

Sentencing Aboriginal offenders:
A study of court of appeal decisions in light of section 718.2 (e) of the Canadian Criminal
Code

Andrée Dugas

Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the MA degree in Criminology

Department of Criminology
Faculty of Social Sciences
University of Ottawa

©Andrée Dugas, Ottawa, Canada, 2013

ABSTRACT

Section 718.2 (e)'s directive to canvass all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of Aboriginal offenders was to be given real force. This study's goal was therefore to identify what considerations may be impeding or encouraging the application of section 718.2 (e)'s directive through a constructivist discourse analysis of 33 court of appeal cases. The study has mapped trends and influences which weigh strongly on sentencing judges in the decision-making process and considerations that are affecting the application of this provision. Prohibitive and permissive dimensions of the *Gladue* case were identified related to the application of section 718.2 (e), creating competing ideals in the application of the provision. Modern Penal Rationality (MPR) underpinned many of the judges' justifications. However, unforeseen considerations were also noted. Ultimately, MPR, dominates the sentencing calculus and diminishes section 718.2 (e)'s application and alternative/restorative potential.

ACKNOWLEDGEMENTS

First and foremost, I would like to offer a heartfelt thanks to my supervisor, Richard Dubé. Thank you for your time, support, insight and for sharing your knowledge with me these past two years. Without your guidance, this project would not be what it is today. Thank you to Jennifer Kilty for chairing my defense, and to my examiners, Alvaro Pires and Prashan Ranasinghe, for providing helpful and constructive feedback on this work. Thanks to my family who has supported and encouraged me throughout my life and who persevered with me during these two challenging years as I completed this degree. I would also like to thank Jon, for believing in me when I did not believe in myself and for being a shoulder to lean on when the challenges seemed insurmountable. – I love you! Completing this project has been both challenging and exhilarating, I thank all those who have not been singled-out but whose help and guidance have been invaluable throughout this endeavor. I owe all of you a great debt of gratitude.

Table of contents

<u>Abstract.....</u>	<u>i</u>
<u>Acknowledgements.....</u>	<u>ii</u>
<u>Table of contents.....</u>	<u>iii</u>
<u>Introduction.....</u>	<u>1</u>
<u>Chapter 1: Contextualizing the issue.....</u>	<u>8</u>
1.1 Literature review.....	12
1.1.1 The retributivist objections.....	13
1.1.1 (a) A need for proportionality in sentencing.....	13
1.1.1 (b) “Playing favorites”: Inequitable sentencing.....	14
1.1.1 (c) Encouraging disparity in sentencing.....	15
1.1.2 The restorative perspective’s response.....	15
1.1.2 (a) Encouraging restraint in sentencing.....	16
1.1.2 (b) Equality in sentencing means accounting for differences.....	17
1.1.2 (c) Non-custodial sentences are not discounted sentences.....	18
1.1.2 (d) A welcomed respite from incarceration.....	19
1.1.3 A reconciliation of perspectives.....	20
1.1.4 R. v. Gladue.....	22
1.1.5 The incompatibility of restorative justice aims within a retributive model of justice.....	26
1.1.5 (a) Seeing justice done through the reestablishment of social bonds versus justice through the application of a punitive sanction.....	27
1.1.5 (b) Restorative justice, more just?.....	28

<u>Chapter 2: Theoretical framework</u>	33
2.1 Modern penal rationality and the use of section 718.2 (e) of the Criminal Code of Canada	33
2.2 Modern penal rationality and the theories of sentencing	37
2.2.1 Theory of retribution	37
2.2.1 (a) Kant and the social contract.....	38
2.2.1 (b) Kant and the notion of retribution.....	38
2.2.1 (c) Foundations for the obligation to punish.....	40
2.2.1 (d) Proportionality in sentencing.....	41
2.2.2 Deterrence theory	44
2.2.2 (a) Foundations for the obligation to punish.....	44
2.2.2 (b) Beccaria and the social contract.....	45
2.2.2 (c) Beccaria and the notion of deterrence.....	46
2.2.2 (d) Proportionality in sentencing.....	47
2.2.3 Denunciation theory	49
2.2.3 (a) The concept of denunciation and its foundations for the obligation to punish.....	49
2.2.3 (b) Proportionality in sentencing.....	51
2.2.3 (c) Severity of punishment and legitimate sanctions.....	52
2.2.4 Rehabilitation theory of the first modernity	54
2.2.5 Rehabilitation theory of the second modernity	55
2.3 Modern penal rationality and the criminal legal system’s distinctive self-conceptualization	56
2.3.1 Trapped in the fly bottle.....	59
<u>Chapter 3:</u>	
<u>Methodology</u>	64
3.1 Empirical foundations	64
3.2 Qualitative research	66

3.3 Constructivist paradigm.....	68
3.4 Methodology and analytical strategy: Constructivist Discourse Analysis.....	74
3.4.1 Purposive sampling.....	78
3.4.2 Data analysis.....	80
3.4.3 Reflexivity.....	86
3.5 Evaluation criteria.....	90
3.6 Limitations.....	92
<u>Chapter 4: Analytical findings.....</u>	<u>93</u>
4.1 <i>Gladue</i> (permissive and prohibitive dimensions).....	95
4.1.1 Side note: Success in life, an aggravating factor in sentencing?.....	98
4.2 Protection of the public.....	104
4.3 Denunciation and deterrence.....	107
4.3.1 Denunciation and deterrence justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing.....	107
4.3.2 Denunciation and deterrence justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing.....	110
4.4 Isolation/separation.....	117
4.5 Rehabilitation.....	118
4.5.1 Rehabilitation (of the first modernity) justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing.....	118
4.5.2 Rehabilitation (of the second modernity) justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing.....	119
4.5.2 (a) Personal reflection: The tainted application of section 718.2 (e).....	121

Restorative considerations and the application of section 718.2 (e) of the <i>Criminal Code</i>	123
4.6 Restorative Justice.....	123
Unforeseen obstacles to the application of section 718.2 (e) of the <i>Criminal Code</i>.....	125
4.7 Consideration of resources/social infrastructure/alternatives to incarceration.....	125
4.7.1 Consideration of resources/social infrastructure/alternatives to incarceration justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing.....	125
4.7.2 Consideration of resources/social infrastructure/alternatives to incarceration justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing.....	127
4.8 Legalization of public opinion by the penal system: Community and victim opinion.....	128
4.8.1 Legalization of public opinion by the penal system: Community and victim opinion justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing.....	128
4.8.2 Legalization of public opinion by the penal system: Community and victim opinion justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing.....	133
<u>Chapter 5: Conclusion and final thoughts.....</u>	<u>136</u>
<u>References.....</u>	<u>144</u>
<u>Appendices.....</u>	<u>155</u>
Appendix A – Case summaries.....	156

INTRODUCTION

Analyzing the sentencing of Aboriginal offenders and the justifications provided by judges in the sentencing of this group is the main focus of this research. This issue is of interest as steps have been taken by Parliament to see that the sentencing of these people be undertaken with particular attention and consideration in an attempt to reduce their alarming rate of incarceration, yet rates continue to rise. Mann (2009: 6), reports that between 1998 and 2008, the federally incarcerated Aboriginal population increased by 19.7 percent and the number of federally incarcerated Aboriginal women increased by an astonishing 131 percent over this period. Of particular interest is the projection that those between the ages of 20 to 29 “(the group with the greatest likelihood for criminal activity) will increase by over 40%”, which is more than four times the projected growth rate for non-Aboriginal people (Mann, 2009: 6). Since the proportion of young Aboriginals is growing compared to other young Canadians¹, the problem of Aboriginal over-representation may very well continue to increase. In that regard, it is crucial to consider the role and efficacy of section 718.2 (e) of the *Criminal Code* in the accomplishment of its stated purpose (to reduce rates of aboriginal over-incarceration) and in the understanding of why judges are or are not applying this section along with the reasons stated for its inclusion or exclusion in sentencing decisions. It is the goal of this research project to pursue these objectives.

Incarceration is an extreme form of societal sanction (Hulsman, 1990; De Haan, 1992; Artières & Lascoume, 2004; Mathiesen, 2006; Morris, 1989; Vacheret & Lemire, 2007; Chauvenet, 2006). In recent years, the increase of Canadian incarceration rates has

¹ Statistics Canada predicts that the Aboriginal population aged 0 to 14 years will grow from 6 percent of all children in Canada in 2001 to over 7.4 percent in 2017 (Mann, 2009: 6). Similarly, by 2017 the population of Aboriginal young adults (aged 20 to 29 years) will have increased from 4.1 percent to 5.3 percent (Mann, 2009: 6).

leveled off, but the fact remains that we incarcerate more people now than we did twenty years ago (Goff, 1999:16). Furthermore, the population in Canadian prisons is overwhelmingly composed of individuals from marginalized groups, including the poor, visible minorities, and Aboriginal people.

There has been a great deal of concern with regards to the over-representation of Aboriginal peoples within the prison system in Canadian society. The Canadian government expressed its concern most notably with the institution of the Royal Commission on Aboriginal Peoples and the creation of Bill C-41. This concern is also evident within the field of social sciences where such notable names as Carol LaPrairie (1992), Rupert Ross (1995), Kent Roach (2009), Julian V. Roberts and Philip C. Stenning (2002) among others have written extensively on the topic. The reasons for aboriginal over-representation are complex and deeply rooted in Canadian history. From regulation and eventual abolition of traditional practices to restrictions on social and familial traditions, the objective of forced assimilation was to eradicate the lifestyle of Aboriginal peoples (Aboriginal Healing Foundation, May 2002). There is general consensus that colonization and forced assimilation have had “consequences, which are still alive with Aboriginal people today” (Ibid: 7).

More than a decade ago, the federal government attempted to address this imbalance by reformulating its sentencing practices in criminal cases. In 1996, Bill C-41 amended the *Criminal Code*; of particular importance to sentencing was the introduction of section 718.2(e) which made explicit reference to Aboriginal people. This section directs judges to consider alternative sanctions to incarceration, with particular attention to Aboriginal offenders.

The provision was interpreted by the Supreme Court of Canada in *R. v. Gladue* ([1999] 1 S.C.R. 688). Writing for the Supreme Court, Justices Cory and Iacobucci noted that Parliament had two objectives when enacting the new legislation including section 718.2 (e). The first was to reduce the use of imprisonment as a sanction. The second was “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” (*R. v. Gladue* ([1999] 1 S.C.R. 688, para.48).

The federal government sees this provision as an attempt to redress the injustice created by systemic discrimination. Systemic discrimination here should not be mistaken with racism or viewed as the result of particular behavioral issues exhibited by Aboriginal people. The issues which most often bring aboriginal persons in contact with the criminal justice system are not individual but the result of social structure factors. Frideres & Gadacz (2001: 4) list the organization of society and the alignment of social institutions as contributing forces and state that while “we will not deny that Aboriginal people are exposed to a great deal of prejudice and discrimination, their greatest obstacle is the very structure of society itself, which prevents them from effectively participating in the social, economic, and political institutions or our society”. Systemic discrimination, in LaPrairie (1990: 437), is defined as:

“[T]reating unequals equally”, applying the same criteria to all offenders in disposition considerations [...] which may have more adverse consequences for aboriginal accused if, for example, judges make disposition decisions and/probation officers make recommendations regarding dispositions based on the presence or absence of certain structural factors such as employment, education, or family and community supports.

Aboriginal criminality, in general, expresses differential life chances and cultural experiences of persons of Native background (Clark, 1989). As is explained in LaPrairie (1990: 437), Aboriginal persons face being incarcerated for less serious offences because its members do not qualify for alternatives based on risk factors, and few sentencing options are available to judges. LaPrairie (1990: 437), states that “[t]heir deprived socio-economic situation acts against aboriginal people at sentencing and against communities in the development and maintenance of community based alternatives [...] [t]he geographic location of the majority of reserves makes access to universal sentencing alternatives difficult and often impossible”. In the absence of policies and programs to redress the imbalance between aboriginals and non-aboriginals, the judgments rendered through the application of section 718.2 (e) are therefore meant to compensate for social and economic inequalities. The belief is that sentencing judges will now have a unique opportunity to provide tailored sentences and interventions which address the different needs and profiles of Aboriginal offenders and to work closely with the communities affected for successful reintegration.

