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AFTER GLADUE: ARE JUDGES SENTENCING ABORIGINAL OFFENDERS DIFFERENTLY?

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Abstract

The over-representation of Aboriginal offenders in Canadian prisons has been well documented. In 1996, the Criminal Code underwent a series of amendments. One such amendment (section 718.2(e)) was in part, introduced to address this problem. In an attempt to reduce the numbers of offenders being sentenced to prison, judges were instructed to use incarceration only as a last resort, and to pay particular attention to the circumstances of Aboriginal offenders, especially when deciding on the appropriateness of a prison sentence. This brief and somewhat vague directive was left to sentencing judges to interpret and apply. It is this judicial interpretation and application of section 718.2(e) that informs the focus of this dissertation. A total of 106 cases involving section 718.2(e) and the sentencing of Aboriginal offenders were reviewed. This review allowed for the categorization of the reasons for applying or not applying section 718.2(e) as identified in the judges’ written comments regarding the case. For the cases in which section 718.2(e) appears to have not been applied, Susan Haslip’s (2003) eight hypotheses as to why judges may be reluctant to use section 718.2(e) were used as a starting point for categorization, with the addition of four other reasons not identified in her work. In the cases in which section 718.2(e) appears to have been applied by judges, the reasons are grouped into three main categories. This dissertation concludes with a general discussion of section 718.2(e) and the factors impeding its full implementation, as well as recommendations for further clarification of section 718.2(e) and related issues.
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CHAPTER ONE: INTRODUCTION

Overview

This dissertation assesses the impact a recent legal change is having on a specific group of offenders in Canada. In 1996, the Criminal Code underwent a series of changes and amendments, one of which, section 718.2(e), instructed judges to use incarceration only as a last resort. Special consideration was to be given to Aboriginal offenders. This somewhat vague directive was later clarified by the Supreme Court in 1999 in the *Gladue* decision. After reviewing the literature on the overrepresentation of Aboriginal offenders in prison and on sentencing, this dissertation explores section 718.2(e) in practice and seeks to evaluate if and under what circumstances judges are implementing this new directive, and why this may or may not be the case.

The Historical Situation of Aboriginal Peoples in Canada

The 1991 Royal Commission on Aboriginal Peoples (RCAP) examined in detail the historical and current situation of Aboriginal peoples in Canada. The Commission noted that Canada enjoys a reputation for being a “fair and enlightened society… [where] …diversity among peoples are [sic] celebrated” (RCAP, 1996, p.1). But they also noted that while Canada was rated by the United Nations as the best place in the world to live, this is not the reality for many Aboriginal peoples. As a group, they are disadvantaged by numerous social-economic problems. Some of the problems include:

- Lower life expectancy
- Illness is more common

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1 The entire case is included at Appendix I.
- Social or human problems such as violence and alcohol abuse
- Fewer children graduate from high school
- Far fewer go to college or university
- Poor housing conditions - their homes are often flimsy, leaky and overcrowded
- Water and sanitation systems in Aboriginal communities are often inadequate
- Fewer Aboriginal people have jobs
- More spend time in jails and prisons (RCAP, 1996, p. 2).

The source of these problems is largely rooted in their history of oppression in Canada.

The Aboriginal experience since first contact with the Europeans involved being forced off their lands and on to reserves, a destruction of their economy that they did not initiate nor advocate, and promises and treaties with the Europeans that were not upheld. They were decimated by health problems from diseases that were previous unknown to them, humiliated by the imposition of foreign cultural and religious values, bewildered by the criminalization of traditional Aboriginal activities, and weakened by a forced dependence on an European economic order.

As part of their assimilation, which was intended to “civilize” the Aboriginal peoples, children were forced to attend residential schools which completely severed them from their language and culture, preventing the transmission of language and culture to future generations. In the residential schools the children were often not properly cared for, were undernourished and over-worked and many children experienced abuse. Many of the problems that Aboriginal peoples in Canada face today are the legacy of colonialism, domination and policies of assimilation. Aboriginal culture has been under attack since first contact with Europeans resulting in a total loss of culture and way of life for many of these people. Rupert Ross (1992) has written extensively on the
problems that arise from the way in which Aboriginal peoples have historically been treated in Canada and he warns,

We cannot continue acting as we have. Since contact was first established, the majority culture has taken “assistance” measures which, in many instances, were profoundly counter-productive because we either failed to perceive the issues accurately, or because our remedies required Native people to take steps which only we would take, within our own definitions of propriety. Those steps were most frequently not proper for Native people, with the result that they were not taken at all or, in being attempted, only compounded the problem (p. xxv).

As one solution to this situation that has been created, the Royal Commission on Aboriginal Peoples recommends returning decision-making control back to the Aboriginal communities.

The “Problem”

Keeping this historical oppression in mind, it should not be surprising therefore to discover that Aboriginal peoples are greatly over-represented within the prison population (Gladue, 1999). Indeed, until recently, imprisonment was perceived as the preferred sanction for many offences. However, research indicates that imprisonment is often relatively ineffective in attaining the traditional goals of sentencing (Haslip, 2003; 

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2 Stack (1999) notes that most of the recommendations from the Royal Commission focussed on political change, and while the Commission recognized that the justice system contributes to the continued oppression of Aboriginal peoples, there were no specific recommendations made toward reforming the judiciary. However, while no official recommendations were made, Stack notes that the Commission did comment on sentencing, as, “…RCAP favoured a sentencing approach that would take into account the disadvantage Aboriginals face in the justice system, the historical roots that led to the disadvantage, and the need to heal the offender and his or her community” (p. 477). Furthermore, this does not mean that RCAP has not influenced the courts, as Stack also notes, “…the courts have been invited to consider the work of RCAP when dealing with Aboriginal issues. A number of courts are accepting the invitation in the hope of using the Report as a means to better establish the perspectives of Aboriginal peoples within the existing Canadian legal framework” (p. 474).
*Gladue*, 1999). Furthermore, incarceration is thought by some (Campbell, 1999; LaPrairie, 1999, for example) to be even less effective for Aboriginal offenders, and may even contribute to the discrimination that many already face in the criminal justice system and society as a whole. This is not to suggest that Aboriginal peoples do not have a high rate of offending - they do. The relevant question is why is this the case?

Social factors are often cited as the source of Aboriginal offending. For example, the authors of *Aboriginal Peoples and the Criminal Justice System*, a special issue produced by the Canadian Criminal Justice Association (2000) noted, “…historic factors, as well as present socio-economic conditions, have contributed greatly to disproportionate levels of Aboriginal incarceration, poverty, unemployment, alcohol abuse, and domestic violence, and to the absence of stable business infrastructures. Indeed, the behaviour of most Aboriginal offenders frequently reflect social rather than criminal problems” (Executive Summary, p. 2). Although theorizing offending is not the focus of this dissertation, this point of view seems to be supported by the data contained herein. For example there were a number of cases in which alcohol was found to be a factor in the crime.

If the root of many Aboriginal offenders’ criminal conduct is to be found in desperate social and economic circumstances with commensurate feelings of hopelessness and despair, then it would seem that the traditional Canadian criminal justice is woefully inadequate to address these issues. In fact, our justice system may exacerbate the problem of Aboriginal offending and over-incarceration. This was the essence of the problem facing the Canadian criminal justice system.
The Official “Solution”

In 1996, the Canadian Criminal Code was amended to include a codification of sentencing laws and new directives to sentencing judges. Specifically, section 718 of the Criminal Code outlines the purposes of sentencing which is said to,

...contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

a) to denounce unlawful conduct;
b) to deter the offender and other persons from committing offences;
c) to separate offenders from society, where necessary;
d) to assist in rehabilitating offenders;
e) to provide reparations for harm done to victims or to the community; and
f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community (Gladue, 1999, p. 8).

While existing in jurisprudence and generally held in common by sentencing judges, the purposes of sentencing as outlined above had previously never been written into the Criminal Code. In terms of the goals of sentencing, the addition of the last two goals (providing reparations for harm done and promoting a sense of responsibility in offenders) was quite innovative, and may be interpreted as a move towards restorative justice. A restorative justice approach places more emphasis on the interests of the individual offender and the victim and community, than on the interests of the state. This approach typically involves efforts to more effectively reintegrate the offender back into the community.

One other amendment relevant to this discussion and which specifically forms the focus of this dissertation is section 718.2(e), which states,
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.

Judicial Ambiguity Regarding Interpretation

A relatively brief directive, the interpretation of section 718.2(e) was left to the individual judges. A review of cases involving the sentencing of Aboriginal offenders reveals some uncertainty on the part of judges as to how to effectively implement this provision. Some judges thought this provision was irrelevant if a prison sentence had to be imposed (i.e. for serious offences), while others assumed that section 718.2(e) only applied to Aboriginal offenders raised in an Aboriginal community. There was also some uncertainty as to what “circumstances” should be considered. In April of 1999 the Supreme Court of Canada released a landmark decision that dealt specifically with this section of the Criminal Code in an attempt to clarify some of these uncertainties. Accordingly, much of the ensuing debate and discussion on section 718.2(e) is primarily based on the Supreme Court’s decision on what has become generally known as the Gladue case.

The Gladue Case

In 1995, Jamie Tanis Gladue, a 19 year old Cree woman was drinking with some friends and family celebrating her birthday. She suspected her partner Reuben Beaver was having an affair with her older sister. When her sister left the party with Beaver, Gladue followed them and confronted them about her suspicions. Later, Gladue and Beaver returned to the residence they shared and started to quarrel again. There was much
shouting and exchange of insults. Gladue attacked Beaver with a large knife and stabbed him in the heart after which she was heard saying, “I got you, you fucking bastard.” She did not appear to realize the seriousness of her actions (Gladue, 1999, pp. 5-6).

Gladue was charged with second degree murder and later pleaded guilty to manslaughter. She was sentenced to three years’ imprisonment and a ten year weapons prohibition. Gladue appealed her sentence to the British Columbia Court of Appeal, but her appeal was dismissed. She appealed to the Supreme Court of Canada on the grounds that the judge did not adhere to the directives set out in section 718.2(e) and did not properly consider her Aboriginal status when imposing her sentence (because she did not live on a reserve, the sentencing judge did not feel that her Aboriginal status should be taken into consideration).

The Supreme Court found that the sentencing judge had erred in assuming that section 718.2(e) was not applicable in the Gladue case because she lived in an urban area. Furthermore, the Court ruled that the judge did not properly consider the relevant systemic or background factors that may have contributed to her crime, or sentencing options that would be meaningful to Gladue, the victim’s family and the community. Although these errors were such to normally warrant a new sentencing hearing, the Court decided that this would not be in the interests of justice because the sentence that Gladue received was not an unreasonable one, and Gladue had already been granted full parole (she served six months in custody and then was released on parole). The appeal was therefore dismissed. However, most of the pages of the ruling were devoted to discussing the 1996 sentencing reforms relative to this case and how the courts should implement
them when sentencing Aboriginal offenders. Therefore, the details and outcome of the appeal itself are not as important as the surrounding discussion offered in the judgment. In light of this, the main issue to be considered and decided upon by the Supreme Court was,

... the proper interpretation and application to be given to s. 718.2(e) of the Criminal Code (Gladue, 1999, p. 11).

The Consequences of Gladue

The purpose of the Supreme Court’s discussion in Gladue was then twofold: first to contextualize and explain the directive, and second to provide a framework of analysis for sentencing judges to use when sentencing Aboriginal offenders. The Court began their discussion by emphasizing that section 718.2(e) was a remedial directive, that is, it was not simply a codification of existing practice but rather it was intended to effect change on the part of sentencing judges.

This provision refers to all offenders. However, the reason the Court found the provision to be remedial is because it refers specifically to the need for a special focus on, and a unique method of analysis for Aboriginal offenders. The Court was careful to clarify that this provision does not mean that more attention should be paid to Aboriginal offenders, but the fact that they are specified, as opposed to any other group of offenders means that they should be given different consideration. The Court states,

... sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders ... [this provision] suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction (Gladue, 1999, p. 13).
The Court argued that if there were to be no remedial purpose to this directive, there
would have been no need to single out Aboriginal offenders. Furthermore, they
emphasized that the practice of sentencing in general is changing when they stated, “the
creation of the conditional sentence suggests, on its face, a desire to lessen the use of
incarceration. The general principle expressed in section 718.2(e) must be construed and
applied in this light” (Gladue, 1999, p. 14). Along with what are referred to as the
“traditional” purposes of sentencing (separation, deterrence, denunciation and
rehabilitation), the addition of two new purposes of sentencing, reparation and the
promotion of a sense of responsibility in offenders represented a shift in sentencing from
punitive to more restorative goals.

In making their case that section 718.2(e) is intended to decrease the use of prison
as a sanction, the Court referred to comments made by then Minister of Justice, Allen
Rock regarding the introduction of the sentencing changes:

A general principle that runs throughout Bill C-41 is that jails should be
reserved for those who should be there. Alternatives should be put in
place for those who commit offences but who do not need or merit
incarceration... Jails and prisons will be there for those who need them,
for those who should be punished in that way or separated from society
(Gladue, 1999, p. 16).

And on the effectiveness of prison, Rock further commented, “it is not simply by being
more harsh that we will achieve more effective criminal justice. We must use our scarce
resources wisely” (Gladue, 1999, p. 16).

Section 718.2(e) then, was created out of a recognition that Canada has a high rate
of imprisonment generally, and that Aboriginal peoples are over-represented in Canadian
jails and prisons relative to their numbers in the general population. Furthermore, imprisonment is viewed by many as problematic and generally ineffective. The Court quotes extensively from various sentencing commissions to make this point. For example, the author of one report stated, "it is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution..." (from Taking Responsibility, 1988, as quoted in Gladue on p. 18). The Court summarizes this position by stating, "Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals" (Gladue, 1999, p. 19). Under this new provision, prison is to be used as a last resort, as the Court states, "prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender" (Gladue, 1999, p. 13).

In essence then, the over-representation of Aboriginal offenders in Canadian prisons appears to be the catalyst for the formation of this directive. It is again worth noting that statistics consistently show that the proportion of Aboriginal people in prison is far greater than their proportion in the general population. On this issue, the Court quotes Jackson, who writes, "more than any other group in Canada they [Aboriginal offenders] are subject to the damaging impacts of the criminal justice system's heaviest sanctions" (Gladue, 1999, p. 20). This sad reality forms part of the basis for section 718.2(e). As the Court states,
It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament’s direction to members of the judiciary to inquire into the causes of the problem and to endeavor to remedy it, to the extent that a remedy is possible through the sentencing process (p. 21).

Consequently, when considering the circumstances of Aboriginal offenders, The Supreme Court directs judges to consider:

A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection (p. 21).

What makes Aboriginal offenders different and why do we need special considerations when sentencing them? The Supreme Court answers,

…it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of those unique systemic and background factors, more adversely affected by incarceration and less likely to be ‘rehabilitated’ thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions (p. 22).

Taking these systemic factors into consideration, judges are required to assess whether or not sentencing an Aboriginal offender to prison will serve to deter or denounce the crime in a way that would be meaningful to the offender and that offender’s community (Gladue, 1999, p. 22). Furthermore, judges are now required to give more consideration
to aspects of restorative justice and more culturally appropriate ways of sentencing Aboriginal offenders.

The consequences of the Gladue case were therefore profound. What follows is a summary of the main points that the Supreme Court wrote in *Gladue*:

1. Part XXIII of the Criminal Code codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.

2. Section 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.

3. Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision’s remedial purpose real force.

4. Section 718.2(e) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.

5. Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.

6. Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

   (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.

8. If there is no alternative to incarceration the length of the term must be carefully considered.

9. The section is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.

10. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

11. Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term “community” must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

12. Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.

13. It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the
terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal. (pp. 28-29).

In their ruling, the Supreme Court Justices emphasized that section 718.2(e) was intended to apply to all offenders, but that special consideration be given to Aboriginal offenders. In other words, judges are not expected to pay more attention to Aboriginal offenders, but rather to bear in mind that the circumstances of Aboriginal offenders are unique. The Court suggested that, “…there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction” (Gladue, 1999, p. 13). As a group, Aboriginal offenders were singled out in this legislation because “more than any other group in Canada they are subject to the damaging impacts of the criminal justice system’s heaviest sanctions” (Gladue, 1999, p. 20). These amendments are seen as a first step in addressing the problem of the over-incarceration of Aboriginal offenders.

It should be noted that Parliament and the Supreme Court were not naïve enough to believe that this was the ultimate solution to the problem. They recognized that changes to sentencing practices would not completely eliminate the problem since the causes are multifaceted and rooted in numerous social problems. On this issue the Court noted,

There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of
balance to the offender, victim, and community, and in preventing future crime (p. 21).

The intention of Parliament in introducing section 718.2(e) was to simply decrease the number of Aboriginal offenders being sent to prison, and where possible, to use a restorative justice approach when sentencing these offenders. Based on these recommendations, it appears that sentencing disparity is inevitable, and perhaps even expected. Judges are encouraged to sentence on a case-by-case basis, taking into consideration what is best for the particular offender, victim and the community. This issue will be discussed in more detail in subsequent sections of this dissertation that review the literature on approaches to sentencing and sentencing disparity.

**Objectives and Rationale of the Dissertation**

This review of the historical treatment of Aboriginal peoples in Canada and their present circumstances and experiences within the criminal justice system provide background information and demonstrate the need for sentencing reforms such as section 718.2(e). The Supreme Court provided a rationale and guidelines to judges on how to properly sentence Aboriginal offenders under these new provisions of the Criminal Code.

The primary objective of this dissertation then is to evaluate if and under what circumstances judges are implementing section 718.2(e) when sentencing Aboriginal offenders. Also, if section 718.2(e) is not being implemented by judges as intended, why? Analyzing the written judgments of judges sentencing Aboriginal offenders provides a context for the sentencing decisions and therefore allows for a greater understanding of the sentencing process than would a simple examination of sentencing
outcomes. This project will involve reviewing judges’ written decisions in order to
determine how section 718.2(e) was taken into consideration in sentencing and why it
was or was not applied.

Section 718.2(e) and the Gladue decision have generated much discussion and
sometimes controversy in academic exchanges and in the media. For example, some
argue that section 718.2(e) will be ineffective in reducing the numbers of Aboriginal
offenders in prison, mainly because it does not address the root causes of crime. Others
are critical of the fact that section 718.2(e) singled out Aboriginal offenders, excluding
other offenders who may also come from disadvantaged backgrounds or face similar
forms of discrimination by the criminal justice system (Stenning and Roberts, 2001).
These issues will also be reviewed in more detail in this dissertation, but it would seem
important at this point to note that while section 718.2(e) has been criticized for not
addressing the causes of Aboriginal crime, this criticism may be misdirected, as it does
not appear that this was the intent of Parliament when it implemented the provision.
Instead, section 718.2(e) arose out of a recognition that there were too many Aboriginal
peoples in Canadian prisons, and that prison was ineffective and perhaps unnecessary for
many of these offenders. Based on this, judges were instructed to consider and use
alternatives in their sentencing, which would be one way to reduce the numbers of
Aboriginal offenders being sent to prison.

This dissertation therefore begins by exploring various issues in the literature
concerning the overrepresentation of Aboriginal offenders in Canadian prisons and
sentencing in general, in order to provide a context and background information on recent
sentencing reforms aimed at reducing those numbers. The discussion then moves to an examination of section 718.2(e) in practice.

The data that I will be using to evaluate changes in the sentencing of Aboriginal offenders will be mainly in the form of judicial decisions from across Canada. Judges are required to give reasons for why or why not section 718.2(e) is applicable or impacts their decision when sentencing Aboriginal offenders. I have collected approximately 106 reported cases involving this provision and Aboriginal offenders. In all of these cases, section 718.2(e) is discussed, but not always applied. A review of these cases will aid in determining how and when sentencing judges are using the directive in their sentencing, and the explicit, or sometimes implicit, rationale underlying their decision.

Many researchers (LaPrairie, 1990, 1999; Roberts, 1999a, for example) have pointed to the lack of research on the topic of sentencing in Canada in general, and more specifically on sentencing Aboriginal offenders. My research will hopefully fill some of that gap. Furthermore, existing literature and research on the over-incarceration of Aboriginal offenders is largely statistical and primarily examines the number of Aboriginal offenders in prison, or compares population distributions within prison. While much of this research is limited to examining the causes of crimes and/or outcomes of sentencing, my research will also examine the process of sentencing, specifically, what factors are taken into consideration and influence the sentence that an Aboriginal offender receives. This will enhance the scholarship on sentencing generally, and on sentencing Aboriginal offenders specifically.
Section 718.2(e) is a relatively new provision, and not without controversy. There have been doubts expressed about how effective it will be and there has also been a fairly large media backlash against it. Five years\(^3\) after its implementation it should be evaluated in order to determine its initial success, and identify potential problems. Reviewing judicial decisions will highlight some of the factors that are taken into consideration at sentencing. Therefore, this study not only fills an information gap on how Aboriginal offenders are sentenced, but also will evaluate the effectiveness of section 718.2(e) to date, and identify the reasons for some judges' reluctance to apply it.

\(^3\)The data collected for this dissertation includes cases between 1996 and 2001.
CHAPTER TWO: LITERATURE REVIEW

Overview

A considerable volume of material in Canadian criminology and sociology has been presented over the years detailing the many problems experienced by the Aboriginal population with the Canadian criminal justice system. Even a cursory review of this literature reveals an emphasis on the alarmingly high numbers of Aboriginal offenders in prison, especially when compared to their numbers in the total population. Some researchers claim that these numbers are the result of systemic racism and discrimination at the various levels of the justice system. For example, Anand (2000) comments, “In the last ten years, empirical evidence has been mounting that shows native offenders are being given lengthy custodial sentences for the same offences which, when committed by non-natives, result in community-based or short custodial sentences” (p. 416). Others (Stenning and Roberts, 2001, for example) argue that the high number of Aboriginal offenders in prisons are simply a reflection of more crimes being committed by these people. However, Wotherspoon and Satzewich (1993) provide an interesting explanation for the high numbers which contradicts this latter argument,

…the overrepresentation of native peoples in correctional institutions helps to produce an image that aboriginal peoples are involved in proportionately more criminal activity than are members of the general population. Common characteristics emerge among those persons who are actually convicted and sentenced: they are typically young, male, aboriginal, poorly educated, and of low socioeconomic status. The incarcerated population, though, includes only a small proportion of all persons who have committed a criminal offence. Evans and Himelfarb (1987:44), for example, estimate that one person is sentenced for every 43 break-and-enter offences that occur in Canada. Because of selectivity and possible bias in reporting and processing cases at various points within the criminal justice system, the inmate population is not a representative
group of those who have committed crimes. Consequently, indicators of native criminality which are based upon the incarcerated population tend to tell us more about class, “race”, and gender inequalities within the criminal justice system and the socioeconomic and political system within which it operates than about the actual nature of criminal activity (p. 190).

Although there may be disagreement on the cause, it cannot be denied that Aboriginal peoples have much higher rates of contact with the criminal justice system than non-Aboriginal people in Canada. A special issue of the journal of the Canadian Criminal Justice Association (Aboriginal Peoples and the Criminal Justice System: Part IV: Aboriginal People and the Justice System, 2000) noted,

Over the past thirty years, there have been numerous studies, reports and justice inquiries across the country, and a growing body of statistical information, that confirm that Aboriginal peoples experience disproportionately high rates of crime and victimization, are over-represented in the court and the correctional system, and further, feel a deep alienation from a justice system that is to them foreign and inaccessible, and reflects both overt and systemic racism (2000, Part IV, p. 1).

Patricia Monture-Okanee (1995) is also critical of the Canadian criminal justice system and Aboriginal peoples’ involvement in it. She contends that “Aboriginal offenders are the commodities on which Canada’s justice system relies” (p. 1). By this statement she highlights the fact that Aboriginal offenders make up the majority of the prison populations and many jobs within the system are dependent on this population. Without a dominant Aboriginal prison population she suggests many prisons would cease to exist. From her point of view, prisons are an industry dependent upon Aboriginal offenders. Ironically, as Monture-Okanee notes, if this closure ever did occur, forcing a mass lay off of justice personnel, Aboriginal peoples’ employment figures would not be affected because so few of them work in this area. Hence, Monture-Okanee draws our
attention to the over-representation of Aboriginal peoples as offenders in the criminal justice system on the one hand, and the under-representation of Aboriginal peoples as employees within the system on the other.

This imbalance leads to what Monture-Okanee describes as a flow of resources out of Aboriginal communities. These resources include people (community members, usually men, sent to prison) and financial resources (money spent on lawyers or paying fines). This depletion of resources contributes to a lack of respect that many Aboriginal people feel toward the criminal justice system as, "It is overly obvious that Aboriginal people cannot (and should not) respect a system of criminal law that entrenches our oppression under a pretense of justice and fairness" (1995, p. 1). It could also be noted that this outflow of human and financial resources from Aboriginal communities also adds to the lack of respect that many non-Aboriginal people feel towards the system.

Stack (1999) also claims the criminal justice system has failed Aboriginal peoples in two ways. The first failure involves the justice system's refusal or inability to take into consideration the different understanding and interpretation of justice that Aboriginal peoples hold. The second failure involves systemic discrimination against Aboriginal peoples, which Stack claims arises in part from a lack of consideration by judges of the widespread poverty, unemployment and other social problems endemic to the Aboriginal population (p. 475). However, Stack is hopeful that judicial practices are changing for the better and that the latter form of failure can be corrected or at least reduced. Stack comments,

Fortunately, a number of judges are now trying to be sensitive to the special situation of Aboriginals going through the criminal process. Some
have even taken advantage of RCAP's reports and findings to inform their exercise of judicial discretion with the perspectives of Aboriginal peoples. There are two discretionary areas of the criminal process where RCAP has been used to advance Aboriginal perspectives: sentencing an Aboriginal accused and allowing an Aboriginal accused to challenge the jury for discrimination (p. 475).

The current system to which Aboriginal peoples are subjected is based on European values, many of which are foreign to or contradict Aboriginal values and culture. Recognition of this has led to efforts to reconcile these differences and to administer justice in a more culturally appropriate way. Section 718.2(e) is one such attempt. Encouraging judges to pay attention to the circumstances of Aboriginal peoples and to use alternatives to incarceration that may be more meaningful and beneficial to Aboriginal offenders is but one way to improve the experience of some Aboriginal peoples.

In this chapter, the issue of discrimination as an explanation for the overrepresentation of Aboriginal offenders in prison will be reviewed, including the hypothesis that racism in the criminal justice system is responsible for the harsher treatment of Aboriginal peoples. The literature on sentencing in general will also be reviewed. However, the essential purpose of this literature review is to determine the relevance of the various research findings to the objective of this thesis. Gaps or contradictions in the literature regarding the sentencing of convicted Aboriginal offenders may be regarded as a justification for my own research on the topic. Two key areas of literature are reviewed here. First, the literature covering the general issue of the over-representation of Aboriginal offenders in the prison population, and second, the literature concentrating on sentencing.
THE OVER-REPRESENTATION OF ABORIGINAL OFFENDERS IN PRISON

Griffiths and Verdun-Jones (1989) explored the issue of overrepresentation of Aboriginal offenders in prisons and noted that, "Concern has been expressed that, all other factors being equal, native Indians are more likely to receive a sentence involving custody than their white counterparts" (p. 565). However, they note that proving discrimination in Canadian courts is a very difficult task for a variety of reasons including the complex nature of the sentencing process, variations in sentencing options and patterns across jurisdictions, and the lack of research on the topic. Having said this, they review some research that supports the claim that Aboriginal offenders are discriminated against in the criminal justice system.

They report findings from research conducted in the 1970’s in Saskatchewan and British Columbia in which discrimination was found, but they caution that the results cannot be generalized to other jurisdictions for the reasons outlined above. They also refer to Hogarth’s 1971 study in which it was found that background and attitudinal characteristics of judges had a significant impact on sentencing. Furthermore, an Alberta study found that “…in an analysis of pre-sentence reports … probation officers in rural areas treated native Indians more severely” (p. 565). While not specific to sentencing, and perhaps particular to certain regions, studies such as these document that discriminatory criminal justice processing does occur, and there is nothing to suggest that it would not occur at the judicial level as well.

Griffiths and Verdun-Jones also note that “… while native Indians committed less serious offences than non-natives, they were more likely to be incarcerated in
Saskatchewan provincial institutions, due in large measure to non-payment of fines” (1989, p. 565). In this sense, overrepresentation may not be a direct result of discriminatory practices by judges themselves, but rather a function of a systemic bias against the economically marginalized, among which are a high number of Aboriginal people.

This conclusion is reached by Stevens (1991) as well. In his discussion of Aboriginal peoples and the criminal justice system, Stevens explored the issue of discrimination against Aboriginal offenders, both overt and systematic. On the issue of overt discrimination, Stevens notes that discriminatory sentencing against Aboriginal peoples is a relatively under-researched area in Canada. The research that has been undertaken often falls short in its attempt to document the existence of unfair sentencing. For example, the Royal Commission on the Donald Marshall Jr. prosecution, which concluded that Donald Marshall Jr. was wrongfully convicted solely because he was Aboriginal, found “... no significant variation in sentencing between Aboriginal and non-Aboriginal offenders” (Stevens, 1991, p. 230).

Stevens reviewed other research that looked at discriminatory sentencing of black offenders. Again, this research found that while black offenders were more likely to be incarcerated than non-black offenders, race was not a significant factor in their sentencing. However, these findings are contradicted, at least in part, by the findings of the Commission on Systemic Racism in the Ontario Criminal Justice System (1995). On the issue of higher incarceration rates for black offenders, the Commission found that higher rates of imprisonment for the sample they looked at could mainly be attributed to
factors such as employment status and detention before trial. However, the Commission also found,

…an unexplained differential, not due to gravity of charge, record, plea, crown election, pre-trial detention, unemployment or other social factors. In short, some black prisoners would not have been sentenced to prison had they been white. This difference can only be attributed to direct racial discrimination (1995, p. 280).

The Commission noted that while this direct discrimination might be limited to specific offences, this does not mean that indirect discrimination is limited to these offences. The Commission explained that judges sentence under busy conditions, and sometimes have to rely on inadequate information collected by others. This creates a situation in which judges may base their decisions on “unexamined assumptions and stereotypes” about the offender before them for sentencing (1995, p. 281).

An important element to the efficient functioning of our criminal justice system is public support. In other words, it is not enough that the system be fair and equitable, it must also be perceived as such. However, Stevens (1991) reports the findings a study in which Aboriginal offenders were asked about their perceptions on sentencing, where it appears that not all offenders hold confidence in the fairness of the system:

One part of the study looked at Aboriginal perceptions of the judiciary with respect to sentencing. Forty-nine per cent of the offenders said that the judges were not fair; 38 per cent said that the judges had been fair; and 12 per cent of the respondents said that they did not know. The range between these three responses appears to indicate that judges are not seen as totally to blame for creating the deficiencies in the system. Another question asked whether the judge had explained the sentence to the convicted Aboriginal person. Sixty-eight per cent said that the judge had done so while only 25 per cent said that the judge had not. Interestingly, the study found that 54 per cent of the respondents felt that Indians got harsher sentences than non-Indians, 16 per cent felt that they got the same as non-Indians, and a further 23 per cent did not know if there had been a
disparity. It is difficult to conclude from these results that there is any significant direct discrimination by the judiciary against Aboriginal people (p. 231).

While it is clear that Stevens’ interpretation of these results is that we cannot state with any degree of certainty that Aboriginal peoples are directly discriminated against by the criminal justice system, we should not ignore the fact that almost half (49%) of the Aboriginal inmates interviewed felt that the judges were not fair, one quarter (25%) reported that the judge had not explained their sentence to them, and over half (54%) believed that Aboriginal offenders received harsher sentences than non-Aboriginal offenders. This could be interpreted as an indication of the lack of confidence that Aboriginal offenders have in the criminal justice system and that they feel discriminated against.

On the second issue, systemic discrimination, Stevens writes, “(A)nother way of determining whether the justice system discriminates against Aboriginal people is to assess whether equal application of the law affects Aboriginal people more adversely than non-Aboriginal” (1991, p. 231). To illustrate this, he looked at whether or not fines had a more adverse affect on Aboriginal offenders. Stevens found this to in fact be the case, since many Aboriginal people are not able to pay off fines due to lack of employment and default of fine payment often leads to incarceration.

This issue of systemic racism is also raised by Rudin and Roach (2002) in their defence of section 718.2(e) as a remedy to the problem of the over-representation of Aboriginal offenders in prisons. The authors highlight the problems with a justice system based on notions of formal equality. Under this approach, everyone should be treated the
same way and discrimination exists when there is differential treatment of similarly situated peoples. Those who are critical of section 718.2(e) may use this argument as a reason not to treat Aboriginal offenders differently. Rudin and Roach detail the dire consequences that may result from such an approach, stating, “Formal equality that treats all offenders the same, or does not allow for group-based amelioration of the disadvantaged, is only a recipe for continued inequality and colonialism” (p. 33).

Moreover, they claim that formal equality is an outdated concept in Canadian law. Formal equality places an emphasis on similar treatment - the idea that all persons are equal under the law is an example of a formal equality concept (Hughes, 2003).

However, it has now been recognized in the legal arena that “…discrimination does not need to be direct or overt, but may occur because ostensibly neutral laws or practices have a disparate impact on particular groups” (Hughes, 2003, p. 2). Because of this recognition, formal equality has instead been replaced with a commitment to substantive equality. Section 718.2(e) appears to be a move towards substantive equality.

Substantive equality recognizes that there are disadvantaged groups in society, and attempts to ameliorate that disadvantage through some form of special consideration or treatment.

Another source of systemic discrimination identified by Stevens (1991) is the lack of resources and support in many Aboriginal offenders’ communities. Faced with no other program alternatives for rehabilitation, judges often must rely on incarceration as a legal sanction, even if it is not the most effective. Also, because factors such as one’s employment and ability to compensate victims are often taken into consideration at
sentencing, Stevens writes, "(I)f these extenuating factors are applied equally to all offenders, the Aboriginal person, who exists at the bottom of the socioeconomic order with little or no apparent support, will likely be more adversely affected than would other offenders" (1991, p. 233).

LaPrairie (1990) has written extensively on the overrepresentation of Aboriginal peoples in Canadian prisons and its relationship to sentencing. She claims the relationship is not as straightforward as many would assume, and offers reasons for why certain groups may be reluctant to explore explanations other than discriminatory sentencing for over-incarceration. The main reason is simply the lack of research and sufficient information on the topic as, "...the relationship between sentencing and overrepresentation has not been explored systematically" (p. 429). LaPrairie is critical of the prevalent assumption that discriminatory sentencing patterns are largely responsible for the high numbers of Aboriginal people in prison. Instead, she claims we must look at events and decisions that occur before the Aboriginal offender comes before the judge for sentencing in order to fully understand the overrepresentation of Aboriginal people in inmate populations.

According to LaPrairie, there are three generally accepted explanations for the high proportion of Aboriginal offenders in Canadian prisons: 1) differential treatment by the criminal justice system (systemic racism against Aboriginal people when they come into contact with the criminal justice system is responsible for their high numbers in the prison population); 2) differential commission of crime (Aboriginal people simply commit more crime); and 3) differential offence patterns (Aboriginal people commit
crimes that are more likely to be detected and processed by the criminal justice system). LaPrairie writes that most of the research concentrates on the first explanation as it appears to serve a number of agendas, such as self-government for Aboriginal peoples, but it also detracts attention from social inequality in larger society by focussing solely on problems within the criminal justice system. For this same reason, she believes explanations two and three are often ignored because they would, “...require an examination of fundamental social structure and economic disparity” (1990, p. 430).

LaPrairie claims that the empirical evidence often does not support the hypothesis that discriminatory sentencing is responsible for the high numbers of Aboriginal peoples in prison. She cites some studies that question the assumption that the courts sentence Aboriginal offenders more harshly. While the research is sparse, there is a lack of data to support the assumption that there are unwarranted disparities in dispositions or sentence lengths. Where they do exist, factors other than race often account for these disparities.

In terms of sentence length, there is even some evidence that Aboriginal offenders receive shorter sentences than non-Aboriginal offenders (although Canadian data is limited). However, LaPrairie hypothesizes that this may be a result of a situation where, “...judges rely more on incarceration when Aboriginal offenders cannot meet the criteria for probation but balance incarceration decisions with shorter sentence lengths” (1990, p. 435). This in itself is problematic as it may lead to higher recidivism rates and longer prior records.

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4 Probation is a sentence imposed by a court which allows the offender to remain free in the community under specified conditions that they must adhere to.
LaPrairie does not deny that overt racism exists in the criminal justice system, but argues that this explanation may be too simplistic and not conducive to finding long-term solutions to the problems. On the other hand, systemic discrimination, or “treating unequals equally” (1990, p. 437) offers a possible explanation for the overrepresentation of Aboriginal offenders in prison. As previously discussed, this occurs in a legal system based on formal equality, where treating all offenders the same, without consideration of the structural factors that may have contributed to their criminality may lead to differential sentencing. Alternatively, understanding the relationship between social and economic marginalization and crime and taking this into account at sentencing may reduce some of the disparities.

In 1992, LaPrairie undertook a large study to investigate the characteristics of Aboriginal inmates as compared to Aboriginal peoples living in urban areas. The purpose was to “…identify specific aboriginal groups most vulnerable to the commission of crime and criminal justice processing” (1992, p. 1), thereby questioning the assumption that all Aboriginal peoples are susceptible to these forces. Faced with the problem of increasing numbers of Aboriginal peoples being sentenced to prison, LaPrairie comments, “One of the difficulties in reducing aboriginal prison populations may be a lack of specificity in defining the problems and in understanding the social structuring of contemporary aboriginal society, and how this affects the commission of and response to crime and disorder” (1992, p. 2).

LaPrairie posits that class, more than race is the most important factor in explaining why Aboriginal people are over-represented in prison populations. In short,
LaPrairie argues, "the perspective put forward here suggests that more registered Indians are in correctional institutions because a disproportionate number of this group are at the bottom of the socio-economic ladder as compared to other aboriginal or non-aboriginal groups" (1992, p. 2). Based on her findings, LaPrairie argues that Aboriginal and non-Aboriginal offenders share many of the same characteristics (i.e. lower socio-economic status), and focusing on race detracts attention from the real issues.

LaPrairie goes on to explain that a lower social status is consistently commensurate with a lack of formal education, unemployment, limited social and work skills, and low income -- all of which place many Aboriginal peoples among the most disadvantaged groups in our society. These are also the factors that lead to increased criminal activity and may affect how certain groups are processed by the criminal justice system. However, focussing only on differential treatment (i.e. racism) by the criminal justice system as an explanation for overrepresentation is too narrow. Therefore, LaPrairie believes that efforts aimed at criminal justice reform as a means of reducing high Aboriginal incarceration rates will be ineffective unless the broader socio-economic conditions of Aboriginal peoples are first addressed.

In another article, LaPrairie (1999) looks specifically at the extent to which differential sentencing is responsible for the high numbers of Aboriginal peoples in prison. Again, she is critical of the assumption that judges sentence Aboriginal offenders more harshly, as it has not been empirically substantiated. Regarding the small body of research showing that Aboriginal peoples are in fact sentenced more harshly than non-Aboriginal peoples, LaPrairie comments that the findings should be interpreted with
caution, as other legal or extra-legal variables may explain the disparity, not just the sentencing process. In her estimation, severity of offence and prior criminal record are the two main factors that determine sentencing. LaPrairie concludes by suggesting that migration patterns, population characteristics, age distributions, education levels and labour force participation and income may prove more telling in explaining Aboriginal incarceration rates than racism in the criminal justice system.

Rudin and Roach (2002) provide a brief overview of three theories on the over-representation of Aboriginal offenders in Canadian prisons. They write that culture-clash theory claims that over-representation is a result of different approaches to justice held by Aboriginal and non-Aboriginal people. This theory purports that the current justice system and its underlying concepts are alien to many Aboriginal peoples. However, Rudin and Roach claim this theory is inadequate, as it fails to explain the large numbers of Aboriginal people in prison who were not raised in traditional Aboriginal homes. For example, they cite findings from the Royal Commission on Aboriginal People revealing that in some prisons, “...over 95 per cent of the Aboriginal inmates had been adopted or raised in foster care” (p. 17).

The second theory that Rudin and Roach review is socio-economic theory, which purports that many Aboriginal offenders come from socially and economically disadvantaged backgrounds. Again, Rudin and Roach criticize this theory for its failure to explain why so many Aboriginal people are marginalized in the first place. The theory

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5 In fact, LaPrairie also cites research indicating that Aboriginal peoples are treated more leniently than non-Aboriginal people, both in dispositions and sentence length.
that Rudin and Roach suggest best explains the over-representation of Aboriginal peoples looks to the legacy of Aboriginal colonization. This theory, also supported by the Royal Commission on Aboriginal Peoples, claims that the history of colonization, and the continuing effects it has on Aboriginal peoples in Canada best explains the causes of Aboriginal crime and other forms of social disorder (p. 17).

For this reason, Rudin and Roach argue that section 718.2(e) and a restorative approach to justice in general, are appropriate responses to address some of the effects of colonization when Aboriginal offenders come before the courts for sentencing. They further claim that section 718.2(e) can contribute to decreasing the numbers of Aboriginal offenders being sent to prison as, “An understanding of the impact of colonialism can lead to the creation of sentences that address the root causes of criminal behaviour, but that do not necessarily require incarceration” (p. 19).

Summary

A review of the research on the overrepresentation of Aboriginal offenders in Canadian prisons indicates that the evidence is inconsistent and inadequate. The assumption that discrimination in the criminal justice system is responsible, at least in part, for the high numbers of Aboriginal peoples in Canadian prisons has not been thoroughly researched, and methodological uses render the empirical evidence inconclusive.

According to the research reviewed here, there is evidence that racial discrimination is more likely to be systemic than overt. Furthermore, it has been suggested that socio-economic status factors (class), more than race can explain the over-
incarceration of Aboriginal peoples. However, both of these issues need to be explored in more detail before any definitive conclusions can be drawn.

SENTENCING

Since Canadian Parliament and the Supreme Court have identified changes in sentencing as a way to address the problem of the high numbers of Aboriginal peoples in prison, it seems appropriate at this time to review some of the sentencing literature. Theoretical approaches to sentencing, the extent and causes of sentencing disparity, and sentencing reform will be reviewed in the following pages.

Sentencing Issues/Research in Canada

While the body of research on sentencing in Canada is quite small, what has been written often stresses the need for major changes. Writing over 10 years ago, Roberts (1990) recommended the need for sentencing reform in Canada, citing the various evaluations that had been undertaken in the 1980's to examine the issue of sentencing. These include the Report of the Canadian Sentencing Commission (1987), the House of Commons Standing Committee on Justice and Solicitor General, and the Law Reform Commission of Canada. Much of the discussion in these reports focussed on the need for more research to be done and the creation of a sentencing guideline system as a way of reducing disparity.

Writing nearly a decade later, Roberts (1999a) reports that sentencing research and discussion comes in waves, and that as a result of the 1996 sentencing reforms, sentencing has once again emerged as an important area of academic inquiry. However,
after outlining the historical context for sentencing research and some of the more recent
important findings, Roberts notes, “regrettably, there is a lack of basic research in the
area of sentencing” (p. 230). The current interest in sentencing research was sparked by
the introduction of Bill C-41 in 1996. These reforms included a “…statutory statement
on the purpose and principles of sentencing, and the creation of a new disposition, the
conditional term of imprisonment”, as well as measures to reduce “…Canada’s reliance
on imprisonment as a sanction” (p. 227, 229). Included in these reforms are sections 718
and 718.2(e).

Theoretical Approaches to Sentencing
A review of the literature on sentencing and sentencing disparity in Canada should
perhaps begin with a discussion of theories of sentencing. When asked what a theory of
sentencing currently used in Canada would be, many refer to the purposes of sentencing
recently legislated in section 718 of the Criminal Code:

- To denounce unlawful conduct
- To deter the offender and other persons from committing offences
- To separate offenders from society, where necessary
- To assist in rehabilitating offenders
- To provide reparations for harm done to victim or the community
- To promote a sense of responsibility in offenders, and acknowledgement of
  the harm done to victims and to the community

These are the objectives that judges are instructed to consider when determining an
appropriate sentence for a particular offender. While codifying these sentencing
objectives was intended to decrease the perceived problem of disparity in sentencing by
specifying a number of agreed upon principles, they serve other purposes as well. As Duff and Garland (1994) note, “punishment requires justification because it is morally problematic. It is morally problematic because it involves doing things to people that (when not described as ‘punishment’) seem morally wrong” (p. 2). In other words, setting out sentencing principles serves to legitimize and justify the actions of the criminal justice system, and show that its purpose is to benefit society as a whole. Implicit in each of these six objectives is a penal philosophy about criminals and the causes of crime and what should be done in response to them. However, as we will see, empirical research indicates that most of these objectives fall short of their aims, especially when incarceration is the sentence.

*Utilitarian vs. Retributivist Objectives of Sentencing*

Generally speaking, these six objectives can be thought of as achieving one of two objectives: utilitarian or retributivist. Utilitarian goals look to some future purpose or benefit as a justification for criminal sanctions. Current actions (i.e. the sentence imposed) are justified on the grounds of some commonly desired future outcome. Rudin and Roach (2002) note, “The traditional utilitarian objectives of sentencing -- deterrence, rehabilitation, and incapacitation -- are largely about using sentencing to address social problems that are not caused exclusively by the sentencing process itself” (p. 15). They provide the example of attempting to reduce drunk driving through sentencing to illustrate their point.

Alternatively, retributivist goals are more concerned with simply punishing the individual offender for their crime, and “…looks primarily to the past, insofar as it
focuses upon the blameworthiness of the offence committed rather than the future consequences of punishment” (Griffiths and Verdun-Jones, 1989, p. 323). In this sense, legal sanctions are viewed as proportional to the crime and are usually punitive in nature. Under this approach, the punishment is usually considered to be an end in itself (Rudin and Roach, 2002).

**Deterrence**

Deterrence is thought to be an important goal in sentencing in that one of the main purposes of punishment is to prevent future crime. Deterrence can take one of two forms: specific or general. *Specific* deterrence refers to preventing the individual offender from committing future crime through punishment, while *general* deterrence refers to the prevention of crime committed by other people, as a result of the threat of punishment (Griffiths and Verdun-Jones, 1989).

Implicit in the theory of deterrence is the notion that criminals (or potential criminals) are rational, calculating human beings who consider a cost-benefit analysis when deciding whether or not to commit a crime. Therefore, Hartnagel (1998) emphasizes this point when he states, “deterrence assumes that the threat of future punishment will inhibit the rational individual from choosing to commit further crime if the costs in punishment exceed the rewards anticipated from crime. Increasing the certainty, swiftness, and severity of punishment should increase the costs of criminal behaviour, thus reducing the amount of crime in society” (p.74).
This sentencing objective is problematic for a variety of reasons. The empirical evidence indicates that in reality, punishment has no deterrent value. Quigley (2000) argues that the premise of this objective, that potential offenders weigh the costs and risks of crime, is generally untrue. Instead, he argues that much crime is spontaneous or committed by those under the influence of drugs or alcohol, which means the offender is not making a rational decision based on the costs and benefits.

If general deterrence is to be effective, people must be informed about the possible consequences of their actions. Legal sanctions cannot have a general deterrent effect unless they are widely known, and at present there is a lack of public knowledge about sentencing (John Howard Society of Alberta, 1998). Furthermore, it cannot be assumed that this knowledge will have the same effect on everyone – people interpret things differently and have different motives for their actions. In terms of specific deterrence, rates of recidivism indicate that legal sanctions often do not deter offenders from committing future crime. Lastly, some may have a moral objection to the aim of general deterrence, in that it is objectionable to use the punishment of a specific offender to discourage others from committing crime.

*Segregation*

The objective of segregation is to separate criminals from law-abiding citizens, usually through incarceration, although offenders may also be segregated through other means such as house arrest. The rationale underlying segregation as a sentencing objective is that it protects society and reduces crime. Simply put, an offender is unable to commit
further crimes while incarcerated. Again, within this perspective there are two strategies of incapacitation. Collective incapacitation refers to giving a prison sentence of uniform length to all offenders who commit a particular crime. Selective incapacitation refers to giving a prison sentence to those specific offenders who pose a particular risk of further crime commission if they were not incarcerated. Griffiths and Verdun-Jones (1989) note, “the theory behind selective incapacitation is that a relatively small number of offenders commit a disproportionately large number of crimes” (p. 217). Therefore, the characteristics of the criminal, not the crime itself, are the basis for incapacitation.

There are a number of specific theories about criminal behaviour implicit in the general theory of segregation. One such theory is Wilson’s “broken windows thesis”6 which purports that decreasing the extent of crime and criminals that people are exposed to (either directly or through viewing its effects) increases people’s efforts to become involved in maintaining order in their community (Ellis and Dekeseredy, 1996). Put another way, when people see crime and its effects around them it increases their fear and indifference to what happens in their community. Therefore, incarcerating and thereby removing those individuals who are committing the most crime should decrease crime in that community, not only by removing the individual offender, but also by removing criminogenic conditions. Ellis and Dekeseredy (1996) summarize the process as,

A disorderly society is a criminogenic one – that is, one that encourages or facilitates criminal conduct. A society that does not effectively punish criminal conduct is also a criminogenic one. A disorderly society in which criminals are unlikely to be captured until they have committed a number of crimes, and are not punished severely enough when they are finally captured, is doubly criminogenic (p. 271).

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6 This theory is also implicit in the sentencing objective of deterrence.
While it is only a temporary measure, the objective of segregation is thought to be the only goal that the Canadian Criminal justice system can effectively accomplish (John Howard Society of Alberta, 1998). This is because while incarcerated, a particular offender is in fact prevented from committing crime. However, this sentencing objective is also problematic because it is based on notions of future risk of offending, and studies show that this is near impossible to determine. Furthermore, Griffiths and Verdun-Jones (1989) note that, “...many people consider it unjust to give one individual a more severe sentence than another who has committed exactly the same offence, solely on the basis of a prediction about what he or she may do in the future” (p. 327).

Rehabilitation

This sentencing objective involves the notion that offenders need to be “corrected” or reformed into law-abiding citizens through some form of treatment. This objective differs from the others that have been discussed so far in that the assumption underlying this theory is that criminal behaviour is caused by some “...biological, psychological, and/or social conditions over which the individual has little or no control or choice” (Hartnagel, 1998, p. 74). Therefore, legal sanctions are necessary to correct or treat the offender so that they will not commit further crime.

Another approach to rehabilitation takes a more paternalistic perspective. Morris (1994) argues that the goal of rehabilitation is not to “correct” criminals, but instead is educative and is intended to “...teach them a moral lesson which, it is hoped, they will understand and accept for themselves” (p. 92). In this perspective, there is no “defect”
involved, but rather the notion that the offender erred morally, perhaps because they did not know any better. Both perspectives view rehabilitation as necessary in order to change some aspect of the individual offender. Whatever the rationale, empirical studies show that generally, rehabilitation is not achieved through traditional sentencing practices, especially incarceration.

Denunciation

Denunciation serves the objective of publicly identifying and chastising behaviours that are deemed not acceptable to society. Denunciation is said to have an educative function as it reinforces society’s basic values and may therefore influence behaviour by reminding people of what will or will not be tolerated. Another perspective views the role of denunciation as one of expressing, “...the abhorrence that society feels for certain types of serious crimes” and “...is supposed to represent the revulsion of society...” (Griffiths and Verdun-Jones, 1989, p.333). This is intended to promote a sense of solidarity and community among member of a society by collectively expressing their outrage towards certain behaviours.

Assumptions about offenders and crime implicit in this theory can be traced back to the work of Durkheim who emphasized the role of shared norms and values in maintaining social order. Punishment, according to Durkheim, is functional for society as it strengthens societal bonds by reaffirming certain collectively held norms and values (Garland, 1990). Punishing crimes then, has a somewhat bonding effect as crimes are
“...moral outrages which 'shock' all 'healthy consciences' and give rise to a demand for punishment rather than any lesser form of social reaction” (Garland, 1990, p. 29).

Again, the effectiveness of denunciation is questionable when, “...so few sentencing cases are publicly reported in sufficient detail to be expressive and, second, even if so, whether we might achieve denunciation more effectively by having offenders visible in the community” (Quigley, 2000, p. 330). Another problem with denunciation arises from the assumption that it is an expression of commonly held beliefs and values. Not all members of society may hold the same beliefs and ascribe to the same values.

*Reparation*

The previous four goals are typically referred to as the “traditional” goals of sentencing. The last two (reparation and responsibility) are recent additions, and are usually discussed under the heading of “restorative justice.” Proponents of restorative justice argue that crime needs to be considered as a “violation of one person by another, rather than a violation against the state” (John Howard Society of Alberta, 1998, p. 91).

Reparation or restitution then, “...attempts to restore circumstances to their original state or condition prior to the crime. It strives to reconcile victim and offender and to provide some compensation to the victim for the harm experienced” (Hartnagel, 1998, p. 75).

One theory implicit in this sentencing objective is Braithwaite’s “reintegrative shaming.” This theory posits that repressive sanctions (i.e. punishment) are not effective for discouraging future criminal behaviour, and in fact may do just the opposite by encouraging it (Ellis and Dekeseredy, 1996). For Braithwaite, reintegrative shaming is
far more effective than stigmatizing shaming which typically occurs with traditional punishment. The former involves a process where the offender is made aware of the community's disapproval of his or her behaviour, but then is welcomed back into that community. The latter, disintegrative shaming, may actually contribute to future criminal behaviour as it stigmatizes the offender and keeps them segregated from other law-abiding citizens.

Reparation is a new sentencing objective, and has not yet been tested empirically for its effectiveness. However, since reparation may involve some form of compensation paid to the victim, there are anticipated concerns about the applicability of this sentencing objective to certain groups of offenders, specifically those who are unable financially to make reparations. Based on this, judges are encouraged to interpret reparation broadly and be creative in determining reparation options. Such interpretations and options could be apologies, efforts to repay some damages, and fine option programs (Roach and Rudin, 2000).

