



Effects of Mandatory Minimum Sentences on the Rights of the Indigenous Population in Canada: A Proposed Solution to Bill C-10's Conflict With Section 718.2(e) of the Canadian Criminal Code

Citation

Way, Makenzie D. 2019. Effects of Mandatory Minimum Sentences on the Rights of the Indigenous Population in Canada: A Proposed Solution to Bill C-10's Conflict With Section 718.2(e) of the Canadian Criminal Code. Master's thesis, Harvard Extension School.

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Effects of Mandatory Minimum Sentences on the Rights of the Indigenous Population in Canada:
A Proposed Solution to Bill C-10's Conflict with Section 718.2(e) of the Canadian Criminal Code.

Makenzie Way

A Thesis in the Field of Legal Studies
for the Degree of Master of Liberal Arts in Extension Studies

Harvard University

May 2019

Abstract

A number of Canadian laws underwent mass revision in 2010 with the passing of Bill C-10 – an expansive piece of legislation that amended a variety of laws, including the *Canadian Criminal Code*, lengthened sentences, and introduced a range of mandatory minimum sentences. Since its passing critics have noted the tension between Bill C-10's mandatory minimums, and affirmative active legislation contained in Section 718.2(e) of the *Canadian Criminal Code*, requiring that judges consider the background and unique circumstances surrounding Indigenous offenders, and when appropriate, use discretion when sentencing.

This thesis analyzes the feasibility of a safety valve for mitigating the conflict between Bill C-10 and Section 718.2(e) of the *Canadian Criminal Code*. In part, the thesis seeks to determine whether a safety valve option was considered during the framing of Bill C-10. The research focuses on the Canadian government's role in the formation of the Canadian Residential School Program, and analyzes the long lasting impacts of the programs associated trauma in connection with 718.2(e) of the *Canadian Criminal Code*. Further, the study explores the conflict between Bill C-10's mandatory minimums, and 718.2(e) of the *Canadian Criminal Code*'s judicial discretion requirement, ultimately suggesting that implementation of a safety valve may reduce the tension between the two pieces of legislation.

Frontispiece

B8

The Vancouver Sun, Wednesday, December 13, 1995

CITY & REGION

Murders alleged at residential school

NDP leadership candidate claims 2 Indians killed in Port Alberni in '40s and '50s.

STEWART BELL

Vancouver Sun

At least two students were murdered at Indian residential schools in the Port Alberni area in the 1940s and '50s, a candidate for the leadership of the New Democratic Party alleged Tuesday.

Jack McDonald, who led a demonstration outside the United Church offices in Vancouver to protest the church's treatment of aboriginal people, called for a public inquiry into the deaths.

However, the head of an RCMP probe investigating abuse at Indian residential schools says he knows nothing about the allegations.

"To me that's a totally new allegation, and I'm familiar with all the information that's come in from Port Alberni," said Sgt. Paul Willms.

"I haven't even heard a rumor or second-hand information of that nature."

McDonald said former students at residential schools in Port Alberni and nearby Ahousaht have recently come forward with stories about the deaths.

In one case, a boy is said to have bled to death after he was beaten as punishment for breaking a jar at the school in Ahousaht in the '40s.

A second death is said to have occurred in the early '50s, when a girl was kicked down a flight of stairs at the Al-

berni Indian Residential School.

"We've held personal interviews with natives who were in the residential school who will tell you they carried bodies out of the school," said McDonald.

The incidents could not be found in police or coroners' records and attempts to research the alleged deaths were met with "roadblock after roadblock" by the United Church, he said.

"They wouldn't let us see the records," said McDonald, a Port Alberni funeral planner who is the only declared candidate so far for Premier Mike Harcourt's job.

He also said the United Church removed Rev. Kevin McNamee-Annett from Port Alberni last January because he was "getting close to those facts, because more and more natives were opening up to him about these atrocities at the United Church."

McDonald wants Attorney-General Ujjal Dosanjh and Aboriginal Affairs Minister John Cashore to order a public inquiry and police investigation.

Art Anderson, personnel minister for the B.C. conference of the United Church, said the church is cooperating fully with the police investigation into residential schools.

He said he invited the demonstrators to his office to discuss their concerns, which they did. "There's no attempt to dodge commitment or hide anything."

Anderson said he was unable to comment on the reasons for McNamee-Annett's dismissal. "That matter is before

the church courts so it would be inappropriate to discuss that at the moment."

McNamee-Annett said the stories about the killings were told to him while he was working with Nuu-chah-nulth Indians in the Alberni Valley.

He said he will not reveal the names of the victims.

But he said he had urged the witnesses to take their accounts to authorities.

In a letter to McNamee-Annett dated Nov. 15, the head of human rights and aboriginal justice for the United Church of Canada called the murder allegations "deeply disturbing."

"If you have evidence related to such allegations, I trust you have reported this to the appropriate police authorities and will encourage others to do so as well," wrote John Siebert.

"It is worth repeating that the United Church of Canada fully supports the investigation of any and all criminal actions alleged to have taken place in residential schools."

Siebert said in an interview from Toronto Tuesday he isn't aware what requests have been made for documents related to the Alberni Valley schools, but he doubts they would be useful in investigating abuse.

"These are records that probably aren't going to record these kinds of stories from the aboriginal people's perspective," he said.

Willms suggested it may be that former students are now recalling deaths that were ruled accidental at the time. He said the deaths would certainly fall



CENTRE OF PROTEST: Rev. Kevin McNamee-Annett details allegations

within the mandate of the police investigation.

The RCMP formed the probe almost a year ago to investigate allegations that large numbers of Indian children were sexually and physically abused at church-run schools.

Beginning in the 1880s, Indian children were removed, sometimes forcibly, from their homes and sent to residential schools in an attempt to assimilate them.

The policy was abandoned in the '70s, but the lingering effects of residential school abuse are blamed for a variety of ills on Indian reserves, including high rates of suicide, substance abuse and family breakdown.

Dedication

This thesis is dedicated to the victims and survivors of the Canadian Residential School Program, whose suffering has largely been overlooked by the wider Canadian, and global, population. Though the residential schools are now closed, the impacts are long lasting. Your continued courage to fight in the face of abuse works towards achieving accountability for our country as a whole.

Acknowledgments

I would like to acknowledge and thank a number of people who have supported me both personally, and academically. First and foremost, I would like to express my sincere and unwavering gratitude to my parents, who from a young age supported my love for academia and made my educational pursuits possible; without them I would not be where I am today. Likewise, to my brother, though you are no longer here in person, know that your pride in my achievements kept me going when I wanted to give up. In addition, I would like to thank my thesis director, Dr. Bruce Hay, for his guidance throughout this research project. And finally, I would like to thank two professors from my undergraduate university, Todd Leader, and Sheldon Wein, who both encouraged me and inspired me to pursue this academic venture. Each and every one of you has helped shape my academic path, and have played an instrumental role in my success.

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Introduction

The Canadian Indigenous Population is highly overrepresented within the criminal justice system, in fact, according to Julie Reitano, Indigenous adults “account for one in four admissions to provincial/territorial correctional services,” while “representing about 3% of the Canadian adult population.”¹ Reitano further states that the overrepresentation statistics cross gender lines and hold steady as we look at federal representation statistics. Additional indicators reveal that Indigenous offenders face higher than average rates of recidivism and reconviction; specifically, the Canadian site for public safety states, “reconviction rates were higher for Aboriginal male offenders than Non-Aboriginal males (58% vs. 42%).”²

A wealth of literature points to Residential School abuse as one of the main contributing factors in Indigenous criminality, further support for the belief came from the Canadian government’s implementation, in 1996, of section 718.2(e) of *The Criminal Code*. The legislation’s aim was to equalize the criminal justice system and reduce Indigenous overrepresentation in correctional facilities, by requiring all Canadian judges take into consideration the past mistreatment of Indigenous peoples, its effects, and in turn, give lenient sentences and/or avoid incarceration when appropriate. However, the Indigenous right to affirmative action legislation was effectively overturned in 2012 with

¹ Julie Reitano, “Adult Correctional Statistics in Canada, 2014/2015,” Statistics Canada, *Juristat* (Ottawa: Minister of Industry, March 2016): 4. <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2016001/article/14318-eng.pdf?st=q5WAOzMR> (Accessed Sept. 26, 2018).

² James Bonta, “The Recidivism of Federal Offenders” Public Safety Canada, (Ottawa: Solicitor General of Canada, July 2003): 2. <https://www.publicsafety.gc.ca/cnt/rsrcs/pbctns/rcvd-fdffndr/rcvd-fdffndr-eng.pdf> (Accessed Sept. 26, 2018).

the passing of *The Safe Streets and Community Act* (Bill C-10), which, among other things, introduced new mandatory minimum sentences for a range of offenses, including drug crimes and sexual offenses. The mandatory minimums pose a threat to the ever-increasing Indigenous overrepresentation statistics, while simultaneously infringing upon Indigenous rights to various *Criminal Code* and *Canadian Charter of Rights and Freedoms* (“*Charter*”) sections.

Taking into account the infringement upon Indigenous rights and the rate of Indigenous incarceration, and reconviction, in comparison to the Canadian averages, it is essential that steps be taken to reduce overrepresentation and prevent its further increase. A thorough search through the available literature reveals I am not alone in this belief. However, the literature is limited to discussions pertaining mainly to *Charter* challenges, which, thus far, have all proven unsuccessful. Therefore, this thesis will introduce a new avenue for avoiding the mandatory minimums set out under bill C-10, namely, the implementation of a safety valve. Specifically, this thesis will seek to explore whether a safety valve option was considered during the Bills adoption history; whether it would be feasible to implement a safety valve in Canada, and if feasible, whether the safety valve holds the potential to successfully reduce overrepresentation statistics.

Interestingly, since the enactment of Bill C-10, few detailed, and publicized discussions have occurred within Canada pertaining to the possibility of implementing a safety valve. This may in part be due to the limited usage of safety valves within the greater Canadian criminal justice system. Looking past the possible unfamiliarity with safety valves, I will suggest that no proposals for the implementation of a safety valve were adopted during the drafting phase of Bill C-10, in large part due to the conservative

political government in control at the time. I will further propose that while the Bill currently does not include a safety valve provision, looking to similarly structured countries, such as the United States of America's usage of safety valves in overrepresentation cases, implementation of a safety valve in the Canadian context is both feasible, and a potentially useful tool for correcting Bill C-10's infringement on Indigenous rights. Finally, I will conclude by noting that the recent shift towards a more liberal government combined with the legalization of cannabis and related promise of legislation for possession pardons, provides an ideal platform for advocating for amendments to conservative legislation, such as Bill C-10.

Chapter I.

The Tragedy of the Residential School Program

European influences led to the enactment of two pieces of Canadian legislation, which in part, gave rise to what has become known as the Canadian residential school system. Federal efforts to assimilate the Indigenous population officially began in 1857 with the enactment of the *Gradual Civilization Act*, which offered federal land grants (termed ‘voluntary enfranchisement’) in an effort to “assimilate indigenous peoples to the economic and social customs of European settler society.” Qualified applicants included “debt free, ‘educated Indian[s]’ … of ‘good moral character.’”³ In many ways these qualifications required Indigenous persons to abandon their cultural way of life and Indigenous identity.⁴ The act was largely a failure, as evidenced by “the fact that only one person voluntarily franchised under the … act.”⁵ Nevertheless, the *Gradual Civilization Act* was later incorporated into the *Indian Act* of 1876.⁶

The *Indian Act* “was first introduced … as a consolidation of previous colonial ordinances that aimed to eradicate First Nations culture in favor of assimilation into

³ Amanda Robinson, “Gradual Civilization Act,” *The Canadian Encyclopedia*, last modified March 3, 2006. <https://thecanadianencyclopedia.ca/en/article/gradual-civilization-act> (Accessed Sept. 26, 2018).

⁴ Alberta Regional Professional Learning Consortium, *Conversation Guide: History and Legacy of Residential Schools*, 2.

⁵ Robinson, “Gradual Civilization Act.”

⁶ Robinson, “Gradual Civilization Act.”

Euro-Canadian society.”⁷ Under the *Indian Act* the Crown was deemed the ‘guardian’ of all federally recognized Indigenous persons, while the Federal Department of Indian Affairs was given broad authority to regulate Indigenous affairs and policies.⁸ With the Crown responsible for “caring for” the Indigenous population under the *Indian Act*, then Prime Minister, Sir John A. MacDonald, came to view education of Indigenous youth to be a federal responsibility, and as such commissioned Nicholas Davin to report on possible Indigenous educational ventures.⁹ The Davin Report, as it is now known, recommended the implementation of an American modeled “Indian boarding school,” which he had found to “be effective in ‘deconstructing young Indians.’”¹⁰ Davin himself was a proponent of Indigenous assimilation, having been quoted stating, “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.”¹¹

Acting on the Davin Report recommendations, various churches began operating Indian Industrial Schools in the early 1880s.¹² Though officially the government had yet to approve these schools, beginning in 1883 the Canadian federal government supported,

⁷ William Henderson, “Indian Act,” *The Canadian Encyclopedia*, Last modified Nov. 13, 2017. <https://thecanadianencyclopedia.ca/en/article/Indian-act> (Accessed Sept. 26, 2018).

⁸ Alberta Regional Professional Learning Consortium, *Conversation Guide*, 2.

