The Unconstitutionality of Mandatory Minimum Sentences for Indigenous Offenders

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Abstract

This thesis explores whether mandatory minimum sentences (MMS) implemented for some criminal offences in the *Canadian Criminal Code* and the *Controlled Drug and Substances Act* are unconstitutional under section 12 of the *Canadian Charter of Rights and Freedoms* for Indigenous offenders. This is done through a systematic review of primary and secondary data. This data is derived from the explanation of the implementation of section 718.2(e) of the *Criminal Code*, by examining the history and impact of colonization on the Indigenous community in Canada, the examination of relevant published research and relevant court decisions. Literature that explores violations of section 12 of the Charter regarding mandatory minimum sentences (MMS) and relevant recent lower court and Supreme Court decisions related to MMS and Indigenous offenders are considered. This study argues that some mandatory minimum sentences are unconstitutional for Indigenous offenders. This is due to the limited judicial discretion for sentencing even through the implementation of s.718.2 (e) and the decisions in the landmark Supreme Court cases such as *Gladue* and *Ipeelee*. This is an extremely important and relevant topic in regard to remedying Canada's history and the current issue of prison over-population. More progress needs to be made in regard to excluding Indigenous offenders from mandatory minimum sentences under particular circumstances, especially since this is included as one of the *Truth and Reconciliation Committee*'s 94 Calls to Action.

Keywords: Criminal Code, Canadian Charter of Rights and Freedoms, Supreme Court of Canada, section 12, Mandatory Minimum Sentences.

Dedication and Acknowledgments

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I would also like to acknowledge the many Indigenous peoples' and communities that continue to struggle due to the intergenerational trauma that was caused by residential schools and other choices Canada has made and continues to make in hopes that one day the pain, suffering, and overall inequality in the criminal justice system will finally come to an end for all of you. Stay strong.

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The Unconstitutionality of Mandatory Minimum Sentence for Aboriginal Offenders

This paper dives into the critical issue regarding the unconstitutionality of mandatory minimum sentences (MMS) for Aboriginal offenders under section 718.2(e) of Canada's Criminal Code (*Criminal Code*, RSC 1985 c, C-46, s.718.2e). This section of the *Criminal Code* was enacted to help remedy the issue of Indigenous over-population in Canadian prison systems by pushing sentencing judges to consider the offender's Indigenous heritage and their past with colonialism, residential schools and more when deciding on the length and type of sentence. Mandatory minimum sentences are primarily set for drug related offences and firearm offences, both of which discriminate against the Indigenous community. For decades, Indigenous peoples have had a higher rate of drug and alcohol abuse than non-Indigenous peoples which has been shown to be related to the traumas of residential schools, victimization, abuse and more. The Indigenous population also has easier and more access to firearms than other communities due to the important tradition of hunting in their culture. By enforcing mandatory minimum sentences policy makers are contradicting what they are trying to remedy with s.718.2 (e). This makes it so that judges are not able to sentence below the MMS and therefore cannot take an offender's Indigenous heritage and their background into proper consideration when determining an "appropriate" sentence.

This paper will argue that MMS are unconstitutional under section12 of the Canadian Charter of Rights and Freedoms (*Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c11 s 12). This section protects against of "cruel and unusual punishment". This paper will explore Canada's history of colonialism, residential schools and the impact they had and still have on the country's Indigenous communities by way of a literature review. Recent Supreme Court of Canada (SCC)

cases will be reviewed that included Indigenous offenders and MMS that were deemed unconstitutional under s.12 by the Court. To truly understand the devastation that occurred to the Indigenous community and the impact that is still seen today we must first take a look at their history with Canada and colonialism.

Research Question

This research aims to answer a question that has been relevant and of utmost importance since the start of the implementation of mandatory minimum sentences in 1995 with Bill C-68. Due to the implementation of Gladue sentencing principles in 1999 to reduce the over-population of Indigenous peoples in the prison system, is the limited judicial discretion regarding Aboriginal offenders' sentences for those who have committed offences that carry mandatory minimum sentences unconstitutional under section 12 of the Canadian Charter of Rights and Freedoms?

Methodology & Limitations

This paper takes a systematic research design approach through collecting a combination of primary and secondary data on relating topics. It is acknowledged that for the purpose of this paper that Indigenous is being used as a term to describe the original peoples of Canada and their descendants. The research was done to find the respective order and impact of Indigenous peoples socio-history with colonialism in Canada. It begins being researching and establishing the history that the Indigenous population of Canada endured through European contact, legislation to control and assimilate them such as the Indian Act, and ending with the horrors of the residential school system through government and Indigenous made websites. This then led to researching the following section involving the impact that colonialism had on the life and wellness of Indigenous peoples, with focus on the residential school system, and how this has worked to create and increase systemic racism in the Canadian criminal justice system. Part of

this included looking at the most recent statistics regarding mental health issues and substance use issues in the Indigenous population which is cross-examined with the same statistics for non-Indigenous offenders. Research was collected regarding the creation of section 718.2 (e) of the Canadian *Criminal Code*, Gladue sentencing principles, and the overall arching issue of this paper: the inability for Indigenous offenders to use these sentencing guidelines when a crime holds a mandatory minimum sentence in the *Criminal Code*. To establish the history of mandatory minimum sentences, research regarding the creation and use of these is included which includes publications regarding issues of mandatory minimum sentences with Indigenous offenders and looking at any possible solutions they may have to offer. To establish where the Supreme Court of Canada stands on this issue, and because this is a relatively newly discussed topic, recent Supreme Court cases brought to them regarding this issue were examined regarding the circumstances of the offenders, the SCC's take on needing to incorporate s.718.2 (e), and why they found the use of a MMS unconstitutional. Commonalities between Supreme Court cases that stated the inability to use these sentencing principles were unconstitutional were examined and explored as to why they stated it was unconstitutional under section 12 of the Canadian Charter of Rights and Freedoms.

Several terms that are used in this paper need to be defined and operationalized in order to have consistency and clarity. In this paper when discussing cruel and unusual punishment we will focus on the definition given by the Supreme Court of Canada in the case of *R v Smith (Edward Dewey)* in 1987. Here, cruel and unusual punishment was defined as "'whether the punishment prescribed is so excessive as to outrage standards of decency" and that "the punishment must not be grossly disproportionate to what would have been appropriate". From the same case, *R v Smith (Edward Dewey)* (1987) we will use the courts definition of grossly disproportionate

which was stated as “abhorrent or intolerable to society?” and “so excessive as to outrage standards of decency”. According to *R v Nur,* the case where the test for a section 12 infringement was refined, a section 12 consideration starts by asking - is this grossly disproportionate? It is answered by going through three questions: is the punishment excessive to the point of being intolerable with human dignity? Is the punishment so excessive as to be “abhorrent or intolerable to society?” Does the law mandate the specific punishment?

Mandatory minimum sentences according to Canada’s Department of Justice are defined as “legislated sentencing floors where the minimum punishment is predetermined by law” (2018a, para.2). Gladue factors have an overall basic definition; for this paper we will focus on defining them as factors that are described as challenges of colonialism faced by the Aboriginal community that still affects them today including: racism, loss of language, removal from land, Indian residential schools, and foster care (Aboriginal Legal Aid, 2020. para.2). Two other concepts include over-representation which has been defined by Canada’s justice department as “a minority disproportionately represented in an area compared with the population as a whole, for example having more of its members in prison” (2019a) and substance abuse which according to the DSM-V, is defined and diagnosed when one of the many criteria are met in a 12 month period. These criteria include: withdrawal, tolerance, hazardous use, used larger amounts/often, repeated attempts to quit/control use, much time spent using, physical/psychological problems related to use, activities given up to use, legal problems, neglected major roles to use, and social/interpersonal problems related to use (National Institute of Health, 2013, para.5). Although substance abuse could be further operationalized by certain drugs, number of drugs used, how many times a day, what amount is considered abuse for each gender, age, etc., for the purpose of this paper the above definition is sufficient as substance

abuse is not the main topic and it is also not the sole over-arching argument for this topic. It is simply meant to help the reader understand that it is defined as an addiction and that it causes many physical and psychological issues that contribute to the cycle of trauma and biases held by individuals. Finally, systemic racism or "institutional racism" as it is sometimes known as is used multiple times throughout this paper with the definition from the Oxford English dictionary in mind; " racial discrimination that has become established as normal behavior within society or an organization" (2020).

For the primary data from Supreme Court cases, Canlii and Lexum were the databases used, along with Sage Premier, and Google Scholar for all other secondary data with keywords and terms such as: Gladue, Gladue factors, Gladue sentencing provisions, mandatory minimum sentences, cruel and unusual punishment, Canadian Charter of Rights and Freedoms, section. 12 of the Charter, colonialism, over-representation, residential schools, Indian Act, enfranchisement, Aboriginal victimization, intergenerational trauma, Canadian Indigenous population, *Criminal Code of Canada*, section 718.2(e), and systemic racism.

The main limitation in this research is that this is still a rather underdeveloped topic. It is still being explored, and there is not an abundance of literature on the specific subject regarding MMS being unconstitutional for Indigenous offenders. Most of the literature discovered focused solely on how MMS were "cruel and unusual" in general, but not specifically for Indigenous offenders. There are not many Supreme Court of Canada cases to examine (a common limitation with this research design according to the University of South California's research guide (2020b)). Another limitation for the statistics used in this research is that most of the current statistics are from 2015 or earlier. This makes it more difficult to see if there has been any impact or change in the numbers over the last 6 years.

Indigenous Socio-History

The shared history of Canada and its Indigenous peoples is devastating. For decades, the Indigenous population of Canada had their identity, cultures, and physical selves being challenged and controlled by the Canadian government. With the arrival of the Europeans, it became the goal to aggressively assimilate the Indigenous peoples into European culture. Over centuries there has been the creation of treaties, laws, and policies in order to control the Indigenous community and to get rid of the "savage" within them. Once the European's use for the Indigenous peoples was over, the desire to assimilate them grew and with increasingly more aggressive tactics. With the creation of the Indian Act in 1876 and later the residential school system, First Nations peoples were forced into assimilating into European culture as they were punished and tortured for things such as if they tried to speak their native language or take part in their native traditions. The children who attended these residential schools were abused, starved, forced to live in poor conditions and more. This section will go into detail regarding early contact between Europeans and First Nations peoples of Canada, the creation of the Indian Act, and the creation and impact of the residential school system.

