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The Aboriginal Sentencing Provision of the *Criminal Code* as a Protected “Other Right” under Section 25 of the Charter

Larry Chartrand*

I. INTRODUCTION

There are varying purposes and reasons for the development of Aboriginal-specific policies by Canadian governments and agencies.

Some of these policies address the desire to protect, repair or enhance the cultures of Aboriginal peoples and their different expressions in the economic, social, spiritual and legal domains of their societies. In short, they are intended to protect the Aboriginal world view and its manifestation in the customs, practices and traditions of Aboriginal peoples from Canadian policies that would threaten their vitality.¹

Others address socio-economic circumstances unique to Aboriginal peoples, recognizing in many cases that the “disadvantaged” conditions of Aboriginal individuals and communities are tied to the negative impact of the history of Aboriginal colonization, discrimination and dislocation.²

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¹ For example, governments sponsor Aboriginal-specific media such as the Aboriginal Peoples Television Network, which offers an Aboriginal cultural perspective to public broadcasting. Similarly, Aboriginal art, music and cultural activities may be sponsored by government programs tailored to preserving and encouraging Aboriginal artistic expression. Indeed there are a myriad of Aboriginal-specific programs too numerous to identify that promote Aboriginal cultural expression. In the legal field, the Department of Justice sponsors a number of community-based justice programs (see <<http://www.justice.gc.ca/eng/pi/ajs-sja/prog.html>>). More specific to the focus of this paper, s. 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46 has been interpreted to require judges to be sensitive to Aboriginal customs and perspectives on justice and to adapt them to sentencing decision-making where appropriate. Sentencing circles may be viewed as one result of this judicial direction and an example of accommodating Aboriginal customs within the criminal justice system.

² Affirmative action initiatives that target Aboriginal peoples are often intended to address the social and economic deficit between Aboriginal communities and Canadians generally. Many educational, employment, health, housing and business development initiatives fall within this general policy category.

Still others address the need to rebuild and protect the political status of Aboriginal peoples as collective authorities (recognizing self-government either comprehensively or by limited subject-matter-specific agreements or initiatives).³

Related to the above policy objectives are policies that are intended to promote or rebuild positive relations between Euro-Canadian society and Aboriginal societies. Sometimes this objective of building positive relations is the dominant objective in a given policy or scheme.⁴ Other times, it is present, but remains in the background and is only indirectly promoted.

Although described separately for facilitating the analysis that follows, the above policy objectives often overlap. Second, these government policy objectives may be manifested in a variety of forms through legislation, common law or by agreements (some of which may have constitutional protection as a treaty, while others provide varying degrees of legal protection). Moreover, these policies may be more directed to Aboriginal individuals within Canada regardless of their specific affiliation with an Aboriginal community, nation or people. Others are designed to protect the Aboriginal community, nation or people as collective entities or to strengthen Aboriginal structures of authority. Many of these nation- or community-specific initiatives are the direct result of specific negotiations between Aboriginal and Canadian authorities. Of course, programs that target individuals will have an indirect positive effect on the Aboriginal communities and their governance structures to which they belong and *vice versa*.

Placed in a broader socio-political context, these Aboriginal-specific policies can be seen as societal efforts to correct the wrongs of Canada's colonial history and the destructive impact of colonization on Aboriginal individuals and/or on Aboriginal structures of authority as community, tribal or national political collectives. They are often remedial, reparative

³ The Comprehensive Land Claims policy of the federal government has led to the negotiation of the Nisga'a land and self-government agreement among others. In terms of limited subject matter agreements, there is a sectoral agreement on education jurisdiction with the Mi'kmaq Nation. See Aboriginal Affairs and Northern Development Canada, *General Briefing Note on Canada's Self-Government and Land Claims Policies and the Status of Negotiations* (January 2012), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100031774>>.

⁴ The establishment of the Truth and Reconciliation Commission is an example of an initiative designed to promote reconciliation between Canadians and Aboriginal peoples, particularly in relation to increased awareness of the impact of the residential schools policy on Aboriginal communities and individuals. See Truth and Reconciliation Commission of Canada, *Canada, Aboriginal Peoples and Residential Schools: They Came for the Children* (Winnipeg: Truth and Reconciliation Commission, 2012).

and reconciliatory in nature. In a sense, such positive Aboriginal-specific initiatives can be seen as evidence that Canada is to a degree engaged in the process of Aboriginal decolonization, even as colonial barriers may still be reinforced or constructed from time to time.⁵

However, the Aboriginal-specific interests that are protected in government policies and benefits unique to Aboriginal peoples may come under attack by others relying on the *Canadian Charter of Rights and Freedoms*.⁶ In particular, they may be challenged by others who feel that their exclusion from such initiatives and the benefits that may attach to them is discriminatory based on race or ethnic background.⁷ The concern that Aboriginal-specific interests may be threatened under section 15(1) of the Charter is precisely the reason why the framers of the Charter thought it necessary to include section 25 to shield Aboriginal-specific rights and interests from such challenges.⁸ It has been determined that the intention of section 25 is to protect Aboriginal-specific interests recog-

⁵ For a compelling analysis of how the judiciary, particularly the Supreme Court of Canada, mirrors this simultaneous duality of rendering colonial and post-colonial decision-making even within the same judgment, see generally the chapter on “Colonial and Postcolonial Legality” in Grace Li Xiu Woo, *Ghost Dancing with Colonialism* (Vancouver: UBC Press, 2011), at 43-98.

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

⁷ There are a number of decided cases where s. 15(1) equality challenges have been brought against government programs that provide a unique and exclusive benefit to an Aboriginal group. For example, *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter “*Kapp*”] involved the exclusion of non-Aboriginal commercial salmon fishers from the benefit of an extra day of open season fishing when certain Aboriginal groups were otherwise entitled. Another more recent case is *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] S.C.J. No. 37, [2011] 2 S.C.R. 670 (S.C.C.) [hereinafter “*Cunningham*”], where the challenge under s. 15(1) came from a recently registered status Indian under the *Indian Act*, R.S.C. 1985, c. I-5, who was subsequently excluded from membership in the Peavine Metis Settlement according to certain provisions of the *Metis Settlements Act*, R.S.A. 2000, c. M-14, which gave discretion to the Settlement authority to exclude status Indians from membership. This legislation was the means chosen to implement the Metis Settlements Accord of 1989 between the province of Alberta and the Metis Settlements Federation. Both cases will be discussed more fully below in terms of their implications for recognition of Aboriginal interests and how they should be protected from individual Charter challenges.