⁹ Alberta Regional Professional Learning Consortium, *Conversation Guide*, 2; See also, Dan Eshnet, “The Indian Act and the Indian Residential Schools,” in *Stolen Lives: The Indigenous Peoples of Canada and the Indian Residential Schools*. Facing History & Ourselves, 2015. Ebook. <https://www.facinghistory.org/stolen-lives-indigenous-peoples-canada-and-indian-residential-schools/chapter-3/historical-background>.

¹⁰ Alberta Regional Professional Learning Consortium, *Conversation Guide*, 2.

¹¹ Nicholas Davin, *Report on Industrial Schools for Indians and Half Breeds* (Ottawa: Public Archives of Canada Library, 1879), 12. <http://eco.canadiana.ca/view/oocihm.03651>.

¹² Eshnet, “The Indian Act and the Indian Residential Schools.”

and contributed funds to the church-run institutions, primarily by relocating funds intended to support Indigenous communities.¹³ Later in 1892, the residential school system was formally recognized when the Canadian federal government entered into an official partnership to fund and operate the school system.¹⁴ The residential schools that arose from this partnership were “built on the model of ‘reformatories and jails established for the children of the urban poor.’”¹⁵ Moreover, “the residential schools struggled with poor funding, poor and unsuitable nutrition, unsanitary conditions, and poor medical care.”¹⁶ Rampant racism within the federal government, and beyond, caused many to turn a blind eye to the inhumane conditions of the residential schools, while continuing to “[seek] … to enroll all First Nations children in schools.”¹⁷ In fact, in 1920, the Deputy Minister of Indian Affairs, Duncan Campbell Scott, who was charged with running the residential school system between 1913 and 1932,¹⁸ justified a bill that made

¹³ Eshnet, “The Indian Act and the Indian Residential Schools.”

¹⁴ Alberta Regional Professional Learning Consortium, *Conversation Guide*, 3; See also, The Truth and Reconciliation Commission of Canada’s book, *What we Have Learned: Principles of Truth and Reconciliation*, where it is explained that one of the underlying motives for the federal government’s decision to officially implement the residential school program stemmed from Treaties, such as the Indian Act, whereby the federal government had agreed to provide economic relief when necessary. As a result of these commitments, the government began to fear the economic burden that could arise if the Aboriginal population fell into economic despair. Thus, the residential school program, in the eyes of the federal government, offered one way to “provide Aboriginal people with skills that would allow them to participate in the coming market-based economy,” while essentially saving the government from extending too many resources within Aboriginal communities. (Library and Archives Canada Cataloguing in Publication, 2015), 29.

¹⁵ Eshnet, “The Indian Act and the Indian Residential Schools.”

¹⁶ Eshnet, “The Indian Act and the Indian Residential Schools.”

¹⁷ Eshnet, “The Indian Act and the Indian Residential Schools.”

¹⁸ Dan Eshnet, “Until There is Not a Single Indian in Canada,” in *Stolen Lives: The Indigenous Peoples of Canada and the Indian Residential Schools*. Facing History & Ourselves, 2015. Ebook. <https://www.facinghistory.org/stolen-lives-indigenous-peoples-canada-and-indian-residential-schools/historical-background/until-there-not-single-indian-canada>.

residential school attendance mandatory for any status Indian fifteen-years or younger, by stating on record to the Special Parliamentary Committee of the house of Commons:

I want to get rid of the Indian problem. I do not think as a matter of fact, that our country ought to continuously protect a class of people who are able to stand alone.... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department.¹⁹

When the residential school system finally came to an end in 1996, the federal government had succeeded in enrolling over 150,000 Aboriginal youth.²⁰

Life in the Residential Schools: Forced Assimilation

While some students elected to enroll in the residential school program willingly, for most the abuse started with their forced enrollment. Countless Indigenous families received official letters threatening termination of benefits and/or jail time should they refuse to enroll their children in the residential schools.²¹ Vitaline Elise Jenner, a residential school survivor, reflects that,

my parents were told that we had to go to the residential school ... my parents were told that if they didn't put us in the residential school that all

¹⁹ National Archives of Canada, RG 10, vol. 6810, file 470-2-3, vol. 7, 55 (L-3) and 63 (N-3). See also, Truth and Reconciliation Commission of Canada, *What we Have Learned: Principles of Truth and Reconciliation*, 31-32. In the *Principles of Truth and Reconciliation*, stating that prior to the 1920 Bill, there existed a 1894 Bill, under which “residential school attendance was voluntary ... [but] if an Indian agent or justice of the peace thought that any ‘Indian child between six and sixteen years of age is not being properly cared for or educated ... he could issue an order to place the child in a [residential school].’” The 1894 legislation also allowed school officials to obtain warrants enabling them to seek and return students to their residential school in the case of escape.

²⁰ Union of Ontario Indians, *An Overview of the Indian Residential School System* (Ontario: Creative Impressions, 2013), 2.

²¹ Truth and Reconciliation Commission of Canada, *The Survivors Speak: a Report of the Truth and Reconciliation Commission of Canada* (Library and Archives Canada Cataloguing in Publication, 2015), 13-14. See also, Truth and Reconciliation Commission of Canada, *What we Have Learned: Principles of Truth and Reconciliation* (Library and Archives Canada Cataloguing in Publication, 2015), 9.

that [welfare and rations] would be cut off. So, my parents felt forced to put us in the residential school, eight out of, of twelve.²²

In some cases, official letters were supplemented by house calls, where, as in the case of residential school survivor, Isaac Daniels, parents were told “it’s either residential school for [your] boys, or [you] go to jail.”²³ Following the conversation outlined above, Daniels reflects that he felt compelled to attend the residential school because he “didn’t want [his] dad to go to jail.”²⁴ In multi-child households parents were often further threatened with the potential of younger children’s forced enrollment; Albert Marshall in particular reflects that he, “failed as a father … the Indian agents told me … if I resist too much then they would take the younger, younger brother and younger, younger children.”²⁵

When letters and threats failed, children were often physically removed from their homes and communities. For instance, former student Howard Stacy Jones remembers being,

kidnapped from … elementary school when I was around six years old … two witnesses saw me fighting, trying to get away from the two RCMP officers that threw me in the back seat of the car and drove off with me. And my mom didn’t know where I was for three days … she finally found out that I was in Kuper Island residential school.²⁶

Even for those who did eventually submit to the forced enrollment, their transportation to the residential schools in many ways foreshadowed the horrors that awaited them. For

²² Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 14.

²³ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 13.

²⁴ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 13.

²⁵ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 15.

²⁶ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 23.

many, their journey began as they were “herded … like cattle, into [an] army truck” with no place to sit, no food, and no idea how long until they reached their final destination.²⁷

The inhumane treatment only worsened when the students reached the residential schools. Upon arrival all students were required to register, at which point they were assigned identification numbers in place of names.²⁸ Nellie Ningewance specifically notes that, “we had a number; they gave us a number and that number was tied in our, in all our clothes; our garments, everything was numbered.”²⁹ Notably, these identification numbers were not limited to clothing, rather, it was by these numbers that most teachers addressed their students for the entirety of a student’s residential school experience.³⁰ In addition to the numerical replacement of names, students possessions were also replaced with conventional British styled garments; they were forced to publicly strip, shower and submit to unnecessary chemical delousing; during which time students were often subject to sexual abuse and humiliation.³¹ To this end, survivor Brian Rae provides a particularly moving account of his experience:

You know, to get stripped like that by a female … you don’t even know … it was embarrassing, humiliating. And, and then she’d have this, you know, look or whatever it was in her eyes, eh, you know. And then she would comment about your private parts and stuff like that … like say, “Oh, what a cute peanut,” and you know, just you know kind of rub you down there … So that kind of made me feel, feel all, you know, dirty and, you know, just, I don’t know, just make me feel awful I guess because she was doing that. And then the others, you know, the other kids were there,

²⁷ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 24-25.

²⁸ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 31-32.

²⁹ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 31-32.

³⁰ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 66.

³¹ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 31-34.

you know, just laughing ... So, I think that was the first time I ever felt humiliated about my sexuality.³²

Finally, after the degrading “cleansing” process, their hair was cut.³³ For many students, the cutting of their hair not only had a physical impact, but a spiritual one as well, since their hair was representative of their culture and traditional beliefs. For instance, Campbell Papequash, reflecting on his arrival experience, notes the following:

... I was stripped of my clothes, the clothes that I came to residential school with, you know, my moccasins ... they took off my clothes and they deloused me. I didn't know what was happening but I learned about it later, that they were delousing me; ‘the dirty, no-good-for-nothing savages, lousy.’ And then they cut off my beautiful hair. You know and my hair, my hair represents such a spiritual significance of my life and spirit ... I cried and I see them throw my hair into a garbage can, my long, beautiful braids. They deloused me then I was thrown into the shower ... and I was shaved, bald-headed.³⁴

For family members, the separation from their cultural ties was further exacerbated when school administrators chose to separate family units.³⁵ Marthe Basile-Coocoo recounts that, “the nuns separated us, my brothers, and then my uncles, then I no longer understood.”³⁶ Watching their siblings be taken away from them only added to the emotional stress,³⁷ and fear, that many of these students faced during the registration process at the residential schools. Furthermore, for many, being separated from their family led to a “sense of, of not connecting to your own ... the people who would mean the most to you, your family members, and your community members, a complete

³² Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 41.

³³ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 31-32.

³⁴ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 32.

³⁵ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 33.

³⁶ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 33.

³⁷ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 38.

separation.”³⁸ In cases of voluntary enrollment, family separation was sometimes the first indicator that academic success was not the true goal of the residential school administrators. Take for example the following statement made by Margaret Simpson:

... I was so happy 'cause I was going to go in here with George (my brother) ... he went one way and I was calling him and this other nun took me the other way, so we separated right there. Right from there I was wondering what is happening here? I was so lost, I was so lost.³⁹

Even for those students without siblings, many residential schools either prohibited family visitation entirely, offered only extremely limited visitation times, and/or conducted family visitations under strict observation and school guidelines.⁴⁰ Regulations around family interaction whilst enrolled in the residential school system existed primarily to limit Indian cultural expression and influences.⁴¹ In fact, Prime Minister Sir John A. Macdonald expressed the following views to the House of Commons in 1883:

When the school is on the reserves the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.⁴²

³⁸ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 91.

³⁹ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 37.

⁴⁰ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 99.

⁴¹ Truth and Reconciliation Commission of Canada, *What we Have Learned: Principles of Truth and Reconciliation*, (Library and Archives Canada Cataloguing in Publication, 2015), 5-6.

⁴² Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 7.

Once integrated into the school, assimilation took the form of forced adoption of mainstream language (i.e. French or English)⁴³ and religious practices,⁴⁴ combined with rigorous army-like programming.⁴⁵ The imposed language requirements were especially difficult, since most students entered the school system “fluent in an Aboriginal language, [but] with little or no understanding of French or English.”⁴⁶ Regardless of a student’s French or English capabilities, use of Indigenous languages was strictly prohibited, often by aggressive means.⁴⁷ Consider for instance the recount of one non-English-speaking student who states:

... I didn’t understand English. My hand was hit because I wrote on my scribblers ... in Cree syllabics. And so I got the nun really mad that I was writing in Cree. And then I only knew my name was Ministik from the first time I hear my name, my name was Ministik. So I was whipped again because I didn’t know my name was Peter Nakogee (assigned name).⁴⁸

Former student Marcel Guiboche notes similar treatment, stating, “I did not speak English, and didn’t understand what she, what she was asking. She got very upset, and starting hitting me all over my body, hands, legs and back.”⁴⁹ Notably, the aim behind such treatment was to “force students to learn English (or French) as quickly as possible,” because Indigenous language was seen as “a dirty language, [where] the devil ... speaks

⁴³ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 47.

⁴⁴ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 86.

⁴⁵ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 63.

⁴⁶ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 47.

⁴⁷ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 47. See also, Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 7 (which alludes that “government officials ... were insistent that children be discouraged – and often prohibited – from speaking their own languages” because Aboriginal language was seen as savage, brutal and “inherently inferior” in comparison to the dominant European French and English languages).

⁴⁸ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 48.

⁴⁹ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 48.

in your mouth.”⁵⁰ The language assimilation tactics were largely successful, evidenced by the vast number of students who, as a result of the school language programming and discipline for non-compliance, lost their ability to communicate in their native dialect.⁵¹ For one, the loss was described in the following way: “they took my language. They took it right out of my mouth. I never spoke it again.”⁵² In the case of smaller Indigenous communities, the effects of the lost language abilities extended beyond the residential survivors and has resulted in entire nations, or the majority of nations, to lose the ability to speak their native tongue.⁵³

For most, one of the few school-approved opportunities to speak Indigenous languages was during religious activities.⁵⁴ The tradeoff however was the forced adoption of a new, often conflicting, religion.⁵⁵ At times, religious training was used as a means to scare or discipline students.⁵⁶ For instance, after being caught talking during a religious lesson one student remarks that as punishment her teacher,

took headpins out of his, on his desk ... and he said ‘spread your hand out’ ... and he started jabbing me in front of the students, jabbing me in the hand, and he said, “you’re gonna feel what Jesus felt on the cross. You’re, you’re gonna feel the same pain.”⁵⁷

⁵⁰ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 50-51.

⁵¹ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 54-55.

⁵² Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 54-55.

⁵³ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 55; See also, Truth and Reconciliation Commission of Canada, *What we Have Learned*, 79 (where it is explained that the conflicting religious teachings not only refers to the tension between Aboriginal spirituality and European religious teachings, but also between the two dominate religions within Canada at the time, i.e. Catholicism and Protestant).

⁵⁴ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 54.

⁵⁵ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 87.