While a growing body of literature has examined the *Gladue* decision and section 718.2 (e) in general, there is little information on how the courts are interpreting this section. Scholars criticize this provision because it works against the retributivist foundations of Canadian law which call for proportionality and just deserts, i.e. the punishment should fit the crime. Other restorative justice scholars view this provision as a toe-hold from which to forward their restorative aims. The anticipated growth of the Aboriginal offender population and potential shifts in its geographic distribution suggest a continuation of over-representation in correctional populations. If this sentencing provision was indeed enacted to

help resolve the issue of Aboriginal over-incarceration (essentially alleviating a harmful practice), it is important to examine what type of scope and impact this provision has had in sentencing and whether it possesses the potential to solve or lessen the gravity of the issue of over-incarceration.

This exploratory study will be a first step in a much needed line of inquiry into the state of Aboriginal offender sentencing. Much of the existing literature in this area is based on quantitative research, examining such things as rates of incarceration and types of offences in relation to Aboriginal offenders. There is a lack of qualitative research in this area and more specifically, there is little information which discusses section 718.2(e) and its application in court and the reasons that are given by the judges in the application or non application of the section. This qualitative study will examine reported cases where judges mention section 718.2(e) and identify the reasons given by judges for the application or non application of the section. The study has the potential to map the trends and influences that weigh strongly on sentencing judges in the decision-making process and possibility to identify and explore what obstacles are impeding the application of this particular provision in the sentencing of Aboriginal offenders.

The first part of this study consists of a literature review as well as a focus on the outcome of the significant case of *R. v. Gladue*, the first case in which the Supreme Court was required to explore and interpret section 718.2 (e) of the *Criminal Code*. The literature review will contain an overview of the discussion surrounding sentencing in general and the implementation of section 718.2 (e) and its lofty ambition to reduce rates of aboriginal incarceration. It also delves into the retributivist objectives surrounding the implementation of section 718.2 (e), restorative justice proponents' response to these retributivist objections,

the particularities of a mixed perspective and ultimately the incompatibility of restorative justice aims within a retributive model of justice such as our own.

The second section of this study will encompass an overview of the theory of Modern Penal Rationality (*Rationalité Pénale Moderne*). While judges' justifications for applying or failing to apply section 718.2 (e) of the *Criminal Code* go beyond the purview of modern penal rationality, a number of elements put forth by this theory figure within the data under scrutiny and contribute to explaining the ways in which this disposition is being employed in sentencing and the obstacles which impede its application.

The third chapter will explore the methodology employed in this research assignment, describing the intricacies of qualitative research, constructivist discourse analysis and the approach used to select the 33 appeal court cases for analysis as well as the coding process utilized to extract pertinent information from each case. Descriptions of all the analytical categories are provided as well as information regarding my stance as a researcher, the approach to knowledge and language employed, along with the evaluation criteria and research limitations of this study.

Chapter four consists of a findings' description which maps-out, by analytical category, appeal court judges' multiple justifications for applying or failing to apply section 718.2 (e) of the *Criminal Code*. Also included are personal yet informed and empirically supported reflections rooted in the findings. Links between the findings and the theory of Modern Penal Rationality will be uncovered and innovative conclusions will be presented. Finally, this chapter will conclude with a summary of the findings and their potential

implications/ramifications on the application of section 718.2 (e) and its potential to affect rates of aboriginal over-incarceration as based on the cases under scrutiny.

CHAPTER 1

CONTEXTUALIZING THE ISSUE

Manson (2001: 29) argues that changes to the Canadian sentencing framework are not always the product of “measured discussion or an equilibrated approach”. At times they are swift reactions to specific events or changes in public mood (Stenning & Roberts, 2002: 82-83; Cairns, 2002: 58-59; Manson, 2001: 29). Amendments have also resulted from substantive public debate or as corrections to perceived problems (Carter, 2002: 64; Daubney, 2002: 40-42; Roach & Rudin, 2002: 5-6).

To set a sentence is challenging. Many different and at times conflicting philosophies, such as deterrence, retribution, denunciation, rehabilitation and incapacitation form the basis for various sentences (Roberts & Cole, 1999; Manson, 2001). Prior to 1996 there was little statutory guidance when sentencing offenders and few guidelines regulating what should or should not be taken into consideration in determining a sentence (Pasquali, 1995: 21). On July 13th, 1995 Bill C-41 was passed in Parliament and came into force on September 3rd, 1996. The Bill enacted sentencing revisions, including Part XXIII of the *Criminal Code*. According to the Supreme Court of Canada, “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” (*R. v. Gladue* [1999] 1.S.C.R. 688, para. 39).

For the first time a statement of purpose, objectives and principles were inserted in the *Criminal Code*. The purpose of sentencing, as explained in s. 718, is “to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just,

peaceful and safe society through the imposition of just sanctions”. This is followed by a recitation of the objectives of sentencing (denunciation, deterrence, incapacitation, rehabilitation, and reparation) with the addition in section 718(f): “to promote a sense of responsibility in offenders, and acknowledgement of harm done to victims and to the community”. Section 718.1, “fundamental principle”, describes the principle of proportionality:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

This is followed by “other sentencing principles”:

718.2 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 common-law partner 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.

According to Manson (2001: 28), sections 718, 718.1 and 718.2, taken together, encourage judges to apply restorative justice principles. Restorative justice “encompasses the various responses to crime which are directed towards reparation and the restoration of equilibrium” (Ibid, 28). According to Manson (2001: 371-372), unlike retributive principles, restorative justice is not focused on punishment but is concerned with the reparation of harm caused by the offence; accordingly, restorative justice measures involve the offender, victim(s), and the community.

Section 718.2(e) was added to the Criminal Code of Canada in an attempt to remedy the problem of Aboriginal over-incarceration. It was also possibly in part an act of benevolence, showing some national responsibility for historical injustice and the ongoing impact of colonialism (Murdocca, 2009: 25; Stenning & Roberts, 2001:160). Provision 718.2(e) directs a sentencing judge 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” (Stenning & Roberts, 200:138). Underlying the statement of purpose, objectives and principles of section 718 of the *Code* is the intention to reduce the use of incarceration while promoting restorative justice principles (Manson, 2001: 80; Daubney & Parry, 1999: 34).

Section 718.2 places general restrictions on sentencing practices, while 718.2(e) emphasizes consideration of alternative sanctions to incarceration where possible, and particularly for Aboriginal offenders. The entire section is intended to “promote consistency

and clarity in the punishment of offenders” (Ruby, 1999: 16). Its success is hotly contested in the literature.

The enactment and application of this particular section of the *Criminal Code* has resulted in much discussion and debate within both academic literature and the courts. The debate around this provision goes beyond the explicit reference to Aboriginal people. Participants in the sentencing debate co-opted the provision through scholarly contributions in an attempt to forward personal agendas and grievances.

“[S]entencing is nothing more than an institutional response to an act or a word. Sentencing Native people—or people from any other culture—poses a very substantial challenge” (Ross, 1992: 146). Research indicates that the process of sentencing Aboriginal individuals is particularly difficult. The legal concept of innocence/guilt, so central to Canadian criminal justice, is not granted the same weight in Aboriginal conceptions of justice. Within Aboriginal communities, the finding of guilt is secondary to the focus of restoring the harmony disrupted by the criminal act (Canadian Criminal Justice Association, 2000). Sentencing Aboriginal offenders is a complex issue but there is agreement that the individual, the community and the harm done need all be acknowledged and considered during sentencing (Ross, 1992: 145-159).

The over-representation of Aboriginal peoples can be traced as far back as 1967, in a report titled, *Indians and the Law*, written by the Canadian Corrections Association (Goff, 1999: 14). The over-representation was again reported in 1974 in a report by the Law Reform Commission of Canada, *The Native Offender and the Law* (Royal Commission on Aboriginal Peoples, 1996: 28). In 1996, the Royal Commission on Aboriginal Peoples

(RCAP) concluded that the current criminal justice system had failed Aboriginal peoples (RCAP, 1996: 28). The high incarceration rates of Aboriginal offenders are evidence of that failure.

It would also appear that this group is particularly affected by incarceration:

Aboriginal offenders, because of their background, are more adversely affected by incarceration and less likely to be rehabilitated thereby, because imprisonment is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions (Ruby, 1999: 494).

Furthermore, the Aboriginal Justice Inquiry of Manitoba states that, “Historically, the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression” (Hamilton & Sinclair, 1991: 26).

The federal government itself has argued that s. 718.2(e) is one method to address Aboriginal offender over-representation. The problem of the over-representation of Aboriginal offenders in Canadian provincial and federal institutions has grown since 1995/96 (Mann, 2009: 4-7). This fact could suggest that, s. 718.2 (e) is ineffective in reducing the high rates of incarceration of Aboriginal offenders. However, little is known regarding how s. 718.2(e) is being used in the courtroom. This conclusion may therefore be somewhat premature as it is unclear if counsel and judges are acknowledging this section and whether its invocation is being opposed. A review of the literature on the subject may help shed light on the issues surrounding the application of this optimistic provision

1.1 LITERATURE REVIEW

The sporadic application of section 718.2 (e) may be, at least partially, explained by the conflicting positions towards sentencing principles entertained by the opposing

sentencing camps. The two main opposing sentencing camps, retributivists and restorative justice proponents value different sentencing objectives and have both reacted strongly for different reasons to the addition of this new sentencing provision. Distinct principles guide the sentencing process in both cases and are particular to each camp. In the following developments, we will consider both camps separately and then examine their conflicting positions on sentencing and the inclusion of section 718.2 (e) of the *Criminal Code*.

1.1.1 The retributivist objections

1.1.1 (a) A need for proportionality in sentencing

Section 718.1 states; “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender” (*Criminal Code*, R.S.C. 1985, c. C-46, s.718.1). Proportionality is stressed in this section as the “fundamental principle” of sentencing. This retributivist aim has more recently been taken up by proponents of “just deserts” models of sentencing. Emile Von Hirsh, a prominent “just desert” theorist, explains that the popularity of the idea of proportionality in sentencing is:

[B]ecause the principle embodies, or seems to embody notions of justice. People have a sense that punishments scaled to the gravity of the offenses are fairer than punishments that are not. Departures from proportionality—though perhaps eventually justifiable—at least stand in need of defense (cited in Manson, 2001: 84).

Roberts & Cole (1999: 10), echo this position and explain that proportionality in sentencing “lies at the heart of everyday notions of justice”. They state that the reason proportionality is so vital to the sentencing process in Canada is “that it underlies popular conceptions of rewards as well as punishment” (Ibid, 10). Von Hirsh and Roberts (1995: 239-240), maintain that the statement about proportionality was included in the amendments

to the *Criminal Code* to ensure the reduction of incarceration, promote proportionality, and reduce the amount of sentencing disparity previously encountered. Because of this, they, like other just deserts proponents, argue that s. 718.2(e) ultimately negates the use of proportionality in sentencing. By requiring judges to favor alternatives to incarceration when sentencing this particular group, the principle of proportionality is essentially nullified (Stenning & Roberts, 2002: 84-85; Stenning & Roberts, 2001: 159-161; Archibald, 1998: 269-270, 286). The gravity of the act committed by the Aboriginal offender and his level of responsibility may very well merit, in proportion, a sentence of incarceration but this section states that when such is the case judges must go a step further and attempt to find another more tailored solution (Stenning & Roberts, 2001: 157-161).