⁸ Section 25 reads as follows:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

nized by federal or provincial governments from being “abrogated or derogated” by a Charter challenge.⁹

II. SHIELDING SECTION 718.2(e) OF THE *CRIMINAL CODE* FROM CHARTER CHALLENGE

The focus of this paper is to consider the application of section 25 of the Charter as a shield to protect an Aboriginal-specific right against a potential conflict with a Charter right such as the right to equality under section 15(1). In particular, I intend to limit the scope of this paper to focus on the obligation that a judge has when engaged in the criminal sentencing process to pay “particular attention to the circumstances of aboriginal offenders”.¹⁰ This unique obligation only applies to Aboriginal offenders. Non-Aboriginal offenders may argue that this unique obligation is discriminatory as it singles out Aboriginal offenders for beneficial treatment to the exclusion of other offenders on the grounds of race or ethnic background, and thus bring a section 15 equality rights Charter challenge against the provision.

Although the Aboriginal-specific nature of section 718.2(e) of the *Criminal Code* may be protected under section 15(2) of the Charter as an “ameliorative program”, I argue that the preferred approach is to shield the unique Aboriginal interest or benefit the provision offers under section 25 of the Charter instead. Unique to Aboriginal Charter challenges is the fact that there are two options for upholding the alleged discriminatory distinction that is the basis of a section 15(1) claim. These challenges can be explained away by relying on the principle of achieving substantive equality under section 15(2), or they can be explained away by relying on the principle that Aboriginal peoples possess interests as against the state which cannot be challenged by individual reliance on the liberal values of the state by applying section 25 of the Charter instead.

The courts have more experience with section 15 analysis and are thus more comfortable with the concept of substantive equality. Hence, given the choice between section 15(2) or section 25, the courts have

⁹ For a fuller discussion of the legislative history of s. 25, see Bruce Wildsmith, *Aboriginal Peoples & Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) [hereinafter “Wildsmith”]. See also Jane Arbour, “The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms” (2003) 21 S.C.L.R. (2d) 3.

¹⁰ Section 718.2(e) of the *Criminal Code*.

invariably relied on section 15(2) for justifying discrimination claims. Unfortunately, the distinctiveness of Aboriginality is lost, along with the corresponding state obligation of achieving a post-colonial relationship with Aboriginal peoples, when section 15(2) is relied upon instead of section 25.

Although this is explained more fully later in the paper, the reason for the preference of section 25 over section 15(2) stems from the invasive prevalence of contemporary liberal discourse that constantly threatens the inherent political status of Aboriginal peoples. By blindly applying a culturally Western liberal construct of individual rights, including the concept of substantive equality when Aboriginal interests are in potential conflict, risks overly conceptualizing Aboriginal peoples as simply another ethnic interest group or minority group wholly dependent on the intervention of Canadian governments to create and protect their interests. The inherent independent political status of Indigenous peoples, and their political/legal agency in the negotiation and definition of specific rights protections “with” Canadian governments, is accordingly devalued in the process. This threat, albeit indirect more than direct, will unnecessarily influence society’s overall understanding of the rightful place of Aboriginal peoples as self-governing entities in Canadian Confederation by mischaracterizing the basis of their rights as being equivalent to those required by other Canadian groups (such as visible minorities) in need of substantive equality to offset historical disadvantage. Such an approach tends to minimize or ignore an equally important basis of Aboriginal entitlement to recognition and protection of Aboriginal-specific interests as being grounded in the overall reparation of their status as independent polities (self-governing authorities). The legitimate reparation of Aboriginal cultures, institutions and structures of authority is unique to the Aboriginal-colonial experience and sets Aboriginal peoples qualitatively apart from other “disadvantaged groups”.¹¹ In this vein, I believe it is fair to ask whether it is reconciliation or assimilation when the judiciary uncritically and blindly

¹¹ Although beyond the scope of this paper, this distinction may justify, in appropriate cases, the shielding of the Charter completely from specific and targeted government action that recognizes and protects Aboriginal interests, particularly those where government action is the result of a negotiated agreement involving the distribution of power and jurisdiction between Aboriginal and non-Aboriginal authorities. As Jane Arbour explains, *supra*, note 9, constitutional doctrine allows *individuals* to challenge the fruits of government decision-making but *individuals* cannot challenge the tree itself or the source of the fruit for government decision-making regarding a subject matter of jurisdiction.

assumes that the Charter and its built-in liberal assumptions apply to issues where Aboriginal-specific interests are being challenged.¹²

This paper makes the argument that section 25 of the Charter is relevant to the sentencing of Aboriginal offenders. Furthermore, this paper argues that section 718.2(e) of the *Criminal Code* qualifies as an “other right” for which section 25 is designed to shield. Admittedly, the fact that a unilateral policy “choice” by the federal government to address the crisis of Aboriginal over-representation by obligating judges to be culturally sensitive to “such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into ... higher levels of incarceration for Aboriginal peoples”¹³ as constituting an “other right” under section 25 is a contentious claim. After all, such a right does not look like the stereotypical Aboriginal or Treaty right that has been the focus of analysis under section 35 of the Constitution.¹⁴ Yet, as explained more fully below, when one considers the rationale behind the Aboriginal-specific sentencing provision and the policy of Aboriginal decolonization generally, the claim that section 718.2(e) is outside the scope of Aboriginal interests protected by section 25 of the Charter is largely unconvincing.

I begin the following analysis with a brief account of common law principles for sentencing of Aboriginal offenders prior to the *Criminal Code* sentencing amendments of 1996. In doing so, I want to reinforce the point that the unique attention paid to Aboriginal offenders in section 718.2(e) did not first appear when the provision was enacted. There has existed at common law for some time principles of sentencing that required judges to take into account the Aboriginality of the offender.¹⁵ Second, I will examine section 25 and the limited case law that has

¹² The idea for this question came from authors Roy Millen and Jennifer Spencer. See R. Millen & J. Spencer, “Fishing for More than One Day: Aboriginal Equality after *Delgamuukw*”, in *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book, 2009), at 287. For highly insightful and comprehensive explanations of the incompatibility of Charter values with Aboriginal values, see further Mary Ellen Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” in *Canadian Human Rights Yearbook* (Toronto: Carswell, 1989-1990); Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2 *Indigenous L.J.* 67; and Dan Russell, *A People’s Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000).

¹³ *R. v. Ipeelee*, [2012] S.C.J. No. 13, 2012 SCC 13, at para. 60 (S.C.C.) [hereinafter “*Ipeelee*”].

¹⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁵ The significance of looking at the common law principles of sentencing involving Aboriginal offenders is important because it provides context. More importantly, however, as argued below, such sentencing principles have more in common with “common law” rights now protected as Aboriginal or Treaty rights in s. 35 than might first appear.

interpreted it to date, particularly the meaning given to the term “other rights”. I will then argue that section 718.2(e) is an “other right” protected by section 25. I argue that the limitations on the scope and content of section 25 suggested by the majority of the Supreme Court in *Kapp* are unjustifiable, particularly when one takes a broader contextual understanding of Aboriginal-Canadian relations.¹⁶ Contrary to the majority opinion that dismissed the case under section 15(2), Bastarache J. applied section 25 instead as the preferred approach for dismissing the Charter claim. Consequently, I shall argue that the analysis offered by the concurring judgment of Bastarache J. in *Kapp* is preferable over that of the majority.

