The law of sentencing in Canada is being pulled in opposing directions: Parliament regularly legislates new mandatory minimum sentences that limit judicial discretion while the Supreme Court strongly affirms the "highly individualized" nature of sentencing. Mandatory minimum sentences have proliferated in recent years, contrary to overwhelming social science evidence that they do not deliver on their promises of deterrence and crime control, and have been largely unimpeded by the Charter. However, the recent decision in R. v. Ipeelee on the principles relevant to sentencing Aboriginal people is deeply at odds with the logic of limiting discretion in sentencing through legislated mandatory minimums.

On March 23, 2013, a mere ten days after Bill C-10 received Royal Assent, enacting a number of new mandatory minimum sentences, the Supreme Court of Canada released its decision in Ipeelee. That decision arguably puts the principles relevant to the sentencing of Aboriginal people on a collision course with the substantial limits on judicial discretion that are central to mandatory minimum sentences. In this brief article, I first outline some of the key holdings in Ipeelee, arguing for their robust application at a time when judicial discretion in sentencing is being limited. I then move on to discuss the extent to which mandatory sentences have a disproportionate impact on Aboriginal people in a way that should attract Charter scrutiny.

R. v. Ipeelee: Just Sentences Require Judicial Discretion

In Ipeelee, a majority of the Supreme Court held that it was an error to not give Gladue principles significant weight in sentencing for breach of an alcohol abstinence condition of a Long
Term Supervision Order (ITSO) by an Inuk man with a serious criminal record for violent offences. The three-year sentence for the breach, which had been upheld by the Court of Appeal, was overturned and a one-year sentence was substituted. *Gladue* had made it clear that s. 718.2(e) of the *Criminal Code*, with its admonition to consider "all available sanctions other than imprisonment that are reasonable in the circumstances... with particular attention to the circumstances of Aboriginal offenders" requires justice system participants to do things differently in sentencing Aboriginal people. However, Lebel J. noted that the "cautious optimism [expressed in *Gladue*] has not been borne out. In fact, statistics indicate that the overrepresenta-

In short, Aboriginal people, as a group, do harder time.

...tion and alienation of Aboriginal peoples in the criminal justice system has only worsened.24 Twenty years after the release of the *Report of the Aboriginal Justice Inquiry of Manitoba,*3 and thirteen years after *R. v. Gladue,*4 the over-representation of Aboriginal people in Canadian prisons and jails has worsened, rather than improved.7 The rate of over-representation has been growing even more quickly for Aboriginal women than for Aboriginal men.8 Incarceration is very costly — both in fiscal and human terms — and the evidence has been mounting for some time that it is particularly counter-productive and damaging for Aboriginal people. For example, the 2009-2010 *Annual Report of the Correctional Investigator* (the ombudsperson for federal prisoners) noted that in comparison to the non-Aboriginal prison population, Aboriginal people tend to be:

- released later in their sentence (lower parole grant rates);
- over-represented in segregation populations;
- more likely to be released at statutory release or at warrant expiry; and
- more likely to be classified as higher risk and in higher need in categories such as employment, community reintegration and family supports.9

In short, Aboriginal people, as a group, do harder time. The Supreme Court recognized as much in *Gladue*, noting that Aboriginal people are "less likely to be rehabilitated [by imprisonment] because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions."10 The Supreme Court took the opportunity in *Ipeelee* to address what Lebel J. called a "fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court's decision in *Gladue*."11 The court attempted to resolve those misunderstandings, affirming that "*Gladue factors*" are consistent with other sentencing principles, that various justice system participants have obligations under *Gladue*, and that *Gladue factors* apply to "serious offences." The court also strongly endorsed the practice of producing *Gladue* reports and affirmed that *Gladue* must be considered in all sentencing decisions involving Aboriginal people unless there is an explicit waiver.

The fact that the causes of Aboriginal over-representation in the criminal justice system are complex and require multi-faceted policy responses does not relieve lawyers and judges of their obligations to meaningfully apply *Gladue* principles in sentencing decisions. The Court in *Ipeelee* made it clear that systemic discrimination plays a role in Aboriginal over-representation in the prison population and, as such, criminal justice system participants must tailor the sentencing process to implement the remedial measures prescribed in s. 718.2(e) and *Gladue*.

