

---

Volume 51  
Issue 1 *Volume 51, Issue 1 (Fall 2013)*  
*On Teaching Civil Procedure*  
Guest Editor: Janet Walker

Article 6


---

10-1-2013

## Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration

Ryan Newell

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Criminal Law Commons](#), [Criminology and Criminal Justice Commons](#), and the [Indian and Aboriginal Law Commons](#)

Article



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

---

### Citation Information

Newell, Ryan. "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration." *Osgoode Hall Law Journal* 51.1 (2013) : 199-249.  
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol51/iss1/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

# Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration

## Abstract

The Safe Streets and Communities Act (SSCA), a recent and wide-reaching piece of the Conservative Party of Canada's tough-on-crime agenda, will exacerbate the ongoing crisis of Indigenous over-incarceration. In this article, I review the extensive literature that addresses the causes of Indigenous over-representation in the Canadian criminal justice system before assessing the impact of *R v Gladue*, nearly fifteen years after the Supreme Court of Canada's decision. I analyze how the SSCA will restrict courts' resort to *Gladue*, thus resulting in the incarceration of increasing numbers of Indigenous people. I then develop one avenue of constitutional challenge to the SSCA's mandatory minimum sentences that is tailored to Indigenous offenders. Drawing on insights from *Gladue* and from the cases that followed it, I argue that the meaning of "cruel and unusual punishment" under section 12 of the Canadian Charter of Rights and Freedoms should shift in the case of Indigenous offenders to account for the well-established connections between colonialism and the over-incarceration of Indigenous people.

## Keywords

Indigenous peoples--Legal status, laws, etc.; Discrimination in criminal justice administration; Imprisonment; Canada

## Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

## Making Matters Worse: The *Safe Streets and Communities Act* and the Ongoing Crisis of Indigenous Over-Incarceration

RYAN NEWELL \*

The *Safe Streets and Communities Act* (SSCA), a recent and wide-reaching piece of the Conservative Party of Canada's tough-on-crime agenda, will exacerbate the ongoing crisis of Indigenous over-incarceration. In this article, I review the extensive literature that addresses the causes of Indigenous over-representation in the Canadian criminal justice system before assessing the impact of *R v Gladue*, nearly fifteen years after the Supreme Court of Canada's decision. I analyze how the SSCA will restrict courts' resort to *Gladue*, thus resulting in the incarceration of increasing numbers of Indigenous people. I then develop one avenue of constitutional challenge to the SSCA's mandatory minimum sentences that is tailored to Indigenous offenders. Drawing on insights from *Gladue* and from the cases that followed it, I argue that the meaning of "cruel and unusual punishment" under section 12 of the *Canadian Charter of Rights and Freedoms* should shift in the case of Indigenous offenders to account for the well-established connections between colonialism and the over-incarceration of Indigenous people.

La *Loi sur la sécurité des rues et des communautés* (LSRC), élément récent et de grande portée du programme de lutte contre la criminalité du Parti conservateur du Canada, exacerbera la crise permanente du taux d'incarcération démesurément élevé des Autochtones. Dans cet article, j'examine la documentation abondante qui aborde les causes de la surreprésentation des Autochtones dans le système canadien de justice pénale avant d'évaluer, quinze ans après les faits, l'impact du jugement *R. c. Gladue* de la Cour suprême du Canada. J'analyse la façon dont la LSRC restreindra la possibilité pour les tribunaux d'invoquer le jugement *Gladue*, ce qui entraînera l'incarcération d'un plus grand nombre d'Autochtones. Je développe ensuite une approche spécifique aux contrevenants autochtones pour contester la constitutionnalité

---

\* J.D., Osgoode Hall Law School, 2012. Associate at Sack Goldblatt Mitchell LLP. I would like to thank Kent McNeil as well as the editors and anonymous reviewers for their helpful feedback on a previous draft of this article.

des peines minimales obligatoires en vertu de la LSRC. Tirant parti de ce que nous apprend le jugement *Gladue* et des jugements ultérieurs, je fais valoir que la signification de « châtiment cruel et inhabituel » en vertu de l'article 12 de la *Charte Canadienne des Droits et Libertés* devrait être modifiée dans le cas des contrevenants autochtones afin de tenir compte de la corrélation bien établie qui existe entre le colonialisme et l'incarcération démesurément élevée des Autochtones.

---

I.	INDIGENOUS OVER-INCARCERATION AND ITS CAUSES.....	202
A.	The Numbers.....	202
B.	Studied, Restudied, Over-studied .....	203
C.	Explanations for the Crisis of Over-incarceration .....	205
II.	LEGISLATIVE AND JUDICIAL INTERVENTIONS.....	208
A.	Bill C-41 .....	208
B.	<i>R v Gladue</i> .....	209
1.	The Reception of <i>Gladue</i> .....	210
2.	Contextualized Sentencing and the Seriousness of the Offence .....	212
3.	Procedural Limitations.....	215
III.	THE <i>SAFE STREETS AND COMMUNITIES ACT</i> : OMNIBUS COMING THROUGH .....	217
A.	More Mandatory Minimum Sentences .....	222
B.	Restriction on Conditional Sentences.....	225
C.	Changes to the <i>Youth Criminal Justice Act</i> .....	227
IV.	CHALLENGING THE CONSTITUTIONALITY OF THE <i>SSCA</i> .....	229
A.	Section 12 of the <i>Charter</i> : Just How "Cruel and Unusual"? .....	230
1.	The Dual Meaning of Gross Disproportionality .....	233
B.	Section 12 Challenges to Mandatory Minimum Sentences .....	236
1.	The Circumstances of the Offender .....	237
2.	Appropriate Range of Sentences .....	238
3.	Existence of Valid Alternatives .....	239
4.	The Penological Goals and Sentencing Principles of the Mandatory Minimum .....	240
5.	Imagining Reasonable Hypotheticals.....	241
V.	CONCLUSION .....	247

---

THE *SAFE STREETS AND COMMUNITIES ACT*<sup>1</sup> (*SSCA*) received Royal Assent on 13 March 2012 and its various components came into force in a staggered sequence between August and November 2012.<sup>2</sup> The impact of the *SSCA*'s wide-ranging reforms to the Canadian criminal justice system will surely be felt for years to come. As the centrepiece of the Conservative Party of Canada's tough-on-crime agenda, the *SSCA* represents a significant step in a massive policy shift towards an expansion of the Canadian prison system. The legislation comes at a time when the Government of Canada's own statistics demonstrate that 93 per cent of

1. SC 2012, c 1.

2. See Canada, Department of Justice, News Release, "Backgrounder: The Safe Streets and Communities Act Four Components Coming Into Force" (June 2012) online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc\\_32759.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32759.html)>.

Canadians report that they are “satisfied with their personal safety from crime.”<sup>3</sup> Not only will the law cost millions of dollars to implement and send thousands more people to prison, its passage has given rise to serious tensions within the structure of Canadian federalism.<sup>4</sup>

The consequences of the *SSCA* are likely to be especially disastrous for Indigenous people.<sup>5</sup> A crisis of over-incarceration among Indigenous people in Canada has been well documented for decades. Yet, the number of Indigenous people being sent to Canadian prisons continues to grow. The *SSCA* will only make matters worse.

Relying on the multitude of existing research, Part I of this article explores the dimensions and underlying causes of the crisis of Indigenous over-representation<sup>6</sup> in the Canadian criminal justice system. I argue that the causes of the crisis are hardly a mystery; they have been well understood for decades. Part II explains the legislative and judicial interventions that have been undertaken to address the crisis and then turns to evaluate their efficacy in light of the insights gleaned from the wealth of research highlighted in Part I. Part III introduces the *SSCA*, charting the way that the draft legislation, Bill C-10, was debated in Parliament, in order to demonstrate that the law’s harmful effects were made amply clear before its enactment. Special attention is paid to the voices of Indigenous people

3. Shannon Brennan, “Canadians’ Perceptions of Personal Safety and Crime, 2009” in Statistics Canada, *Juristat* (Ottawa: Minister of Industry, December 2011) at 5, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11577-eng.pdf>>.
4. See e.g. Tobi Cohen, “Tories Use Majority to Pass Omnibus Crime Bill,” *National Post* (12 March 2012), online: <<http://news.nationalpost.com/2012/03/12/contentious-tory-crime-bill-passes-as-countrys-biggest-provinces-voice-concerns-over-costs/>>.
5. The terms “Indigenous,” “Aboriginal,” “Native,” and “First Nations” have loaded political implications, an in-depth exploration of which is beyond the scope of this article. The term “Aboriginal” is understood by some people as connoting an inherently assimilationist orientation towards the Canadian state. See e.g. Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) at 126. Although this view is certainly not universally held among Indigenous people, I nonetheless choose to use the term “Indigenous” to acknowledge that “Aboriginal” is a contested term. That said, the term “Aboriginal” is used in many of the sources that I draw upon and analyze, including judicial authorities, research by governmental commissions, and academic articles by Indigenous and non-Indigenous scholars.
6. I employ the terms “over-representation” and “over-incarceration” throughout this article somewhat reluctantly. Given many Indigenous nations’ claims to sovereignty and their contestation of the unilateral imposition of Canadian criminal law onto their societies, it seems inappropriate to articulate the problem as one of *over-representation*. Would any amount of Indigenous representation in the Canadian criminal justice system—even if it were consistent with the proportion of Indigenous people in the Canadian population—be appropriate?

and their allies who raised concerns during the debates about how Bill C-10 would compound the ongoing crisis of over-incarceration. I then provide a basic outline of the elements of the *SSCA* that are likely to lead to the imprisonment of even greater numbers of Indigenous people. In Part IV, I develop one avenue of constitutional challenge to the *SSCA*'s mandatory minimum sentences that may be pursued by Indigenous offenders. I explore how the analysis performed by courts under section 12 of the *Canadian Charter of Rights and Freedoms*<sup>7</sup> can be developed to account for the unique circumstances of Indigenous people and mobilized to strike down the *SSCA*'s mandatory minimum sentencing provisions. I investigate the possibility of section 12 challenges as a strategy of harm reduction in the face of a law that, if unchallenged, will surely have grave impacts on Indigenous communities across the country. By identifying opportunities to imbue the section 12 analytical framework with the insights of *R v Gladue*<sup>8</sup> and subsequent jurisprudence, I argue that the meaning of cruel and unusual punishment must shift in the case of Indigenous offenders to address the undeniable connections between colonialism and the drastic over-representation of Indigenous people in Canadian jails and prisons.

## I. INDIGENOUS OVER-INCARCERATION AND ITS CAUSES

### A. THE NUMBERS

Indigenous people are drastically over-represented in the Canadian criminal justice system. One way to begin an analysis of what the Supreme Court of Canada (Court) referred to as a “crisis in the Canadian criminal justice system”<sup>9</sup> is with reference to statistics. While Indigenous people represented approximately 3 per cent of the total Canadian adult population according to the 2006 Census, in 2008/2009 they constituted 27 per cent of those admitted into provincial and territorial prisons, 18 per cent of those admitted into federal prisons, 21 per cent of those on remand, and 20 per cent of those on conditional sentences.<sup>10</sup> Between 1998/1999 and 2007/2008, there was a decrease in the total number of people admitted into provincial and territorial custody. Within that total, however, the

7. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

8. [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue* cited to SCR].

9. *Ibid* at para 64.

10. Donna Calverley, “Adult Correctional Services in Canada, 2008/2009” in Statistics Canada, *Juristat* (Ottawa: Minister of Industry, 2010) at 5, online: <<http://www.statcan.gc.ca/pub/85-002-x/2010003/article/11353-eng.pdf>>.

proportion of Indigenous people sentenced to custody actually increased from 13 per cent to 18 per cent.<sup>11</sup>

Incarceration rates for Indigenous women and youth are even further skewed. Among all women sentenced to provincial and territorial custody between 1998/1999 and 2007/2008, the proportion of Indigenous women increased from 17 per cent to 24 per cent.<sup>12</sup> In 2008/2009, Indigenous women represented 37 per cent of all women admitted into custody.<sup>13</sup> In the same period, Indigenous youth represented 36 per cent of youth admitted into custody.<sup>14</sup> The proportion of Indigenous youth sentenced to custody is 5.5 times greater than their proportion of the total youth population.<sup>15</sup>

The disproportionate rate of Indigenous incarceration is more severe in some provinces than in others. For example, in Saskatchewan, Indigenous people constituted 11 per cent of the total adult population in 2006 but made up 80 per cent of those sentenced to custody in 2008/2009.<sup>16</sup> In Manitoba, Indigenous people represented 12 per cent of the total adult population but represented 71 per cent of those sentenced to prison over the same period.<sup>17</sup>

## B. STUDIED, RESTUDIED, OVER-STUDIED<sup>18</sup>

Prompted by a crisis of less extreme, but nonetheless alarming, proportions in the early 1990s, the Royal Commission on Aboriginal People (RCAP) undertook a wide-ranging study of the relationship between Indigenous people and the Canadian criminal justice system. Reflecting on insights gleaned from existing research and its own series of public hearings at which Indigenous people across the country offered their input, RCAP concluded that there was “remarkable consensus on some fundamental issues and, in particular, on how the justice system has failed

---

11. Samuel Perreault, “The Incarceration of Aboriginal People in Adult Correctional Services” in Statistics Canada, *Juristat* (Ottawa: Minister of Industry, July 2009) at 5, online: <<http://www.statcan.gc.ca/pub/85-002-x/2009003/article/10903-eng.pdf>>.

12. *Ibid.*

13. Calverley, *supra* note 10 at 11.

14. Donna Calverley, Adam Cotter & Ed Halla, “Youth Custody and Community Services in Canada, 2008/2009” in Statistics Canada, *Juristat* (Ottawa: Minister of Industry, Spring 2010) at 5, online: <<http://www.statcan.gc.ca/pub/85-002-x/2010001/article/11147-eng.pdf>>.

15. *Ibid.* at 12.

16. Calverley, *supra* note 10 at 23.

17. *Ibid.*

18. Brian R Pfefferle, “*Gladue* Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration” (2008) 32:2 *Man LJ* 113 at 143.

Aboriginal people.”<sup>19</sup> Indigenous over-representation has since been referred to as “one of the most documented trends in the Canadian criminal justice system.”<sup>20</sup> Given the fact that the gravity of this crisis has been so carefully documented and scrutinized over the course of many years,<sup>21</sup> how is it that the crisis has only gotten worse? If the problem and its purported solutions have been so well debated and well documented, how is it that the statistics reviewed in Part I(A), above, paint an even grimmer picture of the situation than that which the RCAP pictured more than a decade and a half ago?

I would like to acknowledge that in the following discussion of the underlying causes of Indigenous over-incarceration, I draw primarily on government-commissioned reports compiled over the course of decades. Many of the conclusions and recommendations found in these reports are not particularly revelatory to the Indigenous people who have lived for generations under the unilaterally imposed Canadian legal system and have struggled to maintain their sovereignty, distinctive cultures, and traditional governance structures. In fact, in some cases, Indigenous people have played crucial roles in the evidence gathering and authorship of these reports.<sup>22</sup> By relying on reports commissioned and sanctioned by the Canadian state and the broader non-Indigenous legal community,<sup>23</sup> I do not intend to perpetuate the racist paradigm that privileges the voices of the colonizer over those of the colonized. Rather, my intention is to hold the Canadian state accountable for its role in this paradigm. If an argument for a fundamental shift in the structure of the relationship between Indigenous people and the Canadian criminal justice system can be constructed with reference primarily to those voices whose legitimacy is authorized by the colonial state itself, such an argument would seem all the more difficult to ignore. Given this article’s concern with the Canadian legal system’s relationship with Indigenous people and the transformations necessary to address the crisis of over-incarceration, I have chosen to select those sources with the most purchase within that very legal system.

