

# ABORIGINAL PEOPLES AND MANDATORY SENTENCING<sup>©</sup>

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The author examines the impact of mandatory minimum sentencing on Aboriginal peoples in Canada. Emphasis is placed on the recently enacted mandatory minimum sentencing provisions for firearms offences. The author argues that the enactment of such provisions are inconsistent with Parliament's objectives as reflected in section 718.2(e) of the *Criminal Code* which requires sentencing judges to pay "particular attention to the circumstances of aboriginal offenders." In addition, the author explores preliminary arguments to support a finding that mandatory minimum sentences applied to Aboriginal offenders violate sections 12 and 15 of the *Charter*.

L'auteur examine l'effet d'imposer des peines minimales obligatoires sur les peuples autochtones au Canada. L'emphase est placée sur les dispositions récemment promulguées en matière de peines minimales obligatoires pour les infractions relatives à l'usage des armes à feu. L'auteur maintient que la promulgation de telles dispositions est incompatible avec les objectifs du Parlement énoncés à l'article 718.2 du *Code criminel*. L'article 718.2 exige que le tribunal chargé de déterminer la peine à infliger doit tenir compte des circonstances particulières "en ce qui concerne les délinquants autochtones". De plus, l'auteur fait des arguments préliminaires préconisant que l'imposition des peines minimales aux contrevenants autochtones serait contraire aux articles 12 et 15 de la *Charte*.

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## I. INTRODUCTION

The imposition of mandatory minimum imprisonment sentences (particularly those recently enacted for firearms-related offences) will have a disproportionately negative effect on Aboriginal peoples in Canada. Documented experiences of the impact of mandatory minimum sentences on Aboriginal peoples in Australia demonstrate this. There is every reason to believe that mandatory minimum sentences will likewise have a disproportionately negative impact on Aboriginal peoples in Canada.

In addition, the application of minimum imprisonment sentences on Aboriginal peoples is contrary to the stated penal objectives of the Supreme Court of Canada in *R. v. Gladue*,<sup>1</sup> which recognized that a different analysis and approach is required by judges when sentencing Aboriginal offenders, one "... which may specifically make imprisonment a less appropriate or less useful sanction."<sup>2</sup>

Furthermore, the imposition of mandatory minimum sentences is contrary to the stated objectives of Parliament itself in section 718.2(e) of the *Criminal Code*<sup>3</sup> which requires that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders*."<sup>4</sup> The enactment of a mandatory minimum sentence of imprisonment defeats the ability of the judiciary to comply with this explicit direction of restraint in the use of imprisonment. In other words, mandatory minimum sentencing provisions are incompatible with the principle of restraint embodied in section 718.2(e) of the *Criminal Code* and are particularly incompatible as they are applied to Aboriginal offenders. Finally, mandatory minimum sentencing of Aboriginal offenders will not survive scrutiny under the *Canadian Charter of Rights and Freedoms*<sup>5</sup> because of its disproportionately negative impact on Aboriginal peoples.

More precisely, there are compelling arguments to the effect that firearms-related mandatory minimum sentences, as they are applied to Aboriginal peoples, will more readily result in a finding of "cruel and unusual" punishment under section 12 of the *Charter*. The British Columbia

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<sup>1</sup> [1999] 1 S.C.R. 688 [hereinafter *Gladue*].

<sup>2</sup> *Ibid.* at 708.

<sup>3</sup> R.S.C. 1985, c. C-46.

<sup>4</sup> *Ibid.*, s. 718.2(e) [emphasis added].

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

case *R. v. Bill*<sup>6</sup> has already made this determination and is illustrative of the increased likelihood that mandatory sentences are disproportionately more “cruel and unusual” for Aboriginal offenders as compared to non-Aboriginal offenders.<sup>7</sup> I would go further and argue that mandatory sentencing, given the context of Aboriginal criminal justice, will always be “cruel and unusual punishment” for all Aboriginal offenders. In other words, section 12 of the *Charter* would render any application of a four-year mandatory minimum sentence to an Aboriginal offender unconstitutional.<sup>8</sup> Furthermore, the fact that a four-year mandatory minimum sentence is distinctly cruel and unusual punishment because it is applied to Aboriginal offenders will no doubt have a bearing on a section 15 *Charter* challenge that mandatory minimum sentences as they are applied to Aboriginal offenders are discriminatory.

## II. DISPROPORTIONATE IMPACT OF MANDATORY MINIMUM SENTENCING ON ABORIGINAL PEOPLES

The recent introduction of mandatory minimum sentencing for offences involving the use of firearms is evidence of a larger “law and order” mentality and is also influenced by a misguided use of imprisonment as a means to better enforce gun control efforts. These politically driven agendas will be implemented to the detriment of Aboriginal peoples.

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<sup>6</sup> (1997), 13 C.R. (5th) 103 (B.C. S.C.), rev'd on other grounds [1999] B.C.J. No. 493 (B.C. C.A.), online: QL (BCJ) [hereinafter *Bill* cited to C.R.].

