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Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in *R. v. Ipeelee*

Jonathan Rudin*

I. INTRODUCTION

On March 23, 2012, the Supreme Court of Canada released its decision in the appeals of *R. v. Ipeelee* and *R. v. Ladue*.¹ The decision, almost 13 years to the day since the Court issued its landmark decision in *R. v. Gladue*,² clearly restated the Court's insistence that judges are under a positive duty to take the circumstances of Aboriginal offenders into account in sentencing in all cases.

The decision goes beyond *Gladue* in its analysis, its acknowledgment of the realities of colonialism and its strong defence of the need to sentence Aboriginal offenders differently.³ The Court also acknowledges that judicial uptake of *Gladue* has not been what the Court had expected and the decision urges judges to redouble their efforts in this area.

This restatement and expansion of the Court's position came at a time when the ability of judges to actually meaningfully take *Gladue* into account is challenged by a raft of amendments to the *Criminal Code*⁴ significantly restricting the discretion of judges in sentencing.

This paper will look at the *Ipeelee* decision in two ways. First, it will discuss the way in which the decision has addressed some current controversies with respect to the sentencing of Aboriginal offenders. Second, the decision will be examined to see what it might portend for

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¹ [2012] S.C.J. No. 13, 2012 SCC 13 (S.C.C.) [hereinafter "*Ipeelee*"].

² [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.) [hereinafter "*Gladue*"].

³ The decision in *Ipeelee* is, I believe, the first decision of the Supreme Court of Canada that capitalizes the word Aboriginal — in all previous decisions, it was spelled with a lower case "a".

⁴ R.S.C. 1985, c. C-46.

*Canadian Charter of Rights and Freedoms*⁵ challenges to recent amendments to the *Criminal Code*, including those contained in the omnibus criminal legislation found in Bill C-10, which was passed in 2012.⁶

At the outset, it is probably necessary to situate myself, as the author of the paper, in this discussion. The issue of Aboriginal people and the criminal system has occupied much of my time, both professionally and academically, for over 20 years. Among other things, I was counsel for Aboriginal Legal Services of Toronto and appeared as an intervener in *Ipeelee*. I would hope that this fact will not cause a reader to dismiss the paper at the outset as being biased or slanted. Authors have opinions, and those opinions are often formed, sometimes in rarefied (or perhaps less rarefied than imagined) academic worlds, or in the trenches of the courts. Regardless of how or why opinions are formed, the strength of an article such as this should be judged on its content and intellectual rigour rather than on the imagined biases of the author.

II. LOOKING BACKWARD

In *Ipeelee*, the Supreme Court explicitly addressed two issues that have caused some concern and confusion among trial and appellate courts with respect to the interpretation of section 718.2(e) of the *Criminal Code* and *Gladue*. First, the Court stated unequivocally that the *Gladue* analysis was required in all cases; the fact that an offence might be serious and/or violent did not obviate the need to examine the circumstances of the offender and even in those cases, the sentence for an Aboriginal offender may well differ from that of a non-Aboriginal offender.⁷

The other long-standing issue that the Court put to rest was whether or not a direct connection had to be shown between the circumstances of the offender and the specific offence. The Court made clear that such direct connections were not necessary and rarely could be proven.⁸

The Court also appears to have rebutted three more recent challenges to the *Gladue* analysis. The term “appears” is used here because while the Court does not specifically allude to the arguments in the decision, the reasons they provide certainly address them. The three arguments are:

⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

⁶ *Safe Streets and Communities Act*, S.C. 2012, c. 1 [hereinafter “Bill C-10”].

⁷ *Supra*, note 1, at paras. 84-87.

⁸ *Id.*, at paras. 81-83.

(1) the *Arcand*⁹ analysis from the Alberta Court of Appeal that raises proportionality as the first among equals in the sentencing objectives found throughout section 718; (2) the notion that Aboriginal over-representation does not really exist; and (3) that the causes of Aboriginal over-representation (assuming that it exists at all) are too complex to be addressed in the sentencing process.

