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Political Affairs

# Abolishing Mandatory Minimum Sentencing as a Beneficial Reconciliation Measure

November 25, 2023

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Canadian incarceration is an often ignored public policy issue, especially in electoral politics. Canadian prisons are outdated, harsh, and ineffective. Indigenous people are overrepresented in Canadian prisons to an extreme extent. The Canadian justice system is structured in a way that does not work to rehabilitate offenders, and it is even more ineffective when applied to Indigenous offenders. Canadian law has been forced onto nations which should legally be sovereign and has been used as a tool of settler colonialism to attack Indigenous people and nations. Mass incarceration and state violence have weakened and destabilized Indigenous communities and enabled further expansion of the colonial state.

The harsh conditions in prison should end, and the people who must be separated from society for their own safety and the safety of others should be in a much more learning-conducive environment. However, even this is a liberal colonial understanding of justice that should not be forced onto Indigenous nations. Indigenous nations should have sovereignty returned to them, including the right to enforce the rule of law for their own citizens. These, however, are very long-term

goals. In the meantime, action should be taken to reduce incarceration and find more productive applications of justice for Indigenous offenders. A major step that can be fully taken is abolishing mandatory minimum sentencing.

The Canadian justice system does not share the values and traditions of Indigenous nations. University of Ottawa professor Cyndy Wylde has said that incarceration fundamentally does not work from an Indigenous perspective. Indigenous perspectives usually focus more on restorative justice and restitution, rather than punishment. Whereas European justice sees crime as an offence against the sovereign, Indigenous thought tends to see crime as an issue to be resolved interpersonally.

Since Stephen Harper was elected on a tough-on-crime platform in 2006 the number of offences carrying mandatory minimum sentences has risen. Mandatory minimum sentences remove discretion from judges to tailor sentences to offenders, by mandating that sentences for specific crimes must carry a minimum punishment, generally in the form of years in prison. Mandatory minimums are meant to dissuade people

from committing crimes by ensuring criminals know they will serve a painful sentence if they are convicted. Harper added many new mandatory minimum requirements to the *Criminal Code*, and by the end of his time as Prime Minister, there were 51 offences that carried mandatory minimums (Grant, 2018).

In 2022 the Trudeau Government passed legislation which eliminated 14 mandatory minimums from the *Criminal Code*, and all six from the Controlled Drugs and Substances Act. These changes mainly targeted mandatory minimums for drug and firearm offences. The legislation was tabled as a response to over-incarceration of Black Canadians and Indigenous peoples. The effect of this reform is yet to be seen but given that offences for which Indigenous peoples are disproportionately incarcerated were addressed, it could have some positive effects. Senator Kim Pate welcomed these reforms but did not think they went far enough (Lilley, 2022). The whole concept of mandatory minimums should be abolished, not just for specific offences.

There are a variety of reasons that Indigenous people are more likely to be incarcerated than anyone else in Canada. It has been argued that Canadians are too quick to blame over-incarceration on cultural differences. This is a way of shifting responsibility away from violent colonialism and onto individuals (Murdocca, 2009). The intergenerational trauma of residential schools, displacement of lands, and suppression of traditions are likely to blame for increased Indigenous encounters with police and the justice system. There is also

the problem of the over-policing of Indigenous peoples. Police bias and systemic racism make Indigenous people much more likely to be arrested if they are committing crimes. When Indigenous people are going through the justice system, they face additional barriers. Harsh tools such as being placed in segregation, being classified as high security, and using force are much more likely to be applied to Indigenous incarcerated people than settler prisoners (Chartrand, 2018, p. 69).

Indigenous incarceration increased markedly in the 1960s, as previously it was not thought by the colonial state that incarceration was a useful tool to apply to Indigenous people (Chartrand, 2018, p. 77). Prisons came to supplant residential schools as the main tool of colonial violence and control (Chartrand, 2018, p. 77). Indigenous women in particular are very likely to be targeted by the Canadian justice system. This goes back to colonial control of women's bodies as a tool of occupation. It also relates to the precarity that colonialism forces Indigenous women into, as they are more likely to be subjected to interpersonal violence (Monchalin, 2020).