Responsibility

The second of the two new sentencing objectives, promoting a sense of responsibility, is seen as imperative to a restorative justice model in which offenders are reintegrated back into the community. In Gladue, the Supreme Court emphasized this necessity by stating,

Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of
the community rather than a bitter offender returning after a term of imprisonment (1999, p. 23).

One of the theories implicit in this sentencing objective is Braithwaite’s “reintegrative shaming” mentioned above. Another is Hirschi’s “bond-to-society” perspective (Ellis and Dekeseredy, 1996). According to this theory, people who commit crime are less attached to others, less invested in society, spend less time doing conventional things and do not subscribe to commonly held beliefs as much as others. Therefore, if one of the goals of sentencing is to instill a sense of responsibility in offenders, then it logically follows that they may feel more connected to society and others around them, and less inclined to commit further crime. Again, this is a relatively new sentencing principle which has not yet been tested empirically for its effectiveness in reducing further crime.

**Summary**

After reviewing the sentencing objectives and the theories underlying them, some general conclusions can be drawn. First, the objectives provide guidance to sentencing judges, but they appear limited as a tool designed to remedy the problems of sentencing disparity. For example, Doob and Brodeur (1995) describe a theory of sentencing as involving a “set of guiding principles on sentencing and an explanation of how the sentence followed from the guiding principles” (p. 384). Judges, when determining an appropriate sentence, are now specifically directed to take into consideration one or more of the above objectives. However, while a “theory of sentencing” such as this may appear to be straightforward, and while most would agree that these are important and desirable objectives, sentencing disparity and other problems are not eliminated because the
objectives are unordered and different people may apply different weights to them (Doob and Brodeur, 1995). Furthermore, some of the objectives even contradict each other, making it difficult to integrate these objectives into a consistent theory.

Second, the fact that the empirical research indicates that most of these objectives do not achieve their intended goal of reducing crime lends support to the claim that the purpose of stating these goals is perhaps only to legitimize the criminal justice system’s existence and satisfy public demand for punishment and justice. Since most of these objectives (and their failure to meet their goals) are discussed in the context of prison sentences, it seems necessary to consider alternatives to incarceration in order to meet these sentencing objectives.

With the addition of section 718.2(e) to the Criminal Code, judges are to consider all available sanctions other than incarceration, while keeping in mind the six objectives outlined above. Furthermore, the Supreme Court, in Gladue, noted that incarceration is perhaps even less effective for Aboriginal peoples, which means that for Aboriginal offenders, judges will now have to carefully balance a consideration of an offender’s Aboriginal heritage with the sentencing objectives. This appears to be a step in the right direction for improving sentencing in Canada and making it more consistent with its objectives.

Finally, one of the main problems with the theories underlying the six sentencing objectives is the general assumption that criminals are rational actors who choose to commit crime out of a range of possible actions. The objectives do not consider the social circumstances that may contribute to criminal behaviour and the fact that
traditional sentencing practices do not address those conditions. Parliament and the Supreme Court, however, appear to be taking an important first step in remedying this by instructing judges to take some of these things into consideration and to sentence accordingly. Having reviewed the six objectives of sentencing as presented in the Criminal Code, and the underlying rationale behind them, the findings chapters of this dissertation will identify the objectives that are taken into consideration by judges when sentencing Aboriginal offenders and how they affect the sentence imposed.

**Hogarth’s Study on Judges and Sentencing**

Hogarth (1971) studied the sentencing behaviour of judges in a landmark study. He sought to understand sentencing from the perspective of judges, and the meanings they attached to it. His study involved interviews with judges and observation of their sentencing in the courtroom as well as a review of official statistics. When designing his research method Hogarth considered the three levels of analysis that his research could take. The first is the legal-institutional level which would involve reviewing legislation and case law. The second is the sociological level which would involve studying the “...norms, values, and constraints attached to the role of magistrate within the legal framework...and the relationships of this role to the roles of other people who participate in the decision-process analyzed” (p. 16). The third level is the psychological level, which involves examining the attitudes, beliefs and actions of the judges themselves. Hogarth’s study examines sentencing at all three levels.
One of the more interesting aspects of Hogarth’s research involved looking at the penal philosophies of judges, and how they affect their sentencing. Hogarth defines a penal philosophy as, “...a strategy for making decisions. It is seen as a frame of reference around which decisions are made, and consists of all the rules of thumb, priorities, and assumptions that are consciously applied in dealing with cases” (p. 69). Hogarth had the advantage of discovering the penal philosophy of judges by interviewing them directly. In this dissertation I found it was possible to identify, at least in part, the penal philosophy held by judges by carefully reading their reason for decision of sentence. Many judges clearly identified what sentencing purpose was most important, and what in their view was the most appropriate sanction to achieve it. In this sense, the research in this dissertation goes beyond what judges say about their sentencing philosophy and examines how they practice it in their daily courtroom activities.

At the time of his study on judges and sentencing, Hogarth commented on the lack of consensus of what the goals of sentencing should be. Parliament, in its 1996 changes to the Criminal Code attempted for the first time to clarify and codify the purposes and principles of sentencing. However, even though these six goals are now codified, we can suspect that judges will exercise their discretion and some goals will be given more weight than others. As Hogarth notes, it is the judges who bear, “[T]he main burden of reconciling the competing goals of the criminal justice system...” (1971, p. 4). The different weight allotted to the different goals by judges became obvious in the course of this research project, and the goal(s) deemed most important by the judge determined the punishment imposed.
Hogarth also noted the shift in sentencing from punishment to control - that is, punishment was intended to prevent future crime, both by the individual offender and by others. The problem with this, as Hogarth noted, is that sentencing is a very complex process, and the success of various forms of punishment in achieving these goals (specific and general deterrence) is difficult, if not impossible to measure. At the same time, judges must balance this with constraint, as they are instructed to not impose excessive sentences (p. 4).

The 1996 changes to the Criminal Code appear to address one of Hogarth's critiques of the law at the time of his writing. He stated,

Judges and magistrates in Canada cannot look to the legislature for guidance in matters of sentencing. The formal law as expressed in the Criminal Code and related statutes gives enormous discretionary power to the courts without guidance as to how that power is to be exercised… Failure of Parliament to establish a criminal policy expressed in legislative criteria for the imposition of sentence, is perhaps, one of the main reasons for inconsistency in sentencing. It is not surprising, however, that our legislators have failed to address themselves seriously to this question as there are deep divisions in society as to what social purposes sentencing should serve. In the absence of legislative criteria and in an atmosphere of controversy about sentencing, it would not be surprising if the courts were inconsistent in the application of sentencing principles (p. 5).

It would appear then, given Hogarth's observations, that the 1996 codification of sentencing principles should reduce disparity in sentencing. However, as was found in this study, and as was predicted by others (Doob and Brodeur, 1995, for example), the fact that the principles were not ordered means that different judges may still assign different weight to the various principles, still resulting in disparity in sentencing.

The three main problems with sentencing that result in sentencing disparity as identified by Hogarth are the lack of consensus on the purposes of sentencing, the lack of
information about the effectiveness of various sentencing options, and the lack of uniformity in the way that various courts use information put before them (p. 6).

However, this is not to say that Hogarth advocates the elimination of sentencing disparity completely, as he recognizes the necessity for judges to have flexibility and discretion in sentencing in order to take into consideration the particular circumstances of each offender and crime.

The Theory and Practice of Sentencing

Bayda (1996), a Saskatchewan judge, discusses some of the inconsistencies between the theory and practice of sentencing. Without specifically saying so, he appears to be taking a conflict approach to sentencing. One of his main concerns is that the six sentencing objectives set out in section 718 have been decided by one (dominant) group in society and the values upon which they are predicated are assumed to be shared by all other members of society. However, he provides examples of how the intended middle class objectives of sentencing are often received differently by the lower class marginalized individuals being sentenced. These individuals have not been given the opportunity to participate in the legal decision making that affects their lives. Through his examples, Bayda demonstrates a clash in values which in his opinion, often makes the objectives set out in sentencing useless.

Bayda’s main point is that the theory and practice of sentencing are somewhat inconsistent, especially in terms of the traditional reliance on jail sentences, but he does hold hope that the 5th and 6th objectives (reparation and responsibility) will allow for
more effective sentencing through the use of restorative justice practices. However, Bayda warns that even if judges are inclined to use restorative justice approaches in their sentencing, they may be opening themselves up to public criticism. Such pressure may dissuade them from utilizing a restorative justice approach to sentencing. Other difficulties involve political resistance through limited state funding for judicial reform and improvement. Finally, Bayda notes that change comes very slowly in law, so other legal complexities regarding jurisprudence, such as the fact that judges attempt to impose sentences that are consistent with previous ones, need to be considered as impeding factors to restorative justice.

Doob and Brodeur (1995) share some of Bayda’s concerns as they also caution that intellect is separate from political will. Even if an adequate theory of sentencing is created, “it’s application is dependent on a political will to reform the sentencing process” (p. 395). Their article was written before the 1996 legislation amendments and the Gladue decision, but it appears that their prediction of low political motivation has some merit. Even after the 1996 amendments and Gladue, some judges are not implementing the legislative changes in their sentencing.

Sentencing Theory and Sentencing Disparity

Doob and Brodeur (1995) also discuss the public pressure that judges face when sentencing. The lack of standardization and sometimes confusing nature of sentencing in Canada often leads the public to be skeptical of sentencing practices. There is public
concern about lenient sentencing and disparity and, "judges are increasingly criticized for handing down sentences that are apparently inconsistent with other sentences" (p. 376).

Defining disparity is not always an easy task. Doob and Brodeur note that disparity simply means 'variation' - a fairly neutral term. However, disparity, with respect to sentencing usually has a negative connotation. It is assumed that individuals or groups of individuals are being treated unfairly in comparison to others. On this issue, Doob and Brodeur note, "... when we find systematic variation in sentencing that we cannot explain by any acceptable set of principles (such as variation in sentencing because of the race of the offender or victim), we might refer to that variation as unwarranted disparity in sentencing" (1995, p. 384). Disparity can take various forms such as treating identical cases differently, or treating different cases similarly. Individualized sentencing often masks or justifies disparity, but as will be discussed shortly, a more standardized approach or sentencing guidelines may not necessarily resolve the problems.

Doob and Brodeur argue that disparity is not caused by a lack of a theory of sentencing, but rather, too many theories. Different judges have different theories that they adhere to and apply when sentencing. Doob and Brodeur echo the concerns of Bayda, that the current problem is the lack of shared expectations and objectives for sentencing, both between judges and between judges and other members or groups in society.

Since sentencing disparity is thought by some to be a result of the abundance of judicial discretion found in individualized sentencing, another approach called "starting
point sentencing” has been proposed as a possible solution. Lacelle (1996) explores the merits of both individualized sentencing and starting point sentencing and argues that starting point sentencing has its own problems and that individualized sentencing is the preferable approach.

The individualized approach emphasizes “the circumstances and conduct of individual offenders” and provides judges with a maximum amount of freedom as they are subject to few guidelines. This approach allows the judge to tailor the sentence as she/he sees fit under the circumstances. “Because of its overriding concern for proportionality, this approach can be rooted in the retributivist philosophy of punishment” (Lacelle, 1996, p. 2). Advocates praise the flexibility that this approach provides, but it has also been subject to criticism as it often leads to sentencing disparity. As Lacelle points out, this approach does not “adequately consider the individual perspectives that an individual sentencer brings to the process” (1996, p. 2). For example, racial discrimination may be a result of the biases of the individual sentencers.

The starting point approach adopts a more formulaic approach. Lacelle provides an example from the Alberta Court of Appeal whose approach to sentencing involves: “first, a categorization of a crime into ‘typical cases’, second a starting sentence for each typical case, third the refinement of the sentence to the very specific circumstances of the actual case” (1996, p. 3). This approach is assumed to provide more structure to sentencing, but it does not completely restrict judges’ decisions and still provides them with flexibility. In this approach, similar crimes will be treated alike.
However, the starting point approach is premised on notions of formal equality as a means of eliminating disparity. This is problematic because even though it purports to treat individuals equally in terms of sentencing, it does not recognize that individuals being sentenced may not occupy similar positions in society or have similar experiences. Therefore, unequal people should not be treated equally because it only compounds that inequality. Secondly, this approach assumes that incarceration is always the most preferable form of punishment, and does not encourage judges to seek alternatives. For these reasons, Lacelle believes that the individualized approach (with some guidelines) would be more successful in eliminating sentencing disparity.

The central concern for both of these approaches to sentencing is judicial discretion. While on the one hand discretion is necessary for equitable sentencing as judges can tailor sentences to fit the crime, criminal, and conditions, it is also thought to be the main source of disparity in sentencing. Because of this, some critics assume that more guidelines and regulations on sentencing are necessary, but Lacelle demonstrates that this approach only masks, and perhaps exacerbates the problems found in individualized sentencing. She writes, “... because it is premised upon formalistic notions of equality, [it] can only succeed in masking the inequality and disparity present at a number of levels in the criminal justice system” (1996, p. 1).

**Researching Sentencing Disparity in Canada**

In the many discussions of sentencing disparity, two issues are identified as being mainly responsible for sentencing disparity. The first is the amount of discretion, or lack of
guidelines available to judges. Related to this, the second issue is the lack of national statistics on sentencing judges could use as a reference point on which to base their sentencing (Griffiths and Verdun-Jones, 1989).

Griffiths and Verdun-Jones (1989) review the work of Forst who describes two forms that sentencing disparity may take. (Disparity is described as simply “variation from some norm or standard” (1989, p. 337), with the first form of disparity being a variation from the norm in terms of proportionality, while the second form involves variation from the norm of statistical patterns of sentencing.) The first approach looks at sentencing in terms of whether or not the sentence is proportionate to the gravity of the crime, while the second approach looks at the sentences that other offenders committing similar crimes receive. Griffiths and Verdun-Jones note that most researchers focus on the second form of disparity where, “…the focus is upon the issue of whether ‘similar’ cases are treated differently by the courts” (p. 338). The difficulty with this approach is determining what factors determine the level of similarity between cases, as the more factors that are taken into consideration, the less likely cases will be similar.

In terms of sentencing disparity research in Canada, Griffiths and Verdun-Jones found,

There have been two major approaches that reflect, to some extent at least, both the methodological and theoretical predilections of the researchers. The first approach focuses upon the background characteristics of the judges themselves and suggests that the roots of disparity may best be sought in the social and psychological factors that impact upon the judicial decision makers. The second approach casts the spotlight upon the background characteristics of the cases and the offenders, and lends support to the notion that it is these factors that shape the outcome of the sentencing process (1989, p. 339).
As examples of the first approach (an emphasis on the characteristics of the judges), Hogarth’s 1971 study is cited, as is Palys and Divorski’s study of sentencing using simulated cases.

The second approach to sentencing disparity (emphasizing the characteristics of the cases and criminals) examines whether or not certain groups of individuals are discriminated against in sentencing. Examples of this approach include Brantingham’s statistical analysis of sentencing in 1979 and 1980 in which it was found that case facts and prior record of the accused had the most impact on sentencing. Griffiths and Verdun-Jones also explored the argument that the courts discriminate against certain disadvantaged groups, or that legalistic criteria for sentencing is in itself discriminatory. Two studies are cited that support this approach. The first involves an examination of cases heard in five courts in Halifax. The researchers found that unemployed persons were sentenced more severely than employed persons. Another study conducted in Winnipeg drew similar conclusions, that those of lower socio-economic status, particularly the unemployed, received harsher sentences. An example of a harsher sentence would be prison versus a fine (Griffiths and Verdun-Jones, 1989).

In terms of racial discrimination in sentencing, Griffiths and Verdun-Jones report that the research is inconclusive in that some research finds racial discrimination, whereas other research finds no relationship between race and sentencing severity.

Roberts (1999b) addresses the definitional problems surrounding the existence of sentencing disparity. It is often assumed that when offenders who commit the same

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7 Both of these studies are reviewed in more detail elsewhere in this dissertation.
crime are given different sentences that this is an example of disparity. However, this may be erroneous, as other factors (such as prior offences) are taken into account at sentencing that may explain the difference. Therefore, disparity is not always simply discrimination. In fact, a survey of over 400 judges found that 60% of them were quite willing to admit that they perceived a fair amount of variation in sentencing from judge to judge (Roberts, 1999b, p. 149). When asked similar questions, 97% of Crown and defence lawyers believed that there was a great deal, or some unwarranted variation in sentences (40% and 57%, respectively). Roberts also cites findings from two surveys, one of general inmates and one of Aboriginal inmates which suggests that many inmates also perceive that sentencing disparity exists.\footnote{Roberts writes, “Seventy per cent of Native inmates surveyed shared the opinion that different sentences would be imposed by different judges. A second, independent survey of inmates incarcerated in British Columbia generated similar results. Fully 98 per cent believed that some judges send offenders to prison more frequently than others” (1999b, p. 149-50).}

Roberts does not limit his work to perceptions of sentencing disparity, he also reviewed the empirical research done on sentencing disparity, citing research as early as 1919. Unfortunately, much of it comes from countries other than Canada. Within the Canadian literature, Roberts reviewed a variety of research on sentencing disparity including regional variation in sentencing patterns, experimental studies on sentencing disparity, and qualitative research. Roberts reports that sentencing variation (average terms of imprisonment) between the provinces exists, but is often offence-specific. However, since the data does not provide any details about the specific cases (the offender or the crime), it is difficult, if not impossible to determine how much of the variation can be explained by “legally relevant variables or unprincipled variation in
sentencing” (p. 151). Simple comparisons then, should be regarded with caution, and in fact, research that is more case specific indicates that much variation can be attributed to legal factors.

However, this does not eliminate variation due to the personality of judges. Sentencing simulation experiments have shed some light on the question of judges’ personalities and their sentencing practices. Palys and Divorski’s 1986 study is perhaps the most well known in this area (reviewed in more detail in a subsequent section of this chapter). John Hogarth’s 1971 study also examined the issue of sentencing in Canada by gathering information both about judges and actual cases to see how a judge’s personal characteristics affect sentencing⁹. Hogarth found that,

knowledge about the judge and the judge’s attitudes was more relevant than knowledge of the facts of the case ... the facts of the case accounted for less than 10 per cent of the variation in sentencing practices. However, the judges’ perceptions and sentencing philosophies explained about 50 per cent of the variance in sentence length (Roberts, 1999b, p. 155).

While other studies have found similar results, Roberts cautions that this approach is still problematic as there may be “legally justifiable” variables affecting sentencing decisions that have not been identified by researchers.

While each of the studies he reviewed have their limitations, taken together, Roberts concludes it is probably safe to assert that to some degree, sentencing disparity does exist. However, Roberts notes that this should not be too surprising as, “over 1,300 individuals are asked to make complex decisions without a great deal of guidance”

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⁹ Hogarth’s work was reviewed in more detail in an earlier section of this chapter.
(1999b, p. 157). More comprehensive information about sentencing needs to be collected in order to shed more light on the extent of disparity. Roberts advocates the creation of national advisory sentencing guidelines, where judges could see what sentences have been imposed for similar crimes and criminals. In light of the recent changes to the Criminal Code, any changes or improvements to the present situation in sentencing could be more easily identified with the existence of such a sentencing database.

As previously mentioned, Palys and Divorski (1986) conducted a study which investigated the existence and causes of sentencing disparity among judges. After outlining the problems with using only archival data to study the issue, Palys and Divorski propose reasons why their methodology would prove more useful. Their study involved simulated cases, in which 200 Canadian Provincial Court judges were given the same five “cases” and were asked to impose sentences for each and provide reasons for their decisions. The findings from their study verified the existence of considerable sentencing disparity, but the amount of disparity varied among the five cases. In order to study the sources of that disparity, the researchers performed statistical analyses on three sets of variables which they defined as judge variables (demographic characteristics of the judges themselves), legal objectives (goals of sentencing, as identified by the judges), and case facts (various facts about the crime and/or criminals) (pp. 353-5).

Palys and Divorski’s findings indicate that “…differential subscription to legal objectives was the most potent predictor of sentence severity, followed closely by the differential importance accorded various case ‘facts’” (p. 357). Palys and Divorski went even further to try and understand the variability in the amount disparity between the
cases. They found that the amount of discretion accorded to the judges did not account for these variations (p. 358). Instead, in the case in which the judges had the greatest amount of discretion in determining a sentence, the judges showed the least amount of disparity. The converse is also true, the cases with the smallest range of possible sentences showed the most disparity. Palys and Divorski concluded that the recent call for sentencing guidelines will not be as effective in eliminating disparity as previously thought.

Palys and Divorski offer their own explanation for sentencing disparity that involves judges’ subscription to different legal objectives as a factor in sentencing. There have traditionally been four, and now more recently six such objectives, but these objectives are not rank ordered or universally valued and sometimes conflict with each other. Palys and Divorski further assert that legal objectives used as goals in sentencing are influenced by offender and offence attributes. They offer this explanation:

Where the offender may be viewed relatively positively (eg. no prior record, no history of violence, victim of circumstance) and the offence as relatively trivial, it seems reasonable to assume that the legal objectives which emerge as dominant will be those involving rehabilitation or the provision of token sanctions to minimize the stigmatic and criminalizing influence of one’s interaction with the criminal justice system. Disparity, in other words, would be minimal due to the consensus of objectives.... Similarly, the commission of a horrific crime by a negative offender (eg. extensive prior records, history of violence, no remorse) should also lead to relative sentencing uniformity due to the consensus that would exist with respect to legal objectives of the incapacitation and protection of the public (p. 359).

Therefore, according to Palys and Divorski, sentencing disparity occurs most often “when offender and offence information are inconsistent, that is, when relatively positive
offenders commit horrific acts, or when negative offenders commit more trivial offences” (p. 359).

Palys\(^{10}\) concludes by stating that this research has obvious implications for future sentencing policy. He argues that, if sentencing guidelines are to be effective in meeting multiple goals, the Palys and Divorski research suggests the need for a clear discussion of the legal objectives of which directly influence sentencing.

Quigley (2000) takes a different approach to the issue of sentencing disparity. While he acknowledges that disparity exists, Quigley does not believe that it is a problem, and in fact argues that we cannot and should not seek its elimination. He gives two reasons. First, “the difficulty is that focussing on disparity as the problem helps to create or reinforce other problems: jail becomes the norm, starting point or ranges of sentences become hardened into fixed sentences, and factors leading to systemic discrimination are either ignored or inadequately dealt with” (2000, p. 324). Secondly, Quigley argues that it would be nearly impossible to eliminate disparity as no two cases (crimes and offenders) are exactly alike. Furthermore, punishments are experienced differently by different offenders and what may be appropriate and effective for one offender may not be for another. Quigley predicts that if section 718.2(e) is implemented properly, then achieving sentencing parity will become less of a concern for the courts, and sentencing disparity will not be viewed so negatively (p. 333).

\(^{10}\) These are only his conclusions as it was noted in their article that Divorski does not necessarily agree with them.
Sentencing Reform and Aboriginal Offenders

Despite the disagreement about the extent of sentencing disparity and how sentencing results in the overrepresentation of Aboriginal offenders in prison, as has been previously noted, recently this issue has been addressed constructively in a variety of ways. In two recent articles, Quigley (1999, 2000) examined four of these changes to assess their likelihood of reducing the problem of the disproportionate number of Aboriginal offenders in Canadian prisons. Quigley identifies these four changes as, “...a new legislative base for sentencing under the Criminal Code, recent Supreme Court of Canada decisions that have modified the approach that appellate courts should take in reviewing sentencing decisions, restorative justice initiatives, and, the political and judicial responses to the changed sentencing environment” (1999, p. 130).

Firstly, the legislative changes he is referring to are the new sentencing directives as set out in Part XXIII of the Criminal Code relating to the goals of sentencing, and sentencing options and alternatives. These legislative changes were discussed in previous sections of this dissertation. Quigley (1999) emphasizes that these amendments are merely directives for judges, and that their interpretation and implementation is left up to the judges themselves. In terms of the two main directives discussed in this dissertation, seeking alternatives to incarceration and that attention to be paid to the Aboriginal heritage of offenders that are found in section 718.2(e), Quigley claims these directives generally have not been given a high priority in sentencing in practice\(^\text{11}\). Fortunately,

\(^{11}\text{It is important to note that this article was written before the Supreme Court released its ruling on the Gladue case.}\)
Quigley has identified some Saskatchewan judges that seem to be giving the directives, in his view, the attention that they deserve. Writing before the Supreme Court rendered its decision in the Gladue case, Quigley notes that section 718.2(e) is intended to address the long standing systemic discrimination endured by Aboriginal offenders and their overrepresentation in the overall prison population. While he does not specify the source or form of that discrimination, it appears that he is saying that it occurs, at least in part, in the sentencing process.

Regarding the second change, Quigley notes that only recently has the Supreme Court ruled on sentencing issues. He discusses three notable cases and their significance for Canadian jurisprudence. These cases are sometimes referred to as the “trilogy” of R. v. Shropshire, R. v. M., and R. v. McDonnell. Each of these three cases dealt with, at least in part, the role of appellate courts in reviewing sentences imposed by trial judges. The position taken by the Supreme Court in all three cases was that appellate courts should generally give deference to trial judges’ decisions and their personal knowledge of the local conditions and only intervene when a sentence is “clearly unreasonable.”

At particular issue in *McDonnell* was the “starting point approach” to sentencing in which judges are to categorize an offence according to seriousness, start out with a standardized sentence, and then adjust it according to mitigating and aggravating factors. In *McDonnell*, the Court of Appeal found that the trial court had imposed a sentence that was considered to be too lenient because the judge had “mis-categorized” the offence.

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12 For an extensive review of the cases that have considered this provision, please refer to Quigley’s articles.
However, the Supreme Court disagreed with the Court of Appeal and reinstated the original sentence, thereby giving more flexibility to trial judges to impose sentences that are appropriate to the circumstances.

As with the sentencing changes, Quigley has found in his review of Saskatchewan court cases that the lower courts and courts of appeal have not given the Supreme Court cases due attention, and in fact may even be ignoring them. At the time of writing, the Saskatchewan Court of Appeal had only cited one or more of the three cases only a few times. However, there does appear to be a split in the Saskatchewan Court of Appeal in terms of those judges who are willing to explore new approaches to sentencing and those who continue with traditional approaches and standards of review. This will surely lead to inconsistency in sentencing policy and continued sentencing disparity.

The third area that Quigley explored is restorative justice initiatives, including conditional sentences. Briefly, restorative justice focuses not solely on punishment, but rather on restoring relationships that may have been damaged by the wrongdoer’s behaviour and usually involves more community involvement (1999). The addition of conditional sentences as an option is one of the 1996 legislative changes to the Criminal Code, and may be considered a restorative justice initiative. Conditional sentences allow offenders to serve their sentence in the community under certain conditions and restrictions and, as Quigley notes,

... may be imposed in lieu of a standard jail sentence whenever certain criteria are met: if there is no minimum sentence for the offence, where the judge has decided on a sentence of imprisonment of less than two years in length, and where the judge is satisfied that to order a conditional sentence would not endanger the community’s safety or be inconsistent with the
statutory aims and principles of sentencing set out in sections 718 to 718.2 (1999, p. 145).

If an offender serving a conditional sentence does not comply with the conditions specified, they may be sent to prison to serve the rest of their term.

Fourthly, after reviewing these changes, Quigley concludes that the steps taken to date have not alleviated the sentencing disparity problem partly because of the slow political and judicial responses to the changes that he outlines. However, he is still hopeful that meaningful decreases in the use of incarceration in general and specifically for Aboriginal offenders can be made if we continue the legal trend of moving away from a retributive model of justice to a restorative justice approach. He notes this will be difficult given that the public, the media and the government seem committed to a “law and order” mentality that emphasizes the need for punishment which usually favours custodial sentences.

Summary

The 1996 legislative reforms to sentencing were a response, in part, to the problem of sentencing disparity in Canada. Disparity in sentencing continues to be a concern, and is often thought perhaps to be a result of the individualized approach to sentencing that ensures maximum judicial discretion. Theories of sentencing usually involve the goals and objectives set out in the criminal code, but the different weight accorded to each of them by different judges means that disparity in sentencing may continue.

The extent and causes of sentencing disparity in Canada are still relatively unknown. Even when disparity is found to exist, it is often difficult to determine what
factors lead to the difference. There are two general approaches to sentencing disparity; one looks at the characteristics of the judges while the other looks for causes in the characteristics of the offenders being sentenced. One of the main problems in this area of researchers is that disparity may be due to factors that the researchers have not accounted for. Furthermore, there are some researchers who feel that disparity is actually desirable, because disparity follows from sentencing discretion that provides judges with the flexibility to impose appropriate sentences.

Finally, some recent changes in sentencing law were reviewed and assessed for their impact on the treatment of Aboriginal peoples in the criminal justice system. While there is evidence of some improvement, it does not appear that these changes are being implemented to their fullest extent. Part of the reason for the slow movement in this area may be lack of political will and public resistance.

The Reception of Section 718.2(e)

The Supreme Court of Canada devoted much of its 1999 ruling on the Gladue case to interpreting and clarifying section 718.2(e) of the Criminal Code. The problem this amendment was attempting to address was the high number of Aboriginal peoples in Canadian prisons. The solution proposed by Parliament and the Court was for the first time to establish sentencing goals of a general nature. These goals directed judges to consider the Aboriginal heritage of offenders and encouraged them to send fewer Aboriginal offenders to prison. There have been various reactions to these changes –
some believe that these are positive steps that will reduce the number of Aboriginal peoples in prison, while others believe that these changes and directives will be futile.

A review of the literature on the overrepresentation of Aboriginal peoples and sentencing disparity in general reveals inconclusive research results. It cannot be stated definitively that Aboriginal peoples are discriminated against by the criminal justice system, but it also cannot be discounted, as there is evidence to support both perspectives.

Critics of section 718.2(e) often refer to the small body of research on sentencing in Canada, whose findings are inconclusive or even contradict the assumption that discriminatory sentencing is responsible for the high number of Aboriginal peoples in prison. They argue that the overrepresentation of Aboriginal peoples is due in large part to the fact that Aboriginal people simply commit more crimes, and is therefore not a product of systemic racism. If this is in fact the case, and judges are not sentencing Aboriginal offenders more harshly, they argue that this directive will be essentially ineffective (Anand, 2000; Stenning and Roberts, 2001).

Some are resistant to the idea of a reduction in sentence for Aboriginal offenders simply because they are Aboriginal. For example, Anand (2000) argues that this amendment is redundant, as Aboriginal offenders are already protected under section 718.1\(^{13}\) which deals with proportionality of sentences. Anand admits that Aboriginal offenders often receive harsher sentences than non-Aboriginal offenders when

\(^{13}\) Section 718.1 states, “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender” (Roberts and Von Hirsch, 1999, p. 48).
committing the same crimes with similar histories, but argues that this can be remedied by an emphasis on proportionality. Therefore, Anand argues that the Supreme Court should have focused on section 718.1 in their ruling on Gladue.

Another criticism levied against section 718.2(e) is the potential for the misuse of government funds. It is expected that funds should be used to “…deal with the main contributors to high aboriginal crime rates and aboriginal overrepresentation in prisons” (Anand, 2000, p. 717). Instead, under section 718.2(e), these resources will be spent acquiring the necessary information on the effects of the Aboriginal heritage of an offender and alternatives to prison, which may often fall under the responsibility of the Crown. This may lead to an increase in the length and cost of sentencing hearings, even though the result may be the same sentence as without the information.\(^{14}\)

Anand’s main point is that sentencing judges should be encouraged or directed not to give Aboriginal offenders special treatment, but rather equal treatment by emphasizing section 718.1. In his opinion, the role of section 718.2(e) should only be, “…an important and specific reminder that aboriginal offenders should be sentenced on the same basis as non-aboriginal offenders, by resorting to the principle of proportionality” (2000, p. 417).

Haslip (2003) is skeptical of the utility of section 718.2(e) in reducing the over-representation of Aboriginal offenders in Canadian prisons. Haslip’s skepticism is not

\(^{14}\) Similarly, supporters of this amendment are concerned that section 718.2(e) will not be given its full effect because necessary resources will simply not be allocated for this type of information gathering (Turpel-Lafond, 1999; Roach and Rudin, 2000; Rudin, 2001).
based on the directive itself, but rather on the likelihood that it will be used by judges when sentencing Aboriginal offenders. Haslip writes,

... in view of the limited effect that sentencing reform has on the causes of Aboriginal offending, and the many problems associated with the practical application of section 718.2(e), that the federal government’s reliance on section 718.2(e) as a basis from which to expect a reduction in the overrepresentation of Aboriginal offenders in Canadian penal institutions is equivalent to having both feet planted firmly in the air (2003, p. 243).

Haslip’s first concern with the utility of section 718.2(e) to decrease the number of Aboriginal offenders being sent to prison relates to the fact that sentencing reform alone does not address the causes of Aboriginal offending. Therefore, sentencing reform will not lower the numbers of Aboriginal offenders appearing before the courts for sentencing. Recognizing that judges are the ones who determine whether or not offenders will go to prison, Haslip identifies eight reasons why judges may be reluctant to apply section 718.2(e) when sentencing Aboriginal offenders. She provides examples from existing sentencing cases to support her claims. These reasons will be discussed in greater detail in the Chapter Four of this dissertation.

Stenning and Roberts (2001) address the emergence of section 718.2(e) in the Canadian Criminal Code, and express their concerns about the new provision. Assuming that section 718.2(e) was intended to address the problem of discriminatory sentencing, Stenning and Roberts argue that because there is no discrimination against Aboriginal offenders at sentencing, this provision will be ineffective in reducing the over-representation of Aboriginal offenders in Canadian prisons. Furthermore, they argue that the circumstances that judges have been directed to take into consideration by the Supreme Court - what Stenning and Roberts refer to as “social deprivation factors” - are
not unique to Aboriginal offenders. Therefore, they claim that section 718.2(e), by singling out Aboriginal offenders, is too limited in scope, and should include, “…offenders from those other groups who share a similar disadvantage” (p. 158).

Stenning and Roberts summarize section 718.2(e) as “… offering little more than an empty promise to Aboriginal people and a bitter pill for sentencing judges who struggle to do the right thing, but become daily more aware of their powerlessness in the face of a situation far beyond their control” (p. 167). The authors seem to take particular issue with the fact that some Aboriginal offenders may receive a community-based sentence or a shorter sentence than a non-Aboriginal offender with similar social and economic disadvantage.

Stenning and Roberts’ article received much attention from the media and other academics - so much attention that the Saskatchewan Law Review organized a colloquium inviting a number of scholars to respond to the article and to voice any concerns that they may have. What follows is a review of some of these responses.

Rudin and Roach (2002) responded to Stenning and Roberts’ article by indicating some concerns about the data used in the original article and the conclusions drawn based on that data. Rudin and Roach strongly disagree with Stenning and Roberts’ claims that Aboriginal over-representation in Canadian prisons is not a national phenomena\footnote{In the original article, it is argued that this overrepresentation is only a problem in the prairie region of the country.} and that there is evidence to suggest that Aboriginal offenders receive more lenient sentences than non-Aboriginal offenders, Rudin and Roach adamantly disagreed (p. 5). Rudin and
Roach also take issue with Stenning and Roberts’ argument that section 718.2(e) was introduced only to remedy discriminatory sentencing. Rudin and Roach provide their own evidence discrediting these claims arguing that section 718.2(e) was designed to reduce the number of Aboriginal offenders being incarcerated, and suggest that Stenning and Roberts’ faulty data leads them to draw incorrect conclusions on the issue. Specifically, because Stenning and Roberts believe that discriminatory sentencing does not exist, they conclude that section 718.2(e) would be ineffective as a solution. Rudin and Roach disagree about the utility of section 718.2(e) and state,

Even if one accepts Stenning and Roberts’ interpretation of the existing data as proof that sentencing judges do not ‘discriminate’ against Aboriginal people at sentencing, it is illogical to conclude that sentencing decisions cannot be used to provide one of many remedies for Aboriginal over-representation (p. 5).

Rudin and Roach also take issue with what Stenning and Roberts identify as the causes of over-representation. In the original article it is argued that social disadvantage is the reason there are so many Aboriginal offenders in prison. For this reason, Stenning and Roberts further argue that section 718.2(e) is underinclusive, and should be extended to other groups who experience similar disadvantage. Rudin and Roach reject this social disadvantage argument, instead citing the legacy of colonialism which is unique to Aboriginal peoples in Canada as a cause of Aboriginal offending and therefore justification for section 718.2(e) and the special consideration given to Aboriginal offenders.
Brodeur (2002), while generally agreeing with Stenning and Roberts' main arguments, makes a compelling argument for the special consideration of Aboriginal offenders in relation to other socially disadvantaged groups. He writes,

Within the limits of this rejoinder, it is impossible to examine in detail how similar the systemic deprivation factors cited by the authors [Stenning and Roberts] truly are when viewed in the context of an Aboriginal reservation and of a Black ghetto. To suggest the point quickly: ‘high unemployment’ has a different meaning in the context of an Aboriginal reservation where there are simply no job opportunities and in an urban context where the White majority exclude Blacks from segments of the labour-market; ‘substance abuse’ is not the same when it refers to young men smoking crack cocaine and to kids committing suicide by sniffing gasoline; ‘loneliness’ is not experienced in a similar way in bush reservations and urban ghettos. It is possible to continue with every one of the systemic factors quoted above: a surface similarity would be shown to conceal a substantial difference when context is taken into account (p. 49).

Cairns (2002) also responds to Stenning and Roberts’ claim that section 718.2(e) is underinclusive because it excludes other offenders who may be similarly disadvantaged. Using a historical approach, Cairns explains the emergence of section 718.2(e) with reference to the “…political, cultural, intellectual and constitutional developments of the last one-third of a century…” (p. 55). Cairns provides a background context for section 718.2(e), and argues that there were a number of developments towards the empowerment of Aboriginal peoples that have contributed to differential recognition of Aboriginal offenders at sentencing. In response to Stenning and Roberts’ question - why should Aboriginal offenders be treated differently from other similarly disadvantaged offenders - Cairns replies that “Over-representation of members of a defined social category is more likely to elicit special and positive attention when they occupy a prominent place on the public agenda and can make claims for special
contemporary treatment as a form of redress for historical maltreatment” (p. 59). In short, “The others do not have the positive momentum of recent history behind them” (p. 61).

It appears that some of the criticisms of section 718.2(e) and the discussion in the Gladue ruling are somewhat misguided. While there is a high proportion of Aboriginal people in Canadian prisons, the evidence does not point directly to discriminatory sentencing as a cause for those high numbers. However, we should not be quick to conclude that discrimination is non-existent in the system. Discrimination exists in society in general, and it would be naïve to assume that the criminal justice system is unaffected by wider societal influences.

While much of the research concludes that Aboriginal offenders are not overtly treated more harshly than other offenders, there is evidence of systemic discrimination that may produce that result. Alternatively, evidence that supports claims of discriminatory treatment is often accompanied by caveats about the ability to generalize the findings, or about other factors not considered that may account for differences in sentencing. These same caveats should be attached to research that does not find evidence of discrimination. It could be argued that past research has been too broad in its attempt to find discrimination across all groups and crimes, and that the focus of such research needs to be narrowed.

Similarly, the sentencing literature in general is not all that helpful. Disparity in sentencing is often explained away by drawing attention to the fact that no two cases are identical, denying the possibility of discrimination. Furthermore, even if disparity is
established, the research often does not go far enough to describe who is being treated less equitably. These factors lead to skepticism about the effectiveness of section 718.2(e). If judges are not discriminating against Aboriginal people in the first place, then how will instructing them not to discriminate alleviate the problem?

The answer lies in a broader understanding of what was actually said in the *Gladue* decision and what is implied in the Criminal Code amendment. The assumption is that judges were being accused of discriminatory sentencing, and while some deny that this occurs by citing a small body of research, we should not overlook the fact that the Supreme Court has identified this as a problem. In any case, efforts to remedy discriminatory sentencing may not be the only interpretation, and we should not be quick to dismiss section 718.2(e) because of a lack of conclusive evidence of judicial discrimination. To do so is premature and based on a misinterpretation of the intent of section 718.2(e). This misinterpretation appears to be the main premise of Stenning and Roberts’ article which received much attention and criticism. Daubney (2002) warns of the dire consequences this line of thinking may have,

...I am frankly saddened by the authors’ apparent willingness to prefer their interpretation of sentencing purity, with its emphasis on proportionality and parity, to a genuine attempt to contribute to redressing the drastic over-representation of Aboriginal Canadians within our prisons and in the criminal justice system generally. *In so doing, they have provided, no doubt unwittingly, a cloak of legitimacy for those opposed to any recognition of, or societal response to, the position of Aboriginal people in Canadian society* (p. 36, emphasis added).

Perhaps we should move beyond the debate of whether or not there is direct discrimination in the criminal justice system and examine the ability of section 718.2(e) to address the problem of the overincarceration of Aboriginal peoples. We know that
traditional sentencing practices are often ineffective, especially for Aboriginal offenders. Clearly section 718 and subsection 718.2(e) along with the Gladue decision instruct judges to examine the situation of Aboriginal peoples in general in Canada, and of the specific Aboriginal offender before them for sentencing, and consider this information in the context of the goals of sentencing.

The amendment and the Gladue decision are an attempt to move away from a reliance on incarceration as the only appropriate sentence for Aboriginal offenders. While avoiding incarceration is to be considered for all offenders, Aboriginal peoples have a unique history and experience in Canada that justifies special consideration. This directive was not intended to reprimand judges for discriminatory sentencing, but rather to act as a directive that they should consider the social, cultural, political, economic and historical factors that frequently lead to an Aboriginal offender’s offending and seek more effective punishment using alternatives to incarceration. These changes to the Criminal Code reflect growing awareness and recognition of the many factors related to Aboriginal peoples’ law violating that will not be addressed by sending them to prison, and in all likelihood may increase the likelihood of further involvement with the criminal justice system. Recognition of these issues indicates the need for a “dual-focus perspective,” one that takes into consideration not only the causes of criminal behaviour, but also the criminal justice reactions to it. Section 718.2(e) invites us to consider discrimination from two perspectives – first as a cause of crime and second as a factor influencing sentencing.
A review of the literature indicates that more research is required to determine the extent to which judges are considering and applying the new sentencing mandate when sentencing Aboriginal offenders and how section 718.2(e) mitigates the outcome of sentencing. This dissertation addresses this need by collecting more detailed information on criteria considered at the time of sentencing than has been done in previous research. This information can be found in the judicial reasonings that judges must provide regarding their rationale for the sentence imposed, including the objectives that they deem most important to that individual case and to what extent Aboriginal heritage is taken into consideration. Hopefully, researching the process rather than the outcome of Aboriginal sentencing will provide much needed insight into the issues raised in this paper regarding Aboriginal offenders and their treatment by the Canadian criminal justice system.

**Literature Relevant To The Dissertation Objective**

As previously mentioned, section 718.2(e) is a relatively new directive in the Criminal Code, and as such, has not been evaluated to date. For this reason, the research in this dissertation is original and unique. Haslip’s (2003) work is perhaps most relevant to this dissertation’s research objective of identifying the conditions under which judges are or are not applying section 718.2(e) when sentencing Aboriginal offenders. Haslip has identified a number of explanations for why judges may be reluctant to implement section 718.2(e). Many of these explanations are supported with examples from sentencing decisions. As will be discussed in subsequent chapters of this dissertation,
Haslip’s findings were used as a starting point to organize my data and my research validates a number of Haslip’s claims about judges’ reluctance to implement section 718.2(e).

The review of the theories underlying the six sentencing objectives as outlined in the Canadian Criminal Code provides the theoretical groundwork for the findings section of this dissertation. Many of the judges make reference to one or more specific sentencing objectives as justification for their decision of whether or not to incarcerate. As was indicated earlier, these sentencing objectives are sometimes contradictory and are often ineffective when incarceration is the sentence, making these implicit “sentencing theories” problematic. These dilemmas were borne out in my research as well. Judges seemed to vary in their interpretation of the sentencing objectives and the best ways to achieve them, seemingly relying on their own personal penal philosophy. Doob and Brodeur (1995) discussed these different judicial philosophies as one of the main causes of sentencing disparity. Palys and Divorski (1986) also found this to be the case in their research which involved asking 200 judges to impose sentences on five hypothetical “cases.” Their study not only documented the existence of sentencing disparity, but also attempted to explain it. Their findings indicated that differential subscription to legal objectives was the main cause of disparity. Hogarth’s (1971) study into the sentencing behaviour of judges found similar results. Specifically, Hogarth found that almost half of the variance in sentence length imposed by judges could be explained through reference to the judges’ personal sentencing philosophies. While this project does not look
specifically at disparity, these findings are nonetheless relevant, and may explain why some judges choose to incarcerate while others seek alternatives to incarceration.

This dissertation seeks to understand if and under what conditions judges are applying section 718.2(e) when sentencing Aboriginal offenders. A review of the factors taken into consideration by judges when making a decision whether or not to incarcerate will shed some light on to the reasons why some judges may not be applying section 718.2(e) in their sentencing of Aboriginal offenders. Parliament and the Supreme Court have recommended that judges take into consideration the unique circumstances of Aboriginal offenders and sentence them accordingly, using prison as a last resort. Literature reviewed in this chapter supports this recommendation, citing the social and economic disadvantage that many Aboriginal offenders face which may contribute to their offending and the futility of incarceration as a criminal justice response. However, other literature reviews also warn of the problems that may arise from this recommendation, and why there may be some resistance to it. Obviously, in order to understand the conditions under which section 718.2(e) will be applied, one must consider a number of factors including the personal philosophies of the judges who impose the sentences.

In terms of understanding the high numbers\textsuperscript{16} of Aboriginal offenders in prison, LaPrairie (1990) recommends that it is necessary to look at events and decisions that occur before an offender comes before a judge for sentencing in order to understand why

\textsuperscript{16} Rudin and Roach (2002) write, “The data clearly shows that over-representation of Aboriginal people in prison is indeed a national phenomenon... Outside Quebec, the rates of Aboriginal incarceration vary from a low of 3.7 times the proportion of the general Aboriginal population as compared to the general population in the Yukon to a high of 7.3 times that proportion in Alberta” (p. 8).
there are so many Aboriginal offenders in Canadian prisons. This project heeds this recommendation by examining the background and other characteristics of the crime and criminal that the judges take into consideration when deciding whether or not to incarcerate. LaPrairie further recommends that judges should take into consideration the social and economic marginalization that many Aboriginal offenders face, and sentence the offenders accordingly. This project explores whether or not this occurs in recent sentencing decisions.
CHAPTER THREE: METHODOLOGY

Research Methodology and Method: Justifying the Qualitative Approach

The specific method used in this dissertation is document analysis. The documents are written sentencing decisions which were in existence prior to the initiation of this project. The raw data is therefore not researcher generated, but rather “...a product of the context in which they were produced and therefore grounded in the real world” (Merriam, 1998, p. 126-7). Reviewing these decisions provides insight into what factors judges take into consideration at sentencing.

Section 718.2(e) directs judges to consider all available sanctions other than imprisonment, and give particular attention to the circumstances of Aboriginal offenders. Judges are directed to give reasons for their sentencing in written decisions, so it seemed logical to look at the actual written sentencing decisions to determine how section 718.2(e) is being applied and what factors influence a judge’s decision about using it. Going directly to the judges’ written reasons for sentencing has the added benefit of providing a context for those sentences. Looking at the process of sentencing through the use of the judges’ written decisions reveals an understanding of the rationale and factors that were taken into consideration in arriving at that sentence.

The primary objective of this dissertation then involves evaluating if, why and under what circumstances judges are implementing section 718.2(e) when sentencing Aboriginal offenders. A qualitative approach to analyzing the data was deemed more appropriate than a quantitative approach because of the need to understand the rationale behind these sentencing decisions - something that cannot be easily gleaned from a
quantitative analysis. Merriam (1998) supports this when she notes that qualitative research is richly descriptive and seeks to answer questions regarding the existence of some phenomenon. Furthermore, this project was not about testing an existing theory, but rather uses an inductive approach in which themes, ideas and understanding may emerge from a review of the data itself.

In their written statements most judges comment on the factors that influenced their sentencing decisions. Using a qualitative approach allowed me to explore the context and rationale of these decisions. These factors were sometimes limited to the facts of the case, but in many cases the judges commented on the more abstract sentencing goals or principles they deemed most appropriate to a particular case. Quantitative analysis of sentencing patterns would not allow for this kind of personalized understanding of sentencing as a process. Studying aggregate sentencing numbers is useful for descriptive purposes, but frequently lacks a more human approach to understanding behaviour. As Silverman (2000) notes, mere quantitative research can sometimes conceal basic social processes, whereas qualitative research can often provide a deeper understanding of social phenomena.

The utility of this unique approach to sentencing research is supported by Rudin and Roach (2002) who are critical of studies that simply compare sentence lengths for various groups of offenders. They argue that the final sentence can often be misleading as it does not include information about the amount of time spent in pre-trial custody and excludes those offenders who do not receive prison sentences. Furthermore, they argue that meaningful conclusions about sentencing disparity cannot be arrived at from looking
at sentence length alone, and that, "(T)he reason for the apparent disparity will not be found anywhere other than the reasons for sentencing given by the judge" (p. 8). Rudin and Roach's rationale for a more in-depth examination into sentencing is certainly relevant for understanding judicial decision making, and further justification for utilizing a qualitative methodology in this dissertation.

Merriam (1998) would refer to this dissertation as a basic or generic qualitative study, the purpose of which is to, "...seek to discover and understand a phenomenon, a process, or the perspectives or worldviews of the people involved" (p. 11). In short, basic or generic qualitative research involves description, interpretation and understanding. The main issue in this dissertation is not necessarily how often section 718.2(e) is applied, or how many offenders are being sentenced to prison under this new provision, but rather why section 718.2(e) is being applied and what factors influence a judge's decision about whether or not to use it. In this sense, the dissertation is less concerned with the result or outcome of sentencing than it is with the process. My research objectives and the nature of my data therefore provide a rationale for qualitative analysis.

The Data and Data Collection

 Judges are required to give reasons why they did or did not apply section 718.2(e) when sentencing Aboriginal offenders. These written reasons were collected from across Canada and were used to assess if and how judges were implementing section 718.2(e). Since this provision was only introduced in 1996, and my data collection was completed
in 2001, my research covers the available cases from this five-year period. These cases then became my basic data set.

These judicial decisions were readily accessible in two electronic legal databases called *Lexis Nexis* and *QuickLaw*. The databases include resources such as case law (judicial decisions), case commentaries and academic articles. *Lexis Nexis* and *QuickLaw* allow users to search their records in a variety of ways, including keyword searches. In this research, terms such as “section 718.2(e)” and “Gladue” were searched and identified sentencing decisions that made reference to these terms throughout the documents.

Since sentencing judges have been directed to at least consider section 718.2(e) in their sentencing, it was assumed that this information would be included in all decisions regarding Aboriginal offenders. Before collecting all of the cases, a preliminary examination of a sample of cases confirmed that this was in fact the case.

The initial search of the databases resulted in about 300 cases. However, the search yielded a number of cases involving non-Aboriginal offenders. These cases were not relevant to this specific project and were therefore screened out. After collecting all of the cases involving only Aboriginal offenders and section 718.2(e) that were available on the electronic databases, I also screened out the duplicate cases, cases that were not

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17 The focus of my dissertation is on Aboriginal offenders, but because section 718.2(e) applies to all offenders, not just Aboriginal ones, the search included some cases involving non-Aboriginal offenders as well. These cases were screened out and not used in the analysis as the purpose here was not to do a comparison, but rather to only look at how judges are interpreting and applying section 718.2(e) when sentencing Aboriginal offenders as they are the group singled out in this provision.
about sentencing or contained insufficient data for meaningful analysis. The final number of cases was 106.

Coding
After reading through each case, I highlighted any information regarding the circumstances of the offender, any mention of section 718.2(e) and if and how it impacted the sentence, as well as the sentence itself. The aim was to analyze these decisions to assess how and when section 718.2(e) impacted a judge's decision when sentencing Aboriginal offenders. More specifically, I looked at the types of information that judges considered regarding Aboriginal offenders, as it was assumed that this information would be indicative of the judges' theories of sentencing for this group of offenders. For example, Judge Turpel-Lafond (1999) suggests that the following questions should be asked by sentencing judges before sentencing an Aboriginal offender:

- Has this offender been affected by substance abuse in the community?
- Has this offender been affected by poverty?
- Has this offender been affected by overt racism?
- Has this offender been affected by family or community breakdown?
- Has this offender been affected by unemployment, low income and a lack of employment opportunity?
- Has this offender been affected by dislocation from an Aboriginal community, loneliness and community fragmentation? (p. 40.

In order to evaluate how these cultural and structural factors mediate sentencing, my research looked at whether or not judges considered information that could be gleaned from asking these types of questions, and how this information affected their sentencing
practices - i.e. whether or not they chose to implement section 718.2(e) and use alternatives to incarceration, or reduce the length of a prison sentence.

Once the relevant cases had been collected they were sorted into two groups, cases in which section 718.2(e) was applied, and cases in which section 718.2(e) was not applied. Any information pertaining to a consideration of section 718.2(e) was then highlighted. Utilizing these highlighted portions of the decisions it was possible to start identifying the reasons given by the judges for applying or not applying section 718.2(e) in each case.

Susan Haslip’s (2003) article (reviewed earlier in this dissertation) expressed her skepticism of the utility of section 718.2(e) to reduce the incarceration rates for Aboriginal offenders in Canada. The article identified a number of reasons why judges would be reluctant to use section 718.2(e) in their sentencing. These reasons proved very useful as a way of organizing my data in the “section 718.2(e) not applied” group (Chapter Four). I was able to find a number of cases that supported her hypotheses, and organized and presented the data accordingly. However, my research identified a number of reasons judges did not utilize section 718.2(e) that were not mentioned by Haslip. These cases have also been grouped accordingly. The cases in which section 718.2(e) appears to have been applied have been categorized in a similar manner (Chapter Five).

My criteria for whether or not section 718.2(e) was applied are based mainly on the criteria set out in Gladue as presented in chapter one of this dissertation. Sometimes it was quite obvious, and the judge would openly state whether or not section 718.2(e) had any impact on their sentence and why. Other times, I looked at the sentence itself.
For example, if the offender was given a conditional sentence, then I considered section 718.2(e) to have been applied, as the provision’s main point is that judges should be using prison only as a last resort. If a prison sentence was given, but the judge commented that the length of the sentence was reduced, then section 718.2(e) was considered applied. If there was no discussion of section 718.2(e) or a reduction in sentence, then section 718.2(e) was considered not applied. Furthermore, sometimes judges explicitly stated that they were rejecting section 718.2(e), or that it was not applicable to the specific case.