III. SENTENCING OF ABORIGINAL OFFENDERS UNDER COMMON LAW

Prior to the 1996 enactment and codification of sentencing provisions in the *Criminal Code*, the Aboriginality of the offender was a relevant sentencing factor that was to be considered when appropriate by judges, thus requiring a more nuanced consideration of the Aboriginal offender’s lifestyle and culture and the effect of the criminal justice system and sentencing on the offender.¹⁷ Prior to 1996, there existed a growing jurisprudence on the significance of the Aboriginality of the offender during sentencing, and under what circumstances sentencing considerations should reflect the fact that the offender was Aboriginal. The Law Commission of Canada took note of this development in 1991. In its report, the Commission also noted with interest how Australian courts were in some respects much further along in this development.¹⁸

Besides taking into account significant cultural differences in sentencing, other reasons for taking the Aboriginality of the offender into account often stem from an understanding of the socio-economic

¹⁶ *Kapp, supra*, note 7. In this case, the majority dismissed the s. 15(1) Charter claim by characterizing the Aboriginal Pilot Sales program a qualified “ameliorative” program for the purposes of s. 15(2) of the Charter. The majority did not seriously address the application of s. 25 of the Charter, but did make a few *obiter* remarks that would suggest that s. 25 has a very narrow and limited application.

¹⁷ *R. v. Fireman*, [1971] O.J. No. 1642, [1971] 3 O.R. 380 (Ont. C.A.) is a typical case where the cultural background of an Aboriginal offender was taken into account in sentencing. The sentence was reduced on appeal because of the trial court’s failure to take sufficient account of Aboriginal cultural differences.

¹⁸ Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991).

circumstances that Aboriginal communities find themselves in and how this is a reflection of the impact of colonization. Courts have also become increasingly attuned to how cultural conflict or incompatibility can be present between Aboriginal understandings and Western understandings on how to best handle conflict in the community. The British Imperial legal tradition from which the present Canadian system is derived is a foreign-imposed system which can alienate Aboriginal offenders when caught in the Canadian justice system.

Justice Stewart acknowledged in 1992, a few years before the enactment of section 718.2(e), that taking into account the destructive impact of colonization on Aboriginal peoples is appropriate in sentencing and that in doing so, it is inappropriate to measure sentences imposed on such a population with those generally expected of Canadian society:

In a multi-cultural society, where gross inequities in opportunities, social resources, and social conditions abound, just sentencing cannot be monolithic or measured against any standard national “typical sentence”.¹⁹

Justice Stewart in *Moses* further emphasized the significance of cultural differences and noted:

Because aboriginal peoples use the same language, engage in similar play and work, western society assumes similar underlying values govern and motivate their conduct. Particularly within the justice system, this widely spread erroneous assumption has had a disastrous impact on aboriginal people and their communities.

Much of the systemic discrimination against aboriginal people within the justice system stems from a failure to recognize the fundamental differences between aboriginal and western cultures. Aboriginal culture does not place as high a premium on individual responsibility or approach conflict in the direct confrontational manner championed by our adversarial process. Aboriginal people see value in avoiding confrontation and in refraining from speaking publicly against each other. In dealing with conflict, emphasis is placed on reconciliation, the restoration of harmony and the removal of underlying pressures generating conflict.

After extensive exposure to the justice system, it has been assumed too readily that aboriginal people have adjusted to our adversarial

¹⁹ *R. v. Moses*, [1992] Y.J. No. 50, [1992] 3 C.N.L.R. 116 (Y.T. Terr. Ct.) [hereinafter “*Moses*”].

process with its obsession on individual rights and individual responsibility, another tragically wrong assumption.²⁰

The Manitoba Justice Inquiry in 1991 made the further connection that to ignore the historically destructive impact of colonization manifest in current social and economic circumstances is to ignore the systemic discrimination that flows from treating Aboriginal offenders seemingly in a neutral manner undifferentiated from offenders generally. It would be unfair to ignore the forced dislocation onto inadequate postage-stamp plots of land, criminalization of traditional economies (hunting and fishing) and of cultural and religious institutions (Potlatch, Sundance, *etc.*), the imposition of foreign governments and denial of their legal traditions, or the removal of children on penalty of law to residential schools designed for the purpose of cultural genocide. It would be naïve to assume that such past policies do not have a persistent negative individual or collective impact today.

Historically, the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. The oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination; it is merely “laundered” racial discrimination. *It is untenable to say that discrimination which builds upon the effects of racial discrimination is not racial discrimination itself.* Past injustices cannot be ignored or built upon.²¹

Given that courts prior to the enactment of section 718.2(e) were prepared to take into account the impact of colonization on the offender and to acknowledge the importance of cultural differences, it is not surprising that the Supreme Court of Canada in *R. v. Gladue* identified these two factors as necessary considerations that a judge must address when faced with the sentencing of an Aboriginal offender. They are:

²⁰ *Id.*

²¹ *Report of the Aboriginal Justice Inquiry of Manitoba. Vol. 1* (1991), c. 4, online: <<http://www.ajic.mb.ca/volumel/chapter4.html>> (emphasis added). See also Patrica Monture-Angus, “Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice” in David Long & Patricia Dickason, eds., *Visions of the Heart: Canadian Aboriginal Issues*, 2d ed. (Toronto: Harcourt Canada, 2000).

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.²²

Although there existed precedent in the sentencing of Aboriginal offenders before the enactment of section 718.2(e), which required that the unique circumstances of Aboriginal offenders be taken into account, it is also fair to say, as the Supreme Court noted in *Gladue*, that the statutory provision is more than a simple codification of existing sentencing provisions.²³ The provision was intended to be a national endorsement of the need to address the over-representation of Aboriginal offenders in prison and in that sense has a remedial aspect to it. The Supreme Court of Canada recently endorsed the understanding of the provision as “a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons”.²⁴ The Court reminds us that:

Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(e), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.²⁵

The above brief overview of the common law development in recognizing Aboriginality in sentencing offers some additional background to the motivation for enacting Aboriginal-specific sentencing legislation in 1996, besides addressing the obvious issue of severe over-representation.²⁶ The rationale offered by the *Gladue* and *Ipeelee* decisions further demonstrates that the provision’s existence is directly tied to considerations of Aboriginal cultural difference and the negative dynamics of the colonial relationship. The obligation of judges to do no further harm and to repair the damage caused by colonization to the

²² *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 66 (S.C.C.) [hereinafter “*Gladue*”].

²³ *Id.*, at para. 32.

²⁴ *Ipeelee*, *supra*, note 13, at para. 59.

²⁵ *Id.*, at para. 68.

²⁶ The Court in *Ipeelee*, *id.*, at para. 62 notes the crisis of over-representation that existed in 1996 and how that crisis remains unabated and indeed is worse today.

extent possible within the limitations of sentencing discretion is an essential goal of section 718.2(e).²⁷

An understanding of the dynamics of the colonial relationship between the Crown and Aboriginal peoples in the context of sentencing is important when considering whether such a uniquely Aboriginal “benefit” within the sentencing regime can meet the test for what can amount to being an “other right” under section 25 of the Charter. It is my opinion that section 718.2(e) and the common law principles that relate to the sentencing of Aboriginal offenders satisfy the necessary criteria with regard to what can amount to an “other right” for the purposes of section 25 of the Charter.