1.1.1. (b) “Playing favorites”: Inequitable sentencing

There are those who argue that the over-incarceration of Aboriginal people cannot be attributed to discriminatory sentencing and that the creation of s. 718.2(e) will create inequitable sentencing practices (Stenning & Roberts, 2002: 157-161; Cairns, 2002: 58). Instead, they call for the institution of a general mitigation factor (Ives, 2005). A general mitigating factor would help rectify the Court’s’ reliance on a “Pan-Indian” view of native culture that is not consistent with Aboriginal diversity and ignores the distinctiveness of other marginalized groups (Stenning & Roberts 2001: 157-161; Cairns, 2002: 58-59). Paying “particular attention to the circumstances of Aboriginal offenders” could be accomplished just as well with the institution of a provision which recognizes the role of the risk factors that precipitate crime by all offenders regardless of racial/cultural origins. This provision should be applied based on a demonstrated causal link between status and behavior not on the accused’s membership in a disadvantaged group.

1.1.1. (c) Encouraging disparity in sentencing:

The need to consider alternatives when sentencing an Aboriginal offender encourages the individualization of sentences. This is counter to the principle of equity as it increases disparity in sentencing (Roberts & LaPrairie, 1997: 75-76). The concept of equity of treatment is central to modern sentencing practices. Bill C- 41 states that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances” (Bill C-41, s. 718.2(b)). According to Roberts & LaPrairie (1997: 75), “[e]quity of treatment [...] lies at the heart of public conceptions of fair sentencing”; therefore the idea that one group receives additional consideration in sentencing is seen as undermining the notion of parity so central to justice.

Now that we have heard from the retributivist camp, we will next move on to the restorative perspective’s response to the introduction of section 718.2 (e).

1.1.2 The restorative perspective’s response

Restorative justice sees crime as the result of a disharmony in the perpetrator’s relations or environment and does not seek to assign blame solely upon the offender or calculate his degree of responsibility (Walgrave, 1999: 8-11). From a restorative perspective, restoration is made when the offender takes responsibility for his actions and works to make amends while recognition is given to the fact that exterior factors played a part in or may have precipitated the situation, mitigating some of the offender’s responsibility (Ibid: 8-9). However, according to Hannah-Suarez (2003: 258-260), unlike restorative justice, retributive punishment is determined by calculating the moral responsibility of an offender and presumes that the individual had control over his actions.

Retributive punishment condemns the moral choice of the offender but does not account for the natural circumstances that contribute to the incidence of crime. The unluckiness of a poor socio-economic status should have an effect on the calculation of desert. As Hannah-Suarez (2003: 284), explains “[a]rguments seeking to attribute moral responsibility to an agent despite the effects of luck are incapable of overcoming the effects of luck in formulating a conception of the self capable of sustaining the type of moral responsibility required by retributive notions of punishment”. Section 718.2(e) represents a welcome reprise from retributive justice, recognizing the full effects of luck on moral responsibility.

The enactment of s. 718.2(e) of the *Criminal Code*, was heralded by restorative justice proponents as a remedy to the over-incarceration of Native persons (Anand, 2000: 416-417; Roach & Rudin, 2002: 31-33; Daubney, 2002: 41). To many, this provision represents a just response and a welcome respite from more punitive reactions to Aboriginal criminality. Attempts like s. 718.2(e) to make the system less punitive follow a recognition that incarceration may be a less appropriate or useful sanction for Aboriginal offenders (*R. v. Gladue* [1999] 1 S.C.R. 688, para. 37).

1.1.2 (a) Encouraging restraint in sentencing

Subsection 718.2 (d) codifies the principle of restraint, “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances” (*Criminal Code*, R.S.C. 1985, c. C-46, s.718.2 (d)). Judges are required to canvass all available non-custodial sanctions reasonable given the circumstances of the offence (Roberts & Cole, 1999: 35). Section 718.2 (e) then requires the judge to consider “all available sanctions other than imprisonment that are reasonable in the circumstances” (*Criminal Code*,

R.S.C. 1985, c. C-46, s.718.2 (e)). Together these provisions discourage incarceration when a “less onerous sanction will satisfy the relevant sentencing principles” (Manson, 2001: 95). As dictated in *R. v. Gladue*, “restraint means that prison is the sanction of last resort” (*R. v. Gladue* [1999] 1 S.C.R. 688, para. 36-41). According to Manson (2001: 95) however, the 1996 amendments to the *Criminal Code* go beyond making imprisonment a last resort:

Restraint means that when considering other sanctions, the sentencing court should seek the least intrusive sentence and the least quantum which will achieve the overall purpose of being an appropriate and just sanction. [...] [T]he Supreme Court has interpreted the recent amendments as imposing on sentencing judges the obligation to expand the use of restorative justice principles. While this is a change in direction of general applicability, it has a special meaning when courts are responding to Aboriginal offenders.

Judges need not only show restraint in the application of incarceration as a sanction but must also attempt to incorporate a restorative approach to justice which is in keeping with the implicit goal of providing reparation for past harms done to Aboriginal peoples.

1.1.2. (b) Equality in sentencing means accounting for differences

It is widely acknowledged that the special direction, “with particular attention to the circumstances of Aboriginal offenders” (*Criminal Code*, R.S.C. 1985, c. C-46, s.718.2 (e)), was added as an explicit recognition by Parliament of the over-incarceration of Aboriginal people (Roach & Rudin, 2002: 19; Daubney, 2002:38-39). According to Daubney (2002: 36), while just deserts proponents argue that, applied in this way, restraint violates the sentencing criteria of parity (Stenning & Roberts, 2002: 157-162; Stenning & Roberts, 2001: 83-84) it is impossible to construe the meaning of the explicit reference to Aboriginal people in provision 718.2 (e) while over-looking that the “principle of restraint” applies to all offenders. Roach & Rudin (2000: 380), argue that this section is not intended to be unfair to

non-Aboriginal offenders but rather to “treat Aboriginal offenders fairly by taking into account their difference”. Carter (2002: 67), concurs with Roach and Rudin and states that:

No one who is concerned about Canada’s tendency to over-incarcerate its citizens believes that Aboriginal people are the only ones who should be spared some degree of this most punitive measure [...] However, the fact is that we have to start somewhere, and for outstanding historical and social reasons, we have placed Aboriginal people at the front of the list for consideration.

Restorative justice scholars suggest that the notion of “equality with a vengeance” advanced by desert proponents, where no one should benefit if everyone cannot benefit is counterproductive (Ibid: 67-68). Alternatives to incarceration should be considered for all offenders independent of racial/cultural origin therefore the fact that s. 718.2(e) makes this explicit for one distinct group should not offend sensibilities because it remains a consideration that is supposed to be applied universally (Daubney, 2002: 38; Roach & Rudin: 2002: 33). Socio-economic risk factors are not unique to Aboriginal people but few groups can claim historical injustice which compares to that suffered by this group (Carter, 2002: 71; Roach & Rudin, 2002: 33). Brodeur (2002: 48-51), adds that the systemic discrimination that plagues Aboriginal people cannot be seen as having the same meaning as that which affects other marginalized groups. The special consideration allotted to Aboriginal people in s. 718.2(e) does not give this group “*carte blanche*” but since Canada’s first inhabitants have suffered from oppression the longest, it is believed this particular attention is deserved.

1.1.2 (c) Non-custodial sentences are not discounted sentences

According to Carter (2002: 69), “equality with a vengeance”, is nothing more than an unfounded allegation that s. 718.2(e) represents an unequal “distribution of benefits”. Such statements are problematic as they are based on the misguided assumption that non-custodial

sentences represent discounted sentences (Carter, 2002: 69; Bayda, 1996: 325). Non-custodial sanctions do not represent a lesser sentence than incarceration (Roach & Rudin, 2000: 369-372). According to Carter (2000: 69), “[n]on-custodial sentences cannot be considered ‘benefits’ in any conventional sense [...] at best, they are limited relaxations of one of the least explicable and most violent processes of our legal system”. The need to consider alternatives does not signify that a lesser or less meaningful sentence is being handed down even if the alternative does not presume to be as onerous as incarceration. The perceived severity of a sanction does not dictate its ability to have a significant impact on the offender. There is far more support among “members of the judiciary for rehabilitation [than incapacitation]” (Roberts & Cole, 1999: 9). Rehabilitative sentences aim to “restore the offender to the community” by changing him from an offender into a law-abiding citizen (Manson, 2001: 300-301). Roberts and Cole (1999: 9-10), explain that “[t]here is general agreement now, recognized by Parliament, that for many offenders, imprisonment is not an appropriate route to rehabilitation [...] the carceral milieu is sufficiently harmful that judges use imprisonment to achieve other sentencing goals and attempt to rehabilitate offenders by means of noncustodial sanction[s] [...]”.

1.1.2. (d) A welcomed respite from incarceration

Little evidence demonstrates the superior effectiveness of incarceration as a sanction, and according to Carter (2002: 69), this should be reason enough for equality arguments in this area to attempt to save more people from this fate than encourage its necessity. Carter (2002: 69), believes “this points to a less vengeful equality perspective that seeks to preserve whatever benefit s.718.2 (e) provides [...] that, although the best situation might be for everyone to receive a benefit, it is nonetheless preferable that some people receive it rather

than no one". It is clear that Aboriginal people are not the only ones who should receive this "benefit". However, just deserts proponents' insistence upon the legal insignificance of history as the basis of their claim that s. 718. 2 (e) will lead to discriminatory sentencing is faulty and fatal to their argument. Poverty and other incidents of social marginalization may not be unique, "but how people get there is" (Ibid: 71).

The reasons that have led to the over-representation of Aboriginal people within the criminal justice system stem from particular historical and cultural factors which are unique to this group within Canada. The argument that the kind of factors that underlie Aboriginal criminality similarly affects marginalized non-Aboriginal offender groups and therefore is unfair to give such factors particular attention in sentencing Aboriginal offenders is erroneous, as no one's history in this country compares to that of Aboriginal peoples (Brodeur, 2002: 48-51; Carter, 2002: 71; Roach & Rudin, 2002: 33 Daubney, 2002: 41; Findlay, 2001: 226-237).

1.1.3 A reconciliation of perspectives

There are scholars who see potential in s.718.2 (e) but are also aware of its possible limitations. Retributivists and restorative justice proponents alike have identified, perhaps unwittingly, that a single "monochromatic" justification for punishment will be so "riddled with defects that it will fail to provide a persuasive premise" (Manson, 2001: 49). According to R.A Duff both models of punishment can come together and produce an "integrated model":

[A] system of punishment must satisfy the demands of both justice and utility. It must efficiently pursue consequences which are sufficiently substantial to justify it, but it must also be rooted firmly in a conception of desert that recognizes the 'intrinsic demands of justice' (Ibid, 51).

This camp argues that the least restrictive alternative should always be employed. However, they also affirm that the inclusion of section 718.2 (e) did not suggest that the incarceration rate for Aboriginal people was going to necessarily decrease significantly (Roach & Rudin, 2002: 31; Daubney, 2002: 41; Vasey, 2003: 97). This provision is intended to encourage judges to consider alternative sentencing when possible, and alternatives may include restorative and culturally sensitive approaches (Roach & Rudin, 2002; Daubney, 2002: 41; Vasey, 2003: 93). Restorative alternatives to incarceration are meaningful and proportionate responses to crime (Carter, 2002: 69-70). Proportionality can be expressed through restorative alternatives, the principles of just desert and reparation of harm done are not mutually exclusive and can both be expressed through a sanction which is not as extreme as incarceration.