Early Contact and European - First Nation Relationships

Treaties between First Nations peoples and the Crown have existed since the 18th century leading back to the early relationship between European settlers and Aboriginal peoples. These treaties created military and economic alliances and helped create the Canada that we know today. With the assistance of First Nations peoples during the fur trade, Europeans were able to make large profits as they exported the furs back to Europe. As European military conflicts

increased and spread to North America, the French and Britain military and colonial leaders relied on their First Nation allies to defend the colonies (Government of Canada, p.1, 2011).

The Royal Proclamation of 1763 was created by England's King George III in order to create and keep peace and stability in Britain's American colonies. A boundary was created between the colonies and land to the frontier west which became "Indian territories" where settlement and trade could not happen without permission from the government's Indian Department. This land could not be purchased by anyone except the Crown and only with an officially sanctioned representatives meeting with the interested First Nations (Government of Canada, p.4, 2011). The Royal Proclamation was crucial to the relationship of Canada with its First Nations peoples as it was the first public recognition of Indigenous land rights and title.

Even though title to Indigenous land had been recognized by the Government of Canada, it did not stop the government from taking what was needed to benefit their expansion. The Dominion of Canada discussed and eventually purchased "Rupertsland" from the Hudson's Bay Company without First Nation consultation even though they inhabited the area ("The North-West Resistance", 2007, para.2). The Metis population was livid and feared their culture and land rights would be compromised under Canadian control. In 1869, Louis Riel became a Metis spokesman and a leader of the militants of Red River to prevent land surveyors from continuing to enter the colony to re-survey their homes and farms as there was fear of losing them as the government refused to give any reassurances (Britannica, 2020, para.7). Louis Riel proclaimed a provisional government with him as the leader where he helped create a list of provisions of the Metis conditions for joining the country. Once this was brought to the attention of John A. MacDonald agreed to negotiate and sent a Metis delegation to Ottawa. On May 12 Manitoba was created as a home for the Metis. The creation of Manitoba was not a win for the Metis as there

were continued issues with land claims and the land reserved for their children which was eventually also taken over and acquired by the Canadian government (Britannica, 2020, para.9). Louis Riel fled into exile before the arrival of British and Canadian troops but would later be found and requested to help lead the Metis in the next rebellion.

In 1885, many First Nations and Metis were facing starvation from the dwindling numbers of Bison due to the European hunters and much of their land had been taken away during treaty signing ("The North-West Resistance", 2007, para.12). Louis Riel returned from exile to once again lead and addressed the Aboriginals about creating a list of demands to bring forward to the government regarding better treatment of the Metis and title to the lands that they occupied so that they would stop getting pushed out by the influx of settlers. After once again creating a provisional government Riel and his troops seized a church in Batoche leading to the start of the Northwest rebellion ("The North-West Resistance", 2007, para.21)

In March 1885, the Metis received news that there were 500 North-West Mounted Police headed west towards them and took up arms ("The North-West Resistance", 2007, para.42). The Rebellion officially started when 100 Mounted Police open fired on a group of Metis and Cree Indians on March 26 at Duck Lake ("The North-West Resistance", Para.46, 2007). The government of Ottawa sent in British General Middleton, the head of the Canadian army, with 3,000 men to the west to confront the First Nations. Three battles proceeded to take place with many Indigenous bands and leaders joining in which then ended with Louis Riel surrendering on May 15, multiple bands surrendering to General Middleton on May 26, the loss of many First Nations lives, and the hanging of Louis Riel. Many First Nation leaders, members of the provisional government and others were sent to jail, many being charged with treason-felony convictions.

After the Red River Rebellion and the North-West Rebellion there was a dramatic decrease in immigration to Saskatchewan which slowed down the agricultural development of the west (Britannica, 2021, ara.23). Prime Minister Sir John A. MacDonald decided that the "Indians" and their movements needed to be controlled in order for farmers to feel safe. This, along with the European Eurocentric views of superiority, is what started the creation of the Indian Act.

The Indian Act

The Indian Act was created in 1876 in order to consolidate legislation that had been previously passed and was the beginning of the federal government's jurisdiction over the Indigenous population. In 1857, *The Act to Encourage the Gradual Civilization of the Indian Tribes in this Province and to Amend the Laws Respecting Indians* was created to encourage the assimilation process of the Indigenous peoples through the process of enfranchisement. This led to the creation of the *Gradual Enfranchisement Act* in 1869 (Indigenous Foundations, 2009a, para.1).

Enfranchisement

Enfranchisement was the process where an individual would give up their full Indian status to gain a Canadian citizenship. This was both voluntary and involuntary; if an individual could speak English and/or French fluently, had a certain level of education, or one of many other reasons, that person might have been forced into enfranchisement (Indigenous Foundations, 2009a, para. 1). If the husband of a family became enfranchised, the wife and children automatically lost their Indigenous status and became enfranchised as well (Indigenous Foundations, 2009a, para.1). The *Gradual Enfranchisement Act* gave the Superintendent General of Indian Affairs more authority over the Indigenous peoples. The Superintendent

General was allowed to decide who he believed lived properly and showed "good moral character" which would result in getting special benefits. In order to control and move toward assimilating the Indigenous community, under the *Gradual Enfranchisement Act* any individual who was of less than one quarter Indian blood or had committed a crime punishable by imprisonment were now unable to collect annuities or interest money that a tribe, band, or individual would receive (Indigenous Foundations, 2000c, para. 7).

Indian Status

Section 6 of the Indian Act involved registration as a "status" or "non-status" Indian. The federal government was in control of who they believed should be considered Indian. This in turn affected the status of the man's wife and children. Those who are registered as status Indians had access to all of the resources the federal government offered, whether they were registered under 6(1) or 6(2) status; the two different possible status' that Indigenous peoples now had to be registered as. The major difference between these two is the individual's ability to pass this status onto their children. According to the Indian Act, status is determined by being either 6(1) or a 6(2). Essentially, someone who is 6(1) is able to pass their status down to their children no matter what the other parent's status is, and a 6(2) can only pass it down if the other parent is either a 6(1) or a 6(2). If a child's parents are 6(2) and 6(2), they are then registered with 6(1) status allowing them to pass it down to their children, if the parents are 6(1) and 6(2) the child is 6(1), if the parents are 6(1) and 6(1) the child is 6(1), and finally if one parents are 6(1) and the other is non-status, the child will be 6(2). But, if a 6(2) Indian and a non-status Indian were to have a child, they would be considered non-status (Government of Canada, 2018, para.30). This classification system created the issue of second generation cut-off; if there are

two generations that come from parents of status and non-status Indians, the child(ren) will then lose their ability to have status.

According to a Government of Canada's website (2020a), there were three ways for an individual to lose their Indian status: if an Indian woman married a non-Indian man, government enfranchisement, or if an individual lived outside of the country for five or more years (para.16). It took the Federal Government of Canada until 1985 to create and pass Bill C-31 which allowed for the reinstatement of status to those who lost it over these three criteria.

This image comes from the official website for the section 10 band of the M'chigeeng First Nations membership. It is displayed to help show how status is passed down for those applying for status cards. ("Indian Registration", (n.d.))

[Image removed for reasons of copyright.
The original appeared on the Membership page of the M'chigeeng First Nation website: https://www.mchigeeng.ca/membership.html]

The Pass System

In 1885, the "pass system" was introduced for the Indigenous peoples who were placed onto reserves. After the Northwest Rebellion, government officials were nervous about Indigenous freedom of mobility and decided the pass system was necessary to stop large groups from leaving reserves at the same time. The pass system was designed to control the movement of Indigenous peoples coming and going from the reserves. The Indian Agent in charge at each reserve was in charge of the passes and who could have them. The passes had to state where they

were going and when they would return (Provincial Archives of Saskatchewan, 2011, para 2). If someone was caught off the reserve without a pass they would be arrested and returned to the reserve. Hayder Reed, the former assistant Indian commissioner for the federal government and the man responsible for the creation of the Indian Act said "it seems better to keep them [Indians] together for the purpose of training them for mergence with the whites, than to disperse them unprotected among communities where they could not hold their own, and would speedily be downtrodden and debauched" (Barron, 1988, p.30). This pass system lasted until it was repealed in 1951 without it ever becoming a law or getting codified within the Indian Act (Provincial Archives of Saskatchewan, 2011, para. 2).

The Indian Act was created to take away Indigenous peoples' identities, to find everyway they could have an individual lose their Indian status and not allow them to practice their languages, cultures, and traditions. The Indian Act created division in families and worked to tighten the control the government had on Indigenous peoples.

Between the promises of education that were established in many treaties and the creation of the Indian Act to supress and assimilate Indigenous peoples, the federal government decided to create residential schools - one of the greatest horrors in Canadian history.

The Residential School System

Residential Schools were schools that were constructed and run by the federal government with assistance (funding wise and teaching wise) from Anglican, Presbyterian, United, and Roman Catholic churches to "kill the Indian" in Indigenous children. Although residential schools themselves had been around for decades before the official federal residential schools system started, it is frequently said they began in 1883 (Canadian Geographic, 2020,

para.2). Residential schools were created so that Indigenous children were forced to get a European education. The idea was to get to those who were young enough to completely forget anything they had learned about their Indigenous heritage and young enough to easily learn the European language and customs. Over 150,000 students went through residential schools over the years, with the last one closing in Saskatchewan in 1996, only 24 years ago. In a report by Nicholas Flood Davin, a journalist and politician who was commissioned by Prime Minister Sir John A. MacDonald to study the industrial schools that were already functioning in the United States for Indigenous children stated: "If anything is to be done with the Indian, we must catch him very young. The children must be kept constantly within the circle of civilized conditions" (1879, p.2).

At the beginning of residential schools, it was only necessary for children to attend during the day and then they could return home at night. Eventually the government realized this was only working backwards from their goal of assimilation as they still went home to their families where they spoke their native language and took place in their cultural traditions. Under the Indian Act, it became mandatory in 1920 for all children to attend and live in residential schools. Children were forcefully taken away from their homes and families and were placed in schools far from where they lived to distance the families as much as possible (Indigenous Foundations, 2009b, para.6)

In order to assist taking away the children's Indigenous identities while they were in the schools, they were forced to wear uniforms and have their hair cut short. The children were not allowed to interact with the opposite sex or even their siblings in order to weaken any family ties even further (Indigenous Foundations, 2009b, para.8). In the residential schools, students were punished if they were caught speaking their "mother tongue", smiling at a child of the opposite

sex, accidentally wet their bed, and more. Documents that were revealed in 2014, by the demand of a Supreme Court judge, showed that children were often punished by being locked in the school basement for hours on end, being forced to eat their own vomit, sit with soiled underwear on their heads, and even endured forms of corporal punishment and homemade electric chairs (Canadian Geographic, 2020, para.20). Other survivors remembered having needles stuck into their tongues if they spoke their native language and being shackled to their beds for lengthy periods of time.