<sup>7</sup> *Ibid.* at 117. In *Bill*, Mr. Justice Taylor applied the test for determining whether a sanction is cruel and unusual punishment based on *R. v. Goltz*, [1991] 3 S.C.R. 485 [hereinafter *Goltz*]. Mister Justice Gonthier held in *Goltz* that an assessment under section 12 of the *Charter* requires two steps. First, courts are to determine if the sentence as applied to the particular accused would be considered cruel and unusual punishment because it is grossly disproportionate to what the offender deserves. Secondly, it must be determined whether the minimum sentence as imposed by Parliament is on its face grossly disproportionate in reasonable hypothetical circumstances. Mister Justice Taylor concluded that a four-year minimum mandatory imprisonment sentence under section 236(a) of the *Criminal Code* (manslaughter with a firearm) violated section 12 of the *Charter*. He then adjourned the case to allow the Crown an opportunity to bring section 1 evidence to justify the provision. In separate reasons, at [1998] B.C.J. No. 240 (B.C. S.C.), online: QL (BCJ) [hereinafter *Bill #2*], Mr. Justice Taylor found that the Crown failed to satisfy the Court that the provision could be saved by section 1 of the *Charter*. His finding that section 236(a) is unconstitutional would now be subject to the approach in *R. v. Morrissey*, [2000] 2 S.C.R. 90 [hereinafter *Morrissey*]. In *Morrissey*, the majority held that section 220(a) of the *Criminal Code* (criminal negligence with a firearm) which requires a four-year mandatory minimum sentence was not, on its face, a violation of section 12 of the *Charter*.

<sup>8</sup> For the purposes of this article, this conclusion is restricted to the four-year mandatory minimum sentences imposed when offences are committed with a firearm. This conclusion may or may not be valid in other contexts such as murder, where there is a minimum sentence of life imprisonment.

Mandatory minimum sentencing has been implemented in Western Australia and the Northern Territory since 1996 and 1997 respectively. If the experiences in Australia are indicative of what is to come in Canada, there is every reason to be very concerned.

However, unlike in Canada, the mandatory minimum sentencing regimes in these two Australian states involve property offences. For example, in the Northern Territory, the *Sentencing Act*<sup>9</sup> states that persons found guilty of certain property offences (theft, criminal damage, unlawful entry, etc.) shall be subject to a mandatory minimum term of imprisonment of fourteen days for a first offence, ninety days for a second offence, and one year for a third offence. The provision does not distinguish between the amount, value, or nature of the property. Mandatory sentencing also applies to juveniles under the *Juvenile Justice Act*.<sup>10</sup> However, in the case of juveniles under seventeen years of age, a mandatory sentence of twenty-eight days is not imposed until one prior conviction has been recorded.<sup>11</sup> Although the amendments to the *Juvenile Justice Act* have been under significant criticism from various quarters since their enactment, the criticism has been magnified and gained momentum since the tragic death of a fifteen-year-old Aboriginal boy. The boy was sentenced to twenty-eight days imprisonment for stealing pens, pencils, and other stationary items with a total value of less than fifty dollars. While in detention, he hung himself with a bed sheet.<sup>12</sup> Although this is a very tragic case, there are countless others where Aboriginal and non-Aboriginal youths and adults have been imprisoned for trivial property offences with similarly devastating effects.<sup>13</sup>

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<sup>9</sup> *Sentencing Act 1995* (NT).

<sup>10</sup> *Juvenile Justice Act 1995* (NT). Unlike in Canada, each Australian state possesses original jurisdiction over criminal law.

<sup>11</sup> For further information on the history of these provisions and the current issues surrounding their continued use see Australia, Parliamentary Inquiry by Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (Australia: 2000) at 8, online: Parliament of Australia Homepage <[http://www.aph.gov.au/senate/committee/legcon\\_ctte/mandatory/](http://www.aph.gov.au/senate/committee/legcon_ctte/mandatory/)> (date accessed: 21 January 2002) [hereinafter *Inquiry into Bill 1999*]. Senator Brown of Australia has tabled a private members bill to abolish mandatory minimum sentences for property offences for youth. *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, 1<sup>st</sup> Sess., 39<sup>th</sup> Parl., Australia, 1999 (2d reading 25 August 1999) [hereinafter *Senator Brown Speech*].

<sup>12</sup> B. Oquist, *Mandatory Sentencing—the Jailed Generation* (Sydney: Sydney Alternative Media Centre, 2000).

<sup>13</sup> See generally *Senator Brown Speech*, *supra* note 11.

It is not surprising then, that Western Australia and the Northern Territory have received harsh criticism from international human rights treaty monitoring bodies and the legal academic community.<sup>14</sup> For example, the Joint Standing Committee on Treaties has stated that mandatory minimum sentencing is a violation of article 37(b) of the *Convention on the Rights of the Child*<sup>15</sup> which requires that deprivation of liberty not be arbitrary and only be used as a measure of last resort. The Australian Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission have issued a joint report concluding that the Northern Territory and Western Australia are in violation of a number of international human rights standards and common law principles. Their report notes that both the *Convention on the Rights of the Child* and *The International Covenant on Civil and Political Rights* (Canada is a signatory to both) "... require that sentences should be reviewable by a higher or appellate court. By definition, a mandatory sentence cannot be reviewed."<sup>16</sup> In particular, article 14(5) of *The International Covenant on Civil and Political Rights* provides that a person convicted of a criminal offence must have a right to appeal both conviction and sentence to a higher tribunal.<sup>17</sup>