The cases in which section 718.2(e) did not appear to be applied were grouped into the following twelve categories which appear to have informed the judges’ decision making:\(^18\):

1. Restorative vs. retributive elements
2. Disparity in sentencing
3. Influence of appellate courts
4. Nature of offence
5. Difference in treatment of Aboriginal and non-Aboriginal offenders
6. Role of judiciary and counsel and the circumstances of Aboriginal offenders
7. Aboriginal community
8. Additional concerns
9. Aboriginal status not relevant to crime
10. Mixing of retributivist and restorative goals
11. Problems with interpreting section 718.2(e)
12. No reference made to the circumstances of the offender

The cases in which it appears that section 718.2(e) was applied were grouped into the following three categories:

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\(^18\) The first eight categories are those identified by Haslip.
1. Background of the Offender contributed to the crime
2. Deterrence and denunciation and conditional sentences
3. Rehabilitation of the offender takes priority in sentencing

These categories, and the cases included in each of them will be discussed in the next two chapters.

**Limitations of the Methodology**

While a qualitative approach was deemed most appropriate for this project, this methodology is not without criticism. Silverman (2000) details some of the concerns associated with qualitative research. First is the problem of *reliability*, which involves ensuring consistency in the data when manipulated by one or more observers over time. More simply put, will the method used allow anyone using it to achieve the same findings as the original researcher? To ensure consistency in this dissertation, only one researcher undertook the task of coding the data. Furthermore, clearly specifying the categories and criteria used throughout the data coding process aids in the replication of the study by others.

On the specific method of document analysis, Merriam (1998) notes that, “Documents or artifacts have been underused in qualitative research” (p. 124). However, she also describes some limitations of documents as a source of data. The first she discusses arises from the fact that the documents may not have been generated for research purposes and therefore may contain limited useful information. This does not appear to be a concern for this project, as the documents used do contain the desired information for analysis. A second related issue is that the information may not lend
itself to the types of analysis required by the researcher. Again, since the objective of this project was to determine how and if judges are using section 718.2(e) in their sentencing, written sentencing decisions were an appropriate source of data for the analysis.

Merriam's third limitation involves accuracy and authenticity - specifically, the researcher needs to be aware that documents may be subject to bias or errors. This limitation is not specific to this method, as interviews, for example, are subject to the same bias and error. Document accuracy and authenticity was a concern in this project, as there are no guarantees that what the judge writes in his or her decision accurately reflects what he or she is thinking. However, for the purpose of this research this issue is irrelevant, as these sentencing decisions are official documents that are used and accepted by the legal community and the public to explain how a judge arrives at a particular sentence. Therefore, this researcher feels comfortable in using these documents as the focus of her research.

Over and above Merriam's stated limitations on document analysis, other limitations to the data specific to this dissertation must also be considered. The first consideration involves the completeness of the data set. For various reasons it is difficult to make any broad generalizations about sentencing and Aboriginal offenders from this data. While every effort was made to collect all available cases from the electronic databases, the possibility exists that some cases were missed. Efforts to reduce the
number of cases that may have been missed included using different search terms, and using two legal databases, *Quick Law* and *Lexis Nexis*.\(^{19}\)

A second consideration has to do with the number of cases that are available on the databases. The cases included in the database do not represent all cases across the country for a number of reasons. First, in order to be included in the *Quick Law* and *Lexis Nexis* databases, the sentencing decision must be a written one, as opposed to a decision given orally. However, not all written cases are included in the database. Each province is encouraged to submit cases that they want included in the databases, but what cases are actually included in the database is a result of decisions made by various people at the provincial level.\(^{20}\) For these two reasons, not all cases heard across the country are included in the databases and therefore the data set in this dissertation does not include all of the relevant sentencing decisions, but rather all of the *available* decisions.

Obviously, some of the criticisms made of qualitative research are valid, and these must be considered in this dissertation. However, it is the opinion of this researcher that this approach to understanding why judges make the decisions they do is the most appropriate one available. Complex decision-making is a uniquely human act, as is the ability to relate to others why that decision was made. It is this relating of information on

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\(^{19}\) I initially searched *Quick Law* for cases, but then when I did another search on *Lexis Nexis* using the same keywords, a number of cases came up that did not appear in the *Quick Law* search. It appears then that *Lexis Nexis* may be a more comprehensive database, but using both increases the likelihood of finding all of the available cases on the topic.

\(^{20}\) In a telephone conversation on April 29, 2003, a *Quick Law* customer service representative stated that all Court of Appeal cases and “most” of the provincial criminal court cases are submitted to *Quick Law*. However, the criteria for the selection of cases submitted was not specified.
the part of judges that informs the basic methodology of this dissertation and this can best be analyzed through a qualitative approach.
CHAPTER FOUR: FINDINGS - SECTION 718.2(E) NOT APPLIED

This chapter contains summaries of all the cases involving the sentencing of Aboriginal offenders in which it appears that section 718.2(e) was not applied. Much of the analysis and categorization of these cases is grounded in the work of Susan Haslip (2003) and her eight hypotheses that were offered to explain why judges may not consider the use of section 718.2(e). These hypotheses were supported by many of the cases found in my data set. This chapter will also include four other hypotheses that emerged from my data set that were not considered by Haslip. It will be noted throughout this chapter that some cases are included in more than one category because the categories are not mutually exclusive and therefore some overlap occurs. The relevance of these findings will be discussed in Chapter Six.

THE RELEVANCE OF HASLIP

Susan Haslip’s article “Waiting to Exhale: Aboriginal Offenders and Meaningful Sentencing Reform in Canada” (2003) is of considerable importance to this dissertation because it raises some concerns about section 718.2(e) and the impact it will have on Aboriginal sentencing reform in Canada, particularly in terms of a reduction in the number of Aboriginal offenders being sent to prison. In this article Haslip postulates eight hypotheses for why many judges will be reluctant to apply section 718.2(e) in their sentencing of Aboriginal offenders. The reasons for this reluctance are varied, and Haslip notes, “The reluctance is not necessarily attributable to defiance of the SCC
[Supreme Court of Canada] or its reasoning but rather with other concerns that arise due to the SCC’s interpretation of, and direction on, section 718.2(e)” (p. 248).

What follows is a description of Haslip’s eight hypotheses. At the conclusion of each, evidence is provided from my own research that supports her predictions. Following this review of Haslip’s eight hypotheses, additional evidence is presented for why judges appear to be reluctant to apply section 718.2(e) that were not included in Haslip’s analysis.

1) **HASLIP’S FIRST HYPOTHESIS - RESTORATIVE VS RETRIBUTIVE ELEMENTS:**

Haslip first hypothesis states that the new shift to restorative justice found in section 718.2(e) stands in stark contrast to the retributivist approach that judges have historically employed in sentencing. This, she feels, may be problematic. Since these judges have traditionally sentenced according to the retributivist goals, they may find it difficult to immediately switch to a restorative approach. As Haslip states, “(T)he fundamental difference in position informing these two positions suggest that it is very unlikely that a judiciary, the vast majority of whom have contributed to the current situation of overrepresentation through emphasis on traditional retributivist philosophy, will readily incorporate restorative justice elements into their sentencing practices” (p. 248).

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21 Because there may be support for more than one of Haslip’s reasons in a case, there are some cases that are reviewed in more than one section.
Similarly, my data revealed that judges are frequently reluctant to apply section 718.2(e) because of a perceived need for a continued emphasis on retributivist principles of sentencing.

This perhaps calls for some clarification about the distinction between the terms restorative and retributivist. In the Criminal Code, six principles of sentencing are listed, three of which may be considered retributivist, and three are restorative. The retributivist principles are denunciation, deterrence and separation, while the restorative principles are rehabilitation, reparation and responsibility\textsuperscript{22}. Judges are required by the Criminal Code to take into consideration these six principles, and an appropriate sentence should strive to achieve at least one of these principles. Haslip’s concern is that judges who have traditionally sentenced according to retributivist principles (which usually involves sending the offender to prison) will be reluctant to switch to a restorative focus.

Support for this concern can be found in a number of cases reviewed in this thesis. Most of the cases reviewed include some kind of reference to at least one of the retributivist goals as a rationale for the sentence imposed. Furthermore, in some cases, even though the judges stated that a conditional sentence would be appropriate, which would be consistent with section 718.2(e) and a restorative justice approach, a prison sentence was imposed in order to satisfy the goals of deterrence and/or denunciation\textsuperscript{23}.

\textsuperscript{22} Haslip appears to make this distinction between the goals based on, at least partly, a statement made by the Supreme Court of Canada in Gladue which reads, “…however the SCC wrote that it did not mean to suggest that, ‘as a general practice, [A]original offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation’” (cited in Haslip, 2003, p. 249).

\textsuperscript{23} As will be discussed in a later section, judges appear to be divided on the issue of whether or not a conditional sentence can satisfactorily achieve the goals of deterrence and/or denunciation.
This practice implies a belief that a conditional sentence cannot satisfy the principles of denunciation and deterrence. This belief endures within a segment of the judiciary even though there are other judges, including the Supreme Court of Canada, who believe otherwise - that a conditional sentence *can* satisfy these principles. For example, the judge in *R. v. Kooting* states,

> There has been much recent debate at an appellate level as to whether these sentencing objective, denunciation and deterrence can be achieved for certain types of offences through the conditional sentence of imprisonment. This debate has now ended with the release of the recent Proulx judgment. Where the statutory conditions are met, the Supreme Court of Canada has ruled that the full range of sentencing objectives can be achieved through a structured Conditional Sentence Order (para. 29).

Furthermore, on this issue the same Court also noted,

> This Court does not suggest that a serious sexual assault can never be addressed by way of a Conditional Sentence ... This is the necessary result of a shift towards an individualized focus on sentencing that is urged upon sentencing courts by the Supreme Court of Canada. Thus, an offender who is heavily engaged in a restorative process with the support of his community may well bring himself within range of a community-based disposition in the form of a Conditional Sentence ... (para. 36).

However, in the cases reviewed here, potential deterrence of others is viewed as more important than the needs or circumstances of the offender and is used to justify imposing a prison sentence. This line of reasoning appears to contradict the intended purpose of section 718.2(e) - to use prison as a sanction as little as possible or only when absolutely necessary, for instance when the offender poses further threat to society.

What follows is a review of 21 cases from my data set in which section 718.2(e) appeared not to be applied due to the prevailing principles of retributivist sentencing and which support Haslip’s first hypothesis.
R. v. Peters (British Columbia Court of Appeal, 1997)

R. v. Peters involves an appeal by the offender against his four year prison sentence for robbery, break and enter and theft and other related charges. The appeal was based on the judge’s failure to give sufficient weight to the mitigating circumstances in the case, as it was believed that not all available alternatives to prison were considered. However, the appeal was dismissed as the Court found no error in the original sentencing and stated, “...the principle determination in this case is deterrence to others rather than rehabilitation” (para. 33).

Before sentencing, the defendant had taken steps toward his own rehabilitation which included dealing with his substance abuse problems, but the trial judge was not satisfied with this progress due to the violent nature of the crimes committed and commented, “I cannot conclude ... that there is a real and substantial ground to believe that his rehabilitation would be accomplished by a noncustodial sentence” (para. 28). The Court of Appeal echoed this belief and further commented, “The fact that he has been in prison appears to have been beneficial to him24. The treatment that he has been given in prison has included Native involvement with Elders and with others” (para. 31). The “benefits” of being in prison referred to here are not specified, but it appears this belief is based partly on the information that the defendant submitted to the Court as part of his appeal. The Court noted,

Also before us the appellant has filed a written narrative that show much insight into the problems that face him. He also personally spoke to the

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24 This will be discussed in more detail in a later section - the issue of judges who believe that prison is necessary or beneficial for an offender’s rehabilitation and who use this as a justification to impose a prison sentence.
Court which confirmed my view that both in the written material and in his narrative before us he has gained much insight into the background that has led him into these crimes (para. 30).

Based on this, it appears that by bringing forth information that should have been used in a section 718.2(e) analysis, the Court of Appeal took this information as evidence that sentencing the defendant to prison was not only justified, but beneficial to him. This appears to be an “added benefit” as the Court had claimed that the main reason for sending him to prison was deterrence to others over rehabilitation.

R. v. R. (H.) (Alberta Provincial Court, 1997)

In the case of R. v. R. (H.), the 21 year old defendant pleaded guilty to sexually assaulting his nine year old niece on two occasions. The accused accepted responsibility for his actions, and in fact went to the R.C.M.P. and voluntarily confessed before anything had been reported. The defendant felt great remorse and sought counselling immediately. The defendant had much family and community support, and it was believed that “incarceration would do more harm than good and that alternatively, community work service would provide a service to the community, and it would keep him in contact with the elders” (para. 35). The Edmonton Native Youth Committee recommended that he be placed on probation for two years.

The Crown recognized that specific deterrence was not necessary in this case, but argued that general deterrence and denunciation required a term of incarceration between one and four years. The defence argued that denunciation and deterrence could be met by
a sentence served in the community and partly though “public shaming” as the defendant
came from a small community and community service would effectively achieve this.

Section 718.2(e) was discussed, but the judge appeared to have some difficulty
with how to interpret and apply the provision (the case took place in 1997, before
Gladue). The judge had already decided that this crime required a prison sentence in
order to reflect society’s denunciation and the need for general deterrence.

The judge rejected the defence’s submission that denunciation and general
deterrence could be met by a sentence served in the community and sentenced the
offender to one year in prison followed by two years of probation. Even though the
defendant did not pose any threat to the community as it was unlikely that he would re-
offend, the judge felt “this type of abhorrent behaviour is repugnant to members of the
community” and that a conditional sentence “would be inadequate and would appal [sic]
the community” (paras. 76-77).

R. v. R.B.H. (British Columbia Court of Appeal, 1997)
In the case of R. v. R.B.H., it appears that section 718.2(e) was not applied, but no
reasons for it are obvious. This was an appeal that was dismissed, but it appears that the
original prison sentence was at least in part, retributive. R.B.H. was sentenced to one
year in prison for the attempted rape of a five-year old girl he was babysitting - the
offence had occurred 23 years earlier. Since the offence, the accused was in a stable
marriage with five children, was steadily employed and was respected in his community.
While complete reasons for sentence by the trial judge were not offered in this appeal, the sentencing judge was quoted as saying,

I’ve also found, as I have said, that these events were very serious and brutal … but there must be a sentence of imprisonment … I am of the view that with respect to the victim, likely the conviction itself is what is as beneficial to the victim as any terrifying punitive sentence (para. 13).

The appellant argued that a more appropriate sentence would have been a conditional sentence. Even though it appears that the Appellate Court agreed that a conditional sentence would have been appropriate, it found that the sentencing judge had made no legal errors and therefore had to dismiss the appeal.


This is another case which could be included in more than one category, specifically, this one and Haslip #3, because a higher court overturned the decision of a lower court that had sentenced in accordance with section 718.2(e). In this case\(^2\), the Crown had appealed Hunter’s suspended sentence with two year’s probation for assault causing bodily harm against his common-law wife. The sentencing judge had ordered a pre-sentence report and a fairly detailed investigation into the social, political and economic conditions of the defendant’s community so that he may properly consider section 718.2(e) in his sentencing. The judge also collected and presented a number of newspaper articles on the conditions on the reserve. After considering all of the relevant information, the judge imposed a suspended sentence and ordered that the defendant

\(^2\) Both the original sentencing and this appeal took place before *Gladue*. 

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among other things get treatment for his alcohol abuse. The Crown appealed this sentence, arguing that it was unfit, while defense counsel suggested that the suspended sentence be replaced with a conditional one.

The Court of Appeal, in its consideration, referred to the need for denunciation and deterrence in cases of spousal assault. They further commented that the sentencing judge placed too much emphasis on section 718.2(e), at the expense of the other sentencing principles. On the issue of a conditional sentence, the Court concluded that the crime was too serious, thereby making a conditional sentence not a fit sentence, especially in light of the perceived need for deterrence and denunciation. The appeal was allowed, and a sentence of 18 months in prison with two year’s probation was substituted.

R. v. Albert (Ontario Provincial Court, 1998)

In this case, the judge noted that the defendant had a lengthy criminal record which involved many short prison sentences. Since the defendant was before the judge for sentencing for break and enter and theft, causing damage by fire, auto theft, dangerous driving, driving while disqualified, and possession of stolen goods not exceeding $5000, the judge concluded that the deterrent function of incarceration had not been achieved because prior sentences had been too short. After taking into consideration the seven months the offender had spent in remand custody, the judge sentenced Albert to four and a half years in prison for his most recent crimes.

The judge cited the importance of deterrence when crafting this sentence, both specific and general. With respect to specific deterrence, the judge commented, “it is
time to take the perceived fun out of crime” and on general deterrence, “… those who see a career of sustained lawless conduct as appealing must be made aware that ultimately serious consequences prevail” (p. 5). The judge placed lesser importance on rehabilitation, stating that the offender’s lengthy prior record indicated that rehabilitation prospects were minimal and that “…rehabilitation must await the punitive and deterrent considerations in sentencing. Perhaps imposition of a sentence which catches his attention may impact on that mindset and provide a beginning for rehabilitation” (p. 5). The judge did not comment on how this rehabilitation would occur.

It is interesting that the judge does not see prison as an ineffective deterrent for this offender, but rather finds fault in the short duration of the prior sentences. On this issue the judge notes, “The record indicates a lesson not yet learned although ample short term opportunities have been provided. There is no reason why the citizenry should be subjected to this chronic and unrepentant lawless conduct” (p. 5).

On the issue of the offender’s Aboriginal status and circumstances, the court merely noted that 22 year old Albert had a “deprived background” in which he spent most of his formative years in group homes as a ward of the Children’s Aid Society. The offender also has an attention deficit disorder which is being treated with medication. He has only a grade 10 education and a problem with alcohol and a sporadic employment history. Albert’s lawyer noted, “… the offender finds trouble rather than support in that community and does not intend returning to the Reservation” (p. 5). The judge made little reference to section 718.2(e) except to say, “Particular attention to his circumstances requires a substantial term of imprisonment” (p. 5). This statement was not elaborated
upon, but it appears to contradict the directives on sentencing Aboriginal offenders provided in *Gladue*.

**R. v. Miller (Ontario Court of Justice, 1999)**

In the case of R. v. Miller, the defendant pleaded guilty to operating a motor vehicle while impaired causing death and bodily harm. The judge took notice of the offender’s Aboriginal status, the directives set out in section 718.2(e), and the principles and purposes of restorative justice. While there was very little discussion of the circumstances of Miller as an Aboriginal offender, information that was provided spoke favourably to the appropriateness of a conditional sentence. The court noted,

> He is considered an outstanding employee with a high level of performance. Other testimonials filed on his behalf speak to his kindness and high regard in the community...Mr. Miller has been living in the community and has fully complied with his bail terms. He has abstained from alcohol as required and also has voluntarily undertaken a course of alcohol counselling. As stated by his counsellor he considers it 'the ultimate disrespect' to the memory of Mr. Bomberry [a victim] if he were to take a drink of alcohol again. He has not driven a motor vehicle since the accident and is in self-imposed exile from all but immediate family members and does not attend family or community functions. In addition to alcohol counselling he has started personal counselling and traditional aboriginal healing practices. He took part in a healing circle with members of his own family on the eve of the sentencing hearing...that practice is a lengthy and emotional one that includes denunciation of the offender... Mr. Miller has offered to assist Six Nations Police Services with videotape advertisements against drunk driving and to give education seminars at local high schools advocating a sober lifestyle. He has also offered to take up Mr. Bomberry's volunteer work... The author of the pre-sentence report does not consider Mr. Miller as high risk to reoffend. His counsellors consider him to have every possibility of success at rehabilitation (p. 4).
The judge commented that an appropriate sentence would be one of less than two years which would make Miller eligible for a conditional sentence. However, despite the fact that the judge credited Miller for his voluntary steps toward rehabilitation, noted that his remorse was sincere and he had community support available to him and would not pose a risk to the community, the judge still imposed a prison sentence, claiming that a community-based sentence would not meet the needs of deterrence and denunciation. In addition, the judge imposed a three year period of probation (it was this portion of the sentence that was presented as sufficient to meet the requirements as set out in Gladue).

R. v. M.P. (Ontario Superior Court of Justice, 1999)

In R. v. M.P., the defendant was being sentenced for sexual assault. The judge made reference to section 718.2(e) and quoted extensively from Gladue, including the instruction that if there are no alternatives to prison, then the length of sentence must be considered. The sentencing principles mentioned were general deterrence and denunciation, and specific deterrence and rehabilitation. A brief description of the defendant’s background was provided.

M.P. reported being raised in a dysfunctional family, both his parents were alcoholics and his father was verbally and physically abusive. The defendant had been sexually abused by his brother. While he is currently living in a common-law relationship, he is not close with any members of his family, including his own daughter. He had a long history of drug and alcohol abuse which he dealt with in 1993, since which time he has been employed as a truck driver. Mr. M.P.’s pre-sentence report was
described as “generally favourable” (paras. 15-18). Defence counsel suggested a conditional sentence, but the judge concluded that this was not an option as the sentence needed to be more than two years. While no reasons were offered for this or for the sentence imposed, there does appear to be a slight reduction in the sentence, as the defendant was sentenced to two and a half years in prison (The Court noted that the average is usually three years).

R. v. Fortin (Ontario Superior Court of Justice, 1999)

In the case in R. v. Fortin, the accused was being sentenced for attempted murder, and the judge claimed that the principles of deterrence (general and specific) and denunciation took precedence over rehabilitation. After reporting that the offender was Aboriginal and reviewing the directive set out in section 718.2(e), the judge simply commented, “It is my view that there are no sanctions other than imprisonment that are reasonable in the circumstances of this case” (para. 21). No discussion of how section 718.2(e) impacted the length of the prison sentence was provided. Fortin was sentenced to six years in prison.

R. v. Umpherville (Saskatchewan Provincial Court, 1999)

In the case of R. v. Umpherville, the judge appears to have rejected section 718.2(e) because the crime was too serious. Umpherville was convicted of a particularly vicious aggravated assault against his common-law spouse, stabbing her twice and attempting to cut her throat and then denying her the ability to seek medical attention for her injuries.
Umpherville had previously been sentenced for a similar assault. The judge acknowledged that the defendant had had a “difficult background” which included violence by his father, a learning disability and substance abuse (this was all the information provided in the written sentencing decision).

The Crown argued that section 718.2(e) was not applicable in this case as “...[in] a crime of violence it is not appropriate to impose a lesser sentence in recognition of the Gladue principles. There is some suggestion in the Gladue decision that for crimes of violence there may not be a justification for a lesser period of incarceration” (p. 5). The judge appears to have agreed with this submission, stating that denunciation, deterrence and acknowledgement of the harm done to the victim were the most important principles to be considered in determining a sentence. The judge also indicated a need for rehabilitation of the offender as it was stated, “…I am of the view that he is not likely to accept responsibility in a meaningful way and to change his behaviour until he receives appropriate treatment.” While defense counsel argued that an appropriate sentence would be one of two years less a day followed by probation\(^{26}\) (which would involve treatment), the judge disagreed because the defendant needed to be separated from society due to the threat he posed to women he may be involved with\(^{27}\). Umpherville was sentenced to three and a half years in prison (he was given one and a half years credit for the time he had already spent in pre-trial custody).

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\(^{26}\) Probation can only be imposed on sentences less than two years.

\(^{27}\) Due to this, this case could also be included under Haslip #8.
R. v. Sewap (Manitoba Court of Appeal, 2000)

In this case, Sewap was being sentenced for her involvement in a unprovoked killing of a stranger (while intoxicated) which resulted in a manslaughter conviction. In asking for sentencing lenience for his client based on section 718.2(e), defence counsel presented to the court information on the overrepresentation of Aboriginal persons in prison and the discrimination they may face by the criminal justice system. As well as presenting evidence of her own troubled upbringing, defense also described the historical injustices that Aboriginal people have faced in Canada, arguing that his client should be sentenced using a restorative approach instead of a retributive one (one that focuses mainly on deterrence and denunciation). He argued that she should not be incarcerated for a period any longer than is necessary to rehabilitate her.

After reviewing the principles of sentencing, and section 718.2(e) and Gladue in detail, the Court still felt that the principles of deterrence and denunciation were the most important factors to be considered in this case. Furthermore, the Court commented,

The systemic and background factors which contributed to Sheila Sewap being where she is at today have been previously set out. It is clear that she has been affected by substance abuse, poverty, and to a certain extent by a lack of opportunities due to her race. Unfortunately, given the seriousness of the crime, only imprisonment can effectively serve to deter or denounce this type of crime. This is not the type of situation where there are really any other sentencing options other than imprisonment (p.11).

Because of the serious nature of the crime, the Court felt it necessary to separate her from society. While the Court did not think it was too late for her rehabilitation, it appears that rehabilitation was not one of the goals of her sentence. Regarding what was required for her rehabilitation, the Court stated, “Clearly she will have to struggle from the grasps of
poverty and boredom which led her to a life of drug and alcohol addiction. To do so she will have to upgrade her education to a point where she becomes realistically employable…” (p. 12). While agreeing that Sewap needed some treatment and counselling, the Court also appears to be admitting that poverty is one of the contributing factors to her crime. However, having arrived at this conclusion, the Court fails to elaborate on how one becomes “rehabilitated” from being poor. The Court imposed a prison sentence of nine years (in addition to the 20 months credit she was given for pre-trial custody).


In the case of R. v. T.E.B., the accused was convicted of causing a disturbance in a public place after he started a fight in a courtroom during a trial. T.E.B. had been subpoenaed to testify at the trial of a man who was accused of sexually assaulting his (T.E.B.’s) common law spouse. During the sexual assault trial, T.E.B. punched the defendant in the eye. While the defendant did not want assault charges laid against T.E.B., he was still arrested and charged with causing a disturbance (paras. 5-6).

Upon determining sentence for T.E.B., the court considered a conditional discharge, but ruled that even though a discharge would be in the best interests of the accused, a prison sentence was necessary for the purpose of general deterrence. The Court stated that even though this was not a crime of violence, the offence of causing a disturbance must be prevented. Furthermore, the Court stated, “Entirely the wrong message would be sent to the public by a disposition which failed to register a conviction
informing the public of the seriousness of such conduct” (para. 36). Accordingly, the rationale for sentencing this offender to prison was the perceived need for deterrence and denunciation. The judge thought it would be contrary to the public interest to grant T.E.B. a discharge, and stated, “This is not the usual case of causing a disturbance. Its special circumstances call out for a disposition which adequately marks the seriousness of the impact of the offence” (para. 38). T.E.B. was sentenced to 30 days in prison.

R. v. G.L.M. (Yukon Superior Court, 2000)

In the case of R. v. G.L.M., even though the judge decided that the offender met all or most of the criteria for a conditional sentence, a prison sentence was imposed mainly for the purpose of rehabilitation, as the judge viewed the offender’s marijuana problem as largely responsible for the offender’s criminal behaviour. G.L.M. was convicted of three counts of sexual assault involving two victims.

The judge acknowledged that G.L.M., a 45 year old Aboriginal man had led a “troubled life.” He was taken from his family at the age of five and placed in a residential school, to which the judge commented, “Thus began a deterioration in his life that has had serious personal consequences in terms of alcohol and substance abuse and a lasting impact on his children and grandchildren” (para. 8). His tenure at the residential school included four years of cultural loss and physical abuse. He was then placed in a church operated residence for Indian students, and then in various boy’s homes, and while in one he was sexually abused by a priest. After battling an addiction to alcohol for most of his adult life, G.L.M. continued his addiction to marijuana.
Section 718.2(e) directs judges to look at circumstances such as these when sentencing an Aboriginal offender, by way of understanding how past incidents may have contributed to their criminal behaviour. It would seem that knowing G.L.M.'s history provides greater insight into the causes of his actions. However, the judge while noting this history, felt that G.L.M. needed to take more responsibility for his actions. The court noted, “This background has been set out to explain G.L.M.'s life and why he may have committed these sexual assaults. However, there is no excuse for sexual abuse, particularly where Mr. G.L.M. had had ample opportunity to turn his life around since 1992 when he overcame his addiction to alcohol” (para. 15).

The judge considered the appropriateness of a conditional sentence. The length of the sentence requested by the Crown (two years less a day) made a community-based sentence a possibility. On the issue of whether or not the offender posed a risk to the community, the judge referred to the fact that the probation officer involved in the case recommended a community disposition. However, the judge was not convinced that the offender would not re-offend, and took into consideration the “gravity of the damage that would occur” if he did (para. 30). Despite the apparent appropriateness of a conditional sentence in this case, the judge concluded that a one year prison sentence followed by three years probation was necessary to meet the need of denunciation and deterrence of others. Furthermore, the judge felt a prison term was necessary for rehabilitation and for the offender to deal with his addiction.
R. v. Kootoo (Nunavut Court of Justice, 2000)

In the case of R. v. Kootoo, there was much discussion and consideration of section 718.2(e), but no evidence that it was applied in the actual sentence, nor any reasons for why it was not. Kootoo was convicted of sexual assault\textsuperscript{28}. The most important sentencing principles considered in this case were deterrence and denunciation. The Crown argued, and the judge agreed, that the defendant’s rehabilitation was of secondary importance. The defence argued that deterrence and denunciation could be met by a conditional sentence, and would furthermore “facilitate Mickey’s rehabilitation and assist with his ultimate reintegration into Iqaluit society” (para. 22). However, after what seems like careful consideration, the judge concluded that “…some form of custodial sentence is the only appropriate sanction for this offender and this offence that is both just and fit” (para. 31).

Since the judge was obviously aware of the directives set out in section 718.2(e), it would seem that because the judge decided that a prison sentence was necessary, the length of that sentence would be considered within the context of section 718.2(e). However, no such discussion ensued. Furthermore, the judge did not specifically discuss the background circumstances of the defendant, except to mention that the judge had given “anxious consideration of Mickey’s personal circumstances” and to his “disadvantaged background” (para. 32). The only reference to the considerations given to the length of sentence came later where it was stated that the sentence was reduced

\textsuperscript{28} The case mentions two charges, but the charges were never specified. However, there was a reference to the charge of sexual assault, so that is included in this discussion.
because the defendant opted to enter a guilty plea, not because of any consideration of the directives in section 718.2(e).

The judge also made note of the fact that a restorative justice approach was not appropriate in this case, mainly because the defendant had not initiated the process himself. He had taken no steps towards getting help for any of his problems or engaging in a healing process or proposing a plan for his reintegration back into the community, all of which are necessary for restorative justice. Kootoo was sentenced to 40 months in prison.

R. v. T.T. (Newfoundland Superior Court, 2000)

In the case of R. v. T.T., even though section 718.2(e) is discussed, it is not clear if it was applied. T.T., an 18 year old, was charged with second degree murder, but convicted of the lesser charge of manslaughter for taking part in the robbing and beating of a man. Because T.T. was tried under the Young Offenders Act, the maximum penalty that could be imposed was three years, which was what the judge imposed. T.T. had already served 18 months in pre-trial custody\(^{29}\), the judge ordered that T.T. serve six more months in secure custody, and the rest of his sentence (12 months) in open custody\(^{30}\). No details were provided of T.T.'s background or circumstances in the judgment\(^{31}\), and the judge

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\(^{29}\) Pre-trial custody is usually credited as “double-time” which means T.T. would have already served three years if normal practice was followed.

\(^{30}\) Open custody is given to offenders not requiring restrictive security. The offender is not separated from the community and instead is placed in a community-based environment such as a group home or a custody home.

\(^{31}\) Because of this, this case could also be included under reason #12 of this chapter – “No Reference made to the Circumstances of the Offender”.

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imposed the maximum sentence allowable due to the serious nature of the offence as the judge described it as “a senseless, public killing” (para.14). The principles deemed most important in this case were denunciation and general deterrence, and then rehabilitation (which was given as the reason for serving the remainder of the sentence in open custody).

R. v. Cook (Saskatchewan Provincial Court, 2000)\textsuperscript{32}

Cook had received a nine month prison sentence for his conviction of robbery with violence. The judge carefully considered the possibility of imposing a conditional sentence, and even commented that the offender was probably a suitable candidate for such a sentence. However, in the final analysis, the judge decided that a conditional sentence would not adequately achieve the sentencing purposes of denunciation and deterrence for this crime.

R. v. Simcoe (Ontario Superior Court, 2000)

In the case of R. v. Simcoe, it appears that section 718.2(e) although considered, was not applied, mainly because the crime was deemed too serious. Simcoe was convicted of robbery and kidnapping charges. In terms of applying section 718.2(e), the only reference to Simcoe’s background included the following reference:

Mr. Simcoe is a 22 year old. He is unmarried but the father of offspring. It appears from the material filed before me that his early years were far from ideal. His father died when he was very young. His mother was living a lifestyle then which was not conducive to the implantation of

\textsuperscript{32} This case is reviewed in more detail in a later category “Aboriginal Status not Relevant to Crime” (#9).
proper understandings and thoughts in her then young son. She was involved heavily in drugs and different partners, all of which on the evidence as disclosed to me was very much visible to Mr. Simcoe in his young years (p. 3).

It was also revealed that Simcoe had substance abuse problems which were thought to contribute to the crimes for which he was being sentenced. While the judge took into consideration the principles of denunciation, deterrence and separation, rehabilitation was also considered but with some skepticism, as the judge stated, “He is 22 years old and the principle of rehabilitation is certainly still a factor, and very much a factor in his case, although he does not get too many more bites at the apple I would not think before that principle of sentencing begins to lose its appeal” (p. 3).

When considering section 718.2(e) the judge reviewed various penitentiary programs for Aboriginal offenders. On the issue of taking the Aboriginal offender’s heritage into consideration, the judge admitted, “The case [Gladue] indicates that a judge should take judicial notice of the systemic or background factors relevant to aboriginal offenders. That is no doubt something with which judges in other parts of the country may be more familiar than I am, or other judges in this part of Ontario may be” (pp. 3-4). However, the judge did not consider this apparent uncertainty of how to proceed as problematic, as is apparent in the following statements:

But I think it is fairly safe to indicate that any of us involved with the administration of criminal justice have regretfully seen situations in the past where the exposure to certain influences at a fairly young age on the part of a person like Mr. Simcoe appear to deflect them off a more acceptable path of life and those situations also seem to often reflect the difficulty that people have in getting rid of the reliance on either alcohol or drugs, or both, in attempting to reform. Any amount of exposure I might have had in the past to treatment in respect of aboriginal offenders is fairly limited and a lot of it would be anecdotal, but I may say it is certainly not
the first time that I have heard the views expressed today with treatment
programmes geared to people of that background are more likely to
succeed by a large measure than the treatment programmes available, such
as they are, to the general population (p. 5).

Because the judge equates this particular offender’s background to other (non-
Aboriginal) offenders and the behaviours that may follow, the judge appears to be
discarding Parliament’s and the Supreme Court’s directive to judges to pay particular
attention to the circumstances of Aboriginal offenders. Furthermore the judge appears to
be limiting that consideration to factors that occurred in the early years of an offender or
ones related to alcohol or drug abuse. The judge does not appear to be using section
718.2(e) to consider the type of sentence appropriate to this offender, but rather whether
or not there are specific treatment programs available within prisons.

The judge’s final determination of sentence also appears to be based somewhat on
denunciation, “…because of the absolute abhorrence and intolerance for the kind of
activities he engaged in…” and with respect to specific deterrence, the judge stating,
“The message that goes out to Mr. Simcoe has to be serious” (p. 5). A six year
penitentiary sentence was imposed.

R. v. Blake (Northwest Territories Territorial Court, 2001)

In the case of R. v. Blake, Blake was found guilty of sexual assault. While intoxicated,
Blake entered the home of his neighbor who was sleeping at the time and placed his hand
on her vagina over her clothing. The victim woke up and Blake left without incident. At
sentencing, the Crown requested a prison sentence of six to eight months. The defense
argued that if there had to be custody, it should be for 90 days or less and be served intermittently to allow the offender to continue working.

While the judge noted that the offender was Aboriginal, there was no discussion of particular background factors that may have contributed to the crime. However, the judge did comment on the “extreme prevalence” of this kind of activity in that particular community, and the subsequent need for denunciation. The judge also commented that the offender did not pose further risk to society and met all of the other requirements for a conditional sentence. The offender was employed, and being imprisoned would cause the offender difficulty in terms of making maintenance payments. The offender had not been in any more trouble since the incident under discussion, and had suffered much stigma and shame in the meantime. However, the judge still felt that prison was necessary and stated, “…these are factors in his favour, but in my view they weigh toward the duration of the period of custody and not to the form of the imprisonment, because I have concluded that imprisonment is necessary to reflect denunciation and deterrence adequately” (para. 20).

R. v. Fox (Alberta Court of Appeal, 2001)

In the case of R. v. Fox, the accused was convicted and sentenced for two counts of dangerous driving causing death, one count of dangerous driving causing bodily harm and leaving the scene of an accident. Fox received a three and one half year prison sentence for these charges, but appealed the sentence on the grounds that the sentencing judge had limited the applicability of section 718.2(e) to less serious offences (thereby
excluding this one) and placed too much emphasis on the principles of deterrence and
denunciation, and not enough on rehabilitation and restorative justice. The defendant was
18 years old at the time of the accident, and there were no drugs or alcohol involved.
What seems most puzzling to the courts is that no explanation was offered for why the
accident happened (Fox had driven off the highway into a campground area, hitting a
trailer, killing two of its occupants and seriously injured a third). Little information was
provided about the background and circumstances of the offender other than the fact that
he appeared to have had a stable life, but had quit school after grade 10.

A pre-sentencing report prepared by a probation officer recommended a
conditional sentence as the offender was not a danger to the community. However, at
sentencing, the judge found that the crime was serious enough to warrant a prison
sentence, and stopped any consideration of a conditional sentence there. The judge made
reference to section 718.2(e) but concluded that deterrence and denunciation “must be
given paramount consideration in determining a fit sentence in this case” (para. 13).

Furthermore, the Court of Appeal noted that the sentencing judge, “...found no
basis pursuant to section 718.2(e), as guided by Gladue and Wells, upon which to
‘discount’ the length of the sentence based on the fact that the appellant was an aboriginal
person” (para. 13). The Court of Appeal found that the judge had committed no error in
his application of section 718.2(e), but did find that more consideration should have been
given to the rehabilitation of the offender. The sentence was therefore reduced to two and a half years in prison.\(^{33}\)

**R. v. J.B. (Ontario Youth Court, 2001)**

This case involved the sentencing of a young offender who had (along with his co-accused) badly beaten another young person. The victim had lost consciousness during the attack and was hospitalized and in rehabilitation for weeks and suffers permanent disabilities. When sentencing J.B. to prison, the judge acknowledged the fact that prison is not effective for rehabilitation. The judge commented, “I do not expect that much rehabilitative benefit will be derived by someone’s confinement to a criminal institution” (para. 22). However, the judge found it necessary to send the offender to prison for part of his sentence for denunciation and general deterrence.

It is interesting to note in this case that after the judge provided a brief review of section 718.2(e) and the need for it (based on reported systemic discrimination against Aboriginal people in the criminal justice system), the judge noted that the defendant had been waiting in custody for sentencing, while his co-accused (a non-Aboriginal offender) was not.

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\(^{33}\) While this case involves a successful appeal by the offender resulting in a reduction in sentence, it is still included in this section because the reduction was not due to factors related to section 718.2(e).
R. v. Francis (New Brunswick Court of Appeal, 2001)

This case involves a Crown appeal of a three and a half year sentence for aggravated assault. Francis had pleaded guilty to assaulting a friend with a knife while drunk. However, before sentencing for that crime, and in a later, separate incident, Francis committed an aggravated sexual assault on his common-law spouse. The sentencing judge imposed a three and a half year sentence for the assault and a two year sentence for the sexual assault to be served concurrently, but the Crown argued that because of the time that lapsed between incidents and the fact that the crimes involved separate victims, concurrent sentences were not appropriate.

Section 718.2(e) and the Aboriginal status of the offender were considered, but it was argued by the Crown that “the seriousness of the crime merits an increased sentence” (para. 2). The Court cited a number of cases in which it was stated that Aboriginal offenders who commit serious offences are more likely to be sentenced similar to non-Aboriginal offenders. The Court concluded that this was also true in this case, and that the original sentence was unfit. Furthermore, the court stated that a longer prison term was necessary because, “The goals of denunciation and deterrence cannot be sacrificed to the principle of restorative justice” (para. 16). The Court substituted a sentence of five years to be served consecutive to the two year sentence.
R. v. D.M.A. (British Columbia Superior Court, 2001)

In the case of R. v. D.M.A., the defendant was being sentenced on indecent assault charges for events that had occurred 20 years earlier against a young child who was a friend of the family. The court noted that the victim was now a grown woman, and these assaults had had a devastating effect on her. Very little information about the defendant’s background and circumstances were provided except to say that he came from an unfortunate background and was “hopelessly addicted to alcohol.” No pre-sentence or “Gladue report” was provided as the accused refused to meet with the probation officer.

The judge provided a lengthy discussion of section 718.2(e) and the duty of judges when sentencing Aboriginal offenders to carefully consider their circumstances and various sentencing alternatives. Furthermore, the court made reference to cases in which the principles of restorative justice were applied even though the crime was deemed a serious one. However, in the final analysis, the judge only made reference to the “moral blameworthiness” of the offender and concluded that a custodial sentence must be imposed and sentenced the offender to one year in prison. No other explanation for why the offender should serve his sentence in prison was provided, although the principle of denunciation seemed to have been a factor as the judge commented, “There seem to be no mitigating factors to this disgusting behaviour” (para. 33).
2) **HASLIP'S SECOND HYPOTHESIS - DISPARITY IN SENTENCING:**

Haslip's second hypothesis states that judges may be reluctant to apply section 718.2(e) because of the disparity in sentencing that it would appear to cause. The Supreme Court in its directive to judges stated that application of section 718.2(e) will necessarily result in disparity in sentences between Aboriginal and non-Aboriginal offenders for less serious offences. This means that for some offences, an Aboriginal offender may receive a non-custodial sentence where a non-Aboriginal offender may receive a custodial sentence, or if jail term is required, an Aboriginal offender may receive a shorter sentence than a non-Aboriginal offender. Since judges have traditionally striven to achieve parity in their sentencing, according to Haslip, this new provision directing them to do otherwise may be met with some reluctance as the Supreme Court's directive, "is of little comfort to a sentencing judge attempting to come to an internal harmonization of the traditional emphasis on parity in sentencing and the remedial requirements of section 718.2(e), and appears to run contrary to reality and the numerous books written on sentencing guidelines" (2003, p. 250).

Because judges usually take an individualized approach to sentencing, disparity in sentences seems inevitable. Disparity in sentencing usually carries negative connotations, as something to be avoided, but the Supreme Court in Gladue discussed at length the idea that avoiding disparity should no longer be an ideal, given the move towards more individualized sentencing that takes into consideration the unique circumstances of the offender and the crime. In fact, the Supreme Court states,

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34 The Supreme Court noted that for more serious offences, there may be less disparity in sentences between Aboriginal and non-Aboriginal offenders.
“Disparity of sentences for similar crimes is a natural consequence of this individualized focus” (Gladue, 1999, p. 24).

In my review of the cases in my data set, there was no explicit evidence to support the idea that concern over disparity is a reason for why judges may not apply section 718.2(e). However, this does not mean that concern about disparity does not exist. It may in fact be a reason for not applying section 718.2(e), but it does not appear to be a specified reason. Written sentencing decisions only capture what the judge decides to reveal about his or her decision. They do not give us complete insight into the various factors involved in the decision-making process itself.

R. v. Ekenale (Northwest Territories Superior Court, 2000)

Only one case made specific reference to the need to avoid disparity. In the case of R. v. Ekenale35, the accused was convicted of manslaughter and sentenced to a prison term of five years for a crime that occurred almost 30 years earlier. In this case, section 718.2(e) was discussed, but does not appear to have been applied because there were no submissions made regarding any systemic or background factors that contributed to the crime. Therefore, the court saw no reason to sentence this offender differently than any other offender convicted of a similar offence. Furthermore, justification for the prison sentence was based on the perceived need for denunciation and general deterrence. The reason for including this case in this category, however, is because the judge also claimed

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35 This case is also reviewed in later sections (Haslip #6 and #8).
that sentencing this offender as he or she would any other offender was necessary to

“…avoid disparity and uphold public confidence in the administration of justice” (p. 4).
3) HASLIP’S THIRD HYPOTHESIS - INFLUENCE OF APPELLATE COURTS:

This hypothesis suggests that the influence of appellate courts may reduce the amount of discretion that sentencing judges actually have. As a result, judges may be reluctant to deviate from accepted sentencing practices out of concern that their decision will be overturned on appeal.

Even though the Supreme Court has limited the role of appellate courts to intervene on sentencing issues, there is some support for this judicial concern and for Haslip’s hypothesis here, especially in the form of cases in which a conditional sentence is successfully appealed by the Crown, and the original sentence is substituted with a prison sentence. The following four cases are relevant.

R. v. Poucette (Alberta Court of Appeal, 1999)

This case is an example of an Appellate Court rejecting the original sentence given to an Aboriginal offender that had taken into consideration section 718.2(e). The case of R. v. Poucette involved a Crown appeal and although the sentence already included a prison sentence of one year, the Crown argued that the sentence was unfit. The appeal was allowed, and three years of probation was added to the sentence. Poucette was convicted of manslaughter in the stabbing death of his cousin. The original sentencing occurred before Gladue, and the sentence was based largely on the judge’s determination of Poucette’s culpability (which was found to be minimal). Subsequently, the Crown argued, and the Court of Appeal agreed, that the sentence did not reflect the gravity of the offence and therefore was not proportionate.
With respect to section 718.2(e), the sentencing judge did not order a pre-sentence report as he was “familiar with the broad systemic and background factors affecting the aboriginal community at Morley [Reserve]” (p.4). However, the Court of Appeal found this knowledge to be insufficient, as the judge did not adequately tie those factors to the individual offender before him. The Court argued,

It is not clear how Poucette, a 19-year old, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. While it may be argued that all aboriginal persons have been affected by systemic and background factors, Gladue requires that their influences be traced to the particular offender. Failure to link the two is an error in principle (p. 4).

While the sentencing judge appears to have interpreted section 718.2(e) as requiring as short a sentence as possible when incarceration is required, the Appellate Court argued that this crime was serious enough as to not warrant a reduction in sentence.

Furthermore, the Court found the sentence did not give sufficient weight to denunciation and deterrence\textsuperscript{36}, nor did it address rehabilitation or restorative justice. The Appellate Court, by way of a post-sentence report, had access to information to which the sentencing judge did not. Poucette was raised in a stable and supportive family and prior to the crime “considered himself a reasonably settled young man with a bright future” (p. 4-5). He began to drink when he was 15. At the time of the appeal, Poucette had finished serving his sentence and he appeared to do well, taking advantage of treatment programs and courses offered to him.

\textsuperscript{36} Because of this, this case could also have been included under Haslip #1.
The Court of Appeal stated that a three year prison sentence would have been more appropriate in this case, but they were reluctant to send Poucette back to prison given his progress, as it might have interfered with his rehabilitation. However, the Court added, “The goals of denunciation, deterrence and rehabilitation demand that a lengthy period of probation, with stringent conditions designed to address Poucette’s addiction, treatment and education, be added to his sentence” (p. 5). Three years probation was then added to his sentence.


In this case, the respondent had received a conditional sentence after being convicted of failing to comply with a probation order, assault, and uttering threats, in a domestic violence context (para. 1). The respondent had a lengthy criminal record and an anger management problem. The sentencing judge had imposed a blended sentence, consisting of a twelve month conditional sentence, of which the first three months would be served in jail, followed by 18 months probation. At the time of appeal, the jail portion of the sentence had been served.

The Court of Appeal found that the sentencing judge erred in imposing a conditional sentence as F.E.H. posed a risk to the public\(^{37}\). The Court briefly mentioned section 718.2(e) and the Aboriginal status of the offender, but concluded the actual imprisonment was necessary in this case and that a sentence of 12 months imprisonment

\(^{37}\) Because of this reason, this case could also be discussed under Haslip #8.
would be appropriate. Since this Appeal occurred six months after the original sentence was imposed, F.E.H. was required to serve the remaining six months in prison.

R. v. G.L. Ahenakew (Saskatchewan Court of Appeal, 2001)

In R. v. Ahenakew, the accused had received a conditional sentence of two years less one day for robbery with violence. It was reported that the trial judge was aware that a sentence of three years was usually imposed in these kinds of cases, but stated that in his opinion, “prison terms did not work as a general deterrent”, and felt it appropriate in this case to seek an alternative to imprisonment, citing section 718.2(e) of the Criminal Code and R. v. Gladue (para. 6). The Crown appealed this sentence and the Appellate Court agreed that the trial judge had erred in imposing a conditional sentence. Citing the need for public protection, the Appellate Court set aside the conditional sentence and replaced it with a sentence of two years less one day of actual imprisonment.

R. v. Birchall (British Columbia Court of Appeal, 2001)

In the case of R. v. Birchall\textsuperscript{38}, the Crown had also appealed his one year conditional sentence which he had already finished serving. The majority opinion ruled that the sentencing judge had imposed an unfit sentence. No discussion of section 718.2(e) was offered, except to mention that the fact that Birchall was an Aboriginal offender had been considered. The Crown’s appeal was allowed, and a four year prison term was

\textsuperscript{38} This case is reviewed in more detail in a later section (#9 – “Aboriginal Status Not Relevant to Crime”).
substituted. One month credit was given for pre-trial custody, leaving a sentence of three years and eleven months, and Birchall was credited with 12 months time served for the conditional sentence, but the remainder of the sentence was to be served in prison.
4) HASLIP’S FOURTH HYPOTHESIS - NATURE OF OFFENCE:

Haslip’s fourth hypothesis suggests that the ambiguity about when to use a restorative approach (i.e. for what crimes) may cause some reluctance among judges to actually use it. Haslip states, “The absence of direction concerning the nature of the offence for which a restorative philosophy is appropriate is further reason for judicial reluctance to give section 718.2(e) its remedial force” (Haslip, 2003, p. 251). Because Parliament and the Supreme Court did not specify for which offences a restorative justice approach should be used, it implies that this approach should be used for all offences. This leads Haslip to question,

> Are restorative sentences appropriate for offences involving assault and/or alcohol, for example? Since the goal of section 718.2(e) is the reduction in the over-representation of Aboriginal peoples in Canadian penal institutions, and since a high percentage of inmates, particularly Aboriginal peoples, are incarcerated due to property-related offences and the non-payment of fines, is, or should incarceration no longer an option for these types of offences? (2003, p. 251).

There are a number of cases in the data set where judges appear to justify not applying section 718.2(e) because of the nature of the crime committed. In many of these cases the crime was deemed too serious, requiring that the offender be sent to prison. However, a prison sentence is not always an inevitable conclusion to a serious crime. For example, in R. v. D.M.A., the judge quoted the judges in R.v. Wells, “in appropriate circumstances, a sentencing judge may accord the greatest weight to the concept of restorative justice, notwithstanding that an aboriginal offender has committed a serious crime” (para. 22). However, as the following case from my data set indicates there are instances involving serious crimes, where a judge may not apply section 718.2(e) because
the of the nature of the offence and ambiguity regarding when it is appropriate to use a restorative approach.\textsuperscript{39}.


In this case, J.C., an Aboriginal person, was convicted of two counts of sexual touching (of a young person - his nieces). In providing background information, the judge had this to say:

Mr. J.C. is 24 years old. The pre-sentence report outlines his background which has been filled with violence, abuse and tragedy. Sadly, both his parents have been deceased for a number of years. His mother lost her life in a homicide. He has been the victim of sexual abuse himself. Alcohol and drug abuse has been a large part of his life. He has tried to overcome them but, according to the pre-sentence report, with dubious results. He has been living with his brother for a number of years and his brother has significant problems of his own. He has not completed a great deal of formal education despite enrolling and re-enrolling on numerous occasions. He is described however, as polite, remorse-full for his conduct and a hard worker. He completed the fire fighting course and he has been seasonally involved doing this (para. 4).

The judge considered section 718.2(e) and the requirement to consider all available alternatives to prison, but also heard arguments from the Crown about the statement in *Gladue* that “Generally, the more serious and more violent the crime it is more likely that a practical matter the firms [sic] of imprisonment will be the same for similar offences and offenders whether the offender is aboriginal or not aboriginal” (para. 11). Defence

\textsuperscript{39} Many of the cases reviewed in the first “section 718.2(e) not applied" group (Haslip #1) could also be included in this category, especially if the crime is a serious one and judges make reference to using prison as a sentence due to the nature of the crime. However, only this case is included in this category as it made specific reference to the seriousness of the crime and the issue of whether or not section 718.2(e) applies.
counsel recommended a conditional sentence but also said a short custodial sentence may be appropriate. The judge felt J.C. was a danger to the public, “…at least until his problems have been adequately dealt with” and that he would not comply with any conditions set out for him in a conditional sentence (para. 14). These reasons, along with the need for deterrence and a “significant degree of denunciation” in the judges’ view required imprisonment and J.C. was sentenced to one year in prison.
5) HASLIP'S FIFTH HYPOTHESIS - DIFFERENCE IN TREATMENT OF ABORIGINAL AND NON-ABORIGINAL OFFENDERS:

Another reason that judges may be reluctant to apply section 718.2(e) is that judges may be concerned that the public will perceive sentencing Aboriginal offenders differently as a form of “race-based justice system” whereby Aboriginal offenders are treated more leniently than non-Aboriginal offenders (Haslip, 2003). Haslip warns that this perception of “special treatment” of Aboriginal offenders may lead to a backlash by the public which may also influence judges. There were five cases where this seemed to be the reason for the judge’s reluctance to apply section 718.2(e).