⁵⁶ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 87-89.

⁵⁷ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 88.

As a result of the religious training and discipline, “students internalized the lessons they were taught.”⁵⁸ Often the end result, as explained by former student Arthur McKay, was the loss of, or disassociation from, traditional Indigenous beliefs and spiritual practices.⁵⁹

All too often discipline, especially religious discipline, was combined with sexual abuse, commonly at the hands of a priest or school official.⁶⁰ Survivor Mary Vivier recalls that:

there was a priest ... he was the head priest at the time ... whenever we were brought up to his office to get our strapping ... [h]e'd remove our, our unders, our pants, our underpants. He would strap us, and he would rub us, saying. ‘You shouldn't have done that, you shouldn't have done this.’
Another strap, another fondling.⁶¹

Just as often however, sexual abuse was an act of its own, removed from any disciplinary rational. Take for instance Raynie Tuckanow’s account of his witnessing the abuse of a fellow student when staff members, “tied him by his ankles and they tied him to the [heat] register and they put him out the window with a broomstick handle shoved up his ass.”⁶² Notably, staff initiated sexual abuse occurred whilst school policies separated female and male students, prohibited romantic relationships, and humiliated students for the pubescent changes that many students were already sensitive to, and educationally unprepared for.⁶³ These prohibitions combined with the frequent sexual trauma was often extremely confusing to students who “came to school with little knowledge or

⁵⁸ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 88.

⁵⁹ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 88.

⁶⁰ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 155.

⁶¹ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 155.

⁶² Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 154.

⁶³ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 95-97.

understanding of sexual activity, let alone the types of sexual abuse to which they might be subjected.”⁶⁴

⁶⁴ Truth and Reconciliation Commission of Canada, *The Survivors Speak*, 159.

Chapter II.

Lasting Impacts on Residential School Survivors

The period from early childhood into late adolescence is thought to be among the most crucial developmental years for predicting, among other things, future psychiatric disorders, criminal behavior and delinquency. As explained by Ross Macmillan,

[c]hildhood and adolescence are the periods in which the personal and psychological resources that guide cognition and decision-making are developed ... [i]t is also the period in which individuals accumulate the various ‘capitals,’ human, social, and cultural, that shape the context of later lives.⁶⁵

Thus, it comes as no surprise that abuse, trauma, and neglect during these critical years results not only in immediate felt or experienced harm, but also long-term residual impacts that have the capacity to shape subsequent adolescent and adult behavior.⁶⁶ For instance, past studies conducted by researchers like Macmillan have revealed that child “victims of physical and sexual abuse before adolescence have an increased prevalence of anxiety, depression, and post-traumatic stress disorder (PTSD) symptomology.”⁶⁷ While the childhood sexual assault studies reviewed by Macmillan have suggested that survivors are “much more likely to suffer from depression, alcohol or drug dependence,

⁶⁵ Ross Macmillan, “Violence and the Life Course: The Consequences of Victimization for Personal and Social Development,” *Annual Review of Sociology* 27 (2001): 6.

⁶⁶ Macmillan, “Violence and the Life Course,” 2-6.

⁶⁷ Macmillan, “Violence and the Life Course,” 6.

or phobic disorders” for an extended period of time.⁶⁸ Additionally, these studies revealed that childhood abuse victims were found to have less academic success, and overall lower IQ scores, resulting in “lower occupational [and income] status in early adulthood.”⁶⁹

Macmillan also explains that victimization during childhood, especially from caregivers or authority figures, “changes one’s perceptions of and beliefs about others in society … by indicating others as sources of threat or harm rather than sources of support.”⁷⁰ Viewing others as a potential threat instead of support source often results in an individual viewing, and using others as a simple means to an end.⁷¹ Furthermore, the lack of meaningful social ties, combined with the resulting psychological stressors from childhood abuse in part contributes to the significant link between childhood victimization and criminal and delinquent behavior. In fact, multiple studies have suggested that early victimization substantially increases the odds that a child will be involved in criminal activity as an adolescent or adult.⁷² Macmillan likewise notes that

⁶⁸ Macmillan, “Violence and the Life Course,” 7.

⁶⁹ Macmillan, “Violence and the Life Course,” 10.

⁷⁰ Macmillan, “Violence and the Life Course,” 11-12.

⁷¹ Macmillan, “Violence and the Life Course,” 12.

⁷² Macmillan, “Violence and the Life Course,” 8; See also, David A. Wolfe, Karen J. Francis and Anna-Lee Straatman, “Child Abuse in Religiously-Affiliated Institutions: Long-Term Impacts on men’s Mental Health,” *Child Abuse & Neglect: The International Journal* 30, no. 2 (2006): 206, 209 (noting that 66.2% of their studies sample of 76 males who had formally attended some form of religiously affiliated institution “reported a history of sexual problems in their personal relationships … includ[ing] hypersexuality (8.3%), hyposexuality (31.7%), feelings of inadequacy (6.7%) and related difficulties.” The study further indicated that 49% of participants had a history of “verbal and/or physical abuse of their partners” as well as “a history of criminal involvement … or substance abuse related offenses (49.3%)”).

further studies have found that “physical abuse in childhood increases dating violence in adolescence” as well as the likelihood of future substance abuse and addiction.⁷³

Looking specifically to residential school survivors, the staggering rates of physical, emotional and sexual abuse encountered while attending the school program has resulted in not only long-term personal impacts, but also generational impacts as well.⁷⁴ With regard to long-term impacts, the heightened rates of mental health illness, substance abuse,⁷⁵ and violent offenses stemming from the residential school program have partially contributed to both the Indigenous overrepresentation statistics within correctional facilities, and the high suicide rates amongst the Canadian Indigenous population.⁷⁶ Researchers such as Amélie Ross, et al., propose that residential school participation alone, irrespective of sexual or physical abuse, is often sufficiently traumatic to result in

⁷³ Macmillan, “Violence and the Life Course,” 8. See also, Amélie Ross, et al., “Impact of Residential Schooling and of Child Abuse on Substance use Problem in Indigenous Peoples,” *Addictive Behaviors* 51 (2015): 186 (drawing studies by Pearce et al., and Barker-Colo, where researchers found a correlation between abuse and sexual difficulties, “sex work, HIV status, injection drug use, drug overdose, and sexually transmitted infections”).

⁷⁴ Tracey Carr, Brian Chartier, and Tina Dadgostari, “I’m not Really Healed … I’m Just Bandaged up’: Perceptions of Healing among Former Students of Indian Residential Schools,” *International Journal of Indigenous Health* 12, no. 1 (2017): 41; See also, Amy Bombay, Kimberly Matheson and Hymie Anisman, “The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma,” *Transcultural Psychiatry* 51, no. 3 (2014): 321-326.

⁷⁵ See, Amélie Ross, et al., “Impact of Residential Schooling and of Child Abuse on Substance use Problem in Indigenous Peoples,” 186-187 (noting that “former residential school attendees were more than three times at risk of having an alcohol problem than Indigenous peoples who did not attend residential school”).

⁷⁶ Brenda Elias, et al., “Trauma and Suicide Behaviour Histories Among a Canadian Indigenous Population: An Empirical Exploration of the Potential Role of Canada’s Residential School System,” *Social Science & Medicine* 74 (2012): 1562-1563 (indicating that out of 611 residential school participants, 26% had a history of suicide attempts or thoughts).

an increased likelihood of substance abuse.⁷⁷ Utilizing the Jacobs theory, Amélie Ross, et al., suggests that residential school attendance heightens such risks because,

People who have experienced traumas are at risk, during their development, of addictions [because] [a]ddictions are used to escape or dissociate, and to relieve the stress caused by childhood traumatic experiences.⁷⁸

The Jacobs theory is further supported by residential school survivor testimony within the Tracey Carr, et al., 2017 study, wherein a theme of alcohol use to dissociate from trauma was identified amongst the Indigenous participants.⁷⁹

Moving beyond residential survivors themselves, there is also an abundance of evidence pointing towards an intergenerational impact stemming from the residential school trauma. Though residual trauma has, to an extent, formed within Canadian Indigenous communities at large, children of residential school survivors face a significant risk of developing violent tendencies, mental health illnesses, substance abuse, sexual dysfunctions,⁸⁰ and suicide rates.⁸¹ Since the majority of residential school participants were taken from their family at a young age and thereafter raised with neglect and abuse surrounding them, it is no surprise that their learned parenting skills are primarily negative.⁸² With parents lacking positive child-rearing experience, and often

⁷⁷ Ross, et al., “Impact of Residential Schooling,” 186, 189-190.

⁷⁸ Ross, et al., “Impact of Residential Schooling,” 190.

⁷⁹ Carr, et al., “I’m not Really Healed … I’m Just Bandaged up,” 45.

⁸⁰ Bombay, et al., “The Intergenerational Effects of Indian Residential Schools,” 325-327.

⁸¹ Elias, et al., “Trauma and Suicide Behaviour Histories,” 1562-1563 (finding that of the 1100 descendants of residential school survivors, 14% had previously attempted suicide); *See also*, Amy Bombay, et al., “The Intergenerational Effects of Indian Residential Schools,” 324 (finding that 37.2% of residential school survivor adult descendants and 26.3% of youth descendants had a history of suicidal thoughts).

⁸² Bombay, et al., “The Intergenerational Effects of Indian Residential Schools,” 325-326.

suffering from posttraumatic stress disorder and/or mental illness, residential school survivor offspring are all too often subjected to abuse and stressful home environments.

In fact, Amy Bombay, et al., found that:

[residential school survivor] offspring reported greater cumulative child-abuse, neglect, and indices of household dysfunction (e.g., being raised in a household affect by domestic violence, substance abuse, criminal behavior, and mental illness).⁸³

Residential School survivors and academics are not, however, the only facets of the Canadian population aware of the profound consequences and resulting intergenerational effects of the school program. In fact, former Prime Minister Stephen Harper issued the following statements as part of his June 11, 2008 apology in the House of Commons acknowledging the severity of the school program;

[t]he government now recognizes that the consequences of the residential schools policy were profoundly negative and that this policy has had a lasting damaging impact on aboriginal culture, heritage and language ...[for instance] [t]he legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.⁸⁴

While Prime Minister Harper's apology was received by the Indigenous population, in the years following his statement little has changed with regard to the drug and alcohol abuse, mental health issues, and criminal behavior present in many Indigenous communities. Nevertheless, many Indigenous survivors appear motivated in their efforts to heal, if not for themselves, then for the future of their children and grandchildren. For instance, one residential school survivor who participated in the Amy Bombay, et al., study stated, "I don't want my grandchildren ... to go on living with them issues.

⁸³ Bombay, et al., "The Intergenerational Effects of Indian Residential Schools," 326.

⁸⁴ Canada, Prime Minster Stephen Harper. *Statement of Apology – to Former Students of Indian Residential Schools*. [Ottawa], 2008. <https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

Residential garbage!”⁸⁵ For true healing to occur however, the Indigenous population requires the support of the Canadian government, since the impacts of the school program have ingrained themselves so deeply into many Indigenous families that left unsupported intergenerational impacts may continue to influence the Indigenous communities for generations to come.

Moving Forward: Government Acknowledgement and Apology

Strikingly, though the residential school program began to falter in the 1970s, with the last residential school shutting its doors in 1996, the abovementioned apology issued by Prime Minister Harper in 2008 was the first formal apology the Indigenous population received from the federal government. In fact, even though the October 1996 *Report of the Royal Commission on Aboriginal Peoples* made a variety of governmental recommendations on how best to make amends,⁸⁶ it took two years following the reports submission for the government to even acknowledge the abuse via a Statement of Reconciliation made on January 7, 1998.⁸⁷ Moreover, with the exception of the 1999 Supreme Court ruling in *R. v. Gladue*, [1999] 1 S.C.R. 688—emphasizing that judges are required, under the Criminal Code, to consider the background and systemic history of all self-identifying Indigenous offenders during sentencing⁸⁸ from 1998 until the early

⁸⁵ Bombay, et al., “The Intergenerational Effects of Indian Residential Schools,” 50.

⁸⁶ Canada, Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*. [Ottawa], 1996. <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

⁸⁷ Canada, Jane Stewart Minister of Indian Affairs and Northern Development. *Gathering Strength - Canada's Aboriginal Action Plan*. [Ottawa], 1998. <https://www.aadnc-aandc.gc.ca/eng/1100100015725/1100100015726>.

⁸⁸ *R v. Gladue*, [1999] 1 SCR 688, at 690.

2000s, topics surrounding the residential school largely fell under the radar. The only significant apology occurring during this period came when the Royal Canadian Mounted Police (RCMP) delivered a public statement in May 2004 apologizing for their role in transporting students to the boarding schools.⁸⁹ However, after years of governmental neglect, the Indigenous population required a more expansive apology and rectification plan. As a result, the Assembly of First Nations, led by Grand Chief Phil Fontaine, launched a class action lawsuit against the federal government in 2005. The case ultimately settled outside of court, with the signing of the Indian Residential Schools Settlement Agreement (IRSSA) on May 8, 2006.⁹⁰ IRSSA came into effect on September 19, 2007, however, the government strongly maintained their position that a formal apology was outside the bounds of the agreement.⁹¹ However, after a “motion calling for the Government to deliver an official apology to residential school survivors” was introduced and passed unanimously on May 1, 2007, the government was forced to reconsider their stance.⁹² Thereafter, Prime Minister Harper delivered his official apology on June 11, 2008, and the Truth and Reconciliation Commission (TRC) agreed to in the IRSSA was established.⁹³

⁸⁹ RCMP Commissioner. “RCMP Apology.” Royal Canadian Mounted Police. 2004. <http://www.rcmp-grc.gc.ca/aboriginal-autochtone/apo-reg-eng.htm> (accessed Dec. 1, 2018).