Despite these criticisms, the law has not been reformed and continues to be a serious problem, particularly for Aboriginal offenders in the two Australian states. The mandatory minimum sentencing provisions have had a disproportionately negative effect on incarceration rates. For example, the Senate Legal and Constitutional References Committee, in its report concerning mandatory minimum sentences and their impact on juvenile offenders, examined incarceration data and statistics which compare the impact of the Western Australia and Northern Territory

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<sup>14</sup> A number of legal articles in a special edition of the University of New South Wales Law Journal have been written criticizing the imposition of mandatory sentences in Western Australia and the Northern Territory. See e.g. H. Bayes, "Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory" (1999) 22 U.N.S.W. L.J. 286; G. Zdenkowski, "Mandatory Imprisonment of Property Offenders in the Northern Territory" (1999) 22 U.N.S.W. L.J. 302; R. Hogg, "Mandatory Sentencing Legislation and the Symbolic Politics of Law and Order" (1999) 22 U.N.S.W. L.J. 262; N. Morgan, "Capturing Crime or Capturing Votes: The Aims and Effect of Mandatories" (1999) 22 U.N.S.W. L.J. 267; M. Adams, "Launch of UNSW Law Journal Forum on Mandatory Sentencing Legislation" (1999) 22 U.N.S.W. L.J. 257; and N. Cowdery, "Mandatory Life Sentences in New South Wales" (1999) 22 U.N.S.W. L.J. 290.

<sup>15</sup> Joint Standing Committee on Treaties, *Report on the United Nations Convention on the Rights of the Child*, UNHCHR, 1998, UN Doc. A/51/41 at 346.

<sup>16</sup> Senator Brown Speech, *supra* note 11 at 7738.

<sup>17</sup> T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders" in R. Gosse, J.Y. Henderson & R. Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich, 1994) 267 at 289.

mandatory minimum legislation on Aboriginal and non-Aboriginal people. The Committee referred to studies that concluded "... that in March 1997, when the Northern Territory Government introduced mandatory sentencing, the number of Aboriginal people in Northern Territory corrective facilities increased from an average of 388 per month to 430 per month within a 12 month period."<sup>18</sup> The report also confirmed that the imprisonment rate of Aboriginal offenders was already staggeringly disproportionate. "[T]he imprisonment rate for Aboriginal people in the Northern Territory was almost 10 times as high as that for non-Aboriginal offenders, with a rate of about 1460 per 100 000 adults jailed, compared with 169 per 100 000 of non-indigenous adults."<sup>19</sup> The fact that Aboriginal people are disproportionately affected by mandatory minimum sentences for property crimes should not be surprising given their socio-economic status in Australian society.

Aboriginal peoples disproportionately fall within the lowest social and economic bracket of Australian society. The selection of property offences for mandatory minimum imprisonment sentences where minority and lower socio-economic groups are over-represented and where Aboriginal people comprise the majority of such groups is tantamount to imposing a system that specifically and intentionally targets Aboriginal people for incarceration.

In Canada, although mandatory minimum sentences are aimed at different types of offences (violence with firearms as opposed to property offences), the impact of mandatory sentences will be the same. There are three key reasons why the impact of mandatory minimum sentencing, particularly for offences involving firearms, will be discriminatory against Aboriginal peoples.

First, Aboriginal peoples are already grossly over-represented in the criminal justice system. This is not disputed and is supported by countless national and provincial commissions and inquiries.<sup>20</sup> Indeed, the Supreme

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<sup>18</sup> *Inquiry into Bill 1999*, *supra* note 11 at 28.

<sup>19</sup> *Ibid.* Senator Brown also noted that other recent research on the impact of mandatory sentencing has confirmed a disproportionate impact. For example, a study of the Children's Court of Western Australia between February 1997 and May 1998 showed that 80 per cent of youths sent to jail pursuant to a mandatory minimum sentence were Aboriginal (*Senator Brown Speech*, *supra* note 11).

<sup>20</sup> See 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, 1996) [hereinafter *RCAP*] for an excellent summary of the various reports and commissions that deal with Aboriginal justice and their findings. The conclusion drawn from a review of all the studies and reports was that "[t]he Canadian criminal justice system has failed the Aboriginal peoples of Canada—First

Court said in *Gladue* that judges should take judicial notice of this fact and cited it as one of the reasons why Parliament enacted section 718.2(e) of the *Criminal Code*.<sup>21</sup> In *Gladue*, the Supreme Court was asked to interpret the meaning of section 718.2(e) and the significance to be given to the phrase “with particular attention to the circumstances of aboriginal offenders.” The Court took a very broad approach to understanding the significance of the phrase and reviewed the circumstances of Aboriginal peoples and their experiences with the criminal justice system. In particular, the Court noted that the provision was enacted to address the over-representation of Aboriginal peoples in correctional institutions. The Court found that the crisis of over-representation could be attributed to two factors: (1) poor socio-economic circumstances of Aboriginal peoples have contributed to disproportionate criminal activity, and (2) Aboriginal peoples are subjected to the effects of systemic discrimination in the criminal justice system. The Court unequivocally stated that over-representation “... 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.”<sup>22</sup> Thus, not only are Aboriginal people over-represented in jails, they are more likely to be sentenced to jail than non-Aboriginal peoples. The Manitoba Justice Inquiry found that “... 25% of Aboriginal persons received sentences that involved some degree of incarceration, compared to approximately 10% of non-Aboriginal persons, or 2.5 times more for Aboriginal persons.”<sup>23</sup> The Court concluded that the purpose of singling out Aboriginal offenders for distinct sentencing treatment was to redress this social problem “to the extent that a remedy was possible through the sentencing process.”<sup>24</sup> Thus, mandatory minimum sentencing, instead of

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Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions” (*RCAP, ibid.* at 309).