R. v. R. (H.) (Alberta Provincial Court, 1997)40

In the case of R. v. R. (H.), the 21 year old defendant pleaded guilty to sexually assaulting his nine year old niece on two occasions. The accused accepted responsibility for his actions, and in fact went to the R.C.M.P. and voluntarily confessed before anything had been reported. The defendant felt great remorse and sought counselling immediately. The defendant had much family and community support. It was believed that “incarceration would do more harm than good and that alternatively, community work service would provide a service to the community, and it would keep him in contact with the elders” (para. 35). The Edmonton Native Youth Committee recommended that he be placed on probation for two years.

40 This case was also reviewed in an earlier section (Haslip #1), but is included in this section as well because of the Court's interpretation of section 718.2(e) and treating Aboriginal offenders differently.
The Crown recognized that specific deterrence was not necessary in this case, but argued that general deterrence and denunciation required a term of incarceration between one and four years. The defence argued that denunciation and deterrence could be met by a sentence served in the community and partly through “public shaming” as the defendant came from a small community and community service would effectively achieve this.

Section 718.2(e) was discussed, but the judge appeared to have some difficulty with how to interpret and apply the provision (the case took place in 1997, before *Gladue*). The judge had already decided that this crime required a prison sentence in order to reflect society’s denunciation and the need for general deterrence. Taking the defendant’s Aboriginal status into account, the judge concluded that this should not affect the original decision, as it was expressed by the judge that section 718.2(e) should not be interpreted as excluding Aboriginal offenders from taking responsibility or from complying with the other sentencing principles. It was argued that if this were in fact the case, then, “… implicit in such an interpretation would be the crass, insensitive and invalid suggestion that sexual offences in the aboriginal community should not be regarded as seriously as those same offences committed elsewhere” (para. 56).

The judge rejected the defence’s submission that denunciation and general deterrence could be met by a sentence served in the community and sentenced the offender to one year in prison followed by two years of probation. Even though the defendant did not pose any threat to the community as it was unlikely that he would re-offend, the judge felt “this type of abhorrent behaviour is repugnant to members of the
community” and that a conditional sentence “would be inadequate and would appal [sic] the community” (paras. 76-77).

R. v. Whitemanleft (Alberta Provincial Court, 2000)

This is another case which could be included in more than one of Haslip’s categories, however, it is included here because of the judge’s comments on the treatment of Aboriginal and non-Aboriginal offenders. In this case, the judge appears to have considered section 718.2(e) but rejected it because the crime was considered too serious. Whitemanleft was convicted of theft and possession of stolen property, including doctor’s prescription forms. The defendant had a lengthy criminal record and was a drug addict. A joint submission was made by Crown and defense that the appropriate sentence would be three months in prison. At first, the judge commented that the sentence was too low, to the point of being unreasonable. Much of the discussion centered on this belief, and was based on the judge’s perceived seriousness of the crime and the background of the accused (mainly, his lengthy criminal record - which the judge took to indicate that the defendant was “incorrigible”).

The sentencing principles under consideration in this case were deterrence and protection of the public41. Little information was provided in the decision about the defendant’s background or circumstances, and the judge determined that there was no issue of whether or not the defendant should go to jail because of the joint submission.

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41 As such, this case could also be reviewed under Haslip #1.
Only the length of the sentence was being considered, and as previously mentioned the judge would have liked to impose a longer sentence than the one recommended, so it appears that the judge did not apply section 718.2(e) in this case.

The judge took the defendant’s past criminal record as an indication of the likelihood of re-offending and therefore as justification for a prison sentence (for public protection). The judge used these same reasons to reject the possibility of a conditional sentence. While the judge recognized that the defendant’s “sad upbringing” and drug addiction were largely responsible for his crimes, the judge does not appear to have considered these factors as they were set out in *Gladue*, as the judge commented “While this state of affairs is sad, only he can address it and the fact he is Aboriginal does not change that … I do not find the community must accept that risk because he is Aboriginal” (p. 4).

Furthermore, the judge made these somewhat curious statements, “While I may use a different methodology for assessing a fit sentence for an Aboriginal offender, it does not necessarily mandate a different result” and “Incarceration for an appropriate term is a necessity even though he is Aboriginal” (p. 4). In the end, the judge accepted the joint submission for a three month sentence, but only on the grounds that the defendant was given credit for time spent in pre-trial custody and he had entered an early guilty plea.
R. v. Fox (Alberta Court of Appeal, 2001)

This case (already reviewed in detail under Haslip #1) involved an appeal by the offender of his three and one half year prison sentence for various charges including dangerous driving causing death. There was little information provided about the background of the offender, but the Court of Appeal noted that the sentencing judge, “...found no basis pursuant to s. 718.2(e), as guided by Gladue and Wells, upon which to ‘discount’ the length of the sentence based on the fact that the appellant was an aboriginal person” (para. 13).

R. v. Simpson (Northwest Territories Superior Court, 2001)

Again, there is evidence to support more than one of Haslip’s hypotheses in this case. It is included in this category because the court’s comments about the appropriateness of a conditional sentence based on the fact that the offender was Aboriginal raise suspicion that there may be some judicial resistance to section 718.2(e) for the above reason outlined by Haslip. This case involved an appeal of a one-year prison sentence for sexual assault. The appellant argued that the judge over-emphasized the aggravating factors in the case and furthermore, “...did not expressly refer to or review the various sentencing options open to him, such as a conditional sentence” (para. 3). The appellant further argued that the judge did not appropriately consider and take into account the defendant’s Aboriginal status. The Court was asked to determine whether the sentence imposed was a fit one. On the issue of reviewing various sentencing options, the Court of Appeal
found no error, stating, “A judge is, however, presumed to know the law and need not refer to every available option” (para. 3).

The pre-sentence report presented at the original sentencing was positive and favourable to the defendant, and included a recommendation for a conditional sentence. The Appellate Court however, commented that just because the trial judge did not discuss a conditional sentence does not mean that it was not considered. On the issue of the defendant’s Aboriginal status, the Appellate Court admitted that the trial judge also did not make reference to this, but disregarded this fact by commenting, “…being Aboriginal does not mean that a non-custodial sentence is necessarily appropriate. The Territorial Court Judge was clearly familiar with the Appellant’s background, his family, and his community and the problems encountered by all” (para. 5).

The Court concluded that there was no error in the Territorial Court Judge’s decision, and that a conditional sentence was not more appropriate in this case, so the appeal was dismissed and the sentence went unchanged. This decision appears to be based on the serious nature of the crime and the need for public protection in this case, and even though the sentencing judge did not expressly state that this was the reason for sending the defendant to prison as opposed to a conditional sentence, the Appellate Court concluded, “But clearly in this case there was a basis for concern” (referring to the need for public protection) which appears to be based at least in part, on his prior criminal record and problem with alcohol (para. 6).
R. v. Rowell (British Columbia Court of Appeal, 2001)

R. v. Rowell involved an appeal against sentence following a conviction for robbery. The appellant argued that the judge did not properly take into consideration the appellant’s Aboriginal background. The Court of Appeal found no error in the judge’s sentence and the appeal was dismissed. There was only a brief discussion provided, much of which was a reiteration of the trial judge’s comments. The trial judge appears to have rejected section 718.2(e) but the reasons for doing so are unclear. The judge discussed section 718.2(e) and *Gladue*, but commented that it does not mean “a lesser sentence for aboriginal people simply because they are aboriginals” (para. 22). There was some discussion surrounding a submission by the Crown that there were no resources available in the community to support Mr. Rowell, but this does not explain the judge’s apparent outright rejection of section 718.2(e).
HASLIP’S SIXTH HYPOTHESIS - ROLE OF JUDICIARY AND COUNSEL AND THE CIRCUMSTANCES OF ABORIGINAL OFFENDERS:

This hypothesis states that **there may be insufficient information available to a judge regarding a particular offender to preclude the application of section 718.2(e)**. The Supreme Court recommended that both defence and Crown counsel should present the necessary information about both the offender being sentenced, as well as any relevant information about the circumstances of Aboriginal peoples as a group for a judge’s consideration. Haslip’s concern then, is “…how likely it is that a sentencing or appellate court will engage in a meaningful search for this information” (2003, p. 254). Haslip further suggests that counsel may not be aware of community programs for offenders or ways of crafting alternative sentences as intended by section 718.2(e).

The issue of relevant information not being supplied to the court was evident in six cases in the data set. In these cases, the judge stated that section 718.2(e) could not be applied because of insufficient information being provided.

**R. v. Catholique (Northwest Territories Superior Court, 1999)**

For example, in the case of R. v. Catholique, the defendant was being sentenced for assault causing bodily harm. The judge carefully reviewed section 718.2(e) and *Gladue*, but little information was provided about Catholique’s background or circumstances. The sentencing principles considered were rehabilitation, deterrence and public protection, but when it came to determining sentence, the judge commented,

I take, in this particular case, defence counsel’s submissions as to the offender’s attempts to rehabilitate himself in the two years prior to this most recent offence at face value. I take defence counsel’s submission at
face value as to the offender's desire to put behind him his life of petty crime and alcoholism. All of that is to the offender's credit, and I give him credit for that. But there is only so far I can go in the absence of specific information and submissions as to what may be appropriate for this particular offender (para. 19).

Catholique was sentenced to a prison term, as the judge had decided (without giving reasons) that prison was necessary, and while the sentence was reduced somewhat, the reasons given were the defendant's pre-trial custody and the fact that he entered a guilty plea, not because of a consideration or application of section 718.2(e).

**R. v. Morin (Alberta Queen's Bench, 1999)**

R. v. Morin is another case where section 718.2(e) was not applied because defense counsel did not submit sufficient information. Morin was sentenced to an intermittent term of 90 days in prison and one year probation for threatening death and assault with a weapon. The judge took note of the fact that the accused was a youthful offender and had an alcohol problem, as well as the fact that Morin had taken steps toward upgrading his education and had acquired part-time employment. However, the judge faulted defense counsel for not providing the necessary information about the specific circumstances of the offender in order to adequately consider section 718.2(e). On this issue the judge stated,

In the case at bar, about all I know about this accused is that he is an Aboriginal person of some relative youth that belongs to a native youth gang that frequents the inner-city of Edmonton. I have no idea as to whether this offender has been affected by poverty, racism, family or community breakdown, systemic unemployment or low income, loneliness or community fragmentation, by-residential [sic] school education, or any other historical or societal context that may relate to his Aboriginal status (p. 5).
The judge stated that although this imposes an additional burden, it is the responsibility of defense counsel to provide such information, writing, "...defence counsel should realize that simply pointing out the fact that the offending person is of Aboriginal status does not in and of itself mean very much in the context of sentencing" (p. 5).

R. v. Goodstoney (Alberta Court of Appeal, 1999)

The case of R. v. Goodstoney involved a cross appeal\textsuperscript{42}. Goodstoney was sentenced to five years in prison for criminal negligence causing death and bodily harm as a result of drinking and driving. The Crown argued that the sentence was too low, while Goodstoney appealed his sentence in part on the fact that the trial judge did not properly consider and apply section 718.2(e). The sentencing trial took place in 1998, pre Gladue. The trial judge ruled that section 718.2(e) was inapplicable in this case because a prison sentence was necessary. The judge appears to have interpreted section 718.2(e) as involving only the decision of whether or not to send an offender to prison, and did not consider the length of the sentence\textsuperscript{43}.

Goodstoney was 18 years old at the time of offense, had no criminal record, only a grade eight education and a drinking problem. The Appellate Court was aware of these factors, as well as Goodstoney’s efforts to rehabilitate himself while in prison.

The appeal also took place before the Supreme Court ruled on Gladue, however, this court gave section 718.2(e) more consideration in their decision. The Court of

\textsuperscript{42} A cross appeal is an appeal by both the Crown and the defendant.
\textsuperscript{43} In Gladue, the Supreme Court clarified that even where a prison sentence was necessary, the length of the sentence could be reduced in some cases under section 718.2(e).
Appeal was concerned with how to interpret the word “circumstances”, and what was considered to be a lack of information available regarding this particular offender. It appears that defense counsel did provide information about the accused, his family and the general conditions of the reserve on which he resided, but because the information was not presented as new evidence (i.e. proven facts), the Court felt it could not be considered. Instead, the Court recommended,

Maybe some evidence about the accused’s own neighborhood, or his relatives’ culture, or other fortunate or unfortunate circumstances common among his relatives or neighbors, might show something relevant both to sentencing and to the fact that he is aboriginal. So might expert evidence. I express no opinion on such questions. But there was nothing like that here (para. 39).

Even though the Court did have some of this information, they were not satisfied with the way in which it was presented, and they questioned the accuracy of the information as it was not presented as evidence that was agreed upon by all parties. The criteria for evidence appears to be something that is “known to all”, and because the Court knew nothing of the history of the accused, his family and community, the information could not be given judicial notice\(^ {44}\), and therefore section 718.2(e) was rejected. Furthermore, the Court stated,

Now we have a section in the Criminal Code, but one which requires specific information. No one would suggest that an aboriginal offender get a heavier sentence than one who is not, simply because he is aboriginal. Unless the Court has some useable relevant information, it is also difficult to justify an arbitrary deduction simply because of ancestry or culture (para. 45).

\(^ {44}\) Judicial notice is defined as “…a court’s or tribunal’s personal recognition of certain generally known facts whose accuracy cannot be reasonably questioned; in other words, they need not be proved” (Government of Canada, 2003).
It appears that decisions such as this one are evidence of why it was necessary for the Supreme Court to clarify section 718.2(e) as it did in *Gladue*.


In the case of *R. v. Ekenale*\(^{45}\), the accused was convicted of manslaughter and sentenced to a prison term of 5 years for a crime that occurred almost 30 years earlier. In this case, section 718.2(e) was discussed, but does not appear to have been applied because there were no submissions made regarding any systemic or background factors that contributed to the crime. Therefore, the court saw no reason to sentence this offender differently than any other offender convicted of a similar offence. The judge appears to have rejected section 718.2(e), in part, because no information was provided linking the offender’s background to his crime or to appropriate punishment. It is unclear whether this information did not exist, or if it was just not presented to the Court. If the latter is true, there is a judicial duty on judges to ensure that information is available in order to sentence Aboriginal offenders appropriately.

**R. v. Innes (British Columbia Court of Appeal, 2000)**

In this case, section 718.2(e) was also rejected because of a lack of information regarding the offender’s background. This was an appeal by Innes of his prison sentence of six months (and two years probation) for attempted break and enter. Innes had a criminal

\(^{45}\) This case is reviewed in other sections as well (Haslip #2 and #8).
record and an alcohol problem. Innes’ appeal was based partly on the argument that the sentencing judge did not properly consider section 718.2(e). At the sentencing trial, there was a joint submission made that an appropriate sentence would be 60 to 90 days in prison, and because defense counsel recommended a prison sentence, the Court concluded that prison was reasonable in this case.

Furthermore, at the sentencing trial, defense counsel declined an invitation to submit a pre-sentencing report which could have included relevant information about background and systemic factors. Defense counsel did provide brief information orally, but the Court of Appeal found that in this case, the judge could not be faulted for not implementing section 718.2(e) because not enough information was provided to that judge. The appeal was dismissed.

R. v. Shawana (Ontario Superior Court of Justice, 2001)

In this case, the accused was convicted of sexual assault. There was little, if any discussion of the accused’s background, except for brief mention of his alcohol problem. However, the judge decided that section 718.2(e) was not relevant in this case and stated, “...there has been nothing put forward specifically from which I could indicate that any systemic cause arises from this person’s society that has brought him to this particular point of conviction” (para. 38). This case was very brief, and provided little information about the crime, but the Crown did make one curious comment that, “...the forced sexual intercourse with sleeping or unconscious women seems to be a particular problem in this community and it should be deterred, others should be deterred from this behaviour”
(para. 10). A joint submission of three years in prison was presented and accepted by the Court.
HASLIP'S SEVENTH HYPOTHESIS - ABORIGINAL COMMUNITY:

Another concern raised by Haslip has to do with the problem of defining “Aboriginal communities.” This hypothesis states that the concept of “Aboriginal community” held by many people in the legal community and the public is too narrow and judges may exclude certain offenders from a section 718.2(e) analysis because they are not regarded as a member of the Aboriginal community. The Supreme Court in Gladue advocated a very broad definition of community, one which expanded the existing ideas of who was to be included under the term “Aboriginal offender” and the sentencing alternatives available. Specifically, the Supreme Court stated that section 718.2(e) applies to all Aboriginal offenders regardless of residence (i.e. on or off reserve). With respect to sentencing alternatives, the Supreme Court directed judges to look beyond the immediate community of an offender if necessary to find an alternative to incarceration.

Furthermore, judges are to take into consideration the resources and programs available in the community when sentencing Aboriginal offenders. For example, as Haslip states, “Under this broad definition of community, when an Aboriginal person may live on a reserve, his or her community might include an urban centre where the latter centre was the only place that had the appropriate resources for rehabilitation purposes” (2003, p. 256). In short, sentencing judges are to impose community-based sanctions wherever possible. Relatedly, the Supreme Court reminded judges that the absence of programs and resources in the community does not relieve them from imposing restorative justice-based sentences.
However, Haslip is doubtful that this broad definition of community will be readily embraced by all trial and appellate judges. Her main concern is the possibility that, "...bias exists amongst the judiciary and other members of the legal community, and society at large, that Aboriginal peoples living off reserve are not connected to their Aboriginal communities and do not deserve recognition as Aboriginal peoples" (2003, p. 256). Haslip is concerned that these offenders will be excluded from the benefits of section 718.2(e).

Another concern she raises is the lack of resources and programs available in some communities (especially Aboriginal communities), which means a lack of sentencing alternatives for judges sentencing offenders in these communities. Haslip provides an example of one Aboriginal offender who was sentenced to prison only because there were no community-based anger management programs available to him (and the program was offered in prison) (2003, p. 257). The following five cases are relevant to Haslip’s seventh hypothesis.

R. v. Jacobish (Newfoundland Court of Appeal, 1997)

This is another case where there is evidence to support more than one of Haslip’s hypotheses, however, it is included in this section because of the judge’s comments about the need to send Jacobish to prison because of a lack of resources in the community to address his problems.\textsuperscript{46}

\textsuperscript{46} The other issues in this case include the perceived need for deterrence and denunciation of this crime (Haslip #1), and the potential threat that the offender posed to the community (Haslip #8). As well, there appears to be some evidence that the judge was reluctant to treat this offender differently simply because he was Aboriginal (Haslip #5) when the judge commented, “these crimes of sexual assault against children
In this case, the appellant was appealing his sentence of five years and three months imprisonment for various sexual assault convictions on children between the age of six and fifteen. The issue at appeal was whether a restorative justice approach was appropriate given the serious crimes committed against members of the appellant’s community. The Court of Appeal reviewed the information from the original sentencing, including the background factors of the appellant. Jacobish grew up with no supervision from his parents who themselves were alcoholics, and he also experienced sexual abuse as a child. Jacobish had a history of alcohol and substance abuse problems, and a lengthy criminal record including previous convictions for serious sexual assaults. Jacobish’s substance abuse problems affected his ability to maintain regular employment. A report was also submitted that outlined the social conditions facing Innu people in Labrador (Jacobish’s home) “as they struggle with changes in their lifestyle in a world which is in many ways still foreign to them” (para. 11). One report from the Social Development Co-ordinator of the Innu Nation claimed, “…the appellant’s present circumstances are irrevocably linked to his past social history” (para. 12). The author of the report further commented,

It is our contention that victimizers are created, not born. When an overview of Charlie’s life is examined it becomes apparent that violence, abuse and neglect have greatly contributed to family breakdown. We know that we must help Charlie, and others, as part of families to rebuild their lives within a process of reconciliation and healing. There is no place for punishment in this process (para. 13).

transcend all cultural boundaries and are not and cannot be condoned or tolerated by any civilized society regardless of cultural heritage” (para. 16, emphasis added).
The Court of Appeal seemed satisfied that a link between the appellant’s past and his criminal offending had been made, and that in most circumstances these facts should be taken into consideration when determining sentence. However, the sentencing judge, having access to all this information concluded that “the accused must take responsibility for his actions” and “these crimes of sexual assault against children transcend all cultural boundaries and are not and cannot be condoned or tolerated by any civilized society regardless of cultural heritage” (para. 16). The judge sentenced Jacobish to five years and three months incarceration, and did not state how taking the offender’s Aboriginal heritage into account had affected this sentence (the Crown had sought a sentence between four and five years). The judge hoped, and recommended, that the defendant would receive treatment for his problems while in prison.

Returning to the issue at appeal, the Court concluded that it did not find the sentence unfit according to the traditional sentencing principles, most specifically denunciation and rehabilitation. Thus, the issue under consideration was whether the approach to sentencing should have been different, given that it involved an Aboriginal offender (i.e. a restorative justice approach that puts aside punishment and instead seeks to heal the offender and restore harmony to the community). After giving thoughtful consideration to the issue, and to the differences between retributive and restorative justice, the Court concluded that there was a lack of resources in the community to address the appellant’s problems and contribute to his rehabilitation. This, coupled with the fact that he posed a danger to the community until he was rehabilitated meant that incarceration was necessary and the appeal was dismissed.

This is another case in which there is evidence to support more than one of Haslip's hypotheses\(^{47}\), however, the judge's comments provided at the end of the review of this case merit inclusion in this section. In the cases of R. v. Kopalie and R. v. Kuksiak\(^{48}\), the two defendants were being sentenced for armed robbery. The sentencing took place in 1998, so the sentencing judge did not have the benefit of Gladue to refer to when sentencing Aboriginal offenders. The judge did make reference to section 718.2(e), but there was very little discussion of the circumstances of the offenders, and there is no indication that section 718.2(e) was taken into consideration when determining an appropriate sentence.

While the charge of armed robbery carries a minimum sentence, judges do have the power to grant a statutory exemption from the statutory minimum sentence, which is what the judge did in sentencing Kuksiak. Kuksiak received a three year prison sentence while Kopalie received a four year prison term. Kuksiak's shorter sentence was based on the guilty plea that he entered early on in the process, his cooperation with the police, and his testimony against his co-accused. While there were no sentencing principles referred to with regard to the sentences imposed, it appears that general deterrence was deemed important. The judge, in his final comments, said,

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\(^{47}\) The judge's reason for sentence seem to be based, at least in part, on the principle of general deterrence and denunciation (Haslip #1) as indicated in the comments made about sending out a message to those who use a gun in the commission of a crime.

\(^{48}\) These two cases are being discussed together as Kopalie and Kuksiak were co-defendants. The cases were written up separately, but the sentencing decision and discussion are identical for both.
Just in closing, I have spent many, many hours struggling with these issues and the sentences that are appropriate for these individuals. I hope that the sentences that I have imposed today will, as Parliament hopes, send a message to all the people of the communities in this region and other northern regions where guns are a part of everyday life and are readily available to individuals; that is, if guns are used in the commission of crime, the penalties are severe, and hopefully, those sentences will discourage others from being involved in similar activities (para. 62).

It is also interesting to note in these two cases that the judge discussed the hardships that both defendants would face if sentenced to a federal prison as there were no federal prisons in their area (Nunavut) or in the Northwest Territories. Therefore, the defendants would have to serve their time "...far from [their] culture, language, family, friends, and country food ... [and ] will not have access to traditional counselling as [they] would in the North ... [nor] access to Elders and other ways of dealing with difficulties in a traditional Inuit way" (para. 16). However, while the judge seemed alive to these concerns, they were not raised in the final discussion of the sentence to be imposed.

R. v. Powell (Ontario Court of Justice, 2000)

In R. v. Powell, the accused was convicted of robbery and theft over $5,000.00. Powell had robbed a bank, and then two days later robbed a woman making a deposit at another bank. He explained that he had just been released from prison, had no money and was unable to find work, and social assistance could not be arranged for a couple of weeks. The Court was not accepting of Powell’s excuses, especially since the second offence was committed two days later when need was no longer immediate.

The pre-sentence report indicated that Powell was an Aboriginal person who was adopted as an infant and raised in a non-Aboriginal environment. Powell suffered
physical and psychological abuse from his adoptive mother, and was told to deny his Aboriginal heritage, and he was denied any access to his Aboriginal culture or community (para. 10). Furthermore, Powell admitted that he had anger management and substance abuse problems for which he wished to seek help. Powell had a sparse employment record, mainly as a manual labourer.

The Crown sought a prison sentence of two to three years for the robbery conviction, and another year for the theft. Defense argued that a 12 to 18 month conditional sentence would be appropriate, as it could address all the sentencing principles with an emphasis on rehabilitation and restorative justice. In determining sentence, the judge referred to Gladue, and section 718.2(e), but concluded that a conditional sentence was not appropriate in this case, mainly because of the seriousness of the crimes, and because the Court felt Powell posed a threat to society. However, the judge also appears to regard section 718.2(e) as not particularly relevant to this case, and possibly equates systemic or background factors with only having been raised in an Aboriginal environment. While the judge had previously described some of the personal circumstances of the accused, there is no connection made between those factors and the sentence imposed. In fact, from the following comments regarding this case, it appears that the judge had disregarded section 718.2(e):

Although Mr. Powell may have aboriginal roots, he has only recently begun to investigate potential resources provided for aboriginal persons. He was raised in a non-aboriginal setting and has spent his adult life in a non-aboriginal setting. It is encouraging that the accused is now exploring his roots with an expectation of personal renewal. Although aboriginal status is an important consideration for the court to weigh, that factor must be considered in the context of all the circumstances of the accused and the criminal conduct of the accused (para. 22).
Powell received a prison term of two years for the robbery charge and one year for the theft (although he was credited with eight months for pre-trial custody, reducing the sentence to four months).

_R. v. Rowell_ (British Columbia Court of Appeal, 2001)\(^{49}\)

The case of _R. v. Rowell_ involved an appeal against sentence following a conviction for robbery. The appellant argued that the judge did not properly take into consideration the appellant's Aboriginal background. The Court of Appeal found no error in the judge’s sentence and the appeal was dismissed. There was only a brief discussion provided, much of which was a reiteration of the trial judge’s comments. The trial judge appears to have rejected section 718.2(e) but the reasons for doing so are unclear. The judge discussed section 718.2(e) and _Gladue_, but commented that it does not mean "a lesser sentence for aboriginal people simply because they are aboriginals" (para. 22). There was some discussion surrounding a submission by the Crown that there were no resources available in the community to support Mr. Rowell, but this does not explain the judge’s apparent outright rejection of section 718.2(e).

\(^{49}\) Note: this case was reviewed in an earlier section (Haslip #5), but the problem of a lack of resources available in the community is justification for including it again in this section.
8. HASLIP'S EIGHTH HYPOTHESIS - ADDITIONAL CONCERNS:

This last hypothesis states that judges may be reluctant to apply section 718.2(e) in their sentencing because of a belief that returning an offender to the community may be counter-productive, for either the offender or the community or both. This hypothesis relates to the notion of restorative justice, which implies that there is a positive situation to which Aboriginal peoples can return when given a community-based sentence (Haslip, 2003, p. 258). The reality however, as Haslip points out, is that many of the Aboriginal communities are plagued by a number of problems which may have contributed to the offending in the first place. Returning an offender to a community under these conditions may be problematic. The hypothesis also raises the concern that returning an offender to a community may in fact endanger that community, if there is a risk of further offending which threatens the safety of the members of the community.

Judges may be reluctant to send an offender back to the community if it is felt the offender may pose a risk to that community. For example, Haslip cites a number of cases in which the community was divided over whether or not to welcome the offender back into the community as there was divided support for the offender and the victim. The following five cases provide further support for this hypothesis.
R. v. Augustine (New Brunswick Court of Appeal, 1999)\textsuperscript{50}

R. v. Augustine involved a double appeal. Augustine’s appeal against conviction was dismissed, while the Crown’s appeal was allowed. Augustine was convicted of manslaughter, and originally received a two year less one day conditional sentence to be served in the community (Burnt Church Reserve). In 1996, Augustine stabbed Terrance Martin to death, when Martin tried to prevent Augustine from continuing a sexual assault on a woman (para. 2). Drugs and alcohol were involved, Augustine confessed to the murder the next day, but at trial used the defense that someone else had killed Martin or that he had killed himself.

Augustine was actually convicted twice of manslaughter. At his original trial, he was sentenced to six years in prison. He appealed that conviction and received a new trial. It was at this trial that he was sentenced to a conditional sentence of two years less a day, as Augustine had served two and a half years on remand and he was therefore credited with “double time” equaling four years. However, the Court of Appeal found that the judge had made an error, because the original six year sentence had already taken into account time spent on remand. At the retrial, the judge took into consideration section 718.2(e) and alternatives to prison, and concluded that Augustine did not pose a threat to the community and therefore a conditional sentence was appropriate.

There were conflicting reports of whether or not Augustine would be accepted back into his community and whether or not he posed a risk to that community. The

\textsuperscript{50} This case, while described in more detail here, was also included in Haslip’s article as an example of these additional concerns.
Court of Appeal concluded that Augustine would in fact endanger the community and that a conditional sentence was unreasonable. While the Appellate Court did consider section 718.2(e) and made brief mention of Augustine’s background, the writing judge concluded, “I recognize the lifestyle of Mr. Augustine and the background of his way of life on the reservation, the abuse, the drinking, the taking of drugs but, in my view, these are not mitigating factors that should reduce any sentence to be imposed for manslaughter” (para. 32). Furthermore, the court stated, “The sentence for such a violent act, motivated as it was, demands a sentence of imprisonment to effectively deter and denounce the crime such that it is significant to Mr. Augustine and the aboriginal and non aboriginal community” (para. 34). The Court concluded that a sentence of ten years in prison would be appropriate, and after crediting Augustine with four years of time served, sentenced him to six year years in prison from the time of the start of his conditional sentence, and a lifetime weapons prohibition.

**R.v. Sewap (Manitoba Court of Appeal, 2000)**

This case was described earlier (under Haslip #1), but some of the judge’s comments about the communities of the victim and the offender lend support to this hypothesis as well. In this case, Sewap was being sentenced for her involvement in an unprovoked killing of a stranger while she was intoxicated. It is interesting that when determining whether to apply a more restorative approach to her sentencing, the Court spoke of the differences between the communities of the victim and the offender. The victim came from a predominantly white community and he was described as a hard working, valued
member of that community (Flin Flon). Sewap resided in an area outside of Flin Flon (Denare Beach) which included a “relatively small group of aboriginal people which has been marginalized by society” (p. 10). Sewap’s community was characterized by alcohol problems, lower levels of education, lack of employment and the resulting poverty. The Court further commented, “Her community is one that is more forgiving and more tolerant of various criminal activity than is the community of Flin Flon itself” (p. 10).

R. v. Ekenale (Northwest Territories Superior Court, 2000)

The case of R. v. Ekenale has also been discussed in other sections (Haslip #2 and #7), but it is worth mentioning in this section as well because of the judge’s comments about the community in which the crime took place. In this case, the accused was convicted of manslaughter and sentenced to a prison term of five years for a crime that occurred almost 30 years earlier. When considering an appropriate sentence, judges are supposed to determine whether or not prison is necessary in order to deter or denounce the crime in that particular community (Gladue, 1999, p. 25). However, the judge in this case acknowledged that this crime is not a particularly shocking one for this community, noting, “…this was a violent encounter, no doubt fueled by alcohol, between two people who were in a romantic relationship. There is nothing unusual or extraordinary about these circumstances, indeed they are tragically all too common” (p. 4, emphasis added).
R. v. Wilson (British Columbia Superior Court, 2001)

In the case of R. v. Wilson, it appears that section 718.2(e) was not applied because of the seriousness of the offence and the need for public protection as the offender was considered at risk for re-offending. Section 718.2(e) was discussed at length, and the possibility of a restorative sentencing approach was considered but rejected, as the defendant had few, if any, ties to the community or community support, especially because his victim was a highly regarded member of the community. The Court considered the defendant’s background which included his “horrible upbringing” (p.8).

Wilson was subject to severe abuse and neglect as a child, and surrounded by drug and alcohol abuse. At the age of 18 months he was removed from his Aboriginal environment and by the time he was 13 he had been placed in 11 different foster homes. He did not attend school, so has little formal education, and he began to abuse drugs and alcohol at the age of nine. At the time of sentencing, he had little work experience, a substance abuse problem and a fairly lengthy criminal record including a manslaughter conviction from when he was 17 years old.

The judge concluded that a prison sentence was required in this case to satisfy the needs of denunciation, deterrence and separation. Rehabilitation was also a consideration, although the judge concluded that based on the defendant’s record, “the prospect of rehabilitation is dim” (p. 9). Wilson was sentenced to nine years and four months in prison (he was given 32 months credit for time spent in pre-trial custody).
R. v. Wood (Nova Scotia Court of Appeal, 2001)

In the case of R. v. Wood\textsuperscript{51}, the Crown appealed Wood's conditional sentence of two years less one day for a violent sexual assault. The appeal was allowed, and a sentence of 38 months in prison was substituted. Few details were provided in the summary about the offender's background, except for the fact that he had an alcohol problem. The Court appears to have rejected section 718.2(e) because, "...through no fault of the accused, the goals of restorative justice did not seem to be attainable, for in particular, the complainant had left the local community and been made to feel unwelcome" (summary). This seems to be a rather limited interpretation of the application of section 718.2(e). Furthermore, the Court concluded that because the community had rejected the complainant, denunciation was necessary and served as justification for an increased sentence for the accused.

\textsuperscript{51} Only a brief summary of the case was available, so few details are provided here.
HYPOTHESES NOT IDENTIFIED BY HASLIP

A review of the cases in the data set involving the sentencing of Aboriginal offenders obviously lends considerable support to Haslip’s eight hypotheses explaining why there may be some judicial reluctance to consistently and properly apply section 718.2(e). However, my review of the case law has also produced evidence for other hypotheses not anticipated by Haslip regarding why section 718.2(e) is not applied in all cases involving Aboriginal offenders. What follows is a discussion of each of these four additional hypotheses by way of examples from sentencing case law found in the data set.

9. ABORIGINAL STATUS NOT RELEVANT TO CRIME:

A judge may not implement section 718.2(e) because he or she concludes that the Aboriginal status of the offender has no bearing on the crime. In some cases, even where sufficient background information about the offender and his or her circumstances suggest otherwise, the judge decides that the Aboriginal status of the offender had no bearing on their criminal behaviour, making section 718.2(e) irrelevant in their opinion. The following 13 cases from the data set provide examples.

R. v. Ross (British Columbia Provincial Court, 1998)

For example, in this case, Ross was being sentenced for drug trafficking. The judge apparently felt restricted by the Criminal Code regarding the severity of sentence that could be imposed. The judge took a very hard approach to drug traffickers, and stated,

I would normally consider trafficking in this drug to be such a vicious social evil as to impose a substantial prison sentence even upon a first offender, but, as will be seen from the passages of the Code and the Act
that I have quoted, the law requires me to give serious and careful consideration to a number of factors before depriving an offender of her liberty (para. 10).

Here the court is referring specifically to section 718.2(e). This case took place before the judge had the benefit of the Supreme Court’s clarifications in Gladue.

The judge was critical of the ambiguity of section 718.2(e) in terms of what defines “particular attention.” Furthermore, the judge was critical of the lack of definition of “Aboriginal offender” in the provision. The judge also felt that such determinations posed potential problems, and asked (in reference to apartheid South Africa), “Must the courts of this country now embark on the same kind of racist inquiry for sentencing purposes?” (para. 13). With reference to the specific case before the Court, the judge was satisfied of the offender's Aboriginal status because of her appearance and more importantly because of the word of her lawyer. On establishing the Aboriginal status of the offender the judge commented,

Fortunately in the present case that difficulty does not arise. Ms. Ross has the appearance of a full blooded aboriginal Canadian, her parents live on a reserve, and are presumably ‘Indians.’ Most importantly, Mr. Gardiner, whose professional integrity I respect, has told the court that his client is aboriginal (para. 36).

However, the judge rejected section 718.2(e) stating, “Having considered the Accused’s aboriginal background, I dismiss it as factor to be considered in deciding whether she should be imprisoned” (para. 37). This decision was based on the following brief assessment:

Apart from a few years before going to school, the Accused has lived in the urban environment of Williams Lake in the same manner as non-aboriginal people, attended the same schools, received the same education, and learned the same educational and social skills that would enable her to
earn an honest living in the same manner as non-aboriginal people. She was not the product of a broken home, and her father was gainfully employed throughout her childhood and adolescence. Her parents did, however, have a problem with alcohol and there was resultant family violence. She does not claim to have been discriminated against on the grounds of her race. She appears to have been assimilated into the mainstream of Canadian society. Her race was simply not a factor in the commission of her crime (para. 36).

However, the judge then noted that Ross started drinking and taking drugs at the age of 13, although she claims to have stopped now. Because Ross was employed, the judge decided that her crimes were not committed out of need, but rather greed. Although the judge rejected section 718.2(e), a conditional sentence was imposed, one that focused on the offender's rehabilitation. The offender was sentenced to a fine, and three years probation with strict conditions.

R. v. Poucette (Alberta Court of Appeal, 1999)

In some cases, even where the appropriate information is provided about the problems that Aboriginal peoples face as a whole in society, judges rule that they cannot apply section 718.2(e) because there is not enough evidence to tie those factors to the individual offender being sentenced. For example, the case of R. v. Poucette (already reviewed in more detail under Haslip #3) involved a Crown appeal of a sentence that appears to have taken into consideration section 718.2(e). The Crown argued that the one year prison sentence given to Poucette for manslaughter was too lenient and the Court of Appeal agreed, adding three years probation to the sentence.

The Court of Appeal acknowledged that the trial judge was very familiar with the systemic factors affecting the offender's community, but believed this knowledge to be
insufficient, as the judge did not adequately tie those factors to the individual offender before him. The Court argued,

It is not clear how Poucette, a 19-year old, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. While it may be argued that all aboriginal persons have been affected by systemic and background factors, Gladue requires that their influences be traced to the particular offender. Failure to link the two is an error in principle (p. 4).

The Court of Appeal recommended that a three year prison sentence would have been more appropriate, but was reluctant to send Poucette back to prison as he had made considerable progress with his rehabilitation since being released after serving his original sentence.

R. v. Ear (Alberta Provincial Court, 1999)

Ear was convicted of assault causing bodily harm against his common-law spouse. The question before the court was whether the accused should be incarcerated, taking into consideration section 718.2(e). The Crown argued that the serious nature of the offence warranted a prison sentence, while the defense submitted that a prison sentence was inappropriate. Ear was employed, and had support from his employer as well as support from elders in his community. Ear was considered to be suitable candidate for probation as he would likely comply with any conditions imposed. However, the judge also found no evidence of “systemic or background factors which contributed to the commission of these offences” (p. 8).
The judge stated that the only factor he found relevant to the commission of the offense was alcohol and substance abuse. While this is one of the things that the Supreme Court in *Gladue* directed judges to consider when sentencing Aboriginal offenders, this particular judge took a very limited view on the issue, stating,

I am quite comfortable taking judicial notice of the frequency with which alcohol contributes to criminal behaviour for both aboriginal and non-aboriginal offenders. What I do not know, and what, in my view, is beyond the scope of judicial notice, is why this particular accused has an alcohol abuse problem. It may be in some cases that the employment conditions of a particular aboriginal community have led to rampant alcohol abuse, and that such is common knowledge in the community in which the court sits. However, I do not find this to be one of those cases. Indeed, the direct evidence before me suggests that employment is not a problem for the accused (p. 8).

The judge’s rationale for finding that no systemic or background factors, due to being Aboriginal, contributed to Ear’s crimes is somewhat unclear, but it appears that it may be based, at least in part, on the logic that since Ear was gainfully employed, this is evidence that he was not discriminated against or at a disadvantage because of his Aboriginal heritage.

In this case, confidence in the accused’s ability to comply with conditions set out for him, community support and efforts to rehabilitate himself were not enough to warrant a non-prison sentence. The judge decided that a one year prison sentence was necessary because of public safety concerns and the principle of general deterrence.
R. v. Dwyer (Ontario Superior Court of Justice, 2000)

The case decision is brief, but it appears that Dwyer was convicted of sexual assault\(^{52}\).

Section 718.2(e) was given only brief mention,

Counsel have not raised s. 718.2(e). One of the pre-sentence reports would indicate that Mr. Dwyer’s biological father is aboriginal and accordingly, I must consider whether or not that section should have effect. It is my understanding that to give that section affect [sic] there must be some indication there was a systemic influence because of racial background, and that it took apart [sic] in bringing the offender before the court. Although, we are entitled at law to take judicial notice of background factors, a court should be provided with case specific information in a pre-sentence report or by counsel, if such considerations are to be undertaken. I have no case specific information here, and from what little I can gather in the presentence report the biological father has had really no part in Mr. Dwyer’s life nor have there been systemic factors involved. Accordingly, I do not in this particular case feel that s. 718.2(e) should be applied (paras. 17-19).

Two points should be made about the above quote. First, the judge appears to be dismissing section 718.2(e) at least in part, on the fact that Dwyer was not raised in an Aboriginal environment, implying that Dwyer’s Aboriginal status is less relevant. This raises the question of culture versus race. Second, the judge admits that there was not enough case-specific information available about systemic factors in Dwyer’s background to properly consider and/or apply section 718.2(e). However, later in the decision the judge had this to say,

Mr. Dwyer’s background is dysfunctional. He is a 20 year old young man that as Mr. Conroy has said has had very little chance to make something of himself. His parentage has, I think it is not unfair to say, been lacking. His employment record is intermittent, although he does work in the summer. He has not, as the pre-sentence report indicates, recognized the

\(^{52}\) The written decision of this case appears to be incomplete, and therefore there was no sentence discussed.
need to address his problems which include anger management and substance abuse. That is of concern. The pre-sentence report indicates throughout, difficulties because of lack of respect for authority. General belligerence I think is the impression what comes through, and a considerable use of alcohol (para. 26).

According to Gladue, it would appear that these are precisely the factors that are to be considered under an analysis of section 718.2(e). However, the judge appears to not relate these factors to the fact that Dwyer is Aboriginal because Dwyer was not raised in an Aboriginal environment.

R. v. Arcand (Saskatchewan Court of Appeal, 2000)

R. v. Arcand is another case where the court rejected section 718.2(e) on the grounds that the Aboriginal status of the offender before the court had no bearing on his criminal behaviour. In this case the accused was appealing his sentence of three years in prison after he pleaded guilty to sexual assault. The appeal was based partly on the grounds that the trial judge failed to properly consider section 718.2(e). In their review of the facts, the Appellate Court noted,

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Questioned about his past, having regard for R. v. Gladue ... [Arcand] spoke positively about his upbringing. He said his mother and father were both professionally employed, were good parents, and had encouraged various interests. These included sports, native spirituality, and aboriginal customs, including traditional native dancing. He had not suffered poverty or family breakdown or racism, he said, and had always had good jobs as an adult, working regularly in First Nations casinos (para 17).
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The appeal was dismissed, as the Appellate Court found that there was no judicial error in this case and that section 718.2 (e) had been properly considered. The Appellate Court noted, “He [the judge] was alive to the decision in R v. Gladue, but in effect treated the
Gladue considerations as having a limited run in the circumstances” (para 21). No explanation was given for this finding.

R. v. T.E.B. (Alberta Provincial Court, 2000)\textsuperscript{53}

In this case, the accused was convicted of causing a disturbance in a public place after he started a fight in a courtroom during a trial. Again, section 718.2(e) was considered, but rejected because the court found that no systemic factors contributed to the crime. The judge stated,

\begin{quote}
With respect to the accused as an aboriginal offender (and there was a representation made that the accused may be aboriginal) … There is neither direct evidence before me, nor evidence of which I should take judicial notice, suggesting systemic or background factors which contributed to the commission of this offence (para 13).
\end{quote}

T.E.B. had been subpoenaed to testify at the trial of a man who was accused of sexually assaulting his (T.E.B.’s) common law spouse. During the sexual assault trial, T.E.B. punched the defendant in the eye. The defendant did not want assault charges laid against T.E.B., but he was arrested and charged with causing a disturbance by fighting anyway (para. 5-6). Upon determining sentence for T.E.B., the court considered a conditional discharge, but ruled that even though a discharge would be in the best interests of the accused, a prison sentence was necessary for the purpose of general deterrence. The Court stated that even though this was not a crime of violence, the

\textsuperscript{53} This case was also reviewed earlier in Haslip #1.
offence of causing a disturbance in a courtroom is a common one that must be prevented. Furthermore, the Court stated, “Entirely the wrong message would be sent to the public by a disposition which failed to register a conviction informing the public of the seriousness of such conduct” (para. 36).

R. v. Cook (Saskatchewan Provincial Court, 2000)

In the case of R. v. Cook, Cook was sentenced to nine months in prison and two years probation with a number of conditions after being convicted of robbery with violence. An Aboriginal offender, Cook was described by the judge as, “an individual who is able to make a substantial contribution to society” (para. 11). It is surprising that Cook received a sentence of imprisonment considering the judge’s repeated comments that Cook should not necessarily go to prison. For example, at one point the judge stated, “In my view, penitentiary is not an appropriate placement for this offender. Neither he nor society will benefit from the harsh and hardening influence of penitentiary life” (para. 11).

The judge had concluded that a fit sentence for Cook was one of less than two years, which is the first requirement for imposing a conditional sentence. The judge went on to discuss at length the appropriateness of a conditional sentence for this offender. This included a consideration of the need for protection of the community to which Cook would be returned. The judge concluded that Cook would not present a risk to the community, and furthermore, there was a high likelihood that Cook would comply with any conditions imposed, as he had done so in the past when on probation. It was noted
that Cook was in a stable relationship, and had close ties with his family on the reserve, and the judge was convinced that Cook was a good candidate for rehabilitation.

When considering section 718.2(e), the judge noted that Cook had a “less than desirable upbringing”, but that he is “able, articulate and intelligent.” The judge also noted that Cook “has been employed from time to time” and appears to be motivated and responsible, and does not appear to have an “anti-social or psychopathic personality that results from extreme social dysfunction” (para. 22). While the judge did not go into detail about Cook’s “less than desirable upbringing”, and although the crime was committed under the influence of alcohol and involved the theft of a wallet after the victim denied Cook a loan of ten dollars, the judge concluded,

In accordance with Gladue, infra, I am to take account of any of the factors such as early poverty, abuse, and alcoholism, which appear to have specifically affected this offender. Based on the Pre-Sentence report and the submissions of counsel, I am unable to identify may [sic] factors which in Mr. Cook’s case, are of significant or overriding influence … in all the circumstances of this case, I do not consider s. 718.2(e) militates [sic] in favour of either an incarceral or nonincarceral outcome (para. 23).

The last consideration the judge undertook in determining the appropriateness of a conditional sentence, were the principles of deterrence and denunciation. The judge noted that prison is not an effective deterrent, and as previously noted, this appeared to be the case specifically for Cook. The judge cited jurisprudence that is supportive of the deterrent and denunciatory effects of conditional sentences, and had gone so far as to come up with a list of conditions that Cook would have to comply with. The judge’s conclusion appeared to be summarized in the following statement,

It is my opinion, for the reasons above-noted, that Mr. Cook would abide by the conditions I have given consideration to, and that he would
personally benefit, at this stage of his life and maturity, from such a conditional sentence. I think, as I have said earlier, that Mr. Cook has great potential (para. 31).

The above statements make it surprising then, that in the next paragraph of the decision, the judge concluded that “a conditional sentence does not adequately denounce the offender’s conduct in this case” and that the crime “must be denounced and others must know that such conduct will not be tolerated by the community or by the Court” (paras. 33 and 34). Cook was given a prison sentence, albeit a reduced sentence due to his prospects for rehabilitation.

R. v. Abraham (Alberta Court of Appeal, 2000)

Sometimes the misapplication of section 718.2(e) is corrected at appeal. For example, in the case of R. v. Abraham, the defendant was sentenced for impaired driving causing death and bodily harm. The original trial took place in November of 1998, before the Supreme Court released Gladue. The sentencing judge did refer to section 718.2(e) but concluded,

In my view, this section is to be considered by the sentencing judge as he or she contemplates whether a period of incarceration is required. Incarceration is to be the last sentencing resort in all cases. A sentencing judge is to be particularly mindful that there may be other appropriate alternatives in the cases of aboriginal offenders. However, if, after considering section 718.2(e), it is determined that gaol is the only appropriate sentence, then the effect of section 718.2(e) is spent. The section does not then mandate a reduction in the appropriate gaol sentence to be imposed simply because the offender is aboriginal. Once it is determined that the offender must go to gaol, then section 718.2(e) is no longer applicable (para. 65).
Statements such as these indicate the necessity of the Supreme Court’s clarifications and instructions. The sentencing judge sentenced Abraham to seven years in prison. In April 2000, Abraham appealed this sentence, and it was reduced to five years. The Court of Appeal found, “In cases of serious matters, an aboriginal offender’s sentence may be the same as that of a non-aboriginal offender, but there was no justification on the facts of this case for the accused to receive the highest sentence given to a similar offender for a similar offence” (p. 2). Although section 718.2(e) was considered by both courts, neither made specific reference to the particular circumstances and history of this offender.

R. v. Moyer (Alberta Court of Appeal, 2000)

In this case, an Aboriginal woman was imprisoned for eight months after being convicted of trafficking in drugs. Moyer was a treaty Indian - her father was Aboriginal while her mother was not. Moyer had not had any contact with her father since she was very young. Furthermore, the judge noted that Moyer was not raised in an Aboriginal community. This led the judge to conclude that section 718.2(e) was not particularly relevant in this case, stating,

Counsel for the accused raised the issue of the accused as an aboriginal offender. While she has treaty status, I conclude that the considerations outlined by the Supreme Court in R. v. Gladue, pertaining to aboriginal offenders, would have considerably less application to this accused than to many others claiming aboriginal heritage. Many aboriginal offenders have difficulty with the criminal justice system because of cultural differences. I do not consider the Gladue case to endorse special treatment of aboriginals based on their race. Rather it attempts to address problems arising because of cultural differences and background factors specific to

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54 Because of the reduction in sentence at appeal, it could be argued that section 718.2(e) was eventually applied in this case. However, the lack of discussion about the circumstances and history of the offender and how (and if) section 718.2(e) affected the sentence warrants its inclusion in this section.
aboriginal society. If I am correct that the special consideration to be given to aboriginal offenders is to be based on cultural rather than racial factors, then I must look at the extent that this accused’s aboriginal lifestyle or culture has contributed to her offending or might contribute to increased effectiveness of a culturally oriented disposition (p. 2).

This judge seems to have interpreted section 718.2(e) to mean that there are factors in Aboriginal culture that may lead to crime, making the provision only applicable to those offenders raised in an Aboriginal culture or community. The judge does not appear to acknowledge that there may be effects of being an Aboriginal person in Canadian society, no matter where they are raised, that may lead to crime. This appears to be the case even though the judge noted that Moyan was “teased about being Indian” while she was growing up. Furthermore, when told that Moyan was interested in becoming more involved with her Aboriginal heritage, the judge responded by saying,

I am skeptical of her indication in this regard and I consider it more likely that this representation has been made to her counsel in an attempt to legitimize her argument that she should be considered for special treatment as an aboriginal offender, than any real attachment to the aboriginal community (p. 2).

However, the judge did not provide any reason for this assessment. In determining a sentence, the judge contemplated a conditional sentence, but concluded that Moyan was unlikely to obey the conditions set out for her, and that incarceration was necessary for deterrence. It is also interesting to note that at one point in sentencing, the judge stated that the offender needs to “pay her debt to society”, further implying a retributivist approach to sentencing.
This case was appealed by Moyan, and in a very brief decision (less than one page) the Court of Appeal dismissed the appeal finding that the sentencing judge had properly considered section 718.2(e).

R. v. Birchall (British Columbia Court of Appeal, 2001)\textsuperscript{55}

In the case of R. v. Birchall, section 718.2(e) appears to have been rejected on the grounds that the defendant's Aboriginal status had nothing to do with the crime. This case involved a Crown appeal of Birchall's one year conditional sentence for manslaughter. The respondent was drinking with friends one night when they decided to go hunting. Birchall fired at noises he heard in a bush, claiming that he thought it was a moose. It turned out to be one of his companions who died as a result of the gunshot. Even though the respondent's sentence had been fully served, the Crown sought to replace that sentence with one of four years imprisonment, which was upheld by the Court of Appeal.

Although apparently applied at the original trial, it appears that section 718.2(e) was not given much consideration, as the Appellate Court notes,

This question was not pressed by counsel, possibly because the respondent had never lived on a reserve, he graduated from High School in Kamloops, and he has attended as a student at the University College of the Cariboo where he is currently working toward the completion of a Bachelor of Arts with a major in psychology and sociology (para. 14).

\textsuperscript{55} This case was briefly reviewed in a previous section - Haslip #3.
Based at least partly on these facts, the lower Court concluded “...aboriginal status was not a factor contributing in any way to the commission of this offence” (para. 14).

However, at the Appellate level, while the sentence was increased, the judgement to increase the sentence was not unanimous. The dissenting judge acknowledged that the respondent’s Aboriginal status could not be overlooked, and that prison should not be used if other sanctions were available. Furthermore, the dissenting judge stated that imposing a prison sentence on the respondent at this point, “…will benefit no one and will do unnecessary harm to the respondent who has already served a sentence that cannot be said to be unfit” (para. 19). The dissenting judge further stated,

… the present circumstances of the respondent raise the question again of whether a sentence of three years and eleven months at this time, even if dated back to the date of sentencing, is so grossly excessive that it shocks the conscience of right-thinking persons. In my judgement, such a sentence is so wholly disproportionate that it would constitute cruel and unusual punishment at this time (para. 21).

Regardless of this strong dissenting opinion, the majority ruled that the sentence was unfit, and increased the sentence from a one year conditional sentence to a four year prison term. On the issue of the respondent’s Aboriginal status, the Court had only this to say: “In reaching this conclusion I have noted that Birchall is an aboriginal offender” (para. 25).

R. v. Wilson (Manitoba Provincial Court, 2001)

In R. v. Wilson, the judge appeared to have considered section 718.2(e), but decided that the accused’s Aboriginal status had nothing to do with his crime. Wilson pleaded guilty to dangerous driving, driving while suspended, dangerous driving causing death and
dangerous driving causing bodily harm. These charges were the result of two separate incidents. Wilson was a youthful offender and had no prior record. The Crown sought a prison sentence, while the defense argued that a conditional sentence would be appropriate.