⁹⁰ Tabitha Marshall, “Indian Residential Schools Settlement Agreement,” *The Canadian Encyclopedia*. Online: 2013. <https://www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement> (last modified Sept. 29, 2016).

⁹¹ Zach Parrott, “Government Apology to Former Students of Indian Residential Schools,” *The Canadian Encyclopedia*. Online: 2018. <https://www.thecanadianencyclopedia.ca/en/article/government-apology-to-former-students-of-indian-residential-schools> (accessed Dec. 1, 2018).

⁹² Parrott, “Government Apology to Former Students of Indian Residential Schools.”

⁹³ Parrott, “Government Apology to Former Students of Indian Residential Schools.” *See also*, Canada. Prime Minister Stephen Harper. *Statement of Apology – to Former Students of Indian Residential Schools*. [Ottawa], 2008. <https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

The TRC's stated purpose was to encourage truth-seeking in an attempt to promote reconciliation amongst the involved parties, as well as healing amongst the survivors. Many TRC participants have noted that the opportunity to disclose their residential school experience and abuse helped with their healing process. Moreover, in the years immediately following the TRC's establishment, there was a general sense of hope amongst Indigenous communities that the TRC process, combined with the affirmative action legislation arising from *Gladue*, signaled the government's commitment to working with the Indigenous populations to help combat the lasting effects of the residential school and assisting survivors throughout their healing process. However, as of 2018, the majority of the Indigenous people have come to view the TRC as a start, with more being required to truly rectify the situation.

Chapter III.

Affirmative Action Legislation and Rulings

With the effects of the residential school system and colonial discrimination contributing substantially to Indigenous overrepresentation within Canadian Correctional facilities, policy makers sought to enact Bill C-41 to address the problem. Introduced in 1996, Bill C-41 reformed sentencing by amending and adding new provisions to the *Criminal Code*. For Indigenous peoples, one of the most notable provision introduced via Bill C-41 was Section 718.2(e) of the *Criminal Code*. Section 718.2(e) of the *Criminal Code* requires judges, when sentencing Indigenous offenders, consider “all available sanctions other than imprisonment that are reasonable in the circumstances ... with particular attention to the circumstances of aboriginal offenders.”⁹⁴ Unfortunately, “Bill C-41 did not provide judges with specific sentencing guidelines ... [and instead] parliament left it up to the courts to clarify ... the application of s. 718.2(e).”⁹⁵

In April 1999, section 718.2(e) sentencing guidelines were introduced as a result of the Supreme Court’s ruling in *R v. Gladue*. The *Gladue* case involved an Indigenous woman who was charged with manslaughter and subsequently was sentenced to three-

⁹⁴ *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

⁹⁵ Department of Justice Canada, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System*. Dept. of Justice, Research and Statistics Division, 2017. 9. Accessed Dec 16, 2018. http://publications.gc.ca/collections/collection_2018/jus/J4-46-2017-eng.pdf. (note, this article is a reproduction of an official work published by the Government of Canada. Note further, that the reproduction has not been produced in affiliation with, or with the endorsement of the Government of Canada).

years imprisonment.⁹⁶ During sentencing the trial judge refused to apply Section 718.2(e) of the *Criminal Code*, noting that:

there were no special circumstances arising from the aboriginal status of the accused and the victim that he should take into consideration. Both were living in an urban area off-reserve and not “within the aboriginal community as such.”⁹⁷

On appeal, the Court of Appeals for British Columbia, and later, the Supreme Court of Canada both “concluded that the [trial] judge had erred in finding that s. 718.2(e) did not apply.”⁹⁸ While the appeal was dismissed due to the severity of the crime committed by Ms. Gladue, the case remains a landmark in Indigenous rights, since *Gladue* resulted in the Supreme Court setting forth “a framework for the sentencing judge to use in sentencing an aboriginal offender.”⁹⁹

Arising directly from the trial judge’s justification, the Supreme Court’s decision emphasized that “Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on – or off – reserve.”¹⁰⁰ More generally, the *Gladue* opinion re-emphasized that Section 718.2(e) “is a remedial provision aimed at addressing the over incarceration of aboriginal people;” likewise, the opinion highlighted that “sentencing judges have a statutory duty to give force to the provision … [while] incarceration should be seen as a sanction of last resort.”¹⁰¹ The decision further clarified that under Section 718.2(e),

⁹⁶ *R v. Gladue*, [1999] 1 SCR 688.

⁹⁷ *R v. Gladue*, [1999] 1 SCR 688, at 689.

⁹⁸ Department of Justice Canada, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System*. 11-12.

⁹⁹ *R v. Gladue*, [1999] 1 SCR 688, at 705.

¹⁰⁰ *R v. Gladue*, [1999] 1 SCR 688, at 691.

¹⁰¹ Department of Justice Canada, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System*. 12. See also, *R v. Gladue*, [1999] 1 SCR 688, at 690-707.

judges are permitted to distribute lesser jail terms to Indigenous offenders as compared to non-Indigenous offenders convicted for the same offence.¹⁰² Finally, the *Gladue* opinion outlined how, and what, judges are to consider when sentencing Indigenous offenders under Section 718.2(e) of the *Code*. Specifically, the opinion set forth the following requirements:

[i]n sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. In order to undertake these considerations the sentencing judge will require information pertaining to the accused ... additional case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions.¹⁰³

The pre-sentencing report mentioned in the *Gladue* opinion is now known as the ‘Gladue report.’ Under the current framework, the Gladue report is available to status and non-status Indigenous offenders sentenced under Section 718.2(e) of the *Criminal Code*. In applicable cases, a presiding judge, or an attorney from either side may request a Gladue Report be composed. The report contains not only recommendations on appropriate sentencing, but also pertinent background information on the offender (i.e. residential school experience or connections, history of parental abuse and/or substance abuse, mental health disorders, etc.) meant to assist the court in determining whether the particular offender is entitled under Section 718.2(e) of the *Code* to receive a reduced, or alternative sentence as a result of their Indigenous ancestry and lived experiences.

¹⁰² *R v. Gladue*, [1999] 1 SCR 688, at 691.

¹⁰³ *R. v. Gladue*, [1991] 1 SCR 688, at 690.

More recently, in 2012, the Supreme Court reaffirmed and expanded the *Gladue* decision after ruling on two cases of Long-Term Supervision Order breaches. The two cases were tried together as part of the *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 decision, with “the central issue … [being] how to determine a fit sentence for a breach of an LTSO in the case of an Aboriginal offender in particular.”¹⁰⁴ Through the *Ipeelee* decision, McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ, confirmed Canada’s continued commitment to Section 718.2(e) of the *Criminal Code*, and the *Gladue* ruling, by indicating that “judge[s] must consider the factors outlined in *R. v. Gladue*.¹⁰⁵ In justifying the *Gladue* factors, the justices introduced a moral blameworthiness component, noting that “systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness.”¹⁰⁶ As a result, the justices emphasized that, “in every case involving an Aboriginal offender”¹⁰⁷ judges and courts have a statutory duty to apply the *Gladue* principles, including consideration of the following:

the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainments, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.¹⁰⁸

Furthermore, in response to concerns surrounding the equality of affirmative action legislation like Section 718.2(e) of the *Code*, the *Ipeelee* decision points to Section 15(2)

¹⁰⁴ *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at 434.

¹⁰⁵ *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at 435.

¹⁰⁶ *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at 435.

¹⁰⁷ *R v. Ipeelee*, 2012 SCC 13 [2012] 1 SCR 433, at 437.

¹⁰⁸ *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at 436.

of the *Charter of Rights and Freedoms*; noting that under the *Charter*, affirmative action laws do not violate the “equal before the law” clause laid out in Section 15(1) of the *Charter*.¹⁰⁹

Most notably however, the *Ipeelee* decision introduced the concept of proportionality, or the fundamental principles of sentencing to Section 718.2(e) and *Gladue* cases. The justices emphasized that failure to consider the *Gladue* factors when sentencing an Indigenous offender “would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offense and the degree of responsibility of the offender.”¹¹⁰ Likewise, the justices clarified that “courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e)” noting that Section 718.2(e) requires judges “use a different method of analysis in determining a fit sentence for Aboriginal offenders.”¹¹¹ And finally, the decision clarified the intent of Parliament in enacting Section 718.2(e) by noting:

the enactment of s. 718.2(e) is a specific direction by Parliament to pay particular attention to the circumstances of Aboriginal offenders during the sentencing process because those circumstances are unique and different from those of non-Aboriginal offenders.¹¹²

By clearly presenting the parliamentary intent behind Section 718.2(e) and the importance of the fundamental principle of sentencing, the *Ipeelee* decision indicates that

¹⁰⁹ *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at 482. See also, *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹¹⁰ *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at 435-436.

¹¹¹ *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at 435.

¹¹² *R v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, at 435.

prior to Section 718.2(e) and *Gladue*, “sentences for Indigenous offenders were often not consistent with the proportionality principle, because they did not consider the factors set out in *Gladue*.^{”¹¹³}

¹¹³ Department of Justice Canada, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System*. 15.

Chapter IV.

The Conflict Between Section 718.2(e) of the *Criminal Code* and Bill C-10

The ability for judges to apply the *Gladue* factors, and use their judicial discretion when sentencing Indigenous offenders, as required under Section 718.2(e) of the *Criminal Code*, was frustrated with the passing of Bill C-10 in 2012. Bill C-10, composed of nine smaller bills, was initially introduced by the Conservative Party in early 2011,¹¹⁴ and later became the cornerstone of the party’s tough-on-crime agenda, both during and after their campaign. The primary purpose of the bill is to increase incarceration periods for both adult, and young offenders, by restricting conditional sentences and adding mandatory minimum sentences for a wide range of offenses. Interestingly, the tough-on-crime bill came at a time when Government Canada statistics found 93% of Canadians to be “satisfied with their personal safety from crime.”¹¹⁵ Nevertheless, after winning a majority in the House of Commons in May 2011, the Conservative government, under direction of Prime Minister Stephen Harper, pushed the

¹¹⁴ Kirsten Bernas, et al. “Bill C-10: The Truth About Consequences,” *Canadian Centre for Policy Alternatives Manitoba Office* (2012): 5, <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2012/03/Bill%20C-10%20The%20Truth%20About%20Consequences.pdf> (Accessed Sept. 25, 2018).

¹¹⁵ Shannon Brennan, “Canadians’ Perceptions of Personal Safety and Crime, 2009” in Statistics Canada, *Juristat* (Ottawa: Minister of Industry, December 2011) at 5, online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2011001/article/11577-eng.pdf?st=E2YwqvwJ>.

bill forward, passing it on March 12th, 2012;¹¹⁶ the Bill received Royal Assent on March 13th, 2012,¹¹⁷ and came into force between May 2012 and November 2012.¹¹⁸

As mentioned above, Bill C-10 is comprised of several wide-ranging bills. For instance, Part 2 of Bill C-10 amended both the *Criminal Code* and the *Controlled Drugs and Substances Act*, while also introducing mandatory minimum sentences for a range of sexual offenses and drug crimes; Part 3 amended the *Corrections and Conditional Release Act*, the *Criminal records Act*, and the *International Transfer of Offenders Act*, making it harder for appeals, transfers, and conditional sentences to be granted; and Part 4 amended the *Youth Criminal Justice Act*, resulting in lengthier sentences for young offenders.¹¹⁹ More specifically, Part 2 of Bill C-10 amended Section 271 of the *Criminal Code*, and introduced the following mandatory minimum sentence: s. 271(a) sexual assault against an individual under 16 years of age is subject to a minimum sentence of one year.¹²⁰ Additionally, Bill C-10 amended Section 742.1 of the *Criminal Code* to ensure that any offender convicted of sexual assault, or an offense with a mandatory minimum attached, is ineligible to serve their sentence in the community.¹²¹ For drug

¹¹⁶ Canada, House of Commons Debates, 12 March 2012 (The Speaker), <http://www.ourcommons.ca/Content/House/411/Debates/094/HAN094-E.PDF>.

¹¹⁷ Canada, Debates of the Senate, 13 March 2012 (The Hon. the Speaker of the Senate), https://sencanada.ca/Content/SEN/Chamber/411/Debates/pdf/060db_2012-03-13-e.pdf.

¹¹⁸ Parliament of Canada, “House Government Bill: Coming Into Force,” *LEGISinfo*. Last Modified Dec. 14, 2018. <http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5120829&View=6>.

¹¹⁹ Laura Barnett, et al. “Legislative summary of Bill C-10: An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and Other Acts,” *Library of Parliament*. Last Modified Feb. 17, 2012. https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/411C10E (Accessed Dec 1, 2018).

¹²⁰ Safe Streets and Communities Act, SC 2012, c-1, s 25.