1. *R. v. Arcand*

In *Arcand*¹⁰ the Alberta Court of Appeal issued a judgment that it stated would confront the truth about sentencing.¹¹ For the Court, the 1996 sentencing amendments were all about proportionality. Proportionality, it found, was “the only governing sentencing principle under the Code”.¹² What is more, proportionality was the bulwark against unprincipled judges simply imposing their preferred sentences by picking and choosing from the menu of sentencing objectives found throughout section 718. It was this tendency, the Court found, that brought sentencing decisions into public disrepute and risked calling down increased parliamentary direction.¹³

In *Arcand*, the Court reviewed the decision of the trial judge to sentence a young Aboriginal man to a 90-day intermittent sentence for a sexual assault. In the appeal, the Court never specifically mentions the role of section 718.2(e) in the sentencing process.

The Court in *Ipeelee* agrees that:

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.¹⁴

Unlike the Alberta Court of Appeal, however, the *Ipeelee* Court has no trouble reconciling the principle of proportionality with the need to recognize the unique circumstances of Aboriginal offenders. They state:

⁹ *R. v. Arcand*, [2010] A.J. No. 1383, 2010 ABCA 363 (Alta. C.A.) [hereinafter “*Arcand*”].

¹⁰ For a more detailed critique of the *Arcand* decision, see Jonathan Rudin, “Eyes Wide Shut: The Alberta Court of Appeal’s Decision in *R. v. Arcand* and Aboriginal Offenders” (2011) 48:4 Alta. L. Rev. 987 [hereinafter “Rudin, ‘Eyes Wide Shut’”], and a subsequent decision of the Alberta Court of Appeal itself in *R. v. Lee*, [2012] A.J. No. 41, 2012 ABCA 17 (Alta. C.A.).

¹¹ *Arcand*, *supra*, note 9, at para. 8.

¹² *Id.*, at para. 47.

¹³ *Id.*, at para. 8.

¹⁴ *Ipeelee*, *supra*, note 1, at para. 37 (footnotes omitted).

Section 718.2(e) is therefore properly seen as a “direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process”. Applying the provision does not amount to “hijacking the sentencing process in the pursuit of other goals.” The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting section 718.2(e), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.¹⁵

2. The Revisionist Approach to Over-representation

Recently, the Attorney General of Ontario mounted a challenge to the idea that Aboriginal over-representation has any significance whatsoever. In *R. v. B. (T.M.)*,¹⁶ a Charter challenge to mandatory minimum sentences for Aboriginal offenders,¹⁷ the province took the position that figures on over-representation represented “census-benchmarking”¹⁸ and were a crude and unsophisticated measure with no particular significance. Over-representation could be explained as a result of the particular demographic factors that were unique to the Aboriginal population, such as the fact that the Aboriginal population is younger overall than the general Canadian population.¹⁹ The province reiterated this position in oral argument before the Supreme Court in *Ipeelee*,²⁰ and thus the issue was squarely before the Court when they wrote their decision.²¹

¹⁵ *Id.*, at para. 68.

¹⁶ [2011] O.J. No. 4836, 2011 ONCJ 528 (Ont. C.J.) [hereinafter “*T.M.B.*”].

¹⁷ And a case where I represented ALST as an intervener at the Ontario Court of Justice and now on appeal.

¹⁸ Census benchmarking refers, in this case, to comparing numbers of Aboriginal people to non-Aboriginal people in a particular population and drawing conclusions based on the results of that comparison. *T.M.B.*, *supra*, note 16, at para. 31.

¹⁹ *T.M.B.*, *supra*, note 16, at paras. 40-42.

²⁰ *Manasie Ipeelee v. Her Majesty the Queen*, Transcription of Compact Disc, October 17, 2011, A.S.A.P. Reporting Services, at 35-36.