Understanding Aboriginal over-representation in terms of social disadvantage commonly experienced by other marginalized groups over-simplifies a complex problem and discounts Aboriginals' experience of colonialism (Vasey, 2003: 89-90; Brodeur, 2002: 48-49; Murdocca, 2009: 30). The just deserts argument of formal equality forwarded by opponents of s. 718.2 (e) is inconsistent with principles of substantive equality also acknowledged in Canadian law (Roach & Rudin, 2002: 23-25). Substantive equality, "finds discrimination not only in formal discrimination, but also in failures to take account of the disadvantaged positions of groups in Canadian society" (Ibid, 24). The formal approach to equality suggests that it would be suspect to make distinctions on the basis of group membership and that to single out Aboriginal offenders over other offenders who may have experienced similarly adverse social conditions is inequitable. However:

[...] the recognition of the disadvantaged position of Aboriginal people supported in s. 718.2 (e) and *Gladue* is supported by a substantive equality. Distinctions that proponents of formal equality would denounce as reverse discrimination and dangerously based on race can, under substantive equality, be justified on the basis that they attempt to ameliorate the position of the disadvantaged (Ibid: 25).

The case of *R. v. Gladue* showcases quite clearly the interplay between the need to uphold retributivist principles and the need to uphold restorative justice principles simultaneously within sentencing as well as the possible consequences this will have on the application of section 718.2 (e).

1.1.4 R. v. Gladue²

In 1999, the Supreme Court of Canada (S.C.C.), in *R. v. Gladue*, interpreted the meaning of the phrase “with particular attention to the circumstances of Aboriginal offenders” (Criminal Code, R.S.C. 1985, c. C-46, s.718.2 (e)) in s. 718.2(e). The case involved a 19 year-old Aboriginal woman, charged with second-degree murder for the stabbing death of her common law husband because she suspected him of infidelity. At the time of the offence, the accused was diagnosed as suffering from a hyperthyroid condition which could produce exaggerated reactions to emotional situations (Lash, 2000: 88). The offence took place in Nanaimo where the couple lived and the sentencing judge inquired as to whether their previous home in Alberta was located in an Aboriginal community and was advised that it was not (Manson, 2001: 78). The trial judge in the first instance did not consider Gladue’s Aboriginal heritage because she lived in an urban area, not on a registered reserve (*R. v. Gladue* [1999] 1 S.C.R. 688, para. 12-18). The accused was convicted of manslaughter and received a sentence of three years imprisonment plus a 10 year weapon prohibition (Ibid, para. 13). Her three year custody sentence was appealed to the British

² This section refers only to *R. v. Gladue* [1999] 1 S.C.R. 688. Therefore, the paragraph number is indicated where necessary rather than the full citation each time it is referenced.

Columbia Court of Appeal which concluded that the trial judge had erred by not considering s. 718.2 (e). The sentence appeal was dismissed but the majority of the British Columbia Court of Appeal held that the application of section 718.2 (e) was not precluded because an Aboriginal offender does not live on a reserve (Ibid, para.19-20). Gladue then appealed her sentence to the Supreme Court of Canada (S.C.C.). The S.C.C. ultimately dismissed the sentence appeal but still needed to establish whether the Court of Appeal had erred by determining the legislative purpose of section 718.2 (e). According to the S.C.C. 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 section 718.2 (e) in imposing a sentence of three years’ imprisonment” (Ibid, para. 24). In order to address this query the S.C.C. had 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 (Ibid, para. 24).

The case also raised the more general issue of whether the sentencing principles outlined in s. 718.2 (e) were simply the codification of already accepted principles (Ibid, para. 31).

The court concluded that section 718.2 (e) went beyond the codification of existing principles, as it was considered to be restorative in nature (Manson, 2001: 79). Conversely, the court supported the appellant’s expressed fear that the section could be applied in a manner that does not impact sentencing practices for Aboriginal offenders. The Court stated that this section “creates a judicial duty to give its remedial purpose real force” (*R. v. Gladue* [1999] 1 S.C.R. 688, para. 34) in order to “redress this social problem to some degree” (Ibid, para. 64). In interpreting the intentions of Parliament as enacted in this section, the Court

determined that s. 718.2(e) does not require judges to pay more attention to Aboriginal offenders, nor should they treat them as any other group of individuals as this would render the section meaningless. What is meant is “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” (Ibid, para. 66).

The Court asserted that the purpose of s. 718.2 (e) was to reduce the incarceration rate of Aboriginal offenders in Canada and one way to accomplish this was to pay attention to their background during sentencing. The Court affirmed, however, the idea addressed in the literature that section 718.2 (e) does not represent an automatic community sentence or reduction in sentence length, as according to the Court, “[c]learly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant” (Ibid, para. 78).

The trial judge’s responsibility to determine a sentence that is fit for each individual and each offence is not undermined by s. 718.2 (e). What this section does is alter the methodology which must be employed by sentencing judges “in determining the nature of a fit sentence for an aboriginal offender” (Ibid, para. 93). The S.C.C. concluded that:

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 (Ibid, para. 81).

The role of section 718.2 (e) in relation to Aboriginal offenders was the focus of the decision. As Manson (2001: 79) explains, “[s]ubsequently, it has been a source of controversy as a result of the suggestions, especially in the media, that the Supreme Court

has authorized a different standard of sentencing for aboriginal offenders”. This just desert view is supported by Stenning and Roberts (2002), in particular. Moreover, according to Pfefferle (2008: 135-140), there is much debate surrounding how to apply the mitigating principles of s. 718.2 (e) outlined in *Gladue* without ignoring the need for denunciation and proportionality in sentencing. The just desert arguments of proportionality and the narrow focus on the seriousness of the offence has barred the implementation of these principles and subsequently their effectiveness (Roach, 2009: 474-478; Roach & Rudin, 2000: 365-368; Anand, 2000: 415).

According to Manson (2001: 79-80):

Throughout, [both justices] Cory and Iacobucci emphasized the role of individualization as it applies to all offenders but they defined it with respect to aboriginal offenders expressly to include two questions which, in the non-aboriginal context, are usually present although implicit or subliminal: how did background factors contribute to the offence? what is the community’s view of the appropriate sanction?

The Supreme Court decided that two major areas must be considered when sentencing

Aboriginal offenders:

- (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 (*R. v. Gladue* [1999] 1 S.C.R. 688, para. 93).

These guidelines legitimize the consideration of Aboriginal background with respect to understanding the offence and the selection of a suitable sentence in order that restraint may reduce the overreliance on incarceration. Manson (2001: 80) states that:

The major aspect of section 718.2 (e) is its enhancement of the principles of restraint by requiring that sentencing judges consider and reject all available options before turning to imprisonment. While this principle applies to all offenders, the inclusion

of the specific reference to aboriginal offenders in section 718.2 (e) ensures that a background, including historical and systemic discrimination, and the availability of culturally based sanctions, will be considered within the decision-making process.

Ultimately, the countless circumstances which can contribute to the commission of an offence and the infinitely varied character and background of offenders require that sentencing be undertaken with an open mind. Proponents of restorative principles of justice are encouraged by the role individualization can and does play in the sentencing of all offenders but with particular attention to Aboriginal people. The explicit commitment to applying restraint confirmed by the Supreme Court in *R. v. Gladue* is also welcomed by these proponents. The need for proportionality and parity acknowledged in this decision will inevitably produce similar sentences for similarly situated offenders, keeping the retributivists' elements of punishment.

Balancing all these, often conflicting considerations and principles in sentencing becomes quite challenging. It is unlikely that a sentence will reflect such a multitude of opposing goals and principles. More often than not, the reconciliation of the perspectives will be impossible and the sentence will tip in one of the perspective's favor to the detriment of the other. Retributivist justice remains the dominant sentencing perspective within our legal system and often eclipses restorative considerations creating a considerable obstacle to the application of section 718.2 (e). Ultimately, the restorative aims of section 718.2 (e) appear to be incompatible with our retributivist model of justice.

1.1.5 The incompatibility of restorative justice aims within a retributive model of justice

According to Ross (1995: 432), Western and Aboriginal approaches to justice are so fundamentally different that to subscribe to one is to be in "breach of the other". Western

law: 1) deals with offenders as individuals; 2) assumes offenders choose to commit crime; 3) focuses narrowly on particular acts; 4) increases feelings of antagonism through adversarial processes; 5) labels and stigmatizes offenders; 6) believes that taking responsibility for the crime means nothing more than an admission of guilt and proportionality in sentencing; and 7) administers solutions that are best prescribed by legal experts (Ibid: 432-434). Aboriginal law: 1) sees individuals as products of relationships and involves all the actors in the justice process; 2) believes that factors external to the offender affect propensity of criminality; 3) sees acts as signals of disharmonies in relationships between individuals; 4) requires restorative justice processes to reduce antagonism; 5) believes that labeling someone is dangerously reductionist; 6) defines responsibility as making amends with all those affected by the act; and 7) believes that potential solutions can only be arrived at by the people affected by the act (Ibid: 432-434).

1.1.5. (a) Seeing justice done through the re-establishment of social bonds versus justice through the application of a punitive sanction

Restorative justice entails responses to crime that are directed towards reparation and restoration of “equilibrium” (Manson, 2001: 371-375; Ross, 1995: 432-435). According to Manson (2001: 372):

Unlike a retributive response, which aims to punish, a restorative sanction is intended to reconcile and repair the harm caused by an offence. Its beneficiaries include the offender, the victim, and the community at large.

Part XXIII of the *Criminal Code*, including sections 718, 718.1 and 718.2 (e) as a whole encourages the application of restorative justice principles (Manson, 2001: 28). Moreover, the Supreme Court interpreted the amendments as directing judges to expand the use of restorative justice principles as seen in *R. v. Gladue*:

[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 is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime (*R. v. Gladue* [1999] 1 S.C.R. 688).

This type of understanding stands in stark contrast to that of our current retributive system which is adversarial in nature and where crime is understood as an affront to the state and not an event which takes place between private citizens, where the victim is considered a privileged witness only (Dubé, 2008: 43). From this standpoint the re-establishment of social bonds is not important (Ibid, 44) and in opposition to the restorative approach noted above and posited through the application of section 718.2 (e) of the *Criminal Code*. Within this retributivist framework, the offence has much farther reaching effects than those lived by the victim and there is no reparation that can be made to the victim which can reaffirm the value placed on the law that has been broken or restore the disrupted order other than the punishment of the culpable party by a state authority (Pires, 1998: 28). The belief is that justice will be restored through the suffering of the transgressor, the sanction essentially serving as atonement (Ibid: 28).

1.1.5 (b) Restorative justice, more just?

Many proponents of restorative justice feel, like Kwochka (1996:153-155), that issues of Aboriginal criminality and overrepresentation are much better treated through a restorative approach to justice than the retributive justice primarily offered through the current justice system. Modifications of the current justice system to accommodate restorative justice principles are negligible and do not represent significant efforts to create

an environment where such initiatives are legitimated (Wihak, 2008: 3, 8-15 & 16-17). Attempts to incorporate restorative initiatives are confined by the retributivist' framework within which our justice system is rooted, too modest to result in any significant improvement in outcomes (Quigley, 1999: 145-146; Stephens, 2008: 76).

Counter to this argument, Aboriginal women's groups have been vocal in opposing these restorative kinds of remedies because there is evidence that they perpetuate sexual and domestic violence (Cameron, 2006). According to Cameron (2006: 481-484 & 509-510), the restorative justice approach fails to address the complexity which exists within a situation of intimate partner violence involving Aboriginal persons where gender and culture collide. It is believed unable to address the needs of the Aboriginal victim while focused on the cultural needs of the Aboriginal offender (Adjin-Tettey, 2007: 193-196). Sentencing circles as an example of a restorative justice initiative fails to take into account the enduring problematic relationship between Aboriginal people and the criminal justice system and it excludes Aboriginal women's experience and knowledge from the proceedings. Cameron and Cunliffe (2007:14-17 & 32-35), state that the exclusion of Aboriginal women's perspective from the circle exacerbates their disempowerment within the community. Patterns of violence are also kept from the sentencing circle process in favor of an institutional focus on the possibility of decreasing over-incarceration rates of Aboriginal men (Adjin-Tettey, 2007: 193-196).