The following are a few key holdings from *Ipeelee* that bear directly on the day-to-day practice in courtrooms across the country:

- Sentencing judges have a statutory duty to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal will likely lead to an unfit sentence that is not consistent with the fundamental principle of proportionality. This is an error justifying appellate intervention.13
- When sentencing an Aboriginal person, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters provide the necessary context for understanding and evaluating the case-specific information presented by counsel.13
- Counsel has a duty to bring individualized information before the court in every case, unless the offender expressly waives his or her right to have it considered. A *Gladue* report, which contains case-specific information, is tailored to the specific circumstances of the Aboriginal offender. A *Gladue* report is "indispensable" to a judge in fulfilling his or her duties under s. 718.2(e) of the *Criminal Code*.14
- Contrary to the approach taken in a number of lower court decisions, there is no requirement on the accused to establish a causal connection between the "*Gladue factors*" and the instant offence, although it will be important for
the factors to be tied to the culpability of the offender and to the potential sentencing options that might be available to the court.15

A few words about the quality of Gladue information coming before the courts and the use to which it is put in sentencing decisions are in order. A recent post-Ipeelee decision from Manitoba illustrates the way that inadequate Gladue information (often introduced in the form of a pre-sentence report (PSR) with “Gladue factors” added at the end) can undermine the principles articulated in Gladue and Ipeelee and lead to disproportionate sentences. Working to overcome the limitations of an inadequate report in R v Knott,17 Justice McCawley drew heavily on Ipeelee in setting out her reasons for ordering a suspended sentence for a 25-year-old Aboriginal man who was convicted as a party to the aggravated assault of another Aboriginal man. The victim in Knott was badly beaten and left with lasting, debilitating injuries. The Crown was seeking a six-year penitentiary term. Due to recent legislative limitations on conditional sentences, that option was not available.18 Knott had no criminal record, despite growing up in extremely difficult circumstances, and was caring for his very ill mother and his siblings in addition to having cared for his grandparents before they had recently died. Given that there is no dedicated Gladue reporting program in Manitoba (unlike in parts of Ontario), McCawley J. had received a PSR with “Gladue factors” added at the end.

In ordering a suspended sentence, McCawley J. addressed the inadequacies and contradictions in the PSR, which cited some generic “Gladue factors” without linking those to the circumstances and experiences of the accused (including the fact that his grandparents — who had been his primary caregivers while his mother was unavailable due to addictions — were residential school survivors, a fact that was not mentioned in the report). Even more problematically, the report assessed Knott at a high risk to reoffend, a conclusion which McCawley J. found to have been erroneously reached through the “indiscriminate application of [personal stability factors] which ignore the context in which they arose.”19 In short, the “Gladue factors” actually contributed to the accused being assessed as high risk to reoffend, rather than providing context to better understand his needs and capacity for rehabilitation and success in the community.

This is exactly the problem identified by sociologists Kelly Hannah-Moffat and Paula Maurutto who compared Gladue reports prepared by Aboriginal caseworkers from Aboriginal Legal Services of Toronto to PSRs prepared by probation officers, even where the latter incorporated “Gladue factors.”20 The fundamental purpose and governing logic of a PSR is to provide a risk assessment to the court, increasingly incorporating an actuarial criminogenic risk instrument or tool. As Hannah-Moffat and Maurutto point out, there is a basic contradiction between the standard PSR focus on risk assessment and the purpose of a Gladue report “to provide the court with culturally situated information which places the offender in a broader social-historical group context... and reframe[] the offender’s risk/need by holistically positioning the individual as a part of a community and as a product of many experiences.”21 As such, when “Gladue factors” are tacked on to a PSR, the “effect is to situate risk within a broader actuarial framework with no clear direction on how to reconcile the embedded contradictions,” which may have unintended discriminatory consequences by drawing the probation officer’s attention to race and risk factors.22 Meaningful Gladue reports are fundamentally different from PSRs.

In Ipeelee, Lebel J. is alive to the need for fulsome Gladue evidence and submissions, stating that judges should ensure that systemic factors do not lead inadvertently to discrimination in sentencing, citing Tim Quigley:

Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria... Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.23

It is difficult to see Ipeelee as anything other than a call to action.