The judge gave careful consideration to section 718.2(e), but stated that not a lot of information about background and systemic factors were presented to the Court. The Director for Cultural and Traditional Healing from Wilson’s community provided information about how Wilson and his family had lost their culture and tradition as a result of the residential schooling system (para. 39). The Director believed that this loss contributed to the accused’s criminal behaviour. However, the judge was not as accepting of this and stated, “…after having given attention and consideration to the unique background and systemic factors, I do not feel that these factors are such that they played an important part in bringing the accused before me today” and further stated, “This accused seems like any other 19 or 20 year old who come before me for similar offences. Indeed what I see in this case is a young man who appears quite simply to lose all self-control when he gets behind the wheel of a motor vehicle. Nothing more, nothing less” (paras. 41 and 42).

The Chief of the Peguis First Nation, the accused’s community, asked the judge not to impose a prison sentence, and pledged the community’s willingness to participate in Wilson’s healing process. Other community members did the same. While the judge stated that a restorative approach may be in the best interests of the offender, still concluded, “…incarceration is necessary to denounce his conduct and to deter others
from engaging in similar conduct” (para. 46). Wilson was sentenced to 20 months in prison and a five year driving prohibition.

**R. v. P.T.C. (British Columbia Court of Appeal, 2001)**

In the case of R. v. P.T.C., the Court also rejected the idea that the accused’s Aboriginal status had anything to do with his crime. This case involved an appeal of a sentence of three and a half years in prison for armed robbery. The Court noted that P.T.C.’s father was Caucasian and his mother was Aboriginal, which gave P.T.C. Aboriginal status. P.T.C. had a lengthy criminal record and had drug and alcohol abuse problems.

However, the court also noted that P.T.C. was “not without ability” as he had completed his GED and was a talented carver (para. 6). Section 718.2(e) and various sentencing principles were considered at trial, and the judge stated,

> Deterrence then, and denunciation, are important factors to be considered; as well as the protection of the public on the one hand, and the rehabilitation of the Offender on the other. As to the latter, if he is to be rehabilitated, a fairly lengthy period of incarceration, away from his peers and his usual surroundings, probably will be a major step in that direction. Finally, I should observe that I do not associate this man’s problems of substance abuse with his community or with his family or with other, what I will call aboriginal factors, which in my view could cause me to fix a lesser sentence, or one which might be said to be more appropriate to an aboriginal offender (para. 9).

The appeal was based partly on the claim that the sentencing judge did not properly consider and apply section 718.2(e), but the Appellate Court disagreed, finding that the trial judge did in fact properly consider the appellant’s Aboriginal status and therefore dismissed the appeal. Furthermore, the Appellate Court stated, “In this case I cannot say
... that this is one of those cases in which the aboriginal status naturally should have reduced the sentence which otherwise was appropriate for the offence” (para. 14).

Counsel for the accused also brought forth information about P.T.C.’s prospects for rehabilitation in the community by attending an Aboriginal alternative justice program. On the issue of this program, the Court had only this to say,

...I recognize that Mr. P.T.C. has had a difficult adult life. It is commendable that he has embarked on a plan of community assistance through his band at Cheam that has arranged for his participation in the Alternative Justice Program and he is to be encouraged in his art. However, those factors do not persuade me that this sentence, already on the low side for the offence in the circumstances, is demonstrably unfit. I would dismiss the appeal (para. 17).

The Appeal Court judges concluded that the trial judge had made no legal error (by not adequately considering the Aboriginal status of the offender at trial), and decided that P.T.C.’s background circumstances were not sufficient to reduce the sentence.

Furthermore, the fact that P.T.C. had arranged for participation in a community-based alternative justice program that would provide rehabilitation, and had the support of members of his community, was not enough to persuade the Court to grant the appeal and reduce the sentence.

R. v. Shawana (Ontario Superior Court of Justice, 2001)

In this case (already reviewed earlier under Haslip #6) the accused was being sentenced for sexual assault. There was little, if any reference to the offender’s background except for brief mention of his alcohol problem. However, the judge decided that section 718.2(e) was not relevant in this case and stated, “…there has been nothing put forward
specifically from which I could indicate that any systemic causes arises from this person’s society that has brought him to this particular point of conviction” (para. 38).
10. MIXING OF RETRIBUTIVIST AND RESTORATIVE GOALS:

In some instances, judges may not apply section 718.2(e) because he or she believes that a prison sentence can achieve restorative goals. If one considers segregation to be a retributivist goal and rehabilitation a restorative goal, in these cases there seems to be some ambiguity or mixing of retributivist and restorative goals in sentencing. For example, some judges claim that prison is necessary for rehabilitation. This is different from Haslip #1, as there does not appear to be uncertainty over which goals to apply in these cases, or just an over-emphasis on retributivist goals. Sending someone to prison for rehabilitative purposes would seem to run counter to the intentions and purposes of section 718.2(e). Also, while similar to Haslip #6, it does not appear to be an issue of lack of resources in the community, but rather that the judge believes that prison is necessary for rehabilitation. The following four cases are relevant to this hypothesis.

R. v. P.J.J. (Yukon Superior Court, 1997)

In this case, it appears that the judge had determined that prison was necessary for the offender’s rehabilitation. The accused, P.J.J., was convicted of manslaughter, and received a two year prison sentence with 18 months of probation. When determining this sentence, the judge took into consideration that the defendant had spent two and a half years in pre-trial custody. It should be noted, however, that the defendant was not credited with double time for all of it because 17 months of his pre-trial custody were spent in a youth facility. The judge considered this facility not as difficult as serving time in an adult facility. The sentencing occurred in 1997, before the Supreme Court ruled on
Gladue. The judge mentioned section 718.2(e) within a general discussion of the sentencing principles in section 718, but did not make specific reference to the circumstances of the Aboriginal offender, or how this impacted the sentence, so it appears that section 718.2(e) was not applied in this case.

Although the offender had much family support, the judge felt that rehabilitation would be best achieved with the assistance of professionals. This seemed to be the main justification for sending the offender to prison, as the judge felt that the principles of rehabilitation and promotion of a sense of responsibility, followed by denunciation and deterrence were the most important principles to consider. The issue was raised of whether or not the offender's rehabilitative needs could be met in a youth facility, and it was concluded that they would not. Instead, specific programs in an adult facility were proposed as it was decided, “...this is the opportunity to give P. that which he needs; the intensive retraining to return into society” (para. 41).

R. v. Peters (British Columbia Court of Appeal, 1997)

This case (already reviewed earlier in Haslip #1) involved an appeal by Peters of his four year prison sentence for robbery, break and enter and theft, and other charges. Even though the offender had taken steps toward his own rehabilitation before sentencing, the trial judge felt that prison was necessary for Peters' rehabilitation. The Court of Appeal agreed, and further added, “The fact that he has been in prison appears to have been beneficial to him. The treatment that he has been given in prison has included Native involvement with Elders and with others” (para. 31).
R. v. G.L.M. (Yukon Superior Court, 2000)
In this case (already reviewed in detail under Haslip #1), even though the offender met all or most of the criteria for a conditional sentence, a prison sentence was imposed mainly for the purpose of rehabilitation, as the judge viewed the offender’s marijuana problem as largely responsible for the offender’s criminal behaviour.

R. v. P.T.C. (British Columbia Court of Appeal, 2001)
This case was reviewed in more detail in the preceding section. However, it could be included in this category as well. P.T.C. was appealing his sentence of three and a half years in prison for armed robbery. The appeal was based on the belief that the trial judge did not properly consider and apply section 718.2(e), but the Court of Appeal disagreed. At the original sentencing trial, the judge recommended that incarceration was necessary for the offender’s rehabilitation. On this issue the judge stated, “...if he is to be rehabilitated, a fairly lengthy period of incarceration, away from his peers and his usual surroundings, probably will be a major step in that direction” (para. 9). Even though the offender had initiated and taken steps toward arranging his rehabilitation in a community-based program the Appellate Court still felt the sentence was not unfit and dismissed the appeal.
11. PROBLEMS WITH INTERPRETING SECTION 718.2(E):

This hypothesis states that judges sometimes do not apply section 718.2(e) because they believe section 718.2(e) is not to be used in cases traditionally calling for a prison sentence. There were a number of cases (mostly pre-Gladue) where judges thought section 718.2(e) was not relevant or applicable in cases necessitating prison sentences. This represents a misinterpretation of section 718.2(e), as the Supreme Court clearly stated that in cases where a prison sentence was unavoidable, the length of the sentence should at least be considered which in many cases would result in a reduced sentence. The following six cases confirm the point.

R. v. Johnson (British Columbia Court of Appeal, 1996)

This case could have been included under Haslip #1 because of the judge’s reference to the need to satisfy the retributivist goals of deterrence and denunciation, but it is included in this category as the Appellate Court seemed to have rejected section 718.2(e) because a prison sentence was warranted. However, it is also interesting that the original sentencing judge seemed to be more alive to the problems that section 718.2(e) was to remedy, even though the trial occurred before Parliament released section 718.2(e).

In this case, the Crown had appealed Johnson’s 42 month prison sentence for a number of driving offences, including three counts of impaired driving causing death. Johnson was drinking and driving, drove through a red light colliding with two other cars killing three people and injuring three others, and then fled the scene of the crime. The
Crown’s appeal related specifically to the sentence imposed for impaired driving causing death.

Johnson had an alcohol problem and a lengthy criminal record which involved a number of alcohol-related offences. Johnson’s Aboriginal status was not mentioned at his original trial, which occurred in 1995. At that trial, the Crown recommended a lengthy prison sentence, which the judge rejected claiming that prison is not an effective deterrent technique, especially in drinking and driving cases. Furthermore the judge stated that Canada had a problem of over-incarcerating its offenders, and that the principles of sentencing could be achieved without always resorting to prison, or at the very least prison sentences that are excessive in length. It is important to note that this judge made these claims before Parliament implemented its 1996 changes to the Criminal Code promoting a reduction in the use of incarceration.

The appeal occurred in 1996, after the changes to the Criminal Code but before the Supreme Court clarified section 718.2(e) in Gladue. Section 718.2(e) was briefly mentioned, but quickly dismissed, as it was stated, “...I am not persuaded that anything other than a sentence of imprisonment ought to be imposed in this case” (para. 47). The Court found that the trial judged erred by disregarding deterrence as a sentencing principle and by not giving enough weight to the principles of retribution and denunciation. Johnson’s sentence was increased to five years and six months imprisonment (66 months).
R. v. Fortin (Ontario Superior Court of Justice, 1999)

Fortin was being sentenced for attempted murder, and the judge commented that in this case the principles of deterrence and denunciation took precedence over rehabilitation. This case took place after Gladue, and while the judge recognized that the offender was Aboriginal and reviewed the directives set out in section 718.2(e), the judge simply commented, "It is my view that there are no sanctions other than imprisonment that are reasonable in the circumstances of this case" (para. 21). No discussion of how or if section 718.2(e) impacted the length of the sentence was provided. Fortin was sentenced to six years in prison.

R. v. Goodstoney (Alberta Court of Appeal, 1999)

This is another case (already reviewed in detail under Haslip #6) in which the judge appears to have interpreted section 718.2(e) as involving only the decision of whether or not to send the offender to prison, and did not consider the length of the sentence. The case involved a cross appeal. Goodstoney was sentenced to five years in prison for criminal negligence causing death and bodily harm as a result of drinking and driving. The trial judge had ruled that section 718.2(e) was inapplicable in this case as a prison sentence was necessary.

R. v. Devries (British Columbia Court of Appeal, 1999)

In the appeal of R. v. Devries, the accused appealed his 10 year prison sentence for manslaughter and robbery on the grounds that the sentencing judge failed to properly
consider his Aboriginal background and therefore did not properly implement section 718.2(e). The appeal was dismissed, as even though the sentencing judge only interpreted section 718.2(e) to only mean prison or not, and not the duration of the sentence, the sentence was said to not be unfit. The accused’s Aboriginal background appears to not have been significantly considered in this case. Adopted at birth, Devries was raised in a Caucasian family and it was noted, “there is no evidence that their families were anything but loving and caring toward [him]” (p. 2). Furthermore, one of the Appeal Judges made the following statement, which I interpret to be an expression of resistance toward section 718.2(e),

I have been observing the legal system in British Columbia for longer than anyone else in this courtroom, and it was my observation going back to the 50’s and forward that the judges at every level in this Province did take account of the aboriginal circumstances of the offender. Perhaps not expressed in quite the words of the Criminal Code, but the judges were well aware of the poverty and lack of education and opportunity and so on that many aboriginal people had, especially those who left northern and interior reserves and came here to the lower mainland where they had little or any help or support. As far as I am concerned, the addition of the words “with particular attention to the circumstances of aboriginal offenders” does not add much at all, if anything, to what was always the concern of the judges of this Province whatever may have been the situation in other less enlightened parts of this country (p. 4).

This statement appears to contradict what is discussed in Gladue about the remedial nature of section 718.2(e). Furthermore, the judge makes reference to not only his own judging, but to that of all judges in the province in British Columbia. He seems to be ignoring the possibility of systemic discrimination, and reacting defensively to what he seems to perceive as a charge of discriminatory or racist sentencing.
R. v. J.K. (British Columbia Court of Appeal, 2000)

The case of R. v. J.K.\textsuperscript{56} involved an appeal against an order to transfer the appellant to adult court. The appeal was dismissed, and while this case is not a sentencing case, it is interesting to note that in its reasons for not granting the appeal the Court commented,

> While the accused argued that the youth court judge erred in failing to give appropriate weight to his aboriginal background, even assuming that considerations arising from s. 718.2(e) of the Criminal Code might be properly considered in a transfer application involving an aboriginal youth, the issue was of doubtful applicability here, for the accused, if convicted, would almost certainly be sentenced to imprisonment (case summary).

Even though it appears that the defendant had not been tried yet, the Court of Appeal had already decided that imprisonment would be the appropriate sanction, citing public protection and rehabilitation as the reasons.

R. v. Casimir (British Columbia Court of Appeal, 2001)

In this case, Casimir appealed his sentence of three and a half years in prison for impaired driving causing death on the grounds that the sentencing judge did not properly consider and apply section 718.2(e). While the Court of Appeal found that the sentence was not unfit and therefore dismissed the appeal, they made some interesting comments that are worth presenting here. The Court of Appeal acknowledged Casimir’s “most unfortunate, disadvantaged and unhappy history” (para. 11). Casimir grew up poor on a reserve that lacked services and support systems. As a child, he witnessed much alcohol abuse and violence in his community. At seven years of age, Casimir was sent to a residential

\textsuperscript{56} The full case was not available and this information was gathered from the case summary only.
school, and "...recounts witnessing numerous incidents of abuse that have left a legacy of ill feelings toward those involved in operating the school" (para. 4). Casimir's problem with alcohol began when he was 14 years old, which contributed to him dropping out of school in grade 11.

His alcohol problems made it difficult for him to maintain employment. In the 1960's and 1970's, Casimir was in and out of hospitals for detoxification. For most of the 1980's, he was not drinking and was able to find regular employment and became very involved with the affairs of his band as a Band Counsellor. However, in 1990 he began drinking again and admits that he was drunk for the better part of a decade. The accident which led to his charges and sentencing occurred in January of 2000 (paras. 4-7).

The Court of Appeal was asked to consider whether Casimir's sentence should be reduced on the grounds that the sentencing judge did not properly consider section 718.2(e). The Court did not find this to be the case, but one judge had this to say:

I have the view that in the fullness of time we will come to realize that we should go back well into the childhood of aboriginal persons who suffer the kind of misfortune this person suffered and determine whether it is appropriate to sentence them in a conventional way. I think that matter needs a great deal of attention. If I did not find myself constrained by authority, I would be seriously tempted to allow this appeal and to provide what I think would be a more enlightened sentence - a sentence that would return this person to his community under supervision where he would receive the kind of supervision and attention he deserves (para. 9).

It appears that this particular judge did find the sentence to be unfit, but because there was no legal error upon which to base this opinion (which is required in order for a Court of Appeal to interfere with a lower court's decision), the judge could not justify a
reduction in sentence. In this case the judge was constrained by the law.
12. NO REFERENCE MADE TO THE CIRCUMSTANCES OF THE OFFENDER:

In some cases, judges appear to be ignoring or rejecting section 718.2(e) outright, making no reference to the particular circumstances of the Aboriginal offender before them for sentencing. This appears to be a disregard for section 718.2(e). The following ten cases are examples of judges ignoring the circumstances of the offenders, and section 718.2(e).


These cases (they were co-defendants) were also discussed earlier under Haslip #7, but they are also being discussed here because there was very little discussion of the circumstances of the offenders. Also, it appears that section 718.2(e) was not taken into consideration when determining an appropriate sentence. This is surprising given that the judge had made several comments about the hardships that the defendants would face if sentenced to a federal prison as there were no federal prisons in the Northwest Territories. So while the judge understood that the defendants would be removed from their culture, language and family, these concerns were not discussed in the final determination of sentence.

R. v. McKenzie (Saskatchewan Queen’s Bench, 1999)

In the case of R. v. McKenzie, the defendant was being sentenced after being found guilty of sexual assault. The judge made reference to section 718.2(e) and Gladue, but did not discuss the background or circumstances of the offender. The judge raised the
possibility of a conditional sentence, but concluded that the length of the sentence would preclude serving it conditionally. The judge referred to various cases that had similarities to the one before the court. These were cases where the offender was not considered a threat to the community and a conditional sentence could have been imposed, but was not due to the nature of the crime. These cases were used to justify the judge’s decision to send McKenzie to prison for a term of three years. There was no discussion of how or if section 718.2(e) was applied, nor were principles of sentencing discussed.

R. v. Miller (Ontario Court of Justice, 1999)

In this case (already reviewed in detail under Haslip #1) there was very little discussion of the circumstances of Miller as an Aboriginal offender and how that may have contributed to his crime.

R. v. Kootoo (Nunavut Court of Justice, 2000)

This case was reviewed in detail earlier under Haslip #1 where it was noted that the judge did not specifically discuss the background circumstances of the offender, except to mention that the judge had given “anxious consideration of Mickey’s personal circumstances” and to his “disadvantaged background” (para. 32). Even though there was considerable discussion of section 718.2(e), there was no evidence that it was applied in the actual sentence.
R. v. Whitemanleft (Alberta Provincial Court, 2000)

This is another case (reviewed earlier under Haslip #5) in which little information was provided in the written sentencing decision about the defendant’s background or circumstances.

R. v. Blake (Northwest Territories Territorial Court, 2001)

In this case (already reviewed in detail under Haslip #1) the judge noted that the offender was Aboriginal, but there was no discussion of the particular background factors that may have contributed to the crime.

R. v. G.S. (Ontario Court of Appeal, 2001)

In the case of R. v. G.S., the Court of Appeal acknowledged that the trial judge did not expressly consider section 718.2(e) at sentencing, but excused the omission by claiming that the sentence would have been the same regardless. G.S.’s appeal was based on a number of factors, one of which was the judge’s failure to consider and apply section 718.2(e), even though the defendant was Cree. G.S. submitted that for this reason, the judge erred in imposing an indeterminate sentence (G.S. was declared to be a dangerous offender, but this designation was not disputed, just the indeterminate sentence)\textsuperscript{57}.

The Appellate Court, in justifying the lower court’s omission, claimed,

Assuming that the trial judge erred, in my view, his error caused no substantial wrong for at least three reasons. First, the trial judge did consider the appellant’s ‘early years’ and the ‘bad company’ he kept.

\textsuperscript{57} Upon sentencing, when the Crown can establish that an offender poses a significant threat to the community, the designation of “dangerous offender” may be imposed which requires that the offender serve an indeterminate prison sentence.
Second, s. 718.2(e) has a much diminished impact in sentencing persons like the appellant who commit serious and violent offences … Third, the evidence before the trial judge overwhelmingly supported an indeterminate sentence (para. 35).

It appears that even without reviewing any of the information required for a section 718.2(e) analysis, both Courts had decided that such information was irrelevant in this case. The reason for keeping G.S. in prison for an indeterminate period of time appears to be based on public protection and rehabilitation. While it was determined that the defendant was likely to re-offend, he was also amenable to treatment. However, professionals could not say how long that treatment would require (para. 36).

**R. v. Fox (Alberta Court of Appeal, 2001)**

Again, in this case (already reviewed in more detail under Haslip #1) little information was provided about the background and circumstances of the offender, other than the fact that he appeared to have had a stable life but had quit school after grade 10.

**R. v. D.M.A. (British Columbia Superior Court, 2001)**

This is another case in which very little information about the defendant’s background and circumstances were discussed, although the case does mention that D.M.A. came from an unfortunate background and that he was “hopelessly addicted to alcohol.” D.M.A. was being sentenced for indecent assault for incidents that had occurred 20 years earlier (the case is reviewed in more detail under Haslip #1). There was much discussion about section 718.2(e) and the duty of judges when sentencing Aboriginal offenders,
however, the judge failed to mention any of this in relation to the one year prison sentence that was imposed.

The cases reviewed in this chapter include those in which it appears that section 718.2(e) was not applied. The various reasons for this have been identified, and the cases have been grouped accordingly. The first eight groups are reasons that were previously specified by Haslip (2003). Many of the cases reviewed here provide empirical support for her hypotheses as to why judges may be reluctant to use section 718.2(e) in their sentencing as directed by Parliament and the Supreme Court. The remaining four categories are reasons for not applying section 718.2(e) that were not identified by Haslip.

The next chapter involves a review of the cases in which it appears section 718.2(e) was applied. These cases have been grouped into three main categories, according to the judges’ reasons for applying section 718.2(e) in their sentencing.
CHAPTER FIVE: FINDINGS - SECTION 718.2(E) APPLIED

The previous chapter reviewed a number of cases in which it appears that section 718.2(e) was not applied when sentencing Aboriginal offenders. The following is a review of a number of cases in which section 718.2(e) was applied. For each case, the essentials of the case are described, including a discussion (where possible) of the factors that the judges took into consideration when determining an appropriate sentence. In most of the cases, the judges specifically stated how and why they were applying section 718.2(e). Other cases are not so clear, but section 718.2(e) was discussed within the written statement, and the sentence included a non-prison sentence or a reduction in a prison sentence, and were therefore included in this section.

The conditions under which the judges considered and applied section 718.2(e) can be grouped into three main categories. The first group involves cases in which the judge stated that there was a connection between the status of the accused as an Aboriginal offender and the crime. The second group involves cases in which the judge determined that the sentencing goals of deterrence and denunciation could be met through a conditional sentence. These cases stand in contrast to the cases in which judges felt that prison was necessary to adequately achieve deterrence and denunciation, which were reviewed in the “section 718.2(e) not applied” section of the previous chapter. The third group involves cases where the rehabilitation of the offender was given primary consideration when determining an appropriate sentence. Finally, a last group of cases is included which do not fall into one of the previous three groups and which therefore defy categorization at this point. In this group it is obvious that section 718.2(e) has been
applied, but it is difficult to determine the specific reason why. However, they are important to include in this discussion because section 718.2(e) was still applied. The relevance of these findings will be discussed in Chapter Six.

1. ABORIGINAL STATUS OF THE OFFENDER AND THE CRIME

In this group of cases, the judges have applied section 718.2(e) because there is a recognition that the Aboriginal status of the offender contributed to their crime. In the following 17 cases, the judges stated that section 718.2(e) was being applied because the Aboriginal status or circumstances of the offender contributed to their crime.

R. v. Young (Manitoba Court of Appeal, 1998)

In this case, Young was appealing her four and a half year prison sentence after she pleaded guilty to manslaughter. Young had stabbed her aunt during an altercation, and subsequently she died of her injuries. The appeal was based in part, on the claim that the sentencing judge failed to adequately consider section 718.2(e). Two of the three judges on this appeal agreed that the sentence was excessive. While the judges note that this finding is not based solely on the claim that the sentencing judge failed to consider section 718.2(e), the offender’s background was certainly considered in the appeal. The judge writing for the majority commented,

That aboriginal offenders are likely to be disadvantaged members of the community need not be emphasized in this jurisdiction. Sentencing judges are too often faced with serious crimes committed by aboriginal persons with little formal education or employment skills and with backgrounds of dysfunctional family and community structures, physical and/or sexual abuse, and alcoholism. The sentence appeals heard by the Court on the day this accused’s appeal was argued illustrate that reality. The other
three appeals involved aboriginal offenders convicted of serious offences, including sexual interference, robbery, break and enter, and dangerous use of a firearm. In each case, the hallmarks of aboriginal socio-economic deprivation were factors. At the same time, I must say that when these or related factors are present, I would expect them to be taken into consideration by the sentencing judge regardless of the racial, ethnic, or cultural background of the accused. In this case, para. (e) and the particular attention to be paid to the circumstances of an aboriginal offender were put before the sentencing judge. She did not refer to the principle specifically, but it is obvious from her reasons that she was alive to the special needs raised by this offender’s background and culture. In my view, the sentencing judge did not fail to consider the sentencing principle set out in s. 718.2(e) (paras. 11-13).

While the dissenting judge felt that the sentence was appropriate, the majority found the sentence to be excessive as it failed to adequately consider less restrictive sanctions and the offender’s potential for rehabilitation. The sentence was reduced to a prison term of two years less a day with probation for three years.

R. v. George (British Columbia Court of Appeal, 1998)

This case did not involve the actual sentencing of an offender, but rather the accused’s appeal against his designation as a dangerous offender. However, section 718.2(e) was considered by the Appellate Court and was relevant in their decision. The accused had pleaded guilty to manslaughter; he had killed a 79 year old man by beating him in the face with a rock. As a result of the dangerous offender designation, the accused was sentenced to prison for an indeterminate period. George was 18 years old at the time of the offence, and was under the influence of hallucinogenic mushrooms when he committed the beating. He had encountered the victim on the street.
The accused was abandoned by his mother shortly after birth, and he was suspected as suffering from fetal alcohol syndrome. It was noted by the Court that he had an IQ of 70, and he had a youth criminal record involving mainly property offences. He had been raised by various relatives and foster parents. Growing up, the accused exhibited aggressive behaviour in that he often fought with and threatened other children and defied authority. It seems that it was this history of aggressive behaviour that was used by the sentencing judge in the determination to label the accused as a dangerous offender.

With respect to the dangerous offender designation, and the circumstances of this offender in general, the Appellate Court commented,

The dangerous offender provisions may fall more heavily on the poor and disadvantaged members of our society if their childhood misconduct is counted against them. This appellant had to face school as an aboriginal foster child living in a non-aboriginal culture with an I.Q. at or near the retarded level, without having ever acquired a sense of discipline or self-control. It is understandable that any child with this background would get into a lot of trouble by lashing out aggressively when challenged by his or her environment (para. 15).

The sentencing judge concluded that these acts of aggression exhibited by the accused during his childhood constituted a pattern of behaviour that ultimately culminated in the beating death of the victim. The Appellate Court disagreed, stating, “In my respectful opinion the learned trial judge gave too expansive a meaning to ‘pattern’…and thereby created a relationship between unlike elements. Much of the aggressive behaviour on which she relies for the pattern could be classified as school yard aggression which reflects the background and circumstances of many disadvantaged children. It is not necessarily indicative of dangerousness (para. 19). Furthermore, the Court disagreed
with the sentencing judge’s finding that the accused lacked any expression of remorse for his actions, indicating indifference and further justifying the dangerous offender designation.

The Appellate Court substituted a finding that the accused was not a dangerous offender and ordered a new hearing to determine an appropriate sentence for the offence of manslaughter.

R. v. J.K.E. (Yukon Youth Court, 1999)

This case involved the sentencing of a young offender after she pleaded guilty to criminal negligence causing bodily harm. The victim was her then two-month old baby, and the charge stemmed from an incident where, when after a night of drinking, the accused attempted to lift the baby but the baby slipped from her grasp, striking her head on the uncarpeted floor. Although there was swelling and bruising to the baby’s head, neither the accused nor the baby’s father sought medical attention. A week later, the accused was home alone with the baby who would not stop crying and the accused “lost control and slapped the baby once across the face causing the baby’s eyelid to go black” (para. 4). Finally, in another incident, the accused again was alone with the baby and feeling depressed and abandoned. Again the baby would not stop crying and the accused repeatedly hit the baby on the chest abdomen and back and then shook the baby. It was at this point that the accused called for help. The baby sustained a number of serious injuries as a result of the accused’s actions.
The accused was 16 when these events occurred. The judge was reluctant to merely dismiss the case as an unfortunate example of young girl who was acting out of incompetence and ignorance (para. 7). Instead, the judge recommended looking at the facts of the case in detail, in order to learn from it and prevent similar events in the future. The judge justified this decision by commenting,

I am taking the time to tell this story in detail so that all of the professionals in our community can see the ‘bigger picture’ and not just the small part that they see as doctors, nurses, public health nurses, counsellors, teachers, lawyers and judges might encounter. Similarly, it is important for family members and members of the Kwanlin Dun community to reflect on the history of this case in an objective and non-defensive manner. I hope everyone will ask what they might do differently should they encounter similar circumstances in the future (para. 9).

The accused was said to have had an unstable living situation throughout her life, her parents separated shortly after her birth, and both had histories of alcohol and drug use. As a baby, the accused was neglected, and she was transferred among various family members. Her life became more stable when at the age of four she went to live with her grandmother. However, at ten she returned to live with her mother, who was trying to cope with her alcohol problems. This did not even last a year, and her mother began drinking again and was reunited with her boyfriend who was abusive. The accused witnessed much of this abuse. The accused began drinking herself around the age of ten, and at twelve she was drinking daily. She also started using drugs. The accused reported having been sexually abused on several occasions, the earliest being when she was five. As a young teenager, she was also molested by a family member.
The accused did not finish high school having left when she gave birth to her child. She had a criminal record, largely involving theft charges in order to support her drug habit. She was also charged with assaulting her cousin, which she does not remember because she was drinking heavily and has a tendency to black out when she drank. The accused also had a history of getting into fights, mostly when she was drinking. She had been involved in a number of abusive relationships, including the one with the father of her child, who at one point was charged with assaulting her.

The accused had tried treatment and counselling on a number of occasions to deal with her substance abuse issues. She had been able to refrain from drinking for periods of time but often had relapses. However, she did not drink during her pregnancy and took care of herself and her unborn child. After the birth, the accused was considered to be “high risk” by a community health nurse, but she was not offered “commensurate levels of services and support” (para. 25). Since giving birth the accused had returned to using drugs and alcohol. For the four months prior to sentencing, the accused had been in custody, and had quit using drugs and alcohol and was making progress toward healing.

The judge pointed out various points in the accused’s life where someone should have noticed that she needed help. The judge was critical of the various people and institutions that had failed her, causing the judge to comment, “Cases such as this also reveal systemic weaknesses. This is particularly true of the justice system” (para. 46). The judge felt that the accused was “more of a victim than an offender.” Furthermore, the judge voiced concerns about the lack of resources and facilities in the area to treat substance abuse that are suitable for young people (para. 42).
A sentencing circle was held to discuss J.E.’s case. A number of themes emerged out of the discussions, one of which was that “J.E.’s background and offending are not a startling exception in her community. J.E. is unfortunately a reflection of a segment of her community” (para. 49).

In considering the relevant law that would help guide sentencing, the judge referred extensively to the directives outlined in Gladue, with particular attention paid to restorative sentencing. During her time in custody, J.E. had received much needed support and had made great progress. The judge felt that the accused should continue on in a structured environment that provides support and is without access to drugs or alcohol, and that returning her to her community too soon should be avoided as it “presents too many negative opportunities” (para. 71). The judge decided that an open custody placement would be most appropriate. The sentence imposed was six months in open custody followed by 18 months of probation.

R v. Armbruster (British Columbia Court of Appeal, 1999)

This case involved an application for leave to appeal sentence by the defendant.

Armbruster was convicted of armed robbery in 1998 and sentenced to life imprisonment. He was also given 10 years imprisonment for using a weapon during the commission of a sexual assault. The appeal was allowed, and the life sentence was reduced to 20 years in prison. However the sentence for the sexual assault was increased to 14 years (served

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58 The judge explained that, “In the Yukon, open custody is not served in a group home or institution but rather in a placement with a family, not unlike a structured foster home. These caregivers are screened and trained” (para. 74).
concurrently). The reason for this increase was to “reflect the seriousness of the sexual assault” (para. 3) (note: this is the maximum sentence allowable for sexual assault with a weapon). Both convictions were from the same incident. Within a week of being released from prison, the defendant decided to rob a store, and in the process assaulted the clerk “because the clerk had looked at him with disgust and this had angered him” (para. 6).

Armbruster was 35 years old, and had a lengthy criminal record. Since the age of 16, he had only spent three years outside of prison. A prison psychologist reported that Armbruster had serious psychological problems, and was in need of therapy in order to deal with these problems if there was any hope of him becoming a law-abiding citizen. However, Armbruster pleaded guilty to the crimes and expressed great remorse for his victim, and defence counsel believed there might be hope for rehabilitation.

Armbruster had only a grade six education, and when referring to his background the Court noted, “If the appellant ever stood a chance of living a happy, civil and productive life the circumstances of his upbringing help to explain why he never did” (para. 34). Armbruster’s mother was Aboriginal, and she abandoned him when he was two years old and he has not seen her since. He was raised by his father who was abusive and an alcoholic. Armbruster and his siblings were often left in the care of his father’s parents for extended periods of time. The court noted, “The grandmother was a severe woman, who referred to her grandson as a ‘half-breed’, a ‘black little bastard’, and on several occasions, it is said, tried to ‘wash the Indian off of him’” (para. 36).
Armbruster left his father’s home at the age of 10, after Armbruster’s father shoved his hand into a meat grinder, causing him to lose three of his fingers. With regard to his school attendance and achievements, the Court noted,

The appellant came to school in an unwashed and unkempt condition. He had a speech impediment, scored low on tests for academic potential, and was socially inept. He was asked to leave school in grade six. He made three attempts at readmittance and was refused each time. He was living on his own at age 14. At 16, for his first adult offences, he was sent to prison for nine months (para. 38).

Although the sentencing judge referred to section 718.2(e) in his summation of the defence’s position, the Appellate Court noted that he did not refer to it in his final determination of sentence. However the Court also notes that the sentencing judge did not have the benefit of the *Gladue* case as the sentencing occurred in 1998. The sentencing judge based his sentence on the dangerousness of the offender, and argued that a lengthy prison sentence was necessary for public protection.

The appeal against the life sentence for robbery was based on the fact that it was viewed as excessive\(^{59}\), and that the judge “...erred in abandoning any hope of rehabilitation” (para. 45) and gave insufficient consideration to the Aboriginal status of the offender. On this last issue, the Court reviewed the *Gladue* decision. On the issue of Armbruster’s background as an Aboriginal person, the Court commented,

There is no question that Mr. Armbruster has suffered because of his Aboriginal status. His grandmother brutalized him for it. The school

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\(^{59}\) Counsel for defence argued that instead of the judge imposing a life sentence (the maximum) the duty should have been on the Crown to initiate dangerous offender proceedings (life sentences are supposed to be reserved for the “worst offences by the worst offenders”), thereby constituting an error in law. The Court of Appeal posed the question in this case as “…whether the maximum may be imposed where the offence is not the worst offence, but the accused is the worst offender in that he poses a continued danger to society” (para. 48). At sentencing, the Crown sought a sentence between 15 and 20 years, and the Court of Appeal agreed that this was more appropriate and that a life sentence was not fit.
system was not able to deal with him. For his first adult offences he was sentenced to imprisonment for nine months. Because he was Metis, he was thought to be ‘institutionalized’ before he began to serve his first prison sentence. This is evidenced by an excerpt from the Admission Report prepared by a social worker on Mr. Armbruster’s first adult admission to the provincial facilities in Regina ... The subject being of Metis origin may be better equipped to cope with the pressures of incarceration [than] his peers (para. 60).

The Court noted that under the direction of section 718.2(e) and the Supreme Court in *Gladue*, these factors needed to be taken into consideration in determining a fit sentence for Armbruster. Furthermore, the Court also took into consideration the fact that Armbruster was now taking advantage of new programs that are available in prison for Aboriginal offenders that will hopefully aid in his rehabilitation. The Court seems to have given section 718.2(e) the consideration as set out in *Gladue*, as the Court commented, “Unique systemic and background factors have contributed to Mr. Armbruster’s inability to function in a civil society. It is possible that he will be assisted in dealing with his behavioural issues. In my view the Gladue case requires the Court to take these facts into account in determining a fit sentence” (para. 63). While the Court recognized that Armbruster’s crimes were very serious, and given his past there is a good chance he may reoffend, the Court did not discount the possibility that he may be rehabilitated. The Court viewed his guilty plea and remorse and his willingness to get help for his problems as positive indicators.

**R. v. Stewart (Saskatchewan Provincial Court, 1999)**

This case involved sentencing for the breach of a conditional sentence. Stewart admitted to removing his electronic monitoring bracelet and left his residence in order to get some
food, as there was no food in his home and he had not eaten for 15 hours. One of the main issues in this case was whether section 718.2(e) applies in cases of breach of conditional sentence. The original crime he had been sentenced for was sexual assault, and the Crown sought a suspension of his conditional sentence. The defence characterized Stewart’s actions as an “error in judgment” and argued that his actions did not increase the risk that he would re-offend (p. 2).

The judge concluded that section 718.2(e) did have relevance when determining how to address breach of conditional sentences, and after reviewing the pre-sentence and psychiatric reports from the original sentencing hearing concluded, “…it would appear that Mr. Stewart has experienced virtually all of the negative factors which the [Supreme] court discussed, including that; [sic] he has been affected by substance abuse, poverty, racism, family and community breakdown, unemployment, low income and dislocation from an aboriginal community” (p. 4).

The judge mentioned the importance of deterrence (both general and specific) in this case, but decided that Stewart’s rehabilitation via counselling and treatment programs in a community setting outweighed the need for deterrence. Furthermore, the judge decided that there was no increased risk to the community caused by Stewart’s breach. Again, the judge reiterated,

…I have considered his experience as an aboriginal person and in particular, his poverty, separation from community and family supports and his apparent lack of certain social and coping skills which were likely a factor in his inappropriate response to the problem of hunger. Certainly he was entitled to seek food for his survival. What is surprising is that he failed to take logical and appropriate steps to obtain permission to be absent from his home so that he could obtain food (p. 5).
The judge decided not to suspend his conditional sentence and instead added another condition to the sentence (that he participate in a life skills program) and extended the period of electronic monitoring.

R. v. Metatawabin (Ontario Superior Court of Justice, 1999)

Although the summary of this case is vague, one particular statement by the sentencing judge is worth repeating here. Metatawabin was convicted of aggravated assault, and the judge was deciding whether or not a conditional sentence was appropriate. The judge made a direct link between the accused’s background and his crimes, stating, “Without any doubt this accused has had a very troubled past, during which his [sic] has accumulated an unenviable criminal record” and further, “The Pre-Sentence Report outlines an exceedingly troubled background and a home life that could only produce little else but what this man has been for his adult life” (paras. 4 and 6).

While no specific details about the crime or the criminal were given in this brief summary, one comment by the judge appears to summarize the situation that many judges face when sentencing Aboriginal offenders. The judge wrote,

We have a choice today. Do we simply continue on this treadmill by incarcerating the accused for this very serious crime, a sentence, which in my view would clearly reflect society’s denunciation of his conduct or do we try to craft something from which both this offender and society will benefit? I prefer the latter (para. 5).

The judge imposed an 18 month sentence to be served in the community.
R. v. Carratt (Saskatchewan Queen’s Bench, 1999)

This case involves Carratt’s sentencing after being convicted of assault causing bodily harm. While the offender received a prison sentence, section 718.2(e) was applied when the judge took into consideration the background and circumstances of the accused, and accordingly imposed the shortest possible sentence stating, “In my view nothing is to be gained for Mr. Carratt by spending one day more in jail than is absolutely necessary to meet the overall requirements of the Criminal Code” (p.9).

The judge in this case appears to have taken section 718.2(e) very seriously, and much of the written decision is devoted to reviewing the testimony of three witnesses called by the defence who provided information to the Court regarding the situation of Aboriginal peoples in Canada. The judge also criticized the Crown for making “…no effort to comply with the requirements outlined by the Supreme Court of Canada in R. v. Gladue” (p. 2).

The first witness called was Professor Timothy Quigley, who was described as “…qualified as an expert on the subjects of sentencing and rehabilitation, with particular reference to aboriginal people” (p. 2). Professor Quigley spoke of the high rates of incarceration of Aboriginal peoples in Canada, and possible explanations of those rates which included a discussion on socio-economic factors and systemic discrimination in sentencing and other processes in the criminal justice system, and Canada’s over-reliance on incarceration as a sanction. Professor Quigley also spoke of the ineffectiveness of prison to achieve the goals of deterrence and denunciation, and alternatively recommended greater use of conditional sentences and restorative-based justice.
The next witness was Ross Gordon Green, a lawyer, who was described as, “…qualified as an expert in the area of community participation in sentencing and he approaches sentencing and restorative justice with particular emphasis on the efforts undertaken by many aboriginal communities” (p. 4). Mr. Green spoke of the benefits and effectiveness of restorative justice over mere incarceration.

The third witness was Irene Paul, a member of the National Native Alcohol and Drug Program and a band counsellor for the One Arrow First Nation. As someone who had counselled the accused, she spoke of his past addictions to drugs and alcohol, and the progress that he has made towards rehabilitation. Ms. Paul testified that “it would be of no value to incarcerate him [the accused]” (p. 4). Other letters from members of the community were also provided to the Court that supported Carratt’s application for a non-custodial sentence.

The defence argued that Mr. Carratt should not be given a prison sentence. The judge summarized the defence’s position as,

Given the Supreme Court’s statement that sentences for aboriginal offenders must be holistic and designed to achieve a fit sentence in the circumstances, incarceration in his view was not a viable option and would not benefit society or Mr. Carratt. He specifically referred to the substance abuse Mr. Carratt experienced in his community, his poverty, the overt racism he encountered, and the negative impact of his family and community breaking down (p. 5).

The Crown argued that given the serious nature of the offence, a one year prison sentence was necessary, arguing that the factors outlined in Gladue were subordinate to the principles of proportionality and parity. The Crown argued that this sentence was appropriate regardless of whether the offender was Aboriginal or not.
The judge explained in detail what steps needed to be taken in determining a fit sentence for this offender, including the criteria and considerations outlined in *Gladue*. The judge again expressed disappointment in the Crown for not calling any witnesses to address the issue of systemic or background factors that may have contributed to the offender’s crime. This led the judge to comment, “Absent such evidence, it would be difficult for this Court to carry out, other than in a very perfunctory manner, the instructions of the Supreme Court of Canada regarding the sentencing of aboriginals” (p. 7). The judge considered ordering a stay of proceedings until such evidence could be produced, but decided against it.

The judge reviewed the impact that overt racism, poverty, family breakdown, substance abuse and other socioeconomic factors had had on this offender, based on what limited information was present, and on the testimony of the witnesses called by the defence. The judge concluded that the offender had been impacted by these factors. While the judge stated that the offender likely would not pose a threat if he were to serve his sentence in the community, the judge felt that the serious nature of the assault meant that a period of incarceration was prescribed by law. The sentence imposed was nine months in prison followed by nine months of probation. The judge indicated that had section 718.2(e) not been taken into consideration, the sentence probably would have been one year in prison.
R. v. Pitawanakwat (Ontario Superior Court of Justice, 1999)

Heather Faye Pitawanakwat pleaded guilty to three counts of criminal negligence causing bodily harm and theft over $5000. Pitawanakwat, while very intoxicated, had stolen a taxicab and hit another car head on, seriously injuring three people. Pitawanakwat was 18 years old at the time of the offence, and had had a problem with alcohol since the age of 12 or 13 years. Drinking at such an early age was attributed to her environment, as she claimed it was “…due to the fact of being on the reserve and seeing and knowing no other way” (para. 118).

Upon considering sentence, the judge cited the impact of the crimes on the victims, the societal need for the deterrence of drinking and driving, the youth court record of the accused, and the potential for harm of the accused’s actions as aggravating factors to be considered. The mitigating circumstances were the accused’s early guilty plea, her young age (and therefore her first offence as an adult), her remorse and her “troubled youth and the alcohol problems that grew out of that” (para. 234). It was at this point that the judge considered section 718.2(e). The judge noted that both her parents had alcohol problems, that the accused had been taken into the care of the Children’s Aid Society at the age of three, and at age 12 went to live with her grandmother on an Indian Reserve which is when her own drinking began. The judge commented,

Tragically, it seems that the accused is largely a product of the environment in which she was raised. Alcohol abuse is a problem that the aboriginal community is taking great strides to overcome, but it remains a very serious social problem, and they are to be commended for the great efforts that they have taken to date, but it is clear in looking at this particular case, that more needs to be done. Looking at the accused as an aboriginal, coming from her particular background, it is not entirely her fault that she turned out the way she did and found herself behind the
wheel of a stolen cab in a drunken stupor on the night of May 15, 1999, doing something that she would probably never have done had she been in that cab in a sober condition. Taking that into account, I am disposed to impose a more lenient sentence than I would otherwise impose on a non-aboriginal offender who has not been presented with this minefield of obstacles that this accused has had to face in the process of growing up ( paras. 239-241).

While mindful of section 718.2(e), the judge concluded that due to the serious nature of the crime, a prison sentence was necessary in this case. General and specific deterrence were cited as reasons for this decision. However, the judge appears to have imposed a reduced sentence, as the Crown had suggested a prison sentence of between three and four and a half years, and the actual sentence imposed was two and a half years in prison and three years probation.

R. v. Schafer (Yukon Territorial Court, 2000)

In this case of R. v. Schafer, the judge provided a very detailed thoughtful discussion of the reasons for the sentence that was imposed. Schafer pleaded guilty to sexual assault with a weapon. The crime was serious enough to warrant a prison sentence, so the issue before the Court was not whether or not to imprison, but rather the length of the sentence, and related to this, where it should be served. The judge made efforts to impose a sentence that was not longer than necessary, and that addressed both punitive and restorative objectives, while also taking into consideration the particular circumstances of the offence, the offender and the community. The judge also commented on the problem of the over-incarceration of Aboriginal peoples in the Yukon jails.
In considering the background of the offender, the judge commented on Schafer’s extensive criminal history (beginning when he was 13 years old) and the fact that most, if not all, of his crimes involved drugs and alcohol (as did the offence he was being sentenced for in this case). Schafer was raised in a family where both parents and other family members abused alcohol and there were frequent incidents of violence. While much of this stopped when Schafer was 10 years old, the judge commented on the significance of this exposure at such an early age, and stated, “…Mr. Schafer was exposed to the negative influences in his family and community, which, in turn, would become part of his own lifestyle” (para. 30).

The judge extended his analysis of Schafer’s background from his family to his community. The judge further commented, “The family history of the Schafer family is not unique. It is repeated hundreds of times throughout the First Nations families in the Yukon and is now so well documented that I have no hesitation in noting its occurrence judicially” (para. 31). The judge went on to describe some of the other social problems that characterized that community, noting he felt this was necessary when crafting an appropriate sentence because,

It is important to understand the history of the community in order to get a better glimpse of the individuals who live there and the problems that they continue to endure. Equally, it must be pointed out that many of the counseling and treatment resources available in larger centres are almost non-existent in Old Crow. Accessing these resources in Whitehorse is often a practical impossibility due to travel costs and the cost of accommodation in Whitehorse for extended periods of time (para. 34).

The judge also gave careful consideration to the victim of the assault. She had come to the community from Alberta to be the Recreational Director. Immediately following the
assault she left the community. Through counselling and family support, she was able to get on with her life, and the victim was not calling for a lengthy prison sentence for Schafer as part of her own recovery and healing. However, the judge also commented on the impact that the assault had had on the community itself, as the victim was respected by the community and the people of Old Crow felt empathy, shame and sorrow for what happened to her. Sexual assault and alcohol appear to be significant problems in this community, causing the judge to comment,

Until and unless the Old Crow community faces up to its past and current problems, it will be condemned to relive the substance abuse and violence that has affected so many of its members. The present generation of women who suffer their victimization in silence will take no comfort in the knowledge that their daughters will experience the same indignities that were endured by their mothers. Unless there is a break in this cycle of alcohol abuse and violence soon, their grandchildren will grow up to experience the same victimization as their grandmothers did (para. 54).

The judge reviewed various treatment options available to the offender in both federal and territorial corrections systems. However, the judge was reluctant to sentence Schafer to a penitentiary sentence because there was no guarantee of access to the programs needed, and the judge was concerned about the effects of sending someone from a relatively isolated community into a penitentiary system for a variety of reasons, but mainly because “...a placement in the penitentiary system would isolate Mr. Schafer from his family and his community and, thereby, also from his culture” (para. 65). Furthermore, the judge felt that sending Schafer out of the Territory would make it easier for the community to simply forget about the incident, and the judge viewed Schafer’s healing and the community’s healing as interrelated.
The judge then considered sentencing Schafer to the Whitehorse Correctional Centre, and programs that were available in the Yukon. One such program, the Sex Offender Risk Management Program (SORMP) seemed appropriate. This program had continuous intake, so Schafer would not have to wait to be accepted. The program was administered in the community, which meant Schafer could start attending as soon as he achieved minimum-security status which would allow for escorted passes. Furthermore, the judge felt a community-based program was more desirable as there is evidence to indicate that they are more effective. Finally, the judge’s rationale for sentencing Schafer to the Whitehorse Correctional Centre was based partly on the fact that, “He will be closer to his family and community members who have expressed a desire to work with him prior to his return to Old Crow” (para. 71).

Although there was a lack of programs available for this offender and others in Old Crow and in the Yukon in general, the judge was reluctant to send the offender outside the Territory for treatment as it was felt by the judge that this would further discourage the development of local programs. Lack of local programming makes it difficult to implement the restorative justice initiatives mandated by section 718.2(e), and the existence of such programs locally would benefit the community by providing employment for those who staff the facilities and run the programs.

After a careful consideration of a number of factors to be included in determining sentence, the judge commented on the specific background factors of the offender and their relationship to his crimes. The judge noted,

It is apparent that a number of systemic and background factors have played a part in bringing Mr. Schafer before this court today. This
acknowledgement does not minimize his personal responsibility. Nor does he attempt to do so. It does, however, recognize the negative impact that our dominant society has had on the life and culture of Yukon aboriginal people since the Europeans first came to the Yukon not much more than 100 years ago. There is, on the facts, a clear relationship between the systemic and background factors and Mr. Schafer's offending (para. 81).

This led the judge to conclude, “As a result, I perceive his actions to be less deserving of formal punishment” (para. 82).

Furthermore, the judge made some interesting comments on the issue of intoxication as a factor to be considered in sentencing,

As a matter of policy, voluntary intoxication is rarely considered to be a mitigating factor in sentencing. It is usually considered to be aggravating. Because of the unique systemic factors present in this case, and the impact that they have had on Mr. Schafer’s community, family and ultimately on him, I am not prepared to treat his intoxication as an aggravating factor. Further, considering how widespread and chronic alcohol and drug addictions are among native people, automatically labeling voluntary intoxication as ‘aggravating’ will result in disproportionate rates of incarceration, something the new sentencing regime is attempting to avoid. To maintain the presumption would only contribute to the ‘systemic racism’ which already exists in our justice system.

In addition, a policy which presumes voluntary intoxication to be an aggravating factor in sentencing does not fully recognize the insidious and sometimes overpowering nature of drug addiction, the role of cultural factors, the unavailability of adequate treatment resources and the impact of environmental factors during one’s formative years. Indeed, I would go so far as to state that the policy objectives inherent in the new sentencing provisions of the Criminal Code require judges to abandon this presumption, at least as it applies to aboriginal offenders. To maintain the presumption would conflict with the directions given by the Supreme Court of Canada in Gladue...

Rather, each case must now be considered on its facts, including the circumstances of the offender, his community and the existence of systemic and cultural factors. Only after such consideration will it be possible to determine whether voluntary alcohol consumption in a particular case is aggravating, neutral or mitigating (paras. 83-85).
The judge considered specific deterrence to be not necessary in this particular case, as counseling and treatment would most likely prevent future offending. Furthermore, the judge felt that a lengthy penitentiary term served outside of the community would not have much of a general deterrent effect in this community, and that such a sentence would allow the community to forget about the incident and not use it in their own healing. The judge further commented,

In my opinion, certainty of detection, arrest and public accountability will operate more effectively to deter the public generally than a longer period of incarceration. In any event, the deterrent effect on individuals who are intoxicated as was Mr. Schafer when he committed this offence would be non-existent. Nor will it deter young men from drinking, as few would be planning to commit a sexual assault when they start drinking. I am satisfied that the reduction of crime in Old Crow will be more effectively achieved through community awareness and healing rather than by imposing sentences of incarceration near the top of the acceptable range (para. 91).

Having said this, the judge also recognized the need for denunciation of this crime and a recognition of the harm done to the victim, but suggested that this could be achieved through a territorial term of imprisonment followed by a lengthy probation order. The final sentence was two years less a day followed by a three year probation term with a number of conditions.

It is obvious that the judge in this case gave careful consideration to the directives set out in section 718.2(e). This judge had some interesting and perhaps somewhat unique (for a judge) views on the effectiveness of incarceration to achieve the principles of sentencing. I conclude the review of this case with some final words from the judge on the issue of deterrence:
There is another concern that arises from placing too much weight on general deterrence in sentencing offenders. The language of deterrence can mislead a community into believing that the justice system can actually resolve the longstanding problems of abuse, societal dysfunction, poverty, addictions and cultural displacement that are so prevalent in isolated northern communities and contribute to the high crime rates found there. The community may be deceived into thinking that it is someone else’s responsibility and that they need not do anything. The message must be sent and clearly understood: courts can incapacitate the individual offender for a limited period of time, but only members of the community working together can address the root causes of crime (para. 92).

R. v. Tuglavina (Newfoundland Supreme Court, 2000)

In this case, the accused was being sentenced following a conviction for second degree murder. Because this charge carries a mandatory life sentence, the issue to be decided by the judge was the period of parole ineligibility imposed, and the judge claimed to take into consideration the accused’s background and circumstances in making this decision. The Crown recommended that the period of parole ineligibility be 12 to 14 years, while the defence argued that the minimum (10 years) should be imposed.