Milward (2008: 97), makes the argument that a restorative approach to justice does not necessarily represent a more effective solution to the problem of Indigenous over-incarceration. He states that the Western criminal justice system recognizes the legitimacy of restorative justice practices and that the criminal justice system and Indigenous

communities cooperate to manage criminality. Milward (2008: 107-108), explains that Aboriginal justice traditions may not always remain relevant in modern Indigenous communities and there are persuasive critiques against restorative justice. According to Milward (2008: 107-108), critiques of restorative justice include: 1) that it strives to create a less adversarial process with less emphasis on formal rules which can have the adverse effect of a stronger party imposing its will on a weaker party; 2) that power structures in Aboriginal communities can produce power imbalances as restorative justice creates “a forum for the application of political pressure to the advantage of local elite and to the detriment of politically unpopular or marginalized offenders or victims”; 3) that it produces “softer” sanctions; and 4) that these initiatives often reflect power imbalance between genders. There are also significant punitive inclinations among Aboriginal peoples (Ibid, 110-112).

There are scholars who recognize the potential of the restorative approach to justice and also that there are obstacles impeding its application. In order for judges to apply the principles of restorative justice appropriately, more time will need to be spent on the sentencing process to ensure that all information required to evaluate a more restorative approach to the defendant and the community is before the court, therefore drawing out an already lengthy court process. The use of a restorative justice paradigm results in judges sentencing with “community dispositions” which is taxing on the already limited financial resources of these communities (Turpel-Lafond, 2000: 46-48; Stephens, 2008: 49-51, 54-55 & 76). LaPrairie (1998: 75) explains that in order for restorative justice to be effective, many considerations must be met. She states that local justice must serve community, offender, and victim needs. The community’s capacity to respond to the problem must be assessed and ensured (Ibid: 75). Offenders’ suitability to the local justice approach must be

adequately assessed (Ibid: 75). Victims' participation in the adjudication of offences and diversionary alternatives must be ensured (Ibid: 75). Project personnel must be properly trained (Ibid: 75). There is support that a restorative approach to justice can be effective but many considerations must be met in order for this approach to be successfully implemented and produce the desired outcomes (Ibid: 75).

The reliance on the current punitive justice system as a remedial instrument seriously limits the possibility of moving forward and resolving the issue of Aboriginal over-incarceration and in allowing section 718.2 (e) to reach its full potential (Wihak, 2008: 17-18). According to Quigley (1999:159-160), the steps taken thus far are too modest to result in any significant change and a move away from a retributive model of justice to a restorative model is required. The need for "seeing justice done" in a criminal justice system such as ours clouds court officials' judgment and blinds them to the potential of utilizing restorative approaches to sentencing.

The retributive focus of our current legal system, as noted above, may very well be halting the widespread use of section 718.2 (e)'s restorative sentencing approach to aboriginal offenders. The main focus of my research project is to decipher whether this theory holds true and what other issues may be impeding or favoring the use of section 718.2 (e) in sentencing Aboriginal offenders by judges by analyzing a portion of the court of appeal cases which deal with this issue. In the following chapters, I will attempt to uncover how section 718.2 (e) is being applied within Canadian appeal courts. My goal is to uncover what court of appeal judges' justifications are for applying or failing to apply this provision when faced with sentencing aboriginal offenders. I will be analyzing 30 Canadian court of appeal cases in hope of unearthing some of the reasons and circumstances preventing or

encouraging the application of section 718.2 (e). My research will be guided by knowledge developed through Alvaro Pires' theory of modern penal rationality which elucidates the intricacies of the pervading rationale forming the basis of our current criminal legal system's functioning and identifies the classical theories of punishment and their principles as major obstacles to the implementation of innovative rationales, principles and practices in sentencing. I will be utilizing a constructivist discourse analysis as my analytical strategy, leaving an opening for an inductive (grounded theory inspired) approach to allow me to remain open and be receptive to original issues which may be hampering the practice of section 718.2 (e), quashing its potential impact on aboriginal offender alternative sentencing and which may differ from those suggested by modern penal rationality.

CHAPTER 2

THEORETICAL FRAMEWORK

Ezzy (2002) explains that while the researcher should try to move beyond pre-existing theory to allow for original interpretations and understandings to emerge, one cannot and should not ignore data which supports previously established conclusions. Therefore, while judges' justifications for applying or failing to apply section 718.2 (e) of the *Criminal Code* go beyond the purview of modern penal rationality, a number of elements put forth by this theory figure within the data under scrutiny and contribute to explaining the ways in which this disposition is being employed in sentencing.

2.1 MODERN PENAL RATIONALITY AND THE USE OF SECTION 718.2(E) OF THE CANADIAN CRIMINAL CODE

Section 718.2(e) of the Canadian *Criminal Code* is a much debated and controversial provision. Most peculiar however, is trying to decipher what about this section of the *Code* warrants such a fuss. It is true that some feel this provision shows favoritism for First Nations persons in sentencing while it is clearly stated that alternatives to incarceration should be sought for all those before the law when such is deemed appropriate. The explicit mention of this group in section 718.2(e) of the *Criminal Code* is an attempt by parliament to remedy their gross over-representation within the criminal justice system:

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 provision has ruffled many feathers because it goes against the status quo, as it attempts to steer sentencing away from suffering and social exclusion. It works against the current notion of penal justice upon which the Canadian legal system is built, putting into question

the appropriate measurement of sentences, which sentencing principles to utilize and ultimately what is to be considered a just sentence. This provision is upsetting to many because it challenges the dominant discursive framework of “*la rationalité pénale moderne*” (henceforth to be referred to as “modern penal rationality” or MPR).

Although parliament has become aware of the problem of over-incarceration and has by all accounts made a symbolic effort to help remedy the issue, as modern penal rationality continues to be embedded in the workings of criminal law and with classical theories of punishment as the base for the fundamental principles of sentencing, there is little hope that section 718.2(e) will realize its full potential for Aboriginal people. Incarceration has become the penalty “*par excellence*” as Foucault (1979: 231) put it and as long as the punitive mentality of MPR remains and the cleavage between civil and criminal law continues, little other alternatives will be deemed capable enough to take its place and hopes of seeing any real change in incarceration rates will be dashed. How are changes expected to take place in rates of incarceration when the rationality and framework which has given rise to the problem in the first place remains the same?

As is set out in Pires (1991: 71), while changes to penal law are important in order for provisions like this one to be embraced, new theories of punishment and penal rationale must be instituted within the legal system which values more positive sentencing outcomes than suffering and social exclusion in order for its application to have any tangible effect. The emergence of new principles, concepts and theories are necessary at the cognitive level so that the legal system may free itself from the trappings of modern penal rationality, “eliciting an opportunity to break away from the norm and take a chance on options other than those typically privileged through the MPR’s thought process” (Dubé, 2008: 28; our translation).

What I garner from Pires (1991: 71) is, lacking this vital cognitive component as stimulus, legislative breakthroughs such as section 718.2(e) lose a lot of force as without the supporting cognitive structures these developments will likely be usurped by the MPR or be cast aside or left to operate in the margins.

Alvaro Pires coined the term modern penal rationality and it encapsulates within its framework the dominant theories of punishment and sentencing principals underpinning modern criminal law. Pires highlights the contributions of 18th and 19th century reformers such as Beccaria and Kant as pioneers of modern criminal law and its supporting principles and theories. Many of their ideas about justice and its execution were selected and reformulated to form the basis of modern criminal law's cognitive structure or rationale.

The 18th and 19th centuries marked a period of crisis in traditional justice (Foucault, 1979). Under the Sovereign's rule little protection was afforded to the governed "which placed the latter in a precarious position of vulnerability, indefensible against the rulers whims" (Nonet & Selznick in Dubé, 2008: 31; our translation). Traditional justice had become outdated. "Arbitrary and barbaric punishment no longer coincided with society's punitive expectations, therefore, new procedural norms and sanctions would need to be thought up and created in such a way so that human dignity and integrity could remain intact throughout the proceedings" (Dubé, 2008: 31; our translation). Ideals and ideas of justice would be united to form a single system of thought of criminal law which would help secure and affirm the legal system's independent identity. MPR would become a cognitive hurdle "to the system's internal evolution, be a central and dominant feature of the system's identity as well as be equipped strategically to relegate all other alternative discourses of justice" (Ibid: 32; our translation). Modern penal rationality now strongly embedded has

considerable impact on the criminal legal system's operation. The integration of MPR within the system of criminal law, allowed for the system to set itself apart from other social systems and systems of law. As explained by Dubé (2008: 33; our translation), "rooted in MPR, the criminal legal system has adopted a particular identity which has allowed it to conceive of its function and objectives as distinct from other social systems and other legal systems".

Foucault's notion of "*système de pensée*" or system of thought is used to "theoretically represent the ensemble of discourses mobilized by penal rationality" (Ibid: 33; our translation). According to Dubé (2008: 33), this notion highlights important facets of modern penal rationality. The first is MPR's ability to cognitively, differentiate itself from other systems of thought, as aforementioned. While theories and ideas of penal intervention reunited under the framework of penal rationality may compete, they also share common elements, among which we can count the ideology of incarceration (social exclusion) (Ibid: 33-34). The second is MPR's exteriority which stands in contrast to the conscience of the individual actors who are charged with enforcing the logics of modern penal rationality (Ibid: 34). Ultimately, despite the fact that actors within the criminal legal system may be cognizant of the pitfalls of MPR, the rationale is so pervading that the actors tend to reinforce this system of thought through their selection of course of action (Ibid: 35). MPR is such a pervasive thought system that those actors within the system very seldom manage to escape its hold as it is so deeply enmeshed in the fabric of the criminal legal system and in Western culture. Working within this network, actors of the criminal legal system gain a

vision of the world as sustained by MPR³. Once the actors become engaged within the framework of MPR, the rationale being so totalizing and consuming, it is very difficult if not impossible to contemplate a different way of reasoning and going about matters. According to Dubé (2008: 35), once the actors within the criminal legal system become accustomed to thinking through MPR “they are blinded to alternative systems of thought and reasoning or other options are viewed as invalid”. Moreover, once a problematic situation is deemed criminal through the semantics of modern penal rationality all other management options are obscured, it becomes very difficult to think of solutions to these situations outside the penal realm, the only possible course of action becomes “penal and one which is unconcerned with suffering and social exclusion” (Ibid: 35; our translation). Trapped within the conceptual confines of modern penal rationality, individuals are conditioned to employ particular tactics, logics and interpretations which are coherent with the principals promoted through MPR, creating a kind of selective attention, encouraging that which reinforces this rationale and ignoring anything that challenges it.

2.2 MODERN PENAL RATIONALITY AND THE THEORIES OF SENTENCING

Penal rationality, as aforementioned, is the brainchild of several great thinkers of the 18th and 19th centuries. Reunited under the term of modern penal rationality is a mixture of different theories of punishment and their conceptualization of what constitutes an infraction, its supposed motives, appropriate sanctions and their limits and objectives.

2.2.1 Theory of retribution

³While it is acknowledged that similarities may be drawn between MPR and Bourdieu’s theory of habitus and field, these will not be treated in this work.

One such theory is that of retribution most famously developed by Immanuel Kant. Kant's theory is heavily permeated with moral overtones. Retribution is founded on the moral principle which claims that to make a moral wrong right requires the infliction of suffering upon the transgressor for the suffering caused by the delinquent act (Pires, 1998: 28).