<sup>21</sup> In *Gladue*, *supra* note 1 at 719, the Court cited reports that documented Aboriginal representation in federal correctional institutions in 1997 at 12 per cent even though their proportion of the population is only 3 per cent. For certain provincial corrections facilities, the statistics are far more dramatic. For example, in Saskatchewan, Aboriginal inmates made up 72 per cent of the provincial correctional institution population even though only 11.3 per cent of the population of Saskatchewan is Aboriginal.

<sup>22</sup> *Ibid.* at 723.

<sup>23</sup> Manitoba, Parliamentary Inquiry, *The Justice System and Aboriginal People* vol. 1 (Manitoba: Queen’s Printer, 1991) at 103 [hereinafter *Manitoba Inquir.*].

<sup>24</sup> *Gladue*, *supra* note 1 at 722.

having a neutral effect on Aboriginal over-representation, will have a negative effect.

A second factor that supports the conclusion that mandatory minimum sentencing for offences involving firearms will have a disproportionate impact on Aboriginal peoples relates to the nature of the crimes that Aboriginal people tend to commit. Studies have indicated that Aboriginal peoples are disproportionately over-represented in the commission of violent offences as compared to other offences, including property offences. In addition, most violent offences involve the abuse of drugs or alcohol.<sup>25</sup>

Thirdly, Aboriginal peoples' use of firearms is more significant relative to the overall Canadian population. Many Aboriginal peoples use firearms to hunt for their livelihood or for cultural reasons. Hunting is so important to Aboriginal peoples that courts have concluded that it is an activity that is integral to the distinctive culture of Aboriginal peoples.<sup>26</sup> Firearms are part of a way of life in most Aboriginal communities and are readily accessible. For example, from my own experience, Aboriginal people regularly travel with firearms in their vehicles. One never knows when a moose will cross one's path.

So important is the use of firearms in some Aboriginal communities that courts have declared the mandatory firearms prohibitions in the *Criminal Code* to be unconstitutional as a violation of section 12 of the *Charter* when applied to an Aboriginal offender convicted of a violent offence. In *R. v. Chief*,<sup>27</sup> the Yukon Court of Appeal considered whether a

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<sup>25</sup> *Manitoba Inquiry*, *supra* note 23 at 88.

<sup>26</sup> See e.g. *R. v. Dick*, [1985] 2 S.C.R. 309, where the Supreme Court of Canada held that hunting was of such importance to the members of the Alkali Lake Band that it was an integral part of who they were, such that any interference by the province would be interfering with the core of their Indianness and *ultra vires* the province, but for the application of section 88 of the *Indian Act*, R.S.C. 1985, c. 1-5.

<sup>27</sup> [1990] 1 C.N.L.R. 92 (Y.C.A.) [hereinafter *Chief*]. See also *R. v. Iyerak*, [1991] 2 C.N.L.R. 135 (N.W.T.C.) [hereinafter *Iyerak*] and *R. v. Jackson*, [1996] Y.J. No. 134 (Terr. Ct.), online: QL (YJ) [hereinafter *Jackson*]. But see *R. v. Johnson*, [1995] 2 C.N.L.R. 158 (Y.C.A.) where the Yukon Court of Appeal held that a mandatory firearms prohibition was not a violation of section 12 of the *Charter* because the accused did not rely on hunting in any significant way. The Ontario courts have taken a different approach. *R. v. Luke* (1994), 87 C.C.C. (3d) 121 (Ont. C.A.) [hereinafter *Luke*], is representative of the Ontario position. In *Luke*, the Court refused to declare that the mandatory prohibition order was cruel and unusual punishment for an Aboriginal offender. The Ontario courts have taken the view that the mandatory order is not unconstitutional on its face, nor do the Ontario courts seem prepared to grant a "constitutional" exemption on an individual basis. This view will likely change, however, in light of comments by Madame Justice Arbour in *Morrisey* to the effect that constitutional exemptions are allowed in individual cases and indeed are the preferred approach to dealing with section 12 *Charter* violations. However, it is important to note that the Ontario courts have

mandatory firearm prohibition order was “cruel and unusual punishment” in the case of an Aboriginal trapper. The accused was charged with assault and possession of a weapon for a purpose dangerous to public peace as a result of committing an assault during a domestic dispute. Conviction under certain provisions of the *Criminal Code* requires the judge to impose a five-year mandatory order prohibiting the possession of a firearm. The Court of Appeal noted that the accused depended on hunting and trapping to make a living. As a result, the Court held that the imposition of “a five-year firearms prohibition against a trapper and a casual hunter alike is cruel and unusual ...”<sup>28</sup> I draw attention to this case simply to illustrate the importance and prevalence of firearms in Aboriginal communities. However, it does seem somewhat ironic that under the new firearms mandatory sentencing provisions an Aboriginal person could be required to spend four years in jail because of committing an offence involving a firearm and yet successfully argue that because that person is dependent on hunting for a living, a mandatory firearm order would be “cruel and unusual” punishment. If Parliament, by imposing mandatory minimum sentences for crimes involving firearms, intends to send a strong message that offences committed with firearms should attract the most serious of sentencing options, such a message would arguably be lost if offenders were then allowed to possess firearms because an order denying such possession is a violation of section 12 of the *Charter*. Regardless of whether these messages are inconsistent, the point to be made here is that firearms are a fundamental part of the lifestyle of Aboriginal peoples. This fact does not appear to have been seriously considered by Parliament in enacting the four-year mandatory sentencing provisions.