Tuglavina and his co-accused (a young offender) had beaten to death Charles Terriak. Tuglavina had been drinking the night of the attack. The attack was unprovoked, and the victim was also intoxicated and not in a position to defend himself. In terms of the background of the offender, the judge noted that Tuglavina was 19 years old, had a grade 10 education, and started drinking at age 15, and had a criminal record as a juvenile.

Defence counsel urged the judge to consider the accused’s community’s reaction to violence when determining sentence. Defence counsel argued,
...there was a high level of violence in the community of Nain and that this was a contributory factor to dysfunctional behaviour. There was a high degree of indifference on the part of the community and the accused's family to his consumption of alcohol and the general lack of direction in his life (p. 6).

The case involved a trial by jury, and seven of the jurors recommended that the accused be eligible for parole after serving 10 years of his sentence, while four jurors had no recommendation and one juror had been excused during the course of the trial. The judge claimed to take section 718.2(e) into account, and stated that because of this provision the parole ineligibility period may be reduced. The judge stated, "...I have taken into account the deprived upbringing of the offender and his status as an aboriginal which has caused me to reduce the period of parole ineligibility from that which I might otherwise have imposed had the offender not come from an aboriginal and deprived background" (p. 7). While the judge did not state what that period may have been otherwise, the period imposed was 12 years, which is within the range recommended by the prosecution.

R. v. Sackanay (Court of Appeal for Ontario, 2000)

This case involved an appeal by Sackanay against his sentence of eight and a half years' imprisonment (including pre-trial custody) for aggravated sexual assault and aggravated assault after he had sexually assaulted a male prostitute. The appeal was based partly on the claim that the sentencing judge failed to adequately consider the directives set out in section 718.2(e), as Sackanay was an Aboriginal offender. The Appellate Court noted that the original sentencing took place prior to the release of the Gladue decision, and
while the judge did refer to the appellant’s Aboriginal ancestry, the Court concluded that the judge did not adequately consider this ancestry for the purposes of determining sentence. Referring to the Supreme Court’s directive that judges consider the systemic or background factors that may contribute to an Aboriginal offender’s criminal behaviour, the Appellate Court had this to say about Sackanay’s background:

The appellant’s background is a poignant example of just how much the upbringing of an aboriginal can differ from most Canadians. The appellant was born in Moose Factory. When he was an infant his natural father was killed. Both his mother and his stepfather who raised him were alcoholics. Domestic violence permeated the household. When the appellant was eight years old he tried to commit suicide. When he was nine he resorted to drinking to relieve the tension and loneliness of his upbringing. He often tried to run away from home. He spent most of his adolescent years in group homes or in custody. He has a grade 10 education and few skills. He has suffered from the effects of alcohol and drug abuse. Although the appellant’s crimes warrant a jail sentence, the hardships he has suffered should be taken into account in determining a fit sentence. In our view, the sentencing judge did not do so (pp. 2-3).

The sentence was reduced from eight and a half years to one of six years. The Court also noted that they had taken the appellant’s efforts to rehabilitate himself into consideration.

R. v. Pemmican (Ontario Superior Court of Justice, 2000)

In this case, the accused, Pemmican, was found guilty on four counts of “historical” sexual assault, all of which took place between 1975 and 1981. Three of the assaults involved forced sexual intercourse with girls between the ages of 9 and 13 (the accused was 15 at the time of the first and second offences and would have therefore been charged under the Juvenile Delinquents Act for two of the offences). The fourth assault
involved a charge of indecent assault, and occurred when both the accused and the victim were adults. Pemmican was known to all four of his victims, as they all lived on the Lac Seul First Nation.

The judge reviewed the principles and purposes of sentencing, and made specific reference to section 718.2(e). While recognizing that the crimes were serious, the judge noted that a penitentiary sentence or a sentence of more than two years would be inappropriate in this case. The reasons given for this are as follows,

This would be inappropriate because, the needs of the victims, Mr. Pemmican and the community of the Lac Seul First Nation, and the unique systemic and background circumstances which bring Mr. Pemmican before me, persuade me that such a sentence would be unduly long and harsh and therefore inappropriate (para. 20).

The judge provided an extensive discussion of the effects of the assaults on each of the victims from information provided in victim impact statements. When considering the circumstances and characteristics of the accused, the judge noted,

In my sentence I must take into account the fact that Mr. Pemmican is an aboriginal and entitled to the considerations which arise from the fact that, including the systemic situation which existed on the Lac Seul First Nation where these events occurred. I must also take into account Mr. Pemmican’s youth when the events involving R.T., R.L. and S.T. took place. Finally, I must also take into account the fact that these events are “historical”. This necessitates that I must sentence him for events that took place when he was not the man that he represents himself to be, and in fact appears to be, today (para. 41).

Pemmican claimed he could not recall whether the events in question had occurred because he had a serious drinking problem and had been drinking heavily at the time. Pemmican is referred to by the court as an alcoholic, although he claimed to have stopped drinking four and a half years prior to this sentencing hearing. A partial
transcript was provided of the accused describing his unfortunate childhood and upbringing by way of explanation for his actions later in life. The judge took particular notice of the community of the accused and of the victims (Lac Seul First Nation). It was described in this way:

Seemingly boredom and poverty existed to the point where those I have heard from, and about, did not know what they would do with the next five minutes, leave alone for the rest of their lives. There was no apparent belief or expectation that there would ever be improvement in their status. As noted, in games, and then in life, the lifestyles of children was to mimic their elders, resorting to alcohol and substance abuse. Younger members of the community were in constant fear. Mr. Pemmican feared both adults and his peers. His personal hell, frustration and alcohol all underlie his crimes. My perception is that, at the time of these events, alcohol abuse on the Lac Seul First Nation had reached epidemic proportions. All of the victims describe Mr. Pemmican’s drunkenness at the time of the events in which they were involved. Despite being children, the prepubescent girls were themselves already familiar with alcohol when the events which involved them occurred, explaining in at least two instances that their own consumption of alcohol was not a factor in their role on the occasion of their assaults. The fact that these victims would need to explain this, having regard to their young ages at the time, is tragic (paras. 63-65).

Understanding the community in which the accused was raised lead the judge to comment, “Mr. Pemmican is, of course, guilty of these crimes and must bear responsibility for them, however, he was the product of his environment” (para. 72). The judge further condemned the community as well as others external to that community by stating, “In this way the community of Lac Seul First Nation must itself bear some responsibility for the circumstances of the lives of the persons who lived there, and the continuing troubles of Mr. Pemmican’s victims. Such responsibility must also be attributed, to a significant degree, to the larger, external community, and especially to those responsible for the plight of our native peoples” (para. 74).
The judge was reluctant to impose a prison term as it would be ineffective in achieving its deterrent and denunciatory goals in this community. The judge commented, "...it is impossible to rectify the societal problems on the Lac Seul First Nation and the ongoing troubles of his victims simply by imposing a penitentiary term of imprisonment on Mr. Pemmican" (para. 75). The judge was satisfied with the accused's attempts to rehabilitate himself as he had been sober for a number of years, had received a high school diploma and gone on to college (although he had not yet completed his course). The judge deemed a conditional sentence appropriate in these circumstances, and Pemmican was sentenced to a global (total) sentence of two years less a day.

**R v. Augustine (New Brunswick Court of Queen’s Bench, 2000)**

Augustine was sentenced after being found guilty of assault with a weapon, uttering a death threat and aggravated assault. He was given a conditional sentence of 15 months which included community service. The accused was 21 years old and lived on Big Cove First Nations Reservation. The accused had a history of drug and alcohol abuse, and was intoxicated on the night of the offences. Section 718.2(e) was clearly taken into consideration by the author of the pre-sentence report, which was said to be favourable to the accused. A portion of the report reads as follows:

In the preparation of this Pre-Sentence report, I have applied paragraph 718.2(e) of the Criminal Code of Canada and have taken Clark Augustine's aboriginal status into account. I have assessed the degree to which systemic and background factors unique to aboriginal offenders have played a role in the life of Clark Augustine, including drug abuse, alcohol abuse, lack of education, the general understanding by the community of criminal sanctions, and not least of all his introduction into physical violence at a young age. Unfortunately, Mr. Augustine has
grown up in a community where physical aggression is a way of life; he learned early that there would always be individuals looking for a fight. Mr. Augustine learned to fight, at first to survive and later it became part of his identity. The fighting and boxing were what he became known for, but it is also what has ingrained in him a strike first and asks (sic) questions later mentality. It appears that some of these factors have played a significant role in Clark Augustine’s life. Should this Honorable Court conclude that these factors have played a significant role in Clark Augustine’s life, the following alternatives to imprisonment as a sentence are available… (p. 2).

It is clear in this case that the sentencing judge took section 718.2(e) seriously, as the judge stated that an appropriate sentence for the charges before the court would be in the range of fifteen months, but because of section 718.2(e), alternatives to imprisonment must be considered. The judge decided that Augustine did not pose a threat to the community, and therefore the fifteen months could be served via a conditional sentence which would also be consistent with the other principles and purposes of sentencing.

R. v. Courtereille (British Columbia Court of Appeal, 2001)

This case involves an appeal against sentence by a woman, Courtereille, who was convicted of second degree murder and sentenced to life in prison without eligibility for parole for 14 years (she was appealing the parole ineligibility period). Courtereille had entered the deceased’s apartment and beat him with the leg of a coffee table before stabbing him to death.

The Court of Appeal referred extensively to a report that had been prepared outlining what the Court referred to as Courtereille’s “very unfortunate life.” She was 24 years old at the time and was “born and raised in a chaotic, dysfunctional, and abusive family” (p. 2). She was raised mainly by her mother who had a severe drinking problem
and who was physically and emotionally abusive. She was also “extensively sexually abused” for four years by her uncle. At the age of 13, Courtereille became aggressive and violent herself and started drinking at the age of 14, which resulted in a serious drinking problem by the age of 19. This drinking is also said to contribute to her aggression and violence. Although not formally diagnosed, as a child, Courtereille showed signs of having Attention Deficit/Hyperactivity Disorder. She suffered from depression, and tried to kill herself at age 12. Although not mentioned in the Report, the Court also wondered whether Courtereille suffered from Fetal Alcohol Syndrome.

Having only a Grade 10 education, Courtereille was not employed and relies on social assistance. She had been involved in a number of relationships, many of which were abusive. Courtereille has a fairly extensive criminal record, to which the Court commented, “She has led a violent life and I have no doubt that that is largely the function of the chaotic lifestyle that she led” (p. 3).

The Appellate Court felt it was necessary to note that the original sentencing occurred pre-Gladue, however, it also found that “…the learned judge did not give sufficient weight to the fact that this woman was the product of a sub-culture that must have contributed very substantially to the commission of this offence” (p. 3). The Court of Appeal further commented, “…I find that the learned trial judge did not refer to the special attention required to be given to the circumstances of aboriginal offenders. In my judgement the circumstances of this aboriginal offender played a very substantial role in getting her to the stage where this offence was committed” (p. 4).
Because Courtereille had received a life sentence, the length of the sentence could not be altered by the Court of Appeal, only the eligibility period for parole. The Court of Appeal, having considered the Aboriginal status of the offender and her background, and appearing convinced that this background was directly linked to her crime, and reduced her period of ineligibility to 12 years.

R. v. Knowlton (Alberta Provincial Court, 2001)

Knowlton pleaded guilty to various break and enter and possession of drugs charges. He had broken into two residences, and when arrested by police in the second residence they found some stolen property and drugs on him. Although Knowlton had a lengthy criminal record, the judge appeared sympathetic to Knowlton’s background. Referring to the information provided in a pre-sentence report, the judge stated,

At the time of the offences in question, the accused indicated he had been consuming alcohol for about three days and he has, accordingly, no recollection of the commission of the subject offences. Alcohol and substance abuse have been a problem for this accused since he was 15 years of age. His background is regrettably like so many other aboriginal men and women who come before this Court. He comes from a dysfunctional family, one in which alcohol was a significant factor in the dysfunction … His parents were part of the residential school environment and that undoubtedly impacted his upbringing and the problems in their home (para. 8).

The judge also made reference to the fact that the accused was sexually abused at a young age, became involved with drugs and alcohol at a young age, had little formal education and no specific skills or training and some psychological problems.

Although recognizing the need for rehabilitation for this offender, the Crown recommended a sentence of at least two years, to be served in prison. Defence counsel
argued that a conditional sentence was appropriate, one which included treatment and
counselling, as the offender stated that he wanted to make changes to his life, and had
already made some efforts to this end. The judge made extensive reference to section
718.2(e) and Gladue, and commented, “It is absolutely clear that this accused’s unique
background has contributed significantly to bring this accused before the Court both now
and previously” (para. 20).

In considering a conditional sentence, the judge recognized that a prison sentence
was appropriate given the nature of the offence and the criminal record of the accused,
however, the judge did not feel they warranted a sentence of two years or more. On the
issue of risk of re-offending, the judge admitted that the accused posed somewhat of a
risk, but claimed that this risk could be lessened with appropriate conditions imposed.
The judge concluded that a conditional sentence was appropriate and would satisfy the
purpose and principles of sentencing, stating,

This accused needs to be given an opportunity to succeed in life and the
imposition of a conditional sentence I believe is a suitable vehicle for that
process to take place. It will provide structure, supervision, and focus on
rehabilitation and self-assessment and provide the programs through
which these things can be achieved. It will also serve to deter him from
further criminal acts, not solely as a result of the rehabilitation process, but
also by the restrictions that will be imposed upon his liberty. Those
restrictions will demonstrate to the accused and to the public at large that
there is a price to pay with respect to liberty and freedom, even if the
sentence is not one of actual incarceration. It has been said many times
that a conditional sentence of imprisonment is in many ways more onerous
than an actual sentence of incarceration…A conditional sentence requires
individuals to take responsibility for their conduct thereby promoting
responsibility and assisting in rehabilitation. At the same time, a
conditional sentence may be crafted in such a way so as to separate
offenders from society … which reduces the potential risks to society and
also assists the convicted individual in fulfilling his responsibilities under
the conditional sentence (para. 35).
Knowlton was sentenced to one year imprisonment to be served in the community, with probation for one year following, which the judge deemed adequate for the accused’s rehabilitation which would “…give the accused the tools to fight the potential for further criminal activity” (para. 36).

R. v. Edwards (British Columbia Supreme Court, 2001)

This case involved the sentencing of three offenders who were involved in the beating of a man resulting in his death. Edwards was convicted for second degree murder, while the other two accused, Narcisse and Johnny were convicted for manslaughter. The three accused accosted and assaulted a man, a stranger to them, who was on his way home from work around midnight. The attack was unprovoked. Narcisse and Johnny ended their participation in the beating while the victim was still alive, but Edwards continued his attack, and it was his actions that resulted in the victim’s death.

The judge reviewed the backgrounds of each of the accused. Edwards, who was 22 years old was described as,

…a native person with a very deprived upbringing. Many trace much of the cause to the identity-and-culture-destroying residential school system to which his grandparents were subjected. As a child, Mr. Edwards suffered emotional, physical and sexual abuse. There was little parental guidance. He was a seasoned alcoholic by the time of this offence. He comes from a family and community riddled with alcoholism, violence, and unnatural death (para. 7).

A psychologist diagnosed Edwards as having a severe personality disorder and described him as a “very damaged and disturbed person.” Edwards was unable to control his anger, and had little awareness of the harm he caused others when fighting (para. 9).
Narcisse, 20 years old, was said to have a background similar to Edwards and he
"...suffered a deprived upbringing with sexual, emotional and physical abuse. He is an
alcoholic" (para. 11). Johnny, 18 years old, was also said to have been affected by the
residential school system. His background was described in this way:

While he was exposed to alcohol abuse and violence, his childhood was
relatively benign. He was not a victim of abuse as a child. He suffers
from attention deficit hyperactivity disorder. There were significant
disruptions in home and school placements. At age eleven or twelve
years, he began abusing alcohol, associating with negative peers and
engaging in aggression (para. 13).

In determining sentence, the judge claimed that the principles of denunciation,
deterrence and separation from society made it necessary to impose a significant prison
sentence. However, the judge also noted that rehabilitation was important, and that this
was the best form of public protection. Denunciation appeared to be paramount for the
judge, writing that, "This is the type of crime that threatens the sense of peace, well-being
and security that is the foundation of any healthy community. It is replaced with a cold
community chill, leaving law-abiding people reluctant to leave their locked homes" (para.
26).

The judge considered the directives set out in section 718.2(e), stating, "In
addition to taking judicial notice of the broad systemic and background factors affecting
aboriginal people, I have evidence demonstrating how those factors played out in this
case" (para. 23). Accordingly, the judge sentenced Edwards to imprisonment for life (the
mandatory sentence for second degree murder), but set his parole ineligibility at twelve
years. Without consideration of section 718.2(e), the judge would have set the parole
period at fourteen years. For the other two accused, after applying section 718.2(e), and
deducting four years from their sentences for time served, the judge sentenced Narcisse to prison for three years, and Johnny to prison for two years less a day followed by probation for two years. For Johnny's sentence, the judge rejected the possibility of a conditional sentence, stating that such a sentence would endanger the safety of the community, and that treatment in a secured facility was necessary for Johnny's rehabilitation. Furthermore, the judge concluded that a prison sentence was necessary for denunciation and deterrent purposes.

R. v. Boline (Northwest Territories Supreme Court, 2001)

In this case, although a portion of the sentence included time in prison, the judge took into consideration the accused's status as an Aboriginal offender and how his background contributed to his crimes. The directives in section 718.2(e) were therefore applied at sentencing. The accused was convicted of impaired driving and driving while disqualified and resisting arrest. The judge commented that the offences themselves were not particularly serious, and stated instead that “It is the offender’s circumstances that are particularly serious” (p. 2). The judge noted that the 31 year old accused had had a “difficult childhood”, his father died when he was very young, and he was adopted by his grandparents and later lived with other family members. Accordingly, the judge commented that the accused had no stability in his life. While details were not provided, it was noted that the accused had been exposed to violence while growing up. The accused had a longstanding problem with alcohol, minimal education, few job skills and a lengthy criminal record (p. 2).
However, the accused was also considered a good candidate for rehabilitation, and according to the pre-sentence report and the judge’s impressions, the accused appeared to be ready and willing to make changes to his life. The Crown argued that the principles of deterrence and denunciation were to be given priority in his sentencing, and that they necessitated a prison sentence of two years less a day. Defence argued that a conditional sentence with counselling and treatment was appropriate, although the Crown disagreed as the accused was considered to be a risk to the community.

The judge admitted that determining appropriate sentence was difficult in this case, as,

On the one hand, the offender has a history of dangerous conduct with a complete disregard for external controls. On the other hand, past incarceration has failed to change his ways, and a lengthy period of incarceration now may have no greater chance of success. In addition, a lengthy period of incarceration may have devastating effects on his family. The prime objective of all sentencing is of course the protection of the community. But we do not ignore, as well, the aims of rehabilitating the offender and restoring him to the community as a worthwhile member of it (p. 3).

The accused’s previous convictions made him ineligible for a conditional sentence on the impaired driving conviction, however, the judge still went on to consider some combination of actual custody, a conditional sentence and probation in crafting an appropriate sentence. The judge stated that deterrence and denunciation, which were “particularly pressing in this case” would be met by a custodial sentence and a conditional sentence and probation would be consistent with the goals of restoring the offender to the community and rehabilitation.
While considering the principles of sentencing, the judge also considered the directives of section 718.2(e), and commented, “In this case, the offender’s personal history is a poignant example of some of the deprivations that impact on the lives of aboriginals. There is no doubt that the wide-spread abuse of alcohol that has devastated many aboriginal families and communities played a role in this offender’s current problems. For these reasons, I feel that a restorative and rehabilitative approach must be combined with the punitive approach I described earlier” (pp. 4-5). After taking into consideration time spent in pre-trial custody (the equivalent of 12 months), the final sentence imposed was one year less a day in prison followed by probation for three years, and a conditional sentence of 12 months to be served in the community.
2. DETERRENCE AND DENUNCIATION THROUGH CONDITIONAL SENTENCING:

In this group of twelve cases, the judges applied section 718.2(e) when there is a belief that deterrence and denunciation can be met through a conditional sentence.

R. v. Everitt (Yukon Territorial Court, 1996)

In this case, Everitt was being sentenced after pleading guilty to a charge of assault causing bodily harm after he stabbed the complainant in the back three times during an altercation. Everitt was 20 years old and had no previous record. Alcohol was a factor the night of the stabbing, but he had not used alcohol or any other substance since that night (nine months). He claimed to have recognized that alcohol causes problems for him and does not plan to drink any more (para. 18). The accused had expressed remorse for his actions, and it was noted by the Court that he had strong family support.

The Crown argued that a prison sentence of 9 to 12 months was necessary for specific and general deterrence, and that due to the serious nature of the crime, a conditional sentence was not appropriate. The defence submitted that a conditional sentence was appropriate for this offender. The Court recognized the need for deterrence and denunciation, but concluded that given the circumstances, and the need to adhere to the directives set out in section 718.2(e), a conditional sentence was appropriate.

Perhaps anticipating a reaction from the public for this decision, the judge felt it necessary to make some general comments about conditional sentences as punishment. The judge stated,

There will no doubt be a segment of society who will be concerned with the concept of offenders serving their jail sentence in the community. If
that concern is based on a fear that the prisoner will re-offend, that concern should be adequately met by placing the safety of the community as the overriding factor in considering the eligibility for a s. 742.1 order [conditional sentence]. Indeed, the principal [sic] purpose of the criminal process is the protection of the public, and that purpose is addressed directly by the conditional sentence. Moreover, the onus remains on the offender to satisfy the court on this important safety issue. Nor is this a novel or untried concept. In the United States and Great Britain such orders are routine. In Canada, at the current time, we allow for supervision of prisoners in the community under parole, temporary absence programs, electronic monitoring, house arrest and curfews. These programs do not impair the public’s confidence in the proper administration of justice provided they are closely supervised and if breaches are dealt with promptly and properly. Conditional sentences must also be subject to close supervision if they are to be accepted by the public. (para. 46).

The judge also expressed doubt as to the deterrent effects of jail when it was stated,

“Numerous court decisions and government reports have recently questioned the efficacy of jail as a universal deterrent and have expressed the view that traditional punishment has been overstressed as a means of crime prevention” (para. 50). This judge believed that in many cases, criminal prosecution alone may be adequate punishment and deterrence, and that alternatively, once an offender has experienced jail, deterrence may be impeded as there may no longer be a fear of punishment.

The judge felt that having satisfied the criteria for a conditional sentence, serving his sentence in the community would benefit the offender. The judge stated, “I am also satisfied that the longer term prospects for Graham, including his rehabilitation, are best met by serving his sentence in the community with the support of his family. I am concerned that serving his sentence in prison would be a negative factor for his rehabilitation, because of his youth and lack of criminal record” (para. 57). The judge
imposed a sentence of nine months imprisonment, to be served in the community, followed by 18 months of probation.\footnote{Because the judge specifically mentioned the rehabilitation of the offender as a major consideration in determining sentence, this case could also be included in the next section, “Rehabilitation as a Priority”. However, because the judge made specific comments about conditional sentences, it has been included in this section.}


In this case, the accused was found guilty of sexual exploitation. He had had sexual intercourse with his niece on a number of occasions when she was under the age of 18. The Crown sought a prison sentence, while the defence argued that a conditional sentence would be appropriate. Taking into consideration section 718.2(e), the sentencing judge considered whether a conditional sentence was appropriate in this case.

The accused was described as a “stellar member of the community” in a number of reference letters provided to the court by various members of the community (para. 18). The accused was employed with the band, was instrumental in its economic development, and was very involved with the community, coaching and managing various sports teams. The judge decided that the accused met all of the criteria for a conditional sentence, and would pose minimal risk to re-offend if strict conditions were imposed. The judge concluded that a conditional sentence would be consistent with the directives of section 718.2(e), but gave great consideration to whether a conditional sentence could meet the principles of deterrence and denunciation in a case of sexual assault. After reviewing relevant case law, the judge was satisfied that a conditional sentence was appropriate in these circumstances and stated,
...such a sentence, with conditions tailored to the unique circumstances of the Accused, would send an effective message to the community and satisfy the principles of deterrence, both general and personal. It would clearly denounce the abhorrent acts he has committed. In addition, such a sentence can still afford the Accused the opportunity of immediately commencing a process of healing and rehabilitation (para. 64).

The accused was sentenced to a term of 23 months to be served conditionally in the community.

R. v. Emard (British Columbia Superior Court, 1999)

In this case, Emard was convicted of manslaughter after killing her husband by stabbing him during an argument. Both the victim and the accused were heavily intoxicated, and it is unclear whether the accused “stabbed him in a fit of anger or whether the stabbing occurred as a result of the tussling and wrestling” (para. 5). Emard had no prior criminal record, and she showed great remorse after the stabbing incident.

The judge reviewed the various principles of sentencing, including section 718.2(e). For the purposes of section 718.2(e), the judge had this to say about the defendant:

Ms. Emard had led in some respects, her good marriage notwithstanding, a very unhappy life. Her father was not a factor in her life. Her mother had to raise four children by herself. Ms. Emard’s only sister died in 1991 from a drug overdose. One of her two brothers was seriously injured in an assault, injuries that led, I understand, to debilitating brain damage. Ms. Emard’s story, sadly, is consistent with the life which has characterized, through no fault of their own, many aboriginal peoples in this nation, as is evidenced by the report of the Royal Commission on Aboriginal Peoples.... I must, and I do, take this background into account as a circumstance of this particular offender, as I would in any sentencing take into account the personal circumstances of the offender (para. 15).
The primary sentencing goals in this case, appear to be denunciation and deterrence. However, the judge did not feel that specific deterrence was necessary, as there was no indication that this offender was at risk of committing a similar offence. Based on this, the judge did not feel that separation was necessary, as this offender did not pose a further risk to society. Furthermore, there was evidence that Emard had taken steps to rehabilitate herself through counselling and avoiding alcohol. The judge further justified the decision not to send Emard to prison on the fact that she had a five year old daughter to care for who was very dependent upon her. Finally, the judge noted that while the goal of deterrence required a term of imprisonment be imposed, the judge felt that the sentence could be served in the community (para. 20). Emard was sentenced to two years less a day, to be served in the community with a number of conditions attached.

R. v. Logan (Ontario Court of Appeal, 1999)

This case involved an appeal by the accused of his sentence of 30 months in prison following his conviction on charges of impaired driving causing death and impaired driving causing bodily harm. The charges followed an incident where the accused’s vehicle left the road and drove into a creek, killing one passenger and injuring another (the deceased was both his cousin and good friend). The original trial occurred before the release of the Gladue decision and therefore there was little information put before the court regarding the background and circumstances of the accused. The Appellate Court accepted this information as new evidence, as they are required to do. This new evidence was considered in determining whether a conditional sentence would have been
appropriate in this case. One of the key issues for the Appellate Court to consider was whether the principles of deterrence and denunciation could be met by a conditional sentence.

In terms of the new evidence put before the Court regarding the circumstances of the accused, many letters of support were provided by community and family members which spoke of his good status within the community. The appellant himself commented on the "...strong link between his own spiritual practices and his participation in the life of his community" (p. 5). The appellant contributes greatly by way of time and services to the community. Although he had not drunk any alcohol since the incident, the appellant sought counseling and voluntarily speaks to the youth in his community about problems associated with drugs and alcohol. Other letters from community members expressed the desire that Logan be permitted to serve his sentence in the community.

The Appellate Court referred extensively to the framework for analysis for judges sentencing Aboriginal offenders put forward in the *Gladue* decision. Based on this review, the Court concluded, "... in light of the fresh evidence regarding the appellant’s status within the community and his dedication to learning and teaching his community’s traditional and spiritual ways, this court must consider whether a reformatory sentence to be served in the community is an appropriate alternative to incarceration in a penitentiary" (p. 7).

At the original sentencing, the Crown argued that a period of incarceration was necessary for general deterrence as the case involved a drinking and driving offence and suggested a term of three and a half years incarceration. Defence counsel submitted that
a conditional sentence would be appropriate, however the judge disagreed with the
defence and imposed a prison sentence.

This appeal was based partly on the submission that the judge failed to adequately
consider section 718.2(e) in sentencing, and that he erred in assuming that conditional
sentences could not be imposed in cases of driving offences involving alcohol. On this
first issue, the Court found, “…the learned trial judge erred in principle in the sentencing
of the appellant by not giving adequate weight to the facts of the appellant being an
aboriginal, his unique and important role in his small Reserve community and to the
principles of restorative justice” (p. 11). The other issue for this Court was one of
whether or not a conditional sentence could adequately meet the goals of deterrence and
denunciation. After reviewing various other similar cases in which conditional sentences
had been imposed, the Court decided that a conditional sentence was appropriate.
However, they also pointed out that this applied to the circumstances of this particular
offender, and may not be appropriate in other cases. The Court noted,

Nevertheless, I recognize that this is a particularly difficult case by reason
of the fact that alcohol abuse is often prevalent within aboriginal
communities given the many inequities and injustices faced by members
of those communities. Our decision, therefore, should not be interpreted
in any manner whatsoever that would create the impression that members
of aboriginal communities and others will be placed at greater risk because
drinking and driving offences committed by aboriginals will generally be
treated more leniently by our courts. Rather, it is my view, that in the
great majority of cases, a conditional sentence would not adequately
reflect the appropriate denunciation of the crime of impaired drive [sic]
causing death. However, after a consideration of the unusual and
compelling circumstances of this case, I have concluded that a sentence of
twenty months is appropriate. I am further satisfied that serving the
sentence in the community would not endanger the safety of the
community and would be consistent with the fundamental purpose and
principles of sentencing (pp. 11-12).

In this case, the Crown appealed a conditional sentence of two years less a day that was imposed after the respondent was convicted on two counts of dangerous driving causing death and two counts of dangerous driving causing bodily harm. The appeal was based, in part, on the Crown's contention that the sentencing judge did not adequately address denunciation and deterrence in the sentence, and misapplied section 718.2(e). The Appellate Court disagreed, and the appeal was denied.

The Appellate Court found that the sentencing judge did adequately consider the principles of deterrence and denunciation when imposing a conditional sentence. With reference to the application of section 718.2(e), few details of the respondent's background were provided in this brief judgment, other than references to the respondent's "tragic background", and his personal background was described as "pathetic" and involved an absent father, an alcoholic mother, emotional and sexual abuse, lack of education and a number of suicide attempts as a child (para. 4). The Appellate Court concluded that the sentencing judge had imposed a "properly structured conditional sentence" based on the circumstances.

R. v. A.S. (Yukon Territory Supreme Court, 1999)

Mr. A.S. had been convicted after he sexually assaulted a woman who was either asleep or passed out at a party. This brief judgment provided few details about the background of the offender and the application of section 718.2(e) in sentencing, although it was
noted that the defendant had a problem with alcohol. This case took place shortly after the release of the *Gladue* decision and the judge commented, “It is no longer the law that certain crimes require incarceration” (para. 9). The judge imposed a 12 month sentence to be served in the community and specifically commented that this sentence would meet the goals of deterrence and denunciation.

**R. v. Curran (Alberta Provincial Court, 2001)**

In this case, Curran, an Aboriginal woman, was being sentenced after pleading guilty to trafficking in cocaine. The Crown sought a prison sentence, while defence requested a conditional sentence. Much of the legal analysis in this judgment dealt with the appropriateness of imposing a conditional sentence in this particular case, although the judge did comment that a mitigating circumstance taken into consideration was Curran’s status as an Aboriginal offender and the directives set out in section 718.2(e). Little background information was provided about the offender, except that she had had a “difficult upbringing.” Her mother was an alcoholic and “did not provide normal nurturing to her” (para. 5). Curran had a cocaine addiction (at the time of sentencing she had stopped using cocaine) and has only completed a grade 9 education, although she aspires to one day become a registered nurse.

The judge reviewed some of the relevant jurisprudence on conditional sentences, including discussions about the nature and purpose of conditional sentences, and noted, “There are no presumptions either in favour of a conditional sentence or against them” (para. 12). All of the criteria for a conditional sentence were met in this case, and the
judge acknowledged that there was some debate over whether denunciation and
deterrence could be effectively achieved by a conditional sentence in cases involving
drug trafficking. However, after weighing all of the factors, the judge decided that an 18
month conditional sentence would be appropriate in this case.

R. v. P. (C.) (Ontario Superior Court of Justice, 2001)

This case involved the sentencing of C.P. for sexual assaults (on four occasions) against
his niece that occurred 10 to 18 years ago. At sentencing, the defendant was 62 years old
and had no criminal record. The judge stated that the principle concern in this case was
protection of the community, the judge commented, “What must be done to protect
young native children living in [DELETED] from sexual assaults?” (p. 1). The judge
stated that C.P. was unlikely to re-offend, so the sentence must also take into
consideration denunciation and the deterrence of others. The question of whether or not a
conditional sentence would meet these goals was central in this case, as the judge noted,
“Spending time in jail will do nothing to reform or rehabilitate Mr. P. The substantial
question before me is whether a conditional sentence adequately meets the need for
deterrence and denunciation” (p. 1).

The defendant was viewed as an upstanding member of the community, he
worked hard to support his family (despite having only a grade five or six education) and
contributed to his community through volunteering as a teacher of Ojibway and
traditional teachings. The judge decided that a conditional sentence which included
house arrest as one of its terms would be more effective than sending C.P. away to prison because,

If Mr. P. were sent to jail, he would simply disappear from the community for a while, and then return when paroled. [DELETED] is a very small community. If Mr. P. is sentenced to house arrest, with no opportunity for parole, every member of the [DELETED] community will be able to observe the rigours of the confinement, and this will send a message to the community that sexual assault of children is wrong, and will be punished (p. 2).

Furthermore, the judge decided that the sentencing principles of reparation to the victim and promotion of responsibility in the offender could be achieved by a court ordered written letter of apology from the defendant and an admission of wrongdoing.

Finally, the judge ordered Mr. P. to perform 100 hours of community service, in order to “restore some benefit to the community he has harmed by his actions” (p. 3). The judge imposed a 15 month conditional sentence.

R. v. Travers (Manitoba Provincial Court, 2001)

This case involves the sentencing of a 26 year old woman after she pleaded guilty to impaired driving causing death. The accused, while intoxicated, had run a red light and collided with a taxi, killing the driver. The judge reviewed the background of the accused. Her parents were separated, and she was frequently sent back and forth between them which created instability. Her mother was an alcoholic who was physically and mentally abusive and often neglected her children. Her mother’s boyfriend once attempted to sexually assault her. Travers was involved in physically abusive relationships, she spoke of being depressed, and of receiving no emotional support from
family members. The night before the offence she had attempted to commit suicide, and this was not the first time. Travers admitted to have a problem with alcohol. Since the accident however, she had been attending counseling and was taking medication for her depression, had upgraded her education and was enrolled in university and was leading a law-abiding life.

The judge provided an extensive review of section 718.2(e) and the *Gladue* decision, and restorative justice in general. The duty upon the judge was interpreted as follows: “In applying Gladue, supra, however, it seems clear to me that I must exercise my sentencing function, not with inordinate leniency, but with the clear purpose of employing a sentencing regime more consistent with Aboriginal heritage, that is, toward a goal that is less punitive, more restorative” (p.11).

The judge also reviewed relevant case law on conditional sentences, including whether a conditional sentence can adequately achieve the goals of deterrence and denunciation, especially in cases of drinking and driving. With reference to the specific case before the court, the judge concluded that while the crime was a serious one, the accused did not pose a threat to the community and was unlikely to re-offend. However, the judge did recognize the need for deterrence and denunciation which require punitive sanctions, excluding the possibility of probation as a sentencing option, but not necessarily requiring a prison sentence. The judge noted,

The accused comes before the court as a first offender. She has demonstrated remorse. Notwithstanding considerable misfortune in her own life, she had managed to live a decent, productive and law-abiding life. For the one instance of awful recklessness, and its tragic results, on the night of June 23, 1998, it is not my opinion that the imposition of a penitentiary term, the most severe category of punishment known to
Canadian law, is the only measure that can adequately denounce her for her conduct. Nor, in my opinion, is a penitentiary term the only fit category of sentence that can appropriately address the need for deterrence (p. 19).

Furthermore, the judge did not feel that a penitentiary sentence would deter others who were similar to the accused from committing this crime, but rather it is the potential of being charged and sentenced to any term that would be more of a general deterrent. Accordingly, the judge sentenced Travers to a conditional sentence of two years less a day.

R. v. C.L.C. (Manitoba Court of Queen’s Bench, 2001)
Ms. C.L.C. was found guilty of manslaughter. C.L.C. had struck the victim with a small wooden baseball bat, and he died later of his injuries. C.L.C was described by the court as having a “very troubled life”, her father was an alcoholic and she had suffered serious physical, sexual and emotional abuse from her father and his wife. She was taken into the care of the Children’s Aid Society when she was 12 and was in various foster homes and institutions until she was 17 years old. She had attempted suicide on a number of occasions (para. 15).

She married at 19, and her husband was physically, sexually and emotionally abusive. She was violently raped by a stranger and suffered from post-traumatic stress disorder as a result. She became addicted to drugs and alcohol at a young age, and while she had been drinking the night of the crime, since then she had stopped using drugs and alcohol and was receiving counselling. Ms. C.L.C. had a minor criminal record.
The Crown sought a sentence of five years in prison while the defence argued for a conditional sentence. The question before the Court was whether a conditional sentence was appropriate in this case. The judge concluded that all of the criteria for a conditional sentence were met in this case, and that such a sentence could satisfy the goals of denunciation and deterrence, and furthermore would be most effective in C.L.C.'s rehabilitation. On the issue of deterrence and denunciation the judge commented, "I am satisfied that provided the conditional sentence order contains conditions which are sufficiently punitive, the need to express society's condemnation of Ms. C.L.C.'s conduct and to deter similar conduct by others can be achieved by a conditional sentence" (para. 25). C.L.C. was sentenced to a term of imprisonment for two years less a day to be served in the community, followed by three years of probation.

R. v. S.C. and W.F. (British Columbia Youth Court, 2001)

This case involves the sentencing of two young offenders who pleaded guilty to assault causing bodily harm. The charges stem from an incident in which the two accused and a third person severely beat a 17 year old boy. The judge did not refer to any specific details regarding the background and circumstances of the accused, but did discuss section 718.2(e) and how it should be included in determining sentence in this case. The judge also stated quite early in the decision that deterrence and denunciation could be met by a conditional sentence. The judge took this as a given and did not seem to feel the

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61 A third accused who was being tried at a later date because he was an adult, was thought to have inflicted the most serious injuries and therefore was more morally blameworthy.
need to debate this or justify this as some of the other judges have done in their decisions. The judge simply quoted prior case law that stated that whether a conditional sentence could achieve the goals of deterrence and denunciation in a particular case was left to the discretion of the sentencing judge who was to consider all of the circumstances.

The judge considered the needs of deterrence and denunciation in this case. The two accused took responsibility for their actions and entered early guilty pleas and cooperated with the police and the Crown by providing details about their involvement in the incident. It was noted that if they had not confessed, the case might have gone on unsolved. This appears to have possibly diminished the need for specific deterrence in this case. As for general deterrence, the judge was of this view that, “general deterrence has a limited benefit or utility to the community or to the young person” (para. 34). When discussing denunciation, the judge stated, “…if denounce means to confirm in words the horror of that night and the following day and the anguish in the weeks and months, yes, even years following, caused in part by you, W.F. and by you, S.C., I confirm it and I condemn it” (para. 32).

Although the judge acknowledges that a conditional sentence can adequately achieve the goals of deterrence and denunciation, the judge felt that any jail sentence would not be beneficial in this case. The judge stated,

If the two accused were adults, I likely would have reflected the principles of general deterrence, reflected the seriousness of the offence and denunciation, which I talked about a few minutes ago, through a jail sentence of one to one and a half years, to be served in the community, a conditional sentence. Because of the special circumstances that apply in youth sentencing, I consider a jail sentence here would likely reverse, perhaps permanently, the self rehabilitation steps taken by W.F. and S.C.,
with the help of their families and others during the past nine months (para. 51).

The judge felt that it was not appropriate to sentence the two accused to any form of jail sentence. The judge further commented, “I believe that to sentence either young person to jail of any kind would expose them to the influence of persons experienced in crime to the detriment of them, their immediate community, which is much in need of changed lives and resulting role models, and the larger community” (para. 53). The sentence imposed was two years of court supervised probation, including house arrest for the first 18 months.
3. REHABILITATION AS A PRIORITY:

In the following nine cases, the judges applied section 718.2(e) because it was believed that the rehabilitation of the offender must take priority in sentencing.

R. v. Healy (Alberta Court of Appeal, 1999)

This case involves a change in sentencing that appears to be based on priority given to the rehabilitation of the offender. Healy was appealing her sentence for theft of a motor vehicle and impaired driving. She was also convicted of driving over .08, obstruction of a police officer, and failure to comply with the terms of a probation order. The Court of Appeal noted that the original sentencing took place before the Supreme Court released the Gladue decision, therefore the judge did not have the benefit of the clarifications of section 718.2(e) contained in that decision, directing judges to use alternatives to prison when appropriate. At the appeal, Reverend Duncan Winnipeg spoke on behalf of the offender, and explained to the Court the lack of available resources and alcohol addiction treatment programs geared specifically towards women on many reserves. While the information provided by the reverend was “scanty”, he did offer to help in Ms. Healy’s rehabilitation through treatment and employment opportunities in Medicine Hat.

The Court agreed that Ms. Healy’s rehabilitation should be given priority in this case. The Court stated,

In our view, this is a good case to consider sentencing apart from incarceration. Ms. Healy has a serious drinking problem that needs to be addressed...She has at least taken some steps toward a fresh start in her life and says she is willing to move to Medicine Hat for that purpose,

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62 This written decision is brief, and therefore some of the details are unclear, but it appears that the offender was only appealing the sentences for the vehicle theft and impaired driving charges.
leaving behind all of the people and family that have previously been part of her drinking past...Ms. Healy should be given this opportunity to take advantage of this support and try to build a new lifestyle. It is not only in her interest, but it is in the community’s interest that she be released while there is support available to help her change her ways (paras. 7-8).

The court allowed her appeal, and recommended her immediate release, substituting a six month conditional sentence (probation) in place of her existing sentence, which would start upon her release$^{63}$.

R. v. Morin (Saskatchewan Queen’s Bench, 1999)

This case involves the sentencing of Morin, who was convicted for trafficking morphine. He was sentenced to an 18 month conditional sentence. The accused had a significant record and was addicted to morphine. The Crown argued that he should not be eligible for a conditional sentence as there was a risk that he would re-offend and therefore posed a risk to the community, but the Court emphasized his rehabilitation in imposing sentence. Since the offence, the accused had taken steps to rehabilitate himself, he entered a methadone program and gained employment with an Aboriginal newspaper as a journalist and also worked in administration. The Court was presented with many letters of support for Morin, attesting to his progress.

There was some discussion as to whether a conditional sentence could achieve the goals of deterrence and denunciation in drug trafficking offences, but after reviewing

$^{63}$ It appears that Healy was serving four months for a conviction that she did not appeal, so the Court could not deal with that sentence. Accordingly, the sentence they imposed would run concurrent to her existing four month sentence, the result being that the seven month global sentence she was serving would be reduced to four months.
various case law on the issue where conditional sentences had been imposed, the Court was satisfied that a conditional sentence was appropriate in this case. On this issue the Court commented,

...a conditional sentence which imposes serious restrictions on the offenders [sic] liberty is a real denunciation of unlawful conduct, and would certainly deter other ‘right thinking’ persons from committing offences (as opposed to members of the criminal subculture who would not be deterred in any event and for whom the denunciation objective is paramount). There is no reason to separate this offender from society at this point in time as he is behaving in a socially acceptable law-abiding manner. It is s. 718.(d), ‘to assist in rehabilitating offenders’ that will not be met with a term of incarceration, but can be met with a conditional sentence (p. 7).

Taking into consideration section 718.2(e), and emphasizing rehabilitation over denunciation, the Court felt that Morin’s participation in a methadone program made him a candidate for a conditional sentence, and that as long as he stayed in the program he did not pose a danger to the community.

R. v. Norris (British Columbia Court of Appeal, 2000)

This case involved a Crown appeal of the accused’s four month prison sentence for two counts of possession of cocaine for the purpose of trafficking. The Crown argued that this sentence was too lenient, but the Court of Appeal found the sentence to be appropriate given the provisions of section 718.2(e) and because the trial judge’s reasons for sentence emphasized the offender’s rehabilitation, as she had successfully completed substance abuse programs while in pre-sentence custody.

The Crown’s appeal was also based on the argument that the sentencing judge failed to adequately consider the principle of deterrence when imposing sentence. The
Court of Appeal disagreed that a longer sentence would effectively achieve deterrence. On this issue the Court stated, “The deterrent effect of severe sentences on a heavily addicted person is doubtful. The American experience of jailing many drug offenders for long periods provides no support for the deterrence argument” (p. 3). The appeal was dismissed.

R. v. MacCormack (New Brunswick Court of Appeal, 2000)

This case involved a Crown appeal of a conditional discharge with curative treatment and probation for two years imposed upon the accused after he pleaded guilty to impaired driving. The Crown submits that the judge erred in imposing this sentence, given that the accused had 11 prior convictions for impaired driving.

The sentencing judge, on the other hand, alive to the directive set out in section 718.2(e) to seek alternatives to prison in sentencing, “…found that the accused was in need of curative treatment, was convinced of the bona fides of the accused’s desire to take treatment, and concluded that there was a strong possibility of the treatment being successful” (p. 3). Furthermore, the sentencing judge decided that prison was not necessary for specific and general deterrence, and that, “Mr. McCormack would be more of a threat to society to be incarcerated and then released with no curative treatment” (p. 4). The Appellate Court found that the judge had made no error and dismissed the appeal.
R. v. Dumas (Saskatchewan Court of Queen’s Bench, 2000)

In this case the accused was being sentenced after being found guilty of robbery. Dumas had participated in the robbery of a gas station. Compared to his two co-accused, it appears that Dumas’ participation in the robbery was minimal, and this was considered at sentencing. The Crown recommended that an appropriate sentence would be three to four years in prison, as such a sentence was viewed by the Crown as necessary to meet the goals of deterrence and denunciation. Defence counsel suggested a conditional sentence would be appropriate in this case, as it was argued that rehabilitative objectives should take priority over deterrence and denunciation (although the defence reminded the court that deterrence and denunciation could be met by a conditional sentence).

The question before the court seemed to be whether a conditional sentence could be imposed for the charge of robbery, as this crime usually carries a sentence of three years. After reviewing the relevant case law, the judge was satisfied that it was up to the discretion of the judge to decide if there were “exceptional circumstances” present that would allow for the judge to impose a conditional sentence. The judge then proceeded to assess whether the present case met the criteria for a conditional sentence.

While there was little information provided about the background of the accused, the judge did comment on his behaviour since the crime. Dumas was said to have made “substantial changes in his life” (para. 29). He had not used drugs or alcohol in the three years since the robbery, and had attended treatment for his problems. He had completed a diploma in computer programming at the top of his class and had good employment
prospects. He had complied with all of his bail provisions, had taken responsibility for
his part in the robbery, and had been leading a law-abiding life.

The judge was reluctant to sentence the accused to a prison term, as, "...a
penitentiary term would over-emphasize these factors [deterrence and denunciation] and
ignore the objective of rehabilitation" (para. 38). The judge further stated that while most
robbery cases would require a prison sentence in order to meet the objectives of
deterrence and denunciation, this was not one of those cases, based in part because of the
accused's steps towards rehabilitation. Any risk that Dumas may pose to the community
could be minimized through the imposition of certain conditions, and therefore the judge
concluded that a conditional sentence was appropriate in this case.

This judge was of the opinion that deterrence and denunciation could be met by a
conditional sentence, and that rehabilitation could be more effectively achieved with a
conditional sentence. The judge stated,

Rehabilitation focuses on repairing the individual by ensuring whatever
caus[ed his criminal behaviour will be eliminated. It is generally accepted
that rehabilitation of the offender is better achieved by supervising the
offender in an environment in which he will be expected to function upon
his release. The use of incarceration, on the other hand, has been found to
be a less effective means of promoting rehabilitative measures. Thus, in
most cases a conditional sentence would provide a better means of
rehabilitating the offender than a term of incarceration (para. 53).

In this case the judge felt that prospects for rehabilitation outweighed the need for
deterrence and denunciation that might otherwise be the justification for sending an
offender to prison. The judge appeared to be concerned about potential reactions to
imposing a conditional sentence in this case, causing the judge to offer this explanation,

"Although I am aware that rehabilitation plays a significant role in this case, I am also
aware that a lenient conditional sentence would risk bringing the administration of justice into disrepute. As a result I intend to impose onerous conditions on the accused to satisfy society's need for denunciation and deterrence" (para. 56). The sentence imposed was two years less a day, to be served in the community, with a number of conditions (including electronic monitoring), followed by 18 months of probation.

**R. v. Akan (British Columbia Court of Appeal, 2000)**

This case also involved an appeal by the accused against sentence. Akan had been sentenced to four years in prison following his guilty plea to break and enter. The sentencing hearing took place before the Supreme Court released the *Gladue* decision, and the appeal was based on the argument that the trial judge did not properly consider and apply section 718.2(e).

Akan and his co-accused were caught at the scene breaking and entering into an apartment. Akan had a criminal record and was serving a conditional sentence at the time of the offence, and this was not his first breach of condition. At sentencing, little information was provided to the court regarding the background and circumstances of the accused, and defence counsel submitted that a prison sentence would be appropriate in this case. The Court of Appeal had more access to material regarding the accused. The Court had this to say about his childhood,

*When Mr. Akan was a child, his father was rarely around and he and his older brother were brought up by his mother. When Mr. Akan was about nine or ten years old his face and neck were badly burned when a gasoline can exploded next to him. He was placed in the hospital and received many skin grafts but he was left with a considerable amount of scarring. From that point forward, Mr. Akan became withdrawn socially,*
particularly in school where he was teased and ridiculed about his scars. His involvement with alcohol started a few years later. He repeatedly ran away from home and was ultimately placed in a boys school. A number of convictions which appear on Mr. Akan’s criminal record are indicative of his considerable anger or hostility to those in authority (p. 2).

The material presented at sentencing “gave no indication that there was any prospect of Mr. Akan being rehabilitated”, and the sentencing judge referred to the principles of specific and general deterrence, protection of the public and rehabilitation in determining sentence.

At appeal, a large amount of information was submitted regarding Akan’s efforts towards treatment and rehabilitation, which contributed to the Appellate Court’s finding that “…Mr. Akan has decided to try to end his pattern of abuse of alcohol and drugs and to bring an end to his criminal behaviour” and furthermore that “…the sentence which was imposed ought to be varied so as to take into account the commitment Mr. Akan has made to his rehabilitation and the steps he has taken to that end” (p. 4). The Appellate Court still felt that a prison sentence was necessary for this offender, but based on Akan’s realistic prospects for rehabilitation, the sentence was reduced from four years to three years.

R. v. Dennis (British Columbia Court of Appeal, 2001)

In this case, Dennis was appealing his sentence of two years less one day in prison following his guilty plea to assault with a weapon. The appeal was based on the argument that the sentencing judge did not properly consider and apply section 718.2(e), and that the judge gave insufficient weight to the offender’s efforts to rehabilitate himself.
between the offence and sentencing. The assault followed an extensive period of both the accused and victim smoking crack cocaine together. Dennis accused the victim of sleeping with his common-law wife, and then attacked him with a knife. The victim suffered a number of cuts and stab wounds.

Dennis became a drug user at a young age, but since the assault he had “made extensive efforts to rehabilitate himself”, including dealing with his addiction to drugs (para. 13). At his sentencing, four witnesses were called who attested to his success at rehabilitating himself, and professionals submitted letters commenting on his remarkable progress in overcoming his addiction and making other changes to his life, including his involvement in volunteer work. He had much community support. Defence counsel argued at sentencing that a prison sentence would impede Dennis’ progress, but the sentencing judge disagreed. The judge seemed to believe that a conditional sentence could not meet the sentencing objective of denunciation and appeared to be worried about public reaction to such a sentence, as the judge stated, “I think society would not accept, in the circumstances of this case, a conditional sentence, regardless of the conditions that I placed” (para. 15).

On the issues at appeal, the Appellate Court agreed that the judge had erred. On the first claim, that the judge failed to consider section 718.2(e), the Appellate Court noted, “…the sentencing judge said nothing in his reasons which would indicate that in sentencing the appellant he considered the methodology for assessing a fit sentence for an aboriginal offender referred to in R. v. Gladue” (para. 21). The Appellate Court noted that the sentencing judge had plenty of material about Dennis’ background and his
rehabilitation since the offence. The Appellate Court took notice of this information and concluded, “The evidence and material was overwhelmingly in favour of the appellant’s having rehabilitated himself by the time the case came on for sentencing, and, in view of that, it is difficult to see how the principle embodied in s. 718.2(e) would not have relevance…” (para. 27). The Appellate Court reduced the sentence to time served.

R. v. C.D. Ahenakew (Saskatchewan Court of Appeal, 2001)

This is another case in which the court gave priority to rehabilitation as a goal of sentencing. In this case, the female accused had pleaded guilty to two theft charges and two breaches of probation. The charges involved shoplifting, and she was under the influence of drugs at the time, and she was also serving an eight month conditional sentence for assault. Ahenakew was ordered to serve the balance (four and a half months) of her conditional sentence in custody, and for the new offences, she was given another ten month conditional sentence. This case involves the Crown appeal of this sentence. The appeal was dismissed by the majority, with one judge dissenting.

The judges who dismissed the appeal were reluctant to interfere with the sentencing judge’s decision in part, for the following reasons,

This appeal comes to us in a particular context. It is an appeal from the decision of a judge from a Court that is responsible for handling 80% of the criminal matters which come before the courts in this province. The judge from whom the appeal is taken is also the judge who imposed the first conditional sentence and dealt with an intervening breach of that sentence, and who heard detailed submissions from the Crown and defence on all three occasions. She lives in this community, knows it and, from her previous experience, knows this accused. In light of this experience and this familiarity, we must take particular note of the
Supreme Court of Canada’s direction to defer to the sentencing judge” (para. 8).