---

19. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) at 26-27.

20. Pfefferle, *supra* note 18 at 113.

21. Jonathan Rudin, “Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs” (2009) 54:4 *Crim LQ* 447 at 451.

22. See *e.g.* RCAP, *supra* note 19.

23. See *e.g.* Michael Jackson, *Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association Committee on Imprisonment and Release* (Vancouver: University of British Columbia, 1988), reprinted in “Locking Up Natives in Canada” (1989) 23:2 *UBC L Rev* 215 [cited to reprint].



### C. EXPLANATIONS FOR THE CRISIS OF OVER-INCARCERATION

As of 1996, not only was the crisis of Indigenous over-representation in the Canadian criminal justice system well documented, but RCAP noted as well that researchers and policymakers had offered a relatively consistent set of explanations for the roots of the problem. RCAP's study, in particular, was remarkable for its breadth and for its insistence on understanding the roots of the problem out of a caution that proceeding any differently would "provide, at best, temporary alleviation."<sup>24</sup> RCAP considered three explanatory theories for the root causes of the higher rates of crime among Indigenous people and their over-representation in the Canadian criminal justice system.<sup>25</sup>

The first explanatory theory that RCAP identified was cultural difference. Drawing on findings made by the Aboriginal Justice Inquiry of Manitoba (AJI) five years earlier,<sup>26</sup> RCAP discussed the ways in which divergent cultural conceptions of criminality and societal responses to them contribute to Indigenous alienation from the Canadian criminal justice system. While the Canadian criminal justice system's primary objectives are the punishment of the deviant and protection of society through the segregation of offenders, according to the AJI, Indigenous societies tend to prioritize the restoration of "peace and equilibrium within the community."<sup>27</sup> The AJI also explored the implications arising from disparate cultural understandings of concepts such as guilty and not guilty, a subject explored by subsequent researchers as well.<sup>28</sup> As the Law Reform Commission of Canada concluded in 1991, the criminal justice system is "plagued with difficulties arising from its remoteness—a term that encompasses not only physical separation but also conceptual and cultural distance."<sup>29</sup> Ultimately, AJI and RCAP alike concluded that the disproportionate rates of Indigenous crime and incarceration could not be explained solely with reference to cultural alienation. To rely exclusively on a cultural explanation for the crisis in the justice system would not only locate the underlying problem in Indigenous

---

24. *Supra* note 19 at 39.

25. *Ibid* at 39-53.

26. Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Province of Manitoba, 1991) (Commissioners: AC Hamilton & CM Sinclair), online: <<http://www.ajic.mb.ca/volume1/toc.html>> ["AJI"].

27. *Ibid* at 21.

28. See *e.g.* Robynne Neugebauer, "First Nations Peoples and Law Enforcement: Community Perspectives on Police Response" in Robynne Neugebauer, ed, *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars' Press, 2000) 109 at 111.

29. *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 16.

cultures' inability or unwillingness to assimilate into non-Indigenous legal culture, but it would also obscure the "structural problems grounded in the economic and social inequalities experienced by Aboriginal people."<sup>30</sup>

The second explanatory theory considered by RCAP was socio-economic deprivation. The poverty endemic in Indigenous communities has persisted in the seventeen years since RCAP released its report. For instance, in 2006 the median income among Indigenous people was 30 per cent less than that of non-Indigenous Canadians.<sup>31</sup> RCAP was not the first commission to connect the widespread poverty among Indigenous people to their increased levels of criminality and representation in the criminal justice system. As early as 1967, a survey prepared for the Honourable Arthur Laing at the Department of Indian Affairs and Northern Development acknowledged that patterns of over-representation could only be understood in light of the dire economic conditions among Indigenous people.<sup>32</sup> In his report on behalf of the Canadian Bar Association in 1988, Michael Jackson noted the connection between Indigenous poverty and over-representation as an example of "the well-known correlation between economic deprivation and criminality."<sup>33</sup> RCAP further fleshed out the nature of the connection between poverty and over-representation, exploring the disproportionate numbers of Indigenous persons who are denied bail as one manifestation of this phenomenon. Given that judges consider factors such as employment, possession of a fixed address, enrollment in school, and strong connections to the community when assessing an accused person's eligibility for bail, it is no wonder that poverty leads to an increased likelihood of pre-trial detention.<sup>34</sup> This more frequent incidence of pre-trial detention places increased pressure on Indigenous people to plead guilty and curtails their capacity to assemble the resources necessary to prepare their defence.<sup>35</sup> Thus, while it has been established repeatedly that there is a relationship between poverty and increased levels of criminal activity,<sup>36</sup> the bail process's privileging of economic security is one example of the way in which the criminal justice system specifically contributes to the problem of Indigenous over-incarceration.

---

30. RCAP, *supra* note 19 at 42.

31. Daniel Wilson & David Macdonald, *The Income Gap Between Aboriginal Peoples and the Rest of Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2010) at 3.

32. Canadian Corrections Association, *Indians and the Law* (Ottawa: Canadian Welfare Council, 1967) at 9 (Chair: Dr Gilbert C Monture).

33. *Supra* note 23 at 218.

34. See RCAP, *supra* note 19 at 45.

35. *Ibid.*

36. See *e.g.* AJI, *supra* note 26 at 90-92.

Again, like AJI, RCAP concluded that poverty in and of itself provided an inadequate explanation for the disproportionate levels of Indigenous incarceration. Instead, RCAP suggested that Indigenous poverty has roots in the legacy and continuing effects of colonialism, the third explanation offered for the crisis of Indigenous over-representation.<sup>37</sup> As Jackson had stated eight years earlier:

There is no doubt that poverty is a factor in the over-representation of native people in prisons... . However, attributing the problem to poverty itself is not a sufficient explanation. Poverty itself is a product of a particular historical process which has affected native communities and the real fundamental solutions lie in the reversal of that process.<sup>38</sup>

The poverty endemic to Indigenous communities, which is well documented, cannot be divorced from its historical context. Rather, the “social condition of Aboriginal people is a direct result of the discriminatory and repressive policies that successive European and Canadian governments have directed towards Aboriginal people.”<sup>39</sup> Indigenous poverty, the crime that flows from it, and the associated over-representation in the criminal justice system must be situated within the legacy and ongoing effects of colonialism. By Canadian colonialism I refer to a set of processes, which includes the unilateral imposition of Euro-Canadian colonial authority and the corresponding attempts to negate sovereign Indigenous systems of governance,<sup>40</sup> the repeated attempts by the Canadian state to forcibly assimilate Indigenous people into dominant society,<sup>41</sup> and the dispossession of Indigenous people of much of their land. While exploring the nuances of this history and its impact on Indigenous societies at large is beyond the scope of this article, framing the problem of over-representation in Canadian prisons in this manner has substantial implications for the sorts of strategies that arise as viable solutions. As stated in RCAP’s report on the relationship between Indigenous people and the Canadian criminal justice system:

[L]ocating the root causes of Aboriginal crime in the history of colonialism, and understanding its continuing effects, points unambiguously to the critical

37. *Supra* note 19 at 52.

38. *Supra* note 23 at 218.

39. AJI, *supra* note 26 at 92.

40. Kent McNeil provides a brief historical overview of the imposition of the band council system onto Indigenous communities in Canada and a consideration of how this imposition could be challenged under s 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. See “Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government” (2003) 22 Windsor YB Access Just 329.

41. For example, through the use of residential schools.

need for a new relationship that rejects each and every assumption underlying colonial relationships between Aboriginal peoples and non-Aboriginal society.<sup>42</sup>

In Part II, below, I analyze the above-noted legislative and judicial interventions in light of RCAP's powerful admonition about the nature of the crisis of Indigenous over-incarceration and the kind of transformation necessary to address it.

## II. LEGISLATIVE AND JUDICIAL INTERVENTIONS

### A. BILL C-41

*An Act to Amend the Criminal Code (Sentencing) and other Acts in Consequence Thereof*<sup>43</sup> (Bill C-41) came into force in September 1996, bringing the widest-ranging reforms to Canadian sentencing law in decades.<sup>44</sup> The amendments that Bill C-41 introduced to the *Criminal Code*<sup>45</sup> included a codification of the common law of sentencing, enumerating objectives of sentencing that combined "elements of both moral and utilitarian theories of punishment."<sup>46</sup> For the purposes of this article, the most significant feature of Bill C-41 was the addition of the following provision to the *Code*:

s. 718.2: A court that imposes a sentence shall also take into consideration the following principles ... (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.<sup>47</sup>

While there was initially some concern that the *Youth Criminal Justice Act*<sup>48</sup> would not include a similar provision directing youth courts to take into account the special circumstances of Indigenous youth upon sentencing,<sup>49</sup> the final version of the *YCJA* did include such a section.<sup>50</sup>

---

42. *Supra* note 19 at 52.

43. SC 1995, c 22.

44. David Daubney & Gordon Parry, "An Overview of Bill C-41 (The Sentencing Reform Act)" in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 31 at 31.

45. RSC 1985, c C-46 [*Code*].

46. Clayton C Ruby et al, *Sentencing*, 7th ed (Markham, Ont: LexisNexis Canada, 2008) at 4.

47. *Supra* note 45.

48. SC 2002, c 1 [*YCJA*].

49. See Kent Roach & Jonathan Rudin, "Gladue: The Judicial and Political Reception of a Promising Decision" (2000) 42:3 Can J Crim 355 at 357-58.

50. *YCJA*, *supra* note 48, s 38(2):

## B. *R v GLADUE*

In 1999, the Court was tasked for the first time in *R v Gladue*<sup>51</sup> with interpreting the significance of section 718.2(e) of the *Code*. Justices Iacobucci and Cory authored the unanimous judgment of the Court, holding that the provision amounted to “more than simply a re-affirmation of existing sentencing principles”<sup>52</sup> and evidenced a clear legislative direction that the unique circumstances of Indigenous people “specifically make imprisonment a less appropriate or less useful sanction.”<sup>53</sup> Justices Iacobucci and Cory cited the legislative history of Bill C-41 to support the Court’s conclusion that Parliament intended section 718.2(e) to address the drastic over-incarceration of Indigenous people.<sup>54</sup> For example, the Court cited the Minister of Justice’s testimony before the Standing Committee on Justice and Legal Affairs to demonstrate the legislative purpose behind section 718.2(e): “[T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada.”<sup>55</sup> The Court found further support for this interpretation of section 718.2(e) in extensive social science research and the several commissions and inquiries on the subject, many of which are referenced in Part I, above.<sup>56</sup>

The Court recognized that the contextualized sentencing methodology codified in section 718.2(e) could not alone remedy a problem of such gravity:

The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada.<sup>57</sup>

---

A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles: ...  
(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons...

51. *Supra* note 8.

52. *Ibid* at para 33.

53. *Ibid* at para 37.

54. *Ibid* at paras 45-48.

55. House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 35th Leg, 1st Sess, No 62 (17 November 1994) at 15, cited in *Gladue*, *supra* note 8 at para 47.

56. *Ibid* at paras 58-63.

57. *Ibid* at para 65.

The Court developed a framework for sentencing judges' use of the remedial authority under section 718.2(e). A sentencing judge may take judicial notice of and consider the following background factors in determining the appropriate sentence for an Indigenous offender:

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

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.<sup>58</sup>

In defining the types of considerations that would fall within the former category, the Court acknowledged poverty, lack of education and employment, social dislocation, community fragmentation, and substance abuse as key factors leading to Indigenous over-representation in the criminal justice system.<sup>59</sup> Justices Iacobucci and Cory indicated that the latter set of considerations flows from the concept of restorative justice. The Court contrasted the principles that traditionally guide sentencing within the Canadian legal system—deterrence, separation, and denunciation—with those that guide the community-based sanctions used in many Indigenous communities.<sup>60</sup> While the Court acknowledged that Indigenous perspectives on sentencing vary widely across the diversity of nations, it also observed 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.”<sup>61</sup>

## 1. THE RECEPTION OF *GLADUE*

*Gladue* has been received as a welcome development by many scholars, advocates, and practitioners concerned with Indigenous over-incarceration and alienation from the mainstream criminal justice system at large.<sup>62</sup> Soon after the Court's 1999

---

58. *Ibid* at para 66.

59. *Ibid* at paras 67-68.

60. *Ibid* at paras 70-74.

61. *Ibid* at para 73.

62. This is not to suggest that there have been no critiques of *Gladue*. For example, Phillip Stenning and Julian V. Roberts' critique of the methodology employed by the Court in *Gladue* has provoked controversy for exaggerating the regional variation of Indigenous over-representation and for downplaying the unique situation of Indigenous people in relation to the criminal justice system. See “Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders” (2001) 64:1 Sask L Rev 137. See also Jonathan Rudin

decision, Justice M.E. Turpel-Lafond called *Gladue* “an important watershed in Canadian criminal law.”<sup>63</sup> She suggested that “[a]s a barometer of Canadian law, the *Gladue* decision certainly registers as a vital departure point. . . . Perhaps this is no more than the history of the common law with its dialectic of stability and change, but I suspect something more profound is at work.”<sup>64</sup> In the first of their many articles analyzing the decision’s impact, Kent Roach and Jonathan Rudin wrote that “[t]here is much to be glad about in *Gladue*.”<sup>65</sup> Even among scholars who have formulated critiques of aspects of the decision or raised questions about its implications, there is widespread acknowledgment that *Gladue* represents a significant step in the development of the law of sentencing. For instance, Elizabeth Adjin-Tettey expressed concern about the potential for the application of restorative justice principles in the context of gendered violence cases to “excuse violence against women [and] perpetuate their subordination and victimization.”<sup>66</sup> Nonetheless, she celebrated the contextual sentencing methodology outlined in *Gladue* as a strategy for the decolonization of the relationship between Indigenous people and the Crown:

[I]t is attentive to the historical, systemic, and structural processes rooted in colonialism that influence the material conditions of many Aboriginal people and their socio-economic marginality today and, in turn, contribute to their over-representation in the criminal justice system in complex ways.<sup>67</sup>

Thus, *Gladue* inspired high hopes. However, as the statistical overview in Part I(A), above, demonstrates, the crisis of Indigenous over-incarceration has continued to grow over the approximately fourteen years since the Court developed the analytical framework to guide the application of section 718.2(e) of the *Code*. This trend of rising incarceration rates among Indigenous people is all the more troubling given that Canadian incarceration rates are otherwise on the decline. Many commentators agree with the Court that “sentencing innovation by itself cannot

---

& Kent Roach, “Broken Promises: A Response to Stenning and Roberts’ ‘Empty Promises’” (2002) 65:1 Sask L Rev 3; David Daubney, “Nine Words: A Response to ‘Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders’” (2002) 65:1 Sask L Rev 63.

63. “Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue” (1999) 43:1 Crim LQ 34 at 35.

64. *Ibid* at 50.

65. *Supra* note 49 at 383.

66. “Sentencing Aboriginal Offenders: Balancing Offenders’ Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples” (2007) 19:1 CJWL 179 at 195.