¹²¹ Safe Streets and Communities Act, SC 2012, c-1, s 34.

offenses under Part 2 of Bill C-10 the amendments and mandatory minimums were more expansive, and include the following: (a) a minimum of one year for drug offenses involving Schedule I or II substances,¹²² if violence was used or threatened, a criminal organization was involved, there was a weapon, or the defendant has been either convicted of a designated substance offense or been imprisoned within the past ten years;¹²³ (b) a mandatory minimum of two years for offenses committed near any place frequented by persons under eighteen, including schools;¹²⁴ (c) offenses involving Schedule I substances in the amount of one kilogram or less and/or any Schedule II substances that meet the criteria of trafficking are subject to a minimum of one year;¹²⁵ (d) a minimum of three years for Schedule I substances if the crime involves any subsection 3 factors, or a minimum of two years if the factors do not apply;¹²⁶ (e) a minimum of six months for illegally possessing or producing between five and two-hundred cannabis plants,¹²⁷ or 9 months for under 201 plants,¹²⁸ or one year if between

¹²² The Controlled Drugs and Substances Act, SC 1996, c-19, Schedule I-II (noting that among others, Schedule I substances include: cocaine, opium, codeine, oxycodone, heroine, MDMA, ecstasy, and bath salts; while Schedule II substances include, among others: cannabis resin, and tetrahydrocannabinols).

¹²³ Safe Streets and Communities Act, SC 2012, c-1, s. 39(a)(i)(a)-(d). *See also*, Controlled Drugs and Substances Act, SC 1996, c-19, Part I (defining designated substance offenses as any offense included within Part I of the Controlled Drugs and Substances Act (i.e. trafficking Schedule I-IV substances, importing or exporting Schedule I-IV substances, or producing Schedule I-IV substances), or any offense deemed to be a conspiracy or accessory after the fact).

¹²⁴ Safe Streets and Communities Act, SC 2012, c-1, s.39(a)(ii)(a).

¹²⁵ Safe Streets and Communities Act, SC 2012, c-1, s.40(a). *Note*, trafficking is defined as selling, giving, transporting, sending, delivering or administering of any substance included in Schedules I-IV of the Controlled Substances Act.

¹²⁶ Safe Streets and Communities Act, SC 2012, c-1, s.41(a).

¹²⁷ Safe Streets and Communities Act, SC 2012, c-1, s. 41(b)(i).

¹²⁸ Safe Streets and Communities Act, SC 2012, c-1, s. 41(b)(ii).

201-500 plants;¹²⁹ and (f) a minimum of one year for crimes involving Schedule II substances and trafficking, or eighteen months if both trafficking and subsection (3) factors are applicable.¹³⁰ The remaining parts of Bill C-10 resulted in like changes to the acts that they targeted.

As a result of the plethora of mandatory minimums introduced within Bill C-10, judges have been largely stripped of their judicial discretion, and are often unable to adhere to their statutory duty under Section 718.2(e) of the *Criminal Code*. In fact, Justice Renee M. Pomerance notes that “the proliferation of mandatory minimum sentences leaves little room for personal tailoring” meaning “there is no discretion to drop below the communal floor, whatever the circumstances.”¹³¹ Without judicial discretion, Justice Pomerance notes that “it will be difficult and sometimes impossible for a sentencing judge to give meaningful consideration to the principle codified in section 718.2(e) of the *Criminal Code*,”¹³² especially since “there is no ‘safety valve’ that would authorize judges to impose a sentence below the minimum.”¹³³

Justice Pomerance’s concerns surrounding mandatory minimum sentences and judicial discretion are validated by looking across the border to the United States of America. Amidst the “war on drugs”, the Anti-Drug Act of 1986 introduced new mandatory minimums “aimed at decreasing the amounts of crack and drug trafficking in

¹²⁹ Safe Streets and Communities Act, SC 2012, c-1, s. 41(b)(iii).

¹³⁰ Safe Streets and Communities Act, SC 2012, c-1, s. 41(a.1).

¹³¹ Renee M. Pomerance, “The New Approach to Sentencing in Canada: Reflections of a Trial Judge,” *Canadian Criminal Law Review* 17, no. 3 (Dec. 2003): 307.

¹³² Pomerance, “The New Approach to Sentencing in Canada,” 314.

¹³³ Pomerance, “The New Approach to Sentencing in Canada,” 315.

communities.”¹³⁴ As foreseen by Justice Pomerance, the presence of mandatory minimum sentences led to a reduction in judicial discretion, even in cases where federal judges believed the sentence to be disproportionate.¹³⁵ Unfortunately, the mandatory minimums also “had a disproportionate impact on ...[the black population]” because of their “over-represent[ation] amongst those who live in poverty and amongst those who are unemployed.”¹³⁶ Furthermore, the United States black populations history of racial discrimination, slavery, and Jim Crow segregation laws, much like the experiences of the Canadian Indigenous population, have had long-term effects resulting in inequality, high criminalization rates, and continued mainstream stereotyping.¹³⁷ With judges unable to exercise the necessary judicial discretion to avoid perpetuating black overrepresentation, correctional facilities soon began to see a disproportional influx in black prisoners sentenced under the Anti-Drug Act. For instance, a 2006 report notes that in Seattle, where 70% of the population is white, “[64.2%] of drug arrestees are black,” in part because the Act’s focus on crack has resulted in heightened police presence in low-income areas populated primarily by black and minority citizens.¹³⁸ Similar overrepresentation statistics were reported across the country, as implicit racial bias, and low-income

¹³⁴ Jessica Sevier, “A Call to Action from Social Workers around the Mandatory Minimum,” *Social Work* 59, no. 1 (2014): 94.

¹³⁵ Nekima Levy-Pounds, “Par for the Course: Exploring the Impacts of Incarceration and Marginalization on Poor Black Men in the U.S.,” *Journal of Law in Society* 14, no. 1 (Winter 2013): 41.

¹³⁶ Levy-Pounds, “Par for the Course,” 32.

¹³⁷ Levy-Pounds, “Par for the Course,” 36. See also, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: [Jackson, TN]: New Press; Distributed by Perseus Distribution, 2010) (noting that the mass incarceration of blacks resulting from mandatory minimums is partly a result of their “inferior position [in] law and custom,” all-the-while comparing the new war on drugs scheme to the Jim Crow era).

¹³⁸ Levy-Pounds, “Par for the Course,” 33.

community targeting led to mass incarceration of black Americans in the majority of states. As overrepresentation statistics and prison crowding continued to grow, judicial and mainstream frustration led to the development of a federal safety valve provision, and later, the enactment of the Fair Sentencing Act of 2010, which reduced the Acts focus on crack.

The overrepresentation of America's black population resulting from the Anti-Drug Acts mandatory minimums, and subsequent stifling of judicial discretion, paints a dismal future for Canada's Indigenous population, as well as the mandatory minimums set out under Bill C-10. Considering both the American experience, and Justice Pomerance's critical statements regarding Bill C-10's lack of a safety valve, it begs to question why the House of Commons failed to include a safety valve provision before passing the bill.

Why Bill C-10 Has No Safety Valve

To determine whether a safety valve was contemplated during the drafting of Bill C-10 I began by researching and compiling a list of the most likely Indigenous opposition groups and political parties. During stage one of my research I conducted a targeted search within the legislative history of the bill, looking specifically for submissions from oppositions groups. During stage two of my research I searched the House of Commons and Senate Debates for individual comments or proposals relating to safety valve implementation. I employed rather broad search techniques during this phase and utilized the following indicators: "safety valve", and/or, "Section 718.2(e)", and/or, "Gladue", and/or, "aboriginal rights", and/or, "Indigenous". It is my hypothesis that the House of Commons was aware of the conflict between Section 718.2(e) of the *Criminal Code* and

Bill C-10, but was able to proceed without a safety valve provision because the Conservative party, adhering to the tough-on-crime agenda that won them the election, held a majority in the House and Senate. In other words, while opposition to Bill C-10 was vocal, and safety valve proposals were likely made, the Conservative party was able to proceed with a deaf ear, since their majority status gave them the necessary power to push the bill forward without amendment.

Stage one revealed a number of submissions from opposition groups noting the negative ramifications that the bill would have on the Indigenous population. However, for purposes of this paper I will focus on the following four submissions: the Ontario Federation of Indian Friendship Centres (OFIFC) submission; the joint Women's Legal Education and Action fund (LEAF) and West Coast Women's Legal Education and Action Fund (West Coast Leaf) submission; the Assembly of First Nations (AFN) submission; and the Canadian Bar Association submission.

Like many of the submissions, the Ontario Federation of Indian Friendship Centres (OFIFC), urged the committee to consider the negative impacts that passing Bill C-10 would have on the Indigenous community.¹³⁹ Early on they noted that “Bill C-10 proposes a number of legislative amendments that, if passed as proposed, will have a negative impact on Aboriginal people involved with the justice system.”¹⁴⁰ OFIFC’s major complaints were directed towards Bill C-10’s amendments to the *Controlled Drugs and Substances Act*, conditional sentences, and the *Youth Criminal Justice Act*. With

¹³⁹ Ontario Federation of Indian Friendship Centres, *Submission to the Standing Senate Committee on Legal and Constitutional Affairs in Response to Bill C-10, Safe Streets and Communities Act* (Ontario, 2012), 3.

¹⁴⁰ Ontario Federation of Indian Friendship Centres, *Submission to the Standing Senate Committee*. 4.

regard to the *Controlled Drugs and Substances Act* amendments OFIFC stressed that the mandatory minimums would lead to “an increase in Aboriginal incarceration rates” since “Aboriginal peoples are overrepresented in terms of substance use,” evidenced by the fact that “[t]he rate of illicit drug use among First Nations people is documented as double the rate of the Canadian population.”¹⁴¹ Likewise, the OFIFC expressed concern that amendments to limit and/or remove conditional sentencing, “will contribute to a further denial of the rights of Aboriginal offenders and ensure that the disproportionate rate of incarceration of Aboriginal peoples is further exacerbated.”¹⁴² Similarly, when discussing potential amendments to the *Youth Criminal Justice Act*, OFIFC expressed concern that Bill C-10’s amendments may inadvertently target Indigenous youth because of their overrepresentation in the justice system.¹⁴³ Drawing on a Supreme Court declaration, OFIFC quoted Jonathan Rudin in saying, “if the over-incarceration of Aboriginal adults is a crisis, one struggles to find a word to describe the magnitude of the problem regarding Aboriginal youth,” while further noting that the *Youth Criminal Justice Act* was amended to incorporate the wording of Section 718.2(e) of the *Criminal Code*.¹⁴⁴ Finally, in bringing their arguments to a close the OFIFC recommended that mandatory minimums be removed, conditional sentences remain unchanged, and that,

¹⁴¹ Ontario Federation of Indian Friendship Centres, *Submission to the Standing Senate Committee*. 11.

¹⁴² Ontario Federation of Indian Friendship Centres, *Submission to the Standing Senate Committee*. 17-18.

¹⁴³ Ontario Federation of Indian Friendship Centres, *Submission to the Standing Senate Committee*. 28.

¹⁴⁴ Ontario Federation of Indian Friendship Centres, *Submission to the Standing Senate Committee*. 28-29.

the Senate of Canada should repeal proposed amendments in Bill C-10 to section 742.1 of the Criminal Code recognizing that they seriously conflict with sub-section 718.2(e) and the Supreme Court of Canada's 1999 Gladue decision.¹⁴⁵

Other submissions, like the LEAF submission, chose to focus on a particular subset of the Indigenous population. For LEAF the motivation was the impact on indigenous women, who they noted are protected both domestically by the Charter, but also internationally via the *Treaty on Elimination of Discrimination Against Women*, to which Canada is a party.¹⁴⁶ Unlike the OFIFC submission, the LEAF submission clearly points to the conflict between Section 718.2(e) of the *Criminal Code* and Bill C-10's mandatory minimum sentences, noting that "where mandatory minimums are in place, judges will no longer be able to consider the unique situation of Aboriginal offenders or devise alternative sentences;" and that "mandatory minimum sentences conflict with legislative and judicial obligations that require judges to impose sentences that are fit for the offender by considering all alternatives to incarceration."¹⁴⁷ Notably, while the LEAF submission's primary motive seems to be the abolition of Bill C-10, they do make sure to note "the critical importance of including 'safety valve' provisions if the proposed mandatory minimums are to be enacted."¹⁴⁸

¹⁴⁵ Ontario Federation of Indian Friendship Centres, *Submission to the Standing Senate Committee*. 43.

¹⁴⁶ Women's Legal Education and Action Fund, and West Coast Leaf, *Submission on Bill C-10: The Safe Streets and Communities Act* (Canada, 2012), 1-4.

¹⁴⁷ Women's Legal Education and Action Fund, and West Coast Leaf, *Submission on Bill C-10*. 5.

¹⁴⁸ Women's Legal Education and Action Fund, and West Coast Leaf, *Submission on Bill C-10*, 1.

Like the LEAF submission, the AFN submission drew heavily on Section 718.2(e) of the *Criminal Code*, while also introducing a wealth of case law. In particular, the AFN looked to Justice Knazan’s decision in *R. v. King*, finding that,

‘to apply mandatory sentencing to Aboriginal peoples defeats the ameliorative purpose of subsection 718.2(e) and the extent that the mandatory sentencing prevents a judge from using discretion in this context render such sentencing provisions unconstitutional and a violation of the offender’s rights and is not saved by section 1 of the Canadian Charter of Rights and Freedoms.’¹⁴⁹

Moreover, in the section relating to mandatory minimums and sentencing, ANF drew attention to the risk of harm arising from mandatory minimum sentences where no safety valve provisions exist; they likewise recommended the development of a safety valve.¹⁵⁰ Similarly, when discussing the Bill C-10’s amendments to the *Controlled Drugs and Substances Act*, ANF recommended that:

Bill C-10 should not interfere with the application of section 718.2(e) of the *Criminal Code*. The particular situation of First Nations offenders and their marginalization and treatment by society should be considered at sentencing.¹⁵¹

Finally, and most importantly, The Canadian Bar Association’s submission urged the Senate and House to adopt not only “policies and laws that recognize the historical, social and economic realities of aboriginal people,” but also “a judicial ‘safety valve’ to ensure justice in sentencing.”¹⁵² Throughout their lengthy submission, the Bar Association noted the importance of conditional sentences, judicial discretion, and

¹⁴⁹ Assembly of First Nations, *Submission: Bill C-10 Safe Streets and Communities Act* (Canada, 2011), 5.