The implications of mandatory minimum sentences are clear. The systemic discrimination in the justice system that contributes to the over-incarceration of Aboriginal offenders, the disproportionate rate of violent offences committed by Aboriginal offenders, and the high availability of firearms within Aboriginal communities will no doubt mean that a disproportionate number of offenders incarcerated as a result of the mandatory minimum sentences introduced in 1996 will be Aboriginal.

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yet to deal squarely with a situation where the Aboriginal offender was dependent on hunting for a living. As a result, the Ontario decisions regarding this issue are clearly distinguishable from the facts that gave rise to the constitutional exemptions granted in *Chief, Iyarak*, and *Jackson*

<sup>28</sup> *Chief, ibid.* at 99.

### III. MANDATORY MINIMUM SENTENCING CONTRARY TO ESTABLISHED PRINCIPLES OF SENTENCING IN RELATION TO ABORIGINAL PEOPLES

It is in part because of the systemic background factors discussed above that Parliament enacted section 718.2(e) of the *Criminal Code*. In *Gladue*, the Court held that section 718.2(e) is remedial in nature and designed to require judges to examine the causes of over-representation of Aboriginal offenders in the corrections system and to "... endeavor to remedy it, to the extent that a remedy is possible through the sentencing process."<sup>29</sup> Furthermore, the Court recognized that the Aboriginal perspective on sentencing with its emphasis on restorative justice, as opposed to punishment and deterrence, is "... extremely important to the analysis under s.718.2(e)."<sup>30</sup> The Court explained the importance of this approach in these words:

[I]t must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. ... [T]he judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means. ... What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities. ... What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions. ... *In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.*<sup>31</sup>

Mandatory minimum sentences prevent the judiciary from complying with section 718.2(e) because mandatory minimum sentences by their very nature preclude the consideration of sanctions that are in accordance with the Aboriginal perspective. Moreover, the Court held that

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<sup>29</sup> *Gladue*, *supra* note 1 at 722.

<sup>30</sup> *Ibid.* at 725.

<sup>31</sup> *Ibid.* at 724-728 [emphasis added].

section 718.2(e) is mandatory in the sense that judges have no discretion as to whether or not to consider the unique circumstances of Aboriginal offenders. By focusing on the word “should” in section 718.2(e), the Court requires all judges to take judicial notice of the systemic and background factors and the approach to sentencing that is most relevant to Aboriginal offenders.<sup>32</sup>

Nowhere in section 718.2(e) is there wording that says “except in the case of mandatory minimum sentences.” What happens when two provisions of the *Criminal Code* relating to sentencing are incompatible? Parliament is silent on this. Professor Kent Roach has suggested that the enactment of specific mandatory minimum sentences is a signal that Parliament has placed an emphasis on the principles of punishment and deterrence over those of rehabilitation and restoration.<sup>33</sup> It is not apparent to me that this is the appropriate construction to be given to the existence of mandatory minimum sentences. In fact, in *Bill*, Mr. Justice Taylor came to the opposite conclusion. Far from ousting the rehabilitative and restorative sentencing principles, the very existence (as a long-standing part of the criminal law) of such principles actually increases the likelihood that mandatory imprisonment sentences would be found to be in violation of the *Charter*. Mister Justice Taylor stated:

Although the principle of deterrence is valid and important, s.236(a) is inconsistent with fundamental principles of sentencing to the extent that it, effectively, completely eliminates other objectives of sentencing from judicial consideration. In cases such as the present one, those other objectives might lead to a sentence substantially less than four years.<sup>34</sup>

Essentially, the question is one of proper statutory construction. If the impact of *Morrisey* is that mandatory minimum sentencing is presumed to represent Parliament’s intention to emphasize punitive and deterrence principles over others, then there is very little that can be achieved by relying on section 718.2(e) of the *Criminal Code*. Fortunately, in the case of Aboriginal offenders, if this interpretation prevails, there are other avenues of redress that can be pursued under sections 12 and 15 of the *Charter*.

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<sup>32</sup> *Ibid.* at 731-732.

<sup>33</sup> See K. Roach, “Searching for Smith: The Constitutionality of Mandatory Sentences” (2001) 39 Osgoode Hall L.J. 367.

<sup>34</sup> *Bill*, *supra* note 6 at 122.

#### IV. ADDRESSING THE DISPARATE IMPACT OF MANDATORY IMPRISONMENT ON ABORIGINAL OFFENDERS

The last section of this article highlights the types of constitutional issues and arguments that could be raised by Aboriginal peoples against mandatory minimum sentences, particularly those related to firearm use. While there are other *Charter* provisions, such as section 7, that may also provide redress, this article surveys only section 12 and section 15 arguments.