67. *Ibid* at 185.

remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system.”<sup>68</sup> In fact, Toni Williams argues that “sentencing can play no more than a limited role in keeping Aboriginal people out of prison.”<sup>69</sup> Nonetheless, there is broad consensus that contextual sentencing in the spirit of *Gladue* has a role to play, however limited, in addressing Indigenous over-representation. After all, “[s]entencing reform cannot cure the multiple causes of over-incarceration, but judges make the ultimate decision whether aboriginal offenders go to jail.”<sup>70</sup>

In Part I(B)(2-3), below, I explore two of the explanations for why the number of Indigenous people sentenced to custody has continued to grow even in the wake of *Gladue*. However, it is important to acknowledge at the outset that the effectiveness of *Gladue* is impossible to accurately assess without knowing how much worse the crisis would be without the legislative and judicial interventions described here. While the rate of Indigenous incarceration has continued to increase in the last fifteen years, it is presumed that the dimensions of the current crisis would likely be even worse had it not been for the advent of contextualized sentencing for Indigenous offenders.

## 2. CONTEXTUALIZED SENTENCING AND THE SERIOUSNESS OF THE OFFENCE

*Gladue* has been criticized for its ambiguous treatment of the way the unique systemic and background factors it identifies are to be applied in the context of serious or violent offences. *R v Ipeelee*, a recent decision of the Court, has provided a welcome clarification of this issue.<sup>71</sup> But before analyzing the significance of the Court’s clarification of the law in *Ipeelee*, it is important to examine the source of the oft-criticized ambiguity in *Gladue*. The following passage has been cited regularly by lower courts to support longer custodial sentences in certain circumstances: “Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.”<sup>72</sup> Williams has argued that this excerpt

---

68. *Gladue*, *supra* note 8 at para 65.

69. “Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada” (2007) 55:3 Clev St L Rev 269 at 286.

70. Roach & Rudin, *supra* note 49 at 358.

71. 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*].

72. *Gladue*, *supra* note 8 at para 79.



clearly reveals the Court's "ambivalence about the substantive equality project of sentencing Aboriginal people differently to reduce their over-incarceration."<sup>73</sup>

In *R v Wells*,<sup>74</sup> the Court demonstrated continued ambivalence for contextualized sentencing in the face of serious offences. Justice Iacobucci emphasized that section 718.2(e) requires sentencing judges to adopt a different methodology for sentencing Indigenous offenders, but one that does not necessarily mandate a different result.<sup>75</sup> Justice Iacobucci deferred to the decision of the trial judge, who placed greater emphasis on the sentencing principles of deterrence and denunciation given the seriousness of the offence. In his words, "it will generally be the case as, a practical matter, that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders."<sup>76</sup> According to Roach, *Wells* represents a continuation of "the trend of ambiguity."<sup>77</sup>

Courts have subsequently struggled to determine the place of the *Gladue* analysis in the context of serious and violent offences. Many decisions of provincial appellate courts have focussed more on resolving this ambiguity than on implementing the thrust of the *Gladue* analysis—that is, remedying the over-incarceration of Indigenous people.<sup>78</sup> The way that provincial appellate courts have resolved this ambiguity has diverged widely.<sup>79</sup> For instance, Roach's analysis of appellate court decisions in the decade following *Gladue*, from 1999 to 2009, suggests that the Courts of Appeal of British Columbia and Saskatchewan "have operated on the assumption that *Gladue* does not really apply in cases that are particularly serious."<sup>80</sup> That the Saskatchewan Court of Appeal has narrowed the scope of *Gladue* in this manner is especially troublesome given that the over-incarceration of Indigenous people is the highest in that province.<sup>81</sup>

---

73. *Supra* note 69 at 278.

74. 2000 SCC 10, [2000] 1 SCR 207 [*Wells*].

75. *Ibid* at para 44.

76. *Ibid*, citing *Gladue*, *supra* note 8 at para 33.

77. "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54:4 Crim LQ 470 at 478.

78. Roach concedes that an appeal by both the Crown and the accused are more probable in the context of serious offences and, consequently, that his dataset of appeal cases might not be representative of the issues that surface elsewhere in the *Gladue* jurisprudence. See *ibid* at 503-04.

79. *Ibid* at 479-99.

80. *Ibid* at 504.

81. As stated in Part I(A), above, in 2006 Indigenous people made up 11 per cent of the total adult population of Saskatchewan but represented 80 per cent of those sentenced to custody in 2008/2009. See Calverley, *supra* note 10 at 23.

In *Ipeelee*, the Court addressed “the irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences.”<sup>82</sup> The Court heard appeals concerning the sentencing of two offenders, an Inuk man named Manasie Ipeelee and Frank Ralph Ladue of the Ross River Dena Council Band. Both offenders had long criminal records, had been declared long-term offenders, and as a result were the subject of long-term supervision orders (LTSO). Mr. Ipeelee committed an offence while intoxicated, in violation of his LTSO, and was sentenced to three years’ imprisonment. The Ontario Court of Appeal dismissed his appeal. He appealed further to the Court. Mr. Ladue failed a urine test, which was positive for cocaine, and in doing so breached his LTSO. He was sentenced to three years’ imprisonment. Upon appeal, the British Columbia Court of Appeal reduced his custodial sentence to one year. The Crown appealed the Court of Appeal’s decision. The issue before the Court was the manner in which to determine a proper sentence for Indigenous offenders who have breached an LTSO. As a result, the Court was presented with an opportunity to clarify how the *Gladue* analysis should operate in the sentencing of serious offenders.

Writing for the majority, Justice LeBel held that the *Gladue* analysis is equally applicable to serious and violent offences, given that the effect of exempting them would essentially “deprive s. 718.2(e) of much of its remedial power.”<sup>83</sup> Justice LeBel endeavoured to resolve the above-described ambiguity by declaring that the “application of the *Gladue* principles is required in every case involving an Aboriginal offender . . . and a failure to do so constitutes an error justifying appellate intervention.”<sup>84</sup> In the case of Mr. Ipeelee, the majority held that the courts below had failed to adequately consider the sentencing objective of rehabilitation and substituted a sentence of one year. In contrast, the Crown’s appeal of Mr. Ladue’s sentence was dismissed. The majority held that the Court of Appeal’s substitution of a one-year sentence was based on a proper application of the relevant sentencing principles.

The Court’s pronouncements about the application of *Gladue* in the context of serious offences are welcome. It is difficult to imagine a more resolute expression from the Court that the remedial potential of *Gladue* is by no means to be limited to less serious offences.

Although regionally inconsistent,<sup>85</sup> limitation of the applicability of the *Gladue* analysis in the context of serious offences is one factor that must be considered

---

82. *Supra* note 71 at para 84.

83. *Ibid* at para 86.

84. *Ibid* at para 87.

85. For example, the Ontario Court of Appeal is on the other end of the spectrum of appellate court reception of *Gladue*. Rudin argues that “[t]he Ontario Court of Appeal, among all the appellate courts, has appeared to embrace *Gladue* most wholeheartedly.” See *supra* note 21 at 459.

in understanding why rates of Indigenous incarceration have continued to grow since 1999. *Ipeelee* represents a significant clarification of the law that cannot be ignored by appellate and lower courts. The Court has sent a strong message that the contextualized sentencing model elucidated in *Gladue* is equally applicable in cases of serious offenders. While the ability of *Gladue* to help reduce the rates of over-incarceration of Indigenous offenders has been seriously curbed by the Court's ambiguous treatment of the *Gladue* analysis for serious offences, *Ipeelee* offers a reason to hope that the potential of the contextualized sentencing model could still be realized.

### 3. PROCEDURAL LIMITATIONS

For the *Gladue* analysis to be operationalized effectively, the sentencing system itself must change. Sentencing judges cannot adequately determine the proper sentence for an Indigenous offender in the manner envisioned by *Gladue* without access to information about the circumstances of the offender and the availability of restorative justice alternatives to imprisonment.<sup>86</sup> In the wake of *Gladue*, Justice Turpel-Lafond argued that if the analysis was to have the desired effect, Crown counsel, defence counsel, and the judiciary would all need to “adjust their practice to reflect the requirements of the decision.”<sup>87</sup>

One such adaptation can be observed in Toronto's *Gladue* Courts. After a year of discussions among several judges of the Ontario Court of Justice at the Toronto Old City Hall Court and Aboriginal Legal Services of Toronto (ALST), the first *Gladue* (Aboriginal Persons) Court in Canada began hearing cases in 2001.<sup>88</sup> In subsequent years, two other *Gladue* Courts have opened in Toronto.<sup>89</sup> According to Rudin, one of the features that distinguishes the procedural reality of *Gladue* Courts from that of the traditional court-room is the role of the *Gladue* Caseworker.<sup>90</sup> *Gladue* Caseworkers provide the sentencing judge with information about the offender's background and the availability of alternatives to incarceration. Caseworkers compile this information in pre-sentencing reports under section 721

---

86. *Ibid* at 453-55.

87. *Supra* note 63 at 37.

88. See Judge Brent Knazan, “Sentencing Aboriginal Offenders in a Large City – The Toronto Gladue (Aboriginal Persons) Court” (Paper delivered at the National Judicial Institute Aboriginal Law Seminar, Calgary, 23-25 January 2003) at 3-4, online: <<http://aboriginallegal.ca/docs/Knazan.pdf>>.

89. See Aboriginal Legal Services of Toronto, *Gladue (Aboriginal Persons) Court*, online: <<http://www.aboriginallegal.ca/gladue.php>>.

90. *Supra* note 21 at 464.

of the *Code*.<sup>91</sup> Caseworkers play an integral information-gathering role without which sentencing judges would be left to rely exclusively on the submissions of counsel to undertake the *Gladue* analysis. ALST has since begun providing *Gladue* Caseworker services in other Southern Ontario cities such as Hamilton, Brantford, Kitchener, and Guelph.<sup>92</sup> Furthermore, *Gladue*-related services have also become available in Sarnia, Thunder Bay, and the Manitoulin District.<sup>93</sup>

While the availability of *Gladue* Caseworkers and related services has expanded considerably in the last decade, many jurisdictions in Canada do not have the necessary procedural innovations in place to give effect to the *Gladue* analysis. The approach outlined in this section is by no means the only way of modifying existing sentencing structures to make room for *Gladue* to operate.<sup>94</sup> The foregoing discussion does not comprehensively summarize the post-*Gladue* innovations that have been undertaken. I offer the preceding description of the *Gladue* Court and Caseworker programs to emphasize that while *Gladue* represented an important step “on the road to change,” it cannot be understood as an “end point on that road.”<sup>95</sup> In other words, while it is largely accepted that the sentencing process can have only a limited impact on the crisis of Indigenous over-representation in Canadian prisons, the full extent of *Gladue*’s potential cannot be properly assessed in the absence of widespread procedural adaptation aimed at facilitating the contextualized sentencing model. Given the large swaths of the country that have not undergone adaptation on the scale described here,<sup>96</sup> it is not at all surprising that the crisis of Indigenous over-incarceration persists.

---

91. See Brent Knazan, “Time for Justice: One Approach to *R. v. Gladue*” (2009) 54:4 Crim LQ 431 at 437-38.

92. See *ibid* at 466-67.

93. Department of Justice, *Ontario - Location of Aboriginal Justice Strategy Programs in Canada* (30 April 2013), online: <<http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplac/ont.html>>.

94. Jonathan Rudin, Program Director at ALST and advocate for the *Gladue* Caseworker model, writes: “The Ontario experience is not presented as the perfect example of the needed response to *Gladue*. Rather the Ontario experience is an example of how change can occur in the system through a combination of forces outside of government.” See *supra* note 21 at 468.

95. *Ibid* at 459.

96. For another example of such an adaptation—the First Nations Court in Vancouver—see Simon Owen, “A Crack in Everything: Restorative Possibilities of Plea-Based Sentencing Courts” (2010) 48 *Alta L Rev* 847 at 881-86.

### III. THE SAFE STREETS AND COMMUNITIES ACT: OMNIBUS COMING THROUGH

Bill C-10, the *Safe Streets and Communities Act*,<sup>97</sup> is a large omnibus law made up of several smaller bills, most of which were initially introduced by the Conservative Party while they were a minority government. In 2011, the Conservatives campaigned on a platform promising significant reforms to the Canadian criminal justice system within the first one hundred sitting days in Parliament. Upon receiving a majority of the House of Commons in May 2011, the Conservatives made the enactment of the *SSCA* a priority. In their first speech from the Throne, the Conservatives committed to “move quickly to reintroduce comprehensive law-and-order legislation to combat crime and terrorism.”<sup>98</sup> On 12 March 2012, the Conservatives made good on their campaign promise when the bill was passed by the House of Commons.<sup>99</sup> Bill C-10 received Royal Assent on 13 March 2012,<sup>100</sup> and the various parts of the bill came into force in a staggered fashion between June and November 2012.<sup>101</sup>

More than one hundred pages long, the *SSCA* amended several statutes: the *Criminal Code*,<sup>102</sup> the *Controlled Drugs and Substances Act*,<sup>103</sup> the *Immigration and Refugee Protection Act*,<sup>104</sup> the *Corrections and Conditional Release Act*,<sup>105</sup> the

---

97. *Supra* note 1.

98. Parliament, *Speech from the Throne to Open the First Session Forty First Parliament of Canada* (3 June 2011), online: <<http://www.parl.gc.ca/parlinfo/Documents/ThroneSpeech/41-1-e.html>>. The Conservatives have continued to advance their tough-on-crime agenda, pledging in their most recent Throne speech to ensure that the “rights of victims come before the rights of criminals.” See *Speech from the Throne to Open the Second Session Forty First Parliament of Canada* (16 October 2013), online: <<http://www.parl.gc.ca/parlinfo/Documents/ThroneSpeech/41-2-e.html>>.

99. Gloria Galloway & Rhéal Séguin, “Harper’s Promise Fulfilled as House Passes Crime Bill,” *The Globe and Mail* (12 March 2012) online: <<http://www.theglobeandmail.com/news/politics/ottawa-notebook/harpers-promise-fulfilled-as-house-passes-crime-bill/article535802/>>.

100. Canada, Bill C-10, *Safe Streets and Communities Act*, 1st Sess, 41st Parl, 2012, online: LEGISinfo <<http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Mode=1&Language=E&billId=5120829&View=0>>. See also *supra* note 1.

101. *Order Fixing Various Dates as the Day on which Certain Sections of the Act Come into Force*, SI/2012-48, (2012) C Gaz II (*Safe Streets and Communities Act*) at 1672.

102. *Supra* note 45.

103. SC 1996, c 19 [*CDSA*].

104. SC 2001, c 27.

105. SC 1992, c 20.

*State Immunity Act*,<sup>106</sup> and the *Youth Criminal Justice Act*,<sup>107</sup> among others. It also created a new statute, the *Justice for Victims of Terrorism Act*.<sup>108</sup> Members of the Opposition criticized the Conservatives' use of an omnibus bill to push through so many wide-ranging reforms. The *SSCA*'s sheer size and its complex impact on numerous statutory regimes made debate difficult inside the walls of Parliament and beyond. Parliamentarians in Opposition repeatedly derided the Conservatives for packaging the various amendments together in a manner that prevented serious discussion of the relevant issues.<sup>109</sup> As Liberal Member of Parliament (MP) Sean Casey stated during its second reading in the House, "[t]he bill is large and includes nine bills from the previous Parliament all lumped into one big buffet of division and fear."<sup>110</sup>

In the months that followed, as the Bill moved through the parliamentary process, it received considerable media attention.<sup>111</sup> Celebrating the principles articulated in *Gladue*, one reporter cautioned that the *SSCA*'s expansion of mandatory minimum sentencing would limit judicial discretion and, in doing so, "undo a decade-long effort to find culturally specific ways of diverting inmates."<sup>112</sup> The parliamentary debates and the submissions of some witnesses before the Senate Committee on Legal and Constitutional Affairs explored the ways that the *SSCA* was expected to contribute to the crisis of Indigenous over-incarceration.