¹⁵⁰ Assembly of First Nations, *Submission: Bill C-10 Safe Streets and Communities Act*, 10.

¹⁵¹ Assembly of First Nations, *Submission: Bill C-10 Safe Streets and Communities Act*, 13.

¹⁵² The Canadian Bar Association, *Submission on Bill C-10: Safe Streets and Communities Act*, (Ottawa, 2011), 2-3.

continued adherence to Section 718.2(e) of the *Criminal Code*. On multiple occasions they noted not only the importance of including a safety valve provision, but also the customary practice of including “some sort of ‘safety valve’ provision to avoid an unjust result”¹⁵³ where mandatory minimum sentences are being imposed. Ultimately, the Bar Association concluded that, “absent the inclusion of a safety valve provision, the CBA Section does not recommend that these proposals be enacted into law.”¹⁵⁴

After reviewing the contents of the submissions collected during stage one, it is clear that the House of Commons and the Senate were adequately informed of (a) the strong opposition to Bill C-10; (b) the negative impact that Bill C-10 could have on Indigenous persons; (c) the conflict between Bill C-10’s mandatory minimums and revocation of conditional sentences, and Section 718.2(e) of the *Criminal Code* and the *Gladue* factors; and (d) the possibility, and call for a safety valve to resolve some of the abovementioned conflicts, and potential injustices against the Indigenous population in particular.

Like stage one, stage two revealed a number of individual statements from both the House of Commons debates, and the Senate debates, pointing to the shortcomings of Bill C-10 for the Indigenous population, and the necessity of a safety valve provision to remedy the conflict between Bill C-10 and Section 718.2(e) of the *Criminal Code*. Since the entirety of both the House of Commons debates, and the Senate debates show a theme of amendments being presented and subsequently rejected without consideration, as well as members expressing their concerns regarding this phenomenon, I will focus on three

¹⁵³ The Canadian Bar Association, *Submission on Bill C-10: Safe Streets and Communities Act*, 19.

¹⁵⁴ The Canadian Bar Association, *Submission on Bill C-10: Safe Streets and Communities Act*, 24.

debates occurring after the Conservative Party won the election and the majority of seats in the House of Commons, including: the November 29, 2011 House of Commons Debates (following the Conservative Parties rise to power), The March 9, 2012 House of Commons Debates (immediately preceding the bill's passage into the Senate) , and the March 1, 2012 Debates of the Senate (shortly preceding the bill's final approval).

The November 29, 2011 House of Commons Debates are filled with comments regarding the committee's refusal to give sufficient weight to expert testimony, opposition submissions, and amendment proposals. Mr. Jack Harris of the New Democrat Party (NDP), while discussing the wide-spread dissatisfaction with the bill, and the unsuccessful attempts to amend the bill following expert testimony regarding mandatory minimums and judicial discretion, noted that “[n]ot a single amendment proposed by any opposition party was accepted in the clause-by-clause study of the bill.”¹⁵⁵ Similarly, Mr. Jack Harris “raise[s] the point that changes have to be made to the bill but are not being made.”¹⁵⁶ The NDP was not the only one unsuccessfully pushing for change; Ms. Elizabeth May of the Green Party (GP) put forth an amendment for a safety valve provision to combat the effects of Bill C-10’s mandatory minimum sentences, which was later struck down without consideration.¹⁵⁷ She further expressed her concern regarding certain Conservative Party members of the House of Commons’ treatment of their opposition members; in particular she referred to an occasion where a member, and former criminal defendant, was accused of being a “bad person” for having previously

¹⁵⁵ Canada, House of Commons Debates, 29 November 2011 (Mr. Jack Harris), 1100. <http://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-56/hansard>.

¹⁵⁶ Canada, House of Commons Debates, 29 November 2011 (Mr. Jack Harris), 1100.

¹⁵⁷ Canada, House of Commons Debates, 29 November 2011 (Ms. Elizabeth May), 1115.

represented criminal defendants.¹⁵⁸ Ms. Elizabeth May went on to remark that following witness testimony, “there were attempts to amend this legislation … [but] [t]hose amendments were not given adequate opportunity to be discussed.”¹⁵⁹

Just days before the House of Commons’ passed Bill C-10 forward to the Senate, the March 9th, 2012 House of Common’s Debate minutes show continued dissatisfaction from opposition members of the House. Mr. Jack Harris of the NDP again raised concerns about the consequences of Bill C-10 for the Indigenous population, and noted a “disconnect between what the government says when it calls it the safe streets and communities act and what the Canadian Bar Association of the Yukon says.”¹⁶⁰ Mr. Harris further exclaimed that “it is astonishing when a group like [the Canadian Association of Police Boards] … has something important to say about the consequences of what the government is doing, the government does not listen.”¹⁶¹ Noting the divide amongst the House, the Honorable Irwin Cotler, of the Liberal Party, made the following moving statement regarding the constitutionality of Bill C-10:

If … we adopt Bill C-10, we will be adopting legislation that lacks an evidentiary basis in its pertinent particulars, that is constitutionally suspect, thereby violating our obligations and inviting further charter challenges while the costs remain unknown, thereby breaching our responsibilities for the oversight of the public purse while also the burdening the provinces. If we adopt Bill C-10, we will increase prison overcrowding, also giving rise to charter concerns, while, again, not improving the safety of Canadians in any way.¹⁶²

¹⁵⁸ Canada, House of Commons Debates, 29 November 2011 (Ms. Elizabeth May), 1115.

¹⁵⁹ Canada, House of Commons Debates, 29 November 2011 (Ms. Elizabeth May), 1120.

¹⁶⁰ Canada, House of Commons Debates, 9 March 2012 (Mr. Jack Harris), 1005.
<http://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-93/hansard>.

¹⁶¹ Canada, House of Commons Debates, 9 March 2012 (Mr. Jack Harris), 1010.

¹⁶² Canada, House of Commons Debates, 9 March 2012 (Hon. Irwin Cotler), 1045.

Following his strong remarks regarding Bill C-10's constitutional shortcomings, the Honorable Irwin Cotler noted, in agreement with many other dissenters, that "today's debate would not have been necessary had the government simply read my amendments ... when I first proposed them."¹⁶³ He went on to claim that, "it is as arrogant as it is shocking that the government rejected opposition proposals out of pure partisanship rather than considering them on the merits."¹⁶⁴ In justifying his claims that the government was simply pushing opposition concerns under the rug, he noted that during a previous session where he had proposed amendments to the bill, the government responded with "why are you wasting our time when we want to get this bill passed?"¹⁶⁵ When discussion of Bill C-10 resumed the Honorable Irwin Cotler again took the floor, noting that the government had "pre-emptively dismissed the Quebec model ... and, equally, dismissed attempts ... to mitigate the damage through a series of proposed amendments, while not providing any evidence supporting its legislative scheme."¹⁶⁶ Furthermore, the Honorable Irwin Cotler made strong statements regarding "the abuse of process and abuse of Parliament ... [evidenced by] the government[s] reject[ion of] all amendments proposed by the opposition."¹⁶⁷ Expanding upon these claims, he went on to express frustration regarding the government's refusal to:

listen to opposition amendments ... [and] the manner in which debate was shut down in Parliament, in the legislative committee, in report stage, again this week, as well as the manner in which amendments were

¹⁶³ Canada, House of Commons Debates, 9 March 2012 (Hon. Irwin Cotler), 1045.

¹⁶⁴ Canada, House of Commons Debates, 9 March 2012 (Hon. Irwin Cotler), 1045.

¹⁶⁵ Canada, House of Commons Debates, 9 March 2012 (Hon. Irwin Cotler), 1045.

¹⁶⁶ Canada, House of Commons Debates, 9 March 2012 (Hon. Irwin Cotler), 1210.

¹⁶⁷ Canada, House of Commons Debates, 9 March 2012 (Hon. Irwin Cotler), 1215.

summarily rejected and those offering them were accused with the arrogant and offensive rejoinder that the opposition supports criminals and not victims.¹⁶⁸

Expanding upon fellow opposition members claims, Mr. Jasbir Sandhu of the NDP discussed the government's apparent inability to answer relevant questions, noting that "we know the facts do not really matter to the Conservatives."¹⁶⁹ As evidence, Mr. Sandhu pointed to various occasions where the House members were told, by the Conservatives to "ignore the facts."¹⁷⁰ In summary, Mr. Sandhu claimed "the Conservatives are ramming through a bill ... in which the experts warn that safety concerns have not been addressed."¹⁷¹

On March 1, 2012 frustration with the Conservative Party's tactics for pushing forward Bill C-10 continued. Honorable James S. Cowan, the Leader of the Opposition, while reflecting on the vast amounts of witness testimony, reports, and amendments heard by the committee, noted that "after less than an hour of debate on its findings ... the government had heard enough [whereby] Senator Carignan gave notice of this motion to limit further debate."¹⁷² During a discussion that followed, various senators expressed their discontent with the limited discussion time, leading Senator Cowan to further exclaim that "Senator Carignan is telling almost 80 of his colleagues that the government

¹⁶⁸ Canada, House of Commons Debates, 9 March 2012 (Hon. Irwin Cotler), 1215-20.

¹⁶⁹ Canada, House of Commons Debates, 9 March 2012 (Mr. Jasbir Sandu), 1255.

¹⁷⁰ Canada, House of Commons Debates, 9 March 2012 (Mr. Jasbir Sandu), 1255.

¹⁷¹ Canada, House of Commons Debates, 9 March 2012 (Mr. Jasbir Sandu), 1310.

¹⁷² Canada, The Senate Debates, 1 March 2012 (Honorable James S. Cowan), 1350. https://sencanada.ca/en/content/sen/chamber/411/debates/056db_2012-03-01-e.

has absolutely no interest in listening to what they have to say.”¹⁷³ Meanwhile, the Honorable Claudette Tardif, Deputy Leader of the Opposition, expressed her disappointment that “at the report stage of this bill we do not see a piece of legislation that reflects the evidence heard during the extensive hearings of the committee.”¹⁷⁴ Senator Tardif proceeded to present evidence of a multitude of evidence that had been “heard but not headed.”¹⁷⁵ She then went on to note that, “a disturbing pattern has emerged since this government received its coveted majority. We have seen instances ... time and again, of the government invoking procedural tactics to stymie debate on their legislation.”¹⁷⁶ Senator Day expressed similar concerns, mentioning that “what concerns me is that the government is seemingly unwilling to accept any advice from anyone outside of their inner circle. Even members of their own caucus are being ignored.”¹⁷⁷ In agreement, the Honorable Rose-Marie Losier-Cool stated that, “the government is pushing this legislation through using the slim majority it has obtained from merely one quarter of the Canadian population.”¹⁷⁸ In furtherance, the Honorable Dennis Dawson notes that “the system has now slowly been weakened by the present government [since] [n]owadays, committees are expected to blindly adopt legislation put forward to them by the government.”¹⁷⁹ In explaining the decline in standard of the committee process, Senator Dawson pointed to the general decline of amendments being made in both the

¹⁷³ Canada, The Senate Debates, 1 March 2012 (Honorable James S. Cowan), 1350.

¹⁷⁴ Canada, The Senate Debates, 1 March 2012 (Honorable Claudette Tardif), 1400.

¹⁷⁵ Canada, The Senate Debates, 1 March 2012 (Honorable Claudette Tardif), 1410.

¹⁷⁶ Canada, The Senate Debates, 1 March 2012 (Honorable Claudette Tardif), 1410.

¹⁷⁷ Canada, The Senate Debates, 1 March 2012 (Senator Day), 1430.

¹⁷⁸ Canada, The Senate Debates, 1 March 2012 (Hon. Rose-Marie Losier-Cool), 1440.

¹⁷⁹ Canada, The Senate Debates, 1 March 2012 (Hon. Dennis Dawson), 1500.

House and the Senate, noting that amendments are decreasing not because debate has decreased, but because the government is interfering with the legislative process and preemptively pushing bills forward.¹⁸⁰ Similar realizations and complaints from a number of Senators filled the remainder of the time allocated for discussion of Bill C-10.

These findings further support the hypothesis that the Conservative government pushed Bill C-10 forward, while ignoring requests for amendments and safety valve provisions, because as majority seat holders they had the power, and desire to do so. Taken together, the results from stage one and two demonstrate that the government had ample notice of the conflict between Section 718.2(e) of the *Criminal Code* and Bill C-10, and of the need to amend the bill to resolve the conflict, but chose to proceed anyways.