As discussed in the Canadian Geographic (2020, para.12), residential schools were severely underfunded and crowded. It was easy for diseases such as tuberculosis to spread, and easy for fires to start and spread. The sanitation within the schools was poor encouraging the spread of diseases and with the poor selection of food and lack of availability to health care the death toll continued to rise each day. It was common to have a cemetery connected to the schools because of the high amount of deaths they experienced. Children starved to death, were abused physically, emotionally, and sexually, and were often riddled with diseases resulting in the fact that often the deceased were buried in mass unmarked graves. Because of these unmarked graves the recorded amount of deaths are inaccurate, and it is unknown for many of the children's families whether they were dead or missing (Canadian Geographic, 2020, para.12).

Students in these schools were not taught the same things that were taught in public schools but rather skills based on their genders. The girls were taught to cook, clean, and sew while the boys were taught farming, carpentry, and tinsmithing (Indigenous Foundations, 2009b, para.9). The students only attended class part-time and spent the rest of time being forced to work maintaining the schools for zero pay, this resulted in most students only having the equivalence of a fifth grade education by the time they left the school at 18.

In 1951, after the devastation of World War II, Canadians became more aware of human rights and the human rights issues that the Indian Act had on Indigenous peoples. All of the severely oppressive sections were amended, allowing for basic rights such as being able to practice their cultures and customs, hire legal counsel, and to simply enter a pool hall (Indigenous Foundations, 2009c, para.14). Unfortunately, this did not put an end to residential schools as the last one was still running until 1996. Even though the federal government may have put an end to certain sections in the Indian Act, the damage it has caused still lives on today.

Impact of Residential Schools

According to Bombay, Matheson & Anisman (2014), the treatment of Indigenous children in residential school systems has created a vicious cycle creating intergenerational trauma within each new generation (p.320). The residential schools had deprived the children of the experience of life in a family or in a community and what it was like to be raised without abuse but rather with love and care. The loss of language and culture diminished the ability for these children to talk to elders or any family members. This resulted in the loss of identity and the inability to teach any future children their cultures way of life. These children were raised in fear, abused, and then released into the real world with no idea how to survive, no economic self-sufficiency and no idea where their families were or how to get into contact with them. These factors among many others resulted in many Indigenous peoples turning to substance abuse as a coping mechanism.

This has created a vicious cycle of trauma. According to Niccols, Dell, & Clarke (2010) Indigenous persons who face mental illness and addiction that have children struggle to properly raise them due to poverty, addiction and mental illnesses (p.333) combined with a lack of

parenting ability due to not experiencing it firsthand. The systemic racism that has plagued this country's legal system constantly discriminates against Indigenous peoples and this is shown through the over-representation in prison systems (Department of Justice, 2019c, para.12), the lower likelihood to receive parole (Department of Justice, 2019b, para. 10), the high percentage of Indigenous children in the child welfare system, and more. This section will discuss some of the impacts that the residential school system has had and how this has led to systemic racism in the justice system and the overarching issue of over-representation that led to the creation of section 718.2(e) of the *Criminal Code of Canada* and the creation of the "Gladue" sentencing provisions. "There also must be the recognition that the current state of Indigenous health across Canada is a direct result of the residential schools and aggressive assimilation policies of Canada" (Canadian Geographic, 2020, para.30).

Mental Health

Suicide has been higher in Indigenous peoples than in non-Indigenous people for decades due to the ongoing impacts of colonialism, residential schools, the impact of the "sixties scoop" and more; the loss of language and culture, the breakdown of families, history of abuse, intergenerational trauma, and marginalization are associated with high rates of suicide (Statistics Canada, 2019, para.2). Combined, these factors have worked to create social, economic, and political inequalities and challenges that the Indigenous population has to face compared to those who are non-Indigenous. Those who face challenges with their mental health are frequently discriminated against. The Indigenous population faces this discrimination more frequently than those who are non-indigenous which may contribute to the use of addictive substances, committing of crime, and homelessness.

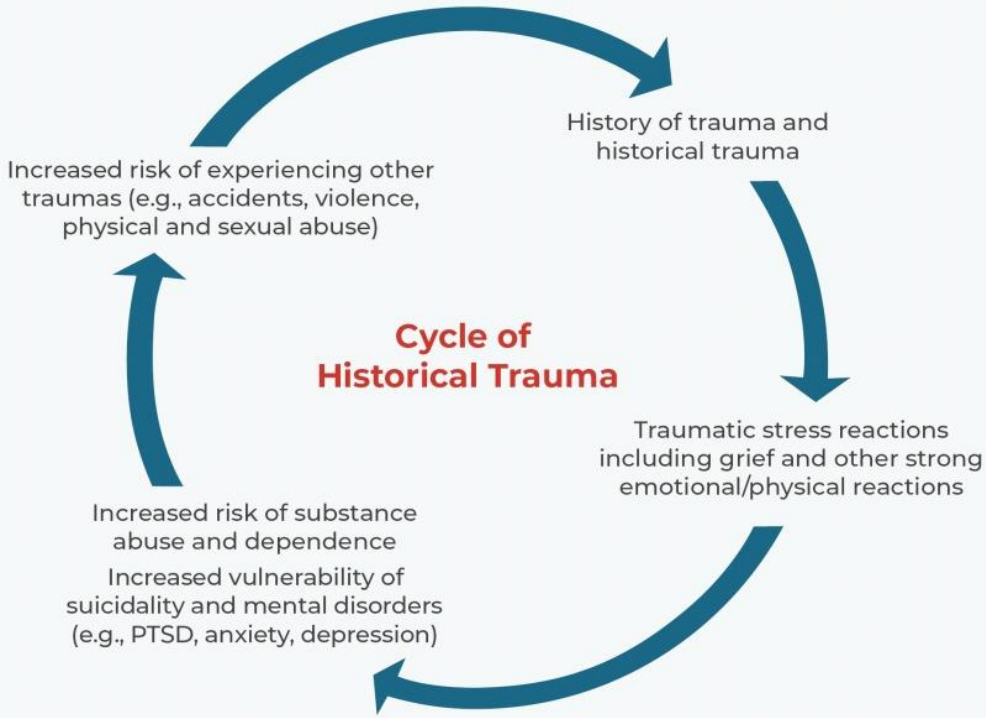
According to Statistics Canada (2019), the suicide rate for First Nations people (24.3 per 100,000 years at risk) is 3 times higher than the suicide rate of non-Indigenous people (8.0 per 100,000 years at risk). Those who lived on reserves were approximately twice as high as those who did not live on reserves and differed based on different First Nation bands. The rate among Métis was 14.7 per 100,000 years at risk which was approximately twice as high than for non-Indigenous and the rate among Inuit were increasingly higher at 72.3 per 100,000 years at risk which was approximately nine times higher than those who were non-Indigenous (Statistics Canada, 2019, para.4). Many factors including education level, socioeconomic factors, marital status, geographic differences such as living on or off a reserve (for First Nation peoples) and community size (for Inuit peoples) accounted for a high proportion of the disparity in the risk of suicide (Statistics Canada, 2019, para.5). Suicide deeply affects Indigenous societies as many members are often related, close knit, and see the group as a collective. Poor health, racial discrimination, and social isolation have shown to be connected to drug and alcohol abuse which in turn is related to poor mental health and suicide (Statistics Canada, 2019, para.11). The high rate of Indigenous children being taken away and placed in the Child Welfare System has also shown to be connected to increased substance abuse rates and suicide in both the parents and the children; this will be discussed separately in a subsequent section of this paper.

According to Statista (2016), respondents from 2011-2014 surveys showed that 12% of First Nations people had a mood disorder, as do 12.6% of Métis, and 7.7% of Inuit in comparison to 7.2% in those of non-Indigenous heritage.

Substance Abuse

The trauma and loss of culture from European colonialism has had many negative effects in Indigenous peoples' lives. As discussed by Corrado & Cohen (2003), many have turned to

substance abuse over the years as a coping mechanism for their losses (p.58), which in return have created a vicious cycle of abuse. Those who grew up in residential schools without any true form of parenting have children of their own; they do not know how to raise a child besides through forms of abuse as they were raised. These parents may also have addictions they use to cope, and these addictions may add to the anger, abuse, and other forms of violence they may already inflict on themselves and their family. This leads to their children growing up in the same fashion as their parent(s); emotionally and physically abused, and may be looking to substances to cope. Substance use may have also started at an earlier age due to seeing the use by authority figures and having possible access to them. This creates a cycle where children grow up in an abusive home, have children, and then raise their children in a similar way to how they raised as this is all that they know. Substance use also puts the individual at risk of experiencing other traumas as they may have a higher rate of being victimized while under the influence (Department of Justice, 2017a, para.15), possibly committing a crime, or getting into some form of an accident. See the image below from the National Health Institute to get a better idea of the cycle of trauma.



(National Institute of Health, 2018)

The use and abuse of substances can be triggered by stress reactions or by the increase in grief. As the Indigenous community is already one of the highest victimized communities along with constant issues with land rights, issues on reserves, and more because of Canada's history, these issues continue to reoccur and be brought back up as they get re-stressed and traumatized from current day issues creating yet another vicious cycle.

According to Statistics Canada (2015), 43% of off-reserve First Nations, 38% of Metis and 40% of Inuit age 12-24 reported heavy drinking in comparison to 36% for those who are non-Indigenous (para.12). In a study done by Correctional Services Canada in 2014 on Indigenous women offenders, it was identified that Indigenous women on average were younger when they tried drugs and alcohol for the first time versus non-Indigenous women. It was also identified that 94% of the Indigenous women had a substance abuse issue in comparison to 71% of non-Indigenous women having a substance abuse issue (para.3). For example, 127 individuals

who were residential school survivors and their stories were assessed in British Columbia revealed that 82% of them started abusing substances after their time in residential schools to try and help them cope from the abuse (Corrado & Cohen, 2003, p.58).

The abuse of substances creates an increased rate for victimization as people are more vulnerable while under the influence. Also, as individuals become more violent and aggressive, it contributes to some crime rates. According to the Department of Justice (2017a), 24% of Indigenous women have reported being abused by a current or a former spouse in comparison to 7% for non-Indigenous peoples (para.15). Violent incidents are 2.5 times more likely to happen to the Indigenous population between the ages of 15-34 than those over age 35. Further, 25-50% of Indigenous women were sexually assaulted children in comparison to 20-25% for non-Indigenous people (para.19).