---

106. RSC 1985, c S-18.

107. *Supra* note 48.

108. *SSCA*, *supra* note 1, s 2.

109. For example, NDP MP François Lapointe stated:

We have a hodgepodge of legislation here that talks about child sexual predators, pardons for serious crimes and drug dealers. These are all very socially complex elements. Each of them requires discussion and reflection regarding the legal, social, ethical, philosophical and even religious aspects. ... How can the government justify putting all of that in one big package and preventing Canadians from having a healthy debate on each of these important issues? That is unacceptable. How does my colleague explain that?

See *House of Commons Debates*, 41st Parl, 1st Sess, No 18 (22 September 2011) at 1351.

110. *House of Commons Debates*, 41st Parl, 1st Sess, No 17 (21 September 2011) at 1306.

111. See e.g. Tobi Cohen, "NDP Won't Give Up Fight over Federal Crime Bill," *The Windsor Star* (28 September 2011) A6; Chris Cobb, "Fazed and Confused," *Ottawa Citizen* (19 November 2011) B1; Jordan Press, "AFN Voices Concerns about Bill's Effects," *Star - Phoenix* (21 February 2012) A13.

112. Robert Everett-Green, "Law and Disorder: What Bill C-10 Could Mean for Canada's Native People," *The Globe and Mail* (18 February 2012) online: <<http://www.theglobeandmail.com/news/national/law-and-disorder-what-bill-c-10-could-mean-for-canadas-native-people/article2342832/singlepage/>>.

Throughout the parliamentary debates on the *SSCA*, the Conservatives continually relied upon empty tough-on-crime rhetoric when responding to critics. Attorney General Rob Nicholson introduced the *SSCA* during its second reading as a reflection of “the strong mandate that Canadians have given us to protect society and to hold criminals accountable.”<sup>113</sup> Suggestions by Opposition members that the *SSCA* would contribute to Indigenous over-representation in the Canadian criminal justice system triggered vacuous retorts. There was a repeated refusal on the part of the Conservatives to actually engage with the substance of the criticisms. When asked by New Democratic Party of Canada (NDP) MP Carol Hughes whether “we should be stocking our prisons with aboriginals ... as opposed to providing rehabilitative and proper services for them,”<sup>114</sup> Conservative MP Kevin Sorenson replied:

Madam Speaker, I think our prisons should be full of those who have committed crimes against our society and who have been found guilty in a court of law. I think our prisons should be a place where we can try to rehabilitate people, but we should hold them, incarcerate them and tell them that the penalty for crime is prison in some cases. ... *We realize that there is a high percentage of aboriginals in our penitentiaries, and, yes, that must be addressed as well*, but in many case [*sic*] there are many aboriginal victims who are standing right there while the offender is the [*sic*] locked in prison.<sup>115</sup>

MP Sorenson is correct that many of the victims of crime perpetrated by Indigenous people are themselves Indigenous. In fact, many Indigenous people who are charged with criminal offences have on other occasions been the victims of crime. It also should not be ignored that Indigenous people implicated in the criminal justice system are also survivors of the genocidal policies of the Canadian state.<sup>116</sup> However, the question that Sorenson and other Conservative MPs consistently evaded throughout the parliamentary debates was whether an increased reliance on imprisonment would actually address the underlying causes of crime and help to prevent future victimization.

---

113. *House of Commons Debates*, 41st Parl, 1st Sess, No 60 (5 December 2011) at 1297.

114. *House of Commons Debates*, 41st Parl, 1st Sess, No 21 (27 September 2011) at 1555.

115. *Ibid* [emphasis added].

116. For the view that Indigenous people have been subjected to genocidal policies under the Canadian state, see e.g. Roland D Chrisjohn et al, “Genocide and Indian Residential Schooling: The Past Is Present” in Richard D Wiggers & Ann L Griffiths, eds, *Canada and International Humanitarian Law: Peacekeeping and War Crimes in the Modern Era* (Halifax, NS: Centre for Foreign Policy Studies, Dalhousie University, 2002) 229; Bonita Lawrence, “Real” Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood (Vancouver: University of British Columbia Press, 2004) (“[T]he underlying premise shaping this book [is] that urban mixed-blood Native identity cannot be adequately understood except as shaped by a legacy of genocide.” (*ibid* at xvii)).

When asked by NDP MP Jean Crowder how the Conservatives planned to address the over-incarceration of Indigenous people, MP Kyle Seeback responded as follows:

Madam Speaker, *my hon. colleague's question was not particularly what I was talking about.* We are talking about introducing legislation to protect Canadians from crime and to support victims of crime. We do have an aboriginal justice strategy in place that we are working on and working very hard to implement. *However, I want to talk to the people who support this legislation.*<sup>117</sup>

MP Seeback's blunt admission that he would rather talk to those who support the *SSCA* than actually engage with its critics is telling. In these two statements made by Conservative MPs, we can observe a compartmentalization of criminal justice policy. While acknowledging—somewhat tacitly in the case of MP Seeback—that there is a problem of over-representation of Indigenous people in Canadian prisons, the Conservatives refused to address how the *SSCA* would affect this crisis. Instead, they repeatedly fell back upon tough-on-crime rhetoric and vaguely alluded to addressing the crisis through other means. Ironically, a key component of the Department of Justice's Aboriginal Justice Strategy, which was celebrated by MP Seeback, involves financial support for community-based justice programs such as sentencing circles, the use of which will undoubtedly be restricted by the imposition of mandatory minimum sentencing provisions in the *SSCA*.<sup>118</sup> During the several days of debate on the *SSCA*, the Conservatives made it quite apparent that they were not interested in analyzing whether the *SSCA* would live up to its name and actually make Canadian streets and communities safer, especially those of Indigenous people. Instead, time and again they evaded pointed questions and rolled out hollow rhetorical flourishes: "This important legislation cracks down on pedophiles, drug dealers, drug producers, arsonists, and the most serious violent and repeat young offenders."<sup>119</sup>

The *SSCA* was referred to the Standing Senate Committee on Legal and Constitutional Affairs after passing third reading by the House on 5 December 2011 and after receiving two readings in the Red Chamber.<sup>120</sup> Several witnesses before the Senate Committee emphasized the impact that the *SSCA* was likely to have on the crisis of Indigenous over-incarceration and urged the Senate to make amendments before returning it to the House. Roger Jones, Senior Strategist

---

117. *House of Commons Debates*, 41st Parl, 1st Sess, No 22 (28 September 2011) at 1581 [emphasis added].

118. Department of Justice, "Community-Based Justice Fund" (5 September 2013), online: <<http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/index.html>>.

119. *Supra* note 113 at 3974 (Hon Rob Nicholson).

120. See *supra* note 101.



at the Assembly of First Nations (AFN), stated unequivocally that the *SSCA* would compound “the already unacceptable overrepresentation of our people in the criminal justice system.”<sup>121</sup> Christa Big Canoe of Aboriginal Legal Services of Toronto emphasized that the *SSCA* would chip away at the gains made by the Bill C-41 reforms and their interpretation in *Gladue*:

Our largest concern with the passing of the act is that there will be an undermining of the principles of sentencing as set out in section 718.2 of the Criminal Code of Canada. When I say that, I mean the entire section, not just (e). ... We believe that the Safe Streets and Communities Act will make the problem of Aboriginal over-representation in prison even worse, while at the same time not actually addressing the legitimate safety concerns of Aboriginal and non-Aboriginal people in this country.<sup>122</sup>

Kim Pate of the Elizabeth Fry Society told the Senate Committee that she supported the goal of providing greater protection to victims. However, Pate argued that instituting additional mandatory minimums and restricting conditional sentencing would not achieve those objectives “in large part because they are focused on punishment after the fact, not on the sorts of measures that need to be in place to protect and prevent.”<sup>123</sup> Catherine Latimer of the John Howard Society of Canada took the position that the *SSCA* was likely to make communities less safe “while eroding rights and principles of justice and having a disproportionate impact on some of the most marginalized amongst us, whether it is the poor, the mentally disordered, the Aboriginals or the aged.”<sup>124</sup>

Despite urging by Indigenous advocates and their allies that the *SSCA* would fail to meet its stated objectives while also exacerbating the crisis of Indigenous over-incarceration, the Conservative-dominated Senate refused to amend the *SSCA* to make room for the application of the *Gladue* principles.<sup>125</sup> Conservative Senator Daniel Lang responded to Liberal Party of Canada (Liberal) Senator Joan Fraser’s

121. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 1st Sess, No 12 (20 February 2012) at 8.

122. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 1st Sess, No 13 (23 February 2012) at 235.

123. *Ibid* at 301.

124. *Ibid* at 303.

125. The Standing Senate Committee on Legal and Constitutional Affairs recommended six amendments to Bill C-10, all of which concerned Part I, the enactment of the *Justice for Victims of Terrorism Act*. The entirety of these suggested amendments was accepted by the Senate and the House of Commons. See “Ninth Report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-10)” in *Substantive Reports*, 41st Parl, 1st Sess, (28 February 2012).

suggestion that attention to the specific circumstances of Indigenous people should be considered at the sentencing stage as follows:

I do have a concern for the Aboriginal community—I think we all do—in respect of the number of individuals who have had to go into the court system, in many cases, not because of their fault but because of the situation they grew up in, the family situations that they have had to endure in some cases, and the residential school situation we have all talked about. . . . I think I can speak for rural Canada. . . . For the life of me, to say that “Because you are Aboriginal, it is okay; we will give you a lighter sentence, although you have been dealing in some very serious drug offences,” I just cannot buy it. It just defies common sense.<sup>126</sup>

Senator Lang’s remarks indicate the ideological inflexibility of the Conservatives’ tough-on-crime agenda. While Conservative parliamentarians were willing to concede some of the social and historical context that gives rise to Indigenous over-incarceration—for example, the legacy of residential schools—in the Conservatives’ ideological paradigm, the applicability of contextualized sentencing ends precisely where the “common sense” of retributive justice begins.

The *SSCA* is certain to have a wide-ranging impact. In Part III(A-C), below, I briefly outline three of the policy shifts effectuated by the *SSCA* that are likely to magnify the crisis of over-incarceration among Indigenous people.<sup>127</sup>

#### A. MORE MANDATORY MINIMUM SENTENCES

Mandatory minimum sentences are by no means a new phenomenon.<sup>128</sup> However, historical analysis of Canadian law indicates that there has been a “dramatic increase in recent years in [their] use.”<sup>129</sup> The trend towards increased use of mandatory minimums flies in the face of widespread consensus that such policies are ineffective: “Almost all domestic and international sentencing scholars, as well as commissions of inquiry in Canada, have decried the existence of mandatory minimum sentences of imprisonment.”<sup>130</sup> As stated by Elizabeth

126. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 1st Sess, No 14 (27 February 2012) at 146.

127. By no means does Part III(A) provide an exhaustive overview of the contents of the *SSCA*. I chose instead to highlight a few aspects of the *SSCA* and move on to consider how it may be challenged.

128. See e.g. Nicole Crutcher, “The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada” (2001) 39:2&3 *Osgoode Hall LJ* 273.

129. Nicole Crutcher, “Mandatory Minimum Penalties of Imprisonment: An Historical Analysis” (2001) 44:3 *Crim LQ* 279 at 280.

130. Julian V Roberts, “Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process” (2001) 39:2&3 *Osgoode Hall LJ* 305 at 306 [citations omitted].

Sheehy, “[t]he sole proponents of mandatory minimum sentencing in Canada appear to be politicians whose positions on the advantages of these laws are without a clear basis in either research or policy.”<sup>131</sup> The enactment of mandatory minimum sentencing laws is by no means an agenda exclusive to the Conservative Party of Canada. According to Julian Roberts, the Liberals’ 1995 enactment of ten new mandatory minimum sentences for firearms offences through Bill C-68 represented the “most comprehensive collection of mandatory minima in Canadian history; at no other point have so many been created by a single piece of legislation.”<sup>132</sup> Of course, the *SSCA* has now surpassed the standard set by Bill C-68. Through amendments to the *Code* as well as the *CDSA*, the *SSCA* adds several mandatory minimum sentences and increases pre-existing mandatory minimums. The *SSCA* institutes or increases mandatory minimums for several sexual offences, most of which relate to children,<sup>133</sup> and also institutes new mandatory minimums for several drug offences.<sup>134</sup>

According to Eugene O’Scapella of the Canadian Foundation for Drug Policy, drug offences in Canada never included mandatory minimums prior to the *SSCA*.<sup>135</sup> Parliament’s attempt to institute a mandatory minimum for the importation of narcotics in the previous incarnation of the *CDSA*, the *Narcotic Control Act*,<sup>136</sup> was thwarted by the Court in 1987 in *R v Smith (Edward Dewey)*.<sup>137</sup> In *Smith*, the Court held that a mandatory minimum sentence of seven years’ imprisonment for the importation of narcotics under section 5(2) of the *NCA* constituted cruel and unusual punishment under section 12 of the *Charter*.<sup>138</sup> The violation of section 12 could not be justified under section 1 of the *Charter* and the law was declared by the Court to be of no force and effect.<sup>139</sup> I will return to *Smith* and other challenges made to mandatory minimums under section 12 in Part IV, below, but it is worth noting at this stage that the Conservatives’ overhaul of the *CDSA* is especially significant given this historical context.

131. “Mandatory Minimum Sentences: Law and Policy” (2001) 39:2&3 Osgoode Hall LJ 261 at 262.

132. *Supra* note 130 at 307.

133. *Supra* note 1, s 17 (amending s 163 of the *Criminal Code* to raise the mandatory minimum penalties for making, possession, distribution, and accessing child pornography).

134. *Ibid.*, ss 39-41.

135. Canadian Drug Policy Coalition, “Thrown Under the Omnibus” (10 November 2011) (video), online: <<http://drugpolicy.ca/2011/11/thrown-under-the-omnibus/>>.

136. RSC 1970, c N1 [*NCA*], as repealed by the *CDSA*, *supra* note 103.

137. [1987] 1 SCR 1045, 40 DLR (4th) 435 [*Smith* cited to SCR].