Because the crime rates in this particular community were so high, the Appellate Court agreed with the sentencing judge that, “…incarceration without addressing the underlying addictions of a person such as Ms. Ahenakew will, in all likelihood, simply lead to more crimes” (para. 9). In this particular case, the accused shoplifts in order to support her addictions. Therefore, it was concluded that future criminal activity will not be reduced without dealing first with her addictions. The result then, according to the Appellate Court was that “this sentencing judge was trying to find a means to effect change in Ms. Ahenakew’s lifestyle by using probation services coupled with appropriate drug treatment instead of the correctional system” (para. 17).

The Appellate Court also took into consideration the background of the accused, which was described as follows:

Ms. Ahenakew, a person of aboriginal descent, has had an extremely difficult life. She was brought up from an early age by adults who instructed her how to shoplift, which she has been doing since a child. Many of Ms. Ahenakew’s peers, including family on and off the reserve, suffer from addictions. She has sought help in the past, but bad associations have made recovery difficult and, prior to this, she had never been on the methadone program... The sentencing judge recognized that this accused needed, not only a drug treatment program, but educational programming which would permit her to develop the coping skills to say ‘no’ to a lifestyle that had been ingrained in her (para. 20).

The court went on to say,

Ms. Ahenakew is like many other aboriginal offenders who appear before our courts for whom we must make a concerted effort to find ways in which criminal behaviours can be addressed other than through a custodial disposition. Consider the sentencing list from Ms. Ahenakew’s date of appearance before us as an example. Of the thirteen offenders appearing before us on this date, at least nine are of aboriginal descent. This
elementary statistic accords with the broader problem of over incarceration of aboriginal people in Saskatchewan jails...While having the protection of the public always in mind, we must take every opportunity to emphasize rehabilitation over any other principle of sentencing in an attempt to address this crisis in our system (para. 22).

The two majority judges dismissed the appeal, and one judge dissented, stating at one point, "Indeed, I am of the respectful opinion the sentence as a whole is long on sentiment, hope, and concern for the accused, but short on reality, principle, and concern for the community" (para. 29). This judge felt the accused was at risk to re-offend, and therefore posed a risk to the community, making her ineligible for a conditional sentence.

This judge also believed that the principles of deterrence, separation from society, rehabilitation and promoting a sense of responsibility in the offender were the main considerations in this case, and again they would not be met by a conditional sentence. Accordingly, this judge thought an appropriate sentence for this offender would have been 18 months in prison. Public reaction was also a consideration for this judge, as the judge commented, "Moreover, I think something of this nature is called for in the interests not only of public protection and rehabilitation, but of upholding public confidence in the administration of the criminal law. After all, every other form of sanction has been tried to no avail. None of the objectives of sentencing laid down by Parliament has yet been achieved" (para. 62).

R. v. Wissler (British Columbia Supreme Court, 2001)

Wissler was convicted on two counts of assault with a weapon, possession of a firearm for a dangerous purpose, careless use of a firearm, and two counts of uttering a threat to
cause death or bodily harm. The charges resulted from an incident where, after an ongoing dispute the accused’s band had with another native band, he confronted the two complainants (who were from the other band), fired a rifle and asked them if they wanted to die. He also pointed the rifle at the complainants, and fired the rifle near the ear of one of them (para. 6).

The accused had a serious drinking problem and an “unfortunate background.” However, since the incident, the accused had made “significant strides in rehabilitating himself” and had become employed as a band counsellor (para. 9). The Crown requested a prison sentence while the defence argued that a conditional sentence was appropriate. The judge briefly reviewed the directives outlined in Gladue, and voiced concern about the potential effects that a prison sentence would have on the accused’s steps toward rehabilitation. The judge stated, “It is my view that were the accused to be removed from his present position through a jail term he may very well revert to his old ways and again become addicted to alcohol and continue to be a threat to society” (para. 19). The accused was given an 18 month conditional sentence and a $500.00 fine.
4. **OTHER CASES: SECTION 718.2(E) APPLIED, NO SPECIFIC REASONS GIVEN, OR UNIQUE CASES:**

In the following ten cases, it is clear that section 718.2(e) was applied, but in some cases there were no specific reasons given, the judges only mentioning section 718.2(e) in their written reasons for sentence. In other cases, reasons were given, but they were unique and did not fall into one of the three previous groups. Hypotheses therefore cannot be drawn from this section, however it is important to include them as they contribute to our understanding of cases in which section 718.2(e) is applied.

**R. v. Robinson (British Columbia Court of Appeal, 1997)**

This case involved an appeal by the accused who had been sentenced to life imprisonment after he pleaded guilty to manslaughter. The accused had been drinking with the victim and some other people, and for no apparent reason the accused attacked the victim, striking him in the head with some rocks he had in his pocket and then stabbed him three times. The victim bled to death from the stab wounds (paras. 5-6). The accused was originally convicted on second degree murder and sentenced to life in prison with no eligibility for parole for 10 years. He appealed the conviction, and a new trial was ordered in which he pleaded guilty to manslaughter. By the time he was sentenced for manslaughter he had been in custody for five years and four months, except for a brief period when he was released on bail.

At sentencing, the background of the accused was discussed. The accused had a lengthy criminal record, and he received his first prison sentence at age 14. He was described as having a “horrendous childhood”, at the age of 6 he was taken from his
parents and placed in a residential school where he experienced “continuous physical abuse” (para. 8). He left school at age nine and went to work in the forest industry. At age 20 he began drinking heavily and became a “street person.” At one point he was hospitalized and diagnosed as being paranoid and suffering from acute delusions.

The accused denied committing the offence, and claims to have only pleaded guilty under the advice of his lawyer. The pre-sentence report emphasized that the accused’s tendency to be violent when drinking coupled with his paranoia made him a threat to society. However, the defence argued that the possibility of rehabilitation should not be discounted in this case. The sentencing judge placed much weight on the accused’s criminal record, which included ten assault convictions when determining a sentence. The accused’s history of violence, his inability to control his drinking and the seriousness of the crime led the judge to conclude that public protection and specific deterrence were to be given paramount consideration at sentencing. Accordingly, the accused was sentenced to life imprisonment (para. 13).

His appeal against sentence was based partly on the argument that the judge failed to properly consider the accused’s Aboriginal status as directed under section 718.2(e). The Court of Appeal, when considering this issue noted that it is rare to impose a life sentence for manslaughter. The appellant submitted that “…Mr. Robinson was sentenced more on the basis of his being an incorrigible drunk than upon a realistic assessment of the likelihood of his future dangerousness” (para. 34). While the Court found that there was a relationship between the accused’s drinking and his history of violence, it disagreed that the prior record was a reliable basis to conclude that the offender posed a
level of dangerousness high enough to warrant a life sentence because the list of charges
did not include details about the facts of the cases. This finding was based on the
following considerations,

In assessing these matters, it is of some relevance that Robinson is an
aboriginal person with a long history of being unable to stay out of trouble
because of his addiction to alcohol and his having lived for 20 years in a
milieu in which he had no purpose in life except to get the next drink.
Such persons inevitably come into conflict with the law and are charged.
Such individuals, tend, more often than others, to plead guilty on the first
appearance to whatever charge has been laid and thus may accumulate a
worse-looking record than those who avail themselves of the right to
defend. Whether that is so in the case of this appellant is a matter of pure
speculation but, as the onus on establishing future dangerousness lies on
the Crown, it is a factor which can be considered in deciding what weight
to give to the prior record (para. 36).

The Court noted that given the circumstances of this case, including the lengthy criminal
record, lack of remorse and poor prospect for rehabilitation, the sentencing range would
usually be in the range of eight to 12 years. The sentencing judge did not consider this
range, and instead used a suspended sentence and life imprisonment as the lower and
upper boundaries, respectively. The Court of Appeal found that this lack of consideration
of the usual sentencing range constituted an error as it contravened the principle of parity.
The Court concluded that this sentence was excessive, and that a sentence of 12 years
would have been more appropriate. Giving the accused nine years’ credit for time served
would have resulted in a three year sentence. However, this would exclude the
possibility of attaching a period of parole to the sentence, which the Appellate Court
thought was necessary in order to provide a maximum period of supervision, so a
sentence of two years’ imprisonment followed by three years of probation was substituted
for the life sentence originally imposed (paras. 41-43).
R. v. Sam (Yukon Territory Supreme Court, 1997)

This case involves the sentencing of three accused after they were convicted of sexual assault. The accused had met the victim in a bar. She was very intoxicated, and they each had sexual intercourse with her. The accused claimed that the victim had consented, but the judge accepted the victim’s denial of consent. While the accused received prison sentences, section 718.2(e) was considered and applied in that the judge reduced the length of the sentence in accordance with section 718.2(e).

The Crown recommended a sentence of three to five years in prison, which would mean the offenders would be sent to a penitentiary in the southern part of the country (i.e. outside of the Territory). However, the judge did not think this was appropriate, stating, “It is in my view that to follow the request and the submission of the Crown to the letter would be to fail to comply with s. 718.2, and particularly 718.2(e)...aboriginal accused who have spent their lives in rural settings, and are sent to penitentiaries, suffer deprivation of liberty which involves cultural deprivation as well” (para. 11). Furthermore, the Crown’s sentencing recommendation would exclude the possibility of imposing a period of probation upon the offenders’ release. The judge believed that a period of probation following a prison sentence was preferable to just releasing offenders back into the general community without any assistance. Accordingly, the judge sentenced the three accused to 20 months in prison, followed by probation for 18 months.
R. v. Bero (Ontario Court of Justice, 1998)

In some cases, section 718.2(e) is applied at the appeal stage, when a sentence is changed because the Appellate Court finds that the sentencing judge did not properly consider and/or apply section 718.2(e). This was the case in R. v. Bero. Bero had appealed his sentence of 30 days in prison after he pleaded guilty to careless driving. He was a young offender, and appeared unrepresented before a justice of the peace. The Appellate Court found that the justice of the peace erred when he did not obtain a pre-sentence report, and therefore did not consider the accused’s Aboriginal status. It was also found that the justice of the peace did not properly consider the principles of individual deterrence and rehabilitation and restraint for this offender.

Although both the original sentencing and the appeal took place pre-Gladue, the Appellate Court gave a considerable amount of consideration to the directives set out in section 718.2(e), citing information from both previous cases and the academic literature on the problem of the over-incarceration of Aboriginal peoples in Canada and systemic discrimination. The Court concluded,

...it appears self-evident that the fact of sentencing any aboriginal offender to imprisonment may bring about a number of secondary penalties that are not present in the case of other offenders who are members of the dominant groups that make up our collective society. Foremost among these collateral penalties is the reinforcement of a negative stereotype to the effect that aboriginal individuals are dishonest or bent on criminal behaviour ... no decision to impose a jail period should be reached unless one has first paused and considered carefully the general direction found at s. 718.2(d) respecting the search for less restrictive sanctions and then paused once more to evaluate whether all other available sanctions are clearly inadequate to then pause once more in order to ensure that the special direction found at s. 718.2(e) is given full effect. In such a case, the recourse to jail with all of its attendant negative
consequences for a First Nations offender must be judged to be necessary in order to arrive at a fit and proper disposition (para. 34).

The Court found that the justice of the peace’s sentence was extreme, the appeal was allowed and the sentence was set aside.

R. v. Paul (New Brunswick Provincial Court, 1998)

This is a case where the judge attempted to craft a sentence with the goal of restorative justice in mind. Paul pleaded guilty to assaulting a police officer and breach of probation. The officer was not harmed, and he described the assault as “minor”, but he noted the potential dangerousness of the situation (para. 9). The accused applied for a sentencing circle, and had much community support for his request. The judge determined that even though sentencing circles are not always used in cases where the victim is not a member of the native community and the offence was an offence against the person which usually called for a period of incarceration, under the provisions of section 718.2(e), a sentencing circle was appropriate in this case (paras. 4-6).

The judge participated in the sentencing circle, and reported that much of the discussion centered around incarceration and banishment as appropriate forms of punishment. However, “Most of the members of the circle spoke against incarceration as they saw it serving no useful purpose and saw banishment as being a more serious and profound punishment as it removed Mr. Paul from his wife, children and system of family and community supports” (para. 12). After weighing all of the principles of sentencing, the judge imposed a sentence of imprisonment for 30 days to be served in the community followed by one year of probation. The judge concluded this written decision
with some thoughts on sentencing circles in general, “From the perspective of a non-native Judge, sentencing circles can, if used in appropriate cases, be an effective tool in sentencing and also in promoting the community’s understanding, monitoring and acceptance of conditional sentence orders…the use of sentencing circles allows the Court to fully utilize effective community sentencing in the native community” (para. 16).

**R. v. L.L.J. (British Columbia Supreme Court, 1999)**

This case involved the sentencing of L.L.J. who pleaded guilty to two counts of sexual assault against his daughter-in-law. The judge, referring to the directives outlined in *Gladue*, reviewed the circumstances of the accused. L.L.J. lost both of his parents to tuberculosis when he was quite young, and had attended a residential school. He had not worked much throughout his life, and had recently been living in poverty. He had a problem with alcohol, and the accused was described by his counsel as “…strong in traditional values but weak in self-esteem on the Western scale of values, leading to conflict in his person” (para. 13).

Three elders testified on behalf of L.L.J., and all three spoke of the support and resources that would be offered to the accused should he be allowed to serve his sentence in the community. Defence recommended a conditional sentence of one year, and the Crown said he would not oppose a conditional sentence, but recommended the maximum term (two years less a day). The judge, in determining an appropriate sentence, considered academic literature on restorative justice and the directives outlined in *Gladue*. 
Accordingly, the judge also felt that it was necessary to consider the victim and the community in the sentence. The judge referred to the “…numerous problems facing aboriginal women who come into contact with the justice system as complainants, including the potential for ostracism in their own communities” (para. 37). Victim impact statements presented to the Court indicate that this was the case for the victim in this particular case. The judge expressed a desire to try to “…restore harmony, heal or make whole this victim, this community and this offender” when crafting a sentence (para. 40). The judge concluded that a conditional sentence of two years less a day would be appropriate under the circumstances in order to achieve restorative justice. The conditions included obtaining treatment for his alcohol problems, writing a letter of apology to the victim, and preparing a written statement which would be delivered to members of his family and community (upon the victim’s approval) in which he “accepts responsibility for the offence and its consequences and states that C.F. was right in reporting the offence” (para. 41).

R. v. Bernard (Alberta Queen’s Bench, 1999)

In this case, while it is difficult to determine specifically how section 718.2(e) was applied in determining sentence, it is obvious that the judge did carefully consider the provision. Other factors to be taken into consideration in the sentence make this a unique case, but it appears that following section 718.2(e) the judge was reluctant to incarcerate this offender. The accused was convicted on charges of possession of firearms while
prohibited and careless storage of firearms. The charges are the result of an accident, in which his young stepson accidentally shot and killed his own sister.

Sentencing in this case was complicated by the fact that in 1987 the accused had been convicted of second degree murder, and while he had served his prison sentence (he was eligible for and received parole after serving ten years), he is "essentially on parole for the rest of his life" (p. 3). Therefore, if the judge imposed any prison sentence in this case, his parole would be revoked and he may have to serve the rest of his life sentence. The Crown argued that an appropriate sentence was two years less a day in prison, and that a jail sentence was necessary for general deterrence. Defence argued that any term of imprisonment would have "very serious consequences" for the accused, and that he had already suffered enough in the loss of his stepdaughter.

The judge reviewed the directives set out in the *Gladue* case regarding section 718.2(e) and the sentencing of Aboriginal offenders. With respect to the circumstances of the accused, the judge noted, "Mr. Bernard lives in relative poverty, and that this poverty is related in part at least to his aboriginal status" (p. 7). Finding that specific deterrence was not relevant in this case, the judge turned to the issue of general deterrence. It seems that section 718.2(e) was relevant to this issue as the judge commented,

I take the Supreme Court of Canada's guidelines in *R. v. Gladue*, supra as requiring me to consider some of the special circumstances that face an individual such as Mr. Bernard as a result of his aboriginal heritage and circumstances. Additionally as Mr. Glancy [defence counsel] has pointed out, the presence of firearms on Alberta reserves or near reserves is in some cases somewhat endemic, and in almost all cases, quite prevalent (p. 7).
The judge concluded that given these circumstances, a prison sentence would be ineffective in achieving general deterrence. As a result, the judge imposed a suspended sentence and placed the accused on probation for 18 months.

R. v. Auger (Alberta Queen’s Bench, 2000) 64

This case involved the sentencing of two brothers on drug charges. Tonie Auger was found guilty of trafficking marijuana and cocaine, and Edgar Auger was found guilty of trafficking in cocaine. It was noted that they came from a small community and that the community supported a conditional sentence (a petition with over 100 names was submitted to the Court and many community members attended all of the court proceedings) (para. 1). The defence asked for a conditional sentence for both of the offenders while the Crown suggested a prison sentence of two years was necessary for the goals of deterrence and denunciation. The judge determined early in the decision that the crimes did not warrant a sentence of more than two years, making the accused eligible for conditional sentences. The judge further concluded that the risk of re-offence for either of the accused was minimal, meaning they did not pose a significant risk to the community. The last consideration, whether a conditional sentence was consistent with the purpose and principles of sentencing, included section 718.2(e) and a review of the

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64 This case involves the sentencing of two brothers for their involvement in the same crime. One brother received a conditional sentence and the other received a prison sentence, and while the latter case could have been included in the “section 718.2(e) not applied” section, I did not want to break the cases up.
individual circumstances of each offender. The judge also took into consideration the
effects of the crimes on the community. The judge commented,

...I also remain particularly cognizant that the community of Grouard,
especially in its vulnerable economic state, does not need any further
stressors on it of the type that cocaine trafficking and its consequences can
inflict. I therefore not only consider the aboriginal status of the accuseds,
but also the aboriginal and vulnerable status of the community in which
they trafficked drugs. It would be a cruel irony indeed for a sentencing
provision, intended to ameliorate the circumstances of aboriginals, to give
more consideration to the welfare of aboriginals who offend against
aboriginals than to the aboriginal victims of those offenders (para. 42).

The importance the judge placed on deterrence and denunciation when sentencing
offenders for drug trafficking is reflected in the observations that, “We have to be
cconcerned about the damage that these brothers have done to the very community which
now supports them and to ensure that their behaviour is condemned so that others do not
follow in their footsteps” (para. 48).

In determining sentence, the judge found that Edgar Auger had a higher degree of
culpability in the offences, and therefore that denunciation and deterrence should be
given greater consideration in his sentence. With respect to his sentence the judge
commented,

I regard Edgar Auger as a cocaine trafficker who was dealt this drug while
residing in a vulnerable aboriginal community and find the degree of his
moral turpitude to be of a level sufficient to require he spend time in gaol.
The mitigating factors and his aboriginal circumstances are not enough,
when all the factors are weighed, to displace the Criminal Code’s direction
that I consider, with aboriginals as well as with all other offenders,
incarceration as a sanction of last resort. I agree with Edgar’s supporters
that incarceration will not be good for him. There comes a point,
however, where a sentencing judge’s concern shifts from the rehabilitative
and restorative end of the spectrum to the denunciation and deterrence end
because the crime is sufficiently serious that the damage to society caused
by the offender overtakes the criminal justice system’s desire to rehabilitate him. Edgar has, unfortunately, crossed that line (para. 63).

Edgar Auger was sentenced to 12 months in prison and was required to pay a victim surcharge of $250.00. In an attempt to contribute to Edgar’s rehabilitation, the judge deferred the date that Edgar would go to prison to after he had finished his education upgrading.

Because the judge viewed Tonie to be involved to a lesser degree in the offences (i.e. he was not the “primary perpetrator”), a conditional sentence was viewed as appropriate for this offender and with strict enough conditions, a sentence that would be able to achieve the goals of deterrence and denunciation. Accordingly, Tonie Auger was given an 18 month conditional sentence to be served in the community, and was ordered to pay a fine of $500.00 and a victim surcharge of $100.00.

The judge concluded by addressing those members of the community that had attended the court proceedings, and offered these words:

I would like to again commend those who have shown up here today and to encourage you to welcome Edgar Auger back into your community when he has served his time, and to assist Tonie Auger with his community service obligations, and to help both brothers with their attempts to upgrade themselves and achieve meaningful and satisfactory employment. It would be of great benefit to all if we can turn this unfortunate situation to one of advantage for the aboriginal community (para. 81).

R. v. Peters (British Columbia Court of Appeal, 2000)

This case involved an appeal by the accused against his sentence of nine years in prison (the total sentence was 11 years and eight months, but he had been credited with 32 months for pre-trial custody) for manslaughter. Peters had been acquitted of murder,
because the jury decided that he was too intoxicated to form intent. The accused was 20 years old at the time of the incident, which had occurred almost 20 years earlier, in which he was involved in a fight that resulted in the death of the victim. The appeal was based in part on the argument that the sentencing judge failed to properly consider the accused’s status as an Aboriginal offender.

Peters had a problem with alcohol, and “came from a family that had been devastated by alcohol abuse” (p.4). Both his parents died from alcohol poisoning, and three of his nine brothers died from alcohol-related causes. At the time of the offence, the accused only had one previous conviction, but by the time he was convicted, he had a lengthy criminal record. The sentencing judge had decided, and the Court of Appeal agreed, that the accused was not a good candidate for rehabilitation. The Court stated, “It is apparent that Mr. Peters has a deep-seated addiction which goes hand in hand with his criminal behaviour. Until his addiction is successfully addressed (which will be no easy task), the public will be at risk from his antisocial behaviour” (p. 4).

The Court of Appeal was not convinced that the sentencing judge completely ignored the accused’s status as an Aboriginal offender, even though it was not discussed specifically in his reasons. The Court also noted that the sentencing took place two years before the release of Gladue. Regardless, the Court agreed with the sentencing judge that a term in prison was necessary, and the issue became the length of the sentence. It is not clear that it resulted from a consideration of the offender’s background, but the Court of Appeal did reduce the length of the sentence to six years (eight years in total, but he was
given two years’ credit for pre-trial custody). This was decided by the majority of the Court, with one judge dissenting who felt that the original sentence was fit.

R. v. Boucher (British Columbia Supreme Court, 2001)

In this case, the offender’s community seemed to be the main consideration in determining an appropriate sentence. This case involved a Crown appeal of Boucher’s sentence of three days imprisonment and one year probation after he was convicted on a sexual assault charge. Boucher, age 50, had “kissed, fondled, and pressed his crotch” against an 18 year woman who was his daughter’s best friend and his son’s girlfriend (para. 2). The accused was intoxicated at the time. At the first sentencing hearing, Boucher appeared to be intoxicated, and he was detained in custody for three days until another hearing was scheduled.

At sentencing, it was noted that Boucher had been the Chief of the Red Bluff band for 30 years. A sentencing circle was considered, but there were divisions within the community on the issue which prevented this from taking place. Boucher had no criminal record and much community support, but did not appear to accept the criminality of his conduct and accordingly expressed no remorse (paras. 5-6). The Crown suggested a three month prison sentence was appropriate, while the defence argued for a suspended sentence and probation, or a conditional sentence.

The Crown’s appeal was based partly on the argument that, “…the sentence imposed by the trial judge did not adequately reflect the gravity of the offence. Error is alleged in unduly overemphasizing the offender’s loss of prestige and unduly
underemphasizing the need for denunciation and general and specific deterrence” (para. 8). The trial judge stated in his reasons that he had taken into consideration section 718.2(e) as outlined in Gladue when determining an appropriate sentence for this offender. Furthermore, the judge commented, “I am quite certain in this matter the main punishing tool is the branding of guilt for this offence in this small community” (para. 19). The Court of Appeal was reluctant to interfere with the sentencing judge’s decision, mainly because, “…the trial judge sitting in judgement of the long-serving chief of this small native band was much better placed than is this court in assessing and measuring the significance to that community of the various sentencing options” (para. 20).

The Appellate Court referred to a passage in Gladue that emphasized the need for a sentence that will be meaningful to the Aboriginal offender and his or her community. Accordingly, the Court dismissed the appeal, concluding,

Rather than constituting an error of emphasis, the trial judge’s recognition that Mr. Boucher’s fall from grace constituted a particularly serious punishment for him seems appropriate and astute. That he was convicted and sentenced to gaol notwithstanding his stature, albeit for a very short term, may well have had a greater denunciatory and general deterrence effect in his small aboriginal community than it would have in a larger non-aboriginal community. It appears that once Mr. Boucher was branded, denunciation has taken place at the community level, perhaps in a more direct and effective fashion than would have been achieved in a larger non-aboriginal community by a 1-3 month period of incarceration (para. 21).

This chapter contains a review of the cases in which section 718.2(e) was considered and applied when sentencing an Aboriginal offender. Application of section 718.2(e) involved either using alternatives to prison or reducing the length of the prison sentence imposed. In some cases, section 718.2(e) was considered applied when the
judge took a restorative justice approach and imposed a sentence that would be meaningful to the offender, the victim, and the community.

It was possible to place the majority of the cases into one of three main groups, according to the reasons provided for why section 718.2(e) was applied. These reasons stand in contrast to some of the reasons provided by judges for not applying section 718.2(e) as discussed in the previous chapter. The next chapter provides a discussion of the findings in these two chapters and of section 718.2(e) generally.

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65 The remaining 10 cases could not be placed into these categories, so they are presented separately.
CHAPTER SIX: DISCUSSION

Section 718.2(e) was added to the Criminal Code in 1996 as a response to Canada's high incarceration rate, especially for Aboriginal offenders. Judges were instructed to use incarceration as a "last resort" in sentencing, and to pay particular attention to the circumstances of Aboriginal offenders when determining a suitable sentence. This somewhat vague directive was clarified three years later by the Supreme Court of Canada in R. v. Gladue. In this ruling, the Court outlined in detail the circumstances of Aboriginal offenders and the unique problems they face when they come into contact with the criminal justice system. Recognizing that incarceration has historically been an ineffective response to Aboriginal offenders, the Court instructed judges on factors to consider when sentencing Aboriginal offenders. The Supreme Court rejected the argument that section 718.2(e) was simply codification of existing sentencing practice and directed judges to use a different analysis in their sentencing.

The objective of this dissertation was to review the cases that have used section 718.2(e) in order to determine if, how and why it is being taken into consideration and applied by the courts. Obviously, if the majority of judges disregard section 718.2(e) in their sentencing, then the intent of Parliament's and the Supreme Court's directive has not been fully met. A review of the available case law reveals that while some judges are implementing section 718.2(e) when sentencing Aboriginal offenders, there are also a number of judges who are not.
The research identified 12 hypothetical constructs for why section 718.2(e) was not being applied and three for why it was when sentencing Aboriginal offenders. These hypotheses are thoroughly discussed in Chapters Four and Five. It is however, worth summarizing both sets of hypotheses here. The research in this dissertation found that section 718.2(e) was not being applied for the following reasons:

1. The new shift to restorative justice found in section 718.2(e) stands in stark contrast to the retributivist approach that judges have historically employed in sentencing.

2. Judges may be reluctant to apply section 718.2(e) because of the disparity in sentencing that it would appear to cause.

3. The influence of appellate courts may reduce the amount of discretion that sentencing judges actually have.

4. The ambiguity about when to use a restorative approach (i.e. for what crimes) may cause some reluctance among judges to actually use it.

5. Judges may be concerned that the public will perceive sentencing Aboriginal offenders differently as a form of "race-based justice system" whereby Aboriginal offenders are treated more leniently than non-Aboriginal offenders.

6. There may be insufficient information available to a judge regarding a particular offender to preclude the application of section 718.2(e).

7. The concept of "Aboriginal community" held by many people in the legal community and the public is too narrow and judges may exclude certain offenders from a section 718.2(e) analysis because they are not regarded as a member of the Aboriginal community.

8. Judges may be reluctant to apply section 718.2(e) in their sentencing because of a belief that returning an offender to the community may be counter-productive, for either the offender or the community or both.

9. The judge may conclude that the Aboriginal status of the offender has no bearing on the crime.
10. Judges may not use alternatives to prison because they believe a prison sentence can achieve restorative goals.

11. Judges may be reluctant to use section 718.2(e) in cases traditionally calling for a prison sentence.

12. Some judges appear to be ignoring or rejecting section 718.2(e) outright, making no reference to the particular circumstances of the Aboriginal offender before them for sentencing.

Section 718.2(e) was applied for the following reasons:

1. A recognition by the judge that the Aboriginal status of the offender contributed to their crime.

2. A belief that deterrence and denunciation can be met through a conditional sentence.

3. A belief that the rehabilitation of the offender must take priority in sentencing.

An analysis of the data based on the above hypotheses revealed that a number of judges are not following the intent of section 718.2(e) by using alternatives to incarceration.

Furthermore, statistics show that the Aboriginal incarceration rate has not changed significantly since the implementation of section 718.2(e). For example, in a Manitoba government report entitled “Aboriginal People in Manitoba 2000”, the following finding from Statistics Canada was cited,

The over-representation of Aboriginal persons in the federal prison population is worsening. Aboriginal persons accounted for 11% of admissions to federal penitentiaries in 1991-92, 15% in 1996-97 and 17% in 1997-98. (Aboriginal persons represent 2% of the adult population in Canada) (2003, p. 1).

This finding suggests that the directive to judges from the Supreme Court is not yet being fully implemented when sentencing Aboriginal offenders. The reasons are
varied, as evident from the review of the written decisions discussed in the previous two chapters. A careful reading of these decisions reveals that certain “themes” emerge regarding reasons for not implementing section 718.2(e). These include themes such as ambiguity about sentencing goals and how to best achieve them, themes regarding concerns about disparity that may result from section 718.2(e), and themes centering on the lack of information – either about the offender or section 718.2(e) itself. These three themes deserve further discussion.

Sentencing Goals

With respect to sentencing goals, this research confirms the idea that sentencing is a complex human process and that sentences imposed vary, at least in part, according to the beliefs of the judges doing the sentencing. This is especially apparent with conditional sentencing. While some judges are using conditional sentences when sentencing Aboriginal offenders, which is consistent with section 718.2(e), other judges are not. The main reason given for not using conditional sentences is the belief that these sentences cannot effectively achieve the goals of deterrence and denunciation, or similarly, that incarceration is the only means to effectively achieve these goals.

However, this belief is not consistent among all judges. This is evident in a subsection of Chapter Five (“Section 718.2(e) Applied”) of this dissertation, where there were a number of cases in which judges imposed a conditional sentence and specifically stated that deterrence and denunciation could be achieved by its use. This is a controversial issue that needs clarification for the sentencing courts. Whether or not
conditional sentences are used seems to be dependent upon the judge’s personal opinion on the issue, and this would appear to result in disparity among cases. Division on this issue exists at the Court of Appeal level as well. For example, a recent Regina Leader Post article describes a case in which a sexual offender was sent to prison for nine months after the Crown appealed his 23 month conditional sentence for child sexual abuse. The reason given for substituting the conditional sentence with a prison term was denunciation. However, the decision to intervene was not unanimous, as there was one dissenting judge who said that in her opinion a conditional sentence could denounce and deter this crime (Pacholik, 2003).

The conditional sentence was added to the Criminal Code in 1996 and was created as an alternative to imprisonment. Under this new sentence, less serious offenders could be allowed to serve their sentence in the community under certain conditions. There were four justifications for creating this alternative: 1) it would lower incarceration rates; 2) the belief that prison is not necessary for non-violent offenders; 3) a recognition of the harmful effects that prison may have on offenders, and its questionable effectiveness as a deterrent; and 4) lower costs for the criminal justice system by not incarcerating as many offenders (Gemmel, 1999, p. 66-7).

There are certain prerequisites that must be met in order for a conditional sentence to be imposed by a judge. These prerequisites are summarized by Gemmel:

1. The court must impose a sentence of imprisonment of less than two years.
2. The offence for which the court is sentencing the offender cannot be punishable by a minimum term of imprisonment.
3. Serving the sentence in the community would not endanger the safety of the community.
4. Serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2. (Gemmell, 1999, p.67).

These prerequisites are broad enough that theoretically there are few offences that could not be punished with a conditional sentence, as most sentences are less than two years in length (Gemmell, 1999). Once these prerequisites are met, it is up to the individual judge to decide whether or not to impose a conditional sentence. The main problem appears to be that many judges still do not believe that conditional sentences can adequately achieve the goals of denunciation and deterrence, and that these goals can only be met by a prison sentence. Gemmel (1999) commented on this judicial division, writing that “…conditional sentences do not appear to convey the necessary public messages of general deterrence, denunciation and retribution. In fact, the imposition of a conditional sentence could be said to subvert the message that the original sentence of imprisonment was meant to communicate” (p. 64).

Public reaction to and perception of conditional sentences seems to be at the heart of the issue here. Concern about how a conditional sentence will be received by the public may prevent judges from using them. The solution, at least in part, according to Gemmel (1999), lies in educating the public about the efficiency and benefits of conditional sentences thereby clearing up any misconceptions about conditional sentences. For example, Gemmel advises,

If the public (and ultimately the courts) regard conditional sentences as allowing offenders who by rights should be sent to jail to escape punishment, then they will be used less and less as an alternative to imprisonment and increasingly as a substitute for the less onerous sanction of probation. On the other hand, if the courts (and ultimately the public) come to see that the relatively widespread use of conditional sentences
instead of jail sentences leads not to a rise in the crime rate, but rather to a reduction in correctional budgets and the promotion of rehabilitation of offenders, then they will succeed in becoming a true alternative to incarceration (p. 66).

It appears that the public and some judges will need some convincing about the benefits of conditional sentences before they are willing to accept them as legitimate sentencing practice. The reduction in cost to the criminal justice system is something that is readily observable, but the effects on the crime rate can only be determined by long-term studies. As conditions are now, it appears that the use of conditional sentences will remain the decision of the individual judges, based on their own personal beliefs. Some judges will probably continue to use incarceration as a sanction, even when the conditions for a conditional sentence have been met while other judges who take a more progressive approach to sentencing and who would have sought alternatives to prison regardless, will likely use conditional sentences wherever possible. In this sense, the landscape of judging will probably remain unchanged.

Roberts (1999b) also identifies public reaction to conditional sentencing as a cause of judges’ reluctance to use the disposition. He claims that since Canadians are already dissatisfied with sentencing patterns in Canada, the conditional sentence may be viewed by members of the public as yet another example of leniency in sentencing. The public may not be accepting of a prison sentence in which the offender does not spend any time in prison. Roberts speculates that this view may only change if the conditions imposed are sufficiently onerous, that is, more so than a probation order, for example (p. 89).
Roberts recommends that public confidence and acceptance of conditional sentences can be increased by making five changes. These changes include 1) lowering the criteria for a conditional sentences to prison sentences of less than one year; 2) limit their use to certain offenders, non-violent or first time offenders, for example; 3) make punishment for breach of conditions more severe; 4) make the conditions of the sentence as punitive as the term of imprisonment it replaces; and 5) use split sentences: part of the sentence would be served in prison followed by a period served in the community (1999b, p. 90-4).

Under current legislation, even when the four prerequisites for a conditional sentence are met, the judge still has the discretion to not impose a conditional sentence, as can be seen in some of the cases reviewed in this dissertation. It would appear that more guidelines and instruction from Parliament or the higher courts are needed if this new sentencing provision is to have a significant impact on our incarceration rates. Gemmel (1999) eloquently summarizes this problematic issue, and its potential for failure if left unaddressed,

In the final analysis, the conditional sentencing provisions leave a great deal of discretion to the courts to develop, on a case-by-case basis, their own doctrines and principles about when a conditional sentence is appropriate, much like they had had to do in the past when deciding when jail was necessary and when a fine would do. How successful this process will be remains to be seen: after all, it was these same courts acting on the same case-by-case basis that created the high rate of incarceration that Parliament hoped partially to rectify through the mechanism of the conditional sentence (p. 69).

Conditional sentences are related to section 718.2(e), since the use of conditional sentences is one way of avoiding incarceration as a sentence. As noted, there seems to be
a concern among some judges about conditional sentences and a general reluctance to use them. R. v. Proulx, a unanimous decision rendered by the Supreme Court in 2000, set out to clarify the use of conditional sentences, but with apparently little effect. As with *Gladue*, it appears that more guidance and more time is needed for these changes to take effect. Conditional sentences and section 718.2(e) are related, as both involve alternatives to incarceration, so it follows that clarification and more direction for judges on conditional sentences should increase the application of section 718.2(e) in sentencing.

Related to this, is the issue of ambiguity or mixing of retributivist and restorative goals. This issue was not identified specifically by Haslip, but emerged out of my analysis of the cases. In these cases (4), the judge felt that prison was necessary for the offender’s rehabilitation, or that prison should be used to achieve restorative goals. However, prison as a means of rehabilitation is not a commonly held view. In fact, as Roberts and Cole (1999) note, while rehabilitation is a noble sentencing goal, prison is not the best setting in which to achieve it. They write:

There is general agreement now, recognized by Parliament, that for many offenders, imprisonment is not an appropriate route to rehabilitation. Although a number of rehabilitation programs are offered in Canada’s penal institutions, the carceral milieu is sufficiently harmful that judges use imprisonment to achieve other sentencing goals and attempt to rehabilitate offenders by means of a noncustodial sentence, such as probation (pp. 9-10).

Therefore, using the goal of rehabilitation as a justification for sending an offender to prison appears to be inconsistent with mainstream sentencing practice, and appears to be a mixing of retributive and restorative elements.
Sentencing Disparity

The “theme” of sentencing disparity frequently appears as a concern in many of the judges’ written reasons for sentence. It is another reason why judges are frequently not implementing section 718.2(e). A most poignant example of a judge expressing concern over the disparity that section 718.2(e) may appear to create can be found in the comments of the judge in R. v. Ross. Judge de Villiers stated,

Mr. Gardiner [defence counsel] in an eloquent submission, dwelling on past injustices suffered by many aboriginal persons, submits that Parliament’s intention was that where all other circumstances are equal, an aboriginal offender must be punished more leniently than a non-aboriginal offender. Implicit in this submission is that members of other races, whatever continent they or their ancestors came from, must be punished more harshly than aboriginal who commit the same crimes and have the same personal circumstances. I reject that submission. Notwithstanding the enactment of s. 718.2(e) appellate courts in Western Canada have refused to embrace the notion of hereditary victimhood as a mitigating factor in sentencing…. One such fundamental purpose of sentencing is to contribute to respect for the law. If the courts were to be seen as automatically favouring aboriginal offenders, Canadians of other races and ancestry would soon lose all respect for the law (paras. 18-20, 30).

To review, concerns over disparity were the theme in Haslip’s second, third and fifth hypotheses discussed in Chapter Four.

On this issue of the difference in treatment between Aboriginal offenders and non-Aboriginal offenders, it must be noted that judges do not sentence in a social vacuum, and their decisions often come under public scrutiny. At this point in time, the public does not seem very accepting of section 718.2(e) because of the concerns outlined above. This assumption can be derived in part from the negative media attention that section 718.2(e) has generated. We know that public attitudes about sentencing are
influenced by the media, as this is often the public’s main source of information about sentencing (Roberts, 1999b). Many of the news articles that have been published since the introduction of section 718.2(e) have been quite critical of treating Aboriginal offenders differently than non-Aboriginal offenders.

For example, the Toronto Sun published an article entitled, “‘Get out of Jail Free’ card for natives?” (Mandel, 1999). Another article in the Ottawa Citizen carried the headline “Should ‘Indianness’ mitigate sentence?” (Ross, 1998). A Globe and Mail article, entitled “A messy prescription for native offenders,” included statements such as “...the law for natives is not supposed to be punitive” and “...Canada has what amounts to separate justice for native peoples within the mainstream system.” Furthermore, in this article, referring specifically to section 718.2(e), the author writes, “Got that? Jail is a last resort for everyone, but especially for some” (2002, p. A12). A National Post headline reads, “Woman cites Metis heritage as reason for light sentence” (Bell, 1999). An internet magazine, Reason Online, published a blurb about the Gladue case and another case in which a woman who killed her husband was asking for sentencing leniency under section 718.2(e). The author of the article wrote, “If the two win their cases, it could make marriage to a Canadian Indian a dangerous thing” (April, 1999).

Concern by judges about treating Aboriginal and non-Aboriginal offenders differently at sentencing may be based on a concern about public reaction to their sentencing decisions. Public opinion is described by Roberts and Cole (1999) as “...one of the major problems associated with the sentencing process” (p. 19). As noted above, the public is often critical of the sentences that are handed down, believing that judges are
too lenient, and this is before taking the effects of section 718.2(e) into account. There are several explanations for why the media is the prime source of public misinformation. The first reason involves bias in terms of what cases the media chooses to report. Research on the matter indicates that, while violent crimes make up the majority of the news reports on crime, they represent only 17 percent of all crimes (Roberts, 1999, p. 139). Furthermore, while the media mainly reports on the high profile cases, they generally only report on the result (i.e. the sentence) and do not provide information about the context and the rationale for the sentence provided by the judge. Judges who are wary of the reaction to their sentencing from an already disapproving public may be reluctant to use section 718.2(e) in their sentencing because of the additional public perception of sentencing differentials between Aboriginal and non-Aboriginal offenders.

**Informational Issues**

A final theme in the cases in which section 718.2(e) was not applied involves various informational issues, specifically with receiving or interpreting and applying information about the offender. In some cases judges cannot make an informed analysis because relevant information about the offender or alternatives to incarceration are not provided to them. In other cases, the relevant information is supplied, but the judges do not consider it relevant to a section 718.2(e) analysis, thereby disregarding the information.

The fact that even a small number of cases came before the court with little or no personal information about the offender being available to the judge suggests that the courts need clarification about what personal factors and conditions are relevant and
required for consideration under section 718.2(e). For example, in cases where an
Aboriginal offender had been raised off reserve, was gainfully employed or was well
educated, the judge frequently stated that the offender’s Aboriginal status had no bearing
on their criminal offending. In other words, the judge ignored the intent of section
718.2(e) and used the accused’s off-reserve lifestyle against them. The following cases
make this point.

In R. v. Birchall, a case in which section 718.2(e) was not applied, the court noted
that the offender had not been raised on a reserve, had graduated from high school and
was attending university. In R. v. Ear, another case in which section 718.2(e) was not
applied it was noted that Ear was employed (which should have worked in his favour for
a conditional sentence). In this particular case, it is interesting to note that the judge
specifically acknowledged that the offender had an alcohol problem. However, the
source of the problem was unknown and the judge speculated that in some communities
unemployment is a source of alcohol abuse. Because Ear was employed, the judge
appears to have dismissed the idea that Ear’s status as an Aboriginal person had anything
to do with his crime.

In R. v. Moyan, the judge appears to have dismissed section 718.2(e) because
Moyan was not raised in an Aboriginal community. The judge specifically commented
that in his or her opinion, section 718.2(e) only applies to offenders raised in an
Aboriginal community as it is intended to address cultural differences and considerations
that an Aboriginal offender may have faced, not “racial factors.” The judge is in effect
dismissing the possibility that Aboriginal persons face certain difficulties in Canadian
society due to the fact that they are Aboriginal. Furthermore, the Supreme Court of Canada did address this issue in *Gladue*, when it stated that section 718.2(e) applies to all offenders regardless of whether or not they were raised on a reserve.

In *R. v. Ross*, the judge was also reluctant to apply section 718.2(e) simply because the offender was Aboriginal. The judge in this case did not agree with treating Aboriginal offenders differently, and raised the question of the problems involved in determining who is Aboriginal. The judge equated this practice with apartheid South Africa and questioned, "Must the courts of this country now embark on the same kind of racist inquiry for sentencing purposes?" (para. 13). In terms of the offender before the court, the judge noted that while her parents had a problem with alcohol and violence, Ross had the same educational opportunities as other non-Aboriginal members of her community and her father was employed. Therefore, the judge concluded that Ross had not faced any discrimination based on her race, and, as a result, it was not a factor in her crime. Furthermore, the judge concluded that, because Ross was employed at the time, her crime (trafficking in drugs) was committed out of greed, not necessity.

While the Supreme Court in *Gladue* directs judges to apply section 718.2(e) when sentencing *all* Aboriginal offenders, it appears that judges make their own determinations about which cases section 718.2(e) will apply, and they may be less likely to apply the provision if the offender has not been raised in an Aboriginal environment. Again, it appears that there is some reluctance to treating Aboriginal offenders differently from non-Aboriginal offenders, which is perhaps erroneously interpreted as being a consideration to be based solely on the race of the offender. For example, one judge
commented, “In this case I cannot say ... that this is one of those cases in which the Aboriginal status naturally should have reduced the sentence which otherwise was appropriate for the offence” (R. v. P.T.C., para. 14). So, while the stated justification for not applying section 718.2(e) in many of these cases is the lack of connection between the background of the offender and the crime, it appears that concerns over disparity in sentencing between Aboriginal and non-Aboriginal offenders, or a rejection of section 718.2(e) as a form of “race-based justice”, may also be underlying issues for these judges as well.

Another related issue is that judges appear to be unclear as to for what offences it is appropriate to use section 718.2(e) for when sentencing. For example, judges appear to be less likely to use alternatives to incarceration for more serious offences. In particular, many of the cases in which section 718.2(e) was not applied involved sexual offences. The Supreme Court did comment on this issue in R. v. Wells, in which it was written, “in appropriate circumstances, a sentencing judge may accord the greatest weight to the concept of restorative justice, notwithstanding that an aboriginal offender has committed a serious crime” (para. 22). Furthermore, in my review of the cases in which section 718.2(e) was applied, some cases did involve serious crimes such as armed robbery, assault with a weapon, aggravated assault, sexual assault, and dangerous driving causing death. In many of these cases a conditional sentence was imposed, but even in the cases in which the offender was sent to prison, judges who abided by the directive of section 718.2(e) took the sentence length into consideration. These cases are evidence that section 718.2(e) can be applied even when the offence is a serious one. However, since
some judges are not using section 718.2(e) in more serious cases, it is clear that more clarification and direction about the use of section 718.2(e) is needed on this issue.

Conclusions

The judge's stated reasons for not applying section 718.2(e) are varied, and reflect a number of concerns and, at times, perhaps misperceptions. While the inconsistency and contradictions in its implementation are perhaps a result of the fact that it is a relatively new directive, what is apparent is that more clarification is needed if this provision is going to be successful in its intended purpose of reducing the number of Aboriginal offenders being sentenced to prison.

It has been noted that the reasons for whether or not a judge applies section 718.2(e) and the amount of variation that occurs in the sentencing can be grouped within certain themes. However, the most prevalent factor in determining if and how section 718.2(e) will be applied appears to be found in the individual characteristics of the judge. A myriad of factors determine the sentence that an Aboriginal offender will receive, and these various factors have different weights and significance in each case, but the variation among judge's opinions and beliefs seems to be the overarching determining factor. The individualized approach to sentencing in place today means that variation in sentences will continue. As Judge David Cole commented in a recent newspaper article,

... differing sentences for similar crimes are inevitable. If they are dramatic, they can raise troubling questions of fairness... The nature of an offence and the specific offender can account for many differences ... but it is jarring to see two entirely different results when the cases are quite similar (Makin, 2003, p. F6).
While Judge Cole was referring specifically to pre-trial negotiations and plea bargaining, the fact remains that sentencing disparity continues, and whether or not an Aboriginal offender will be sent to prison remains at the discretion of the individual judge. This means that in its current use, section 718.2(e) is going to have little impact on the number of Aboriginal offenders being sent to prison. Many of the reasons offered by judges for not implementing section 718.2(e) and finding alternatives to incarceration are based on personal penal philosophies. Changing the personal philosophies of people is a daunting path to follow in our search for judicial equality.

The effects of using alternatives to prison must be monitored over time. Future research must determine if those sentenced under section 718.2(e) avoid future offending. If there is a reduction in recidivism for these offenders, then the judiciary and ultimately the public may become more accepting of section 718.2(e). However, as was evident in many of the cases reviewed, judges hold strong opinions about the goals of sentencing and how best to achieve them. Older judges in particular may not be willing to change those opinions. The same is true of the public who have traditionally been misinformed about the issues, and critical about the way in which many offenders are sentenced.

The difficulties associated with changing attitudes is another reason why it may take more time to have section 718.2(e) accepted as standard practice in the courts.

While Gemmel refers specifically to conditional sentences, this message is applicable to section 718.2(e) as well since the two issues are interrelated (section 718.2(e) directs judges to use alternatives to imprisonment). Gemmel (1999) writes,

The notion of a generous granting of conditional sentence as an alternative to imprisonment has not met with widespread approval by either the
judiciary, many of whom have tended to remain wedded to their old reliance on imprisonment, or some elements of the public, who have seen conditional sentences as the remittance of punishment rather than a viable alternative to jail. These two phenomena are related, as the courts prefer to reflect existing social norms rather than to initiate changes. Convincing the public at large of the justice of a conditional sentence will take some doing ... In today's political climate, punishing criminals is popular; releasing them back into the community is not... Only time will tell whether the public and the judiciary can come to terms with what amounts to an easing of the penal regime in Canada in a time of increasing political popularity for more severe criminal laws and harsher penalties (p. 73).

If Gemmel is correct, change is possible but it will take time. Changes within the criminal justice system are often slow to take effect, and may be impeded by individuals within the system who are not willing to change their ways. As previously noted, the criminal justice system is made up of individuals who have their own preferences and reasons for doing things the way they do.

There appears then to be no consistency in the use of section 718.2(e) in sentencing, and the findings of my research confirm what was already known about sentencing in general. Even though the Criminal Code outlines the basic goals of sentencing, the judges are still left with considerable discretion on how to achieve those goals. Roberts and von Hirsch (1999) succinctly summarize the problem, and while they are referring to how judges sentence in terms of the goals of sentencing, the same can also be said of how judges interpret and apply section 718.2(e). They write, “This choice [of sentencing goals] provides judges with a dilemma that they will probably resolve in their own individual ways, just as they have done in the past. If changing trial court sentencing practices is one of the goals ... it is unlikely to be realised. The likely consequence is that judges will continue to sentence as before” (p. 54).
The use of section 718.2(e) must be consistent with the other goals and principles of sentencing as set out in the Criminal Code. Judges are given the latitude to determine what goals are to be achieved and what messages are to be conveyed through their sentencing in each particular case. Judging is a complex activity and even though the goals and purposes of sentencing are set out in the Criminal Code, these goals and purposes can be contradictory. What is in the best interests of society is not always in the best interests of the offender. It is up to the judge to reconcile these interests as he or she sees fit. Furthermore, judges must take into consideration a number of factors relating to both the past (the offender’s offence and background) and the future (the offender and other’s potential future offending). To make things even more complicated, judges must sentence under the watchful eye of an already critical public as well as face possible review by the higher courts. When it comes to the roles and activities of judges, “Sentencing is without a doubt the hardest part” says Judge David Cole (Makin, 2003, p. F7). The source of this quote is appropriately titled, “What we do is desperately human.”

Thus, the nature and severity of a sentence in any case is largely dependent upon the sentencing purposes that the presiding judge personally subscribes to (Roberts and Cole, 1999). This is not to say that other factors are not relevant, such as the background of the offender and the seriousness of the crime and the resulting need for deterrence and/or denunciation - quite the contrary in fact. All of these things are usually considered in each case. However, when arriving at a sentence, the determining criterion seems to be not only the goals of sentencing necessary in each case, but also how to achieve those goals. In the case of alternatives to incarceration such as conditional sentences, two
judges may have similar views on the necessary sentencing goals in a given case, but they may have quite different views on how to achieve those goals. So, when Roberts and Cole (1999) conclude, "The lesson for sentencing reform is clear. If reformers wish to reduce the amount of disparity in sentencing, judges will have to be given some guidance as to which sentencing purpose is more important" (p. 12), I would argue that this is an important first step, but that it is incomplete. Judges also need more specific guidance on how to achieve those sentencing purposes and goals. For example, there needs to be some resolution on whether or not conditional sentences can adequately achieve the goals of deterrence and denunciation.

Perhaps only time will convince those who are skeptical about the utility of section 718.2(e). Sending people to prison as a crime reduction strategy has generally been ineffective, and perhaps even contributes to increases in criminal offending. As Roberts and Cole (1999) note, "Incarceration is assumed to do little or nothing for an offender, it is directed exclusively toward the interests of society" (p. 9). However, these societal benefits are short lived. It is true that by separating the offender from society they cannot commit crimes while they are in prison, but eventually they return to society, and perhaps may commit more crimes. Not insignificant recidivism rates are an indication that traditional sentencing practices need reconsideration. Section 718.2(e) and some of the other sentencing reforms are a first step in moving towards a more restorative approach to justice in which the needs and interests of the offender and society are taken into consideration.
Having considered the above issues and reviewed the available case law, it appears that section 718.2(e) is not being fully and consistently applied by the courts.

However, it is too early to conclude that section 718.2(e) has failed, as social change is often slow and cumbersome. At the very least, it is encouraging that the number of cases by year that mention section 718.2(e) is increasing. Table 1 presents the number of cases each year that made reference to section 718.2(e), categorized by whether or not section 718.2(e) was applied.

Table 1: Number of Cases Each Year that Applied or Did Not Apply Section 718.2(e)*

<table>
<thead>
<tr>
<th>YEAR</th>
<th>S.718.2(e) APPLIED</th>
<th>S.718.2(e) NOT APPLIED</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>1997</td>
<td>2</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>1998</td>
<td>5</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>1999</td>
<td>15</td>
<td>13</td>
<td>28</td>
</tr>
<tr>
<td>2000</td>
<td>11</td>
<td>19</td>
<td>30</td>
</tr>
<tr>
<td>2001</td>
<td>14</td>
<td>16</td>
<td>30</td>
</tr>
<tr>
<td>TOTAL</td>
<td>48</td>
<td>58</td>
<td>106</td>
</tr>
</tbody>
</table>

* From the cases reviewed in this dissertation

As evident in the table, between 1996 and 2001, the number of cases that made reference to section 718.2(e) increased each year. Statistics were not collected post 2001, so it is not possible to determine here if that increase has continued. This increase in the cases using section 718.2(e) perhaps implies a growing jurisprudence and more direction for judges to inform their decision-making.