Addiction can lead a person into complicated situations because of how powerful the need to get the next dose can be. Individuals with addictions can find themselves in issues such as poverty, homelessness, and committing crimes as not only are stealing (as an example) to get their next dose, but they may also be committing crimes (besides the use and possession of illicit drugs) such as theft, robbery, pan-handling, and more, so that they can feed themselves and try to get basic necessities. The long-term impact of colonialism has created this need to self-medicate in so many Indigenous peoples and this in turn has contributed to the stigma, crime rates, and over-population in the justice system.

Systemic Racism in the Justice System

The trauma caused by colonialism, the residential school system and the coping mechanisms used by the Indigenous community to deal with the abuse, loss of culture, loss of family and more, has resulted in some justice workers seeing Indigenous peoples as a troubled

population. Many do not know or think about Indigenous peoples' history and what they have been through. Rather some justice workers listen to what their own personal biases tell them. According to the Department of Justice (2019b), the Indigenous population in Canada has been both over-policed and under-policed. Although there have not been any studies done (such as self-report surveys) about justice workers being racist toward Indigenous individuals, it is believed they are more frequently targeted as there have been many instances where there has been injustice by wrongfully accusing, arresting an Indigenous individual, etc. due to bias racism on behalf of a justice worker. One example of racism against Aboriginals held by police officers includes those who participated in the "starlight tours" where an Indigenous individual is picked up by an officer, driven out to the edge of the city (usually in the winter and when they are under the influence) and drops them off there to freeze and most likely pass away overnight (Reifenberg, 2018, p.13). Bias can also be seen with the issues of Missing and Murdered Indigenous Women and Girls (MMIWG) and the lack of energy being put into finding them. There are also rising number of cases in the media where Indigenous individuals who are supposed to be receiving a wellness check from an officer get hurt or murdered instead while the officer is usually left unaccountable. Between 2007 and 2017, Indigenous peoples made up one third (22 of 61) of the individuals shot to death by RCMP officers (Freeze, 2019, para.2). Studies have shown that biases that police officers hold against Indigenous peoples has resulted in them being seen as less worthy victims in comparison to non-Indigenous resulting in them having their credibility questioned, their requests for help ignored (para.7). In a report done by the Federal Corrections Investigator in 2012, it was also discovered that Indigenous peoples are more likely to be denied bail, have longer lengths of pre-trial detention, serve more of their sentence in prison as they are often denied parole, under-represented in community supervision groups and

over-represented in maximum security populations (Department of Justice, 2019b, para. 10). In 2017-2018, the Indigenous population made up only 4% of Canada's population but made up approximately 30% of the provincial/territorial admissions and approximately 29% of the admissions to federal custody (Department of Justice, 2019c, para.12). In addition, in the 2017-2018 year, Indigenous youth made up approximately 8% of the youth population but made up approximately 43% of those who admitted into correctional services (Statistics Canada, 2019. para.59), and in the same year they also made up 48% of custody admissions and 39% of community submissions (para.61).

Child welfare

In 2015, the Canadian government's Truth and Reconciliation Committee released their report on the traumas of residential schools. The committee identified 94 "calls to action" that needed to be completed in order for Canada to stop contributing to the trauma that the Indigenous population is still facing and to help with the reconciliation of the past (CBC News, 2020, para.1). Throughout this report there is extensive mention and emphasis on the issues of the high numbers of Indigenous children in the child welfare system and how this is just another form of taking away children into an unfamiliar and uncomfortable environment where they lose their language, culture, family connections, and more. The result of this is just continuing and contributing to the trauma that was already caused and already experienced by a large portion of the Indigenous population through residential schools and the resulting intergenerational trauma.

The calls to action created to help reduce this issue include: eliminating the overrepresentation of Aboriginal children in the care of child welfare, allowing Indigenous communities to be in charge of their child welfare, the government publishing numbers of the amount of children in child welfare, creating Indigenous based parenting programs and more,

none of which have been completed yet (CBC News, 2020, para.8). According to the Government of Canada, Indigenous children make up only 7.7% of the child population but make up over half (52.2%) of the children in foster care (2020b, para.14). Even with Indigenous specific welfare services, there have still been numerous cases of discrimination and harm reported to be occurring. In 2016, the Canadian Human Rights Tribunal made the decision that the Indigenous-specific welfare services that were being provided to them were discriminatory as they were inequitable. It was discovered that many who needed help were declined and that when they decided to step in their main choice was to always immediately take the child(ren) away from the family. The specific department, the Department of Indian and Northern affairs (INAC) and their First Nations Child Family Services (FNCFS) were found to have known about the issues and the adverse impacts but did not make any significant changes and impacts and they were informed they need to take immediate action and follow the remedies ordered by the tribunal (Canadian Human Rights Tribunal, 2016).

The high number of Indigenous children in the child welfare system is another continued result of the issues of residential schools. As discussed earlier in this paper, issues such as substance abuse and mental health disorders can lead to social and economic disadvantages such as homelessness, poverty, violence and more which can all lead to the intervention of Child Welfare Services. Discrimination that is evident in the system can also contribute to the high number of children that have been taken away rather than working with other forms of intervention. According to the Ontario Human Rights Commission (2018), studies have shown that Indigenous children are more likely than non-Indigenous children to be transferred to long-term child protection services (p.23). While further research needs to be conducted as to why this

is so, it is admitted that bias in workers that may not be believe it a quality home for a child to grow up in because they are Indigenous is a potential reason to why this is occurring.

Criminal Code of Canada- Section 718.2(e)

Section 718.2(e) was added into the *Criminal Code of Canada* during the 1996 legislative reforms. According to the *Criminal Code of Canada*, section 718 falls under the "purpose and principles of sentencing" and states that "the fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community" (*Criminal Code*, RSC 1985 c, C-46, s.718.2(e)). Section 718.2(e) states that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders". This section was created so that when judges were determining what they

believed to be an appropriate sentence for an Aboriginal offender, they must consider the offenders past history, what they have had to endure due to being of Aboriginal descent, the hardships they have had to face as a community and look into all other possible sanctions than imprisonment (Provincial Court of British Columbia, 2020, para.1) The fact that this section needed to be created reveals that it is well known that there is an issue when it comes to proper sentences for Aboriginal offenders; "the purpose of creating a section specifically dealing with Aboriginal offenders reflects the assumption that over-representation of Aboriginal offenders is partly a product of inappropriate sentencing" (Pfefferle, 2008, p.2).

S.718.2(e) was first interpreted in the precedent setting case of *R v Gladue* (1999, SCC 678) (which will be examined in the following section) where it was determined that when the Court is sentencing an Aboriginal offender they must take two things into consideration: "the unique systemic or background factors that may have played a part in bringing the particular Aboriginal offender before the courts" and "the types of sentencing procedures and sanctions that may be appropriate for the offender because of his or her particular Aboriginal connection or heritage" (Provincial Court of British Columbia, 2020, para.5). More direction regarding how to consider these factors was given in the Supreme Court case of *R v Ipeelee* (2012, SCC 13). It was specified that judges had to consider systemic and background factors that affect Canadian Aboriginals including the history of colonialism, residential schools, displacement, and more. Judges must also consider how these past issues are contributing to the many issues faced by the Indigenous community today including lower incomes, high unemployment, higher rates of substance abuse, higher levels of incarceration, as previously discussed in this paper, and more (Provincial Court of British Columbia, 2020, para.6). If a judge does not consider these factors which have been dubbed "Gladue factors", the sentence that was given can be appealed.

Clarifying Section 718.2(e)

There are two important cases that were brought to the Supreme Court of Canada that affected how s.718.2 (e) of the *Criminal Code* is used and interpreted today. Before these cases, the use of the section was limited and the idea regarding whether considering this section in Indigenous sentencing was mandatory or not was vague. The case of *R v Gladue* in 1999 and the case of *R v Ipeelee* in 2012 set precedents for how courts apply this section today.

R v Gladue

R v Gladue (1999 SCC 678) is a precedent setting case that appeared before the Supreme Court of Canada on April 23, 1999. This case involved Jamie Tanis Gladue who was charged with manslaughter for killing her common law husband on her 19th birthday while under the influence of alcohol. Gladue believed that her husband and her sister had engaged in sexual activity during the party and when they returned home, they proceeded to get into an argument. As her husband attempted to leave their home, Gladue ran at him with a knife and stabbed in the chest. There was also some evidence of him being stabbed in the arm as well (*R v Gladue*, 1999 SCC 678, at para.1).

When Gladue was sentenced the judge took consideration of several mitigating factors, these factors included that she was a young mother, had no criminal record other than a single impaired driving conviction, that she had a supportive family, she attended alcohol abuse counselling and upgraded her education while on bail, she was provoked by her husband's remarks, she had a hyperthyroid condition that made her over emotional, and that she showed some signs of remorse while entering a guilty plea. There were also several aggravating factors that were identified, these included that the accused stabbed the victim twice; the second time being when he tried to flee, that Gladue was heard making comments such as "he's going to get

it, he's really going to get it this time" before the attack and "I got you, you fucking bastard" after the stabbing, and that she was the aggressor in this scenario. The judge concluded that three years imprisonment was appropriate for such a serious case with all these circumstances taken into consideration. The trial judge stated that that there were no special circumstances that needed to be taken into consideration regarding her Aboriginal status because she did not reside in a rural area or on-reserve (*R v Gladue*, 1999 SCC 678 at para.2).

Gladue filed for appeal because she believed that her Aboriginal socio-history should have been taken into consideration, but majority of the Court of Appeal dismissed the appeal and held the original court's decision. The case was later accepted by the SCC. The SCC determined that the previous courts erred in limiting the use of s.718.2(e) to only those Aboriginals who live in rural areas or on-reserve, and although the previous judges did not take this into consideration, the SCC believed that Gladue's charge of three years imprisonment was not unreasonable and kept it (*R v Gladue*, 1999 SCC 678 at para.8).

In its decision, the Supreme Court pointed out a major issue in that previous judges did not use s.718.2 (e) as it was designed. This section of the *Criminal Code* is mandatory when considering a sentence for an Indigenous offender as it is was designed to ameliorate the over-representation of the Indigenous population in the prison system, this means that the previous judge(s) should have considered at all other available sanctions than imprisonment and take into account the circumstances of socio-history, colonialism, and all that comes with Aboriginal history in Canada. More guidance was given around applying section 718.2(e) and the SCC stated that when sentencing an Indigenous offender the judge(s) must consider: "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" (*R v Gladue*,1999 SCC 678 at para.4).