##### A. *Section 12 of the Charter*

In *Bill*, Mr. Justice Taylor addressed the question of whether the four-year minimum sentence for manslaughter using a firearm was a breach of section 12 of the *Charter*.<sup>35</sup> The accused, Lonny Bill, was at home in his reserve community when a local gang of Aboriginal men called the “Warriors” threw a bottle of beer at his home. He had had trouble with this gang before. Bill had been drinking and decided to confront the gang, which by then had moved to his neighbour’s property. He took a rifle from his house for the purpose of scaring off the gang. In the confusion that followed, Bill discharged the gun and killed Wayne Alleck, one of the gang members. Lonny Bill had no prior criminal record.

Mister Justice Taylor considered the impact of section 718.2(e) and, among other factors, the fact that the offender was an Aboriginal person in deciding upon the accused’s section 12 *Charter* argument. In examining the impact of a four-year minimum sentence, Mr. Justice Taylor recognized that the Aboriginal community includes such institutions as elders and the longhouse and that these institutions play an important role in guiding and rehabilitating young people.<sup>36</sup> In particular, he observed that a four-year minimum sentence would “strip Lonny Bill away from the very community that could provide him with the resources that he needs and the community in which he must begin to play a role of atonement.”<sup>37</sup> In deciding that the four-year mandatory minimum sentence was a breach of section 12, Mr. Justice Taylor relied on section 718.2(e) of the *Criminal Code*, which no doubt influenced his decision that such a punishment would be cruel and

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* at 117-118.

<sup>37</sup> *Ibid.* at 117.

unusual under the circumstances. Thus, he found that the mandatory sentence of four years for an offence under section 236(a) violated section 12 of the *Charter*. In a separate opinion, he also found that the provision was not saved by section 1 of the *Charter*.<sup>38</sup>

However, in *R. v. Kuksiak*,<sup>39</sup> Judge Browne decided not to follow Mr. Justice Taylor's decision in the context of a case involving two Aboriginal offenders charged under section 344 of the *Criminal Code* (armed robbery). In *Kuksiak*, the accused assisted in the commission of an armed robbery by providing a gun, ammunition, and a snowmobile. He pleaded guilty and assisted the police in the investigation. He argued that a mandatory sentence of four-years imprisonment was unconstitutional because it constituted cruel and unusual punishment under section 12 of the *Charter*.

Judge Browne, however, distinguished *Bill* on the basis that section 344 is more specific in terms of the circumstances under which the provision will apply, namely armed robbery, as opposed to manslaughter where any number of various and distinct circumstances could give rise to the charge. Consequently, Judge Browne was not prepared to make a finding that section 344 was, on its face, a violation of section 12 of the *Charter*.<sup>40</sup> However, Judge Browne subsequently found that the accused qualified for a constitutional exemption and one of the reasons she gave for making such a finding was the accused's Aboriginal heritage.<sup>41</sup>

It would appear however, that Judge Browne, unlike Mr. Justice Taylor, did not examine the issue of Aboriginal heritage in deciding whether section 344 of the *Criminal Code* was, on its face, unconstitutional. It appears that she only considered that factor in the analysis of the constitutional exemption. I would argue that given the *Gladue* decision and the reasons discussed by the Supreme Court of Canada for singling out Aboriginal offenders in section 718.2(e), Judge Browne ought to have considered the significance of Aboriginal heritage in determining whether section 344, on its face, was a violation of section 12 of the *Charter* because it imposed a mandatory minimum of four-years imprisonment without regard to relevant factors of Aboriginal heritage. Moreover, a good

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<sup>38</sup> See *Bill #2*, *supra* note 7.

<sup>39</sup> [1998] N.W.T.J. No. 103 (Terr. Ct.), online: QL (NWTJ) [hereinafter *Kuksiak*].

<sup>40</sup> *Ibid.* at para. 32.

<sup>41</sup> *Ibid.* at para. 48.

argument can be made that mandatory minima will always be in violation of section 12 of the *Charter* in the case of Aboriginal offenders.

A strong argument can be made that any imposition of a mandatory minimum sentence would be cruel and unusual punishment in the context of Aboriginal offenders because of their right under section 718.2(e) to have a restorative/healing perspective on sentencing to be given appropriate consideration by the sentencing judge.

The historical circumstances of Aboriginal offenders, their alienation and dislocation as a result of colonialism, and the current manifestations of colonialism on their disproportionate involvement in the prison system are the very circumstances that mandated the inclusion of section 718.2(e) in the *Criminal Code*. Hence, there is an obligation imposed upon judges to understand and appreciate the unique circumstances and approaches to justice of Aboriginal peoples.<sup>42</sup> The singling out of Aboriginal offenders in section 718.2(e) recognizes the fact that the Canadian criminal justice system is an imposed system inconsistent with and foreign to Aboriginal traditions of resolving disputes in the community. It also recognizes that Aboriginal involvement in crime is part of a complex social system whereby the negative effects of colonialism, characteristic of the historical relationship between the Aboriginal community and the Canadian government, is just as responsible for Aboriginal crime as are the individual decisions of each offender.