Section 718.2(e) is an attempt to lower the numbers of Aboriginal peoples in our prisons, but this is not to suggest that these efforts should be limited to sentencing
changes. The question still needs to be asked, what else can be done to rectify the problem of the over-incarceration of Aboriginal peoples. This is not an easy question to answer, and it is not the primary intent of this dissertation to address this issue. Indeed, because of the complex array of historical, social, economical and cultural forces that contribute to this phenomenon, it could even be argued that this is not a question for sociologists or criminologists alone to answer.

While there can be no question that the over-incarceration of Aboriginal peoples is a problem that generates multiple secondary problems for all concerned, its resolution calls for meaningful input from all sectors of society. Certainly the participation of the Aboriginal community is necessary here, as is the knowledge and compassion of much of the legal community. The judiciary must be more of one mind in recognizing that collective action and thought on their part is essential for a successful resolution of this issue, and that continued resistance to section 718.2(e) severely undermines the efforts of those who are working towards its implementation.

While the issue of how to best resolve the problem of over-incarceration is beyond the scope of this dissertation, it would seem obvious that the judges themselves have an integral role to play and this fact was recognized by Parliament when they introduced section 718.2(e). However, the responsibility is not one that judges bear alone, nor should they be held solely accountable for the problem of Aboriginal over-incarceration. Police, social workers, prison workers and social scientists must also participate if this effort is to be successful. Governments at all levels must be prepared to offer both direction and financial support. Finally, the education system must endeavor
to educate young people regarding the history of oppression suffered by Aboriginal peoples in Canada, a topic which to date has been itself subverted and suppressed.

While at this point it seems that section 718.2(e) is not being utilized to the full extent that Parliament and the Supreme Court intended, it is too early to conclude that that this directive to judges is meaningless. Judges enjoy a certain degree of discretion in their sentencing, and while section 718.2(e) is a directive that judges are strongly encouraged to use, there is no way of enforcing the practice. Ultimately, and for better or for worse, it is still the responsibility of the individual judges to determine whether or not to use alternatives to incarceration or reduce the length of a prison sentence given to an Aboriginal offender.

While it is up to the individual judges as to whether or not they will apply section 718.2(e) in their sentencing, one should not assume that section 718.2(e) itself is clear and free of ambiguity. Even though the Supreme Court in Gladue attempted to provide some clarification, there still remains much ambiguity about how and when to use section 718.2(e). One of the main issues that remains to be resolved is the question of whether section 718.2(e) should be applied for all Aboriginal offenders simply because they are Aboriginal, or whether Aboriginal offenders were singled out merely because it is likely that the circumstances that judges are supposed to make note of will be present in most cases involving Aboriginal offenders. This ambiguity seems to be at the root of much of the controversy. If the former is true, this implies a different form of justice based on race - one that may exclude other offenders who face similar circumstances but who are not Aboriginal. In a system of justice that espouses notions of equality in the treatment
of all who come before it, judges may have reservations about treating a group of offenders differently based on race.

What is clear at this point is that more direction and guidance to judges is needed in order to clear up any existing ambiguities or misconceptions about how and when to use section 718.2(e). Reluctance to use alternatives to incarceration is not always the result of a misreading of section 718.2(e) or Gladue, and as the preceding discussion indicates, the directive is still open to interpretation. While some of the interpretations and reasons for not using section 718.2(e) were revealed in this dissertation, it must also be kept in mind that the cases reviewed in this dissertation are only a portion of the cases that go through the courts across Canada. Not all cases are written up, and some cases that are written up may not get included in the electronic databases. However, from the cases reviewed here, it is possible to shed light on at least some of the reasons for why judges are not implementing section 718.2(e).

It is only once these reasons are identified that steps can be taken to address the concerns and reluctance of judges to use the directive in their sentencing. Redress could come in a number of forms - such as further direction in another ruling on the issue from the Supreme Court of Canada, or through informational sessions or literature for judges and others in the legal profession. Addressing some of these issues in law classes will ensure that graduating lawyers and future judges will have been exposed to restorative justice ideas in their legal training. Just as important as putting resources into educating judges on the use of section 718.2(e), resources also need to be committed to the
alternatives to incarceration that judges are being encouraged to use. Philosophical shifts among judges are irrelevant if the means are not available to implement those changes.

In the meantime, Aboriginal offenders will probably continue to be over-represented in Canadian prisons. This is not in any way to suggest that a full-scale implementation of section 718.2(e) is the sole solution to over-incarceration. Indeed, I agree with the critics of section 718.2(e) who argue that this provision does nothing to address the social factors that contribute to offending, in either the Aboriginal or non-Aboriginal populations. However, in light of the view that prison is ineffective in terms of reducing future crime and perhaps exacerbates the problems that many of these people already face, section 718.2(e) and other restorative justice responses to crime should be welcomed as an alternative effort at crime reduction, one that takes into consideration and seeks to redress the hardships and discrimination that Aboriginal peoples in Canada have historically (and currently) face.

While much of this concluding discussion in this dissertation has focused on the fact that some judge’s are not implementing section 718.2(e) for a variety of reasons, it should not be overlooked that some judges are wholly embracing the directive. Manitoba Judge Kopstein, in R. v. Travers provides an excellent example of how section 718.2(e) is to be considered and applied when sentencing Aboriginal offenders. Kopstein’s views on the reason for the creation of section 718.2(e) are worth noting here:

European settlers imposed their laws on the Aboriginal population, and it may well be that even later because of bias against Aboriginal people, offenders among them did not receive equal treatment to that accorded non-Aboriginal offenders in terms of community based sentences. It is now, I believe, notorious that the bias and discrimination that permeated Aboriginal relations with the wider community and its laws cast
Aboriginal people into poverty, social alienation, alcoholism and distress. In that background lies the basis for the criminal activity that has led to their overpopulation in Canadian jails.

Section 718.2(e) is, for that reason remedial, as I understand Gladue, supra, to facilitate a reversal of the trend so far as a legislative initiative can do. It is for the judge presiding in an individual case, involving any Aboriginal offender, to respect that purpose and to reject jail unless the seriousness of the particular case and the particular factors or characteristics of the accused demand such a strong expression of denunciation and deterrence that nothing short of a custodial term will express it (paras.35-36).

This dissertation provides a glimpse into initial effectiveness of section 718.2(e) in its early stages. Future reviews such as this one can continue to monitor the progress of section 718.2(e) in terms of an increase in its use. Further reviews may also identify other reasons for judges’ reluctance to use section 718.2(e), reasons that were not discovered in this project. In order to gain a broader understanding of the directive, future research may also involve looking at how section 718.2(e) is being interpreted and applied when sentencing non-Aboriginal offenders. A comparison of this type may provide some insight into the impact of Aboriginal status on deciding sentence.
References


Cases Cited


Appendix I: R. v. Gladue
Criminal law -- Sentencing -- Aboriginal offenders -- Accused sentenced to three years' imprisonment after pleading guilty to manslaughter -- No special consideration given by sentencing judge to accused's aboriginal background -- Principles governing application of s. 718.2(e) of Criminal Code -- Class of aboriginal people coming within scope of provision -- Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(e).

The accused, an aboriginal woman, pled guilty to manslaughter for the killing of her common law husband and was sentenced to three years' imprisonment. On the night of the incident, the accused was celebrating her 19th birthday and drank beer with some friends and family members, including the victim. She suspected the victim was having an affair with her older sister and, when her sister left the party, followed by the victim, the accused told her friend, "He's going to get it. He's really going to get it this time". She later found the victim and her sister coming down the stairs together in her sister's home. She believed that they had been engaged in sexual activity. When the accused and the victim returned to their townhouse, they started to quarrel. During the argument, the accused confronted the victim with his infidelity and he told her that she was fat and ugly and not as good as the others. A few minutes later, the victim fled their home. The accused ran toward him with a large knife and stabbed him in the chest. When returning to her home, she was heard saying "I got you, you fucking bastard". There was also evidence indicating that she had stabbed the victim on the arm before he left the townhouse. At the time of the stabbing, the accused had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

At the sentencing hearing, the judge took into account several
mitigating factors. The accused was a young mother and, apart from an impaired driving conviction, she had no criminal record. Her family was supportive and, while on bail, she had attended alcohol abuse counselling and upgraded her education. The accused was provoked by the victim’s insulting behaviour and remarks. At the time of the offence, the accused had a hyperthyroid condition which caused her to overreact to emotional situations. She showed some signs of remorse and entered a plea of guilty. The sentencing judge also identified several aggravating circumstances. The accused stabbed the deceased twice, the second time after he had fled in an attempt to escape. From the remarks she made before and after the stabbing it was clear that the accused intended to harm the victim. Further, she was not afraid of the victim; she was the aggressor. The judge considered that the principles of denunciation and general deterrence must play a role in the present circumstances even though specific deterrence was not required. He also indicated that the sentence should take into account the need to rehabilitate the accused. The judge decided that a suspended sentence or a conditional sentence of imprisonment was not appropriate in this case. He noted that there were no special circumstances arising from the aboriginal status of the accused and the victim that he should take into consideration. Both were living in an urban area off-reserve and not “within the aboriginal community as such”. The sentencing judge concluded that the offence was a very serious one, for which the appropriate sentence was three years’ imprisonment. The majority of the Court of Appeal dismissed the accused’s appeal of her sentence.

Held: The appeal should be dismissed.

The considerations which should be taken into account by a judge sentencing an aboriginal offender have been summarized at para. 93 of the reasons for judgment. The following is a reflection of that summary.

Part XXIII of the Criminal Code codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence. In that Part, s. 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders. The provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision’s remedial purpose real force. Section 718.2(e) must be read in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. In determining a fit sentence, all principles and factors set out in that Part must be taken into consideration. Attention should be paid to the fact that Part XXIII, through certain provisions, has placed a new emphasis upon decreasing the use of incarceration.

Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. The effect of s. 718.2(e), however, is to alter the method of analysis which sentencing judges must use in determining a
fit sentence for aboriginal offenders. Section 718.2(e) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. In order to undertake these considerations the sentencing judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions, which in turn may come from representations of the relevant aboriginal community. The offender may waive the gathering of that information. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

If there is no alternative to incarceration the length of the term must be carefully considered. The jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence. However, s. 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. It is also unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term “community” must be defined broadly so as to include any network of support and interaction that might be available, including one in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

In this case, the sentencing judge may have erred in limiting the application of s. 718.2(e) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, he does not appear to have considered the systemic or background factors which may have influenced the accused to engage in criminal conduct, or the possibly distinct conception
of sentencing held by the accused, by the victim's family, and by their community. The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors. Although in most cases such errors would be sufficient to justify sending the matter back for a new sentencing hearing, in these circumstances it would not be in the interests of justice to order a new hearing in order to canvass the accused's circumstances as an aboriginal offender. Both the sentencing judge and all members of the Court of Appeal acknowledged that the offence was a particularly serious one. For that offence by this offender a sentence of three years' imprisonment was not unreasonable. More importantly, the accused was granted, subject to certain conditions, day parole after she had served six months in a correctional centre and, about a year ago, was granted full parole with the same conditions. The results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the accused and society.

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Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 15, 25.

Constitution Act, 1982, s. 35.

Criminal Code, R.S.C., 1985, c. C-46, Part XXIII [repl. 1995, c. 22, s. 6], ss. 718, 718.1, 718.2 [am. 1997, c. 23, s. 17], 742.1 [am. 1997, c. 18, s. 107].

Interpretation Act, R.S.C., 1985, c. I-21, s. 12.

Authors Cited


Gil D. McKinnon, Q.C., and Michael D. Smith, for the appellant.

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Kimberly Prost and Nancy L. Irving, for the intervener the Attorney General of Canada.

Goran Tomljanovic, for the intervener the Attorney General for Alberta.

Kent Roach and Kimberly R. Murray, for the intervener Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

//Cory and Iacobucci JJ.//

1 CORY AND IACOBUCCI JJ.-- On September 3, 1996, the new Part XXIII of the Criminal Code, R.S.C., 1985, c. C-46, pertaining to sentencing came into force. These provisions codify for the first time the fundamental purpose and principles of sentencing. This appeal is particularly concerned with the new s. 718.2(e). It provides that 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. This appeal must consider how this provision should be interpreted and applied.
I. Factual Background

2 The appellant, one of nine children, was born in McLennan, Alberta in 1976. Her mother, Marie Gladue, who was a Cree, left the family home in 1987 and died in a car accident in 1990. After 1987, the appellant and her siblings were raised by their father, Lloyd Chalifoux, a Metis. The appellant and the victim Reuben Beaver started to live together in 1993, when the appellant was 17 years old. Thereafter they had a daughter, Tanita. In August 1995, they moved to Nanaimo. Together with the appellant’s father and two of her siblings, Tara and Bianca Chalifoux, they lived in a townhouse complex. By September 1995, the appellant and Beaver were engaged to be married, and the appellant was five months pregnant with their second child, a boy, whom the appellant subsequently named Reuben Ambrose Beaver in honour of his father.

3 In the early evening of September 16, 1995, the appellant was celebrating her 19th birthday. She and Reuben Beaver, who was then 20, were drinking beer with some friends and family members in the townhouse complex. The appellant suspected that Beaver was having an affair with her older sister, Tara. During the course of the evening she voiced those suspicions to her friends. The appellant was obviously angry with Beaver. She said, “the next time he foils around on me, I’ll kill him”. The appellant told one of her friends that she wanted to test Beaver, and asked her friend to “hit on Reuben to see if he would go with her”, but the friend refused.

4 The appellant’s sister Tara left the party, followed by Beaver. After he had left, the appellant told her friend, “He’s going to get it. He’s really going to get it this time.” The appellant, on several occasions, tried to find Beaver and her sister. She eventually located them coming down the stairs together in her sister’s suite. The appellant suspected that they had been engaged in sexual activity and confronted her sister, saying, “You’re going to get it. How could you do this to me?”

5 The appellant and Beaver returned separately to their townhouse and they started to quarrel. During the argument, the appellant confronted him with his infidelity and he told her that she was fat and ugly and not as good as the others. A neighbour, Mr. Gretchin, who lived next door was awakened by some banging and shouting and a female voice saying “I’m sick and tired of you fooling around with other women.” The disturbance was becoming very loud and he decided to ask his neighbours to calm down. He heard the front door of the appellant’s residence slam. As he opened his own front door, he saw the appellant come running out of her suite. He also saw Reuben Beaver banging with both hands at Tara Chalifoux’s door down the hall saying, “Let me in. Let me in.”

6 Mr. Gretchin saw the appellant run toward Beaver with a large knife in her hand and, as she approached him, she told him that he had better run. Mr. Gretchin heard Beaver shriek in pain and saw him collapse in a pool of blood. The appellant had stabbed Beaver once in the left chest, and the knife had penetrated his heart. As the appellant went by on her return to her apartment, Mr. Gretchin heard her say, “I got you, you fucking bastard.” The appellant was described as jumping up and down as if she had
tagged someone. Mr. Gretchin said she did not appear to realize what she had done. At the time of the stabbing, the appellant had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

7 On June 3, 1996, the appellant was charged with second degree murder. On February 11, 1997, following a preliminary hearing and after a jury had been selected, the appellant entered a plea of guilty to manslaughter.

8 There was evidence which indicated that the appellant had stabbed Beaver before he fled from the apartment. A paring knife found on the living room floor of their apartment had a small amount of Beaver’s blood on it, and a small stab wound was located on Beaver’s right upper arm.

9 There was also evidence that Beaver had subjected the appellant to some physical abuse in June 1994, while the appellant was pregnant with their daughter Tanita. Beaver was convicted of assault, and was given a 15-day intermittent sentence with one year’s probation. The neighbour, Mr. Gretchin, told police that the noises emanating from the appellant’s and Beaver’s apartment suggested a fight, stating: “It sounded like someone got hit and furniture was sliding, like someone pushed around” and “The fight lasted five to ten minutes, it was like a wrestling match.” Bruises later observed on the appellant’s arm and in the collarbone area were consistent with her having been in a physical altercation on the night of the stabbing. However, the trial judge found that the facts as presented before him did not warrant a finding that the appellant was a “battered or fearful wife”.

10 The appellant’s sentencing took place 17 months after the stabbing. Pending her trial, she was released on bail and lived with her father. She took counselling for alcohol and drug abuse at Tilicum Haus Native Friendship Centre in Nanaimo, and completed Grade 10 and was about to start Grade 11. After the stabbing, the appellant was diagnosed as suffering from a hyperthyroid condition, which was said to produce an exaggerated reaction to any emotional situation. The appellant underwent radiation therapy to destroy some of her thyroid glands, and at the time of sentencing she was taking thyroid supplements which regulated her condition. During the time she was on bail, the appellant pleaded guilty to having breached her bail on one occasion by consuming alcohol.

11 At the sentencing hearing, when asked if she had anything to say, the appellant stated that she was sorry about what happened, that she did not intend to do it, and that she was sorry to Beaver’s family.

12 In his submissions on sentence at trial, the appellant’s counsel did not raise the fact that the appellant was an aboriginal offender but, when asked by the trial judge whether in fact the appellant was an aboriginal person, replied that she was Cree. When asked by the trial judge whether the town of McLennan, Alberta, where the appellant grew up, was an aboriginal community, defence counsel responded: “it’s just a regular community”. No other submissions were made at the sentencing hearing on the issue of the appellant’s aboriginal heritage. Defence counsel requested a suspended sentence or a conditional sentence of imprisonment. Crown counsel
argued in favour of a sentence of between three and five years' imprisonment.

13 The appellant was sentenced to three years' imprisonment and to a ten-year weapons prohibition. Her appeal of the sentence to the British Columbia Court of Appeal was dismissed.

II. Relevant Statutory Provisions

14 It may be helpful at this stage to set out ss. 718, 718.1 and 718.2 of the Criminal Code as well as s. 12 of the Interpretation Act, R.S.C., 1985, c. I-21.

Criminal Code

Purpose and Principles of Sentencing

718. [Purpose] The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

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

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

(d) to assist in rehabilitating offenders;

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

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 [Fundamental principle] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the
offender’s spouse or child,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(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.

Interpretation Act

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

III. Judicial History

A. Supreme Court of British Columbia

15 In his reasons, the trial judge took into account several mitigating factors. The appellant was only 20 years old at the time of sentence, and apart from an impaired driving conviction, she had no criminal record. She had two children and was expecting a third although he considered her pregnancy a neutral factor. Her family was supportive and she was attending alcohol abuse counselling and upgrading her education. The appellant was provoked by the deceased’s insulting behaviour and remarks. At the time of the offence, the appellant had a hyperthyroid condition which caused her to overreact to emotional situations. The appellant showed some signs of remorse and entered a plea of guilty.

16 On the other hand, the trial judge identified several aggravating circumstances. The appellant stabbed the deceased twice, the second time after he had fled in an attempt to escape. Also, the offence was of particular gravity. From the remarks she made before and after the stabbing it was very clear that the appellant intended to harm the deceased. Further, the appellant was not afraid of the deceased; indeed, she was the aggressor.

17 The trial judge considered that specific deterrence was not required
in the circumstances of this case. However, in his opinion the principles of denunciation and general deterrence must play a role. He was of the view that the sentence should also take into account the need to rehabilitate the appellant and give her some insight both into her conduct and the effect of her propensity to drink. The trial judge decided that in this case it was not appropriate to suspend the passing of sentence or to impose a conditional sentence.

18 The trial judge noted that both the appellant and the deceased were aboriginal, but stated that they were living in an urban area off-reserve and not "within the aboriginal community as such". He found that there were not any special circumstances arising from their aboriginal status that he should take into consideration. He stated that the offence was a very serious one, for which the appropriate sentence was three years’ imprisonment with a ten-year weapons prohibition.

B. Court of Appeal for British Columbia (1997), 98 B.C.A.C. 120

19 The appellant appealed her sentence of three years’ imprisonment, but not the ten-year weapons prohibition. She appealed on four grounds, only one of which is directly relevant, namely whether the trial judge failed to give appropriate consideration to the appellant’s circumstances as an aboriginal offender. The appellant also sought to adduce fresh evidence at her appeal regarding her efforts since the killing to maintain links with her aboriginal heritage. The fresh evidence showed that the appellant had applied to become a full status Cree, and that she had obtained that status for her daughter Tanita. She had also maintained contact with Beaver’s mother, who is a status Cree, and who was in turn assisting the appellant with the status applications.

20 The Court of Appeal unanimously concluded that the trial judge had erred in concluding that s. 718.2(e) did not apply because the appellant was not living on a reserve. However, Esson J.A. (Prowse J.A. concurring) found no error in the trial judge’s conclusion that, in this case, there was no basis for giving special consideration to the appellant’s aboriginal background. Esson J.A. noted that the appellant’s actions involved deliberation, motivation, and “an element of viciousness and persistence in the attack”, and that the killing constituted a “near murder” (p. 138). He found that, on the facts presented in this case, it could not be said that the sentence, if a fit one for a non-aboriginal person, would not also be fit for an aboriginal person. Esson J.A. concluded therefore that the trial judge did not err in not giving effect to the principle set out in s. 718.2(e) of the Criminal Code and dismissed the appeal. Although it is not entirely clear from the reasons of Esson J.A., he appears also to have dismissed the appellant’s application to adduce fresh evidence regarding her efforts to maintain links with her aboriginal heritage.

21 Rowles J.A. (dissenting) reviewed many reports and parliamentary debates and determined that the mischief that s. 718.2(e) was designed to remedy was the excessive use of incarceration generally, and the disproportionately high number of aboriginal people who are imprisoned, in particular. She stated that s. 718.2(e) invites recognition and amelioration of the impact which systemic discrimination in the criminal
justice system has upon aboriginal people. She referred to the importance of acknowledging and implementing the different conceptions of criminal justice and of appropriate criminal sanctions held by many aboriginal peoples, including, in particular, the conception of criminal justice as involving a strong restorative element.

22 In this case, Rowles J.A. agreed that the crime committed by the appellant was serious. The circumstances surrounding the offence were tragic for everyone, including the appellant’s children. Yet, the circumstances of the offence included provocation, superimposed on an undiagnosed medical problem affecting the appellant’s emotional stability. The offender was young and emotionally immature. She had an alcohol problem but no history of other criminal conduct or acts of violence. The success the appellant enjoyed while on bail awaiting trial showed that she was likely to be a good candidate for further rehabilitation. Rowles J.A. also referred favourably to the fresh evidence which showed that the appellant was taking steps to maintain links with her aboriginal heritage.

23 Rowles J.A. concluded that a sentence of three years’ imprisonment was excessive. The principles of general deterrence and denunciation had to be reflected in the sentence, but the sentence could have been designed to advance the appellant’s rehabilitation through a period of supervised probation. Rowles J.A. would have allowed the appeal and reduced the sentence to two years less a day to be followed by a three-year period of probation.

IV. Issue

24 The issue in this appeal is the proper interpretation and application to be given to s. 718.2(e) of the Criminal Code. The provision reads as follows:

718.2 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.

The question to be resolved is whether the majority of the British Columbia Court of Appeal erred in finding that, in the circumstances of this case, the trial judge correctly applied s. 718.2(e) in imposing a sentence of three years’ imprisonment. To answer this question, it will be necessary to determine the legislative purpose of s. 718.2(e), and, in particular, the words “with particular attention to the circumstances of aboriginal offenders”. The appeal requires this Court to begin the process of articulating the rules and principles that should govern the practical application of s. 718.2(e) of the Criminal Code by a trial judge.

V. Analysis
A. Introduction

25 As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act’s legislative history and the context of its enactment: Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at paras. 20-23; R. v. Chartrand, [1994] 2 S.C.R. 864, at p. 875; E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; Driedger on the Construction of Statutes (3rd ed. 1994), by R. Sullivan, at p. 131.

26 Also of importance in interpreting federal legislation is s. 12 of the federal Interpretation Act, which provides:

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

27 Section 718.2(e) has already received judicial consideration in several provincial appellate court decisions; see, e.g., R. v. McDonald (1997), 113 C.C.C. (3d) 418 (Sask. C.A.); R. v. J. (C.) (1997), 119 C.C.C. (3d) 444 (Nfld. C.A.); R. v. Wells (1998), 125 C.C.C. (3d) 129 (Alta. C.A.); R. v. Hunter (1998), 125 C.C.C. (3d) 121 (Alta. C.A.); R. v. Young (1998), 131 Man. R. (2d) 61 (C.A.). This is the first occasion on which this Court has had the opportunity to construe and apply the provision.

28 With this introduction, we now wish to discuss the wording of s. 718.2(e) and the scheme of Part XXIII of the Criminal Code, as well as the legislative history and the context behind s. 718.2(e), with the aim of determining and describing the circumstances of aboriginal offenders. This discussion is followed by a framework for the sentencing judge to use in sentencing an aboriginal offender. The reasons then deal with the specific facts and sentence in this case.

B. The Wording of Section 718.2(e) and the Scheme of Part XXIII

29 The interpretation of s. 718.2(e) must begin by considering its words in context. Although this appeal is ultimately concerned only with the meaning of the phrase “with particular attention to the circumstances of aboriginal offenders”, that phrase takes on meaning from the other words of s. 718.2(e), from the purpose and principles of sentencing set out in ss. 718-718.2, and from the overall scheme of Part XXIII.

30 The respondent observed that some caution is in order in construing s. 718.2(e), insofar as it would be inappropriate to prejudge the many other important issues which may be raised by the reforms but which are not specifically at issue here. However, it would be equally inappropriate to construe s. 718.2(e) in a vacuum, without considering the surrounding text which gives the provision its depth of meaning. To the extent that the
broader scheme of Part XXIII informs the proper construction to be given to s. 718.2(e), it will be necessary to draw at least some general conclusions about the new sentencing regime.

31 A core issue in this appeal is whether s. 718.2(e) should be understood as being remedial in nature, or whether s. 718.2(e), along with the other provisions of ss. 718 through 718.2, are simply a codification of existing sentencing principles. The respondent, although acknowledging that s. 718.2(e) was likely designed to encourage sentencing judges to experiment to some degree with alternatives to incarceration and to be sensitive to principles of restorative justice, at the same time favours the view that ss. 718-718.2 are largely a restatement of existing law. Alternatively, the appellant argues strongly that s. 718.2(e)’s specific reference to aboriginal offenders can have no purpose unless it effects a change in the law. The appellant advances the view that s. 718.2(e) is in fact an “affirmative action” provision justified under s. 15(2) of the Canadian Charter of Rights and Freedoms.

32 Section 12 of the Interpretation Act deems the purpose of the enactment of the new Part XXIII of the Criminal Code to be remedial in nature, and requires that all of the provisions of Part XXIII, including s. 718.2(e), be given a fair, large and liberal construction and interpretation in order to attain that remedial objective. However, the existence of s. 12 does not answer the essential question of what the remedial purpose of s. 718.2(e) is. One view is that the remedial purpose of ss. 718, 718.1 and 718.2 taken together was precisely to codify the purpose and existing principles of sentencing to provide more systematic guidance to sentencing judges in individual cases. Codification, under this view, is remedial in and of itself because it simplifies and adds structure to trial level sentencing decisions: see, e.g., McDonald, supra, at pp. 460-64, per Sherstobitoff J.A.

33 In our view, s. 718.2(e) is more than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists 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. It should be said that the words of s. 718.2(e) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders. What s. 718.2(e) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. In our view, the scheme of Part XXIII of the Criminal Code, the context underlying the enactment of s. 718.2(e), and the legislative history of the provision all support an interpretation of s. 718.2(e) as having this important remedial purpose.

34 In his submissions before this Court, counsel for the appellant expressed the fear that s. 718.2(e) might come to be interpreted and
applied in a manner which would have no real effect upon the day-to-day practice of sentencing aboriginal offenders in Canada. In light of the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system, we do not consider this fear to be unreasonable. In our view, s. 718.2(e) creates a judicial duty to give its remedial purpose real force.

35 Let us consider now the wording of s. 718.2(e) and its place within the overall scheme of Part XXIII of the Criminal Code.

36 Section 718.2(e) directs a court, in imposing a sentence, to consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, “with particular attention to the circumstances of aboriginal offenders”. The broad role of the provision is clear. As a general principle, s. 718.2(e) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.

37 The next question is the meaning to be attributed to the words “with particular attention to the circumstances of aboriginal offenders”. The phrase cannot be an instruction for judges to pay “more” attention when sentencing aboriginal offenders. It would be unreasonable to assume that Parliament intended sentencing judges to prefer certain categories of offenders over others. Neither can the phrase be merely an instruction to a sentencing judge to consider the circumstances of aboriginal offenders just as she or he would consider the circumstances of any other offender. There would be no point in adding a special reference to aboriginal offenders if this was the case. Rather, the logical meaning to be derived from the special reference to the circumstances of aboriginal offenders, juxtaposed as it is against a general direction to consider “the circumstances” for all offenders, is that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.

38 The wording of s. 718.2(e) on its face, then, requires both consideration of alternatives to the use of imprisonment as a penal sanction generally, which amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders. The respondent argued before this Court that this statutory wording does not truly effect a change in the law, as some courts have in the past taken the unique circumstances of an aboriginal offender into account in determining sentence. The respondent cited some of the recent jurisprudence dealing with sentencing circles, as well as the decision of the Court of Appeal for Ontario in R. v. Fireman (1971), 4 C.C.C. (2d) 82, in support of the view that s. 718.2(e) should be seen simply as a codification of the state of the case law regarding the sentencing of aboriginal offenders before Part XXIII came into force in 1996. In a similar vein, it was observed by Sherstobitoff J.A. in McDonald,
supra, at pp. 463-64, that it has always been a principle of sentencing that courts should consider all available sanctions other than imprisonment that are reasonable in the circumstances. Thus the general principle of restraint expressed in s. 718.2(e) with respect to all offenders might equally be seen as a codification of existing law.

39 With respect for the contrary view, we do not interpret s. 718.2(e) as expressing only a restatement of existing law, either with respect to the general principle of restraint in the use of prison or with respect to the specific direction regarding aboriginal offenders. One cannot interpret the words of s. 718.2(e) simply by looking to past cases to see if they contain similar statements of principle. The enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law. Each of the provisions of Part XXIII, including s. 718.2(e), must be interpreted in its total context, taking into account its surrounding provisions.

40 It is true that there is ample jurisprudence supporting the principle that prison should be used as a sanction of last resort. It is equally true, though, that the sentencing amendments which came into force in 1996 as the new Part XXIII have changed the range of available penal sanctions in a significant way. The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration. The general principle expressed in s. 718.2(e) must be construed and applied in this light.

41 Further support for the view that s. 718.2(e)'s expression of the principle of restraint in sentencing is remedial, rather than simply a codification, is provided by the articulation of the purpose of sentencing in s. 718.

42 Traditionally, Canadian sentencing jurisprudence has focussed primarily upon achieving the aims of separation, specific and general deterrence, denunciation, and rehabilitation. Sentencing, like the criminal trial process itself, has often been understood as a conflict between the interests of the state (as expressed through the aims of separation, deterrence, and denunciation) and the interests of the individual offender (as expressed through the aim of rehabilitation). Indeed, rehabilitation itself is a relative late-comer to the sentencing analysis, which formerly favoured the interests of the state almost entirely.

43 Section 718 now sets out the purpose of sentencing in the following terms:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
(a) to denounce unlawful conduct;

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

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

(d) to assist in rehabilitating offenders;

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

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. [Emphasis added.]

Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (a) through (d). What are new, though, are paras. (e) and (f), which along with para. (d) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras. (d), (e), and (f) is briefly discussed below, but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process: D. Kwochka, “Aboriginal Injustice: Making Room for a Restorative Paradigm” (1996), 60 Sask. L. Rev. 153, at p. 165. Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament’s choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s. 718.2(e) will necessarily be informed by this re-orientation.

44 Just as the context of Part XXIII supports the view that s. 718.2(e) has a remedial purpose for all offenders, the scheme of Part XXIII also supports the view that s. 718.2(e) has a particular remedial role for aboriginal peoples. The respondent is correct to point out that there is jurisprudence which pre-dates the enactment of s. 718.2(e) in which aboriginal offenders have been sentenced differently in light of their unique circumstances. However, the existence of such jurisprudence is not, on its own, especially probative of the issue of whether s. 718.2(e) has a remedial role. There is also sentencing jurisprudence which holds, for example, that a court must consider the unique circumstances of offenders who are battered spouses, or who are mentally disabled. Although the validity of the principles expressed in this latter jurisprudence is unchallenged by the 1996 sentencing reforms, one does not find reference to these principles in Part XXIII. If Part XXIII were indeed a codification of principles regarding the appropriate method of sentencing different categories of offenders, one would expect to find such references. The wording of s. 718.2(e), viewed in light of the absence of similar
stipulations in the remainder of Part XXIII, reveals that Parliament has chosen to single out aboriginal offenders for particular attention.

C. Legislative History

45 Support for the foregoing understanding of s. 718.2(e) as having the remedial purpose of restricting the use of prison for all offenders, and as having a particular remedial role with respect to aboriginal peoples, is provided by statements made by the Minister of Justice and others at the time that what was then Bill C-41 was before Parliament. Although these statements are clearly not decisive as to the meaning and purpose of s. 718.2(e), they are nonetheless helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision in the context of Part XXIII as a whole: Rizzo & Rizzo Shoes, supra, at paras. 31 and 35.

46 For instance, in introducing second reading of Bill C-41 on September 20, 1994 (House of Commons Debates, vol. IV, 1st Sess., 35th Parl., at pp. 5871 and 5873), Minister of Justice Allan Rock made the following statements regarding the remedial purpose of the bill:

Through this bill, Parliament provides the courts with clear guidelines . . . .

... . . .

The bill also defines various sentencing principles, for instance that the sentence must be proportionate to the gravity of the offence and the offender’s degree of responsibility. When appropriate, alternatives must be contemplated, especially in the case of Native offenders.

... . . .

A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.

... . . .

Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. . . . [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.

It is not simply by being more harsh that we will achieve more effective criminal justice. We must use our scarce resources wisely. [Emphasis added.]

The Minister’s statements were echoed by other Members of Parliament and by Senators during the debate over the bill; see, e.g., House of Commons Debates, vol. V, 1st Sess., 35th Parl., September 22, 1994, at

47 In his subsequent testimony before the House of Commons Standing Committee on Justice and Legal Affairs (Minutes of Proceedings and Evidence, Issue No. 62, November 17, 1994, at p. 62:15), the Minister of Justice addressed the specific role the government hoped would be played by s. 718.2(e):

[The reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.

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 the public -- alternatives to jail -- and not simply resort to that easy answer in every case. [Emphasis added.]

48 It can be seen, therefore, that the government position when Bill C-41 was under consideration was that the new Part XXIII was to be remedial in nature. The proposed enactment was directed, in particular, at reducing the use of prison as a sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders.

D. The Context of the Enactment of Section 718.2(e)

49 Further guidance as to the scope and content of Parliament's remedial purpose in enacting s. 718.2(e) may be derived from the social context surrounding the enactment of the provision. On this point, it is worth noting that, although there is quite a wide divergence between the positions of the appellant and the respondent as to how s. 718.2(e) should be applied in practice, there is general agreement between them, and indeed between the parties and all interveners, regarding the mischief in response to which s. 718.2(e) was enacted.

50 The parties and interveners agree that the purpose of s. 718.2(e) is to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples. They also agree that one of the roles of s. 718.2(e), and of various other provisions in Part XXIII, is to encourage sentencing judges to apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations. As the respondent states in its factum before this Court, s. 718.2(e) "provides the necessary flexibility and authority for sentencing judges to resort to the restorative model of justice in sentencing aboriginal offenders and to reduce the imposition of
jail sentences where to do so would not sacrifice the traditional goals of sentencing”.

51 The fact that the parties and interveners are in general agreement among themselves regarding the purpose of s. 718.2(e) is not determinative of the issue as a matter of statutory construction. However, as we have suggested, on the above points of agreement the parties and interveners are correct. A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada’s aboriginal peoples, provides additional insight into the purpose and proper application of this new provision.

(1) The Problem of Overincarceration in Canada

52 Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison. Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada’s rate of approximately 130 inmates per 100,000 population places it second or third highest: see Federal/Provincial/Territorial Ministers Responsible for Justice, Corrections Population Growth: First Report on Progress (1997), Annex B, at p. 1; Bulletin of U.S. Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 1998 (March 1999); The Sentencing Project, Americans Behind Bars: U.S. and International Use of Incarceration, 1995 (June 1997), at p. 1. Moreover, the rate at which Canadian courts have been imprisoning offenders has risen sharply in recent years, although there has been a slight decline of late: see Statistics Canada, “Prison population and costs” in Infomat: A Weekly Review (February 27, 1998), at p. 5. This record of incarceration rates obviously cannot instil a sense of pride.

53 The systematic use of the sanction of imprisonment in Canada may be dated to the building of the Kingston Penitentiary in 1835. The penitentiary sentence was itself originally conceived as an alternative to the harsher penalties of death, flogging, or imprisonment in a local jail. Sentencing reformers advocated the use of penitentiary imprisonment as having effects which were not only deterrent, denunciatory, and preventive, but also rehabilitative, with long hours spent in contemplation and hard work contributing to the betterment of the offender: see Law Reform Commission of Canada, Working Paper 11, Imprisonment and Release (1975), at p. 5.

54 Notwithstanding its idealistic origins, imprisonment quickly came to be condemned as harsh and ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals. The history of Canadian commentary regarding the use and effectiveness of imprisonment as a sanction was recently well summarized by Vancise J.A., dissenting in the Saskatchewan Court of Appeal in McDonald, supra, at pp. 429-30:

A number of inquiries and commissions have been held in this country to examine, among other things, the effectiveness of the use of
incarceration in sentencing. There has been at least one commission or inquiry into the use of imprisonment in each decade of this century since 1914. . . .

.. An examination of the recommendations of these reports reveals one constant theme: imprisonment should be avoided if possible and should be reserved for the most serious offences, particularly those involving violence. They all recommend restraint in the use of incarceration and recognize that incarceration has failed to reduce the crime rate and should be used with caution and moderation. Imprisonment has failed to satisfy a basic function of the Canadian judicial system which was described in the Report of the Canadian Committee on Corrections entitled: “Toward Unity: Criminal Justice and Corrections” (1969) as “to protect society from crime in a manner commanding public support while avoiding needless injury to the offender”. [Emphasis added; footnote omitted.]

55 In a similar vein, in 1987, the Canadian Sentencing Commission wrote in its report entitled Sentencing Reform: A Canadian Approach, at pp. xxiii-xxiv:

Canada does not imprison as high a portion of its population as does the United States. However, we do imprison more people than most other western democracies. The Criminal Code displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment. A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction. [Emphasis added.]

56 With equal force, in Taking Responsibility (1988), at p. 75, the Standing Committee on Justice and Solicitor General stated:

It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution, as the lengths of prison sentences handed down vary for the same type of crime.

Since imprisonment generally offers the public protection from criminal behaviour for only a limited time, rehabilitation of the offender is of great importance. However, prisons have not generally been effective in reforming their inmates, as the high incidence of recidivism among prison populations shows.

The use of imprisonment as a main response to a wide variety of
offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society. Moreover, modern technology may now permit the monitoring in the community of some offenders who previously might have been incarcerated for incapacitation or denunciation purposes. Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments. [Emphasis added; footnotes omitted.]

The Committee proposed that alternative forms of sentencing should be considered for those offenders who did not endanger the safety of others. It was put in this way, at pp. 50 and 54:

[O]ne of the primary foci of such alternatives must be on techniques which contribute to offenders accepting responsibility for their criminal conduct and, through their subsequent behaviour, demonstrating efforts to restore the victim to the position he or she was in prior to the offence and/or providing a meaningful apology.

... [E]xcept where to do so would place the community at undue risk, the “correction” of the offender should take place in the community and imprisonment should be used with restraint.

57 Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.

(2) The Overrepresentation of Aboriginal Canadians in Penal Institutions

58 If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people were about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population. In Manitoba and Saskatchewan, aboriginal people constituted something between 6 and 7 percent of the population, yet in Manitoba they represented 46 percent of the provincial admissions and in Saskatchewan 60 percent: see M. Jackson, “Locking Up Natives in Canada” (1988-89), 23 U.B.C. L. Rev. 215 (article originally prepared as a report of the Canadian Bar Association Committee on Imprisonment and Release in June 1988), at pp. 215-16. The situation has not improved in recent years. By 1997,
aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates: Solicitor General of Canada, Consolidated Report, Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act -- Five Years Later (1998), at pp. 142-55. The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia: Canadian Centre for Justice Statistics, Adult Correctional Services in Canada, 1995-96 (1997), at p. 30.

59 This serious problem of aboriginal overrepresentation in Canadian prisons is well documented. Like the general problem of overincarceration itself, the excessive incarceration of aboriginal peoples has received the attention of a large number of commissions and inquiries: see, by way of example only, Canadian Corrections Association, Indians and the Law (1967); Law Reform Commission of Canada, The Native Offender and the Law (1974), prepared by D. A. Schmeiser; Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba, vol. 1, The Justice System and Aboriginal People (1991); Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide (1996).

60 In “Locking Up Natives in Canada”, supra, at pp. 215-16, Jackson provided a disturbing account of the enormity of the disproportion:

Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Native people come into contact with Canada’s correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject to the damaging impacts of the criminal justice system’s heaviest sanctions. Government figures -- which reflect different definitions of “native” and which probably underestimate the number of prisoners who consider themselves native -- show that almost 10% of the federal penitentiary population is native (including 13% of the federal women’s prisoner population) compared to about 2% of the population nationally. . . . Even more disturbing, the disproportionality is growing. In 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate in native communities.

Bad as this situation is within the federal system, it is even worse in a number of the western provincial correctional systems. . . . A study reviewing admissions to Saskatchewan’s correctional system in 1976-77 appropriately titled “Locking Up Indians in Saskatchewan”, contains findings that should shock the conscience of everyone in Canada. In comparison to male non-natives, male treaty Indians were 25 times more likely to be admitted to a provincial correctional centre while non-status Indians or Métis were 8 times more likely to be admitted. If only the population over fifteen years of age is considered (the population eligible
to be admitted to provincial correctional centres in Saskatchewan), then
male treaty Indians were 37 times more likely to be admitted, while male
non-status Indians were 12 times more likely to be admitted. For women the
figures are even more extreme: a treaty Indian woman was 131 times more
likely to be admitted and a non-status or Métis woman 28 times more likely
than a non-native.

The Saskatchewan study brings home the implications of its findings by
indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of
at least one stay in prison by the age of 25 (that age range being the one
with the highest risk of imprisonment). The corresponding figure for
non-status or Métis was 34%. For a non-native Saskatchewan boy the figure
was 8%. Put another way, this means that in Saskatchewan, prison has become
for young native men, the promise of a just society which high school and
college represent for the rest of us. Placed in an historical context, the
prison has become for many young native people the contemporary equivalent
of what the Indian residential school represented for their parents.
[Emphasis added; footnotes omitted.]

61 Not surprisingly, the excessive imprisonment of aboriginal people is
only the tip of the iceberg insofar as the estrangement of the aboriginal
peoples from the Canadian criminal justice system is concerned. Aboriginal
people are overrepresented in virtually all aspects of the system. As this
Court recently noted in R. v. Williams, [1998] 1 S.C.R. 1128, at para. 58,
there is widespread bias against aboriginal people within Canada, and
“[t]here is evidence that this widespread racism has translated into
systemic discrimination in the criminal justice system”.

62 Statements regarding the extent and severity of this problem are
disturbingly common. In Bridging the Cultural Divide, supra, at p. 309, the
Royal Commission on Aboriginal Peoples listed as its first “Major Findings
and Conclusions” the following striking yet representative statement:

The Canadian criminal justice system has failed the Aboriginal peoples
of Canada -- First Nations, Inuit and Métis people, on-reserve and
off-reserve, urban and rural -- in all territorial and governmental
jurisdictions. The principal reason for this crushing failure is the
fundamentally different world views of Aboriginal and non-Aboriginal people
with respect to such elemental issues as the substantive content of justice
and the process of achieving justice.

63 To the same effect, the Aboriginal Justice Inquiry of Manitoba
described the justice system in Manitoba as having failed aboriginal people
on a “massive scale”, referring particularly to the substantially different
cultural values and experiences of aboriginal people: The Justice System
and Aboriginal People, supra, at pp. 1 and 86.

64 These findings cry out for recognition of the magnitude and gravity
of the problem, and for responses to alleviate it. The figures are stark
and reflect what may fairly be termed a crisis in the Canadian criminal
justice system. The drastic overrepresentation of aboriginal peoples within
both the Canadian prison population and the criminal justice system reveals
a sad and pressing social problem. It is reasonable to assume that
Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament’s direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

65 It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remediying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

E. A Framework of Analysis for the Sentencing Judge

(1) What Are the “Circumstances of Aboriginal Offenders”?  

66 How are sentencing judges to play their remedial role? The words of s. 718.2(e) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

(a) Systemic and Background Factors

67 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. A disturbing account of these factors is set out by Professor Tim Quigley, “Some Issues in Sentencing of Aboriginal Offenders”, in Continuing Poundmaker and Riel’s Quest (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that “[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail.”

68 It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

69 In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

(b) Appropriate Sentencing Procedures and Sanctions

70 Closely related to the background and systemic factors which have contributed to an excessive aboriginal incarceration rate are the different conceptions of appropriate sentencing procedures and sanctions held by aboriginal people. A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. The aims of restorative justice as now expressed in paras. (d), (e), and (f) of s. 718 of the Criminal Code apply to all offenders, and not only aboriginal offenders. However, most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely
important to the analysis under s. 718.2(e).

71 The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context. In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime. See generally, e.g., Bridging the Cultural Divide, supra, at pp. 12-25; The Justice System and Aboriginal People, supra, at pp. 17-46; Kwochka, supra; M. Jackson, “In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities”, [1992] U.B.C. L. Rev. (Special Edition) 147.

72 The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focussed on restorative justice is not necessarily a “lighter” punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence. See Kwochka, supra, who writes at p. 165:

At this point there is some divergence among proponents of restorative justice. Some seek to abandon the punishment paradigm by focusing on the differing goals of a restorative system. Others, while cognizant of the differing goals, argue for a restorative system in terms of a punishment model. They argue that non-custodial sentences can have an equivalent punishment value when produced and administered by a restorative system and that the healing process can be more intense than incarceration. Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.

73 In describing in general terms some of the basic tenets of traditional aboriginal sentencing approaches, we do not wish to imply that all aboriginal offenders, victims, and communities share an identical understanding of appropriate sentences for particular offences and offenders. Aboriginal communities stretch from coast to coast and from the border with the United States to the far north. Their customs and traditions and their concept of sentencing vary widely. What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.
It is unnecessary to engage here in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects, which are available especially to aboriginal offenders. What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions. Sentencing judges should not conclude that the absence of alternatives specific to an aboriginal community eliminates their ability to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved. Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.

(2) The Search for a Fit Sentence

The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community. Nothing in Part XXIII of the Criminal Code alters this fundamental duty as a general matter. However, the effect of s. 718.2(e), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

In R. v. M. (C.A.), [1996] 1 S.C.R. 500, at p. 567, Lamer C.J. restated the long-standing principle of Canadian sentencing law that the appropriateness of a sentence will depend on the particular circumstances of the offence, the offender, and the community in which the offence took place. Disparity of sentences for similar crimes is a natural consequence of this individualized focus. As he stated:

It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the “just and appropriate” mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

The comments of Lamer C.J. are particularly apt in the context of aboriginal offenders. As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being
characterized by unique systemic and background factors. Further, an aboriginal offender’s community will frequently understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight. Through its reform of the purpose of sentencing in s. 718, and through its specific directive to judges who sentence aboriginal offenders, Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.

78 In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

79 Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

80 As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

81 The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique
circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the Criminal Code and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

(3) The Duty of the Sentencing Judge

82 The foregoing discussion of guidelines for the sentencing judge has spoken of that which a judge must do when sentencing an aboriginal offender. This element of duty is a critical component of s. 718.2(e). The provision expressly provides that a court that imposes a sentence should consider all available sanctions other than imprisonment that are reasonable in the circumstances, and should pay particular attention to the circumstances of aboriginal offenders. There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.

83 How then is the consideration of s. 718.2(e) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

84 However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate
circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.

85 Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. In the same vein, it should be noted that, although s. 718.2(e) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.

(4) The Issue of “Reverse Discrimination”

86 Something must also be said as to the manner in which s. 718.2(e) should not be interpreted. The appellant and the respondent diverged significantly in their interpretation of the appropriate role to be played by s. 718.2(e). While the respondent saw the provision largely as a restatement of existing sentencing principles, the appellant advanced the position that s. 718.2(e) functions as an affirmative action provision justified under s. 15(2) of the Charter. The respondent cautioned that, in his view, the appellant’s understanding of the provision would result in “reverse discrimination” so as to favour aboriginal offenders over other offenders.

87 There is no constitutional challenge to s. 718.2(e) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the Charter. We would note, though, that the aim of s. 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.

88 But s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. To the extent that the appellant’s submission on affirmative action means that s. 718.2(e) requires an automatic reduction in sentence for an aboriginal offender, we reject that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as part of the task of weighing the multitude of factors which must be taken into account in striving to impose a fit sentence. 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. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be given to these various factors
will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.

(5) Who Comes Within the Purview of Section 718.2(e)?

89 The question of whether s. 718.2(e) applies to all aboriginal persons, or only to certain classes thereof, is raised by this appeal. The following passage of the reasons of the judge at trial appears to reflect some ambiguity as to the applicability of the provision to aboriginal people who do not live in rural areas or on a reserve:

The factor that is mentioned in the Criminal Code is that particular attention to the circumstances of aboriginal offenders should be considered. In this case both the deceased and the accused were aboriginals, but they are not living within the aboriginal community as such. They are living off a reserve and the offence occurred in an urban setting. They [sic] do not appear to have been any special circumstances because of their aboriginal status and so I am not giving any special consideration to their background in passing this sentence.

It could be understood from that passage that, in this case, there were no special circumstances to warrant the application of s. 718.2(e), and the fact that the context of the offence was not in a rural setting or on a reserve was only one of those missing circumstances. However, this passage was interpreted by the majority of the Court of Appeal as implying that, “as a matter of principle, s. 718.2(e) can have no application to aboriginals ‘not living within the aboriginal community’” (p. 137). This understanding of the provision was unanimously rejected by the members of the Court of Appeal. With respect to the trial judge, who was given little assistance from counsel on this issue, we agree with the Court of Appeal that such a restrictive interpretation of the provision would be inappropriate.

90 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 Metis and 40,220 Inuit.

91 Section 718.2(e) applies to all aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area. Indeed it has been observed that many aboriginals living in urban areas are closely attached to their culture. See the Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, vol. 4, Perspectives and Realities (1996), at p. 521:
Throughout the Commission’s hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples’ existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.

And at p. 525:

Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable.... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

Section 718.2(e) requires the sentencing judge to explore reasonable alternatives to incarceration in the case of all aboriginal offenders. Obviously, if an aboriginal community has a program or tradition of alternative sanctions, and support and supervision are available to the offender, it may be easier to find and impose an alternative sentence. However, even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative. For all purposes, the term “community” must be defined broadly so as to include any network of support and interaction that might be available in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

VI. Summary

Let us see if a general summary can be made of what has been discussed in these reasons.

1 Part XXIII of the Criminal Code codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.

2 Section 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.

3 Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision’s remedial purpose real force.

4 Section 718.2(e) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken
into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.

5 Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.

6 Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

7 In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.

8 If there is no alternative to incarceration the length of the term must be carefully considered.

9 Section 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.

10 The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

11 Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term “community” must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the
aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

12 Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.

13 It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

VII. Was There an Error Made in This Case?

94 From the foregoing analysis it can be seen that the sentencing judge, who did not have the benefit of these reasons, fell into error. He may have erred in limiting the application of s. 718.2(e) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, and perhaps as a consequence of the first error, he does not appear to have considered the systemic or background factors which may have influenced the appellant to engage in criminal conduct, or the possibly distinct conception of sentencing held by the appellant, by the victim Beaver’s family, and by their community. However, it should be emphasized that the sentencing judge did take active steps to obtain at least some information regarding the appellant’s aboriginal heritage. In this regard he received little if any assistance from counsel on this issue although they too were acting without the benefit of these reasons.

95 The majority of the Court of Appeal, in dismissing the appellant’s appeal, also does not appear to have considered many of the factors referred to above. However, the dissenting reasons of Rowles J.A. discuss the relevant factors in some detail. The majority also appears to have dismissed the appellant’s application to adduce fresh evidence. The majority of the Court of Appeal may or may not have erred in ultimately deciding to dismiss the fresh evidence application. The correctness of its ultimate decision depends largely upon the admissibility of the fresh evidence and its relevance to the weighing of the various sentencing goals. However, assuming admissibility and relevance, it was certainly incumbent upon the majority to consider the evidence, and especially so given the failure of the trial judge to do so. Moreover, if the fresh evidence before the Court of Appeal was itself insufficient to inform the court adequately regarding the circumstances of the appellant as an aboriginal offender, the proper remedy would have been to remit the matter to the trial judge with instructions to make all the reasonable inquiries necessary for the sentencing of this aboriginal offender.

96 In most cases, errors such as those in the courts below would be sufficient to justify sending the matter back for a new sentencing hearing. It is difficult for this Court to determine a fit sentence for the
appellant according to the suggested guidelines set out herein on the basis of the very limited evidence before us regarding the appellant’s aboriginal background. However, as both the trial judge and all members of the Court of Appeal acknowledged, the offence in question is a most serious one, properly described by Esson J.A. as a “near murder”. Moreover, the offence involved domestic violence and a breach of the trust inherent in a spousal relationship. That aggravating factor must be taken into account in the sentencing of the aboriginal appellant as it would be for any offender. For that offence by this offender a sentence of three years’ imprisonment was not unreasonable.

97 More importantly, the appellant was granted day parole on August 13, 1997, after she had served six months in the Burnaby Correctional Centre for Women. She was directed to reside with her father, to take alcohol and substance abuse counselling and to comply with the requirements of the Electronic Monitoring Program. On February 25, 1998, the appellant was granted full parole with the same conditions as the ones applicable to her original release on day parole.

98 In this case, the results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the appellant and society. In these circumstances, we do not consider that it would be in the interests of justice to order a new sentencing hearing in order to canvass the appellant’s circumstances as an aboriginal offender.

99 In the result, the appeal is dismissed.

Appeal dismissed.

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