2.2.1 (a) Kant and the social contract

Just as Beccaria did, Kant explains the idea of the social contract as follows. Without the institution of a legal state, individuals would be left in a state of chaos and perpetual violence against one another, people would not have any safeties against the violence of others or have the freedom necessary for exercising rights (Kant in Ibid: 9). Kant also believed that people were hedonistic and acted in such a way as to maximize their own interest even at the expense of others (Kant in Ibid: 9). It is this negative image of human behavior which he feels justifies the need for state run societies and the enactment of laws. The understanding is that by instituting these measures, lasting peace can be achieved (Kant in Ibid: 9). For Kant the social contract creates a state in which property and life is protected and lasting peace is ensured, with disputes being settled within a peaceful court (in Ibid: 10). The state has fulfilled its duty only when it has ensured freedom for all its citizens and this through infallible persecution of transgressors and an inflexible application of the law (Kant in Ibid: 46). As was the case with Beccaria's understanding of the social contract, Kant (in Ibid:12) holds that individual freedom while needing to be maximized can be limited by the state but only insofar as is necessary to ensure the freedoms of all.

2.2.1 (b) Kant and the notion of retribution

Kant does not oppose the institution of laws with individual freedom. According to Kant individuals were not free in the state of nature (in absence of laws), he believes that freedom is only accessible through the creation of a state of law (in Ibid: 12). In his eyes the state becomes constitutive of freedom (Ibid: 12). However, Kant is very clear that the state should intervene as little as possible in order to provide the greatest freedom and happiness to its citizens. When the freedom and protection of one individual is infringed upon through the actions of another, the state is forced to respond with the imposition of a sanction and a stigmatizing social status on the transgressor (Ibid: 15). Nevertheless, the minimal intervention of the state calls for such responses to be utilized as a last resort (*ultima ratio*) (Ibid: 15).

Kant explains the logic behind the punitive sanction as:

In punishment, a physical evil is coupled to moral badness. That this link is a necessary one, and physical evil a direct consequence of moral badness, or that the latter consists in a *malum physicum, quod moraliter necessarium est*, cannot be discerned through reason, nor proved either, and yet it is contained in the concept of punishment that it is an immediately necessary consequence of breaking the law. The judicial office, by virtue of its law-giving power, is called upon by reason to repay, to visit a proportionate evil upon the transgression of moral laws[...] Now from this it is evident that an essential *requisitum* of any punishment is that it be just, i.e. that it is an immediately necessary consequence of the morally bad act; and this, indeed, is what its quality consists in, that it is an *actus justitiae*, that the physical evil is imparted on account of the moral badness (in Heath & Schneewind, 1997: 308).

The old adage of an “eye for an eye” (Law of talion) is put into practice within the theory of retribution. The idea is that one of the purposes of law is to provide equitable retribution for an offended party. It is believed that justice is done when the illegitimate wrong (the criminal act) may be made right through the enforcement of a legitimate wrong (that of an equal sanction). In deciding how much punishment should be meted out, Kant’s

theory has propounded the principle of *lex talionis*, which implies the application of like for like:

But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than the other. Accordingly, whatever undeserved evil you inflict on another within the people, that you inflict on yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the law of retribution (*ius talionis*) – it being understood, of course, that this is applied by a court (not by your private judgment) – can specify definitely the quality and quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them (Kant in Gregor & Sullivan, 1996: 105).

Kant is clear that retribution is not to have a utilitarian purpose. However, if while meting out the punishment a kindness may be simultaneously accomplished through the sanction this will be allowed in so far as the goal of punishment is first achieved:

Punishment by a court (*poena forensic*) [...] can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted on him only *because he has committed a crime* [...] He must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative (Kant in Ibid: 105).

Although he who punishes can at the same time have the kindly intention of directing the punishment to [the end of happiness] as well, yet it must first be justified in itself as punishment, that is, as mere harm, so that he who is punished, if it stopped there and he could see no kindness hidden behind the harshness, must himself admit that justice was done to him and that what was allotted to him was perfectly suited to his conduct (Kant in Ibid: 34).

2.2.1 (c) Foundations for the obligation to punish

The right to punish the transgressor is thus transformed into an obligation, moreover it becomes a moral obligation to punish (Pires, 2001: 199). Whether reparation is done and peace between the parties is established or forgiveness is offered to the offender is of no

consequence as the moral obligation to punish the wrongdoer remains. The sovereign and the state have a responsibility to society to preserve and re-establish justice by inflicting an equitably measured sanction (Kant in Pires, 1998: 28).

According to Kant, just actions are moral actions and therefore punishment must satisfy the dictates of both morality and justice. Retributivism claims that punishment can be given solely on the basis of criminal guilt. The retributive theory of punishment holds that criminal guilt deserves punishment and people have a moral duty to inflict it as to leave an injustice unpunished is to be complicit. Punishment becomes the only way to reconcile the injustice suffered and within the perspective of a retributivist theory, only a punitive judicial sentence will do “as all others are said to demonstrate impunity” (Pires in Dubé, 2008: 43). Kant best expresses this idea in his example of the island. Kant believes in the concept of exact reciprocity in sentencing. Kant insists that society has a moral duty to punish those who have transgressed as this is just, and leaving a transgression unpunished is perpetuating an injustice. Therefore, in his example of the island Kant maintains that even if a society was to dissolve itself, every last transgression and transgressor would need to be punished in the amount required by the offence in order for justice to reign and the moral integrity of the society’s law abiding citizen’s to remain intact as the sanction has an expiatory function:

Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people living on an island decided to separate and disperse around the world), the last murderer remaining in the prison must be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of justice (Kant cited in Ladd, 1999: 140).

2.2.1. (d) Proportionality in sentencing

The retributivist theory of law entertains exact reciprocity in sentencing, meaning that it prescribes a fitting counter punishment for an offense. The principle of exact reciprocity is evoked here, wherein the punishment must be exactly equal to the crime, for if the castigation is disproportionately severe it shall be in turn an illegitimate offense (Pires in Dubé, 2008: 43). This implies that in order to enjoy the benefits of a legal system, each person must make certain sacrifices and obey the law irrespective of personal feelings. In Kant's view, if the law is to remain just, it is essential that those who disobey it don't get any unfair advantage over the people who obey it voluntarily. In his view, the criminal himself should have no complaint when punishment is being carried out upon him as he has rationally consented to his punishment through his transgression (Pires, 1998: 30). Because the criminal derives benefit from the obedience of others to certain rules, he owes a debt to other people in the form of his own obedience so that they may enjoy the same benefit. Therefore if the transgressor does not exercise the necessary restraint, he must pay the debt in the form of a penalty.

An offense from this perspective is understood to take place between the transgressor and a higher authority (God, the authorities, the sovereign or the moral order of society at large) rather than the transgressor and the victim(s) of the transgression (Dubé, 2008: 43). By the interference by this higher authority, "the actual victim becomes excluded from the dispute or may be only privileged to witness" (Ibid: 43; our translation). It can therefore be concluded that "the re-establishment of social bonds is of absolutely no importance from a standpoint of retribution theory" (Ibid: 44; our translation).

Kant believes that the transgression of a penal law must be treated as something that is separate from the wrong perpetrated against the victim (Kant in Pires, 1998: 28). The

criminal act has much further reaching effects than those lived by the victim and there is no reparation which can be made to the victim which can reaffirm the value placed on the law which has been broken or restore the order which has been disrupted other than the punishment of the culpable party by a state authority (Ibid: 28). The belief is that justice will be restored through the suffering of the transgressor, the sanction essentially serving as atonement (Ibid: 28). Kant sees the right to punish as flowing from the “moral obligation of restoring the transcendent moral order through the suffering of the accused” (in Ibid: 28, our translation). Punishment becomes the only way to restore order and serve justice. Moreover, it is not just any sanction that will do. It must be dispensed within the framework of the criminal legal system as a sanction, flowing from any other legal proceeding is viewed as granting impunity (Ibid: 28). As Pires (1998: 29), explains, “[...] *dans la théorie pénale restitutive, seule la peine criminelle étatique cherchant à produire la souffrance a la vertu de rétablir l’ordre et d’accomplir l’idéal de justice dans sa plus parfaite approximation*”, what is more, “[...] *à l’époque de Kant, la loi pénale était figurée strictement en termes de punition. Or, Kant accepte cette image et ne lui attribue, par conséquent, que le rôle de punir*” (Ibid: 32). Kant’s fixation on the punitive criminal legal sanction as the only measure of atonement has created a sharp division between what transgressions may be dealt with within the criminal legal and civil arenas, as well as what constitutes suitable/unsuitable punishments within each sphere (Ibid: 52). Kant seems to believe that there exists an ontological difference between the “*illicit civil*” and the “*illicit criminel*”, meaning that the latter has more far reaching consequences than the former (Ibid: 54). According to Kant, transgressions which fall under the purview of civil law “are those actions who have immediate consequences on a particular victim, while actions which are dealt with through the criminal legal system are those whose consequences extend beyond those immediately

felt by the victim and include an immediate threat to public security” (Ibid: 54; our translation). As the criminal transgression has greater consequence than the civil transgression, according to Kant it follows that the punishment allotted for such actions must demonstrate the severity of the offence and requires a penal intervention as to not show impunity (Ibid: 28).

2.2.2 Deterrence theory

The modern version of this theory was developed by Cesare Beccaria in the 18th century in *On Crimes and Punishment*. During the great penal reform taking place during the 18th and 19th century, Beccaria’s ideas would find so much support that “it is said that judges of this period often chose to make their judgments based on the principles set out in *Crime and Punishment* rather than following the laws instituted at the time” (Roederer in Dubé, 2008: 46; our translation).

2.2.2. (a) Foundations for the obligation to punish

In deterrence theory, the offender is described as a rational individual whose offending behavior is the result of a careful calculation of the advantages and disadvantages which may be procured by proceeding with his intentions (Ibid: 46). Penal intervention is legitimated here not as a moral obligation as it is within the perspective of retribution theory, but a practical and political obligation of deterrence (Pires, 1998: 66). The objective of the sanction is to promote fear in the wrongdoer and the general public as to discourage offenses being committed. The right to punish is derived from the need to ensure the safety of citizens (Ibid: 26).

Within the theory of deterrence it is believed that only a sanction prescribed in law prior to an offence is capable of producing a deterrent effect. The penalty must be foreseeable as to negatively affect the cost/benefit calculation for committing the offense. It is surmised that in knowing the potential unpleasantness which awaits the offender post offense, he and the general public may be deterred from acting on their impulses given the undesirable consequences (Ibid: 65).

2.2.2. (b) Beccaria and the social contract

Beccaria (in Morellet, 1797: 7-13) considers the implications of social contract theory for issues of law and punishment. The social contract provides a way of distinguishing a good law from a bad law, tells us what sorts of behavior ought to be considered criminal, and establishes limits to the degree that government can use its power to hurt and punish its citizens.

Crimes and punishments must be prescribed within laws, in accordance with the principles of the social contract, and not decided by judges (Pradel, 1989: 26-27). The social contract is said to have been concluded amongst members of society as a way to create a more peaceful and secure (safe) coexistence. According to this theory, people are hedonistic. The basis for an individual's action is hedonism or, taken more generally, self-interest. Individuals will usually act in order to benefit themselves, and will attempt to minimize pains or costs (Beccaria in Pires, 1998: 48). People are believed to be rational and can thus calculate what is really in their self-interest before they act. However, they are also hedonistic and self-interested. It was believed that because individuals are hedonistic or self-interested, they would be led into conflict with one another, each wishing to acquire and accumulate resources even at the expense of the other (Beccaria in Ibid: 29). However,

because these individuals are rational, they can consider what is really in their self-interest during times of conflict. They will realize that although their freedom is a good worth keeping, a degree of security and cooperation is also necessary for a happy life. Such security is only possible if individuals agree to restrict their freedom, to promise not to hurt or threaten others (Beccaria in Ibid: 29). Thus, the reason of individuals lead them to make rational promises with one another and create peace. If the basis of two people living in peace is a promise not to do certain actions, then the basis of a peaceful and orderly society is to think of everyone as bound to everyone else by such promises. These promises to each other can be considered the social contract, the basis of society's laws (Beccaria in Ibid: 29). However, because of self-interest and hedonistic tendencies, individuals will tend to break their promises when they calculate that it is in their benefit to do so unless people rationally foresee this consequence, and therefore authorize a power to create a social environment in which it is not in peoples' self-interest to break these promises at any time (Ibid: 29). This forms the basis of deterrent strategies of punishment and deterrence theory. The social contract theory is thus an argument that government is necessary because it serves the interests of all of its citizens (Beccaria in Ibid: 29-30). While people are essentially free, living together with some laws produces a happier life than living in anarchy (Ibid: 29-30). Such a government derives its authority and power from the consent of the governed.