It is difficult to see Ipeelee as anything other than a call to action. It is true that the ability of judges to effectively tailor individualized sentences based on Gladue information has been hampered by the recent introduction of new mandatory sentences. However, in my view, it is also not accidental that the Supreme Court emphasized the importance of individualized sentencing decisions in Ipeelee at a time when a host of new mandatory sentences had just proceeded through Parliament. While the Court does not address that issue (and it was not before them), the decision in Ipeelee reads as a strong affirmation that judges should utilize the remaining discretion they have to craft just sentences, and as an implicit rebuke of measures that would further restrict that discretion.
Mandatory Minimums, Judicial Discretion, and Sentencing Aboriginal People

Perhaps most importantly in the context of proliferating mandatory minimum sentences, the Supreme Court in *Ipeelee* emphasized the principle of proportionality, noting that "just sanctions are those that do not operate in a discriminatory manner." In short, to sentence an Aboriginal person proportionately, one must take into account the systemic and background factors that have contributed to Aboriginal over-representation at all stages of the criminal justice system and consider alternatives to incarceration and other ways to tailor a sentence appropriately and proportionately.

The reality that mandatory sentences to do not actually remove discretion in sentencing—they simply transfer it from judges to Crown attorneys—is clearly inconsistent with the objective of removing that discretion in the pursuit of greater consistency in sentencing.

Of course, the problem with implementing this direction from the Supreme Court is that mandatory minimum sentences and other measures to reduce judicial discretion in sentencing (such as limiting the availability of conditional sentences) are at odds with the proportionality principle and interfere with a judge's ability to take the relevant evidence and principles into account. As pointedly noted by Justice Arbour in *R v Wuss*, mandatory sentences "depart from the general principles of sentencing expressed in the Code, in the case law, and in the literature on sentencing. In particular, they often detract from... the principle of proportionality." The extent to which mandatory minimum sentences are bad policy is well-known to defence lawyers. They have been adopted by Parliament in the face of a massive body of evidence, accumulated over nearly 50 years, showing that mandatory sentences not only do not deliver on their promise to deter crime, but that they have many negative, unintended effects. These include fostering circumvention by justice system participants and reducing transparency and accountability by pushing discretion down to prosecutors rather than to sentencing judges. They create distortions in sentencing, ratcheting up the "floor" such that sentences become longer overall, with negative societal returns.

A particularly problematic result of the move to mandatory minimum sentences is a wholesale transfer of discretion from judges to prosecutors. Whether intended or not, this move signals a profound lack of trust in judges (whose decisions are, of course, reviewable through the appellate process) and a simultaneous transfer of discretion and, implicitly trust, to Crown attorneys (whose decisions are virtually unassailable due to the high degree of deference accorded to prosecutorial discretion which is reviewable only for abuse of process).

We do not yet have a body of empirical research in Canada that documents the effects of this transfer of power through the combination of increased mandatory sentences and the entirely unreviewable nature of prosecutorial discretion. But there is such a body of evidence in the U.S. where various states and the federal jurisdiction have a much longer history with mandatory sentences. The research there reveals that "charge bargaining" and other forms of evading the impact of mandatory minimum increases with the proliferation of minimum sentences. Members of certain racialized groups (such as African-Americans and Latin-Americans) are disproportionately subject to mandatory minimum sentences due to the exercise of prosecutorial discretion.

In the Canadian context, the Supreme Court has openly acknowledged the systemic discrimination experienced by Aboriginal people in the Canadian criminal justice system, particularly in cases dealing with sentencing and imprisonment. The Aboriginal Justice Inquiry of Manitoba found that Aboriginal people were over-charged relative to non-Aboriginal people and were more likely to plead guilty. The implication is clear: Aboriginal people are less likely than other accused to benefit from the exercise of prosecutorial discretion that grows with the proliferation of mandatory sentences.

In addition to raising issues under ss. 12 and 15 of the *Charter*, these and other unintended consequences of mandatory sentences raise the spectre of arbitrariness and a violation of s. 7 of the *Charter*. Arbitrariness has been defined in the s. 7 case law as a measure that "is inconsistent with or bears no relation to the objective." Importantly, Chief Justice McLachlin held in the 2008 *Ferguson* decision that a key legislative objective behind mandatory minimum sentences is the removal of judicial discretion (in the course of concluding that a constitutional exemption would be an unacceptable remedy for a mandatory sentence that violated the *Charter*). The reality that mandatory sentences to do not actually remove discretion in sentencing—they simply transfer it from judges to Crown attorneys—is clearly inconsistent with the objective of removing that discretion in the pursuit of greater consistency in sentencing. When one considers the systemic discrimination experienced by Aboriginal people in the Canadian criminal justice system, along with evidence of racialized groups being disproportionately disadvantaged by the exercise of prosecutorial discretion, the case for a finding of arbitrariness grows stronger.
While the Supreme Court has largely deferred to the decisions of Parliament to enact mandatory minimum sentences, the decision in *Ipeelee* reveals a strong commitment to the basic principle that sentencing is "a highly individualized process. Sentencing judges must have sufficient maneuverability to tailor sentences to the circumstances of the particular offence and the particular offender." As that maneuverability shrinks with every new mandatory minimum sentence, it becomes exceedingly difficult to tailor just sentences. As mentioned earlier, the principles in *Ipeelee* are on a collision course with the proliferation of mandatory minimum sentences. Courts can continue to defer to Parliament's reckless decisions to ratchet up sentences without regard to the evidence or they can give meaningful effect to the *Charter*. I hope that at least some will choose the latter course and that, in the meantime, there is a greater commitment shown in utilizing existing judicial discretion to address the growing crisis of Aboriginal over-representation and the general overuse of imprisonment in Canada.