²¹ The Crown also argued in *T.M.B.*, although not at the Supreme Court of Canada, that the word “colonialism” is vague and has no discernible meaning: see *T.M.B.*, *supra*, note 16, at para. 43. In *Ipeelee* the Court expressly refers to the impacts of colonialism on Aboriginal people on a number

The issue of the extent to which Aboriginal over-representation could be explained by demographic factors was considered in a 2009 study conducted by Statistics Canada entitled “The Incarceration of Aboriginal People in Adult Correctional Services”. The report concluded that while demographic factors played a role in explaining levels of Aboriginal over-representation, they were not sufficient to explain the phenomenon completely.²² In her decision in *T.M.B.*, Sparrow J. concluded as well that Aboriginal over-representation could not be explained simply by reference to demographic factors.²³

The Supreme Court expressly rejects the argument that over-representation cannot be determined by looking at the percentage of Aboriginal people in prison. The Court states:

In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent. ... From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent. As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when Gladue was decided, they accounted for 17 percent of federal admissions in 2005. ... As Professor Rudin asks: “If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?”²⁴

3. The Role of Sentencing in the Over-representation of Aboriginal Offenders

On February 28, 2012, the Senate released their report on Bill C-10 — the omnibus crime bill that increased the number and range of mandatory minimum sentences and restricted access to conditional sentences for all but the most minor of offences.²⁵ A number of witnesses who appeared before the Senate spoke of the likely significant impact of

of occasions, and it appears safe to say that this argument too has now been rejected by the Court: see *Ipeelee*, *supra*, note 1, at paras. 60, 77.

²² Samuel Perreault, “The Incarceration of Aboriginal People in Adult Correctional Services” (2009) 29:3 *Juristat* 5, at 12.

²³ *T.M.B.*, *supra*, note 16, at para. 119.

²⁴ *Ipeelee*, *supra*, note 1, at para. 62 (footnotes omitted).

²⁵ Bill C-10 will be discussed in more detail later in this paper.

the bill on increasing rates of Aboriginal over-representation.²⁶ In its report, the Senate acknowledged this concern but dismissed its relevance to Bill C-10:

Another concern that was expressed forcefully and often in the course of the hearings on Bill C-10 was the over-representation of Aboriginals, both as victims and in the correctional systems. This over-representation needs to be addressed on an urgent basis. This is a problem that goes beyond the criminal justice system and will require a major societal effort involving all levels of government and community organizations.²⁷

Unlike the decision in *Arcand*, which received a great deal of publicity,²⁸ or the argument against over-representation statistics which was put before the Court, there is no reason to assume that the Court was aware of this rather disingenuous response from the Senate. The Court, however, did make clear, in express terms, that while there are many causes of Aboriginal over-representation, some of which are beyond the purview of the legal system, that system has a role to play in reducing over-representation.

As we have seen, the direction to pay particular attention to the circumstances of Aboriginal offenders was included in light of evidence of their overrepresentation in Canada's prisons and jails. This overrepresentation led the Aboriginal Justice Inquiry of Manitoba to ask in its Report: "Why, in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system" ... The available evidence indicates that both phenomena are contributing to the problem (RCAP). Contrary to Professors Stenning and Roberts, addressing these matters does not lie beyond the purview of the sentencing judge.

First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not

²⁶ Christa Big Canoe, Legal Advocacy Director at Aboriginal Legal Services of Toronto, appeared before the Committee as a witness.

²⁷ See <<http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/rep/rep09feb12-e.htm>>.

²⁸ Rudin, "Eyes Wide Shut", *supra*, note 10, at 989.

further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities ...

Second, judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing ... Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.²⁹

The specific nature of the role judges can play as front-line workers in the justice system in addressing the realities of Aboriginal over-representation is challenged by legislation such as Bill C-10, and it is to that issue that the paper will now turn its attention.

