Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration

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I. INTRODUCTION

Aboriginal over-representation is one of the most documented trends in the Canadian criminal justice system. There have been a number of reports,[1] studies,[2] commentaries[3] and commissions[4] that have focused on the difficulties facing Aboriginal peoples in Canadian society and subsequently in the Canadian criminal justice system.

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1 See Solicitor General Canada, *Task Force on Aboriginal Peoples in Federal Corrections. Final Report.*, (Ottawa: Minister of Supply and Services, 1988); Public Safety Canada, *CCRA 5 Year Review: Aboriginal Offenders* (Ottawa: Minister of Supply and Service, 1998); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995).

2 See P. M. Bienvenue & H. A. Latif, "Arrests, dispositions, and recidivism: A comparison of Indians and Whites" (1974) 16 Canadian Journal of Criminology and Corrections 105; John Hagan, "Criminal Justice and Native People: A Study of Incarceration in a Canadian Province" (1974) Canadian Review of Sociology and Anthropology 220; Douglas A. Schmeiser, *The Native Offender and the Law* (Ottawa: Law Reform Commission, 1974); E. D. Boldt *et al*, "Pre-sentence Reports and the Incarceration of Natives" (1983) Canadian Journal of Criminology 269.

3 See J. C. Hathaway, "Native Canadians and the Criminal Justice System: A Critical Examination of the Native Court-Worker Program" (1985) 49 Sask. L. Rev. 201; Michael Jackson, "Locking Up Natives in Canada" (1989) 23 U.B.C. L. Rev. 215; C. La Prairie, "The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions" (1990) 32 Canadian Journal of Criminology 429; Rupert Ross, "Leaving our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 C.N.L.R. 1; Rupert Ross, *Dancing With a Ghost* (Markham: Octopus Publishing, 1992); Susan Zimmerman "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System" (1992) U.B.C. L. Rev. 367; Patricia Monture-Okanee & Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 U.B.C. L. Rev. 239; S.G. Coughlan, "Separate Aboriginal Justice Systems: Some Whats and Whys" (1993) 42 U.N.B. L.J. 259; Rupert Ross, "Restorative Justice: Exploring the Aboriginal Paradigm" (1995) 59 Sask. L. Rev. 431; Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (London: Penguin Books, 1996); Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Sask. L. Rev. 153; Larry Chartrand "Aboriginal Peoples and Mandatory Sentencing" (2001) 39 Osgoode Hall L.J. 449; Julian Roberts & Ronald Melchers, "Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003) Canadian Journal of Criminology and Criminal Justice 211.

4 See A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry*: *The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Government of Manitoba, 1991); Jim Harding, Y. Kly & D. Macdonald, *Overcoming Systemic Discrimination Against Aboriginal People in Saskatchewan: Brief to the Indian Justice Review Committee and the Métis Justice Review Committee* (Regina: Prairie Justice Research, 1992); Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996); Saskatchewan, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Saskatchewan Department of Justice, 2004).

The documented materials developed over the years have all unanimously concluded that Aboriginal peoples are over-represented in the Canadian criminal justice system, and experts have subsequently concluded that something must be done to respond to this situation.

The first response to the over-representation of Aboriginal peoples in the criminal justice system came in 1996. The reforms to the *Criminal Code*[5] of that year helped create a set of guidelines for the sentencing of all offenders in the Canadian criminal justice system, with some of the provisions specifically concerned with the over-representation of Aboriginal peoples. The over-representation of Aboriginal peoples was addressed primary through section 718.2(e) of the *Criminal Code* which currently reads:

A court that imposes a sentence shall also take into consideration the following principles:

....

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

In 1999, the *Gladue*[6] case, followed one year later by the *Wells*[7] decision, laid down the principles applicable for the sentencing of Aboriginal offenders in conjunction with section 718.2(e). While the application of the *Gladue* case appeared to establish the principles through which sentencing judges could apply section 718.2(e), consistent application of the *Gladue* case and section 718.2(e) has yet to occur.

In this paper I will briefly outline Aboriginal over-representation and the purpose of section 718.2(e) of the *Criminal Code*. I will then outline the *Gladue* principles, followed by a critical assessment of some recent decisions primarily from Canadian appellant courts as they endeavour to apply *Gladue* and section 718.2(e). The recent reported cases examined in this paper address the following issues: the need for "Gladue Reports," the type of proceedings which will require a *Gladue* analysis, to whom section 718.2(e) should apply, what factors should be considered when assessing the "circumstances" of Aboriginal offenders, issues surrounding the effect of deterrence and denunciation, and lastly, claims for restorative justice. The examination of these issues has led to some salient thinking regarding the application of section 718.2(e), but the issues surrounding Aboriginal offenders are still far from being resolved.

II. ABORIGINAL OVER-REPRESENTATION IN CANADA AND THE 718.2(E) RESPONSE

Over-representation of Aboriginal peoples in the Canadian criminal justice system is an indisputable fact. Over-representation has been argued by academics, outlined in statistics, and debated and recognized among Aboriginal peoples themselves.[8] The over-representation of Aboriginal offenders in Canada first became noticeable in Canada's post-World War II society.[9] It is largely attributable to cultural differences between Aboriginal and non-Aboriginal peoples,[10] the dislocation experienced by Aboriginal offenders who are adoptees,[11] poverty within Aboriginal communities, [12] the effect of residential schools on survivors and subsequent generations of survivors of residential

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5 *Criminal Code*, R.S.C. 1985, c. C-46

6 *R. v. Gladue*, [1999] 1 S.C.R. 688, 171 D.L.R. (4th) 385 [*Gladue*].

7 *R. v. Wells*, [2000] 1 S.C.R. 207, 182 D.L.R. (4th) 257 [*Wells*].

8 See generally, B. Morse & L. Lock. *Native Offenders' Perception of the Criminal Justice System* (Ottawa: Department of Justice, 1988).

9 A.C. Hamilton & C.M. Sinclair, *supra* note 4 at 101.

10 See Rupert Ross, "Duelling Paradigms?: Western Criminal Justice Versus Aboriginal Community Healing" in Richard Gosse, James Henderson & Roger Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publications, 1994). See also Ross, *Dancing with a Ghost*, *supra* note 3.

11 Shelley Trevethan *et al.*, "The Effect of Family Disruption on Aboriginal and non-Aboriginal Inmates" (Ottawa: Correctional Services of Canada, 2001), online at <http://www.cscscc.gc.ca/text/rsrch/reports/r113/r113_e.pdf> at 2.

12 Tim Quigley, "Some Issues in Sentencing Aboriginal Offenders", in Richard Gosse, James Henderson & Roger Carter, eds., *Continuing Poundmaker and Riel's Quest* (Purich Publications, Saskatoon, 1994) at 272. See also Robert Stenning & Julian Roberts, "Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask. L. Rev. 137 at 137.

schools, the over-policing of Aboriginal peoples,[13] substance abuse,[14] and considerable social dysfunction due to colonialism, discrimination and racism.

As mentioned, statistically, Aboriginal peoples are overrepresented in the Canadian criminal justice system.[15] Recent statistics indicate that "Aboriginal people make up 3% of Canada's population, but about 20% of the prison inmate population".[16] In Saskatchewan, of the approximately 25,000 adults who were under correctional supervision in from 1999 to 2004, 57% were Aboriginal people, despite the fact that Aboriginal people made up only 10% of Saskatchewan's adult population during this period.[17] Furthermore, "[58%] of the Saskatchewan Aboriginal offenders released during the 1999-2000 fiscal year were re-admitted less than four years later – double the recidivism percentage of non-Aboriginal offenders."[18]

Even a brief statistical overview of Aboriginal over-representation paints a dim view of the present and future existence of Aboriginal peoples in Canadian society. The criminal justice system and society as a whole have an obligation to ensure that the over-representation of Aboriginal peoples in the criminal justice system is addressed and alleviated.

While the creation of section 718.2(e) has led to a hot debate in the media and in Parliament, there are still questions about its application. In 1999, the Supreme Court of Canada in *Gladue* laid down the principles for interpreting section 718.2(e). Now eight years after the decision, the accuracy and consistency of this sentencing provision, and the application of the *Gladue* decision, still leave much to be desired. Justice Harry LaForme of the Ontario Court of Appeal has argued that in spite of the recent *Criminal Code* reforms passed in 1996 – such as those referenced in *Gladue* – nothing appears to be changing. Indeed, "some could legitimately argue it is getting worse".[19] LaForme notes that since 1996 there has been an increase rather than a decrease in the volume of Aboriginal admissions into police custody. LaForme also observes that while the *Criminal Code* revisions of 1996 resulted in a 22% decline in non-Aboriginal admissions to custody, there has been a 3% increase for Aboriginal offenders.[20] Given these facts, has section 718.2(e) served its purpose?

III. Bill C-41 and 718.2(e) – a Brief Background

Bill C-41 received Royal Assent on July 13th, 1995 and was proclaimed into force in September of 1996 - thus creating section 718.2(e) of the *Criminal Code*. This section indicated that all sanctions other than imprisonment should be considered in the sentencing of offenders. At the same time, Parliament also asked that "particular attention to the circumstances of aboriginal offenders" be focused on by sentencing judges.