Proposed Solution: Amending Bill C-10 to Include a Safety Valve Provision

Examining Bill C-10 solely through an Indigenous lens, observing the interference with Indigenous rights and negative impact that the bill has had on the Indigenous population, it becomes easy to call for the dissolution of the entire bill. Looking at the bill from the larger Canadian societal perspective, however, reveals that there are some aspects of the bill that appear to have had a positive impact on the criminal justice system. Since the bill is composed of so many parts, some positive, and some, like mandatory minimum sentences without exemption, negative, a solution that allows the bill to remain, but introduces procedures to resolve and rectify the shortcomings seems most fitting. Based on both the proposals of House members, Senators, trial judges, and opposition groups, as well as the procedures of comparable

¹⁸⁰ Canada, The Senate Debates, 1 March 2012 (Hon. Dennis Dawson), 1500-10.

countries, I suggest Canada amend Bill C-10, or enact separate legislation relating to Bill C-10, to include a safety valve provision for the mandatory minimum sentences appearing throughout the bill, in order to resolve the conflict between the bill and Section 718.2(e) of the *Criminal Code*.

A safety valve allows judges to avoid sentencing certain offenders for the length of time required by the mandatory minimum, provided the offender meets the specific requirements. The safety valve criteria is set prior to the safety valve becoming law, meaning the government has a say in how expansive or narrow the safety valve provision will be. For instance, in the Canadian context the government could implement a safety valve provision that either, (a) encompasses only Indigenous offenders whom the court believes has right to be sentenced under Section 718.2(e) of the *Criminal Code*, or (b) more broadly encompasses any offenders who, in the courts opinion, would face undue hardship or infringement of their rights should the mandatory minimum sentence be imposed. Here it is important to note also that the availability of a safety valve does not mean that a judge necessarily must depart from the mandatory minimum sentence. Rather, in cases where an offender is sentenced, should the judge after considering the particular offender, case, and the safety valve provision, find the mandatory minimum to be appropriate, it is within their discretion to sentence offenders at that minimum. For instance, were Canada to implement a safety valve specifically for Indigenous offenders, the judge could, after considering the *Gladue* factors, nevertheless find the offender fully culpable and deserving, and as such, sentence the offender to either the mandatory minimum, or a lengthier sentence if applicable.

Comparing the Canadian criminal justice system structure to similarly structured countries such as The United States of America (USA), England, and Australia reveals that safety valves are not incompatible with the criminal justice or governmental systems at play. In fact, a review of nine countries – Scotland, England, Wales, Australia, New Zealand, Israel, Sweden, South Africa, and USA – mandatory minimum laws uncovers a customary practice of including exemptions/safety valves. Examining the laws in each of these countries revealed a variety of combination of mandatory minimums and safety valve provisions, as shown in Table 1 below, that may prove useful should the Canadian government proceed with the safety valve option presented above.¹⁸¹

Table 1. Exploration of Mandatory Minimum Safety Valves Globally

Country Name	Relevant Statute or Act	Mandatory Minimum	Safety Valve
Scotland	<i>Crime and Punishment (Scotland) Act.</i> 1997, c. 48.	Minimum of seven years for third applicable drug trafficking offence (s. 2(205B)(2)).	Section 2(205B)(3): “the court shall not impose the sentence ... where it is of the opinion that there are circumstances which – (a) relate to any of the offenses or the offender; and (b) would make the sentence unjust.” ¹⁸²
England & Wales	<i>The Powers of the Criminal Court Act.</i> 2000, c.6.	Minimum of seven years for drug trafficking offence (s. 110); and three year minimum for third burglary (s. 111)	Section 110(2) and 111(2): the court must impose the minimum unless “the court is of the opinion that there are particular circumstances which – (a) relate to the offender; and (b) make it unjust to do so in all the circumstances” ¹⁸³

¹⁸¹ Note: in collecting the data contained in Table 1, I briefly consulted the following article: Yvon Dandurand, Ruben Timmerman, and Tracee Mathison-Midgley. *Exemptions From Mandatory Minimum Penalties: Recent Developments in Selected Countries*. Department of Justice Canada [a reproduction of an official work published by the Government of Canada]. 2016.

¹⁸² *Crime and Punishment (Scotland Act)* 1997, 1997, c. 48, s. 2(205B)(3)(a)-(b).

¹⁸³ *The Powers of the Criminal Court Act*, 2000, c.6, s. 110(2) – 111(2).

Table 1 (continued).

England & Wales	<i>Firearms Act.</i> 1968, c.27	Five-year minimum for possession and distribution of prohibited firearms (s. 51A)	Section 287(2): “the court shall impose ... at least the required minimum term ... unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.” ¹⁸⁴ Section 291: “power ... to exclude application of minimum sentences to those under 18.” ¹⁸⁵
Australia (Northern Territories)	<i>Youth Justice Act.</i> No. 32 of 2005.	For sentences greater than twelve months, there is a mandatory non-parole period (s. 85(1)).	Section 85(1): “the court must fix a non-parole period unless the Court considers that the nature of the offence, the past history of the youth or the circumstances of the particular case make fixing such a period inappropriate.” ¹⁸⁶
Australia (Northern Territories)	<i>Sentencing Act.</i> 2018.	For sentences greater than twelve months a minimum 8 month non-parole period applies (s. 54); for sexual and drug offenders sentenced to 12+ months, the minimum non-parole period is “70% of the period of imprisonment that the offender is to serve” (s. 55). ¹⁸⁷	Section 54(3): the minimum non-parole period is not applicable “where the court ... considers the fixing of a non-parole period is inappropriate” ¹⁸⁸ Section 55(2): The minimum does not apply if “the court considers that the fixing of a non-parole period is inappropriate.” ¹⁸⁹ Section 53(1): Judges can deviate from the minimum if they consider “the nature of the offence, the past history of the offend rot

¹⁸⁴ United Kingdom. *Criminal Justice Act*, 2003, c. 44, s. 287(2).

¹⁸⁵ United Kingdom. *Criminal Justice Act*, 2003, c. 44, s. 291.

¹⁸⁶ Northern Territory of Australia. *Youth Justice Act*, No. 32 of 2005. s. 85(1).

¹⁸⁷ Northern Territory of Australia. *Sentencing Act*, 2018. s. 55.

¹⁸⁸ Northern Territory of Australia. *Sentencing Act*, 2018. s. 54(3).

¹⁸⁹ Northern Territory of Australia. *Sentencing Act*, 2018. s. 55(2).

			circumstances of the particular case make the fixing of such a period inappropriate.” ¹⁹⁰
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Table 1 (continued).

Australia (South)	<i>Criminal Law (Sentencing) Act.</i> 1988.	A variety of minimum sentences exist for serious repeat offenders (s. 20AB); serious firearm offences (s. 20AAC); serious drug, sexual or criminal organization offences (s. 20A(1); etc.	Section 23(3): If an offense is ‘trifling’ the court need not apply the mandatory minimum. Section 25: A court can sentence below the minimum based on “character, antecedents, age, or physical or mental condition, of the defendant; or the offence was trifling; or any other extenuating circumstances.” ¹⁹¹
Australia (Victoria)	<i>Crimes Amendment (Gross Violence Offense) Act.</i> 2013.	Four year minimum for gross violent offences (s. 15A).	Section 10A: Courts can depart from the minimum if they the offender is a juvenile, assisted the police or courts, is between 18-20 and is psycho-socially immature, has a mental illness, intellectual disorder, brain injury, autism, or neurological impairment. ¹⁹²
New Zealand	<i>Sentencing Act.</i> No. 9 of 2002	Minimum of five years when sentenced to preventative detention (s. 89); life imprisonment for murder (s. 102); 20 year minimum for stage 3 offences involving manslaughter (s. 86D(4)).	Section 102(1): Life sentences can be avoided if the court “given the circumstances of the offence and the offender [finds], a sentence of imprisonment for life would be manifestly unjust.” ¹⁹³ Section 86D(4): “unless the court considers that, given the circumstances of the offence and the offender, a minimum period of that duration would be manifestly unjust.” ¹⁹⁴

¹⁹⁰ Northern Territory of Australia. *Sentencing Act*, 2018. s. 53(1).

¹⁹¹ South Australia. *Sentencing Act*, 2017. s. 25.

¹⁹² See, *Sentencing Act*, No. 49 of 1991. (Vic). s.10A.

¹⁹³ New Zealand. *Sentencing Act*, No. 9 of 2002. s. 102(1).

¹⁹⁴ New Zealand. *Sentencing Act*, No. 9 of 2002. s. 86D(4).

Table 1 (continued).

Israel	Penal Law 5737-1977	A minimum sentence of one fourth the maximum penalty for persons convicted of section rape, indecent acts, or sex offences within the family (s. 355).	Section 355: the minimum applies “unless the court decide[s] – for special reasons that shall be recorded – to adjudge a lesser penalty.” ¹⁹⁵
Sweden	<i>Swedish Penal Code.</i> 1962.	Two year mandatory minimum for rape (ch. 6, s. 1); minimum of five years for gross rape (ch. 6, s. 1); ¹⁹⁶ two year minimum for rape of a child (s. 4) four years for ‘gross’ crimes; gross crimes against life and health have a minimum of one year (ch. 3, s. 6); minimum of four years for kidnapping a child (ch. 4, s. 1); a minimum of six months for gross crimes against the family (ch. 7, s. 4); etc.	Chapter 29, Section 5: Judges are able to impose lesser sentences if “any circumstances covered by the first paragraph exist,” ¹⁹⁷ including hardship due to the defendant’s age or health, or any circumstances dictating a lesser sentence.

¹⁹⁵ Israel. Penal Law 5737-1977. <https://www.icj.org/wp-content/uploads/2013/05/Israel-Penal-Law-5737-1977-eng.pdf>.

¹⁹⁶ For Chapter 6 please see the following October 5, 2018 memorandum amending the *Swedish Penal Code*. <https://www.government.se/4a95e7/contentassets/602a1b5a8d65426496402d99e19325d5/chapter-6-of-the-swedish-penal-code-unofficial-translation-20181005>.

¹⁹⁷ *Swedish Penal Code.* 1962. Ch. 29, s. 5. <https://www.regeringen.se/49bb67/contentassets/72026f30527d40189d74aca6690a35d0/the-swedish-penal-code>.

Table 1 (continued).

South Africa	The Criminal Law Amendment Act (No. 105 of 1997)	10 year minimum for first offender's sentenced for serious offences (s. 51(2)(b)(i)); 15 year minimum for second offenders sentenced for serious offences (s. 51(2)(b)(ii)); 20 year minimum for third offenders sentenced for serious offences (s. 51(2)(b)(iii)).	Section 51(3)(a): Courts can impose lesser sentences if they are “satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.” ¹⁹⁸
USA	<i>Controlled Drugs and Substances Act</i> (21 U.S.C. §801)	Mandatory minimum for a range of drug offences including: three year minimum for secondary offenders charged with manufacturing or distributing near schools (§860(b)); minimum of 1 year for distributing drugs to persons under twenty-one (§859); and a minimum of one year for using a minor during a drug operation (§861), etc.	18 USC §3553 (e): judges can depart from the minimum sentence “to reflect a defendant’s substantial assistance in the investigation or prosecution of another person” 18 USC §3553(f): safety valve provision provided if the defendant meets five criteria, which include: “(1) defendant does not have more than 1 criminal history point ... (2) the defendant did not use violence or credible threats of violence or possess a firearm or dangerous weapon, (3) offence did not result in death or serious bodily injury to any person; (4) the defendant was not the organizer, leader, manager or supervisor of others in the offense; (5) ... the defendant has truthfully provided to the Government all information and evidence the defendant has.” ¹⁹⁹

¹⁹⁸ Republic of South Africa. *Criminal law Amendment Act 1997*. Government Gazette (Dec. 1977), 24. http://www.saflii.org/za/legis/num_act/claa1997205.pdf.

¹⁹⁹ 18 U.S.C. §3553

Table 1 (continued).

USA (Montana)	Montana Code	Life sentences for homicide, aggravated kidnapping, rape, or sexual abuse of children (46-18-219); life sentences for anyone previously convicted of two of the following offences: mitigated deliberate homicide, aggravated assault, kidnapping, robbery, or aggravated promotion of prostitution (46-18-219).	46-18-222 (2)-(5): A safety valve for mandatory minimums exist if the judge determines that any of the 6 exceptions exist. ²⁰⁰
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Based on the availability, and success of the safety valves outlined above for mandatory minimum sentences in countries similar to Canada, it would appear that a safety valve provision is more than compatible with Canada's justice system. Likewise, it seems that a safety valve provision attached to Bill C-10's mandatory minimum sentences would be successful in resolving the current Indigenous rights discrepancy, since it would restore the judicial discretion necessary under Section 718.2(e) of the *Criminal Code*. Furthermore, based on recent acts of the majority Liberal Government headed by Prime Minister Trudeau – including the legalization of cannabis in 2018,²⁰¹ and

²⁰⁰ For a full description of the exceptions to mandatory minimum sentences under Montana Code § 46.18.222, see here: <https://leg.mt.gov/bills/mca/46/18/46-18-222.html>.

²⁰¹ Cannabis Act, SC 2018, c.16.

upcoming pardons for persons formerly convicted of cannabis possession –²⁰² the chance of success should opposition groups push for Bill C-10 safety valve legislation is high. Regardless of the recent liberal enactments, the fact that the Conservative Party, whose primary motivator in passing Bill C-10 was adherence to their tough-on-crime agenda schedule, no longer holds a majority in the House of Commons or the Senate, indicates that should an amendment, or safety valve legislation, be brought before the current House and Senate, it will at a minimum receive proper consideration. Notably, since the variety of safety valves being employed amongst the nine countries examined in Table 1 confirms that it is up to the country to shape their own specialized safety valves, it is likely that many Conservative party members of the House and Senate would vote favorably if a safety valve provision were introduced. The shift in Conservative party member votes would likely stem from their acknowledgement that, since they no longer hold a majority, they cannot forcefully squash proposed amendments. After acknowledging their more limited power position, they may come to view a safety valve provision favorably since such a provision would enable to maintain their tough-on-crime approach, while reducing the risk that a plethora of Indigenous *Charter* challenges, stemming from the conflict between the bills mandatory minimums and Section 718.2(e) of the *Criminal Code*, would result in the removal of the entire bill.