138. *Ibid.*

139. *Ibid.*

The *SSCA* amends the *CDSA* to include a complex sequence of escalating mandatory minimum sentences for drug offences depending on the existence of various aggravating factors. To provide one example, a person convicted of producing marijuana for the purposes of trafficking is subject to a mandatory minimum sentence of six months if the number of plants produced is more than 5 but less than 201.<sup>140</sup> However, a person convicted of producing marijuana for the purposes of trafficking is subject to a mandatory minimum sentence of three years' imprisonment if the number of plants produced exceeds 500<sup>141</sup> and the accused used a third party's real property in the commission of the offence.<sup>142</sup>

One aspect of the *SSCA* that will mitigate the harshness of the imposition of mandatory minimums in select circumstances is the addition of a provision that allows courts to delay sentencing in order to allow an offender to participate in a drug treatment court program approved by the Ministry of the Attorney General or to attend a treatment program as defined in section 720(2) of the *Code*.<sup>143</sup> Perhaps even more significant is the amendment to section 10(5) of the *CDSA*: "If the offender successfully completes a program under subsection (4), the court is not required to impose the minimum punishment for the offence for which the person was convicted."<sup>144</sup> Indigenous people embroiled in the criminal justice system are also frequently contending with drug and alcohol issues,<sup>145</sup> a reality that is clearly connected with what Jackson called the "process of dispossession and marginalization."<sup>146</sup> While the effectiveness of Canadian drug treatment courts has been questioned,<sup>147</sup> giving accused persons the option of seeking some form of treatment is certainly preferable to sending them straight to prison. Sections 10(4) and (5) of the *CDSA* will likely prove to be useful tools in the hands of defence counsel to urge courts to soften the hard edges of mandatory minimum sentences, whether in the cases of Indigenous offenders or otherwise.

To clarify, my argument is not that the specific offences in respect of which the *SSCA* has introduced mandatory minimum sentences are necessarily more likely to

140. *CDSA*, *supra* note 103, s 7(2)(b)(i), as amended by the *SSCA*, *supra* note 1, s 41.

141. *CDSA*, *supra* note 103, s 7(2)(b)(vi).

142. *Ibid*, s 7(3)(a).

143. *Ibid*, ss 10(3)-(4), as amended by the *SSCA*, *supra* note 1, s 43(2).

144. *Ibid*.

145. Michelle M Mann, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections* (Ottawa: Office of the Correctional Investigator, 2009), online: <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20091113-eng.pdf>>.

146. *Supra* note 23 at 218.

147. See Cynthia Kirkby, "Drug Treatment Courts in Canada: Who Benefits?" in *Perspectives On Canadian Drug Policy* (Kingston, Ont: John Howard Society of Canada, 2004) vol 2, 59, online: <<http://www.johnhoward.ca/document/drugs/perspect/volume2/volume2.pdf>>.

affect Indigenous people. I have not undertaken a thorough demographic analysis of convictions for the specific offences for which the *SSCA* creates mandatory minimum sentences. Larry N. Chartrand argued that mandatory minimum sentences for firearms offences were more likely to impact Indigenous people because they are more likely to possess firearms than the rest of the population.<sup>148</sup> While comparable data may be available to suggest a disproportionate number of Indigenous people are convicted of certain offences for which the *SSCA* creates mandatory minimum sentences,<sup>149</sup> an exhaustive review of such research is beyond the scope of this article. I am less concerned with the frequency of specific offences at hand than the broader trend towards an increased reliance on mandatory minimum sentencing. I contend that mandatory minimum sentences—irrespective of the specific offences for which they are instituted—place constraints on the judicial discretion necessary to allow the *Gladue* analysis to mitigate the ongoing over-incarceration rates among Indigenous people. In short, more mandatory minimum sentences, regardless of the crimes with which they are associated, can only exacerbate the crisis.

## B. RESTRICTION ON CONDITIONAL SENTENCES

Introduced in 1996, a conditional sentence “places restraints on the offender’s liberty without completely separating the offender from the community at large.”<sup>150</sup> In effect, a conditional sentence allows an offender to remain in the community as long as he or she adheres to certain conditions. In its submissions on the *SSCA*, the Canadian Bar Association (CBA) noted that “conditional sentences have helped to reduce the over-reliance on incarceration in Canada, and have gone a long way to ameliorating several previous problems.”<sup>151</sup> The *Code* outlines the conditions that a court must impose when ordering a conditional sentence<sup>152</sup> as well as several optional conditions that a court may choose to impose in certain

148. “Aboriginal Peoples and Mandatory Sentencing” (2001) 39:2&3 Osgoode Hall LJ 449 at 456.

149. For example, according to statistics from the Offender Management System compiled by the Correctional Service of Canada for 2008/2009, a larger proportion of Aboriginal offenders were serving prison sentences in respect of sexual offences than their non-Aboriginal counterparts. However, the same report suggests that the opposite is true with respect to drug offences. See Correctional Service of Canada, *The Changing Federal Offender Population: Aboriginal Offender Highlights 2009* (18 July 2013), online: <[http://www.csc-scc.gc.ca/research/092/ah2009-Aboriginal\\_Highlights-2009-eng.pdf](http://www.csc-scc.gc.ca/research/092/ah2009-Aboriginal_Highlights-2009-eng.pdf)>.

150. Ruby, *supra* note 46 at 533.

151. *Submission on Bill C-10 Safe Streets and Communities Act* (Ottawa: CBA, October 2011) at 14, online: <<http://www.cba.org/cba/submissions/PDF/11-45-eng.pdf>>.

152. *Supra* note 45, s 742.3(1).

circumstances.<sup>153</sup> Prior to the *SSCA*, conditional sentences were available in limited circumstances as defined by the *Code*.<sup>154</sup> For example, among other limitations, conditional sentences were unavailable to offenders convicted of “serious personal injury” offences as defined in section 752 or to offenders convicted of offences for which there were specified mandatory minimums.

The *SSCA*'s amendments to the *Code* will restrict access to conditional sentences even further and, in doing so, will undercut the progress made in the *Gladue* jurisprudence aimed at finding the least restrictive sentence possible for Indigenous offenders, given their circumstances. The most significant amendment is the addition of a list of offences for which conditional sentences will no longer be available if prosecuted by way of indictment.<sup>155</sup> To provide a handful of examples, conditional sentences are no longer available for offences such as criminal harassment,<sup>156</sup> motor vehicle theft,<sup>157</sup> theft over five-thousand dollars,<sup>158</sup> and being unlawfully in a dwelling-house.<sup>159</sup> Of course, the *SSCA* also restricts access to conditional sentences by instituting the additional mandatory minimums described in Part III(A), above. As explained in that section in reference to the *SSCA*'s mandatory minimum sentences, I am less concerned with the specific offences for which the *SSCA* restricts access to conditional sentencing than with the general trend towards increased reliance on incarceration. Restricting access to conditional sentences removes one tool previously available to courts to mitigate the over-incarceration of Indigenous people.

Research by Elspeth Kaiser-Derrick offers a stark illustration of the impact the *SSCA* will have on the availability of conditional sentences to Indigenous offenders.<sup>160</sup> Kaiser-Derrick reviewed ninety-one cases of Indigenous women offenders to assess the ways that courts account for the *Gladue* factors. Of the ninety-one cases that Kaiser-Derrick analyzed between 1999 and 2011, thirty-one resulted in conditional sentences.<sup>161</sup> She came to the following startling conclusion about how these thirty-one cases would be decided in the wake the *SSCA*:

---

153. *Ibid.*, s 742.3(2).

154. *Ibid.*, s 742.1.

155. *Ibid.*, s 742.1(f), as amended by the *SSCA*, *supra* note 1, s 34(f).

156. *Code*, *supra* note 45, s 742.1(f)(ii).

157. *Ibid.*, s 742.1(f)(vii).

158. *Ibid.*, s 742.1(f)(viii).

159. *Ibid.*, s 742.1(f)(x).

160. *Listening to What the Criminal Justice System Hears and the Stories It Tells: Judicial Sentencing Discourses about the Victimization and Criminalization of Aboriginal Women* (LL.M. Thesis, University of British Columbia, 2012) [unpublished].

161. *Ibid.*

Following the 2012 s. 742.1 amendments, 29 of those 31 conditional sentence orders would no longer be possible. That bears repeating: either immediately on the law, or because on the facts the Crown proceeded by indictment for a hybrid offence now excluded by s. 742.1, 29 of the 31 Aboriginal women that received conditional sentence orders in my research would no longer be eligible for conditional sentences for the same offences/facts today. For one further case, I was unable to determine whether that offender would remain eligible for a conditional sentence, because the answer hinged on whether the Crown proceeded by indictment or summarily, which is unclear in the judgment. I only found *one* decision of the 31 that actually resulted in a conditional sentence order that would continue to be eligible for a conditional sentence order after the 2012 amendments. To be clear, that means that those 29 (possibly 30, depending on the answer for the judgment I could not conclusively settle) criminalized Aboriginal women would likely have been sent to prison instead under the current 2012 law (although perhaps in limited cases a strict probationary term may have been ordered). This regressive turn in sentencing law is deeply troubling, and threatens to further exacerbate the ongoing problem of overrepresentation.<sup>162</sup>

### C. CHANGES TO THE *YOUTH CRIMINAL JUSTICE ACT*

Part 4 of the *SSCA*, formerly Bill C-4, amends the *Youth Criminal Justice Act*<sup>163</sup> in ways that will likely increase the incarceration rates of Indigenous young offenders. While Part 4 is bound to have a negative impact on non-Indigenous youth who come into contact with the criminal justice system, like many parts of the *SSCA*, it is likely to have a disproportionately negative impact on Indigenous youth and magnify the rates of Indigenous youth over-incarceration noted in Part I(A), above.<sup>164</sup> In their submissions on Bill C-4, Justice for Children and Youth (JFCY) called the amendments a “reaction to fear-mongering and not evidence-based leadership, misdirecting significant energy and resources... .”<sup>165</sup> The CBA noted that many of the aspects of Part 4 of the *SSCA* would only serve to undermine the “unmitigated success” of the *YCJA*, which had led to the imposition of fewer “custodial sentences” on youth.<sup>166</sup>

The *YCJA*, as amended by the *SSCA*, will undoubtedly undercut an important objective described in the statute’s Preamble: the creation of “a youth criminal justice

162. *Ibid* at 261 [emphasis in the original] [citations omitted].

163. *Supra* note 48.

164. See Calverley, Cotter & Halla, *supra* note 14.

165. *Justice for Children and Youth’s Submissions re: Bill C-4: An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts* (Sebastien’s Law – Protecting the Public from Violent Young Offenders) (Toronto: JFCY, 2010), online: <[http://www.jfcy.org/PDFs/Bill%20C4\\_JFCY\\_Position\\_Final.pdf](http://www.jfcy.org/PDFs/Bill%20C4_JFCY_Position_Final.pdf)>.

166. *Supra* note 151 at 7-8.

system that ... reduces the over-reliance on incarceration for non-violent young persons... ”<sup>167</sup> I will outline three principal ways that the *SSCA* will lead to more incarceration of Indigenous youth. Firstly, the *SSCA* will increase the likelihood that accused youth will be subjected to pre-trial detention. For example, as long as other pre-conditions are satisfied, the *YCJA* now directs courts to consider pre-trial detention of offenders with a “history that indicates a pattern of either outstanding charges or findings of guilt... ”<sup>168</sup> Given the large number of Indigenous youth who have criminal justice histories, this provision will likely lead courts to order pre-trial detention more frequently in the cases of Indigenous youth. Secondly, the *SSCA* adds deterrence and denunciation to the list of principles that a court should consider upon sentencing a young offender.<sup>169</sup> According to JFCY, prevailing social science research indicates that young offenders do not “engage in a cost-benefit thought process when contemplating on whether or not to commit a particular act.”<sup>170</sup> As such, the addition of the principle of deterrence to a youth court’s sentencing considerations is unlikely to effectively deter would-be repeat young offenders and will only result in the imposition of lengthier custodial sentences. Thirdly, the *SSCA* encourages the Attorney General to apply to the youth justice court for the imposition of adult sentences in certain circumstances.<sup>171</sup> In the event that a youth over the age of fourteen is found guilty of a “serious violent offence,” the adult sentence for which would exceed two years, the Attorney General is obliged to consider applying to the court for an adult sentence.<sup>172</sup>

AFN National Chief Shawn Atleo told the Standing Senate Committee on Legal and Constitutional Affairs that Indigenous youth are “more likely to end up in jail than in school.”<sup>173</sup> Unfortunately, with the *SSCA*’s amendments to the *YCJA*, the situation of Indigenous youth will be made even worse. The three amendments outlined above will lead to the incarceration of greater numbers of Indigenous youth.

It is apparent from this sketch of three policy shifts included in the *SSCA*—the expansion of mandatory minimum sentencing, the restriction on conditional sentencing, and the increased emphasis on incarceration in the *YCJA*—that the *SSCA* is likely to exacerbate the crisis of Indigenous over-incarceration. In Part IV, below, I examine how the mandatory minimum sentences imposed by the *SSCA*

---

167. *Supra* note 48.

168. *Ibid.*, s 29(2)(ii).

169. *Ibid.*, ss 38(2)(f)(i)-(ii).

170. *Supra* note 165 at 10.

171. *YCJA*, *supra* note 48, ss 64(1) and (1.1), as amended by the *SSCA*, *supra* note 1, s 176(1).

172. *YCJA*, *supra* note 48, s 64(2).

173. *Supra* note 121 at 16.



can be challenged on constitutional grounds in order to maintain and build upon the positive, although limited, gains made through Bill C-41 and the *Gladue* model of contextualized sentencing for Indigenous offenders.

#### IV. CHALLENGING THE CONSTITUTIONALITY OF THE *SSCA*

Constitutional challenges will undoubtedly be brought by Indigenous people to several aspects of the *SSCA*. I have chosen to focus on constitutional challenges that may be brought to strike down mandatory minimums and carve out space for the judicial discretion necessary to apply the *Gladue* analysis. Such challenges may be brought under a number of different provisions of the *Charter*—including sections 7,<sup>174</sup> 12, and 15<sup>175</sup>—and under section 35<sup>176</sup> of the *Constitution Act, 1982*. A review of the arguments that could be made by Indigenous offenders challenging the *SSCA* under each of these provisions is beyond the scope of this article. Instead I will provide an overview of the section of the *Charter* that has most frequently been relied upon in legal challenges to mandatory minimums: section 12. In doing so, I aim to sketch a basic outline of the relevant jurisprudence and point to some of the ways the section 12 analytical framework may be developed to account for the unique circumstances of Indigenous people facing mandatory minimum sentences under the *SSCA*.

---

174. For examples of cases involving Indigenous offenders challenging mandatory minimum sentences under s 7, see *R v Martin*, 2005 MBQB 185, 203 Man R (2d) 214 [*Martin*]; *R v Boissoneau*, 2006 ONCJ 561, 75 WCB (2d) 338 [*Boissoneau*]; *R v King*, 2007 ONCJ 238, 221 CCC (3d) 71 [*King*]; *R v Bressette*, 2010 ONSC 3831, 221 CRR (2d) 183 [*Bressette*]; *R v TMB*, 2011 ONCJ 528, 247 CRR (2d) 117, aff'd 2013 ONSC 4019 (available on CanLII) [*TMB*]. For a recent case involving a non-Indigenous offender who successfully challenged a mandatory minimum on the basis of s 7, see *R v Smickle*, 2012 ONSC 602, 110 OR (3d) 25 [*Smickle*].

175. For examples of cases involving Indigenous offenders challenging mandatory minimums on the basis that they violate s 15, see *Boissoneau*, *supra* note 174; *King*, *supra* note 174; *TMB*, *supra* note 174.

176. In his article about mandatory minimums and their impact on Indigenous people, Chartrand argues:

[S]ection 718.2(e) as it applies to Aboriginal offenders may be viewed as a statutory affirmation of an Aboriginal right to have traditional concepts of social dispute resolution applied in sentencing. A violation of the principles in section 718.2(e) would in turn be regarded as a violation of section 35(1) of the *Constitution*.