The Truth and Reconciliation Commission was a landmark event in Canada-Indigenous relations. The calls to action of the commission have the potential to seriously and tangibly improve the lives of Indigenous people. Unfortunately, very few of the calls to action have been implemented, and the ones implemented have largely been symbolic and easy-to-accomplish reforms. The 32nd call to action is "We call upon the federal government to amend the *Criminal*

*Code* to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences” (Helwig, 2015). While this technically is not calling for the abolition of mandatory minimums, it amounts to the same thing. If mandatory minimums are not mandatory, then they are not mandatory minimums after all. This is an incredibly important reform to accomplish. It could be non-controversial for the government to pursue, as it involves the pursuit of justice without requiring additional federal spending. Alternately it could be controversial as the Canadian public generally prefers the allure of safety that tough-on-crime colonial policies provide. For example, it would be easy for Conservatives to argue that whoever abolished mandatory minimums wanted murderers out on the streets. It is however fundamentally unjust to constrain defendants to a universal penalty when our justice system is supposed to consider the circumstances of the offender. This is even more egregious when applied to Indigenous offenders. Indigenous offenders should be able to have their cultural background and history considered when sentencing. If a sentence is decided without any ability for the judge to make it less harsh, then Gladue’s principle cannot be applied. Kim Pate has detailed instances of Indigenous women receiving mandatory minimum life sentences for murdering their abusers and rapists (Lilley, 2022). Decolonization of Canada’s justice system would necessarily involve either abolishing mandatory minimum penalties or at the very least not applying them to Indigenous offenders.

Debate on the Truth and Reconciliations Proposal in the House of Commons has revealed the positions of the different parties. Matthew Green the NDP MP for Hamilton Centre has called on the government to stop taking a gradual approach to justice and instead abolish mandatory minimums. He supports this by listing various settler justice organizations which support this reform, as well as by referencing the TRC recommendation (Hansard). Andréanne Larouche, the Shefford MP, of the Bloc Québécois, has stated in the House that her party’s policy on mandatory minimums is in line with the TRC’s recommendations (Hansard). Despite this, her colleague Rhéal Fortin has said that the Bloc Québécois opposes removing mandatory minimums for firearms offences (Hansard). This is an example of settler politicians saying they support a TRC call to action while opposing the actual measures being proposed by the TRC. Compromising to conform to public opinion is an essential part of Canadian politics, but it is difficult to excuse when it involves going against TRC recommendations. As a settler working in politics in a colonial state, I must consider my positionality regarding decolonization. It is easy for me to write this essay in opposition to mandatory minimum sentences. It would be somewhat harder for me to push for a politician I am working for to support this measure.

At various points in Canadian history, policy decisions have been intended to target Indigenous nations and harm their people. Obvious examples include the distribution of smallpox blankets, bounties for the murder of Indigenous people, residential schools,

and the disenfranchisement of the Indian Act. In modern times it is less socially acceptable for governments to openly target Indigenous nations, so it is done slightly more subtly. Policies which disproportionately affect Indigenous people can be portrayed as universally applied. An analogy to this approach is how Bill 21 in Quebec doesn't specifically target Muslim women but rather bans *everyone* from wearing visible religious symbols. This is an example of how a universalist approach can be used to excuse discrimination. A famous quote on this subject is by Anatole Francis. It says, "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The use of mandatory minimum penalties can be seen as this form of targeted attack under the pretence of universal application. Mandatory minimums are presented as universally applied parts of the *Criminal Code* because they are applied to everyone who is guilty of the crime in question. This universalism ignores that Indigenous people are more likely to be placed in a situation where they are forced to commit crimes, are more likely to be arrested and charged for the crime if they commit it and are more likely to be found guilty by a colonial jury. The supposed universalism of mandatory minimums conceals the fact that they are disproportionately applied to Indigenous people, and that they are a tool of colonial control. Paul Martin, the former Prime Minister of Canada has outright said that mandatory minimum policies were meant to target Indigenous peoples (Thompson, 2016). This could be seen as a biased

statement because most mandatory minimum sentences were brought in by Stephen Harper, who contested two elections against Martin. I consider Martin's statement to be true however, as western politics often centers Indigenous criminality and white retribution as political issues. Harper's support was very strong in the prairie provinces, where Indigenous incarceration rates are the highest (Justice Canada, 2020), and white people often claim to feel unsafe due to Indigenous criminality.