The purpose of creating a section specifically dealing with Aboriginal offenders reflects the assumption that over-representation of Aboriginal offenders is partly a product of inappropriate sentencing. Furthermore, it indicates that a modification of sentencing practices may alleviate the problem of over-representation - at least to some extent.[21] The Manitoba Justice Inquiry clearly had this in mind when it recommended that the "Manitoba Court of Appeal

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[13] Quigley, *supra* note 13 at 273; Erica Pasmeny, "Aboriginal Offenders: Victims of Policing and Society" (1992) 56 Sask. L. Rev. 403; Jim Harding, "Policing and Aboriginal Justice" (1991) 33 Canadian Journal of Criminology 363; Curt Taylor Griffiths & J. Colin Yerbury, "Natives and Criminal Justice Policy: The Case of Native Policing" (1984) 26 Canadian Journal of Criminology 147.

[14] Quigley, *supra* note 13 at 273.

[15] For a discussion of the possible problems with collecting data on the over-representation of Aboriginal peoples, see Statistics Canada, "Collecting Data on Aboriginal People in the Criminal Justice System: Methods and Challenges" (Ottawa: Canadian Centre for Justice Statistics, May 2005) online at <http://dsp-psd.tpsgc.gc.ca/Collection/Statcan/85-564-X/85-564-XIE2005001.pdf>.

[16] Statistics Canada, "Aboriginal people over-represented in Saskatchewan's prisons" online at <http://www41.statcan.ca/2693/ceb2693_002_e.htm>.

[17] *Ibid*.

[18] *Ibid*.

[19] Harry S. LaForme, "The Justice System in Canada: Does it Work for Aboriginal People?" (Fall 2005) 4 Indigenous Law Journal 1 at 15.

[20] *Ibid.* at 15. See also Roberts & Melchers, *supra* note 3.

[21] Stenning & Roberts, *supra* note 13 at 142. See also La Prairie, *supra* note 3; *Wells*, *supra* note 7 at para. 47; and *R. v. Carriere* (2002), 164 C.C.C. (3d) 569, 158 O.A.C. 36 (C.A.) at para. 17.

encourage more creativity in sentencing by trial court judges so that the use of incarceration is diminished and the use of sentencing alternatives is increased, particularly for Aboriginal peoples".[22] This creativity has not occurred in all circumstances, due in part to a lack of resources and a failure on the part of Crown and defence counsel in bringing the issues and circumstances of specific Aboriginal offenders before the courts.

The ultimate result of the recognition of Aboriginal over-representation in Canada, at least for the time being, is section 718.2(e). The application of this section has primarily been left up to the Canadian courts and was outlined by two major Supreme Court decisions, *Gladue* and *Wells*.

IV. THE *GLADUE* AND *WELLS* PRINCIPLES

The *Gladue* decision offered the Supreme Court of Canada its first opportunity to interpret and apply the then four year old section, 718.2(e). In that case, the 19-year-old accused, an Aboriginal woman, pled guilty to manslaughter for killing her common law husband. On the night of the offence, after an argument with the victim, the accused stabbed him in the chest twice. At trial, no section 718.2(e) analysis took place since the accused was an urban-Aboriginal person and was therefore considered not "within the aboriginal community". As a result, Gladue was sentenced to three years in prison.

In *Wells*, the Aboriginal accused was convicted of sexual assault after assaulting a young woman in her bedroom while she was asleep or unconscious. The sentencing judge accounted for the accused's Aboriginal ancestry, but held that the necessary elements of deterrence and denunciation would be lacking if the accused was permitted to serve a conditional sentence in the community. On appeal, the Supreme Court of Canada upheld the sentencing judge's decision.

The decisions in *Gladue* and *Wells* provided sentencing judges in Canada guidance in applying section 718.2(e). While I do not intend to outline all the applicable principles from these two decisions, it is useful to assess some primary points that were discussed in each decision.

In *Gladue*, the Court overtly paid homage to the finding of some public inquiries that racism and systemic discrimination are a reality for Aboriginal offenders, and concluded that "widespread racism has translated into systemic discrimination in the criminal justice system".[23] The Court instructed sentencing judges to consider other systemic issues faced by Aboriginal offenders, including "poor social and economic conditions" and a "legacy of dislocation" faced by Aboriginal peoples.[24] While these factors are by no means exclusive to Aboriginal peoples,[25] they are, all too often, descriptive of Aboriginal peoples' existence. When imposing a sentence on an Aboriginal offender, the Court in *Wells* also indicated that judicial notice should be taken of the "systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system, and throughout society at large".[26]

In *Gladue* the Supreme Court also established that Aboriginal offenders should, in certain cases, be treated differently from other offenders. The Court stated that section 718.2(e):

[C]onsists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.[27]

While the Supreme Court in *Gladue* called for different treatment, the Supreme Court in *Wells* clarified this position by indicating that different treatment does not necessarily mean a different result. The Court stated:

> Let me emphasize that s. 718.2(e) requires a different methodology for assessing a fit sentence for an aboriginal offender; it does not mandate, necessarily, a different result. Section 718.2(e) does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. Furthermore, in *Gladue*, as mentioned the Court stressed that the application of s. 718.2(e) does not mean that aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principle of restorative justice and less weight to the goals such as deterrence, denunciation, and separation. As a result, it will generally be the case,

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22 Hamilton & Sinclair, *supra* note 4 at 405.

23 *Gladue, supra* note 6 at para. 61.

24 *Ibid.* at para. 68.

25 See generally Dale E. Ives, "Inequality, Crime and Sentencing: Borde, Hamilton and the Relevance of Social Disadvantage in Canadian Sentencing Law" (2004) 30 Queen's L.J. 114; *R. v. Borde* (2003), 172 C.C.C. (3d) 225, 8 C.R. (6th) 203 (ON C.A.); *R. v. Hamilton* (2003), 172 C.C.C. (3d) 114, 8 C.R. (6th) 215 (ON S.C.J.).

26 *Wells, supra* note 7 at para. 53.

27 *Gladue, supra* note 6 at para. 33.

> as a practical matter, that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders.[28]

In addition to outlining the need for a different approach to sentencing, the Supreme Court also indicated that section 718.2(e) was created to address the problem of over-incarcerating Aboriginal offenders:

> [Section] 718.2(e) has a particular remedial purpose for aboriginal peoples, as it was intended to address the serious problem of over-incarceration of aboriginal offenders in Canadian penal institutions. In singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), it is reasonable to assume that Parliament intended to address this social problem, to the extent that a remedy was possible through sentencing procedures.[29]

The issues surrounding Aboriginal over-incarceration were also identified as having a direct link to the judicial system. The Court in *Gladue* reasoned that over-incarceration is partially a result of "an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders".[30] Furthermore, when comparing Aboriginal offenders with non-Aboriginal offenders, the Court indicated that Aboriginal offenders are "unique in comparison," and therefore must be treated uniquely.[31] The factors that should be considered according to the Supreme Court include: "low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness and community fragmentation….substance abuse in the community, or poverty, or overt racism, or family or community breakdown".[32]

The Supreme Court has also recognized the differences between Aboriginal and non-Aboriginal theories of justice. In *Wells* the Court gave credence to the differing worldviews between non-Aboriginal dispute resolution and those traditionally used by many Aboriginal groups. The Court noted the following:

> While the objective of restorative justice, by virtue of s. 718.2(e), applies to all offenders, the requirement to pay "particular attention to the circumstances of aboriginal offenders" recognizes that most traditional aboriginal conceptions of sentencing hold restorative justice to be the primary objective .... In particular, given that most traditional aboriginal approaches place a primary emphasis on the goal of restorative justice, the alternative of community-based sanctions must be explored. [33]

The Court *Gladue* indicated that the provisions of section 718.2(e) apply to any class of Aboriginal offenders "who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act*, 1982", without regard to whether the person is a status or non-status Indian, Métis or Inuit person.[34] Similarly, and contrary to the opinion of the Court of Appeal in *Gladue*, the section 718.2(e) provision applies equally to an urban-Aboriginal person (even if the offender has been estranged from their culture) as it would to an on-reserve Aboriginal person.[35]

In addition to outlining some of the factors applicable to the sentencing of Aboriginal offenders, the Supreme Court in *Gladue* and in *Wells* held that section 718.2(e) should be applied while also taking into account the other principles of sentencing outlined in the *Criminal Code*. Therefore, although the Court in *Gladue* established an excellent approach to the sentencing of Aboriginal offenders, the Court also reinforced that "it cannot be forgotten that s. 718.2(e) must be considered in the context of that section read as a whole and in the context of s. 718, s. 718.1, and the overall scheme of Part XXIII [of the *Criminal Code*]".[36]

The Supreme Court also appeared to hold that violent and serious offences will typically result in exactly the same sentence for Aboriginal offenders as it would for non-Aboriginal offenders[37]; however, even in cases involving violent or serious offences, "the sentencing judge must look to the circumstances of the aboriginal offender… it may be that these circumstances include evidence of the community's decision to address criminal activity associated with social

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28 *Wells, supra* note 7 at para. 44.
29 *Ibid.* at para. 37.
30 *Gladue, supra* note 6 at para. 65.
31 *Wells, supra* note 7 at para. 36.
32 *Gladue, supra* note 6 at paras. 67, 80.
33 *Wells, supra* note 7 at paras. 37-38.
34 *Gladue, supra* note 6 at para. 90.
35 *Ibid.* at para. 91.
36 *Ibid.* at para. 88.
37 *Ibid.* at para. 33.

problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice, notwithstanding the serious nature of the offence in question."[38]

It appears that the real challenge for courts and sentencing judges is the interpretation of the continuously ambiguous provision under section 718.2(e) to each specific case. Furthermore, institutional restraints and practical problems in identifying and remedying Aboriginal overrepresentation continue to challenge sentencing judges. Recent case law is demonstrative of the continued struggles faced by sentencing judges, Crown counsel and defence counsel.