R v Ipeelee

R v Ipeelee (2012 SCC 13) is another precedent setting case where the guidelines to applying s. 718.2(e) were made more specific. The case brought to the SCC in 2012 involved two appeals; one from Manasie Ipeelee and a second from Frank Ladue. Both cases involved long-term Aboriginal offenders who broke their long-term supervision orders (LTSOs) and believed that their Aboriginal social history was not considered in the sentencing (*R v Ipeelee*, 2012 SCC 13 at para.1).

Ipeelee was a known alcoholic who had a history of committing violent offences when he was under the influence of alcohol. After originally being sentenced to six years imprisonment and being released with a LTSO, he committed an offence while intoxicated, breaking his LTSO. He was sentenced to three more years in prison less six months that he spent in pre-sentence custody (*R v Ipeelee*, 2012 SCC 13 at para.1).

Ladue had a known addiction to drugs and alcohol and had a history of committing sexual assaults when under the influence (*R v Ipeelee*, 2012 SCC 13 at para.1). He was originally sentenced to three years imprisonment, also with an LTSO when he was released. After he was released, Ladue failed a urinalysis test which resulted in a breach of his LTSO. He was sentenced to three years imprisonment less five months that he had spent in pre-sentence custody. A majority of the Court of Appeal dismissed Ipeelee's appeal but allowed the appeal of Ladue and lowered his sentence to one year imprisonment (*R v Ipeelee*, 2012 SCC 13 at para.1).

The SCC was facing the issue of how to determine an appropriate sentence for the breach of a LTSO with an Aboriginal offender. The purpose of a LTSO is to protect the community and

to help the offender re-integrate into the community. The severity of the breach depends on the circumstances such as the nature of the condition that was breached and how that condition is tied to the managing of the offender to not re-offend (*R v Ipeelee*, 2012 SCC 13 at para.3). (It is stated by the SCC in this case that the factors outlined in *R v Gladue* must be considered in order for the sentence to be proportionate. It was also stated for the first time that the courts must take notice in specific circumstances such as colonialism, displacement, residential schools, and how 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" (*R v Ipeelee*, 2012 SCC 13 at para.6). This now provides more guidance and context to help judges when evaluating the information in each individual case.

The SCC decided that in the case of Ipeelee, the lower courts made errors when they concluded that rehabilitation was not one of the sentencing objectives and therefore less consideration was given to the offender's Aboriginal background. The three year sentence for Ipeelee was reduced to one year imprisonment by the SCC. In the case of Ladue, it was decided that the Court of Appeal's decision to make his sentence one year imprisonment was found to be well founded and that it reflects the principles and objectives of sentencing (*R v Ipeelee*, 2012 SCC 13 at para.8).

Cruel and Unusual Punishment under the Canadian Charter of Rights and Freedoms

Section 12 of the Canadian Charter of Rights and Freedoms is titled as "Cruel and Unusual Treatment or Punishment". The Charter states, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment (Canadian Charter of Rights and

Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c11 s 12).

Punishment has been defined by the SCC in three ways; "(1) …is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) ….is imposed in furtherance of the purposes and principles of sentencing, or (3) has a significant impact on an offender's liberty or security interests" (*R v K.R.J.*, 2016 SCC 31 at para.41). The SCC has not yet defined "treatment", but they have taken note of the broad definition that is given in the dictionary which defines treatment as "a process or manner of behaving towards or dealing with a person or thing…" (*Canada v Chiarelli*, 1992 SCC 87 at para.29). In *R v Smith (Edward Dewey)* (1987 SCC 64), the SCC outlined three dimensions to help define what is considered cruel and unusual punishment; the nature of the punishment, the conditions and environment where the punishment is served and the duration of the punishment (para.4).

It was ruled by the SCC in *Rodriguez v British Columbia* (1993 SCC 75) that the scope of s.12 only applies to punishments or treatments that have been imposed on an offender by the state and not by something that state prohibits from occurring (para.6). The Department of Justice website gives a list of measures that are considered punishments or treatments when it comes to the scope of s.12, this list includes "a term of imprisonment, a monetary fine, the victim surcharge and a prohibition on the possession of firearms by convicted drug offenders etc. imposed as a penalty for an offence is considered a punishment and detention for non-punitive reasons, the taking of a DNA sample where ordered as the consequence of conviction and other forms of detention including lockdowns in remand facilities are some examples of treatment (Department of Justice, 2019d, para.9).

After a measure has officially engaged s.12 of the Charter, it is up to a court to decide if it is, in fact, “cruel and unusual”. In order for something to be considered cruel and unusual it must be “grossly disproportionate” and considered “so excessive as to outrage standards of decency” and “abhorrent or intolerable to society” (Department of Justice, 2019d, para. 15). It is also noted that “cruel and unusual” is a term that is meant to be flexible, context-specific, and linked to community standards that are reasonable (Department of Justice, 2019d, para. 15).

Tests for Infringement

Section 718.1 of the *Criminal Code of Canada* states that the fundamental principle for sentencing is that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender” in order for it to be considered just and fair. In order to determine if the length of a sentence of imprisonment or other form of treatment/punishment is “grossly disproportionate” a test is conducted where certain factors are examined and weighed against each other in order to answer the question of if the sentence is “grossly disproportionate to the sentence that is appropriate, having regard to the nature of the offence and the circumstances of the offender”. The list of factors that are examined during this test includes ” the gravity of the offence, the personal characteristics of the offender, the circumstances of the offence, the effect of the sentence on the offender and other claimants, whether the punishment is necessary to achieve a valid penal purpose (Is Parliament responding to a pressing problem?), whether the punishment is founded on recognized sentencing principles, whether valid alternatives to the punishment exist, comparison with punishments for other crimes within the jurisdiction to determine proportionality and comparison with punishments for similar crimes in other jurisdictions” (Department of Justice, 2019d, para.21).

The gross proportionality test was articulated in *R v Smith* (*Edward Dewey*) (1987 SCC 64). It outlines a two-part test to decide if an infringement of s.12 has occurred. The first step of this test is determining if one of the dimensions (nature, conditions, duration) is "so excessive as to outrage the standards of decency" and the second step being a consideration of the offender's personal qualities such as age, gender, race, etc. Four years later, in 1991, the SCC articulated a s.12-specific test titled the "reasonable hypothetical test" in *R v Goltz* (1991 SCC 51). This test was later renamed as the "reasonable foreseeable test in *R v Nur* (2015 SCC 15). The first consideration in this test involves whether the punishment/treatment imposed on an offender is grossly disproportionate to the actions and criminal liability that the offender holds. The second consideration that occurs in this test involves the court looking at "reasonable hypotheticals" where they consider reasonable scenarios of where an offender would be punished for breaking the law in the case the SCC is currently considering (*R v Goltz*, 1991 SCC 51 at para.5). This generally includes the hypothetical offender satisfying the minimum elements for the *actus rea* and the *mens rea* or in other words, outlining if the punishments outlined by law are grossly disproportionate to the least criminally liable offender.

Mandatory Minimum Sentences

Mandatory minimum sentences (MMS) are described as "legislated sentencing floors where the minimum punishment is predetermined by law" (Department of Justice, 2018a, para.2). This minimum penalty requires judges to make the offenders sentence a minimum length, severity, etc. if they have committed one of the 29 crimes that hold a MMS in Canada's *Criminal Code* or one of the many offences that hold a MMS in the Controlled Drugs and Substances Act. MMS can be applied to certain offences or to certain repeat (adult) offenders by politicians in response to the public's perception of the severity of certain crimes or the danger of

particular offenders (para.6). Judges are not able to give a sentence lower than the MMS even if there are certain arguments or circumstances as to why they should possibly do so. The possible penalties for these MMS include imprisonment, prohibitions, and/or possible fines (Department of Justice, 2018a, para.2).

According to the Department of Justice website (2018a), the use of MMS is not new. In a historical review that occurred, it was found that in the first enacted *Criminal Code of Canada* (1892), there were six offences that had an MMS. These included frauds upon the government, engaging in a fight, stealing post letter bags, stealing post letters, stopping the mail with intent to rob and corruption in municipal affairs (para.3). It is also noted that crimes such as first and second degree murder have had a long history of holding MMS.

Since 2006, there has been an increase in offences that have started to hold an MMS. This includes the 2012 amendments made to the Controlled Drugs and Substances Act that increased the amount of drug offences that held MMS from Prime Minister Stephen Harper's Conservative party passing Bill C-10 because of their "get tough on crime focus" (Department of Justice, 2018a, para.4). It is estimated for there to be over 100 offences that currently hold an MMS. Some of the crimes that currently carry a MMS include treason, trafficking firearms, aggravated sexual assault, first and second degree murder, sexual interference and use of a firearm in commission of an offence (para.7).

The use of MMS has defeated the purpose of s.718.2 (e) in regard to remedying the over-population issue in prison systems. According to recent statistics, between 2007-2008 and 2016-2017, Indigenous and Black offenders were more likely to be admitted to federal custody for an offence punishable by an MMP (Department of Justice, 2017b, para. 3). In 2017/2018, despite representing approximately 4% of the Canadian adult population, Indigenous adults accounted

for 30% of federally incarcerated inmates" (Department of Justice, 2019c, para.12). The proportion of Indigenous offenders admitted with an offence punishable by an MMP has almost doubled between 2007-2008 and 2016-2017, from 14% to 26%.

Mandatory Minimum Sentences and S. 12

There is very limited research on the issue of MMS being unconstitutional for Indigenous offenders under section 12 of the Charter. While conducting a literature review, it was noticed that majority of the research that has already been conducted is regarding MMS being unconstitutional via s.12 for offenders in general, but not specifically for Indigenous offenders and the clash of MMS and s.718.2(e). When research was found within these parameters, it often dealt with the issue of s.15 (equality) in the Charter (Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c11 s 15) rather than s.12. This section looks at the few published sources that explores this issue with regard to Indigenous offenders and s.718.2 (e).

Chartrand (2001) introduces his research by explaining how minimum mandatory sentences contradict the landmark cause of *R v Gladue*, as this case recognized that a different approach needs to be taken by judges when it comes to sentencing Indigenous offenders (p.450). Chartrand also provides insight on how these provisions contradict s.718.2 (e) of the Canadian *Criminal Code* that was set out by the SCC where they directly state that sentencing judges need to look at alternative sanctions to imprisonment and consider all of the offenders socio-history and how it may have impacted the offender, leading them to committing the crime(s) that they did. Chartrand states that he believes any four-year minimum mandatory sentence will always be considered unconstitutional under section 12 of the Charter and that there could also easily be Charter challenges when it comes to section 15 (p.450).