IV. THE PURPOSE AND SIGNIFICANCE OF SECTION 25 OF THE CHARTER

Much writing and discussion has taken place over the past several years about whether the individual rights protected in the Charter are consistent with Aboriginal collective rights. The concern from the Aboriginal perspective is that, given the prominence of the mainstream philosophical views on human rights, much of what is Aboriginal may be unduly and unfairly trumped. Section 25 exists, in part, to guard against this tendency of attrition due to the overwhelming influences of non-Aboriginal society and culture.²⁸

It is in this context that section 25 of the Charter exists. It exists because Aboriginal peoples have unique rights that may be threatened by the “ideological baggage of paternalism, assumptions of superiority, and liberal belief in the progress of ‘mankind’ as an organic and undifferentiated whole”.²⁹ These rights exist within a society governed by a belief in liberalism and the prominence of individual rights. Yet it is not so much liberalism or democracy *per se* that is the ultimate source of conflict and contention, but the colonial arrogance that Eurocentric Canadian authority is the only legitimate authority of the territory. Canada assumes it is an authority fashioned after the British Constitution that regards itself as the only valid source for the creation, definition and management of legal rights. Thus, in order to ensure that collective Aboriginal interests,

²⁷ *Id.*, at para. 77.

²⁸ Wildsmith, *supra*, note 9, at 20-22.

²⁹ Mary Ellen Turpel/Akwi-Kwe, “Further Travails of Canada’s Human Rights Record: The Marshall Case” in Robynne Neugebauer, *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars Press, 2000), at 334.

including political and authoritative interests, are not unduly restricted or negated, a mechanism must exist to re-order the normal expectation given to the prominence of individual rights. Section 25 re-orders this expectation by stating that Aboriginal collective rights are not to be compromised by the cultural and philosophical interests of the non-Indigenous community.

When the Charter was being considered for incorporation in the Constitution of Canada, there was a concern that some of its provisions, particularly section 15, which guarantees every individual the right to equality, could be used to erode or negate Aboriginal and Treaty rights which by their very nature benefit only a certain “*segment of Canadian society*”.³⁰ In other words, non-Aboriginal Canadians are excluded from the benefits of such rights and may argue that their exclusion is contrary to the guarantee of equality under the law protected in section 15 of the Charter. The possibility of such a challenge to the unique rights of Aboriginal peoples was enough of a concern that the negotiators of the Constitution in 1982 thought it necessary to include a provision in the Charter that would ensure that Aboriginal and Treaty rights would not be threatened by such a challenge. For example, without a provision in the Charter to shield Aboriginal rights, an individual Canadian might be successful in arguing that such rights were discriminatory based on race under section 15 and therefore a violation of the right to equality.³¹ Such a finding would of course make hollow the protection of Aboriginal peoples’ unique rights (whether such rights are of constitutional standing as in section 35, or otherwise as in general policy, legislation or agreement between government and Aboriginal peoples).³² Section 25 of the Charter is thus designed to protect the rights unique to Aboriginal peoples because of their existence as distinct peoples in a colonial

³⁰ In characterizing Aboriginal peoples as a “segment of Canadian society”, I purposely qualify this characterization because fundamental questions continue to exist as to whether Aboriginal peoples have been legitimately incorporated under British or Canadian sovereignty. There is a significant growing scholarship that, in total, offers a powerful and compelling challenge to the assumptions of an exclusive Canadian sovereignty. These views can no longer be ignored. Their voices represent a growing demand for a fundamental paradigm shift in legal theory regarding the source and nature of the relationship between Aboriginal peoples and Canada. See generally the more recent Aboriginal law and studies scholarship from Brad Morse, John Borrows, Gordon Christie, June McCue, Darlene Johnston, Sakej Henderson, Grace Woo, Dale Turner, Taiaiake Alfred, Larry Chartrand, Minniwaanagogizhigook, D’Arcy Vermette, Sarah Morales, Patricia Monture, Tracey Lindberg and Felix Hoehn, to name but a few.

³¹ See *R. v. Nicholas*, [1988] N.B.J. No. 261, [1989] 2 C.N.L.R. 131 (N.B.Q.B.), where the New Brunswick Court of Queen’s Bench acknowledged that s. 25 protects Aboriginal and Treaty rights from abrogation based on individual rights recognized in the Charter.

³² *Kapp*, *supra*, note 7, *per* Bastarache J., at para. 103.

relationship where the sanction of respect for human rights of all peoples regardless of race and ethnicity now demand reparative action in the context of Aboriginal-Canadian relations.

Aboriginal rights and interests are far more profound than being a means to achieve substantive equality within Canada. They may be ameliorative, in the sense of being consistent with the objectives of substantive equality, but they possess qualities that transcend the inherent limitations placed on “ameliorative” programs. Accordingly, section 15(2) and its concern for substantive equality is insufficient in scope to protect Aboriginal political interests, or the right to self-determination as peoples or the right to sovereignty as a nation.

Section 25 explicitly states that it protects “any aboriginal, treaty or other rights or freedoms” from Charter rights.³³ The provision, in part, is designed to protect Aboriginal and Treaty rights specifically from Charter challenge. It thus protects from Charter challenge the rights acknowledged in section 35 of the Constitution.³⁴

There is a significant jurisprudence surrounding what can be recognized as a Treaty or Aboriginal right. The tests applied by the courts based on the leading cases of *R. v. Sparrow*, *R. v. Van der Peet* and *Delgamuukw v. British Columbia* are complex and involved.³⁵ Neverthe-

³³ (Emphasis added). I emphasize the word “any” in the provision because it is too easy to assume that the Aboriginal or Treaty rights referenced in s. 25 are only those constitutionalized under s. 35 of the Constitution. The provision certainly includes s. 35 Aboriginal and Treaty rights, but could also include, for example, common law Aboriginal rights short of constitutional protection. For instance, there are cases that recognize Aboriginal customary adoptions and marriages under the common law long before the entrenchment of s. 35 in 1982. The Aboriginal-specific right to have customary adoptions recognized by the courts and given legal effect did not then and does not now require satisfaction of the *Van der Peet* test, *infra*, note 35. See *Re Adoption of Katie E7-1807*, [1961] N.W.T.J. No. 2, 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.). The phrase is also broad enough to make the argument that internationally recognized human rights of Aboriginal peoples, such as those provided for in the United Nations *Declaration on the Rights of Indigenous Peoples*, GA Res. 7 September 2007, UN Doc. A/61/L.67, is captured by the term “any” rights in s. 25 of the Charter.