III. LOOKING FORWARD

There is no question that *Ipeelee* is more than just a strong re-statement of *Gladue*. For those concerned with increasing levels of Aboriginal over-representation over time — to the point where now approximately one-quarter of inmates in custody in Canada are Aboriginal,³⁰ *Ipeelee* is a major step forward. In its clarification of some of the confusion that arose following *Gladue*, and in its repudiation of those academics and judges who have sought to minimize or trivialize that decision, the Court has made clear that addressing Aboriginal over-representation is properly the responsibility of all those in the justice system.

Tempering this enthusiasm for the Court's approach is the fact that with the passage of Bill C-10, the ability of judges to actually implement *Gladue* and *Ipeelee* in a meaningful way has been severely constrained. Bill C-10 continues a trend that sees the sentence length of existing mandatory minimum sentences increased, and new mandatory minimums created. Where new mandatory minimums are not created, the ability of judges to rely on conditional sentences has been restricted because those sentences are now available for only a few minor offences.

Bill C-10 now more than ever turns Crown attorneys into judges. It is the decisions of Crowns as to what charges to prosecute that will largely determine what sentencing options are available for judges. Unlike

²⁹ *R. v. Ipeelee*, *supra*, note 1, at paras. 65-67.

³⁰ In 2008/2009 Aboriginal people made up 27 per cent of admissions to provincial custody and 18 per cent of admissions to federal custody: D. Calverly, "Adult Correctional Services in Canada, 2008/09" (Fall 2010) 30:3 Juristat 11.

decisions of judges, however, decisions by the Crown as to what charges to proceed with are generally unreviewable.³¹

It is these changes in the legal landscape that have now made resort to the Charter to challenge mandatory minimums (and perhaps restrictions on access to conditional sentences) more necessary than ever. As opposed to most previous Charter challenges to mandatory minimums, which were based on the deprivation of liberty under section 7 and cruel and unusual punishment under section 12, these challenges will likely have to enter new territory and rely on the equality provisions of section 15. Before looking at how section 15 might be used in such challenges, it is important to briefly review the section 7 and section 12 jurisprudence with relation to mandatory minimums.

1. Challenges to Mandatory Minimums under Section 7 and Section 12³²

*R. v. Smith*³³ in 1987 was the first successful challenge of a mandatory minimum. The minimum in this case was seven years' imprisonment for the importation of any amount of a narcotic into Canada. In finding that the minimum violated section 12 of the Charter, the Court set out a four-part test to determine that the punishment in this case was "grossly disproportionate". The test involved weighing the gravity of the offence, the characteristics of the offender, the circumstances of the case and the effect of punishment on the offender.³⁴

What weighed heavily in the Court's determination was that the results in a particular case could be dramatically different depending on the exercise of Crown discretion. For example, if someone were arrested coming into Canada with a small amount of marijuana the Crown could choose to prosecute the person for simple possession of a narcotic. In such a case the person might not receive any jail time whatsoever. On the other hand, if the Crown, in its unfettered discretion, chose to prosecute

³¹ See, e.g., *R. v. Power*, [1994] S.C.J. No. 29, [1994] 1 S.C.R. 601 (S.C.C.); *Miazga v. Kvello Estate*, [2009] S.C.J. No. 51, [2009] 3 S.C.R. 339 (S.C.C.); *R. v. Smythe*, [1971] S.C.J. No. 62, [1971] S.C.R. 680 (S.C.C.).

³² For a more nuanced and sophisticated approach to this issue, please see Kent Roach, "The Charter versus the Government's Crime Agenda" (2012) 58 S.C.L.R. (2d) (forthcoming).

³³ [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) [hereinafter "*Smith*"].

³⁴ *Id.*, at para. 56. The Court allowed that this could be done by way of a reasonable hypothetical set of facts rather than relying on the specific circumstances of the offender.

the offence of importation, then the judge would have no choice but to impose the seven-year minimum.³⁵

In 2000, in *R. v. Morrisey*,³⁶ the Supreme Court upheld the four-year mandatory minimum for criminal negligence causing death with a firearm. The Court found that the offence required proof of wanton and reckless disregard for life and safety — a high threshold that only served to punish those who used firearms in a marked departure from the general standard of care.³⁷ Unlike *Smith* then, the simple act itself of causing a death with a firearm did not attract the minimum sentence.