Chartrand links his discussion to Australia and the very similar issue of residential schools, colonialism, and Indigenous over-population in the prison system. He acknowledged that Australia placed minimum mandatory sentencing provisions before Canada. Although, Canada's situation is slightly different because mandatory minimum sentences in Australia's were focused on property offences, and that they were detrimental to the Indigenous population. When Australia's minimum mandatory sentences were introduced in March 1997, the incarceration rate of Indigenous peoples went up from approximately 388 per month to approximately 430 per month (Chartrand, 2001, p. 454). The incarceration rate in Australia's Northern Territory was also approximately ten times high for Indigenous offenders than for non-Indigenous offenders. Indigenous offenders had a rate of about 1460 per 100,000 while the non-Indigenous rate was around 169 per 100,000 (p.454). After Chartrand reflects on the impact of these minimum sentences in Australia, he states that even though in Canada the focus is more on offences involving firearms, the impact will be the same.

Chartrand looks at the landmark case of *R v Gladue* and how the judges stated that it is a non-disputable fact that there is a highly disproportionate amount of Indigenous representation in prisons in comparison to the community. The Court believed this was and is caused by poor socio-economic circumstances contributing to the occurrence of crime and the fact that once in the criminal justice system, they are faced with the issue of systemic racism and less likely to be granted bail and likely to be given longer prison sentences than non-Indigenous offenders (Chartrand, 2001, p.455). This is why s.718.2 (e) was put into effect; to help "redress the social problem" (p.455), but the use of minimum mandatory sentences contradicts this and instead has a negative outcome on the offenders; "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" (p.458). Chartrand explains how having minimum mandatory sentences on primarily firearm offences is discriminatory against Indigenous peoples. Not only do studies indicate that Indigenous offenders are over-represented in committing violent offences, but that the commission of these offences often involve the over-use of drugs and/or alcohol. Chartrand (2001) also finds it important that it must be taken into consideration that firearms are much more readily available to the Indigenous community as hunting is part of their way of life (p.456).

Chartrand finishes his article regarding how this is a violation of s.12 of the Charter and that it can be fought to be considered a s.15 violation as well. Chartrand believes that Canada's policy makers are more focused on punishment and deterrence than they are with rehabilitation. He argues that the country, along with Indigenous offenders, need to view s.718.2(e) as statutory affirmation that they have the right to have their traditional ways and concepts of dispute included in their sentencing or else it would be considered a violation of s.35(1) of the Constitution (Chartrand, 2001, p.463). Chartrand states that it would indeed be "cruel and unusual" to give hope to the offenders that they may be heard and understood through the enactment of s.718.2(e); that was designed to be remedial in nature, just to have it contradicted and taken away by the "arbitrary application" of minimum mandatory sentences (p.464).

Manikis (2015) discusses many topics in her research including the rise of MMS in Canada, the extra power these MMS gives prosecutors and "quasi-absolute prosecutorial discretion in Canada". She then gets into and reflects on the issue of prosecutors being able to ignore proportionality and Aboriginal status because of the use of MMS (p.287). Manikis states that mandatory minimum sentences have been detrimental to the criminal justice process,

specifically to the issue of proportionality and the over-representation of Indigenous offenders in the prison system. Manikis expresses that this is continuing to erode the principle of proportionality by not allowing sentencing judges to use their discretion and them being unable to sentence below the stated minimum. She believes that a Charter challenge for section12 would be the most appropriate but expresses concern for how often this would occur because of the SCC's high standards for something to constitute being grossly disproportionate and therefore, cruel and unusual punishment (p.278). It was n noted that these MMS have also created legislative contradictions with s.718.2(e) as this section was designed to mandate sentencing judges to take mitigating factors into consideration and to try and remedy the over-population in prisons by taking all other sanctions than imprisonment into consideration (p.279). Manikis believes that as these provisions clash with each other, there is a continuous major issue as MMS have been a direct cause and contribution to the over-population in prison systems (p.280).

It was decided in the SCC's decision in *R v Ipeelee* that Indigenous background can affect someone's moral blameworthiness and that this combined with the Gladue principle make up some of the framework for proportionality when it comes to sentencing Indigenous offenders (p.289). The focus of Gladue principles is more than just the issue of moral blameworthiness but in itself has a remedial purpose for decreasing the over-representation in the prison population. Manikis (2015) believes that in order for this to be properly effective this needs to be considered in all criminal justice agencies that can restrict the liberty of an Indigenous individual (p.289). Manikis quotes Turpel-Lafond J. who, in regard to Gladue having its desired effect, states that Crown counsel, defence counsel, and the judiciary would have to "adjust their practice to reflect the requirements of the decision" (p.290).

In research conducted by Rudin (2012), the author discusses the case of *Ipeelee* and the impacts it has had on the controversies of Indigenous sentencing and how it may affect Charter challenges, including the implementation of an increased amount of MMS from Bill C-10. Rudin emphasizes that in the SCC decision of *Ipeelee* that Court made it clear that the *Gladue* analysis needs to be considered for all offenders no matter how serious or violent the offence and that a direct connection between an offender's circumstances and the specific offence is not needed in order to consider the individual's circumstances (p.376). The SCC also stated that the over-population of Indigenous peoples in the justice system has increased since *Gladue* was enacted due to the sentencing judges not considering *Gladue* factors or for it not being used properly. ,Rudin mentions two ways in which sentencing judges can help decrease this over-representation: first, they can lower crime rates by giving sentences that deter and rehabilitate offenders and, second, they can ensure that systemic factors do not lead to discrimination when it comes to giving sentences (p.381). Rudin discusses the impact of the judicial discretion that could be being used to help decrease the over-population, due to the increased amount and length of MMS from Bill C-10. There is also the issue, especially for a community as vulnerable as our Indigenous communities, regarding how this increases Crown prosecutors power and makes it more similar to that of the judges. The sentences that the judges are able to give now rest on the charges laid by the Crown and whether some charges are chosen to be summary or indictable (p.382). Rudin believes that Charter challenges are necessary more than ever under sections 7, 12 and 15 so that Indigenous offenders can be charged fairly. Rudin continues on to review section 12 Charter challenges; the section of "cruel and unusual punishment", including those that were upheld such as *R v Morrisey* and *R v Ferguson,* along with some that the SCC deemed unconstitutional such as *R v Smith (Edward Dewey), R v Smickle,* and *R v Nur.* The common

issue occurring in these cases involving the large gap in sentences with hybrid offences depending on whether they proceeded summarily or by indictment (pp.382-384). This continues on to Charter challenges involving section 15, the equality section of the Charter. Rudin (2012) believes this is the section where a majority of the Charter challenges would lie and mentions that the grounds for these section 15 Charter challenges would be due to MMS exacerbating the discrimination that Indigenous offenders are already facing in the justice system (p.385).

On a final and more general note, there is an article written by Parkes (2012) regarding the pursuit of proportionality after the decision in *Ipeelee* when we live in a world of mandatory minimum sentences. Parkes starts by explaining the issue of the implementation of Bill C-10 with the decision made in Ipeelee days after the bill's enactment (p.22). The author focuses on discussing the Court's decisions in *Ipeelee* regarding judges considering unique circumstances of Indigenous offenders, obtaining individual information in a *Gladue* report, judges needing to consider all other sanctions than imprisonment and more (p.23). Parkes also bring up the issue of the lack of dedicated Gladue reporting programs in some parts of the Canada and how adding Gladue factors into a pre-sentence report (PSR) does not have the same effect as it could unintentionally lead the probation officer to looking at race and risk factors (p.24).

Parkes finds it hard to see the decision in Ipeelee as "anything other than a call to action" as Bill C-10 has made it nearly impossible for judges to follow the decision made by the SCC (2012, p.25). Parkes believes that although the implementation of MMS have severely limited judicial discretion, that judges need to use what discretion they have left and ensure they are crafting as fair and just sentences as they can (p.24).

At the end of her 2012 article, Parkes looks into the issue of proportionality with MMS. Parkes directly states that according to Ipeelee, in order to give a proportional sentence to an

Indigenous offender one must take systemic and background factors into consideration and how these have worked to contribute to the over-representation of Indigenous peoples in all parts of the criminal justice system (p.25). Parkes' research indicates that not only do MMS depart from the crucial principle of proportionality, but that it has been shown that MMS do not do what was expected by politicians in the sense of deterring crime. Instead, they have shown to have many negative and unintended effects such as the increased imprisonment of Indigenous offenders.

As previously stated, the literature for this topic is scant and needs to be continued by scholars. These articles all follow the same ideas when it comes to MMS being unconstitutional for Indigenous offenders as it affects the principle of proportionality and goes directly against the SCC decisions in cases such as Gladue and Ipeelee. These researchers seem unanimous when it comes to believing that there will continue to be Charter challenges with sections 12, 15 and possibly 7 until MMS are able to be reconsidered for Indigenous offenders. There is also a common theme among these articles regarding that these MMS have not done the job that they were expected to and instead have just been having increasing negative effects. It is unanimous that something needs to be done in order to finally decrease the over-population in prison systems and that there is no way that this could occur while there are still MMS.

Supreme Court of Canada Case

R v Nur (2015 SCC 15)

R v Nur (2015 SCC 15) became a key decision when it came to the SCC ruling unconstitutional on mandatory minimum sentences. The Court had not ruled a decision against mandatory minimum since almost 30 years prior in *R. v. Smith (Edward Dewey*) (1987, SCC 64). Although Hussein Jama Nur was not an Indigenous offender, it is crucial to include a discussion of the cases.. Previously, even under s.718.2 (e), judges were not finding sentences

unconstitutional in instances of Indigenous offenders. Yet, some MMS for non-indigenous offenders were being found to infringe on s. 12 of the Canadian Charter (*Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c11 s 12).

The Offence

In January 2009, a young man entered a Toronto store in the Jane and Finch area. He told the worker that he felt concerned by someone outside the store that appeared to be threatening. As the neighbourhood tended to have high rates of crime, the supervisor decided to lockdown the store and to call the police. When the police arrived, they found and approached four individuals who ran and scattered (*R v Nur* (2015 SCC 15 at para.17). The police ran after one individual (Hussein Jama Nur) who appeared to be hiding something against the left side of his body as he held his left hand against his body. As the police officer got closer to Nur, he noticed Nur throw something to the side, and arrested him shortly after.