³⁴ Section 35 of the Constitution reads as follows:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

³⁵ *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) [hereinafter “*Sparrow*”]; *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507 (S.C.C.) [hereinafter “*Van der Peet*”]; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.) [hereinafter “*Delgamuukw*”].

less, where an Aboriginal party has proven such rights or a compelling but unproven claim to such rights in the *Haida* sense, section 25 of the Charter would protect those substantive rights or the procedural right to consultation regarding claimed but unproven rights recognized through this jurisprudentially developed doctrine of Aboriginal and Treaty right interpretation in the Constitution.³⁶

Concerning the scope of section 25, one noteworthy case found that the reference to “land claim agreements” in section 25(b) protects the Nisga’a Land and Self-government Agreement (which is by definition a Treaty under section 35(1) of the Constitution) from Charter challenges that threaten the existence of certain provisions within the Nisga’a Agreement.³⁷ Section 25 was relied on successfully to defeat a claim that the Nisga’a land and self-government agreement was unconstitutional because non-Nisga’a who live in Nisga’a territory cannot vote in Nisga’a elections. In *Campbell*, this exclusion of non-Nisga’a from voting was said to be a violation of section 3 of the Charter.

The Nisga’a Nation responded by arguing that the Nisga’a Agreement is recognized in section 25 as a “land claim agreement” and that the rights of the Nisga’a Nation as set out therein are protected from Charter challenges and operate as a shield against the claim by the plaintiffs. The Court agreed with the Nisga’a Nation, citing section 25 as a shield against such a Charter challenge. Thus, in *Campbell*, the land and self-government agreement under scrutiny was regarded as a Treaty for the purposes of section 35. Section 25 was then triggered by the *Campbell* claims under the Charter and served to protect the challenged provisions of the Nisga’a Agreement, even where some of those who may be affected by it are unable to benefit from select Charter rights to the extent that Nisga’a citizens are able to benefit.

Significantly, however, section 25 is open-ended and covers more than the rights contained in section 35 of the Constitution. In addition, the provision expressly recognizes a third category of rights (which need not be constitutional rights) belonging to Aboriginal peoples which are

³⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter “*Haida*”]. It is uncertain whether an unproven procedural right (not yet recognized by a court or in legislation) to consultation based on an unproven substantive claim to an Aboriginal right or Treaty right would qualify under s. 25 of the Charter. However, an “accommodation” agreement reached as the result of consultation would arguably qualify because the asserted claim has now transformed into specific contractual rights and obligations. See *infra*, note 41.

³⁷ *Campbell v. British Columbia*, [2000] B.C.J. No. 1524, [2000] 4 C.N.L.R. 1 (B.C.S.C.) [hereinafter “*Campbell*”].

also to be shielded from abrogation or derogation by the Charter. Bruce Wildsmith, after a comprehensive analysis canvassing various legal authorities relevant to the issue, concluded that “it seems likely that ‘other rights and freedoms’ includes statutory and contractual sources of rights that can be attributed to the unique position of the native peoples”.³⁸ Unfortunately, there is very little case law interpreting this third category of “other rights”. What does exist, however, would arguably support the view that Aboriginal-specific entitlements (like the one embedded in section 718.2(e) of the *Criminal Code* that provides for beneficial treatment of Aboriginal offenders in sentencing) would be captured by section 25. Although a benefit like section 718.2(e) is different from the traditional types of claims generally made under section 35 by Aboriginal peoples (cultural rights to renewable and non-renewable resources or Treaty rights), it may nonetheless receive similar section 25 Charter protection.

V. ABORIGINAL SENTENCING PRINCIPLES AS “OTHER RIGHTS”

Although section 25 is generally regarded as protecting Aboriginal and Treaty rights from being abolished or unduly limited, it is apparent that section 25 goes beyond section 35 in terms of what it can shield from Charter challenge.³⁹ The provision makes reference to other rights in addition to Aboriginal and Treaty rights in section 35 of the Constitution. It remains somewhat uncertain what constitutes “other rights and freedoms”.

In a number of court cases, judges have stated that the mere reference to an entitlement or benefit in legislation or a policy-based agreement is not necessarily sufficient to raise the benefit or entitlement to a level supported by section 25. In other words, the benefit or entitlement must derive from an inherent source beyond the government simply

³⁸ Wildsmith, *supra*, note 9, at 35. This point was noted by Celeste Hutchinson in a case comment on the *Kapp* British Columbia Court of Appeal decision. See Celeste Hutchinson, “Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the Charter” (2007) 52 McGill L.J. 173, at para. 36. In this comment, the author noted the conclusion by Wildsmith that statutes and agreements may be included within the scope of s. 25 as “other rights”. However, with respect, she mistakenly questions this conclusion because she argues that their inclusion in s. 25 would elevate them to the status of constitutional rights. Respectfully, this is not the case. Protection under s. 25 does not elevate the right itself to constitutional status, as Bastarache J. noted in *Kapp*, *supra*, note 7, at para. 107.

³⁹ See *Morseby Explorers Ltd. v. Canada (Attorney General)*, [2005] F.C.J. No. 723, 273 F.T.R. 175 (F.C.), *aff’d* [2007] F.C.J. No. 1116, [2008] 2 F.C.R. 341 (F.C.A.), leave to appeal refused [2007] S.C.C.A. No. 536 (S.C.C.).

saying it exists in the form of legislation or policy. There must be some basis for the content of the right in the customs and traditions of the Aboriginal group or in the dynamics of the colonial relationship that logically supports the benefit or entitlement captured in the legislation, policy or agreement.

In *Kapp*, Brenner J. of the British Columbia Supreme Court said that the “Pilot Sales Program” which gave certain Aboriginal communities a 24-hour advance start to the commercial fishing of salmon was not sufficient to be considered an “other right” for the purposes of section 25 of the Charter.⁴⁰ “As such, it seems to me that something more than an ‘asserted right’ or a negotiated agreement in the context of an asserted right is necessary”, stated Brenner J.⁴¹ A similar perspective on the interpretation of “other rights” in section 25 was stated by L’Heureux-Dubé J. in a case involving a claim by a Band that the restriction of voting to on-reserve members only was acceptable and not a violation of the section 15 equality rights of non-reserve band members.⁴² Justice L’Heureux-Dubé said that although section 25 is broader in scope than section 35, and might include statutory rights (*i.e.*, rights referred to in legislation), that fact alone may not be sufficient to bring the statutory provision within the meaning of section 25. In *Kapp*, the majority decided to apply section 15(2) instead of section 25 of the Charter. Justice Bastarache, however, followed the approach in *Campbell* and held that a section 15(2) analysis is unnecessary, as section 25 is triggered as a shield once a claim under the Charter challenges a right protected by section 25.

As discussed briefly in the introduction, there are some serious criticisms for pursuing a Charter analysis in the context of policy initiatives that address claimed Aboriginal rights and interests, as the majority did in *Kapp* and more recently in *Cunningham*. The focus on race and culture that a Charter analysis requires results in the Court having to justify treating Aboriginal peoples’ legal interests in Agreements or accommo-

⁴⁰ *R. v. Kapp*, [2004] B.C.J. No. 1440, 2004 BCSC 958 (B.C.S.C.).