See *supra* note 148 at 463.

### A. SECTION 12 OF THE *CHARTER*: JUST *HOW* “CRUEL AND UNUSUAL”?

Section 12 of the *Charter* provides: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”<sup>177</sup> Generally speaking, mandatory minimum sentences have thus far withstood the Court’s scrutiny under section 12.<sup>178</sup> As mentioned in Part III(A), above, one notable exception was *Smith*,<sup>179</sup> the first decision of the Court to consider the significance of section 12. In that case, the Court was tasked with determining whether a seven-year mandatory minimum under section 5(1) of the *Narcotics Control Act* for the importation of drugs constituted cruel and unusual punishment. Justice Lamer decided that the test for section 12 was “one of gross disproportionality, because it is aimed at punishments that are more than merely excessive.”<sup>180</sup> The analysis takes place in two stages.<sup>181</sup> First, the specific circumstances of the accused are examined in relation to the minimum sentence in order to determine if it would be grossly disproportionate to impose such a sentence. Second, “reasonable hypothetical circumstances”<sup>182</sup> are considered to determine if the mandatory minimum could be grossly disproportionate in other potential cases.

In *Smith*, the Court listed the following factors as relevant to the determination of gross disproportionality under section 12:

[T]he gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case [must be considered] in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.<sup>183</sup>

In *R v Latimer*, the Court identified additional factors from the jurisprudence that followed *Smith*:

[T]he actual effect of the punishment on the individual, the penological goals and sentencing principles upon which the sentence is fashioned, the existence of valid alternatives to the punishment imposed, and a comparison of punishments imposed for other crimes in the same jurisdiction.<sup>184</sup>

---

177. *Supra* note 7.

178. See Ruby, *supra* note 46 at 510.

179. *Supra* note 137.

180. *Ibid* at para 55.

181. *Ibid* at para 37.

182. *R v Goltz*, [1991] SCR 485 at 506, 61 BCLR (2d) 145 [*Goltz*].

183. *Supra* note 137 at para 56.

184. 2001 SCC 1, [2001] 1 SCR 3 at para 75 [*Latimer*].

Considered alone, none of these factors is determinative of gross disproportionality. Rather, the goal under section 12 is to arrive at “a full contextual understanding of the sentencing provision.”<sup>185</sup> Some of the factors may not be relevant in certain cases.<sup>186</sup>

The emphasis in *Smith* was on the second stage of this analysis. In holding that there was a violation of section 12, Justice Lamer conjured up a hypothetical small-time drug offender who might be caught within the “wide net cast by s. 5(1)”<sup>187</sup> and determined that a sentence of seven years’ incarceration would constitute cruel and unusual punishment in the imagined circumstances. Justice Lamer held that the mandatory minimum violated section 12 and was not justifiable under section 1 even though the facts underlying the appellant’s conviction were quite distinct from those of the hypothetical small-time offender that he imagined.<sup>188</sup>

*Smith* has been called the “high watermark” of section 12 jurisprudence.<sup>189</sup> But in the twenty-five years that have followed *Smith*, the Court’s section 12 analysis has been gradually restricted as a tool for challenging mandatory minimums. Jamie Cameron has observed, “Any expectation that the jurisprudence would blossom after *Smith* was dashed by a series of decisions which, together, show that the Court regards section 12 as a ‘faint hope’ guarantee of sorts—one which is available only on rare occasions and in exceptional circumstances.”<sup>190</sup> Peter W. Hogg has pointed out that without ever explicitly overruling the approach employed by Justice Lamer in *Smith*, the Court has become increasingly deferential to Parliament when analyzing mandatory minimum sentences for section 12 compliance.<sup>191</sup> The potency of section 12 has been diluted considerably as the Court has limited the use of hypothetical examples like the one used by Justice Lamer in *Smith* to imagine circumstances in which the imposition of a mandatory minimum sentence would constitute cruel and unusual punishment.<sup>192</sup> Instead, the Court has become increasingly

---

185. *R v Morrissey*, 2000 SCC 39, [2000] 2 SCR 90 at para 28 [*Morrissey*].

186. See *Latimer*, *supra* note 184 at para 75.

187. *Supra* note 137 at para 65.

188. The appellant pleaded guilty under s 5(1) of the *NCA* to importing 7.5 ounces of cocaine. See *ibid* at para 6.

189. Athar K Malik, “Mandatory Minimum Sentences: Shackling Judicial Discretion for Justice or Political Expediency?” (2008) 53:2 *Crim LQ* 236 at 239.

190. “Fault and Punishment under Sections 7 and 12 of the Charter” in Jamie Cameron & James Stribopoulos, eds, *The Charter and Criminal Justice: Twenty-Five Years Later* (Markham, Ont: LexisNexis Canada, 2008) 553 at 583.

191. *Constitutional Law of Canada*, loose-leaf (consulted on 30 October 2013), 5th ed (Toronto: Carswell, 2007), ch 53 at 53-7.

192. See *e.g. Morrissey*, *supra* note 185 at para 33, Gonthier J [emphasis in the original] (stating, “[I]t is to be remembered that the courts are to consider only those hypotheticals that

focussed on the moral blameworthiness of the specific offender,<sup>193</sup> and at times the assessment of “reasonable hypotheticals”<sup>194</sup> appears in the analysis as a mere afterthought.<sup>195</sup> In an article reviewing the section 12 jurisprudence up to 2001, Roach argued that the Court had demonstrated an increasing willingness to defer to “Parliament’s decision to stress denunciation, retribution, and deterrence over specific deterrence, rehabilitation, and the restorative principles of sentencing.”<sup>196</sup> Unfortunately, the case law of the last decade has offered no reason to question the continued relevance of Roach’s insights.<sup>197</sup>

A few remarks on the remedies available under section 12 are in order. In its 2008 decision in *R v Ferguson*, the Court held in *obiter* that when a court decides that a mandatory minimum violates section 12, the remedy of a constitutional exemption under section 24(1) of the *Charter* is no longer available.<sup>198</sup> In its first definitive ruling on the issue, the Court held in *Ferguson* that the appropriate remedy in such circumstances is to strike down the operative provision under section 52 of the *Constitution Act, 1982*.<sup>199</sup> This *obiter dictum* arguably makes section 12 less likely to provide robust protection to Indigenous offenders seeking relief from mandatory minimums. While provincial and superior courts might have been more willing to break with the prevailing trends in the section 12 jurisprudence and to grant constitutional exemptions from mandatory minimums for particular Indigenous offenders in certain circumstances,<sup>200</sup> *Ferguson* will likely lead to increased

---

could reasonably arise.”). See also *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at para 30, McLachlin CJ [*Ferguson*]. The Chief Justice did not actually address specific hypothetical situations raised by the appellant in her reasons but, instead, dismissed out of hand this aspect of the appellant’s argument. In her view, the appellant failed to identify “a hypothetical case where the offender’s minimum level of moral culpability for unlawful act manslaughter using a firearm would be less than that in the reasonable hypotheticals considered in *Morrissey*.”

193. See Malik, *supra* note 189 at 240.

194. See Goltz, *supra* note 182.

195. See *e.g.* *Ferguson*, *supra* note 192.

196. “Searching for *Smith*: The Constitutionality of Mandatory Sentences” (2001) 39:2&3 Osgoode Hall LJ 367 at 372.

197. Hogg has emphasized the prominence of the principle of denunciation in the Court’s s 12 jurisprudence after *Smith*: “The Court’s new doctrine of denunciation, which seemed to drive the decision in *Latimer* and influenced the decision in *Morrissey*, will make it very difficult if not impossible to challenge minimum mandatory sentences in the future.” See *supra* note 191 at 53-13.

198. *Supra* note 192 at para 13.

199. *Supra* note 40.

200. For examples of cases prior to *Ferguson* in which an Indigenous accused successfully obtained a constitutional exemption to a mandatory minimum under s 12, see *R v Massetoe*, 2003 BCPC 451, 16 WCB (2d) 578 [*Massetoe*]; *R v Kuksiak*, [1998] NWTJ No 103 (QL).

caution among lower court judges before finding violations of section 12, given the near inevitability of appellate review after a mandatory minimum has been declared unconstitutional. On the other hand, the unavailability of a section 24(1) exemption as a remedy means that in circumstances where the unconstitutionality of a mandatory minimum has been established, a court will have no choice but to strike down the law even if gross disproportionality is unlikely to arise in most applications.

#### 1. THE DUAL MEANING OF GROSS DISPROPORTIONALITY

There are only a handful of reported cases in which Indigenous offenders have undertaken section 12 challenges to mandatory minimums,<sup>201</sup> let alone have succeeded in doing so.<sup>202</sup> Before turning to discuss the ways in which the section 12 analytical framework may be infused with some of the insights contained in the *Gladue* jurisprudence, I analyze two recent decisions in which Indigenous offenders unsuccessfully challenged mandatory minimum sentences under section 12.

In *R v Bressette*, Justice Desotti of the Ontario Court of Justice held that the mandatory minimum sentence under section 96(2)(a) of the *Code*,<sup>203</sup> possession of a weapon obtained by commission of an offence, did not violate section 12.<sup>204</sup> The accused, Jerome Lee Bressette of the Kettle Point First Nation, pleaded guilty to possession of a stolen rifle, possession of marijuana for the purposes of trafficking, and possession of a firearm while subject to an order that prohibited him from doing so, among other offences. He challenged the mandatory minimum sentence for possession of a stolen firearm under sections 7, 12, and 15 of the *Charter*. The facts underlying the accused's guilty pleas were not recited by the court in much detail.<sup>205</sup>

While Justice Desotti listed some of the factors identified in *Smith*<sup>206</sup> and *Latimer*<sup>207</sup> as relevant to the assessment of gross disproportionality,<sup>208</sup> he placed emphasis on the legislative purpose, describing the mandatory minimum sentence as

201. See e.g. *Martin*, *supra* note 174 (dismissing the appeal of an Indigenous offender claiming that a mandatory minimum sentence of 14 days for driving with a blood alcohol level above 0.08 violated s 12).

202. For an example of a successful challenge under s 12, see *R v Bill* (1997), 13 CR (5th) 103, 37 WCB (2d) 305 (BC SC) (holding that the imposition of the mandatory minimum sentence for manslaughter under s 236(a) of the *Code* violated s 12 of the *Charter*). For the BC Supreme Court's analysis under s 1, see *R v Bill* (1998), 13 CR (5th) 125, 1998 CanLII 1446. See also *Massettoe*, *supra* note 200.

203. *Supra* note 45.

204. *Supra* note 174 at para 14.

205. *Ibid* at paras 3-4.

206. *Supra* note 137.

207. *Supra* note 184.

208. *Bressette*, *supra* note 174 at paras 6-7.

“a specific and calculated attempt by Parliament to reflect Canadian and community values and the harm that occurs as a result of the illegal use of firearms.”<sup>209</sup> Without actually addressing the offender’s argument that his circumstances as an Indigenous person should be considered when determining the proportionality of the sentence, Justice Desotti made the point that firearms offences represent a “serious and meaningful” threat within Indigenous communities and, for this reason, a mandatory minimum was warranted in the circumstances.<sup>210</sup> Justice Desotti’s section 12 analysis failed to consider crucial factors identified in *Smith* and *Latimer*, such as “the personal characteristics of the offender,”<sup>211</sup> “the actual effect of the punishment on the individual,”<sup>212</sup> and “the existence of valid alternatives to the punishment imposed,”<sup>213</sup> choosing instead to focus entirely on the gravity of the offence and Parliament’s objectives of general deterrence or denunciation. Furthermore, after concluding that section 96(2)(a) would not result in a grossly disproportionate sentence in the particular circumstances of the accused, Justice Desotti failed to proceed to the second stage of the *Smith* analysis, in which “reasonable hypothetical circumstances”<sup>214</sup> are to be considered.

In *R v Sheppard*,<sup>215</sup> Justice Jenkins of the Provincial Court of Newfoundland and Labrador held that the mandatory minimum sentence under section 244(2) (b) of the *Code*,<sup>216</sup> discharging a firearm with the intent to wound, did not violate section 12. Shane Sheppard, whose specific Indigenous ancestry is not identified in the court’s reasons, pleaded guilty to discharging a firearm with the intent to wound, aggravated assault, use of a handgun in a robbery, and forcible confinement. Along with his co-accused, Mr. Sheppard planned the armed robbery of a grocery store in an effort to pay back large, drug-related debts. After duct-taping the store manager to a chair and gagging her at gunpoint, the three men stole the store’s surveillance equipment and recordings. They were subsequently overwhelmed by fear and fled the scene without stealing the store vault. The following day, Mr. Sheppard was asked by one of his co-accused, Thomas Hickey, to shoot him so that Mr. Hickey’s creditors would have more sympathy for him and give him more time to pay back his debt. Mr. Hickey coaxed the accused by agreeing to forgive

---

209. *Ibid* at para 10.

210. *Ibid* at para 13.

211. *Smith*, *supra* note 137 at para 56.

212. *Latimer*, *supra* note 184 at para 75.

213. *Ibid*.

214. *Goltz*, *supra* note 182 at 506.

215. (2011), 310 Nfld & PEIR 277, 241 CRR (2d) 14 (NL Prov Ct) [*Sheppard* cited to Nfld & PEIR].

216. *Supra* note 45.

him of a \$7000 debt. Mr. Hickey then loaded and cocked the gun and guided it to his shoulder, and Mr. Sheppard pulled the trigger. The only offence to which Mr. Sheppard pleaded guilty that featured a mandatory minimum was discharging a firearm with the intent to wound. He challenged the four-year mandatory sentence under section 12.

In arriving at the conclusion that the mandatory minimum did not violate section 12, Justice Jenkins considered several of the factors outlined in *Smith* and *Latimer*: the gravity of the offence,<sup>217</sup> the personal characteristics of the offender,<sup>218</sup> the penological goals and sentencing principles,<sup>219</sup> and the actual effect of the punishment.<sup>220</sup> However, the force driving Justice Jenkins's analysis was the seriousness of the offence,<sup>221</sup> a common thread in section 12 cases. The unusual facts of this case would seem to support the accused's argument that a four-year mandatory minimum would be grossly disproportionate in the circumstances. Not only did the victim of the firearm discharge consent to being shot, Mr. Hickey actively persuaded the accused to participate in the criminal act. While the accused did participate in a violent robbery on the previous day, the court's section 12 analysis should have been limited to the specific circumstances surrounding the offence which featured a mandatory minimum.

Given the bizarre scenario leading to the firearm discharge, the court's holding that the four-year sentence was proportionate to the seriousness of the offence seems unwarranted. This is especially true given that Justice Jenkins failed to adequately account for the accused's Indigenous identity. While Justice Jenkins did briefly acknowledge the accused's status as an Indigenous person,<sup>222</sup> she did not explore

---

217. *Sheppard*, *supra* note 215 at para 29 (claiming, "One cannot overstate the gravity of this offence.").

218. *Ibid* at para 32 (including education, age, employment history, and Indigenous identity).

219. *Ibid* at paras 35-39 (including proportionality, the potential for rehabilitation, and general deterrence).

220. *Ibid* at paras 40-41.

221. The gravity of the offence is mentioned no less than eight times in the thirteen pages of the court's reasons. See *ibid* at paras 29, 31, 35, 38, 42.