The Manitoba Inquiry made the following observations:

A century of paternalism and duplicity in government policies has had disastrous consequences. Canada's original citizens have lost much of their land and livelihood, family life has been ruptured, and community leadership and cohesion have broken down. These policies have left many Aboriginal people not only impoverished, but also dependent and demoralized. These government policies must also be held ultimately responsible for a good portion of the high rates of Aboriginal crime, which are the almost inevitable result of social breakdown and poverty. ... We believe it is clear that the social situation of Aboriginal people is a direct result of a history of social, economic and cultural repression, all carried out under a cloak of legality. This is a disturbing picture. But it also makes it clear that the high crime rates that characterize Aboriginal communities are not a natural phenomenon, but a direct result of government policies.<sup>43</sup>

The inclusion of section 718.2(e) in the *Criminal Code* and the special direction given to sentencing judges to consider the unique

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<sup>42</sup> See M.E. Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (1999) 4 *Justice As Healing*, online: University of Saskatchewan <[http://www.usask.ca/native/law/jah\\_turpel-lafond.html](http://www.usask.ca/native/law/jah_turpel-lafond.html)> (date accessed: 21 January 2002).

<sup>43</sup> *Manitoba Inquiry*, *supra* note 23 at 110.

circumstances of Aboriginal peoples is a response and an acknowledgment by government that Aboriginal crime is not simply a question of individual circumstances but rather the result of complex social factors. Fundamental to this acknowledgment is the value given to Aboriginal concepts of justice and dispute resolution—concepts that emphasize rehabilitation and healing as opposed to punishment. These Aboriginal concepts are more than “alternative” sentencing principles to Aboriginal peoples: they are primary and fundamental. They are integral to the Aboriginal social structure and to how Aboriginal people structure their relations with one another. These principles would quite rightly be viewed as part of an Aboriginal right to control their social order. The Royal Commission on Aboriginal Peoples made the following findings and conclusions in this regard:

At the heart of a new relationship between Aboriginal and non-Aboriginal people must be recognition of Aboriginal peoples' inherent right of self-government. This right encompasses the authority to establish Aboriginal justice systems that reflect and respect Aboriginal concepts and processes of justice.

Aboriginal nations have the right to establish criminal justice systems that reflect and respect the cultural distinctiveness of their people pursuant to their inherent right of self-government. This right is not absolute, however, when exercised within the framework of Canada's federal system. The contemporary expression of Aboriginal concepts and processes of justice will be more effective than the existing non-Aboriginal system in responding to the wounds that colonialism had inflicted and in meeting the challenges of maintaining peace and security in a changing world.<sup>44</sup>

In other words, section 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*.<sup>45</sup>

Regardless of whether such sentencing concepts are seen as Aboriginal rights *per se*, it would still be unjust to ignore their application

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<sup>44</sup> *RCAP*, *supra* note 20 at 310.

<sup>45</sup> *Constitution Act, 1982*, s.35(1), being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. This section states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” There is a complex body of Aboriginal law jurisprudence that would have to be examined to determine whether the principles of rehabilitation and healing as they are applied in the context of resolving disputes in an Aboriginal community qualify as an Aboriginal right under section 35(1). See e.g. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075. It is beyond the scope of this article to fully deal with this issue. However, for an excellent in-depth analysis, see M.R.J. Leonardy, *First Nations Criminal Jurisdiction in Canada: The Aboriginal Right to Peacemaking under Public International and Canadian Constitutional Law* (Saskatoon: Native Law Centre, 1998).

simply because Parliament has enacted mandatory sentencing provisions regarding certain offences. By appreciating Parliament's progressive thinking in singling out Aboriginal offenders and the remedial nature of section 718.2(e), it would indeed be cruel and unusual punishment to then deny application of this enlightened approach to sentencing when addressing the systemic discrimination Aboriginal offenders face through the arbitrary application of mandatory minimum imprisonment sentences. To hold out such hope and understanding only to then turn around and apply mandatory minimum imprisonment sentences would definitely be cruel and unusual.

B. *Section 15(1) of the Charter*

Recent Supreme Court of Canada jurisprudence such as *Corbiere v. Canada*<sup>46</sup> and *Lovelace v. Ontario*<sup>47</sup> has shown that discrimination can result from the *effects* of legislation that appears on its surface to be neutral. *Lovelace* also determined that section 15(1) of the *Charter* embodies the principle of substantive equality. This means that achieving equality may mean treating different groups differently.<sup>48</sup> In *Lovelace*, Mr. Justice Iacobucci made the following remarks:

For, while it is often true that distinctions may produce discrimination, there are many other situations where substantive equality requires that distinctions be made in order to take into account the actual circumstances of individuals as they are located in varying social, political, and economic situations.<sup>49</sup>

It is well documented by the numerous Aboriginal justice inquiries and commissions that the criminal justice system is discriminatory. The Manitoba Inquiry concluded that:

the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination; it is merely "laundered" racial discrimination. It is untenable to say that

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<sup>46</sup> [1999] 2 S.C.R. 203.

<sup>47</sup> [2000] 1 S.C.R. 950 [hereinafter *Lovelace*].