In 2008 in *R. v. Ferguson*,³⁸ the Supreme Court found the four-year mandatory minimum for manslaughter with a firearm (a very similar type of offence to that in *Morrisey*) to be constitutional. In *Ferguson*, the appellant, a police officer who shot and killed a suspect in a cell during an altercation, asked that the mandatory minimum be found to be cruel and unusual punishment as against him based on his personal circumstances. He then sought a constitutional exemption from the operation of the law under section 24(1) of the Charter as opposed to relying on section 52 to strike down the legislation, as was done in *Smith*.

The Court concluded that constitutional exemptions were not the proper response to Charter violations caused by mandatory minimum sentences. If the specific facts of a case occasioned a finding that the sentence violated section 7 or section 12, then the law should be struck down.³⁹ Essentially, a unique set of facts should be treated as a reasonable hypothetical as opposed to allowing a particular person's circumstances to allow only that person to avoid the sanction. In the end, the Court upheld the four-year minimum as they did in *Morrisey*.⁴⁰

In *R. v. Smickle*⁴¹ in 2012, Molloy J. of the Ontario Superior Court of Justice found the three-year mandatory minimum contained in section 95(1) of the *Criminal Code* for possession of a loaded firearm, if the offence were prosecuted by indictment, to be unconstitutional.⁴² This offence is one of the more recent mandatory minimums that are hybrid

³⁵ Here the Court relied on a reasonable hypothetical to find the Charter violation. If the law is unconstitutional in a reasonably hypothetical situation, then it is unconstitutional in all cases.

³⁶ [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.) [hereinafter "*Morrisey*"].

³⁷ *Id.*, at para. 1.

³⁸ [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.) [hereinafter "*Ferguson*"].

³⁹ *Id.*, at para. 13.

⁴⁰ *Id.*, at para. 30.

⁴¹ [2012] O.J. No. 612, 110 O.R. (3d) 25 (Ont. S.C.J.) [hereinafter "*Smickle*"]. The Crown has appealed the sentence in this case to the Ontario Court of Appeal. The appeal will be heard along with *R. v. Nur*, referred to later in this article, and *R. v. Wong*.

⁴² *Smickle, id.*, at para. 9.

offences and where penalties differ significantly depending on how the matter is proceeded with.

In the case of a violation of section 95(1), if the Crown proceeds summarily, there is no mandatory minimum and the maximum penalty is one year's imprisonment. As noted however, if the Crown proceeds by indictment, the minimum penalty is three years' imprisonment. This two-year gap between the maximum summary and the minimum indictable punishment was one of the main reasons the law was found to be unconstitutional.

In *R. v. Nur*,⁴³ another challenge to this section, Code J. of the Ontario Superior Court of Justice found the law to be constitutional, although he too was troubled by the sentencing disparities between the summary and indictable offence. He was satisfied by the Crown's argument that its discretion as to how to prosecute the offence would mean that reasonable hypotheticals that would find a three-year sentence to be oppressive in some circumstances would be addressed through the use of Crown discretion to prosecute the matter summarily. While Code J. accepted this argument, he indicated that if that did not prove to be the case, then the section was susceptible to challenge.⁴⁴

Smickle was just the case. The Crown proceeded by indictment because its theory of the case suggested that the behaviour of the offender attracted a mandatory sentence. During the trial, however, it became clear that the Crown's version of events was incorrect and that the offender had engaged in foolish but not particularly dangerous or risky behaviour.⁴⁵ Having made the election to proceed by indictment, however, the Crown did not have the ability to charge the offender with the offence that his behaviour actually deserved and thus, absent the Court's finding that the section was unconstitutional, the offender would have gone to jail for three years.