222. *Ibid* at para 32 (observing that "Mr. Sheppard is an aboriginal person."). Jenkins J did go on to consider the Indigenous identity of the accused in sentencing him for his other convictions. Tellingly, however, Jenkins J concluded that *Gladue*

does not serve to change the fundamental responsibility of the sentencing Judge. ... [I]n this particular case there is nothing before the Court to substantiate that the circumstances of Mr. Sheppard, pertaining to his aboriginal descent, which would override the remaining objectives and principles to such a degree as to interfere with the principles set forth and argued by counsel and to reduce the sentence set forth herein.

See *ibid* at para 56.

how the assessment of proportionality under section 12 might be transformed by this fact. Instead, in a manner similar to *Bressette* and consistent with the trends in post-*Smith* Court jurisprudence, the court's reasoning in *Sheppard* demonstrates a willingness to defer to Parliament's goals of general deterrence and denunciation. Again, like in *Bressette*, "reasonable hypothetical circumstances"<sup>223</sup> did not form a part of Justice Jenkins's section 12 analysis.<sup>224</sup>

In my view, neither of these recent decisions from disparately situated Canadian jurisdictions gave sufficient consideration to how the insights contained in the *Gladue* case law necessarily transform the section 12 analysis in cases of Indigenous offenders. Neither *Bressette* nor *Sheppard* adequately addressed the fact that the offender in each case was Indigenous, let alone the undeniable connections between the legacy of colonialism and the ongoing crisis of Indigenous over-incarceration. In Part IV(B), below, I argue that the section 12 analysis must be developed in a manner that is responsive to the particular realities of Indigenous offenders.

#### B. SECTION 12 CHALLENGES TO MANDATORY MINIMUM SENTENCES

Drawing upon *Gladue* and the jurisprudence that has followed it, I identify some starting points for ways in which the assessment of cruel and unusual punishment may be transformed in the cases of Indigenous offenders. To be clear, what follows is a skeletal outline of the ways in which the section 12 analytical criteria can be mobilized in the cases of Indigenous offenders to formulate persuasive arguments that mandatory minimum sentences are unconstitutional. Further work and research will be necessary to flesh out the arguments and analysis below.

It should also be noted at the outset that many of the factors explored in this section are overlapping and mutually reinforcing. The factors that have been applied in the section 12 jurisprudence cannot be readily parsed into discrete sections. To provide one example, considerations that arise in the "circumstances of the offender" may also be relevant to determining "the actual effect of the punishment on the offender." Accordingly, some of the insights from *Gladue* and other cases that I have identified as relevant to one stage of the analysis may also have applications at other stages.

---

223. *Goltz*, *supra* note 182 at 506.

224. To be fair, the court was not presented with any reasonable hypotheticals by counsel for the accused. See *e.g. ibid* at para 23. Nonetheless, courts arguably have a duty when performing the s 12 analysis to complete this second stage of the *Smith* analysis regardless of whether or not it is specifically argued by counsel.



## 1. THE CIRCUMSTANCES OF THE OFFENDER

One of the two principal elements of the *Gladue* analysis involves a consideration of the “unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts.”<sup>225</sup> In *Ipeelee*, Justice LeBel reinforced this fundamental principle in the reasons of the majority:

[C]ourts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered.<sup>226</sup>

From the foregoing, there are two points I would like to stress. First, when assessing the meaning of gross disproportionality under section 12 in the context of a mandatory minimum sentence for an Indigenous offender, the systemic and background factors that contribute to Indigenous over-incarceration should form an integral part of the analysis of the “circumstances of the offender.” Courts’ responsibility to acknowledge this indisputable reality does not evaporate merely because Parliament has legislated a mandatory minimum sentence for a specific crime. Rather, when considering the proportionality of a mandatory minimum sentence for an Indigenous offender, courts have a duty to take judicial notice of the impacts of colonialism, displacement, and poverty. Doing so will allow courts to more accurately assess the ways in which the imposition of a mandatory minimum could exacerbate the crisis of Indigenous over-incarceration and, as a result, be grossly disproportionate. Second, while the generalized context of colonialism and dispossession unquestionably must form a backdrop for the section 12 assessment in the cases of Indigenous offenders, defence counsel have an obligation to present evidence of how the specific circumstances of the accused have been shaped by this legacy. While the Court recently clarified in *Ipeelee* that *Gladue* does not require “a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge,”<sup>227</sup> it is clear that evidence connecting the circumstances of the accused to the relevant background factors will ultimately be more persuasive. Doing so will give courts a

225. *Gladue*, *supra* note 8 at para 66.

226. *Supra* note 71 at para 60 [emphasis in the original].

227. *Ibid* at para 81.

more solid foundation on which to base a finding of gross disproportionality and to strike down the mandatory minimum at hand.

## 2. APPROPRIATE RANGE OF SENTENCES

In *Smith*, Justice Lamer suggested that the purpose of considering the circumstances of the case at this stage of the section 12 analysis is to determine which “range of sentences would have been appropriate to punish, rehabilitate or deter *this particular offender* or to protect the public from this particular offender.”<sup>228</sup> Thus, the purpose of the section 12 analysis at this stage is to assess the range of sentences that, but for the mandatory minimum, would be necessary to meet specific sentencing objectives. In the absence of a mandatory minimum, the sentencing analysis is governed by the fundamental purposes and principles laid out in sections 718, 718.1, and 718.2 of the *Code*.<sup>229</sup>

In the cases of Indigenous offenders, at this stage of the analysis, special attention must be paid to section 718.2(e) of the *Code*. In order to determine the appropriate sentence in the absence of a mandatory minimum in cases involving an Indigenous offender, courts must apply the *Gladue* and *Ipeelee* analysis. Despite the fact that determining the appropriate sentence in the absence of a mandatory minimum is a particularized inquiry, insights from *Gladue* about the general efficacy of incarceration for Indigenous offenders are extremely relevant here, especially in light of the fact that rehabilitation is among the key sentencing objectives that should guide the determination. As indicated in many of the commissions and studies outlined in Part I, above, custodial sentences are even less likely to have the desired rehabilitative effect for Indigenous people than for non-Indigenous people. As Justices Iacobucci and Cory recognized in *Gladue*, Indigenous people are “more adversely affected by incarceration and less likely to be ‘rehabilitated’ thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.”<sup>230</sup> If, as the Court recognized in 1999, incarceration is culturally alienating for Indigenous offenders and, as a result, less likely to serve one of its key purposes—rehabilitation—courts should incorporate this understanding into their analysis of the appropriate range of sentences at this stage of the section 12 analysis. In other words, the recognition in *Gladue* that prison is an especially alienating place for Indigenous people is one consideration that should shape the

---

228. *Supra* note 137 at 56 [emphasis added].

229. See *Smickle*, *supra* note 174 at para 49, Molloy J (noting that the s 12 analysis at this stage should proceed with reference to the sentencing principles contained in the *Code*).

230. *Supra* note 8 at para 68.

way that courts consider the appropriate range of sentences in the absence of a mandatory minimum.

### 3. EXISTENCE OF VALID ALTERNATIVES

The second major aspect of the *Gladue* analysis involves assessing “[t]he 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.”<sup>231</sup> This principle should influence courts’ considerations of the existence of valid alternatives to incarceration under the gross disproportionality analysis.<sup>232</sup> In *Ipeelee*, the Court affirmed:

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.*<sup>233</sup>

As was explored briefly in Part II, above, in the years following *Gladue*, restorative justice initiatives have developed across the country. While the accessibility of such initiatives varies regionally, in many cases such initiatives represent viable alternatives to the imposition of custodial sentences for Indigenous people. The availability of restorative justice alternatives to imprisonment should lead courts to more readily hold that the imposition of a mandatory minimum sentence constitutes a violation of section 12. Sending more Indigenous people to prison rather than making use of restorative alternatives would seem to be all the more cruel and unusual in light of the Supreme Court’s recognition that incarceration is a less effective rehabilitative strategy for Indigenous offenders. Not only is it less likely to serve one of the key sentencing objectives, prison is also inadequate because Indigenous people, by virtue of their cultural identities, have access to a greater breadth of alternatives to incarceration. Again, the existence of these alternatives, many of which are not only sanctioned but also funded by the Canadian state, necessarily colours the meaning of gross disproportionality for Indigenous offenders.

---

231. *Ibid* at para 66.

232. See *Latimer*, *supra* note 184 at para 75.

233. *Supra* note 71 at para 74 [emphasis added].

#### 4. THE PENOLOGICAL GOALS AND SENTENCING PRINCIPLES OF THE MANDATORY MINIMUM

At this stage of the section 12 analysis, a court “determine[s] whether Parliament was responding to a pressing problem, and whether its response is founded on recognized sentencing principles.”<sup>234</sup> As is evident from the above review of *Bressette*<sup>235</sup> and *Sheppard*,<sup>236</sup> courts often hold that the primary penological goals underlying mandatory minimums are denunciation and general deterrence. The rhetoric employed by the Conservatives in the parliamentary debates following the introduction of the *SSCA* reinforces this interpretation of the legislative intent underlying the *SSCA*'s mandatory minimums. The section 12 jurisprudence is clear that Parliament is entitled to craft mandatory minimum sentences as long as it does so “in a manner consistent with existing sentencing principles,”<sup>237</sup> which include denunciation and general deterrence, among others. As noted in Part III(A), above, the Court's post-*Smith* jurisprudence has become increasingly deferential to Parliament's choice about which sentencing principles to stress in the creation of mandatory minimums. However, the Court has also stated that “[t]he presence or absence of *any one sentencing principle* should never be determinative at this stage of the analysis under s. 12. *General deterrence cannot, on its own, prevent a punishment from being cruel and unusual.*”<sup>238</sup> Here, the Court reminds us that there is a limit to the deference it is willing to give to Parliament's sentencing objectives. In order to survive scrutiny under section 12, a mandatory minimum sentence cannot be singularly fixated on achieving one of the myriad objectives that govern Canadian sentencing law.

The analysis of the penological goals that underlie a specific mandatory minimum sentence in the case of an Indigenous offender should not occur in the abstract. Rather, courts should consider insights from *Gladue* about the relevance of specific penological goals in the context of Indigenous communities: “A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community.”<sup>239</sup> The objectives animating a mandatory minimum sentence should be considered in light of judicial authority

---

234. *Morrissey*, *supra* note 185 at para 43.

235. *Supra* note 174.

236. *Supra* note 215.

237. *Morrissey*, *supra* note 185 at para 44.

238. *Ibid* at para 45 [emphasis added].

239. *Gladue*, *supra* note 8 at para 70.

acknowledging that the traditional sentencing principles have limited purchase among Indigenous communities. When courts assess Parliament's penological goals for the purposes of determining whether a mandatory minimum sentence would result in cruel and unusual punishment if imposed on an Indigenous offender, the diminished applicability of the principles of deterrence, separation, and denunciation in the cases of Indigenous offenders must be considered.

#### 5. IMAGINING REASONABLE HYPOTHETICALS

The section 12 analysis employed in *Smith*<sup>240</sup> represents a significant hurdle to the implementation of tough-on-crime policies largely because of Justice Lamer's use of a hypothetical offender to assess the meaning of gross disproportionality. While the Court has gradually restricted the breadth of this analytical tool in subsequent cases, *Smith* remains good law on this point. Consequently, Indigenous people bringing section 12 challenges to the *SSCA* would be well advised to think creatively and present courts with hypothetical scenarios that reveal the disproportionality of the mandatory minimum, even if the circumstances of the accused have failed to do so. Such arguments can be made in the alternative to those that frame the sentence as cruel and unusual in the specific circumstances of the accused. While hypothetical examples must not be "far-fetched or only marginally imaginable as a live possibility,"<sup>241</sup> there remains considerable breadth for counsel to present scenarios that drive home the potential for mandatory minimums to result in cruel and unusual punishment.

Reasonable hypotheticals can be employed by Indigenous offenders to highlight the potential for gross disproportionality to arise in light of the well-established causes of Indigenous over-incarceration. In cases where there is a lack of specific evidence connecting the circumstances of the offence with the background factors identified as relevant in *Gladue*, the second stage of the section 12 analysis provides an opportunity to imagine hypothetical scenarios in which those connections can be made more explicit. Where an Indigenous accused is unable to present evidence that concretely connects the legacy of colonialism, residential schools, endemic poverty, or other background factors to the offence in issue, such circumstances can be imagined and presented to draw a court's attention to the potential for gross disproportionality to arise in the cases of other Indigenous offenders. Real cases can be drawn upon to develop "reasonable hypotheticals,"<sup>242</sup> and the decade-plus of *Gladue* jurisprudence offers no shortage of such cases to use as starting points to this end.

---

240. *Supra* note 137.

241. *Goltz*, *supra* note 182 at 515.

242. *Morrissey*, *supra* note 185 at para 65.

*R v Bouchard*<sup>243</sup> is an example of a case that may be helpful as a “reasonable hypothetical” in the context of the *SSCA*’s amendments to the *CDSA*. Jessica Bouchard, a thirty-three-year-old Indigenous woman from Long Lake 58 First Nation in Northern Ontario, pled guilty to trafficking in marijuana. She had purchased marijuana and given it to three young girls, one of whom was her niece. In its summary of Bouchard’s pre-sentence report, the court indicated that the accused had grown up in a family affected by substance abuse and had intermittently lived with relatives and under foster care. The accused had been physically abused by both of her parents and had been sexually abused while in foster care as well as by members of her extended family. As an early adolescent, the accused started using alcohol and drugs as a means to cope. The court also noted that members of the accused’s family, like many others in her community, had attended residential school. The accused had a long criminal record and she had previously been sentenced to jail. Justice DiGiuseppe noted the “inter-generational impact that violence, neglect and substance abuse has had on Ms. Bouchard.”<sup>244</sup> After applying the *Gladue* analysis and acknowledging that the “range of sentence must be tempered to reflect those systemic factors that have contributed to Ms. Bouchard’s offending behaviour and address her rehabilitation,”<sup>245</sup> the court sentenced her to a four-month term of imprisonment.

In contrast, if Ms. Bouchard were to be sentenced on the basis of the amended *CDSA*, she would likely face a mandatory minimum sentence of two years. A person convicted of trafficking who “involves” a person under eighteen “in committing the offence” is subject to a mandatory minimum sentence of two years.<sup>246</sup> The term “traffic” is defined broadly in the *CDSA* and includes “to sell, administer, give, transfer, transport, send or deliver the substance.”<sup>247</sup> While this provision has yet to be interpreted by a court, by providing marijuana to three girls under the age of eighteen the accused arguably “involved” them in the commission of the offence. This interpretation is confirmed by the Department of Justice, which has taken the position that the amendment captures trafficking “in relation to a youth.”<sup>248</sup> As a result, Ms. Bouchard would be subject to a two-year mandatory minimum sentence based on the aggravating factor stipulated in section 5(3)(a)

---

243. 2012 ONCJ 425, 101 WCB (2d) 571 [*Bouchard*].

244. *Ibid* at para 20.

245. *Ibid* at para 25.

246. *CDSA*, *supra* note 103, s 5(3)(a)(ii)(C).

247. *Ibid*, s 2(1)(a) [emphasis added].

248. News Release, “Backgrounder: *Safe Streets & Communities Act*: Increased Penalties for Serious Drug Crime” (30 April 2013) online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc\\_32636.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc_32636.html)>.