⁴¹ *Id.*, at para. 35. With due respect to the view of Brenner J., there is a relevant distinction between an asserted right and a right recognized in an agreement. Contractual rights, like treaty rights, are not mere asserted rights. The parties have determined their legal rights as per the contract and they will be recognized by a court if requested, but neither the courts nor the common law create the rights in question. They are created by the parties to the agreement. The view of Wildsmith that contractual rights are protected by s. 25 is thus preferable to that of Brenner J. See Wildsmith, *supra*, note 9, at para. 35.

⁴² *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.) [hereinafter “*Corbiere*”].

dations with the Crown as “affirmative action” programs rather than as a manifestation or vindication of Aboriginal peoples’ unique political and legal rights and status.⁴³ The “analytical confusion” caused by improperly labelling government-recognized Aboriginal rights in the form of programs, agreements and initiatives as ameliorative treatment of a minority group is profoundly problematic.⁴⁴ The unique legal status of Aboriginal peoples (which to fully appreciate requires one to go beyond the confines of Canadian domestic law) is a factor that requires us to distinguish many government-recognized Aboriginal benefits programs and initiatives from the ameliorative treatment accorded non-Aboriginal disadvantaged “minority groups”. In the case of Aboriginal rights, there is often a political collective rights dimension to them which non-Aboriginal minority groups do not enjoy.

The inherent collective rights are entitlements that are not dependent on the goodwill of the Crown. They are inherent and beyond the reach of the common law or federal/provincial legislation (although they may be recognized by the common law and legislation). Aboriginal-specific government programs such as the Pilot Sales Program in *Kapp* and the Alberta Metis Settlements land and self-government agreement at issue in *Cunningham* have come about in part due to the existence of inherent collective rights belonging to the Indigenous parties in these cases that other groups do not have. They are entitled to such benefits not simply because Canadian governments find that they are in the interests of ameliorating a socio-economic condition, but because they are simultaneously characteristic of Canadian society’s remedial obligations to repair the peoplehood damage caused by colonization. Aboriginal rights to self-government and cultural protection, and freedom from systemic discrimination and prejudice, are not just about correcting a disadvantaged “condition” of life. They are (whether in purpose or effect), as the Supreme Court of Canada reminded us in *Haida*, about reconciling “*pre-existing Aboriginal sovereignty* with assumed Crown sovereignty”.⁴⁵

⁴³ See June McCue, “Kapp’s Distinctions: Race-Based Fisheries, the Limits of Affirmative Action for Aboriginal Peoples and Skirting Aboriginal Peoples’ Unique Constitutional Status Once Again” (2008) 5 Directions 56. See also Dominique Nouvet, “Case Comment: *R. v. Kapp*: A Case of Unfulfilled Potential” (2010) 8 Indigenous L.J. 81, where the author makes the argument that the Pilot Sales Program in *Kapp* should have been characterized as a “reasonable accommodation” arrangement in the *Haida* sense of a duty to consult and accommodate, and thus protected as an “other right” under s. 25 in that way.

⁴⁴ Jonathan Adams, *A Case Comment on Alberta v. Cunningham: Another Lost Opportunity for Section 25* (Ottawa: Research Paper, 2011), at 17 [hereinafter “Adams”].

⁴⁵ *Haida*, *supra*, note 36, at para. 20 (emphasis added). For an excellent review of the significance of the Supreme Court of Canada admitting that the Crown’s sovereignty is only *de facto*

Unfortunately, the reliance and application of the Charter reinforces the “treatment of Aboriginal peoples as just one of several other disadvantaged minorities” which “exacerbates and perpetuates the historical struggle for identity present throughout Aboriginal history”.⁴⁶ Although the end result of applying section 15(2) instead of section 25 in both *Kapp* and *Cunningham* is the same, how we get there is extremely important if we are to stay true to the course of decolonizing Aboriginal-Canadian relations.

Although refusing to apply a section 25 analysis, the majority in *Kapp* nevertheless opted in *obiter* to make a brief remark about the scope of section 25. In *obiter* the majority said that

the wording of s. 25 and the examples given therein — aboriginal rights, treaty rights, and “other rights or freedoms”, such as rights derived from the *Royal Proclamation* or from land claims agreements — suggest that not every aboriginal interest or program falls within the provision’s scope. Rather, only rights of a constitutional character are likely to benefit from s. 25. If so, we would question, without deciding, whether the fishing licence is a s. 25 right or freedom.⁴⁷

The requirement that the right be of a “constitutional character” results in an unnecessarily narrow interpretation of the scope given to the term “other rights”. In my opinion, the limitation on the scope of section 25 put forth by the majority in its *obiter dicta* remarks is unjustified and not supported by any previous authority, and in fact is inconsistent with its own views put forth in *Corbiere*, where L’Heureux-Dubé J. acknowledged that statutory rights may qualify as “other rights” under certain circumstances. Moreover, the analysis required to determine what “constitutional character” means would lead us down a path impossible to objectively measure with any sense of confidence.⁴⁸ This is a very ambiguous test and offers courts little concrete guidance. There may be initiatives that profoundly address colonial harms, yet may be inappropriate to describe such an initiative as being of constitutional character. Would the residential schools settlement agreement be considered of a

and not legally legitimate until a treaty is made between the Crown and Aboriginal peoples, who possess *de jure* sovereignty over the territory in question, see Felix Hoehn, *The Emerging Equality Paradigm in Aboriginal Law* (Saskatoon: Master’s Thesis College of Law, University of Saskatchewan, 2011).

⁴⁶ Adams, *supra*, note 44, at 17.

⁴⁷ *Kapp*, *supra*, note 7, at para. 63.

⁴⁸ To realize how unworkable such a proposed test for determining what would be included in s. 25 would be, one need only note that matters of constitutional significance range from the mundane (beacons and buoys) to the fundamental (freedom itself).

constitutional character? It is, after all, a private law settlement between plaintiffs and defendants which are not typically thought of as having constitutional characteristics. Yet the agreement is viewed as a major turning point in addressing the colonial harms of the residential schools era.

The better view is that statutes and cooperative agreements (such as co-management arrangements) can and should be included within the scope of section 25 provided that there is some policy connection or justification that addresses in a meaningful way the colonial experience of Aboriginal peoples and/or the protection of their cultures and institutions, such as those identified at the outset of this paper. For these reasons, the approach offered by Bastarache J. in *Kapp* is preferable.⁴⁹

When *Kapp* was heard by the Supreme Court of Canada in 2008, Bastarache J. examined the issue of whether the “Pilot Sales Program” was an “other right” under section 25 of the Charter. Contrary to the opinion of Brenner J. at the trial court level, Bastarache J. was of the view that section 25 is to be interpreted broadly and has the ability to protect agreements like the Pilot Sales Program, which benefits Aboriginal fishers to the exclusion of Canadians generally. Justice Bastarache held that the scope of section 25 could also potentially include legislative provisions that provide a benefit exclusively for Aboriginal peoples to the exclusion of Canadians generally, provided there is a legitimate Aboriginal interest at stake. Justice Bastarache goes on to define what kind of interest needs to be implicated in such an agreement or legislative measure to warrant inclusion in section 25.

