despite the Gladue factors, a conditional sentence was not appropriate. Similarly, in R v Laliberte, [2000] 189 Sask R 189 (Sask CA) where the Court also refused to grant a conditional sentence. On the other hand, in R v Gates, [2002] 166 BCAC 197 (BCCA) relied on the principle in Wells, but nevertheless reduced the Aboriginal defendant’s sentence from 56 months to 48 months.
62 (2005) 74 OR (3d) 561 at para 27 (Ont CA) [Jensen].
63 (2006) 81 OR (3d) 664 (Ont CA) [Kakekagamick].
64 Jensen, supra note 62 at para 27; ibid at para 38.
65 Ipeelee, supra note 48 at para 59.
66 (2011) 97 WCB (2d) 56 [Ladue].
mandate from the SCC in *Ipeelee*, Aboriginal accused convicted under s. 231(5)(e) will be treated like every other accused: they will receive a life sentence with no parole eligibility for 25 years and no hope of early parole. While this argument equally applies to the entire classificatory scheme that distinguishes between first-degree and second-degree murder, the scope of this paper is limited to demonstrating that these significant changes governing sentencing Aboriginal accused enable lower courts to reconsider the SCC’s decision in *Luxton* under s. 231(5)(e).

It could be argued that the appropriate remedy would be to read down s. 231(5)(e) when applied to Aboriginal accused in order to accommodate s. 718.2(e) and the *Gladue* principles.\(^\text{68}\) This interpretation, however, would likely be an error in law. The SCC in *R v Ferguson*\(^\text{69}\) held that, generally, where a provision is found to be grossly disproportionate in effect to even one person, striking the entire provision is a less intrusive remedy because it allows Parliament to respond to the constitutional defect.\(^\text{70}\) Therefore, if a court finds that s. 231(5)(e) fails to take into account the moral blameworthiness of an Aboriginal accused is unconstitutional, then the appropriate remedy would be to strike down the entire provision.

***III. THE FAILURE TO CONSIDER REASONABLE FORESEEABLE CASES IN LUXTON WARRANTS A RECONSIDERATION OF THE CONSTITUTIONALITY OF SECTION 231(5)(E) OF THE CRIMINAL CODE***

The final material change in the law is that the judicial interpretation of s. 12 of the *Charter* has evolved significantly since *Luxton*. When determining whether a mandatory minimum sentence is cruel and unusual, the SCC in *R v Nur*\(^\text{71}\) held that courts may consider not only whether a sentence is grossly disproportionate for the specific accused, but also for that accused in reasonably foreseeable cases.\(^\text{72}\) Because this two-part analysis has developed since *Luxton* was decided, the SCC did not consider reasonably foreseeable cases in its decision to uphold the constitutionality of s. 231(5)(e). This development in the legal analysis points to an opportunity for the courts to revisit the conclusions made in *Luxton*.

The SCC in *Nur* determined the constitutionality of s. 231(5)(e) before the development of the two-stage test for determining s. 12 *Charter* challenges.\(^\text{73}\) The first step in considering whether a sentence violates the right not to be subject to cruel and unusual punishment is an examination of all the relevant contextual factors specific to

\(^{68}\) See *R v King*, 2007 ONCJ 238, where the Court read down the provision requiring a mandatory minimum sentence for impaired driving for Aboriginal defendants.

\(^{69}\) 2008 SCC 6 [*Ferguson*].

\(^{70}\) *Ibid* at para 51; Paciocco, *supra* note 2 at 197.

\(^{71}\) *Nur, supra* note 42 at para 58; Paciocco, *supra* note 2 at 194.

\(^{72}\) *Nur, supra* note 42 at para 58.

\(^{73}\) *Ibid* at paras 52-58. See also: *Smith, supra* note 45 at 1073; *Goltz, supra* note 46 at 500; *Morrissey, supra* note 46.
the accused. The contextual factors include “the gravity of the offence, the personal characteristics of the accused and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular accused or to protect the public from this particular offender.”

The SCC first alluded to this two-part test in *R v Smith*. In that decision, the SCC struck down a mandatory minimum sentence of seven years for importing narcotics, on the grounds that the law was too wide in scope; for example, a student driving home to Canada from the United States with her “first joint of grass” may be indicted. The SCC acknowledged that a long prison sentence was appropriate with “few exceptions for people who import drugs into the country, but held that the law was unconstitutional because it could [also] catch people for whom the seven-year minimum sentence would be grossly disproportionate.”

In *R v Goltz*, the SCC set out additional relevant factors necessary for a full contextual understanding of a sentencing provision, including the actual effect of the punishment on the individual and the existence of valid alternatives to the punishment imposed. The SCC further narrowed the scope of the inquiry by holding that laws should not be struck down based on circumstances that were unlikely ever to arise. The focus must be on “reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases.”

While these cases were decided prior to *Luxton*, an ongoing debate on whether a court should be required to consider reasonable hypotheticals during a s. 12 Charter analysis emerged. The Attorney General of Ontario recently argued in *Nur* that the reasonable hypothetical is not a part of the s. 12 Charter analysis. This argument was dismissed by the SCC, which held that it is appropriate for courts to consider how the law may impact third parties in reasonably foreseeable situations when determining whether mandatory minimum sentencing laws violate s. 12. The SCC stated that the second part of the test asks “whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples’ situations, resulting in a violation of section 12.”