(ii)(C) of the *CDSA*. A two-year sentence, in stark contrast to the four-month term that she received after the court's careful consideration of the *Gladue* factors, would seem to be grossly disproportionate. *Bouchard* is thus an example of a case in the *Gladue* jurisprudence that could prove to be helpful to counsel attempting to construct "reasonable hypothetical" scenarios in which the imposition of a mandatory minimum would result in cruel and unusual punishment.

Two recent decisions penned by different judges of the Superior Court of Ontario raise questions about the fate of the "reasonable hypothetical" scenario analysis in the context of hybrid offences. Neither case involved an Indigenous offender. Nonetheless, the fact that the vast majority of the *SSCA*'s mandatory minimum sentences are associated with hybrid offences makes certain facets of the decisions particularly relevant to this discussion. Released within six months of one another, *R v Nur*<sup>249</sup> and *R v Smickle*<sup>250</sup> analyzed the constitutionality of section 95(2) of the *Code* and reached opposite conclusions. Both cases were heard by the Ontario Court of Appeal in February 2013. At the time of this writing, however, the Court of Appeal's judgments have not yet been released. To my knowledge, the applicability of the analysis of "reasonable hypotheticals" in the context of hybrid offences has yet to be considered by any appellate court in Canada.<sup>251</sup> Thus the conclusions reached by the Court of Appeal in *Nur* and *Smickle* will have significant bearing on the potential of section 12 to protect against cruel and unusual punishment effected by the *SSCA*'s mandatory minimum sentences.

In *Nur*, Justice Code considered the constitutionality of a mandatory minimum sentence of three years' imprisonment, on indictment, for possession of a loaded prohibited firearm. After indicating that there was little difficulty in constructing hypothetical scenarios in which the imposition of a three-year sentence would constitute cruel and unusual punishment, Justice Code went on to find that the Crown's discretion to proceed summarily in such circumstances provided a "complete answer to all of the 'reasonable hypotheticals.'"<sup>252</sup> In *Nur*, section 95(1) of the *Code* managed to survive section 12 scrutiny because the Crown's discretion to proceed summarily in such circumstances would supposedly prevent comparable hypothetical scenarios from ever arising on indictment. According to Justice Code's analysis, when faced with one of the hypothetical scenarios imagined in *Nur*, the Crown would choose to prosecute summarily, thereby circumscribing the

---

249. 2011 ONSC 4874, 241 CRR (2d) 306 [*Nur* cited to ONSC].

250. *Supra* note 174.

251. As Code J pointed out in *Nur*, the Court has not yet had occasion to develop this branch of the s 12 analysis in the circumstances of a hybrid offence. See *supra* note 249 at para 110.

252. *Ibid* at para 108.

possibility of gross disproportionality in those cases. Given that Justice Code had already determined that the three-year sentence imposed by section 95(2) of the *Code* was not grossly disproportionate to the appropriate sentence in the absence of a mandatory minimum and given that the Crown's discretion to prosecute summarily was a "complete answer" to the hypothetical scenarios imagined, there was no violation of section 12.

Justice Code acknowledged that the Crown's decision about how to proceed is usually made early in the proceedings, before all of the information relevant to its election may be available.<sup>253</sup> In doing so, he recognized that the gross disproportionality flowing from the Crown's choice to proceed by way of indictment might only become apparent as the full facts are revealed at trial. In such a case, Justice Code recognized that "one unwise Crown election may end up invalidating Parliament's s. 95 sentencing scheme for all cases."<sup>254</sup>

In fact, within six months of the release of Justice Code's reasons in *Nur*, precisely this kind of situation arose in *Smickle*.<sup>255</sup> In *Smickle*, Justice Molloy had the occasion to reconsider whether section 95(2) violated section 12 in the case of a twenty-seven-year-old man who was caught posing in front of his laptop with a loaded handgun. The Crown had elected to proceed by way of indictment, which, as stated above, carried a three-year mandatory minimum sentence.<sup>256</sup> At the first stage of the analysis, Justice Molloy held that the appropriate sentence in the absence of a mandatory minimum would be one year.<sup>257</sup> Accordingly, the mandatory minimum sentence of three years was grossly disproportionate, making it unnecessary to proceed to consider "reasonable hypothetical" scenarios.<sup>258</sup>

*Smickle* confirms the risk that Justice Code acknowledged in *Nur*, raising serious questions about Justice Code's approach to "reasonable hypothetical" scenarios in cases involving hybrid offences. A situation akin to the easily constructed hypothetical scenarios described by Justice Code in *Nur* arose on the facts of *Smickle*, and the prosecutorial discretion to proceed summarily did not prevent the potential for a grossly disproportionate sentence being imposed. In other words, what Justice Code referred to in *Nur* as a "constitutional 'safety valve'"<sup>259</sup> did not function the way it should have.

---

253. *Ibid* at para 117.

254. *Ibid*.

255. *Supra* note 174.

256. For a recent discussion of the implications of *Smickle* for the constitutionality of mandatory minimum sentences, see Debra Parkes, "From *Smith* to *Smickle*: the Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 Sup Ct L Rev (2d) 149

257. *Smickle*, *supra* note 174 at para 75.

258. *Ibid* at para 85.

259. *Supra* note 249 at para 117.



*Smickle* makes it clear that there is still a place for the “reasonable hypotheticals” analysis in the case of hybrid offences. Putting aside the influence that systemic racism has on the exercise of prosecutorial discretion and assuming, without accepting, that it is always exercised in good faith,<sup>260</sup> prosecutors do not always have the facts they need to make the election in the correct direction. As Justice Molloy stated in her analysis of whether the violation of section 12 could be justified under section 1, “Often, the full facts will not be known until the trial judge delivers his or her reasons or the jury delivers a verdict.”<sup>261</sup> This is especially true in the cases of Indigenous offenders, given the fact that the Crown may not even know the offender’s Indigenous identity at the time it makes its election, let alone how the background factors identified in *Gladue* might relate to the circumstances of the offence. Accordingly, there are significant dangers associated with entrusting the Crown with the responsibility of ensuring constitutional compliance by way of election in the context of hybrid offences.

Interestingly, the Crown argued in *Smith* that the constitutionality of the mandatory minimum in that case was preserved by the fact that the prosecution possessed the discretion to charge for a lesser offence in cases where gross disproportionality would arise. Justice Lamer rejected the Crown’s argument as follows:

In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.<sup>262</sup>

While the prosecutorial discretion to charge for a lesser offence is admittedly distinct from the statutory prosecutorial discretion of election,<sup>263</sup> the same reasoning applies. As stated by Justice Molloy in *Smickle*, “the suggested safety valve with respect to electing to proceed summarily rather than by indictment is no less

---

260. For a thorough discussion of the manner in which systemic racism shapes black peoples’ experiences in the Canadian criminal justice system, specifically in the context of mandatory minimum sentences, see Faizal R Mirza, “Mandatory Minimum Prison Sentencing and Systemic Racism” (2001) 39:2&3 Osgoode Hall LJ 497.

261. *Smickle*, *supra* note 174 at para 110.

262. *Smith*, *supra* note 137 at para 69.

263. This distinction was emphasized by Code J in *Nur*. See *supra* note 249 at para 112.

problematic.<sup>264</sup> *Smickle* makes it clear that situations in which the Crown makes an inappropriate election are bound to arise, and it is this certainty that makes the analysis of “reasonable hypotheticals” necessary.

It may be argued that the analysis of hypothetical scenarios remains unnecessary in the context of hybrid offences because in cases like *Smickle*, where the Crown’s election is made improperly or on the basis of incomplete facts, the imposition of a mandatory minimum sentence will nonetheless be subject to constitutional review. Leroy Smickle got his day in court and the constitutionality of section 95(2) was considered on the basis of the actual facts of his case rather than an imagined scenario. Because the imposition of a mandatory minimum sentence of three years would have resulted in cruel and unusual punishment on the facts of the case, section 95(2) of the *Code* was struck down as unconstitutional. However, such an argument is premised on a misunderstanding of the mechanics of the criminal justice system. Most criminal defendants do not go to trial. The vast majority of criminal defendants plead guilty, thereby waiving their right to a trial.<sup>265</sup> While official statistics about the scope of the practice are unavailable,<sup>266</sup> commentators estimate that 70 to 95 per cent of cases are resolved through guilty pleas.<sup>267</sup> The respective bargaining positions of the Crown and the accused are inherently unequal, and the coercive elements at play in the process of plea bargaining have been noted by scholars.<sup>268</sup> Mandatory minimum sentences place increased pressure on accused persons to plead guilty to lesser offences,<sup>269</sup> magnifying the imbalance of power in bargaining positions between the Crown and the accused.<sup>270</sup> In his analysis

---

264. *Supra* note 174 at para 110.

265. Alan Young has described the guilty plea as “the most dramatic manifestation of waiver. The panoply of procedural safeguards at trial can be circumvented by this admission of guilt.” See “Not Waving but Drowning: A Look at Waiver and Collective Constitutional Rights in the Criminal Process” (1989) 53:1 Sask L Rev 47 at 71.

266. Mia Dauvergne, “Adult Criminal Court Statistics in Canada, 2010/2011” in Statistics Canada, *Juristat* (Ottawa: Minister of Industry, May 2012) at 10, online: <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11646-eng.pdf>> (“The extent to which plea negotiations are utilized in Canada is unknown.”).

267. See Oonagh E Fitzgerald, *The Guilty Plea and Summary Justice* (Toronto: Carswell, 1990) at 168; Young, *supra* note 265 at 71; Joseph Di Luca, “Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada” (2005) 50:1&2 Crim LQ 14 at 15.

268. See *e.g.* Fitzgerald, *supra* note 267 at 137-68.

269. See Di Luca, *supra* note 267 at 31; Roach, *supra* note 196 at 382.

270. This reality was acknowledged by Molloy J as one of the deleterious effects of the mandatory minimum regime in *Smickle*. In his view, there is an “unfair advantage given to the Crown as an accused will be under pressure to plead guilty to a lesser included offence in order to avoid the risk of a the mandatory minimum.” See *supra* note 174 at para 121.

of systemic anti-black racism in the Canadian criminal justice system, Faizal R. Mirza argues that “[m]andatory prison sentences enhance the quasi-judicial role of prosecutors, providing them with greater leverage to convict a disproportionate number of Black persons.”<sup>271</sup> Mirza’s insight is equally applicable in the context of Indigenous defendants.

Given the prevalence of guilty pleas in general and the increased pressure to engage in plea bargaining when faced with a mandatory minimum, many accused persons in the position of Leroy Smickle will never get their day in court. Most people facing mandatory minimum sentences for hybrid offences for which the Crown has elected to proceed by way of indictment on the basis of incomplete facts will not commit the resources or be willing to undertake the risk involved in launching a section 12 constitutional challenge. Instead, most accused persons in the position of Leroy Smickle, a portion of whom may be innocent,<sup>272</sup> will plead guilty in an attempt to secure a less onerous sentence than the mandatory minimum that looms over their heads, however grossly disproportionate that sentence is in light of the facts. Beyond the scope of rigorous constitutional review, it is inevitable that such sentences, negotiated in the shadow of mandatory minimums, will be inflated and will result in cruel and unusual punishment. It is this reality that makes the analysis of “reasonable hypotheticals” a necessary element of the section 12 analysis.

## V. CONCLUSION

The *SSCA* is a step in precisely the wrong direction. It is also a manifestation of a much larger problem. As the enactment of the *SSCA* leads to the incarceration of thousands more Indigenous people, it will perpetuate the colonial power dynamics between the Canadian state and Indigenous people. Ignoring the voices of Indigenous advocates, activists, and scholars, and flying in the face of the countless studies outlined in Part I, above—which have identified the legacies of colonialism and dispossession as the root causes of the crisis of over-incarceration—the Conservative government has chosen instead to formulate tough-on-crime policies that will further alienate Indigenous people from the Canadian criminal justice system.

---

271. *Supra* note 260 at 504.

272. Christopher Sherrin estimates that as many as thousands of innocent accused persons plead guilty in Canada each year. See “Guilty Pleas from the Innocent” (2011) 30 Windsor Rev Legal Soc Issues 1 at 6.

In Part I, I relied on the several commissions, inquiries, and reports published in the last thirty years to explore the dimensions and underlying causes of the ongoing crisis of Indigenous over-incarceration. I concluded that, at its most fundamental, the crisis of Indigenous over-representation in the Canadian criminal justice system is a function of the legacy and ongoing impacts of colonialism. Such a conclusion indicates that reform to the Canadian sentencing regime will only go so far to address the crisis. Instead, a fundamental shift in the relationship between Indigenous people and the Canadian state is necessary.

In Part II, I assessed the legislative and judicial interventions undertaken to address this crisis. I concluded that the contextualized sentencing model legislated by section 718.2(e) of the *Code* and interpreted by the Court in *Gladue* has made positive, if limited, steps towards addressing Indigenous over-representation. I explored some of the explanations for the muted effect that *Gladue* has had in the face of growing rates of incarceration of Indigenous people. I pointed out that the Court's recent decision in *Ipeelee* offers a reason to hope that *Gladue's* potential to help reduce Indigenous over-incarceration in the context of serious offences can still be realized.

In Part III, I described the way that the *SSCA* was framed and discussed in Parliament before analyzing some of the ways that the *Act* will lead to the imprisonment of even greater numbers of Indigenous people. While the effectiveness of the contextualized sentencing methodology can certainly be questioned, in Part III I argued that the wholesale elimination of judicial discretion in the context of several criminal offences will surely only make matters worse.

In Part IV, I explored one avenue for constitutional challenge of the *SSCA's* several mandatory minimum sentencing provisions, section 12 of the *Charter*. In doing so, I developed a kind of harm-reduction strategy to address the aspects of the *SSCA* most likely to exacerbate the ongoing crisis of over-incarceration. The section 12 analysis must be reconfigured in order to account for the unique circumstances of Indigenous people. If the protection against cruel and unusual punishment provided by section 12 is to be meaningful, courts cannot afford to ignore the crisis of Indigenous over-incarceration. Given the grossly disproportionate number of Indigenous people inside Canadian prisons and the likelihood that the *SSCA* will only magnify the problem, courts hearing section 12 challenges by Indigenous offenders should use the analytical tools that they have inherited from the Court's section 12 jurisprudence to refashion the meaning of gross disproportionality. Not only are there opportunities within the section 12 analytical framework to develop a particularized definition of cruel and unusual punishment in the context of Indigenous offenders, there is ample support for such an undertaking in the

Court's post-*Gladue* jurisprudence. In *Ipeelee*, the Court confirmed in no uncertain terms that sentencing judges have an obligation to consider the *Gladue* principles whenever an Indigenous offender comes before them, no matter how "serious" the offence at hand.<sup>273</sup> While there is clearly work to be done in reconciling such statements with the prevailing trends of deference in the section 12 jurisprudence on mandatory minimums, the Court's judgment in *Ipeelee* supports the proposition that the gravity of the offence (and the associated principles of general deterrence and denunciation) should not be allowed to overtake all other considerations when courts are deciphering the meaning of gross disproportionality.

My hope is that section 12 can be employed to contain the destructive effects of the *SSCA* and in doing so create space for the continued development of restorative justice alternatives to incarceration. While such a strategy will not, in and of itself, lead to the kind of transformative social change necessary to decolonize the relationship between Indigenous people and the Canadian state, there is reason to believe that section 12 can be a useful tool in attempting to reduce the harm that could be done by the *SSCA* to Indigenous people.

---

273. *Supra* note 71 at para 87.