In interpreting the scope and purpose of section 25, Bastarache J. stated that what was called for was a “contextualized interpretation that takes into account the cultural needs and aspirations of natives”.⁵⁰ In agreeing with Professor Macklem, he noted that section 25 “protects federal, provincial and Aboriginal initiatives that seek to further interests associated with indigenous difference from Charter scrutiny” and that legislation (arguably like section 718.2(e)) which “distinguishes between aboriginal and non-aboriginal people in order to protect interests associ-

⁴⁹ Grace Woo in her seminal book, *supra*, note 5, at 103-104, has identified a list of factors that would be characteristic of “post-colonial” decision-making that could be adapted to assist in the identification of government initiatives that could be described as positively addressing the colonial experience in a meaningful way.

⁵⁰ *Kapp*, *supra*, note 7, at para. 109.

ated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from Charter scrutiny”⁵¹.

It is trite to say that it is an interest of Aboriginal peoples to not be more harmed by the criminal justice system than they already have been.⁵² Moreover, it is a valid interest of Aboriginal peoples to have the systemic discrimination inherent in the criminal justice system consciously abridged to the extent possible in sentencing Aboriginal offenders. This is an interest unique to Aboriginal peoples because of the colonial relationship that existed and is currently manifest in statistics of over-representation in prisons. In *Ipeelee*, LeBel J. noted that current levels of criminality are intimately tied to the legacy of colonialism. Quoting Professor Carter, LeBel J. notes that, “poverty and other incidents of social marginalization may not be unique, but how a people get there is. No one’s history in this country compares to Aboriginal people’s”.⁵³ A logical response to this colonial impact on Aboriginal peoples is to endorse the reparative nature of section 718.2(e) and the desire to minimize cultural disconnect to the extent possible in the sentencing of Aboriginal offenders. The Supreme Court in *Gladue* acknowledged that two key objectives of the provision were to ameliorate the effects of systemic discrimination in the system and to address the cultural alienation by providing judges with the necessary mandate and direction to do so where appropriate.

This Aboriginal-specific sentencing provision must be viewed in relation to the overall colonial experience that has impacted Aboriginal peoples and the desire by government to address a particular aspect of this experience through an accommodation in sentencing. The provision is, in a sense, a legislative attempt, within the context of criminal justice, to reconcile the interests of Aboriginal peoples with the Crown. There is a political reparative dimension in Aboriginal-specific rights that does not have a parallel in the context of other minority-protection instrumentalities. At first blush, this reparative dimension is not apparent on the surface of section 718.2(e), because it is relevant to Aboriginal offenders as individuals and not as collectives. However, the purpose and objectives reflect the rebuilding of Aboriginal peoples as collectives and

⁵¹ *Id.*, at para. 103.

⁵² This point was reinforced in *Ipeelee*, where the majority stated that “[s]entencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria [socio-economic and systemic factors] to ensure that they are not contributing to ongoing systemic racial discrimination”: *Ipeelee*, *supra*, note 13, at para. 67.

⁵³ *Id.*, at para. 77.

indirectly promotes healthier Aboriginal communities and Aboriginal-Canadian relations. Moreover, it is directed to Aboriginal cultural interests by recognizing and indeed promoting traditional justice approaches, which are just as much an Aboriginal collective interest as an individual Aboriginal interest.⁵⁴

Section 718.2(e) is the only provision in the *Criminal Code* that expressly identifies Aboriginal peoples for special positive treatment regarding sentencing. The Supreme Court of Canada commented on the provision and made several observations about the intended purpose of the special sentencing consideration and how it supports Aboriginal culture and traditions regarding social control within Aboriginal communities. The Supreme Court of Canada made reference to the fact that section 718.2(e) exists because Aboriginal people have a distinct cultural background and experiences that require special consideration.

The Court reinforced this perspective in *Ipeelee*:

As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: “What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.” As the RCAP indicates, at p. 309, the “crushing failure” of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to “the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.” The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.⁵⁵

Given the purposes of section 718.2(e), and the broader social and political context behind its enactment, it is logical that it would be included as an “other right” within the meaning of section 25 of the Charter. Although it is a statutory provision that references Aboriginal peoples and provides a relative benefit, it is more than a mere policy

⁵⁴ For a very insightful account of s. 718.2(e) as reflective of the acceptance of “individual nation responsibility” as well as collective national responsibility both for reconciling Aboriginal-Canadian relations and for the reparation of colonial harms, see Carmela Murdocca, *To Right Historical Wrongs: Reparative Justice, Sentencing and the Production of Racial Difference* (Unpublished Manuscript, 2012), on file with the author.

⁵⁵ *Ipeelee*, *supra*, note 13, at para. 74.

endorsement of some fleeting interest or arrangement between government and Aboriginal peoples. It reflects prior common law principles that have the same goals in the sentencing of Aboriginal offenders as the statutory provision does. It references Aboriginal peoples having due regard to the unique circumstances that Aboriginal peoples have historically faced as a result of colonization. These unique circumstances have historically disadvantaged Aboriginal peoples in the face of the Canadian criminal justice system and are uniquely felt by them. Section 718.2(e) was enacted to address this historical and ongoing “wrong”. Actions that have a reparative quality to them are of the same nature as a legal right. They fit the paradigm as to what is theoretically a “right” and thus deserving of recognition as a legal right belonging to Aboriginal peoples, which in this case directly benefits individual Aboriginal persons and indirectly benefits Aboriginal polities.⁵⁶

Usually a solution that is developed to address a wrong is at the same time a “right” from the perspective of the victim. Interestingly then, an Aboriginal offender can be regarded simultaneously as an offender *vis-à-vis* the specifics of the criminal offence and as an indirect victim in the larger racialized societal context of Aboriginal-Crown cultural, political and social conflict. Related to this is the recognition in *Ipeelee* that the underlying causes (background factors) of criminal conduct may quite appropriately diminish the moral blameworthiness of the offender.⁵⁷

It should also be noted that the recognition of section 718.2(e) as a protected “other right” in section 25 is consistent with various Aboriginal specific human right standards contained within the *United Nations Declaration on the Rights of Indigenous Peoples*. For example, the sentencing provision is relevant to upholding Aboriginal-specific human rights reflected in Articles 2, 9, 21 and 34.⁵⁸

The purpose behind section 718.2(e) and its effect within the present decolonizing state of Canadian society is strong support for the argument that it should properly be regarded as a right, although not an Aboriginal right under section 35, but nonetheless a legal right that should be recognized under section 25 of the Charter. The requirement that the interest protected be rooted in the protection of Aboriginal culture and interests is fully present in the purpose and effect of section 718.2(e) and thus satisfies the criteria for triggering section 25 protection. This is

⁵⁶ Leif Wenar, “The Nature of Rights” (2005) 33 *Philosophy and Public Affairs* 223.