V. Recent Case Law, Some Comments

The most recent decisions dealing with the *Gladue* case and the section 718.2(e) analysis reinforce some important principles from the *Gladue* decision, but also demonstrate the difficult questions and practical problems that still arise. The need for Gladue Reports, the circumstances and proceedings where *Gladue* factors should be applied, who qualifies as an Aboriginal person under a *Gladue* analysis, the factors that should be assessed under the "circumstances" of an Aboriginal offender, and the need for deterrence and denunciation while also assessing the need for restorative justice were all outlined as prominent issues in recent decisions.

A. The Need for Gladue Reports

The issue of bringing the unique background of each Aboriginal offender before the sentencing judge has been outlined in a number of recent decisions dealing with section 718.2(e) and the *Gladue* decision. One method of assessing the unique background of specific Aboriginal offenders has been through the use of "Gladue Reports".[39] Recent case law has dealt with the applicability of Gladue Reports and their necessity in a proper application of section 718.2(e).

The Ontario Court of Appeal decision in *R. v. Kakekagamick*[40] dealt with the filing of a Gladue Report in addition to addressing issues regarding the principles of deterrence and denunciation when assessing a proper sentence for offenders. In this case, the accused appealed his conviction for aggravated assault and his sentence of five years' imprisonment. The charges and subsequent conviction occurred when the accused, who was intoxicated, violently assaulted his spouse. The accused alleged that the sentencing judge erred when she failed to give weight to section 718.2(e) and the *Gladue* principles of sentencing for Aboriginal offenders.

On appeal, LaForme J.A. held that the trial judge had in fact erred when she failed to give appropriate consideration to the legal requirements of section 718.2(e), the *Gladue* decision, and the offender's Aboriginal

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[38] *Wells*, *supra* note 7 at para. 50. This approach has been affirmed in *R. v. Hamilton* (2004), 22 C.R. (6th) 1, (*sub nom. Regina v. Hamilton and Mason*) 186 C.C.C. (3d) 129 (ON. C.A.), where the court held that a sentence should not depreciate the seriousness of an offence.

[39] A *Gladue* report is a pre-sentence report, or a portion of a pre-sentence report, that focuses on the circumstances of Aboriginal offenders. In *R. v. Pawis*, [2006] O.J. No. 4158, 2006 ONCJ 386 (Sup. Ct.) (QL) the Court indicated at note 5: "Although I refer to this as a Gladue report, it nonetheless remains a pre-sentence report that addresses those issues mandated by the Supreme Court of Canada when sentencing an Aboriginal offender." A court may decide that a regular pre-sentence report is unnecessary where a Gladue report is given: see *R. v. R.L.*, [2004] 2 C.N.L.R. 204, O.T.C. 136 (Sup. Ct) at para. 13 LaForme J. described the Gladue Report under note 1 as follows: "Briefly, a Gladue Report is part of the response of the Aboriginal community, together with the Attorney General of Ontario and the Attorney General of Canada, to the Supreme Court of Canada decision of *R. v. Gladue* …. Many others, including judges and Legal Aid Ontario, developed a process and aids for sentencing of Aboriginal offenders. Among other things, the Toronto Gladue (Aboriginal Persons) court was established, along with a Gladue Court caseworker that is affiliated with Aboriginal Legal services of Toronto. Where an Aboriginal person is convicted of an offence, the Gladue Court caseworker, when requested, will prepare a report as a sentencing aid - similar to that of a pre-sentence report. It is not a substitute for a pre-sentence report but can be an adjunct to one. One significant difference will be an awareness of Aboriginal aspects that attempt to respond to the concerns observed by our Supreme Court in *R. v. Gladue*."

[40] *R. v. Kakekagamick*, [2006] 211 C.C.C. (3d) 289, 40 C.R. (6th) 383 (ON C.A.) [*Kakekagamick*].

ancestry. Additionally, the Appeal Court held that the sentencing judge erred when she considered Kakekagamick's failure to make efforts at rehabilitation as an aggravating factor in sentencing.

While LaForme J.A. found errors in the sentencing judge's reasoning, he held that the nature of the offence, being in the context of a domestic relationship, coupled with the accused's high risk to re-offend, necessitated a term of imprisonment given the circumstances. The offence was serious enough, according to the Court, that the objectives of restorative justice expressed in section 718.2(e) of the *Criminal Code* together with the principles established in the *Gladue* decision were outweighed by the sentencing principles of denunciation and deterrence.

This case importantly reiterated the approach outlined in *Gladue*. It reaffirms that section 718.2(e) is not a "'get out of jail free' card"[41] and indicates that judges have a positive duty to assess the sentencing of Aboriginal offenders differently than non-Aboriginal offenders. This is a finding that Courts have also made in other decisions, discussed later in this paper.

The Court in *Kakekagamick* also reemphasised the role defence counsel will play in bringing the history of the offender before the court[42] and placed the onus on Crown counsel to ensure a *Gladue* analysis occurs.[43] Giving heed to the role of the pre-sentence Gladue Report, LaForme J.A. writes:

> I would note that the *Criminal Code* was amended in 1996 to include s. 718.2(e) and *Gladue* was decided in 1999. One would expect that Correctional Services, Probation and Parole would by now fully appreciate the nature and scope of the information required in a pre-sentence report for an Aboriginal offender.[44]

The *Kakekagamick* judgement is certainly positive as it implies that merely mentioning the offender is Aboriginal will not be sufficient to warrant a valid section 718.2(e) and *Gladue* analysis. Furthermore, the case creates a duty on counsel to formally examine the status of the Aboriginal offender before sentencing. Professor Quigley, commenting on this case in annotation, remarks that the approach by Laforme J.A. should be applied in all jurisdictions:

The decision on the merits of the sentence appeal in this case was unremarkable. However, the admonition by Justice LaForme that counsel and judges must consider *Gladue* factors is an important practice direction, one hopes not just for Ontario but for the rest of the country as well.[45]

The importance of using Gladue Reports was also outlined by the Manitoba Court of Appeal.[46] in *R. v. Thomas*.[47] In this case, the Manitoba Court of Appeal dealt with an appeal by two accused, Flett and Thomas, from their conviction and sentence for manslaughter. Flett was sentenced to six years in prison, and Thomas was sentenced to five and a half years in prison, for an assault on an elderly man which resulted in his death. The cause of death was determined to be sudden cardiac arrest brought on by the assault, thus giving rise to a charge of manslaughter rather than first or second degree murder. At trial, the sentencing judge accounted for the fact that the two accused were Aboriginal offenders, but found that deterrence and denunciation were critical factors which prevailed over the fact that both offenders' were of Aboriginal descent.

In allowing the appeal in part, Scott C.J. frowned upon the fact that the offenders' Aboriginal status was only mentioned, and that a formal pre-sentence or Gladue Report was not filed detailing the circumstances of each offender. Scott C.J. held that simply outlining the nature of an accused's background is not sufficient for the purposes of a proper section 718.2(e) assessment.

In such circumstances, it is surprising that what has come to be known as a Gladue brief was not proposed. ... (I add that the time and place to do this is during the hearing before the sentencing judge and not for the first time at the appellate level.) While the sentencing judge was assisted by extensive memoranda composed by the appellant Flett (as well as the victim impact statement from the family of the deceased), and was clearly alive to the situation of the

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41 *Ibid.* at para. 34.

42 *Ibid.* at para. 44.

43 *Ibid.* at para. 53.

44 *Ibid.* at para. 52.

45 Tim Quigley, Annotation of *R. v. Kakekagamick* (2006), 40 C.R. (6th) 383 at 384.

46 In *R. v. Dick*, [2005] B.C.J. No. 2894 (C.A.) (QL) the British Columbia Court of Appeal allowed the defence counsel to proceed without adducing evidence of the offenders Aboriginal ancestry. Defence counsel argued that the facts of the case were sufficient to demonstrate the offender's circumstances. On appeal, the Court held that if the facts were sufficient to demonstrate the offenders circumstances, and defence counsel did not adduce any further information, then the Appeal court could not say that the trial judge did not account for the offenders ancestry.

47 *R. v. Thomas*, [2005] M.J. No. 161 (QL), 195 Man.R. (2d) 36 (C.A.) [*Thomas*].

appellants as "aboriginal offenders," I cannot help but conclude that all would have been better served in this instance had a thorough and comprehensive *Gladue* brief been initiated by counsel and presented to the court. All those who are involved in the process of sentencing aboriginal offenders need to do better to ensure that the Supreme Court's expectations in *Gladue* are fulfilled.[48]

The Manitoba Court of Appeal points to what is arguably a flaw in the *Gladue* decision in that under a section 718.2(e) analysis, counsel is not compelled to file a Gladue Report when Aboriginal ancestry is claimed or can be presumed. The inconsistency with which Gladue Reports are being filed was seen as a significant issue in this case, and the Court correctly acknowledged the fact that such a report was not filed.[49] Sentencing judges require these more formal reports to enable a meaningful *Gladue* analysis.[50] All relevant professionals should be made aware that these reports are vital in this area[51] and should be mandatory in any proceedings where the liberty of an Aboriginal accused is in jeopardy.[52]

B. Where to Apply *Gladue* and a 718.2(e) Analysis?

The question of which proceedings involve an application of the *Gladue* decision has also been an issue of debate in recent jurisprudence. When section 718.2(e) was enacted, it was for the purposes of dealing with Aboriginal offenders in the criminal justice system. Recently, questions regarding the scope of section 718.2(e) and its application outside the criminal justice system came before the courts.