2. Charter Challenge of Mandatory Minimums Based on Section 15

A Charter challenge to mandatory minimums for Aboriginal offenders would likely not be grounded on section 7 or section 12. It is not necessarily going to be the case that a mandatory minimum sentence for an Aboriginal person amounts to cruel and unusual punishment while the

⁴³ [2011] O.J. No. 3878, 2011 ONSC 4874 (Ont. S.C.J.).

⁴⁴ *Id.*, at para. 114.

⁴⁵ *Smickle*, *supra*, note 41, at paras. 17-19.

same sentence for a non-Aboriginal person would attract no Charter scrutiny.⁴⁶

A Charter challenge to mandatory minimums for Aboriginal offenders could, however, be based on the section 15 equality provisions of the Charter. Such a challenge would be grounded on the fact that the impact of the minimums on Aboriginal offenders exacerbates the discrimination they already face in the criminal justice system.

As noted earlier in this paper, the Court in *Ipeelee* specifically found that Aboriginal people face discrimination in the criminal justice system and it is the responsibility of the sentencing judge to address that discrimination. To repeat the Court's finding:

Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.⁴⁷

Until recently, the findings by the Supreme Court regarding the existence of systemic discrimination in the criminal justice system faced by Aboriginal offenders has not attracted a great deal of judicial attention.⁴⁸ As long as judges were generally free to set the sentences they found to be appropriate for Aboriginal offenders based on the provisions of section 718.2(e) of the *Criminal Code*, reference was generally not necessary to the systemic discrimination faced by Aboriginal people in the justice system. The specific sentences for specific offenders were grounded on the circumstances of that offender — both those specific to that person and those more general that have had an impact on the person and his or her community.

But mandatory minimum sentences change all that. Where a mandatory minimum is involved, judges do not have the ability to choose the sentence that is most appropriate for the particular offender unless that sentence falls at or above the minimum sentence. Mandatory minimums require judges, in some circumstances, to sentence an Aboriginal

⁴⁶ However, the finding by the Supreme Court in *Gladue* that prison for Aboriginal offenders may be more difficult than for other offenders based, in part, on the racism that is “rampant” in prisons cannot be ignored. Recent reports by the Office of the Correctional Investigator indicate the concerns expressed by the Court in 1999 have not abated: see, e.g., Office of the Correctional Investigator, *Annual Report of the Correctional Investigator 2009-2010*, section 4, online: <<http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20092010-eng.aspx#2.4>>.

⁴⁷ *Ipeelee*, *supra*, note 1, at para. 67.

⁴⁸ *Ipeelee* was not the first occasion that the Supreme Court has spoken of the discrimination faced by Aboriginal people in the justice system. The Court first raised the issue in *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at para. 58 (S.C.C.) and again the next year in *R. v. Gladue*, *supra*, note 2, at para. 68.

offender to a sentence that is greater than they otherwise would have in considering section 718.2(e).

This concern with minimum sentences is not, however, restricted to Aboriginal offenders. Nor is consideration of section 718.2(e) restricted to Aboriginal offenders. While the section is often referred to as the Aboriginal sentencing section, as the Court makes clear in *Ipeelee*, section 718.2(e) applies to all offenders.⁴⁹ Why then would Aboriginal people then be able to mount a section 15 challenge to a law that affects everyone in the same way?

The difference is that it is only Aboriginal people who, the Supreme Court has found, face systemic discrimination throughout the criminal justice system. Non-Aboriginal offenders deal with a justice system where it is assumed they will be treated in a non-discriminatory manner; that is not the case for Aboriginal offenders. A reasonable Aboriginal person who has read the decisions of the Supreme Court of Canada (as well as the many reports on Aboriginal people and the justice system) would be perfectly within his or her rights to conclude that those with power in the justice system make decisions based on negative stereotypes regarding Aboriginal people — and these decisions can have a significant impact on the lives of Aboriginal people in the justice system.