75 *Smith, supra* note 46 at 1073.
76 Ibid at 516.
77 Ibid.
78 *Nur, supra* note 42 at para 53.
79 *Goltz, supra* note 46.
80 Ibid at 500.
81 Ibid at 506. See *Nur, supra* note 42 at para 54.
82 *Nur, supra* note 42 at para 54 [emphasis in original].
83 Ibid at para 52.
84 Ibid at para 46.
85 Ibid at para 55.
In *Luxton*, the SCC focused only on the dominating and aggravating factors that can arise during a forcible confinement without considering the circumstances that surround that forcible confinement. The problem with relying only on the particular facts presented in *Luxton* and not reasonable hypotheticals becomes evident when examining the multitude of ways in which forcible confinement can be committed. Section 279(2) of the *Criminal Code* states the following:

> Everyone who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.\(^86\)

The sentences available for forcible confinement range from a conditional discharge, where the offence is minor and fleeting in nature, to lengthy penitentiary terms, usually where violence is involved.\(^87\)

The wide range of sentencing reflects the varying degree of power and domination in each case. In *R v Van Santen*,\(^88\) the Court of Appeal for Ontario upheld the conviction of an angry parent for forcibly confining a school principal in her office.\(^89\) Ms. Van Santen followed the principal into her office, uninvited, and shut the only door to the office behind her. The principal asked the accused three times to open the door. The accused refused each time, stating that she wanted to have a private conversation. While the Court of Appeal upheld the conviction, it substituted the trial judge’s sentence with a conditional discharge in light of the Crown’s concession that the sentence imposed was too harsh.\(^90\)

*Van Santen* demonstrates two principles: (1) while forcible confinement “is punishable by up to ten years,” there are many circumstances where the circumstances do not warrant a criminal record, let alone a significant period of custody; and (2) there are circumstances where an accused may be guilty of forcible confinement without “exploiting their position of dominance and power” to the degree contemplated by the

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\(^86\) *Criminal Code, supra* note 3, s 279(2).

\(^87\) *R v Bagnulo*, 2012 ONCJ 815, [2012 No 6328 (conditional discharge); *R v Piamonte*, [2006] OJ No 2814 (Ont Sup Ct) (conditional sentence); *R v Ducharme*, (1998) 41 WCB (2d) 146 (Ont Ct J (Gen Div)); *R v Nolan*, 2009 ONCA 727, (100 days custodial sentence); *R v King*, 2012 ONSC 252, (23 month custodial sentence); *R v Campbell*, [1997] 30 OTC 310 (Ont Ct J (Gen Div)) (five year custodial sentence concurrent with conviction for sexual assault); *R v Hurley*, (1995) 27 WCB (2d) 313 (Ont Ct J (Gen Div)) (eight years custodial sentence concurrent with sentence for attempted murder); *R v Bottineau*, 2011 ONCA 194, (eight years custodial sentence concurrent to life imprisonment for second degree murder).

\(^88\) [1999] 42 WCB (2d) 329 [*Van Santen*].

\(^89\) *Ibid* at para 2.

\(^90\) *Ibid* at paras 3-5.
SCC in *Luxton*. Where the elements constituting the offence of forcible confinement fall within the lower range of moral culpability, a charge should not be elevated to first-degree murder, a provision that reflects “society’s condemnation of a person who has exploited a position of power and dominance to the gravest extent possible.”

In *R v Parris*, the Ontario Court of Appeal held that the accused’s act of standing in front of the door with a knife and preventing an unrelated person from leaving the house was sufficiently connected to the murder to meet the essential elements of s. 231(5)(e). However, according to s. 231(5)(e), an accused who committed a factually similar crime of forcible confinement, who did not use a knife but still caused a death, would be legally required to receive the same sentence as *Parris*. The SCC’s conclusion in *Luxton* that the “added element of forcible confinement in the context of the commission of a murder, markedly enhances the moral blameworthiness of an offender” may be revisited in light of the Court’s failure to consider reasonably foreseeable cases.

**CONCLUSION**

Murder is among the most serious offences in the *Criminal Code*. It is important to remember that Parliament’s rationale for the difference between first-degree and second-degree murder is that those guilty of the former are supposedly the most grievous murderers. In *White*, however, the accused’s act that elevated the offence to first-degree murder was “bear hugging” the victim. It seems grossly disproportionate that standing in front of a door or “bear hugging” a person elevates an accused’s moral culpability to such a degree that he or she deserves a fifteen year increase in the minimum parole eligibility. When looking at cases such as *White*, where a “bear hug” elevated the offence from second-degree murder to first-degree murder, against the highly aggravating facts in *Luxton*, it is worthwhile to revisit the constitutionality of s. 231(5)(e) of the *Criminal Code*. There are three ways that lower courts have the authority to depart from the conclusions made in *Luxton*.

First, when Parliament repealed the FHC, it also eroded the legal foundation that supported the SCC’s decision to hold that s. 231(5)(e) was constitutional in *Luxton*. The SCC relied on the FHC when finding that s. 231(5)(e) was not contrary to either s. 7 or 12 of the *Charter*. Second, Parliament’s decision to amend the *Criminal Code* to require courts to consider the unique circumstances of Aboriginal accused during the sentencing process, in conjunction with recent jurisprudence, significantly changed the

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91 *Luxton*, supra note 10 at paras 10-11.
92 *Ibid* at para 12.
93 2013 ONCA 515 at paras 65-66 [*Parris*].
95 *Ibid* at para 12.
96 *White*, supra note 10 at para 104.
parameters of this debate. Finally, there have been significant changes in legal jurisprudence surrounding the proper “reasonable hypothetical” analysis under s. 12 of the *Charter*. As a result, there are now many avenues that defence counsel could and should consider using to provide a lower court with the authority to depart from the conclusions drawn in *Luxton*. 