In the case of *R v. Sim*,[53] the Ontario Court of Appeal dealt with an appeal by Sim from the Ontario Review Board which found him to be a continuing threat to public safety. The accused was of Aboriginal descent; however, given the fact that the Ontario Review Board was not a criminal court who was sentencing the accused, the Board did not apply the *Gladue* factors. Sharpe J.A. of the Ontario Court of Appeal held that the Review Board was under a positive duty to apply *Gladue* and thus consider Sim's Aboriginal background.[54] Sharpe J.A. made the following comments:

> I conclude that the ORB should always consider the unique circumstances of aboriginal NCR accused and ensure that it has adequate information in relation to the aboriginal background of an NCR accused to enable the ORB to assess the reintegration of the accused into society and the accused's other needs pursuant to s. 672.54.[55]

While Sharpe J.A. indicated that the Ontario Review Board's failure to assess Sim's Aboriginal ancestry did not amount to an error of law in this case, he did indicate that there will, in certain circumstances, be a legal duty to obtain information regarding an Aboriginal accused:

> I am not prepared to lay down a rigid rule to the effect that the ORB must always obtain a "*Gladue* report" or other similar evidence as to the particular circumstances of aboriginal NCR accused, I am prepared to say that the ORB has a legal duty to obtain such information

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48 *Ibid.* at para. 22.

49 The *Thomas* decision was referred to favourably in *R. v. Bird*, [2006] M.J. No. 18 (QL), 202 Man.R. (2d) 33, (Q.B.) where a *Gladue* report requested at the beginning of the sentencing hearing. However, the earlier decision of *R. v. Paul*, [2005] M.J. No. 310 (Prov. Ct.) (QL) at para. 19 appears to have accepted a less formal mention of the offenders Aboriginal background is acceptable.

50 It is notable that in *R. v. Shoker*, [2006] 2 S.C.R. 399, 271 D.L.R. (4th) 385 at para. 14 the Supreme Court of Canada indicated that the "purpose and principles of sentencing set out in ss. 718 to 718.2 of the Criminal Code make it clear that sentencing is an individualized process that must take into account both the circumstances of the offence and of the offender". This indicates the importance of outlining the Aboriginality of an offender and presenting the offenders circumstances to the court.

51 In *R. v. Kootenay*, [2006] A.J. No. 439 (Q.B.) (QL) at paras. 36 and 37 it was noted in the reproduced oral submissions to the Court that experienced probation officers did not know that Gladue Reports were required. This is further evidence that the *Gladue* case still has a long way to go before complete implementation.

52 See *R. v. Sim,* [2006] 78 O.R. (3d) 183, 2 C.N.L.R. 298 (C.A.) [*Sim*] at para. 30 where a rigid rule is not established for the application of Gladue Reports before review boards, but such reports are recommended.

53 *Ibid.*

54 This case is not the first case to examine an applicant's Aboriginal ancestry in a Review Board: See *Re J.R..,* [2001] O.R.B.D. No. 1485 (QL); *Re Alexis*, [2003] B.C.R.B.D. No. 1 (QL).

55 *Supra* note 54 at para. 30.

> where it would be pertinent and relevant to the disposition it is asked to make. Failure to do so would, in my view, amount to a legal error.[56]

This case should be seen as an advancement in the area of criminal sentencing in that it seems to extend the reach of the section 718.2(e) and *Gladue* analysis to decisions of the Ontario Review Board and arguably, to other similar Boards. Therefore, the *Gladue* inquiry would be called for whenever the liberty of an Aboriginal accused is at stake, whether it be before a judicial or quasi-judicial decision maker. This case is certainly an appropriate application of the *Gladue* principles and follows and expands reasoning similar to that made by the Court in *R. v. Jensen*.[57] In that case, the Court held that that the law in Ontario requires that the *Gladue* analysis be performed in all cases involving an Aboriginal offender, regardless of the type of the offence.

The reasoning of the *Sim* decision should not be overlooked however, as it draws from principles that are fundamental to the issue of Aboriginal overrepresentation, specifically the need to understand the circumstances of the individual whose liberty is at stake. If the criminal justice system is to act as the mediator between Aboriginal and non-Aboriginal people in society, as it oftentimes unfortunately does, a duty to understand all individuals whose liberty is at stake is fundamental to the fair and substantive justice sought by the criminal justice system.

C. Who Qualifies as an "Aboriginal" for the Purposes of 718.2(e)?

The question of who qualifies as an "Aboriginal person" as contemplated under the section 718.2(e) analysis is a difficult one that must be answered by sentencing judges and counsel.[58] The Court in *Gladue* did specify the type of Aboriginal person that section 718.2(e) should apply to, writing:

> The class of aboriginal people who come within the purview of the specific reference to the circumstances of aboriginal offenders in s. 718.2(e) must be, at least, all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act*, 1982. The numbers involved are significant. National census figures from 1996 show that an estimated 799,010 people were identified as aboriginal in 1996. Of this number, 529,040 were Indians (registered or non-registered), 204,115 Métis and 40,220 Inuit.[59]

Although the court may have determined that, at a minimum, those persons recognized under section 35(1) of the *Constitution Act, 1867*[60] and section 25 of the *Charter*,[61] are included in the contemplation under section 718.2(e), it is difficult to see who, in addition to these persons, would be included. This is particularly true where offenders do not appear "culturally" or visibly "Aboriginal".

This difficult question was addressed in a recent decision of the Ontario Court of Appeal. In the case of *R. v. Brizard*[62] the Ontario Court of Appeal dealt with a 45-year-old Aboriginal accused, who pleaded guilty to charges of manslaughter after helping dispose of the victim's body and clean the scene of the crime. The Court of Appeal held that the trial judge erred in failing to give adequate weight to the accused's Aboriginal status. On this basis, the accused's sentence was reduced to fifteen months imprisonment.

The importance of the *Brizard* case is the Court's emphasis on applying section 718.2(e) and the *Gladue* principles of sentencing to all Aboriginal offenders, even those not connected to the Aboriginal community. This reinforces the concept outlined in *Gladue* which held that an Aboriginal offender need not be a part of an Aboriginal community to be considered under section 718.2(e). The court in *Brizard* also reiterated that failure to give adequate weight to an Aboriginal accused's background can amount to an error of law.[63]

The Ontario Superior Court also recently dealt with the issue of to whom a section 718.2(e) application applies. In *R. v. J.R.*[64] the Ontario Superior Court dealt with two accused who had been convicted of sexual assault. The assault occurred against a victim who was in a vulnerable state and was unable to consent to sexual intercourse.

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56 *Ibid.*

57 *R. v. Jensen*, [2005] 74 O.R. (3d) 561, 195 C.C.C. (3d) 14 (C.A.) at para. 27.

58 For an analysis of this difficulty in the context of Aboriginal rights, see Brian R. Pfefferle, "The Indefensibility of Post-Colonial Aboriginal Rights "(2007), 70 Sask. L. Rev. 393.

59 *Gladue*, *supra* note 6 at para. 90.

60 *Constitution Act,1867* (U.K.), 30 & 31 Vict., c.3.

61 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to The Canada Act 1982 (U.K.), 1982, c.11.

62 *R. v. Brizard,* [2006] O.J. No. 729 (C.A.) (QL) [*Brizard*].

63 *Ibid.* at para. 3.

64 *R. v. J.R.*, [2006] O.J. No. 4777 (Sup. Ct) (QL) [*J.R.*].

Neither of the accused used a condom in the assault which was held to be an aggravating factor by the sentencing judge.

With regard to the issue of determining section 718.2(e) applicability, one of the accused identified himself as an Aboriginal person. This person had a considerably troubled past, including dropping out of high school, alcohol and substance abuse, social insecurity, depression and unemployment. Despite this, the accused did have a considerable support network. In sentencing this accused, the Court was faced with the question of who is an "Aboriginal" person as contemplated by section 718.2(e). In this case, the Crown had disputed the Aboriginal status of the accused and later argued that although the accused was Aboriginal, he "did not come before the courts as a result of any Aboriginal-specific or 'unique systemic or background factors.'"[65] This argument corresponds to a recent decision of the Saskatchewan Court of Appeal in *R. v. P.C.*[66] where the Court held that there must be a connection between the offender, his or her background, and the crime committed, for section 718.2(e) and the *Gladue* factors to apply directly.

Counsel for the defence in *R. v. J.R.* conceded that although the offender had a somewhat troubled past, he had not been affected by the common features defining many Aboriginal offenders, including poverty, racism, family or community breakdown, or substance abuse in his community.[67] Demonstrating the confusion in the area of defining who section 718.2(e) contemplates, Ducharme J. wrote in notation:

> As was made clear in ... *Gladue*, the class of aboriginal people who come within the scope of "aboriginal offender" in s. 718.2(e) must be, at least, all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*, i.e. the Indian, Inuit and Métis people of Canada. However, I have been unable to find any guidance as to what, if anything, needs to be proven for an accused to be considered an aboriginal offender within the meaning of section 718.2(e) of the *Code*. Nor is there any guidance in the *Code* provisions or the jurisprudence interpreting them as to which party bears the burden of proof and what the standard of proof is. Finally, I would observe that the concept of aboriginal identity is complex.[68]

Although some cases may find it easy to see an offender to which section 718.2(e) specifically contemplates, difficult situations are sure to arise given the confusing concept of "Aboriginality". This is particularly true for Métis or Aboriginal offenders who are not visibly of Aboriginal descent. Ducharme J. writes:

> While a person's aboriginal identity may be readily apparent in some cases, such as that of a person who enjoys Indian status under the *Indian Act*, it can be far more complex when dealing with non-status Indians or Métis individuals. [69]

The complex historical policies which systematically displaced Aboriginal peoples, particularly Aboriginal women,[70] have played a significant role in the difficulties faced when applying section 718.2(e):

> [I]t should be remembered that the ability of any particular offender to prove his or her aboriginal status may be significantly compromised by the fact that past Canadian governments pursued a policy of displacement and assimilation towards Canada's aboriginal peoples. As noted by the Royal Commission on Aboriginal Peoples, for more than 100 years following confederation the Canadian federal government "attempted to promote the eventual break-up of Aboriginal societies and the assimilation of Aboriginal people into mainstream - that is, non-Aboriginal - society." This historical reality is a part of the "the distinct situation of aboriginal peoples in Canada" that *Gladue* instructs sentencing judges to consider.