²⁰² Daniel LeBlanc, “Cannabis Pardons will Have to Wait Until Next Year,” *Globe and Mail*, Oct. 18, 2015. <https://www.theglobeandmail.com/cannabis/article-canadians-seeking-cannabis-pardons-will-have-to-wait-until-next-year/>.

Chapter V.

Recommendations for Future Study

Should the liberal Government of Canada refuse to enact legislation or amend Bill C-10 to include a safety valve provision for Indigenous offenders, I suggest further study be conducted on Canada's violation of international law's in relation to their treatment of the Canadian Indigenous population. Specifically, I would suggest examining Articles 2, 4, and 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), which was ratified by Canada on June 24, 1971; Articles 1-3 of the *Genocide Convention*, ratified by Canada on September 3, 1952; and generally, the *Universal Declaration of Human Rights*. It is likely Indigenous groups could bring forth, either legally or to the media, claims against the Canadian government for International violations of their rights, which may work to strong-arm the presumably resistant government into enacting reasonable legislation sought by the Indigenous population.

Appendix 1.

Definition of Terms

Safety Valve: A tool that provides an exception to mandatory minimum sentences; the valve works by allowing judges to sentence offenders below the mandatory minimum when specific conditions are met.

Residential Schools: Those federal Canadian schools run between 1892 and 1996 whose intended purpose was to ethnically cleanse Aboriginal children.

Bill C-10: The nine components of the federally enacted *Safe Streets and Communities Act of 2012*, with specific attention on the implementation of mandatory minimum sentences.

Section 718.2(e): A section of the Canadian Criminal code that instructs judges to give special attention to the circumstances of Aboriginal offenders, and when appropriate, give lenient sentences.

The Criminal Code: A Canadian document that codifies most criminal offences within Canada; its official title is “An Act Respecting the Criminal Law.”

The Charter: Refers to the “Canadian Charter of Rights and Freedoms,” which is Canada’s bill of rights ingrained in the country’s *Constitution Act of 1892*.

Resilience: Taken from the field of psychology, resilience in this case refers to the ability to return to baseline, or even flourish in the face of adversity.

Low Resilience: When adversity or trauma has lasted too long it prohibits the body from returning to baseline, and consequentially affects the way one handles stress and their decision-making capacities.

Status Indian vs. Non-Status Indian: Status Indian refers to those Indigenous groups who are officially recognized by the Canadian government while non-status Indian refers to those groups who are not yet officially recognized.

Reserves: Refers to pieces of land set aside under the Indian Act for exclusive use of an Indian band or tribal group; members of these groups are eligible to live on the lands, conduct business and form political structures there.

Protective Factors: Refers to those factors mentioned in resilience literature that lend to resilient outcomes (i.e. good neighborhood, high school education, non-alcoholic parents, etc.)

Transitional Justice: Measures implemented in reparation of human rights abuses; such measures can be of a judicial or non-judicial nature and generally include reparation programs and institutional reforms.

References

Works Cited

Alberta Regional Professional Learning Consortium, *Conversation Guide: History and Legacy of Residential Schools*

Assembly of First Nations. *Submission: Bill C-10 Safe Streets and Communities Act.* (Canada, 2011).

Barnett, Laura, Tanya Dupuis, Cynthia Kirkby, Robin MacKay, Julia Nicol, and Julie Bechard. "Legislative summary of Bill C-10: An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and Other Acts," *Library of Parliament*. Last Modified Feb. 17, 2012. https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/411C10E (Accessed Dec 1, 2018).

Bernas, Kirsten, Lynne Fernandez, John Hutton, and Shauna MacKinnon. "Bill C-10: The Truth About Consequences," *Canadian Centre for Policy Alternatives Manitoba Office* (2012): <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2012/03/Bill%20C-10%20The%20Truth%20About%20Consequences.pdf> (Accessed Sept. 25, 2018).

Bombay, Amy, Kimberly Matheson, and Hymie Anisman. "The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma," *Transcultural Psychiatry* 51, no. 3 (2014): 320-338.

Bonta, James. "The Recidivism of Federal Offenders," *Public Safety Canada*. (Ottawa: Solicitor General of Canada, July 2003) <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rbcd-fdffndr/rbcd-fdffndr-eng.pdf> (Accessed Sept. 26, 2018).

Brenda, Elias, Javier Mignone, Madelyn Hall, Say P. Hong, Lyna Hart, and Jitender Sareen. "Trauma and Suicide Behaviour Histories Among a Canadian Indigenous Population: An Empirical Exploration of the Potential Roles of Canada's Residential School." *Social Sciences & Medicine* 74 no. 10 (2012): 1560-1569.

Canada. House of Commons Debates, 29 November 2011.

<http://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-56/hansard>

Canada. House of Commons Debates, 9 March 2012. <http://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-93/hansard>.

Canada. Jane Stewart Minister of Indian Affairs and Northern Development. *Gathering Strength - Canada's Aboriginal Action Plan*. [Ottawa], 1998. <https://www.aadnc-aandc.gc.ca/eng/1100100015725/1100100015726>.

Canada. Prime Minister Stephen Harper. *Statement of Apology – to Former Students of Indian Residential Schools*. [Ottawa], 2008. <https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

Canada. The Senate Debates, 1 March 2012. https://sencanada.ca/en/content/sen/chamber/411/debates/056db_2012-03-01-e.

The Canadian Bar Association. *Submission on Bill C-10: Safe Streets and Communities Act*. Ottawa, 2011.

Carr, Tracey, Brian Chartier, and Tina Dagoftari. “‘I’m not Really Healed … I’m Just Bandaged up’: Perceptions of Healing Among Former Students of Indian Residential Schools.” *International Journal of Indigenous Health* 12, no. 1 (2017): 39-56.

Davin, Nicholas, *Report on Industrial Schools for Indians and Half Breeds* (Ottawa: Public Archives of Canada Library, 1879). <http://eco.canadiana.ca/view/oocihm.03651>.

Department of Justice Canada. *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System*. Dept. of Justice, Research and Statistics Division, 2017. http://publications.gc.ca/collections/collection_2018/jus/J4-46-2017-eng.pdf.

Dandurand, Yvon, Ruben Timmerman, and Tracee Mathison-Midgley. *Exemptions From Mandatory Minimum Penalties: Recent Developments in Selected Countries*. Department of Justice Canada [a reproduction of an official work published by the Government of Canada]. 2016.

Eshnet, Dan. “The Indian Act and the Indian Residential Schools.” In *Stolen Lives: The Indigenous Peoples of Canada and the Indian Residential Schools*. Facing History & Ourselves, 2015. E-book.

Henderson, William. *The Canadian Encyclopedia*, s.v. “Indian Act.” Last modified Nov. 13, 2017. <https://thecanadianencyclopedia.ca/en/article/Indian-act>.

JD Supra. “Smart is the New Tough: A Changing Approach in America’s War on Drug Crime?” *ACI Information Group* 2014: 1.

- Jones, Elaine. "The Failure of the 'Get Tough' Crime Policy (Symposium: Violent Crime Control and Law Enforcement Act of 1994)." *University of Dayton Law Review* 20, no. 2 (1995): 803-808.
- Macmillan, Ross. "Violence and the Life Course: The Consequences of Victimization for Personal and Social Development." *Annual Review of Sociology* 27 (2001): 1-22.
- Marcus, Joseph. "Sometimes Help Hurts: imagining a New Approach to Section 15(2)." *Appeal: Review of Current Law and Law Reform* 18 (2013): 121-138.
- Marshall, Tabitha. *The Canadian Encyclopedia*. "Indian Residential Schools Settlement Agreement." Online: 2013. <https://www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement> (last modified Sept. 29, 2016).
- National Archives of Canada, RG 10, vol. 6810, file 470-2-3, vol. 7, 55 (L-3) and 63 (N-3).
- Ontario Federation of Indian Friendship Centres. *Submission to the Standing Senate Committee on Legal and Constitutional Affairs in Response to Bill C-10, Safe Streets and Communities Act*. Ontario, 2012.
- Parrott, Zach. *The Canadian Encyclopedia*. "Government Apology to Former Students of Indian Residential Schools." Online: 2018. <https://www.thecanadianencyclopedia.ca/en/article/government-apology-to-former-students-of-indian-residential-schools>
- Pomerance, Renee. "The New Approach to Sentencing in Canada: Reflections of a Trial Judge." *Canadian Criminal Law Review* 17, no. 3 (2013): 205-326.
- RCMP Commissioner. "RCMP Apology." Royal Canadian Mounted Police. 2004. <http://www.rcmp-grc.gc.ca/aboriginal-autochtone/apo-reg-eng.htm>
- Reitano, Julie. "Adult Correctional Statistics in Canada, 2014/2015." Statistics Canada, *Juristat*, (Ottawa: Minister of Industry, March 22, 2016) <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2016001/article/14318-eng.pdf?st=q5WAOzMR>.
- Robinson, Amanda. *The Canadian Encyclopedia*, s.v. "Gradual Civilization Act." Last modified March 3, 2006. <https://thecanadianencyclopedia.ca/en/article/gradual-civilization-act> (accessed Sept. 26, 2018).
- Ross, Amélie, Jacinthe Dion, Michael Cantinotti, Delphine Collin-Vézina, and Linda Paquette. "Impact of Residential Schooling and of Child Abuse on Substance use Problem in Indigenous Peoples." *Addictive Behaviors* 51 (2015): 184-192.
- "Safety Valves." FAMM. Accessed March 9, 2017. <http://www.famm.org/projects/federal/us-congress/safety-valves/>.

Schoenfield, Heather. "The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States." *Journal of Gender, Race and Justice* 15, no. 2 (2012): 315-352.

Sewrattan, Christopher. "Apples, Oranges, and Steel: The Effects of Mandatory Minimum Sentences for Drug Offenses on the Equality Rights of Aboriginal Peoples." *University of British Columbia Law Review* 46, no. 1 (2013): 120-153.

Truth and Reconciliation Commission of Canada. *The Survivors Speak: a Report of the Truth and Reconciliation Commission of Canada*. Library and Archives Canada Cataloguing in Publication, 2015.

Truth and Reconciliation Commission of Canada. *What We Have Learned: Principles of Truth and Reconciliation*. Library and Archives Canada Cataloguing in Publication, 2015.

USSC. "Overview of Statutory Mandatory Minimum Sentencing." U.S. Sentencing Commission (2008): 1-12.

Union of Ontario Indians, *An Overview of the Indian Residential School System*. Ontario: Creative Impressions, 2013.

Wolfe, David, Karen J. Francis, and Anna-Lee Straatman. "Child Abuse in Religiously-Affiliated Institutions: Long-Term Impacts on men's Mental Health," *Child Abuse & Neglect: The International Journal* 30, no. 2 (2006): 205-212.

Women's Legal Education and Action Fund, and West Coast Leaf. *Submission on Bill C-10: The Safe Streets and Communities Act*. Canada, 2012.

Young, Bryanne. "'Killing the Indian in the Child': Death, Cruelty, and Subject-Formation in the Canadian Indian Residential School System." *Mosaic* 48, no. 4 (2015): 63-76.

Statutes and Cases Cited

Canada

An Act to Encourage the Gradual Civilization of the Indian Tribes in This Province and to Amend the Laws Respecting Indians. 20 Victoria, c. 26, Assented to 10th June, 1857.

Bill C-10: Safe Streets and Communities Act. 1st Session, 41st Parliament, 60-61 Elizabeth II, 2011-2012.

Cannabis Act. SC 2018, c.16.

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Canadian Criminal Code. R.S., c. C-34, s. 1.

Canadian Criminal Code Part XXII, R.S., C. 46.

Controlled Drugs and Substances Act. S.C. 1996, c. 19.

R. v. Gladue, [1991] 1 SCR 688.

R v. Ipeelee, 2012 SCC 13, [2012] 1 SCR 433.

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

The Indian Act, R.S., 1985, c. I-6, s. 1.

United States

18 U.S.C. §3553

21 U.S.C. §801

Montana Code § 46.18.222

International

Crime and Punishment (Scotland Act). 1997, c. 48.

Israel. Penal Law 5737-1977. <https://www.icj.org/wp-content/uploads/2013/05/Israel-Penal-Law-5737-1977-eng.pdf>.

New Zealand. Sentencing Act. No. 9 of 2002.

Northern Territory of Australia. Sentencing Act. 2018.

Northern Territory of Australia. Youth Justice Act. No. 32 of 2005.

Republic of South Africa. *Criminal law Amendment Act 1997*. Government Gazette (Dec. 1977). http://www.saflii.org/za/legis/num_act/claa1997205.pdf.

Sentencing Act. No. 49 of 1991. (Vic).

Swedish Penal Code. 1962.

The Powers of the Criminal Court Act. 2000, c.6.

United Kingdom. Criminal Justice Act. 2003, c. 44.

Treaties Cited

UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: <https://www.refworld.org/docid/3ae6b3ac0.html>.

UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <https://www.refworld.org/docid/3ae6b3940.html>.

Universal Declaration of Human Rights. *JAMA* 280 no. 5 (1998).