Debra Parkes teaches and researches in the areas of Constitutional and Human Rights Law, Criminal Law, Prisoner’s Rights and Penal Policy at Robson Hall, University of Manitoba. She has also worked extensively with the Elizabeth Fry Society of Manitoba, and the Women’s Legal Education and Action Fund.

NOTES:

1 See, e.g., Kent Roach, “Searching for Smith, The Constitutionality of Mandatory Sentences” (2001) 30 Osgoode Hall Law Journal 367 (criticizing the high threshold of “gross disproportionality” for a breach of s. 12 of the *Charter*, which has meant that most mandatory sentences have been upheld). But see R. v. Smickle, 2012 CarswellOnt 1484, 2012 ONSC 602, 91 C.R. (6th) 132 (Ont. S.C.J.) in which Molloy J. declared invalid the mandatory three-year sentence in s 95(2) for possession of a loaded firearm in the basis that it violates both s. 7 and s. 12 of the *Charter*.


3 Bill C-10: The Safe Streets and Communities Act, 41st Parliament, 1st Session.

4 *Ipeelee, supra* note 2, at para. 62.


7 In 2007-2008, Indigenous persons comprised 21% of all admissions to provincial jail in Newfoundland and British Columbia, 35% in Alberta, 69% in Manitoba, 76% in the Yukon, 81% in Saskatchewan, and 86% in the Northwest Territories: Samuel Perreault, *The Incarceration of Aboriginal people in adult correctional services*, Juristat 29:3 (Ottawa: Statistics Canada, 2009) at 20. These rates of over-representation are higher than the 1995 statistics cited in *Gladue*. While 9% of Ontario prisoners are Aboriginal, Ontario actually has the third highest rate of Aboriginal over-representation among provinces (as a percentage of the Aboriginal population in the province): Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System*, research paper commissioned by the *Ipperwash Inquiry* (2007), online at <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy3part/research/index.html>.


10 *R. v. Gladue, supra* note 6 at para 68.

11 *Ipeelee, supra* note 2, at para 63. Rothstein J. dissented, seeing little room for the application of s. 718.2(e) and *Gladue* to the LITSO regime which, in his view, prioritizes protection of the public over all other sentencing principles.


14 *Ibid*, at para. 60.


18 *Criminal Code*, s. 742.1 (making CSOs unavailable for “serious personal injury offences”).

19 *Knott, supra* note 17, at para 22.


21 *Ibid*, at 274.


24 *Ipeelee, supra* note 2 at para 68.


26 *Wust, ibid*, at para. 18.
IPEELEE AND THE PURSUIT OF PROPORTIONALITY IN A WORLD OF MANDATORY MINIMUM SENTENCES


39 Tonry, supra note 27.


41 Tonry, supra note 27.


43 R. v. Gladue, supra note 6.


45 AJI Report, supra note 5, Vol. 1, Ch. 4.

46 See Smickle, supra note 1, for a recent decision that a mandatory sentence amounts to "gross disproportionality" contrary to s. 12.


49 See Canada (Attorney General) v PHS Community Services Society, [2011] 3 SCR 134 where the unanimous court found that the decision of the federal government to not grant an exemption to a safe-injection program from the relevant offences in the Controlled Drugs and Substances Act was arbitrary. See also Smickle, supra note 1, where Molloy J. found the two-year gap in the hybrid sentencing scheme for the offence of possessing a loaded firearm to be arbitrary and thus a violation of s. 7.


51 Ipeelee, supra note 2, at para 38.