How one is to apply the *Gladue* decision is particularly difficult given the history of displacement for Aboriginal peoples. Defining "Aboriginality" is complicated due to legislative definitions as to who is and who is not "Aboriginal". Persons that are legally defined as "Indians" have become legitimized as "Aboriginals". Persons falling outside this definition are looked at as "outsiders" by their own communities and not authentically "Aboriginal" for the purposes of Aboriginal rights, section 35 of the *Constitution Act* and perhaps even section 718.2(e) of the *Criminal Code*. Thus, many of these persons are displaced from communities and are no longer "culturally" Aboriginal.

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65 *Ibid*. at para. 29.

66 *R. v. P.C.*, [2004] 249 Sask.R. 143; 61 W.C.B. (2d) 606 (C.A.).

67 *Supra*, note 66 at para. 40.

68 *Ibid*. at notation 2 of judgment.

69 *Ibid*.

70 For a further discussion of problems associated with these membership changes for women, see Joan Holmes, *Bill C-31: Equality or Disparity - The Effects of the New Indian Act on Native Women*, (Ottawa: Canadian Advisory Council on the Status of Women, 1987); Mary Ellen Turpel-Lafond, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" in *Women and the Canadian State* (Montreal, McGill University Press, 1997).

One would hope that the application of the *Gladue* case can be creatively applied to those situations where the "identity" of an Aboriginal person is suspect, particularly where there is substantial dislocation from the culture and community from which a person may be ethnically descended. Although the practical application of restorative justice may require a connection to an Aboriginal community in some circumstances, the offender should still be classified as an "Aboriginal" person if they are ethnically and biologically descended from Aboriginal peoples. Ignoring culturally detached persons would likely be ignoring the purpose of section 718.2(e) – and it may be these very people that section 718.2(e) and the principles of proportionality must seek to assist.

D. What Factors Should be Considered in the "Circumstances" of the Offender?

The factors which should be examined under a section 718.2(e) analysis have also been questioned in recent court decisions. How one is to give "attention to the circumstances of aboriginal offenders" is a difficult question given the changing nature of Canadian society and the circumstances of those offenders who are Aboriginal.

The root socio-economic problems recognized by section 718.2(e) have received questionable analysis in a recent decision of the Saskatchewan Court of Appeal. In *R. v. Gopher,*[71] the Saskatchewan Court of Appeal dealt with an appeal by the Crown from the sentencing of two accused, Moccasin and Night, who were high ranking officials in the Saulteaux First Nation. These men were convicted of breach of trust, for defrauding their First Nation of more than one million dollars in trust fund money. Both accused in this case committed fraud by using a series of unsophisticated illegal payments from trust funds to themselves, family, and friends over a period of 21 months.

The trial judge, Baynton J., originally concluded, that conditional sentences of two years less a day met the objectives of deterrence and denunciation, while also accounting for section 718.2(e). In applying section 718.2(e), Baynton J. considered the circumstances of the offenders and also the past illegal conduct of other First Nations members as a mitigating factor. Furthermore, Baynton J. held that the accused had to be judged in the context within which the offences had taken place, rather than the standards applicable to the larger society.

On appeal, Richards J.A. reversed the Baynton J. decision, holding that it is improper to consider past acts of illegal conduct by other members of the community in a section 718.2(e) analysis,. This, according to Richards J.A, is not the kind of root socio-economic circumstances to be considered in a section 718.2(e) analysis. Given the broad objectives of section 718.2(e) and the concepts outline in the *Gladue* decision, this decision appears fundamentally flawed.

Richards J.A., in deciding that past acts of criminal conduct should not be considered under section 718.2(e), appeared to draw an arbitrary distinction between the social circumstances of an Aboriginal offender and the criminal activity happening in the offender's community. The context and circumstances within which an offender lives certainly shapes the offender's life considerably and becomes part of the socio-economic circumstances of an offender. Many of these contextual circumstances, including criminal activity, stem from the socio-economic conditions within these communities. This factor should be accounted for in a proportionality analysis under section 718.1 and certainly should be relevant under section 718.2(e).

The Court in *Gopher* indicated that criminal conduct within the community is not the kind of systemic and background factors referred to in *Gladue*:

> First, the sentencing judge should not have seen any pattern or history of illegality in the activities of the Saulteaux First Nation leadership as a factor to be taken into account under s. 718.2(e) of the Code. Simply put, any such pattern of conduct is not the kind of systemic and background factor referred to in *Gladue*.[72]

The court continued, citing *R. v. Laliberte*[73] for the proposition that criminal activity should not be considered under the *Gladue* factors. Richards J.A. for the Court wrote:

> In other words, the so-called *Gladue* factors comprehend the root socio-economic circumstances which play a part in bringing an offender into contact with the criminal justice system. They do not include criminal activity itself but, rather, relate to the environmental factors which give rise to criminal activity.[74]

One must question however, the logic of distinguishing between root causes and criminal activity in this context. The environmental factors giving rise to criminal activity may be accounted for, but criminal activity itself is not

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71 *R. v. Gopher (Moccasin and Night appeals),* [2006] 5 W.W.R. 659; 275 Sask.R. 226 (C.A.) [*Gopher*].

72 *Ibid.* at para. 34.

73 *R. v. Laliberte,* [2000] 4 W.W.R. 491, 189 Sask.R. 190 (C.A.).

74 *Supra,* note 73 at para. 34.

considered. Does not criminal activity in the community shape one's social environment? The Supreme Court of Canada stated in *Gladue* that:

> The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.[75]

The past criminal breaches of trust, along with other criminal activity which have occurred in Aboriginal communities are not unlike the cited alcoholism, unemployment, and community fragmentation in that the socio-economic situation has created a particular effect. While these cited factors are not seen as "criminal," such a distinction is made only with regard to what is considered "deviant" under the law, and not accessed with consideration of the actual causation of negative social conduct.[76]

Under the *Gopher* analysis, activities such as substance abuse and narcotic possession, which may be rampant in an Aboriginal community, would not be considered under section 718.2(e) if the drugs in question were prohibited under the *Controlled Drugs and Substances Act*.[77] However, substance abuse would still figure prominently among the causes of criminal activity by Aboriginal offenders, and would thus in a sense, be a root cause.

The Court in *Gopher* appears to take the approach that policy considerations and the requirements of denunciation and deterrence override the actual social problems created by living in communities where criminal activity is rampant. Richards J.A. writes for the Court:

> I am also concerned that the logic of the sentencing judge's reasoning yields inappropriate results. That is so because it tends to create a self-reinforcing spiral through which the presence of criminal activity becomes a factor mitigating against strong sentences to punish that activity. For example, the trial judge's approach seems to suggest the sentence of an aboriginal offender charged with aggravated assault would be moderated on the basis of *Gladue* if assaults were common on his reserve and suggests, by way of further illustration, that an offender charged with robbery would have her sentence adjusted if a culture of robberies had taken hold in a community. This cannot be what Parliament intended. Sentencing judges must give careful consideration to the fundamental socio-economic circumstances which play a part in bringing an aboriginal offender to court. But these factors do not include the very criminal activity in which the offender has become involved.[78]

This passage demonstrates two things: first, it indicates that the Court of Appeal in Saskatchewan still misunderstands the intended practical effects of section 718.2(e); and second, it demonstrates that courts are willing to ignore social circumstances if those circumstances are criminal in nature.

It is apparent that the Court in this case believes that section 718.2(e) automatically gives the Aboriginal offender a lesser sentence. The Court indicates that when an offender is sentenced who belongs to a community where robbery is common, accounting for this atmosphere of criminal activity under section 718.2(e) would lead to an "adjustment" of the sentence. This is to be contrasted with the early understanding that a section 718.2(e) consideration will not necessarily lead to different results or a lesser sentence, but rather will lead to a sentence more fitting for an individual in his or her particular circumstances.[79]

The reasoning by the Saskatchewan Court of Appeal in the *Gopher* case should be contrasted with the earlier *R. v. Anaquod*,[80] where Richard J.A. indicated that an application of section 718.2(e) "will not always mean a lower sentence for an aboriginal offender".[81] Commenting on this aspect of the *Gopher* case in annotation, Professor Quigley states:

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75 *Gladue*, *supra* note 6 at para. 67.

76 See generally, Bernard Schissel, "Introduction to Deviance and Social Control" in Bernard Schissel and Linda Mahood eds. *Social Control in Canada: Issues in the Social Construction of Deviance* (Toronto: Oxford University Press, 1996).