2.2.2. (c) Beccaria and the notion of deterrence

A good law is thought to be one which any rational individual, if they considered it, would realize is in their self-interest; a bad law is one which people consider an unnecessary restriction of their freedom, or which is only in the interests of some. The social contract thus establishes legal equality and encourages minimal restriction of individuals' freedom by

the state (Ibid: 30). Laws should then establish as much order as is necessary to live a happy life but leave as much freedom to its citizens as possible. Crimes are considered not only to be the breaking of laws, but the breaking of those promises that the individual made to society. According to the terms of the social contract, the offender has agreed that the state is authorized to punish him to the extent necessary to produce general deterrence (Ibid: 29-30). Punishments must therefore be proportional; as severe as necessary to stop the crime from occurring, but leaving as much freedom to the offender as possible. Anything more, argues Beccaria, is vengeance by the state and a use of its power that no rational individual would have authorized according to the social contract (in Morellet, 1797: 10). According to the social contract, individuals agree to give the state power over them, but only to the extent that is necessary to create order and harmony (Beccaria in Ibid: 8-10). Therefore, the state can punish only to the extent that is necessary to deter crimes, and no more than is required. Any excessive punishment is an abuse of power by the state. Beccaria (in Ibid: 72), argues that if punishments were not proportional, then the state would in fact encourage and create more crimes. This argument depends on Beccaria's understanding of human nature as hedonistic or self-interested and if forced to choose between a less-serious crime and a more-serious crime that are assigned the same punishment, we would be more likely to attempt the more serious crime (in Ibid: 72). We gain more, for the same risk and consequences. In order to best function as a general deterrent, the punishment should immediately bring to mind the crime of the would-be offender (Beccaria in Ibid: 99). The punishment should therefore symbolize the crime that it punishes (Beccaria in Ibid: 100-101).

2.2.2. (d) Proportionality in sentencing

Within the perspective of deterrence theory, exact reciprocity is not what is sought or even desired as is the case with retribution theory. Here proportionality is measured in terms of how harmful the offense is considered. The more harmful the offense the more deterrence is desired and therefore the punishment must be more severe to encourage deterrence (Beccaria in Pires, 1998: 71-72). Deterrence therefore always requires a greater harm be instituted through the sanction than was created through the commission of the offense (Beccaria in Ibid: 72). Moreover, while it is important for the gravity of the sentence to outweigh the gravity of the offense the theory of deterrence depends more heavily on the certainty of a sanction (Pradel, 1989: 35). Deterrence theory necessitates the punishment for an offence to be established prior to the offence, for the aforementioned reason and because pre-established sanctions may prevent unjust and violent abuses to be carried out against the offender (Beccaria in Pires, 1998: 65). However, the utilitarian inclination which permeates this theory of deterrence insists more on the sureness that the sentence will be carried out than the gravity of the sentence. Greater importance is placed on the certainty of a sanction because Beccaria believes that while deterrence is favored by the severity of the sanction, the offender and the public must believe that such a sanction is inescapable, for if it is thought avoidable, the severity of the sanction will lose all potential of deterrence (Morellet, 1797: 102-103). Following this logic, pardons are not to be granted either, as according to Beccaria, it demonstrates impunity: “*montrer aux hommes qu'on peut pardonner les fautes et que le châtement n'en est pas la conséquence nécessaire, c'est faire naître en eux l'espoir de l'impunité*” (Beccaria in Ibid: 104). According to Beccaria, this show of impunity is seen as a threat to justice and deterrence and must be avoided (Pires, 1998: 62). A minimum sentence must be prescribed for every offence (Ibid: 73). Moreover, a sanction should be prompt, as according to Beccaria, the more swiftly the penalty is carried out the greater the

impression it leaves upon the offender and society (Ibid: 59). As was the case with retribution theory, “the victim is excluded from the litigation except to be privileged to witness” (Dubé, 2008: 51; our translation).

These theories of retribution and deterrence may be guided by different logics and may differ on some points but it is quite simple to see that their vision of justice is not so dissimilar. In common, the theory of deterrence and retribution share a great deal:

[...]une représentation guerrière de l’État et de la loi pénale comme seuls défenseurs du Contrat social et des valeurs fondamentales de la société (Pires, 1998, p.51); une vision guerrière de la protection de la société; une représentation fondamentalement négative de l’homme; une obligation pragmatique ou politique de punir; une valorisation exclusive des peines afflictives; l’exclusion des sanctions alternatives (dédommagement, etc.) et du pardon; une définition du conflit qui exclut ou instrumentalise la victime et une absence de considération à l’égard d’un rétablissement concret des liens sociaux ” (Ibid: 50).

2.2.3 Denunciation theory

2.2.3. (a) The concept of denunciation and its foundations for the obligation to punish

Lachambre (2011), places James Fitzjames Stephen as denunciation’s spearhead. Denunciation is the latest theory of punishment to emerge and is said to have “become part of the criminal legal system’s communications only in the latter half of the 20th Century” (Garcia, 2010: 123; our translation).

Under the denunciation theory, punishment should be an expression of societal condemnation. The denunciation theory is often viewed as a hybrid, combining utilitarianism and retribution. It is utilitarian because the prospect of being publicly denounced serves as a deterrent and helps maintain social cohesion. Rychlack (1990: 332), explains that this is due to the fact that punishing those who violate social rules “helps draw law-abiding citizens together by reaffirming societal values”. Punishment is also said to educate the masses on

what behaviors are deemed acceptable and unacceptable while simultaneously directing “community anger away from vengeance” (Ibid: 332). The single most important aim of denunciation however, is to “reassure the majority of society that the system does work” (Ibid: 332). It is on this point that denunciation really sets itself apart from deterrence theory as utilitarian theories are solely focused on:

[...] shaping the behavior of convicted criminals, or persons who might be tempted to engage in criminal activity—the potential lawbreakers. [...]Denunciation, however, focuses not on lawbreakers or potential lawbreakers. Instead, it is focused on the majority of society, those people who would not be inclined to break the rules, regardless of the potential punishment. In short, denunciation deals with criminal law’s impact on the law-abiding segment of society (Ibid: 333).

The reason this is such an important distinction is that in light of the social contract, all members have agreed to abide by society’s criminal laws in exchange for a peaceful coexistence and in doing so have “turned over the role of judge and ‘punisher’ to the collective entity” (Ibid: 334). Society must then see its role through and punish those who transgress the law and denunciation theory recognizes this obligation. Denunciation theory goes one step further than simply deterring unlawful behavior through punishment to ensure the safety of society (as is posited by deterrence theory), it also satiates society’s need for vengeance.

Denunciation is likewise retributive because it promotes the idea that offenders deserve to be punished. According to Rychlak (1990: 331), denunciation theory states that those who are held criminally responsible should be, “held up to the rest of society and denounced as violators of the rules that define what the society represents”. It is believed that society must have its chance “to register its disapproval of wrongful acts and reaffirm the values violated by these acts” (Ibid: 331) and this through the application of a punishment which is commensurate with the level of society’s disdain which is roused by the

violation, “[p]unishment declares that society will not tolerate this conduct, regardless of any future deterrent effect (or lack thereof)” (Ibid: 331).

Denunciation, while sharing similarities with both utilitarian and retributive theories, stands on its own. Retribution is said to be backward looking, as punishment has no other purpose but to reprimand the offender for his past misbehavior while deterrence is said to be forward looking as it punishes with the intent to deter law breaking in the future (Ibid: 335). Denunciation on the other hand, is both forward and backward looking. As Rychlak (1990: 335) explains:

Denunciation is focused on society’s attitude (after the crime has been committed—hence, in the future) as it looks back on the crime (in the past). [...] This accounts for its ability to identify not only the offender’s obligation to suffer punishment, but also the society’s right to inflict it.

Denunciation thus creates an obligation to punish solely lawbreakers but without exception, so as not to raise the moral indignation of society which may seek out personal vengeance otherwise and to deter and reaffirm social values:

[Criminal justice] can never be a real terror to evil-doers and a real encouragement to healthy indignation of honest men against criminals unless it is put in force inflexibly (Stephen in Lachambre, 2011: 351).

2.2.3. (b) Proportionality in sentencing

A sentence which has denunciatory aims must take into account the level of public repugnance *vis-à-vis* the offence committed as well as the public’s perception of the individual’s level of moral culpability in instituting the appropriate sanction. Therefore, the more morally culpable an individual appears to the public, the greater the punishment shall be:

Everything which is regarded as enhancing the moral guilt of a particular offence is recognized as a reason for increasing the severity of the punishment awarded it. [...] When public attention is strongly directed to a crime, and the public imagination is greatly shocked by it, it is of great importance that the punishment should be exemplary and calculated to impress the public as much as the crime, and in the opposite direction. The criminal is triumphant and victorious over the enemy and over the law which protects him until he himself has suffered a full equivalent for what he has inflicted (Stephen in Ibid: 356).

There is a certain level of proportionality which needs to be achieved by the sentence. Proportionality under the theory of denunciation stands in contrast to that which is evoked under the theory of retribution or deterrence. Proportionality in all three instances “relates to the need to graduate the sentence so that it is proportional to a specific end, however, both retribution and deterrence use the crime (gravity of the offence/degree of culpability) as their point of reference for establishing proportionality whereas the theory of denunciation includes the level public disapproval and reproach elicited by the commission of the offence into the calculus” (Lachambre, 2011: 357-358; our translation). The sentence must therefore first reflect the public sentiment surrounding the offence and to a lesser extent the gravity of the offence and the offender’s culpability (Ibid: 358). Consequently, the greater the societal reprobation the greater the punishment must be, which opens the door for the application of some very punitive sanctions (Garcia, 2010: 123-124).

2.2.3. (c) Severity of punishment and legitimate sanctions

The sentencing scale under the theory of denunciation must encapsulate the most severe of sanctions in order to represent the whole gamut of reactions and emotions the commission of an offence may elicit in the general public. The public’s disapproval can be great and ignite intense hatred which the sentence must then be able to convey in order to protect society and reaffirm social values. As Stephen (1874; in Lachambre, 2011: 341) explains:

It is impossible to form any estimate of the degree in which [society] succeeds in [promoting virtue and restraining vice], but it may perhaps be said that the principal importance of what is done in this direction by criminal law is that in extreme cases it brands gross acts of vice with the deepest mark of infamy which can be impressed upon them, and that in this manner it protects the public and accepted standard of morals from being grossly and openly violated. In short, it affirms in a singularly emphatic manner [...] that there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity.

The particular severity of punishment allotted under the theory of denunciation results in certain types of sanctions being deemed appropriate/legitimate or inappropriate/illegitimate. The punishment is implemented for the benefit of the public and should proceed without regard for the individual who is subject to it (Lachambre, 2011: 349). Because the punishment must not exonerate the offender, restitution is not an appropriate substitute for punishment and pardon from the victim does not nullify the need for a sanction to be applied. According to Stephen (1883; in Lachambre, 2011: 349):

Punishment is not intended to benefit the sufferer. It is distinctly intended, to a certain extent, to injure him for the good of others; and this consideration enters more or less into almost all punishments, and is the dominant one in the cases in which punishments of great severity are inflicted. It reaches its highest point in the case of the punishment of death.