⁵⁷ *Ipeelee*, *supra*, note 13, at para. 73.

⁵⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, *supra*, note 33.

evident in the two-prong test in *Gladue*, which imposes the requirement that judges address the “unique systemic or background factors” of the Aboriginal offender and to give due regard to restorative goals because of the offender’s “particular aboriginal heritage”. This Aboriginal-specific judicial mandate corresponds directly with the kind of characteristics that attract section 25 Charter protection and that it is meant to address.

This does not mean, as Bastarache J. carefully pointed out, raising the “right” to the level of a constitutional right.⁵⁹ The protection from Charter scrutiny does not have the effect of advancing the right in that sense. It only protects a regular common law or legislative right/benefit unique to Aboriginal peoples from Charter challenge. Parliament can still unilaterally amend the legislation and repeal the Aboriginal reference to sentencing by its own authority at any time without qualification.⁶⁰

As a final point, I agree with Bastarache J. that section 25 operates as a threshold issue, and once triggered is a shield. It is not, as some commentators have argued, simply an interpretive prism.⁶¹ If the provision was intended to aide in interpretation only, then arguably the wording would be more like the wording of a similar provision in the *Canadian Human Rights Act*.

This Act *shall be interpreted* and applied in a manner *that gives due regard to* the First Nations legal traditions and customary laws, particularly the balancing of individual rights and collective rights and interests, ...⁶²

Moreover, it would be repeating past mistakes if section 25’s other rights were to be read as only protecting rights that are culturally distinctive according to the *Van der Peet* test, as some commentators and authorities have argued.⁶³ The *Van der Peet* test for determining the scope of Aboriginal rights has been severely criticized in the literature and academic commentary.⁶⁴ It is also apparent that the Supreme Court

⁵⁹ *Kapp, supra*, note 7, at para. 107.

⁶⁰ Doing so unilaterally would, however, be very colonial and anti-politic.

⁶¹ For a useful discussion of the various approaches advocated for interpreting s. 25, see Jane Arbour, *supra*, note 9, at 10-15.

⁶² R.S.C. 1985, c. H-6 (emphasis added). See discussion of this provision in Canadian Human Rights Commission, *Human Rights Handbook for First Nations* (2011), at 31-32.

⁶³ For example, Jane Arbour, in noting the test set by *Van der Peet*, says that the scope of “other rights” may find guidance in applying a similar test to s. 25 “other rights”. *Supra*, note 9, at 60-62.

⁶⁴ Although many legal scholars have found serious problems with the *Van der Peet* test, a recent and masterful review can be found in Minniwaanagogiizhigook (Dawnis Kennedy),

of Canada itself may be distancing itself from the strict test laid down by *Van der Peet* as to what constitutes an Aboriginal right in section 35.⁶⁵ Aboriginal rights should not be contingent on the degree to which the activity, custom or tradition looks different culturally from the mainstream.⁶⁶ Such rights also often acknowledge directly or indirectly the political status of Aboriginal peoples and are therefore not just about protecting cultural practices or racial difference. Let's not make the same mistakes in interpreting the content and scope of section 25 rights that were previously made when defining the scope and content of section 35 rights.⁶⁷

Section 25 was included in the Charter to protect arrangements that uniquely benefit Aboriginal peoples because of their uniquely colonial relationship and experiences with English Imperial authorities, and to ensure in this decolonization period that there exists a mechanism to justify differential treatment for Aboriginal peoples accordingly. There is nothing in the language of the provision that requires these rights to be restricted to culturally distinctive practices, traditions and customs. A variety of policies exist that accommodate a wide range of Aboriginal interests (cultural, political, human rights-based, spiritual, environmental, ethical, collective and individual, domestic and international) in this present-day state of Aboriginal-Canadian relations. All deserve equal protection under section 25.

"Reconciliation without Respect?: Section 35 and Indigenous Legal Orders" in Law Commission of Canada, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2008).

⁶⁵ *R. v. Sappier; R. v. Gray*, [2006] S.C.J. No. 54, [2006] 2 S.C.R. 686 (S.C.C.).

⁶⁶ It should be remembered that s. 25 existed well before *Sparrow* and *Van der Peet* were decided. The limited definition given to "Aboriginal" rights came after the fact. Indeed, if we avoid the limitations to the definition of "Aboriginal rights", there is no reason not to find a provision like s. 718.2(e) to be an "Aboriginal right" itself, instead of trying to characterize it as "another right" because it does not fit well with the subsequent jurisprudential analysis of s. 35. If we define Aboriginal rights more broadly to include remedial responses to colonialism or those initiatives aimed at the repair of the relationship between Aboriginal and non-Aboriginal peoples (for example, along the lines of a human rights theory of Aboriginal rights endorsed by the United Nations), there is no reason why we cannot find a sentencing provision directed to Aboriginal offenders as an Aboriginal right proper.

⁶⁷ Grace Woo, in her exhaustive review of 65 Supreme Court of Canada cases dealing with Aboriginal issues, concluded that "overall, the post s. 35 judgments remain profoundly colonial in their capacity to impose externally defined categories and prototypical models on Indigenous peoples even though, among themselves, the judges demonstrated awareness and tolerance of alternatives required by postcoloniality". Woo, *supra*, note 5, at 161-62.

VI. CONCLUSION

The special care required of judges to avoid incarceration of Aboriginal offenders required by section 718.2(e) may be viewed by some as discriminatory based on race or ethnic background and subject to Charter challenge, most likely under section 15. In *Gladue*, the Supreme Court of Canada anticipated a reverse discrimination argument if section 718.2(e) was challenged. In doing so, the Court said:

There is no constitutional challenge to s. 718.2(e) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the Charter. We would note, though, that the aim of s. 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.⁶⁸

This paragraph is a hint that if challenged the Court might rely on section 15(2) to justify its existence. *Gladue* makes no reference to section 25. However, for the reasons stated above, to opt for section 15(2) protection over section 25 protection would be inconsistent with the goal of reconciling Aboriginal political and societal interests with Canadian political and societal interests. The section 15(2) approach would reinforce assimilation and detract from the overall objective of a decolonized Canada.

Putting section 718.2(e) into a historical colonial context, and recognizing the contemporary goals and objectives of government policies that are aimed at reparation of colonial harms and rebuilding positive relations through reconciliation, the sentencing provision can logically be characterized as an “other right” belonging to Aboriginal peoples protected by section 25 of the Charter from those who wish to abrogate or derogate the special and targeted benefit accorded to Aboriginal offenders. Applying section 15(2) instead of section 25 is unnecessary and indeed far too risky to the post-colonial project of strengthening Aboriginal-Canadian harmonious co-existence.

⁶⁸ *Gladue*, *supra*, note 22, at para. 87.