77 Controlled Drugs and Substances Act, R.S.C. 1985, c. C-38.8.

78 *Supra*, note 73 at para 36.

79 The Court of Appeal of Saskatchewan in *R. v. Cappo* [2005] S.J. No. 720 (QL), 269 Sask.R. 311 (C.A.) has clearly indicated that the fact that an offender is Aboriginal does not entitle them to a lesser sentence as contemplated by ss. 718(d) and (e) of the *Criminal Code*. See also *Gladue, supra* note 6 at para. 69. Furthermore, the Supreme Court indicated in *Gladue* at para. 78 that with more serious crimes any distinction between Aboriginal and non-Aboriginal sentences will disappear. It is also important to note that s. 718.2(e) does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender: *Wells*, *supra* note 7 para. 44.

80 *R. v. Anaquod*, [2005] S.J. No. 531 (QL), 269 Sask.R. 298 (C.A.) [*Anaquod*].

81 Ibid.at para. 6.

First, although *Gladue* mandated only a different approach to sentencing, not necessarily a different result, there has been an unfortunate tendency to overemphasize the latter at the expense of the former.[82]

The *Anaquod* decision demonstrates that the Saskatchewan Court of Appeal, and in particular Richards J.A., understands that the *Gladue* case and section 718.2(e) asks for a different approach to sentencing and not necessarily a different result. The *Gopher* case leads one to conclude that the distinction between a different approach and different results has been temporarily misunderstood by the Court.

The *Gopher* case is also problematic in that the Court demonstrated a willingness to ignore criminal activity as a social circumstance due to a fear of the possible "self-reinforcing spiral" created by such recognition. Professor Quigley, commenting in annotation, writes that the "reasoning of the court is certainly supportable in the sense that it is important to remove any suggestion that Aboriginal people do not take breach of trust as seriously as the non-Aboriginal community".[83] One should note however, that Baynton J. does not imply that Aboriginal communities do not take breach of trust as seriously as the non-Aboriginal community, rather, he recognizes differences within Aboriginal and non-Aboriginal communities:

> [T]he typical case of white collar crime committed by financially sophisticated individuals is significantly different than the type of crime in the case before me. It raises and involves aboriginal attitudes, practices and customs that, as set out in *Gladue*, are significantly different than those of other Canadians. By making this observation I do not imply that this justifies the illegal conduct of the offenders nor does it excuse their behaviour. But it is a factor that must be taken into consideration as it bears on what is an appropriate sentence.[84]

The circumstances of the fraud committed by Moccasin and Night showed it was not the sophisticated commercial crime that most often gives rise to breach of trust actions. In fact, the accused were sloppy and haphazard in their spending, and this is something that is recognized in the larger context of the crime.

If some Aboriginal communities are surrounded by members that take part in criminal activity, then such surroundings must be accounted for in sentencing.[85] In fact, statistics have shown that Aboriginal communities are subject to considerable crime in comparison to non-Aboriginal communities. Statistics have shown that on-reserve crime rates in 2004 were about three times higher than rates in the rest of Canada, amounting to approximately 28,900 per 100,000 people living on Indian reserves, compared to 8,500 per 100,000 people in the rest of Canada.[86] Therefore, some Aboriginal communities could quite likely be described as having considerable criminal activity, something which can define a community's environment.

In terms of the question facing the Court in *Gopher*, that being which socio-economic factors and circumstances must be considered under section 718.2(e), the Court should have focused back on the wording of the provision itself - particularly the words "with particular attention to the circumstances of aboriginal offenders". It is notable that the types of relevant circumstances are not outlined in this provision, and that the Courts should thus ensure to take an approach that fulfills the goals set out by Bill C-41. It is unfortunate that the Supreme Court in *Gladue* did not emphasis the importance of accounting for a broader range of socio-economic circumstances.

The Court in *Gopher* also made some *obiter* comments regarding the factors to consider in undertaking a *Gladue* analysis, writing that "the trial judge's approach seems to suggest the sentence of an aboriginal offender charged with aggravated assault would be moderated on the basis of *Gladue* if assaults were common on his reserve".[87] Clearly, given

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82 Tim Quigley, Annotation of *R. v. Gopher (Moccasin and Night appeals)*, [2006] 37 C.R. (6th) 126 at 127.

83 *Ibid.* at 127.

84 *R. v. Gopher*, [2005] 270 Sask.R. 175, 34 C.R. (6th) 145 (Sask. QB.) at para. 34.

85 There has been considerable work in the area of criminology defining the role one's region or territory may have on one's criminal activity. This is particularly true in the 1980s and 90s. See Paul Brantingham & Patricia Brantingham, *Patterns in Crime* (New York: Macmillan, 1984) which has documented that "criminal areas" perpetuate criminal activity within these communities; see also Timothy F. Hartnagel & G. Won Lee, "Urban Crime in Canada" (1990) 32 Canadian Journal of Criminology 591; James Bonta & Paul Gendreau, "Re-examining the cruel and unusual punishment of prison life" (1990) 14 Law and Human Behavior 347; Robert J. Bursik & Harold G. Grasmick, *Neighborhoods and Crime: The Dimensions of Effective Community Control* (Toronto: Maxwell Macmillan, 1993); Robert J. Sampson & W. Byron Groves, "Community Structure and Crime: Testing Social-Disorganization Theory" (1989) 94 American Journal of Sociology 774.

86 Juristat: Canadian Centre for Justice Statistics, "Victimization and offending among the Aboriginal population in Canada" Catalogue no. 85-002-XIE by Jodi-Anne Brzozowski, Andrea Taylor-Butts & Sara Johnson, (Ottawa: Minister of Statistics, 2006)at 1.

87 *Supra*, note 73 at para. 36.

the goals of section 718.2(e), the criminal activity of an offender and within the offender's community must be accounted for under a proper *Gladue* analysis. This should also be the case if violence is rampant in an offender's community.[88] It seems particularly destructive to place an individual who lives in a community with a high rate of crime into a penal system with other criminals.[89] While there is no easy solution to addressing the issue of criminal activity in communities, it is clear that consideration of all sanctions other than imprisonment is especially important where criminal activity is cited as a factor. The courts should not pick and choose socio-economic factors in an attempt to avoid "self-reinforcing spirals". Nor should courts define the list of circumstances outlined in *Gladue* as exhaustive and reason that the effects of so-called "root" factors cannot create other relevant conditions. In the end, one can conclude that the factors which should be accounted for in a section 718.2(e) analysis have been considerably narrowed by the Saskatchewan Court of Appeal.

E. Deterrence, Denunciation and Restorative Justice in Serious Offences

One of the most difficult questions facing courts in a section 718.2(e) analysis deals with the application of section 718.2(e) in conjunction with the other main principles of sentencing - most notably that of deterrence and denunciation. As the Court in *Gladue* noted, "there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant."[90] Furthermore, Iacobucci J. in *Wells* wrote:

> Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community. As held in *Gladue* ... to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.[91]

It is clear that a section 718.2(e) analysis must occur in relevant cases, even if the offence in question is serious. In *R. v. Jensen* it was made clear that the law in Ontario requires that the *Gladue* analysis be performed in all cases involving an Aboriginal offender, regardless of the seriousness of the offence.[92]

A recent decision of the Saskatchewan Court of Appeal demonstrates that deterrence and denunciation will be particularly important in cases where an Aboriginal community is harmed by a particular crime. In *R. v. Kasakan*[93] the Saskatchewan Court of Appeal dealt with an appeal by an Aboriginal offender from a sentence of four months imprisonment following his guilty plea to: possession of marijuana for the purposes of trafficking on a remote reserve, failure to report to a bail supervision officer, and failure to attend court. The primary issue at appeal was whether the sentencing judge, Tucker J., erred when he did not accept a joint submission for a conditional sentence of nine

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88 In 2004, the on-reserve rate for violent crime was eight times the violent crime rate of the rest of the country (7,108 compared to 953 per 100,000 population). See *Supra,* note 88 at 1.

89 There is evidence that incarceration increases criminal activity rather than reduces it. Solicitor General Canada, "The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences" by Paula Smith, Claire Goggin & Paul Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences (User Report 2002-01)* (Ottawa: Public Works and Government Services Canada, 2002) found a 3% increase in recidivism from incarceration when compared to community sanctions. The studies found that longer sentences were associated with higher recidivism rates. Short sentences (less than six months) had no effect on recidivism, but sentences of more than two years had an average increase in recidivism of 7%. While other factors outside of incarceration no doubt contribute to this increase in incarceration, it can be concluded that incarceration, at the very least, does not prevent future criminal activity. See also Gresham Sykes, *The Society of Captives: A Study of A Maximum Security Prison* (New Jersey: Princeton University Press, 1958), P.J. Giffen "The Revolving Door: A Functional Interpretation" (1966) 3/3 Canadian Review of Sociology and Anthropology 154; Scott D. Camp *et al.* "The Influence of Prisons on Inmate Misconduct: A Multilevel Investigation" (2003) 20(3) Justice Quarterly 701; Alison Liebling & Shadd Maruna, eds. *Effects of Imprisonment* (Portland, Oregon: Willan Publishing, 2005).

90 *Gladue*, *supra* note 6 at para. 78.

91 *Wells*, *supra* note 7 at para. 42.

92 *Jensen, supra* note 59 at para. 27.