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* at 987.

discrimination which builds upon the effects of racial discrimination is not racial discrimination itself. Past injustices cannot be ignored or built upon.<sup>50</sup>

As mentioned before, section 718.2(e) of the *Criminal Code* can be viewed as a measure designed to achieve substantive equality in the sentencing of Aboriginal offenders. In *Gladue*, the Court made the connection between equality and section 718.2(e) explicit when it stated:

The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s.718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.<sup>51</sup>

Thus, the imposition of mandatory sentencing, viewed from the perspective of section 718.2(e), prevents the realization of equality for Aboriginal peoples in the sentencing process. Mandatory sentencing provisions essentially deny courts the ability to rectify statutorily acknowledged racial discrimination. Since section 718.2(e) is designed, in part, to address racial discrimination against Aboriginal peoples in sentencing, it follows that any statutory provision that denies Aboriginal offenders the benefit of such a targeted and remedial provision is itself discriminatory.

Again, the experience of Australia is helpful. Although Australia does not have a *Charter*, critics of the mandatory minimum sentencing regime have drawn support from international instruments including the *International Convention on the Elimination of All Forms of Racial Discrimination* (to which Canada is a signatory).<sup>52</sup> Martin Flynn, a professor in the Faculty of Law at the University of Western Australia, has argued that mandatory sentencing laws violate the principle of equality under articles 1(1), 2, and 5 of *CERD*. Professor Flynn explains:

The Commonwealth, Western Australian and Northern Territory Governments assert that mandatory sentencing laws do not discriminate on the grounds of race. They argue that the same sentencing laws apply to all. This argument fails to appreciate the existence of a prohibition against indirect discrimination. The Preamble and articles 1(1), 2 and 5 of *CERD* prohibit acts which have a discriminatory purpose or effect. The effect of mandatory sentencing laws is that the court must ignore racial factors that are relevant to sentencing. The effect is to violate the right to equal treatment before the tribunals administering justice

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<sup>50</sup> *Manitoba Inquiry*, *supra* note 23 at 109.

<sup>51</sup> *Gladue*, *supra* note 1 at 733.

<sup>52</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195 [hereinafter *CERD*].

(article 5(a) CERD). Equal treatment before courts administering justice in Western Australia and the Northern Territory requires consideration of the different impact of sentencing options on different racial groups. The persistence of mandatory sentencing legislation in Western Australia and Northern Territory ensures the disproportionate imprisonment of Aboriginal people in those jurisdictions.<sup>53</sup>

Since article 5(a) of CERD contains the same concept of substantive equality that is built into section 15 of the *Charter*, one could argue by analogy that mandatory minimum imprisonment is likewise a violation of equality under section 15.

Although the three-stage section 15 test pronounced in *Law v. Canada*<sup>54</sup> and reaffirmed in *Lovelace* requires a specific contextualized analysis to be applied, it is not undertaken in any detail here. In fact, the existence of discrimination is so obvious that it would be an embarrassing waste of energy to apply the three-stage test to the circumstances of mandatory minimum sentencing of Aboriginal people for firearms-related offences. It is painfully clear that Aboriginal peoples will be discriminated against because mandatory minimum sentences do not allow courts to take into account relevant differences in order to address the underlying systemic and substantive inequality Aboriginal offenders face in the sentencing process. To impose a mandatory minimum sentence of four years for an offence involving a firearm, in light of the purpose of section 718.2(e)—namely to address the injustice in the existing criminal justice system—is the equivalent of legislatively re-creating inequitable treatment against Aboriginal peoples when the federal government has already acknowledged its existence and provided for its redress. The only conclusion one can draw from this state of affairs is that Parliament is saying that despite its acknowledgment of discrimination, it is going to ignore this discrimination and in fact reinforce it in certain circumstances.

## V. CONCLUSION

How is it possible that the government of Canada can be so well intentioned in addressing systemic discrimination inherent in the sentencing of Aboriginals by singling them out for special treatment while at the same time imposing mandatory sentences that do not make any distinction between Aboriginal and non-Aboriginal offenders? A neutral

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<sup>53</sup> M. Flynn, "Mandatory Sentencing, International Law and the Howard/Burke Deal" (2000) 4 *Indigenous L. Bull.* 7 at 9 [emphasis in original].

<sup>54</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

interpretation would suggest that Parliament was simply not aware of the implications of, and the inconsistencies in, its penal policies. A more pessimistic interpretation is that Parliament was aware of these implications and inconsistencies, but simply did not care.

Mandatory sentences such as those imposed for firearms-related offences will clearly have a disproportionately negative impact on Aboriginal peoples. This impact has already been documented in Australia in the context of mandatory sentencing for property offences. It is only a matter of time before the statistics will indicate the same results in Canada.

In light of such blatant ignorance on the part of the government of Canada, or perhaps because of it, the application of mandatory minimum sentencing to Aboriginal peoples for firearms-related offences will invariably qualify as a form of "cruel and unusual" punishment under section 12 of the *Charter*. However, even if a judge is not prepared to declare mandatory minimum sentencing provisions unconstitutional on their face, then, as has already been the case in at least one reported decision, section 718.2(e) of the *Criminal Code* will weigh heavily in favour of granting constitutional exemptions to individual Aboriginal offenders.

Finally, mandatory minimum sentences are clearly a violation of section 15 of the *Charter* because they discriminate against Aboriginal offenders. Aboriginal offenders sentenced under mandatory minimum provisions will not be able to benefit from section 718.2(e) of the *Criminal Code*, which is intended to ameliorate discrimination against Aboriginal peoples in sentencing. If a general provision is designed to address substantive discrimination against Aboriginal offenders and a class of those same offenders is precluded from its benefit, it follows that the very act of exclusion is itself discriminatory.