Indigenous people under Gladue's principle should expect to have their cultural background considered during sentencing. This can mean that sentencing is decided by a sentencing circle instead of by a judge. These sentencing circles usually involve the defendant sharing more of their experience, rather than remaining silent. This allows elders and other members of the community in the sentencing circle to decide what course of action would best help rehabilitate the offender or atone for their actions. Indigenous notions of justice are more restorative so these sentencing circles may decide to compel the offender to do something that compensates for their actions, rather than punish them. The offence in western notions of justice is seen as being against the state, while Indigenous nations see crimes as more interpersonal. An example shared by Professor Cyndy Wylde was a man who broke his neighbours' drums and was compelled to take the time to help them fix their drums. This allowed for a healing, learning, and forgiveness process that incarceration, or even western community service, could not provide.

Alternative forms of sentencing for Indigenous people are just one aspect of Gladue's principle. A judge who considers the impact of colonialism and systemic racism may also decide to simply give the offender a shorter sentence in a Canadian prison. This is because intent is essential when deciding the sentence in the Canadian justice system. If the offender has been driven to commit crime by their circumstances, then their level of guilt is different. Gladue reports have been in place for over 20 years, during which time they should have allowed the Canadian justice system to be less harmful toward Indigenous people. Unfortunately, this has not happened. Indigenous incarceration rates have continued to rise since the Gladue case. One reason that Gladue's principle has not been effective is that judges are constrained in their ability to apply it. Even if a judge understands the need for restorative justice, if the defendant has been found guilty of a crime that carries a mandatory minimum sentence, the judge is unable to prescribe a more decolonial sentence. Instead, they must generally give the defendant a minimum number of years in a Canadian prison. Indigenous people are disproportionately charged with crimes that carry a mandatory minimum sentence. Because of this, the Gladue section of the *Criminal Code* has not had a serious impact, as in the years following Gladue many new mandatory minimums were added to the *Criminal Code*.

Gladue's principle has many flaws, the most obvious one being that the decision about how to apply the principle still lies with a judge in the Canadian justice system, who is

likely to be a settler. Another problem is that in order for the principle to be applied, a Gladue report on the background of the defendant must be prepared. Canada has a severe shortage of Gladue report writers, which means that many Indigenous defendants do not have one of these reports and cannot receive a sentence that takes into account their circumstances (Minifie, 2017). Gladue's principle should have signified a shift away from the harmful colonial treatment which Gladue herself received. The Canadian justice system should be changed to allow a more consistent and systemic application of Indigenous sovereignty and justice. This, however, is a long-term project. In the meantime, Gladue's principle, were it properly adhered to would be a good start. By eliminating mandatory minimum sentences many more Indigenous defendants could be referred to culturally sensitive restorative justice.

Some would say that the preservation of order is dependent on strong deterrents like mandatory minimums. However, this assumes that European notions of justice are more effective than Indigenous ones. Perhaps the idea of disappointing or hurting the community can be as strong a deterrent as the fear of a harsh period of incarceration. We must also ask if the current system is actually making anyone safer. Time in prison is not particularly productive in Canada, and arguably actually promotes the worst instincts in a person rather than any real process of education. Mandatory incarceration results in more people having spent time in prison, in an oppressive environment surrounded by dangerous and

abusive people. In many cases, Indigenous restorative justice processes result in a safer society, as values of community and self-improvement are instilled into offenders.

Abolishing mandatory minimums should be the first step taken in decolonizing the justice system. This would enable judges to make sentences that are tailored to offenders and incorporate Gladue factors into deciding the sentence. Eliminating the inherent rigidity of a mandatory sentence

would also allow for more Indigenous offenders to be referred to their own nation's justice system. This could be a pathway toward true sovereignty in the realm of justice for Indigenous nations. Mandatory minimums have served as a brutal tool of colonial oppression over the last few decades. Their impact is anything but equal. A true reconciliation effort would involve accepting the 32nd recommendation of the Truth and Reconciliation Commission and allowing more flexible sentencing.

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