93 *R. v. Kasakan*, [2006] 8 W.W.R. 23, 275 Sask.R. 306 (C.A.) [*Kasakan*].

months. A sub-issue was the application of section 718.2(e) of the *Criminal Code* and the principles of deterrence and denunciation. In rejecting the joint submission of both Crown and defence counsel, Vancise J.A. for the Court concluded that the sentencing principles of denunciation and deterrence would not be met if Kasakan were to serve the recommended community-based sentence, and that "those conditions are not sufficiently restrictive and do not infringe the liberty of the appellant sufficiently to satisfy the principles of denunciation or general deterrence."[94] The Court in this case appeared to hold that criminal activity, which creates or has the potential to create considerable social problems for an Aboriginal community, will receive little recognition under section 718.2(e), and the principles of denunciation and deterrence will therefore apply.

Issues surrounding the application of section 718.2(e) of the *Criminal Code* and serious violent offences against women have also come up in recent jurisprudence. In *R. v. L.D.W.*[95] the British Columbia Court of Appeal dealt with an appeal by L.D.W. from sentences arising from two aggravated assaults, two counts of assault with a weapon, and one count each of common assault, uttering a death threat, and possession of a weapon for a dangerous purpose. The offender was an Aboriginal person and had a lengthy criminal record. The incident in question arose from an altercation at the offender's ex-wife's house where he assaulted her and her friends with a knife. He was under the influence of drugs and alcohol at the time.

At trial, the sentencing judge held that the circumstances of the offences and the accused's background meant that the principles of deterrence and denunciation took precedence over rehabilitation given the violent nature of the offences. On appeal, the Court of Appeal upheld the trial judge's decision, holding that the trial judge accounted sufficiently for the offender's personal circumstances. In reinforcing the decision in *Wells*, the Court held:

> The circumstances of these offences were most egregious and call out for a denunciatory and deterrent sentence and as well one of isolation to protect society, despite those special circumstances. These are the types of violent and serious offences described by Iacobucci J. in *R. v. Wells*, ... where he said that the goals of denunciation and deterrence overtake the mitigating effects of the appellant's aboriginal background.[96]

The Court indicated that there are situations where the Aboriginal offender's status may be completely usurped, particularly when the offence is so serious that the goals of denunciation and deterrence overtake the mitigation of Aboriginal status. This may be especially true where the offence involves a female victim.

The Ontario Court of Appeal in *R. v. Kakekagamick*[97] also gave great weight to the principles of deterrence and denunciation in the context of a violent crime against a spouse. To reiterate, in that case the accused appealed his conviction for aggravated assault and his sentence of five years' imprisonment. At the time of the assault the accused was intoxicated when he violently assaulted his spouse. LaForme J.A. indicated that although restorative justice must play a role in the sentencing of an Aboriginal offender, a restorative sentence is not a requirement under the section 718.2(e) analysis. He writes:

> To be clear, s. 718.2(e) does not require, nor is there a general rule, that Aboriginal offenders must be sentenced in a way that gives the most weight to the principle of restorative justice. It may be that in certain cases the objectives of restorative justice articulated in s. 718.2(e) and *Gladue* will not weigh as favourably as those of separation, denunciation, and deterrence. ... Aboriginal people also believe in the importance of those latter objectives. Those principles will always be relevant and may predominate for more serious offenders or where the offence is serious enough that imprisonment is necessary.[98]

This case again reinforces the theme that deterrence and denunciation will take precedence in the case of an offence against a spouse.

The British Columbia Court of Appeal in *R. v. Morris*[99] also confirmed that a court must assess section 718.2(e) in the context of other sentencing guidelines, particularly when the offence is violent. In that case, Finch C.J.C. dealt with an appeal by the Crown on a suspended sentence and two years of probation imposed after the accused pleaded guilty to assault, unlawful confinement and pointing a firearm. These, charges followed a violent attack on Morris' common law partner. Finch C.J.C. held that while it is important to take into account the particular circumstances of an Aboriginal offender, it is not appropriate to ignore the other general principles of sentencing. In this case,

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94 *Ibid*. at para. 22.

95 *R. v. L.D.W.,* [2005] B.C.J. No. 1746, 215 B.C.A.C. 64 (C.A.) (QL) [*L.W.D.*].

96 Ibid. at para. 27.

97 *Supra* note 42.

98 *Ibid*. at para. 42.

99 *R. v. Morris,* [2004] 186 C.C.C. (3d) 549, 3 C.N.L.R. 295 (B.C. C.A.) [*Morris*].

according to the Court of Appeal, the principles and objectives of general deterrence and denunciation were not given sufficient weight by the sentencing judge, as the severity of the offense required a custodial sentence.

The *Morris* case reinforces the idea that being an Aboriginal offender will not prevent a judge from imposing custodial sentences in the case of violent acts:

> Although judges are therefore required to approach the sentencing of aboriginal offenders with an analysis that is sensitive to the conditions, needs and understandings of aboriginal offenders and communities, this does not mean that sentences for such offenders will necessarily focus solely on restorative objectives or give less weight to conventional sentencing objectives such as deterrence and denunciation.[100]

The Court established that the principle of proportionality will weight in favour of denunciation and deterrence when the crime is a violent one, writing that the "fundamental principle of sentencing requires, for aboriginals and all others alike, that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1."[101]

The court in *Morris* also made it clear that if restorative means are sought in dealing with an Aboriginal offender, a community must be able to give effect to these restorative justice initiatives.[102] Furthermore, the Court again appears to draw particular attention to the fact that the victim was an Aboriginal woman, citing work by Turpel-Lafond[103] and the Royal Commission on Aboriginal Peoples[104]:

> Several reports and commentators have emphasized the need to ensure that the use of traditional aboriginal sentencing measures pay attention to the voices and special needs of aboriginal women[105]

While violence against spouses invokes a court's emphasis on the principles of denunciation and deterrence, recent jurisprudence respecting gang violence invokes a similar response. In *R. v. D.S.K.*[106] the Saskatchewan Court of Appeal dealt with an appeal by the Crown from the sentence of two years less a day for aggravated assault contrary to the Crown's recommendation that the 19-year-old Aboriginal man receive four years imprisonment. The circumstances of the case were extremely violent, where gang members of a well known Aboriginal gang in Saskatchewan known as the "Native Syndicate" repeatedly attacked a non-Aboriginal bystander on the basis that he was non-Aboriginal and that what happened to him is "what happens to white boys who come into the 'hood.'"[107] The victim was beaten and stabbed several times and nearly died as a result of his injuries.

In allowing an appeal, Cameron J.A. held that the sentence given at trial did not adequately reflect the objectives of denunciation and deterrence, and substituted it with a four year prison sentence. In assessing the Aboriginal ancentry of the accused, the Court reiterated comments made by the trial judge:

> [The trial judge] observed that there was nothing in the accused's background, except his aboriginal ancestry - his ancestry is partially aboriginal - to invite application of the considerations mentioned in *R. v. Gladue*.... She also observed that he did not appear to have an alcohol problem, noting, "No explanation has been provided for this nasty assault."[108]

Although the actions of D.S.K. are so reprehensible that they would demand some serious sanctions, at least in the eyes of the public, it is interesting that the attack by an Aboriginal gang on a non-Aboriginal victim would not demonstrate a genuine need to apply *Gladue* factors. It is arguable that an attack that is racially motivated is demonstrative of community dislocation, class hatred, and perhaps even societal racism that may have been faced by the accused or members of the gang. Rather than assess this as a *Gladue* factor, Cameron J.A. stressed the importance of denunciation and deterrence in gang related violence, writing that "[t]he law has long recognized that racial motivation in the commission of an offence against the person adds to the seriousness of the offence and invites a firm response oriented toward denunciation and deterrence."[109]

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100 *Ibid*. at para. 55.

101 *Ibid* at para. 56.

102 *Ibid*. at para. 65.

103 Mary-Ellen Turpel-Lafond, "Sentencing Within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (2000) 43 C.L.Q. 34.

104 Bridging the Cultural Divide, supra note 4.

105 *Supra,* note 102 at para. 69.

106 *R. v. D.S.K.*, [2005] 257 Sask.R. 161, 64 W.C.B. (2d) 102 (C.A.) [*D.S.K.*].

107 *Ibid*. at para. 41.

108 *Ibid*. at para. 12.

109 *Ibid*. at para. 39.

Although the seriousness of the crime may not warrant a different sentence, it is interesting, at the very least, that the Court did not examine the issue of gang violence in the context of deeper systemic issues, which arguably are the issues contemplated in *Gladue*. Rather, the Court assessed race-related violence as worthy of harsher punishment:

> Such attitudes are utterly abhorrent and highly destructive, no matter by whom they are held, and against whom they are directed. So are such associations. And when they manifest themselves in the commission of an offence, it falls to the courts to take them into account and act upon them in keeping with the principles of sentencing found in section 718.2(a) of the *Code*. In other words, the offender's sentence should be increased in consequence.[110]

While most would certainly agree that racial attitudes and violence based on these attitudes are of considerable detriment to society, the Court in this case appears more focused on punishing the accused rather than on determining the reasoning behind the attack.[111] This reinforces the fact that only root causes, and not the effects thereof, are addressed by sentencing judges. Furthermore, the case also reinforces that in order for background factors to apply, they must likely be more than general factors associated with an offender's Aboriginal descent.[112]

In conclusion, it is apparent that recent case law confirms that less weight will be given to the Aboriginal status of an offender with preference going to a consideration of conventional sentencing objectives such as deterrence and denunciation.[113] Although it may appear that the principles of denunciation and deterrence are over-valued in these decisions, it is possible, given the right circumstances, for Courts to account for the offender's status and determine that denunciation and deterrence have been over-emphasized.[114]

F. To which Aboriginal Offenders is Restorative Justice Available?

Associated with the concept of deterrence and denunciation is the issue of restorative justice. Some recent case law has demonstrated the practical difficulties associated with applying restorative sentences to Aboriginal offenders who have little or no connection to an Aboriginal community.