When returning to the scene, a working 22-calibre semi-automatic firearm with an oversized ammunition clip was found by the police tossed under a parked car. It had 24 bullets in total loaded in the weapon and if working properly can fire them all in 3.5 seconds. This was a prohibited firearm (*R v Nur*, 2015 SCC 15 at para. 18)). It was discovered that Nur was not part of the threatening behaviour that was occurring earlier and it is unknown when, how long, or how he came to having the handgun (para.19).

The Charge

As documented in *R v Nur* (2015 SCC 15), Nur was charged with one count of possession of a loaded firearm contrary to s.95 (1) of the *Criminal Code of Canada*. After the Crown proceeded by indictment, Nur decided to be tried by the judge alone. Nur pleaded guilty

to the charge and only admitted facts essential to the plea. At his sentencing hearing, Nur laid out the proof to any facts that the Crown were relying on to count as aggravating factors. Nur also challenged the constitutionality of the three year mandatory minimum that is required under s.95 (2)(a)(i) (*R v Nur* 2015 SCC 15 at para.20). Nur did not argue that the mandatory minimums were grossly disproportionate when being applied to him, but rather that it is grossly disproportionate when applied to other offenders. Nur's history included being part of a family of refuges who were law-abiding and supportive. Nur was 19 and still attending high school when he was charged with the offence. He was doing well in school and was hoping to attend university. He had worked a few different part-time jobs and volunteered in his community. He was praised by teachers and past employers and had no past criminal record (para.21).

The Sentence

The original trial judge decided that the three-year mandatory minimum sentence did not violate section 12 or 15 of the Charter (*R v Nur,* 2015 SCC 15 at par. 19)) It was decided that the two-year gap between the one-year maximum if the Court had decided to proceed summarily and the three-year minimum for the Court decided to proceed by way of an indictment was arbitrary and violated section 7 (*R v Nur,* 2015 SCC 15). Even with this determination, the trial judge foind that this gap did not affect Nur's sentence (para.22). It was determined that 40 months was an appropriate sentence. At this point Nur had already been denied bail and had been held in custody for 26 months. Nur received two to one credit for 20 months of the pre-trial custody and as a result the judge imposed a sentence of one day in custody and two-years of probation (para.23).

Nur brought the sentence to the Ontario Court of Appeal (*R v Nur*, 2015 SCC 15). His appeal was allowed, and it was held that the three-year mandatory minimum violated s. 12 based on the reasonable hypothetical scenario of the possible spectrum of offenders for s.95(2). The appeal court believed that those who are on the "true crime end" of the spectrum should continue to receive "exemplary sentences that emphasize deterrence and denunciation" (para.25). The court believed that those who have a proper license to carry and properly take care of their gun who may have made a mistake on where to properly store it do not deserve the same punishment as someone with a loaded and restricted firearm who poses a danger to others. Nonetheless, the Court of Appeal held that Nur's original sentence by trial judge's sentence was appropriate and did not infringe on s. 12 of the Charter (para.25).

At the Crown's appeal to the SCC, the Court looked at the test for determining a s.12 violation. The Court looked at the history of cases and decisions with mandatory minimum sentences such as *R v Smith (Edward Dewey)* (1987) , *R v Goltz* (1991), and *R v Morrisey* (2000) to see how to properly interpret a Charter violation; specifically, a s.12 Charter violation. In particular, the Court looked at how cases are sometimes reviewed on the basis of a "reasonable hypothetical" and focused on how the Attorney General of Ontario stated that cases under s.12 should look beyond the circumstances of the offender. The Court also stated that the cases used to constitute a "reasonable hypothetical" are "irreconcilable" (*R v Nur* 2015 SCC 15 at para.52). The Court looked at *R v Goltz* (1991) and how it was confirmed that a s.12 review of the mandatory sentencing laws can look at situations or scenarios other than the offender's (par. 54). In its judgement, the Court stated that laws cannot be considered unconstitutional by examples of situations that are unlikely to arise and that the focus must be on "reasonable hypothetical circumstances" (para.54). This means a court must look at reasonably foreseeable situations due

to the mandatory sentence and see whether it would be grossly disproportionate; therefore imposing a cruel and unusual punishment (para.60). The Court concluded that a mandatory minimum sentence can be challenged if it seems as though it would impose a grossly disproportionate sentence on the offender or others when it comes to reasonably foreseeable situations (para.65). The SCC decided that based on the range of possible offenders and blameworthiness for s.95 (2)(a)(i), it is of no force or effect as it violates section 12 of the Charter. The majority decided to keep the trial judge's sentence and dismiss the appeal of Nur's sentence as it did not feel his particular sentence violated s.12.

Ontario Court of Appeal Case

R v Sharma (2020 ONCA 478)

The Offence

At the time of her appeal, Cheyenne Sharma was a 25 year old woman, with Ojibway ancestry and a member of the Saugeen First Nation (*R v Sharma*, 2020 ONCA 478 at para.5). On June 27, 2015, Sharma returned from a trip to Surinam with 1,971.5 grams of cocaine in her luggage. Sharma and her daughter were facing eviction and her boyfriend promised her $20,000 if she would retrieve the drugs from Surinam. Once apprehended by the RCMP, Sharma immediately confessed and told the RCMP about her and her boyfriend's deal. The total street value of the cocaine was approximately $130,000. At the time of apprehension, Sharma was 20 years old with no prior criminal record (*R v Sharma*, 2020 ONCA 478 at para.6).

The Charge

At trial, Sharma plead guilty for importing two kilograms of cocaine and explained her circumstances to a case worker (*R v Sharma*, 2020 ONCA 478). This included the accused being

desperate for many reasons not to get evicted. These reasons included so her daughter didn't have to suffer though homelessness, the deal she made with her boyfriend, how she was in "a bad place" and how on the day of her departure she had a breakdown and did not want to go. The hardships that Sharma faced growing up were also examined (*R v Sharma*, 2020 ONCA 478). During her childhood, Sharma's birth father was convicted of murder and deported to Trinidad. Sharma, her mother, and her family, were forced to live with her grandmother. Her grandmother had attended two residential schools between the ages of 4 and 16. Because of this background the sentencing judge labelled Sharma as "an intergenerational survivor of the government's residential school effort to eradicate the cultural heritage of her people" (*R v Sharma*, 2020 ONCA 478 at para.9). It was also noted that when Sharma was 13, she was sexually assaulted while walking home from school. This led to her leaving school, running away from home, and becoming a sex worker by the time she turned 15. After re-enrolling in high schools at 16, Sharma was forced to drop-out again as she was not able to pay the $400 fee for the uniform. When she was 17, Sharma became a single mother after giving birth to her daughter. Sharma had also attempted to commit suicide multiple times and has struggled with anxiety and depression over the years (*R v Sharma*, 2020 ONCA 478 at para.10).

As discussed in *R v Sharma* (2020 ONCA 478), Sharma was charged with importing cocaine against section 6(1) of the *Controlled Drugs and Substances Act* and was sentenced to 17 months of incarceration on February 20, 2018 (para.1). Section 6(3)(a.1) of the *Controlled Drugs and Substances Act* originally calls for a minimum mandatory sentence of two years of incarceration; the sentencing later determined was 18 months. (*R v Sharma*, 2020 ONCA 478 at para.26). She served 17 months due to time spent in pretrial detention.

Constitutional Issues

During the sentencing hearing, Sharma requested that the judge strike down ss.742.1 (b) and s.742.1(c) of the *Criminal Code*. This section removed that possibility for there to be a conditional sentence imposed when prosecuted by indictment, where the maximum sentence is 14 years of incarceration or life in prison. Sharma argued that under s.15 of the Charter, this section discriminated against Aboriginal individuals based on race. It was argued that this discriminates against Indigenous offenders due to s.718.2(e) of the *Criminal Code* where it is stated that all other available sanctions should be explored rather than incarceration "with particular attention given to Indigenous offenders" (*R v Sharma*, 2020 ONCA 478 at para. 2). Section 7 of the Charter was also briefly raised to the sentencing judge in regard to Sharma's liberty rights. After consideration, the judge dismissed Sharma's s. 7 and s. 15 arguments. While rejecting the s. 15 argument related to s.742.1(c), the sentencing judge did acknowledge that this makes it so that Indigenous offenders are ineligible for conditional sentences (*R v Sharma*, 2020 ONCA 478 at para.24). The issue of a s.12 Charter violation was brought up in relation to the two-year minimum sentence that is mandatory under s. 6(3)(a.1) of the *Controlled Drugs and Substances Act*; this argument was accepted by the judge as he believed this would infringe s.12 of the Charter and constitute cruel and unusual punishment when considering the circumstances and her Indigenous heritage (*R v Sharma*, 2020 ONCA 478). The judge determined that a fit sentence for Cheyenne would be 18 months, when taking the circumstances and s.718.2(e) into consideration which was then reduced to 17 months to take into account her time on bail and her presentence detention (*R v Sharma*, 2020 ONCA 478 at para.26).

When appealed to the Ontario Court of Appeal, Sharma once again asked the judges to consider striking down s.742.1(c), along with another section of the *Criminal Code of Canada.*

Sharma argued that s. 742.1(e)(ii) violate s.15 of the Charter by discriminating against them based on race. Further, it also violates s.7 of the Charter because their purpose is believed to be arbitrary and overbroad (*R v Sharma*, 2020 ONCA 478 at para.3).

The Ontario Court of Appeal's majority decision in *R v Sharma* was that ss.742.1(c) and 742.1(e)(ii) of the *Criminal Code* were to be struck down. Both sections infringed ss.7 and 15 of the Charter and therefore have no force or effect (*R v Sharma*, 2020 ONCA 478 at para.186). These sections make it so that the purpose and remedial effect of s.718.2(e) in the *Criminal Code* was undermined by not allowing conditional sentences and thereby ignoring the issue of Indigenous over-population in prisons directly related to issues of colonization that have been acknowledged by Parliament and the courts (*R v Sharma*, 2020 ONCA 478 at para.79). Sharma requested that her sentence of 17 months imprisonment be set aside and that instead, she receives 24 months less a day of a conditional sentence of imprisonment, even though although she has already served her previous sentence (para.182). This was granted by the Ontario Court of Appeal. However, since she had already served her previous sentence, Sharma's conditional sentence of incarceration of 24-months did not have to be served (*R v Sharma*, 2020 ONCA 478 at para.187).

The 2020 Sharma case is an example where an appeal court has decided that the inability of an Indigenous offender to get receive a sentence other than incarceration can constitute as cruel and unusual punishment under section 12 of the Charter of Rights and Freedoms due to s.718.2(e) of the *Criminal Code of Canada*. Another example lies in the next case that will be explored; *R c Neeposh* (2020 QCCQ 1235).