The reality is that offence categories within the *Criminal Code* are not watertight compartments. For example, the crime of sexual interference, which carries a mandatory minimum, is also encapsulated in the crime of sexual assault, which does not carry a mandatory minimum. A Crown who wishes to preserve all the options available to the sentencing judge may choose to proceed on a sexual assault charge, while a Crown who wishes to ensure that the offender goes to jail will proceed with the sexual interference charge. Either decision is justifiable, and since it is the decision of the Crown, it is generally not subject to review. But what happens when this decision is made with respect to an Aboriginal person — a person who is subject to systemic discrimination in the justice system?

The Manitoba Aboriginal Justice Inquiry addressed the issue of the way in which those with power in the justice system exercise their discretion with respect to Aboriginal people:

A significant part of the problem is the inherent biases of those with decision-making or discretionary authority in the justice system. Unconscious attitudes and perceptions are applied when making

⁴⁹ *Ipeelee*, *supra*, note 1, at para. 77.

decisions. Many opportunities for subjective decision making exist within the justice system and there are few checks on the subjective criteria being used to make those decisions. We believe that part of the problem is that while Aboriginal people are the objects of such discretion within the justice system, they do not “benefit” from discretionary decision making, and that even the well-intentioned exercise of discretion can lead to inappropriate results because of cultural or value differences. ...

However one understands discrimination, it is clear that Aboriginal people have been subject to it. They clearly have been the victims of the openly hostile bigot and they also have been victims of discrimination that is unintended, but is rooted in policy and law.⁵⁰

It is here that the issue is joined. Aboriginal people face discrimination in the criminal justice system. That discrimination must include the decisions by Crown attorneys as to what charges to prosecute against an Aboriginal offender. If the offence prosecuted contains a mandatory minimum, then in a case where the judge would otherwise not sentence the offender to that minimum (or more), the role of the judge as the front-line worker charged with preventing further discrimination against Aboriginal people in the justice system is frustrated.

As with *Smith* and *Smickle*, this challenge to mandatory minimums is grounded on the exercise of Crown discretion. As with those cases, this challenge does not mount an assault on the exercise of Crown discretion itself. It is not suggested that judges should look behind the exercise of the Crown discretion and challenge the decisions that were made. Rather, the existence of systemic discrimination towards Aboriginal people means that section 15 requires that judges ensure that in making the decision they alone are empowered to make — the sentencing decision — they are not contributing to the discrimination faced by Aboriginal people.

IV. CONCLUSION

Section 15 is not the lever with which to change the world. Judges cannot be expected to rewrite the operations of the justice system to ensure the elimination of all discrimination towards Aboriginal people.

⁵⁰ Aboriginal Justice Implementation Commission, *Report: Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Manitoba Provincial Government, 1999), at ch. 4, online: <<http://www.ajic.mb.ca/volume.html>>.

However, given the fact that the Supreme Court has found that Aboriginal people face discrimination in the criminal justice system, what is a judge to do when mandatory minimum sentencing laws mean that unreviewable decisions of judicial actors such as Crowns can constrain the decisions of judges, whose decisions are public and subject to appellate review? What should be the response of a judge to mandatory minimum sentences that must, in some way, inevitably exacerbate the problem of Aboriginal over-representation?

If the answer is that judges can do nothing, that section 15 is of no use at all to individuals who clearly face systemic discrimination, then what is the point of the court finding that such discrimination exists? What is the use of all the high-toned rhetoric about the significance of section 15 and the equality rights guarantee, when Aboriginal people cannot rely on that guarantee to try to stop a worsening situation that the Supreme Court has already declared a crisis?

The *Ipeelee* decision builds on previous decisions of the Supreme Court with regard to Aboriginal over-representation and the discrimination Aboriginal people face in the justice system. Bill C-10 builds on the trend to take decision-making powers away from sentencing judges and place it more and more in the hands of those whose decisions are not subject to review. The lines are now drawn more starkly than ever before, and it is likely that sooner rather than later the courts will have to come to grips with this reality.