In *R. v. John*,[115] the Saskatchewan Court of Appeal dealt with an appeal by John from a three year sentence, followed by a three-year driving prohibition imposed for criminal negligence causing death. The incident giving rise to John's conviction involved an accident where he was driving his truck at an excessive speed on a gravel road and ended up killing another driver. He appealed his sentence, claiming that the trial judge failed to apply the sentencing principles under section 718.2(e) and the *Gladue* decision.

The accused was a Northern Aboriginal person who never attended school, did not have a significant criminal record and made a living as a trapper and fisher. On appeal, the Saskatchewan Court of Appeal held that the sentencing judge erred by failing to consider the offender's Aboriginal ancestry. In holding that the sentencing judge overemphasized the goals of deterrence and denunciation, the Court stated:

> In my opinion, the sentencing judge erred in principle by failing to consider and properly apply the principles of sentencing set out in s. 718.2(d) and (e) with particular reference to aboriginal people and by overemphasizing the factors of deterrence and denunciation, and failing to consider whether deterrence and denunciation could be satisfied by the imposition of a conditional sentence of imprisonment. This failure to consider the factors in *Gladue* to determine whether a custodial sentence should be imposed is an error of law, an error in principle which enables this Court to intervene to determine whether or not the sentence imposed was an appropriate or fit sentence pursuant to s. 687 of the *Code*.[116]

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110 *Ibid.* at para. 42.

111 In *R. v. K.E.M.,* [2004] B.C.J. No. 2735, 206 B.C.A.C. 299 at para. 14 (C.A.) (QL), the court did not disagree with the proposition that public protection should take precedence over the other elements outlined in s. 718, but focussed on denunciation in evaluating the sentence of an Aboriginal offender.

112 See also *R. v. Andres* (2002), 223 Sask.R. 121, 168 C.C.C. (3d) 372 (C.A.) at para. 29.

113 Recent case law, other than that discussed in this paper, reinforces the courts preference to favour denunciation and deterrence over restorative justice. See, for example, *R. v. R.K.S.*, [2005] 195 Man.R. (2d) 285, M.J. No. 342 (C.A.) (QL); *R. v. Pakoo*, [2004] 9 W.W.R. 414, 190 Man.R. (2d) 133 (C.A.); *R. v. M.T.P.*, [2004] 196 B.C.A.C. 247, 186 C.C.C. (3d) 1 (C.A.); *R. v. Monias*, [2004] 184 Man.R. (2d) 93, 61 W.C.B. (2d) 358 (C.A.); *R. v. Joseph*, [2003] B.C.J. No. 1526, 183 B.C.A.C. 155 (C.A.) (QL); *R. v. Barton*, [2003] B.C.J. No. 853, 180 B.C.A.C. 286 (C.A.) (QL); *R. v. Homer*, [2003] B.C.J. No. 162, 33 M.V.R. (4th) 220 (C.A.) (QL); and *R. v. B.L.*, [2002] 299 A.R. 78, 6 W.W.R. 602 (C.A.).

114 See, for example, *R. v. Lawrence*, [2005] O.J. No. 2210, 197 O.A.C. 364 (C.A.) (QL); *Borde*, *supra* note 27.

115 *R. v. John*, [2004] 7 W.W.R. 643, 241 Sask.R. 268 (C.A.) [*John*].

116 *Ibid*. at para. 29.

It is also noteworthy that the Court in this case emphasised that the community in which John lived was able to support restorative justice, and therefore such alternate measures could be applied. The Court wrote:

> The aboriginal offender's community will frequently understand the nature of a just sanction differently with the result that traditional sentencing objectives will be less relevant. Here, the aboriginal offender's community is totally supportive of a restorative approach to sentencing by the use of alternative measures, and the community has the resources to implement those alternative measures. That information unfortunately was not before the sentencing judge. She did order a pre-sentence report, but does not appear to have considered the factors set out in s. 718.2(d) and (e).[117]

Furthermore, the Court continued by reinforcing that principles of denunciation and deterrence can be fulfilled with a conditional sentence[118] :

> The primary question here is whether the principles of denunciation and deterrence can be satisfied by the imposition of a community based sentence. In my opinion, the principles of deterrence and denunciation can be satisfied by the imposition of strict conditions in a conditional sentence of imprisonment. The principle of denunciation, which is the communication of society's condemnation of the offender's conduct can be achieved without a custodial sentence.[119]

It is arguable that the *John* case demonstrates the difficulty in applying restorative justice sentencing to Aboriginal offenders who do not have the proper community support mechanisms. This is perhaps best exemplified in the case of *R. v. Cappo.*[120]

In C*appo,* the Saskatchewan Court of Appeal dealt with an accused who was convicted of criminal negligence causing death. The accused was an Aboriginal person and was driving home from a bar in a vehicle without working headlights. He struck another vehicle head-on, killing the driver and injuring three others. The accused had seven previous convictions, including two convictions for motor vehicle offences.

A pre-sentence report found that Cappo was affected by poverty, alcohol use in the community, and racism. The Saskatchewan Court of Appeal held that a conditional sentence would not be proportionate to the gravity of the offence and would fail to satisfy the principles of denunciation, deterrence, and parity. The pre-sentence report indicated that Cappo claimed only to be affected in a general way by the poverty and alcoholism in the Aboriginal community, and by racism in society in general. He did not claim to have been disadvantaged in any way that could be related to the offence which he committed. Furthermore, a restorative sentence is generally inappropriate where the Aboriginal accused has been urbanized.

The Court of Appeal's decision in this case reinforces the fact that only systemic issues that relate of the accused's crime will be considered as mitigating factors under section 718.2(e). Furthermore, the majority judgement also indicates that Aboriginal offenders living a traditional lifestyle are able to access restorative justice measures more easily that those who live in urban areas. Sherstobitoff J.A. writes comparing the accused background to that of the accused in *R. v. John*:

> A further distinction between this case and *John*, is that Mr. John was an aboriginal who lived in the wilderness of northern Saskatchewan and earned his sustenance in the traditional aboriginal way by hunting, trapping and fishing. He never went to school and learned his skills from his father on the trapline and on the lakes. The Court found that he "would have difficulty coping in urban society" and this seemed to be an important factor in the decision to impose a conditional sentence. By contrast, the respondent in this case has the equivalent of a grade 12 education and works and lives in Regina, as well as maintaining a residence on the reserve. A prison sentence would not work the same hardship as upon Mr. John. This is an important circumstance in light of ss. 718(d) and (e) of the *Code* which require the consideration of sanctions other than imprisonment for all offenders, with particular attention to the circumstances of aboriginal offenders.[121]

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117 *Ibid*. at para. 35.

118 This concept was also affirmed in *R. v. Chalifoux,* [2005] A.J. No. 682 (C.A.) (QL) where the accused was charged with robbery, and a conditional sentence imposed. The Alberta Court of Appeal upheld the conditional sentence and held at para. 7 that the sentence imposed "does punish, but provides for the opportunity for rehabilitation and builds in protection for the community, in the short term, by the conditions attached to the conditional sentence and, in the long term by the possibility that Mr. Chalifoux will be rehabilitated." This case is important in that it reiterates the fact that sanctions involving imprisonment are not the only sanctions that can have a punitive effect on the offender. See also *R. v. Proulx,* [2000] 1 S.C.R. 61, 2000 SCC 5 (QL) at para. 105.

119 *Supra* note 118 para. 55.

120 *Cappo*, *supra* note 81.

121 *Ibid*. at para 15.

Although *Gladue* has recognized that section 718.2(e) should apply to all Aboriginal offenders, the concepts of deterrence and denunciation as well as issues surrounding the urbanization of Aboriginal offenders and the dislocation they have experienced from Aboriginal communities may create substantively unfair sentencing outcomes for Aboriginal offenders who live in urban centers.

VI. CONCLUDING THOUGHTS

The issues surrounding the relationship of Aboriginal peoples and the Canadian criminal justice system has been studied, re-studied and perhaps even over-studied. As such, there is no shortage of recommendations and conclusions regarding the problems of over-representation. Despite this, the problem of Aboriginal overrepresentation in the Canadian criminal justice system persists. The *Gladue* case and the section 718.2(e) sentencing provision may in fact be one more recommendation that is only mildly effective.

The problems associated with the practical application of the *Gladue* case and section 718.2(e) is apparent in the recent decisions in this area. The recent jurisprudence dealing with Aboriginal offenders demonstrates confusion and frustration in applying section 718.2(e). Additionally, the recent jurisprudence demonstrates the difficulty in implementing alternative sentencing approaches in communities that are unwilling, unable, or unprepared to properly integrate them. The result of the *Gladue* decision requires that Aboriginal offenders, and their individual circumstances, be properly brought before sentencing judges. Furthermore, Aboriginal people should, within reason, have access to resources that would properly enable them to work towards rehabilitation; something which will inevitably benefit all Canadians.

Recall the words of former Minister of Justice Alan Rock when Bill C-31 was enacted, as cited in *Gladue*: "What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of public - alternatives to jail - and not simply resort to that easy answer in every case."[122] What is becoming abundantly clear, however, is that, unlike dispensing jail sentences, there is no easy answer with regard to the application of section 718.2(e).

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122 *Supra,* note 6 at para. 47.