Court of Quebec (Provincial Court) Case

R c Neeposh (2020 QCCQ 1235).

Background History

Kyle Neeposh was raised as part of a large family; he was one of ten children and was a member of the Cree First Nation (*R c Neeposh*, 2020 QCCC 1235 at para.3). As a child, Neeposh was abused around the ages of 5 and 6 years. He was regularly suspended for children accusing him of certain acts. Neeposh started to surround himself with bad influences. In high school, Neeposh started using marijuana as a reaction to his father's poor attitude towards him. When his family reunited while he was a teenager, Neeposh's father was verbally and physically abusive towards him. His father showed who was and who was not his preferred children; which Neeposh was not one of (*R c Neeposh*, 2020 QCCC 1235 at para.7 - 9).

At 18 years of age, Neeposh dropped out of a carpentry course he was taking and began drinking. He met the woman who became the mother of his child, who then she gave birth to his daughter when Neeposh was 22 years old. By this time, he was drinking and doing cocaine daily. Things were turning around for Neeposh until 2017 when the mother of his child became pregnant with someone else's child. Neeposh tried to help take care of her and get ready for the baby, but she chose to leave him due to his issues with adduction (*R c Neeposh*, 2020 QCCC 1235 at para.10 - 12). This strongly fueled Neeposh's addiction which resulted in him isolating himself from his family and having issues finding employment. He returned back to his parent's home and began having suicide thoughts. This is the context that must be considered as this is the state of mind that Neeposh was in when he committed the crime.

The Offence

On May 25, 2018, Neeposh attended a party where his sister and ex-girlfriend, who were both drunk, got into an altercation. He did not intervene in the fight, but later tried to mend the situation with his ex-girlfriend. This resulted in his ex-girlfriend telling him to "go kill himself", leading Neeposh to drink large amounts of hard liquor for several hours. Later on, two individuals approached Neeposh, and because he refused to speak, they also got into an altercation (*R c Neeposh*, 2020 QCCC 1235 at para.14). A witness later saw Neeposh approach his residence, angry and with flailing arms. He went inside, and returned outside with a gun case. The witness called the police emergency line to explain what they had seen. The witness then heard two gun shots. Following this, multiple calls to the emergency line were made regarding the accused, and multiple gun shots were heard by the responding officer. It was later determined that some of the gun shots were directed towards the witness (Malick Rabbitskin)

Seven empty cartridges from a.12 caliber firearm were found (*R c Neeposh*, 2020 QCCC 1235 at para.17). The officer found the Neeposh and asked him to put his hands up multiple times. Neeposh turned and faced the gun towards the officer, then fell to his knees, pointing the firearm towards his own chin. The officer asked him to stop. Two individuals approached Neeposh but before they could reach him, he dropped the gun on the ground and crumpled himself on the ground *R c Neeposh*, 2020 QCCC 1235 at para.20-22). Neeposh started screaming and became aggressive towards the officers as they handcuffed him. He smelled like alcohol and had bloodshot eyes. When Neeposh was brought to a cell in the police station, he attempted to choke himself (*R c Neeposh*, 2020 QCCC 1235 at para.25).

The Charges

Neeposh was charged with committing assault against Rabbitskin, using a weapon, pointing a firearm at Rabbitskin., intentionally discharging a firearm while being reckless as to the life or safety of another person, pointing a firearm at officer Kaei Vroye and carrying or possessing a weapon for a dangerous purpose to the public (*R c Neeposh*, 2020 QCCC 1235 at para.36). In the case against Neeposh, the court needed to decide if the minimum mandatory sentence of four years for the single charge of intentionally discharging a firearm while being reckless as to the life or safety of another person was considered as cruel and unusual punishment. The trial court was required to consider the agitating and mitigating circumstances of the situation while also considering Neeposh's Indigenous heritage in accordance with s.718.2(e) of the *Criminal Code* (*R c Neeposh*, 2020 QCCC 1235 at para.31). The trial court also needed to decide on how the appropriate sentence was going to be decided; it needed to decide whether it were going to focus solely on the offence that carries the minimum mandatory sentence. Alternatively, the court needed to consider if it was to include the other offences as well, as this could impact whether the minimum sentence was appropriate or not (*R c Neeposh*, 2020 QCCC 1235 at para.35).

Determining a Fit Sentence

The trial court's main concern lay with the charge of holding the gun toward officer Vroye. The trial judge determined the answer to this was found in a previous court decision (*Desjardins c R*, 2015 QCCA 1774) where it is stated that "as a general rule, prison sentences should be concurrent if the charges arise from a single event or if they involve ongoing criminal acts, unless the law provides for consecutive sentences or the court finds that one of the counts forming part of the single event contains an aggravating factor that justifies a consecutive

sentence" (*R c Neeposh,* 2020 QCCC at para.44). It was decided that due to Neeposh pointing a gun at an officer, this counted as the aggravating factor needed to justify a consecutive sentence.

When doing this, the court must take into account the "totality principle" which as stated in *R v M.(C.A.*) (2015 1996 SCC 230) "the totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender." The sentence given to the offender must also be proportionate to the responsibility of the offender and the degree of the offence ((*R c Neeposh*, 2020 QCCC at para.50). Since the accused was an Indigenous offender two things must be looked at when it comes to the length and type of sentence. As outlined in both the Supreme Court decisions in *R v Gladue* and *R v Ipeelee,* the court must first take into account the accused's socio-history and system background factors that may have had an impact on their moral blameworthiness and, second, when deciding on the form of sanction the focus must be on the effectiveness of the sentence rather than the degree of the culpability of the offender ((*R c Neeposh*, 2020 QCCC at para.54).

Trial Court Decision

The trial court determined that the minimum mandatory sentence of 4 years is more than double of what they believe to be an appropriate sentence for Neeposh. The trial judge noted how large of an issue the over-representation of Indigenous peoples in the prison system is, and how year after year the issue seems to be getting worse even with the implementation of s.718.2(e) ((*R c Neeposh,* 2020 QCCC at para.94). The trial judge believed that the drafting and creation of the provision to implement a four year minimum mandatory sentence was done without the consideration of the consequences to the Indigenous population Furthermore, consideration must be given to the fact that this is a population has access to firearms due to

hunting and use in their traditional way of life which can result in unforeseen circumstances ((*R c Neeposh*, 2020 QCCC at para.95). The trial judge declared that in Neeposh's case, the minimum mandatory sentence of four years infringed s.12 of the Charter and Neeposh's right not to be subjected to cruel and unusual punishment ((*R c Neeposh*, 2020 QCCC at para.96). When taking into account the principle of totality, the sentence given by the trial court was 26 months minus the 209 days spent in pre-sentence custody ((*R c Neeposh*, 2020 QCCC at para.98).

Discussion and Conclusions

The legal paradox is this. Legal rules and guidelines within the context of s.718.2(e) for the sentencing of Indigenous offenders have been established by the Supreme Court in decisions such as *R v Gladue* (1999) and *R v Ipeelee (*2012) (Department of Justice, 2018a, para.2). Yet, in many instances, judges are required, by law, to follow mandatory minimum sentencing established by Parliament for many criminal offences in the Criminal Code. This paradox is further complicated by Supreme Court of Canada decisions such as *R v Nur* (2015) that have found some mandatory minimum sentences as unconstitutional under s. 12 of the Canadian Charter of Rights and Freedoms. "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" (Chartrand, 2001, p.450). In the *Truth and Reconciliation Commission's* 94 calls to action, one of the 24 calls for action that have hardly been started includes "amend the *Criminal Code* to allow trial judges to depart from mandatory minimum sentences" . Clearly this paradox has been identified as an issue. Yet, in the 5 years since the publication of the *Truth and Reconciliation Commission's* final report, there has been minimal progress by the Federal Government of Canada to address this legal paradox.

In allowing this legal paradox to continue, more and more Indigenous offenders are facing sentences that are possible Charter violations under s. 12 for cruel and unusual punishment. In the face of mandatory minimum sentences, many Indigenous offenders do not get the opportunity to have their background considered in sentencing. This, no doubt, is contributing to the growing over-representation of Indigenous offenders in prisons - the very reality that s.718.2 (e) of the Criminal Code was established to address.

Section 12 of the Canadian Charter was designed to be context-specific. Yet, by enforcing mandatory minimum sentences we are taking away the ability for judges to take the offenders' context into consideration when determining a "fit" sentence. This is incredibly troubling as this context for Indigenous offenders includes the issues of residential schools and colonialism that were created by Canadian governments. The fundamental principle of sentencing in s.718.1 of the *Criminal Code* directly states that **"**a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". It is fully recognized by the federal government that minimum sentences could constitute a s.12 violation due to gross disproportionality. Yet, it appears as though the consistent violation for Indigenous offenders who were given some hope of remedy and change with the implementation of s.718.2 (e) is not a priority; "on the other hand, mandatory minimum sentencing provisions can raise issues of gross disproportionality, because they have the potential to require departures from the general principle of proportionality in sentencing" (Department of Justice, 2019d, para. 23).

By continuing to allow Indigenous offenders to be sentenced under many mandatory minimum sentences in the Criminal Code, Canada's criminal justice system is perpetuating many of the factors that have led to the continuing over-representation of Indigenous peoples in the system. Recognizing that mandatory minimum sentences can contribute to Indigenous over-

representation is an important first step. Understanding that these mandatory minimum sentences place a legal barrier to fully implementing the legal principles established for Indigenous offenders in *Gladue* and *Ipeelee* must, and likely will, lead to action by either Canada's courts or by the federal government.

Lower court decisions such as *Sharma* (2020) and *Neeposh* (2020) may represent a growing awareness in Canada's courts that some mandatory minimum sentences offend the purpose of s.718.2(e) and therefore, resist the sentencing guidelines for Indigenous offenders articulated by the Supreme Court in Gladue and Ipeelee. The fact that some mandatory minimum sentences have been found to infringe s. 12 of the Canadian Charter provides a clear path of the Supreme Court of Canada to address the relationship between mandatory minimum sentences, Gladue principles under s. 718.2(e) and the Court's understanding of cruel and unusual punishment.

A quicker path to addressing the paradox between mandatory minimum sentences and how they contradict s.718.2 (e) in the Criminal Code of Canada and s. 12 of the Charter would be for the Federal Government of Canada to take legislative action. Removing mandatory minimum sentences for some criminal offences through legislation may pre-empt a lengthier, but inevitable, involvement by the Supreme Court of Canada.

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