What Stephen elucidates most clearly here is that denunciation, like the other theories of punishment, sees the sentence as a penalty which is separate from reparation (Lachambre, 2011: 349). This theory then tends to refocus punishment towards more punitive and exclusionary options and away from those more restorative and inclusionary sanctions.

The types of sanctions which are considered legitimate vary over time and place (Stephen in Lachambre, 2011: 350), as long as the punishment is in line with the public's opinion then the sanction is valid (Stephen in Ibid: 354-355); it is public opinion which sets the limits of punishment. Punishment is thus moderated by the will of the collective

conscience, which translates most often into punitive and exclusionary punishment such as incarceration over restorative sanctions, given the indignation elicited by the commission of crime.

2.2.4 Rehabilitation theory (first modernity)

The theory of rehabilitation of the first modernity distinguishes itself from the aforementioned theories of modern penal rationality because its primary objective is of a markedly different nature. From the perspective of rehabilitation theory the goal is that “the sanction shall lead to the re-education or treatment of the offender” (Dubé, 2008: 52; our translation). This re-education or treatment however, is only considered to be possible through “the *social exclusion of the offender*” (Ibid: 53, our translation)⁴. According to Dubé (2008: 53), “*la théorie de la réhabilitation donne plutôt à la rationalité pénale moderne la possibilité d’évoquer d’autres «bonnes» raisons pour valoriser l’enfermement et résister aux sanctions alternatives*”. All four theories seek to socially exclude the offender by the sanction imposed and therefore do not stand in stark contrast to one another and show how penal rationality has strongly rooted itself within criminal law.

⁴The rise in industrialization and urbanization during the 19th century sprung a rather peculiar understanding of criminality and its cause. There was an ardent belief at the time that an offender/criminal was the product of an unsound environment (Dufresne, 1995). It was believed that offensive behavior was the direct result of being exposed to an offensive environment which many cities had by then become. The moral integrity of the environment thus influenced the physical and moral integrity of its inhabitants, therefore living in an unsound environment was said to create unsound individuals. There was a whole hygienic discourse created around criminality and the prison became the default environment in which the individual could be plucked from his misery within the city and have his soul, body and mind reformed within the confines of the penitentiary, in which much effort had been invested to create a now hygienic milieu favorable to reform which was deemed impossible in the environment from which the individual came from. According to “*les hygiénistes*”, “*la prison se voudrait l’envers de la ville, un modèle idéal de celle-ci... il est possible qu’elle est été l’esquisse d’un milieu assaini et la tentative pour résoudre un mal essentiellement urbain.*” (Dufresne, 1995: 130). From this understanding of criminality and the potential of the penitentiary arose the notion that rehabilitation could only be undertaken within the confines of imprisonment rather than within the community.

According to Dubé (2008: 53; our translation), “the emergence of an innovative system of thought will be fundamental to the reform of penal norms, the legitimization of alternative sanctions and to the promotion of the evolution of criminal law”. Such a theory began to develop in the mid 20th century, the rehabilitation theory of the second modernity.

2.2.5 Rehabilitation theory (second modernity)

The rehabilitation theory of the second modernity is distinguished from that of the first modernity in that it “promotes re-education and treatment *outside* of the confines of imprisonment rather than *inside*” (Ibid: 54; our translation). While the former theory’s objectives were only to be realized through social exclusion, the rehabilitation theory of the second modernity would see the same objectives as only realizable and desirable through social inclusion. Although the other theories of punishment value incarceration, the rehabilitation theory of the second modernity will have “learned from the critiques made to incarceration and will privilege treatment within the community” (Ibid: 54; our translation):

Le passage d’une perspective d’exclusion à une perspective d’inclusion introduit un nouveau paradigme pour cette théorie de la réhabilitation. Elle complexifie et «sélectionne» des variétés (idées) innovatrices préexistantes dans l’univers cognitif du droit criminel moderne. Marginale, mais bien présente, elle se différencie, à titre d’alternative, de la rationalité pénale moderne. Pour le dire autrement [...], on peut parler ici d’une nouvelle «auto-description»; une «auto-description» centrée sur la réhabilitation plutôt que sur la souffrance, mais surtout centrée sur l’inclusion plutôt que sur l’exclusion. Dans la version la plus achevée de cette théorie [...], il ne s’agit plus d’intimider pour conformer (dissuasion) ni de produire un mal pour en expier un autre (rétribution) ni encore d’exclure pour, plus tard, mieux inclure (réhabilitation de la première modernité); il s’agit de maintenir au premier plan l’inclusion, d’envisager différents types d’intervention (décisions, dispositions) à l’intérieur de la communauté et de protéger concrètement les liens sociaux contre l’intervention destructrice du droit criminel (Ibid: 54-55).

The four other theories of punishment which make up modern penal rationality, while different, still insist that in order for the sanction to fulfill its function and have the desired

impact, social exclusion is necessary (Ibid: 56). The rehabilitation theory of the first modernity seeks to exclude at first, in order to pursue the treatment or re-education of the offender so that he may then be re-introduced within society. It does not view the prison simply as a place of suffering as do the theories of deterrence and retribution but as site in which pro-social treatment can be applied (Ibid: 55). However, four of these theories continue to support social exclusion to some degree as necessary and contribute to the construction of penal rationality. Rehabilitation theory of the second modernity is the only theory which is able to introduce a shift in paradigm within the realm of criminal law and privileges treatment through social contact (Ibid: 57). According to Dubé (2008: 57; our translation), “it is the only theory to have escaped modern penal rationality’s dogmatism and lay out the contours of a new thought system of criminal law”.

2.3 MODERN PENAL RATIONALITY AND THE CRIMINAL LEGAL SYSTEM’S DISTINCTIVE SELF-CONCEPTUALISATION

Modern penal rationality with its theories of punishment has created a vision of the criminal legal system which tends to encourage the system to distinguish itself as self-sufficient and unique separating itself from the system of civil law (Pires, 2001: 181). The types of infractions which are treated through these different conduits become particular to each system of law, criminal responsibility is viewed as unconnected to civil responsibility, and the criminal sanction becomes incompatible with the civil sanction (Ibid: 54).

Modern penal rationality tends to “naturalize the division between civil and criminal law which in turn encourages and fuels its desire for self-preservation and differentiation” (Pires & Acosta in Dubé, 2008: 58; our translation). According to Dubé (2008: 59; our translations), this “organizational cleavage was stabilized by the 18th century and endorsed

the narrowing of the notions of crime and punishment”. Henceforth, a civil infraction and a criminal infraction became “distinctive realities which must be treated through systems of law that are just as distinct” (Ibid: 59; our translation). The split between civil and criminal did not always exist and is not natural, this division had to be learned (Ibid: 59). Flowing from this, a resistance has mounted against all attempts looking to “blur the line and which question the unnatural separation between these systems of law” (Ibid: 59; our translation). This cognitive resistance has become one of the main obstacles to the evolution of the modern criminal legal system’s identity and limits the possibilities made available to it (Pires, 2001). Punitive and exclusionary sanctions become the privileged sanctions of the criminal legal system and the sanctions privileged through civil law are considered invalid as they do not meet the requirements of suffering and social exclusion (Dubé, 2008: 60). As a result, according to Pires, restorative sanctions “will be strictly associated with civil law and all stigmatizing or penal sanctions the stuff of criminal law” (in Ibid: 60; our translation). At the turn of the 18th and 19th century, when imprisonment as a sanction gains popularity within the West, it is observable in the drafting of penal laws, as explains Dubé (Ibid: 61; our translation), “to every punishable behavioral norm becomes attached a sanction of incarceration specifying the quantum of the offence”. The severity of the sanction is an expression of society’s attachment to the norm which was violated through the offence and imparts to the offender the reprehensibility of the action (Ibid: 61). By operating in this manner the criminal legal system has fostered such a mechanical reaction to crime that we now believe it necessary to “attach a punitive sanction to the offense and consequently an attachment to incarceration as the most popular option” (Ibid: 61; our translation).

This “penal rhetoric” creates a barrier to innovation in criminal law and the evolution of the system’s self-identity (Ibid: 61; our translation). Modern penal rationality has us believing that condemnation and the reaffirmation of social norms can only be achieved through the punitive and exclusionary sanctions provided through the criminal legal system (Ibid: 61). However, the criminal justice system is not the only system equipped to manage these offenses; others have and continue to successfully intervene through more positive forms of action (Dubé, 2008: 62).

If modern penal rationality does operate as this theory dictates then it could prove quite difficult for the directives outlined in section 718.2(e) of the *Criminal Code* to have considerable impact. This theory maintains that “criminal legal matters” may only be settled through a criminal legal procedure and thus employ the sanctions available within this system. However, as aforementioned with the aims of deterrence and retribution firmly embedded within the criminal legal rhetoric and incarceration as the go-to sanction, one would consider it unlikely that imprisonment would be sought out as a last resort even if there are alternatives available as they are invalidated through the thought process of the modern penal rationality. This theory also explains that even though individual legal players within the criminal legal system may not be in agreement with the rationale which underpins the criminal legal system and its functioning and may see value as well as the potential for great success through alternative sanctions and legal procedures, modern penal rationality is so totalizing and thoroughly enmeshed within the fabric of the criminal legal system that those divergent voices and attempts are all but silenced or converted. With alternative sanctions being invalidated, it is hard to believe that a judge would have any inclination to employ alternative measures of punishment to the ever popular prison sanction.

2.3.1 Trapped in the fly bottle

Pires (1995: 134) makes reference to Watzlawick's work when he uses the analogy of being trapped in the "fly bottle", while alluding to the current situation with the criminal legal system. The fly bottle is used as an analogy to explain the immovable state in which the current criminal legal system finds itself despite some of its obvious failings. This reasoning may also help to explain why section 718.2(e) of the *Criminal Code* may possibly be under-utilized or overridden by some of the other sentencing principles set out in the *Code* which are more in accordance with modern penal rationality and classical sentencing/punishment theories (such as retribution and deterrence), if such is the case.

Ces bouteilles à mouches avaient une large ouverture, en forme d'entonnoir, donnant une apparence de sécurité aux mouches qui s'aventuraient dans le col toujours plus étroit du récipient. Une fois dans le ventre de la bouteille, la seule façon pour la mouche de s'en sortir était d'emprunter le même conduit étroit par lequel elle était entrée. Mais, vu de l'intérieur, il lui paraissait encore plus étroit et dangereux que l'espace dans lequel elle se trouvait prisonnière [...] il aurait fallu, dans la pareille situation, convaincre la mouche que la seule solution à son dilemme était en fait celle qui semblait la moins appropriée, et la plus dangereuse: il fallait reprendre le chemin inverse, s'aventurer dans le col étroit de la bouteille, pour reconquérir sa liberté. Mais qu'arriverait-il de notre espoir de nous en libérer si toutes les solutions que nous imaginons ne mènent jamais qu'à plus de la même chose [...] (Ibid: 135).

What this analogy tells us is that now that the system is firmly embedded in this modern penal rationality and guided by utilitarian and retributivist aims, despite realizing that the existing system is flawed, we feel more comfortable with doing more of the same rather than trying alternative measures. We may now be trapped within the confines of modern penal rationality and not be able to convince ourselves that attempting an alternative is less frightening than continuing as we have. There are other ways to reaffirm valued behavioral norms without having to resort to the use of a punitive sanctions but modern penal rationality

may have blinded us to this fact and act as a real obstacle to the intended use of section 718.2(e) of the *Criminal Code*.

According to Pires (2001) modern penal rationality has become an obstacle to the creation of an innovative rationality and new normative structure and this for many reasons. Firstly, as of the 18th century the legal system began projecting an essentially punitive self-image. With this system, only punitive responses to offences are said to protect us from crime (Ibid: 184). Secondly, the classic theories of punishment which are said to be the basis of MPR (i.e. the theories of deterrence and retribution) and tend to exclude “positive” forms/alternatives methods of conflict resolution have created a protection of society which is “hostile, abstract, negative and atomistic” (Ibid: 184; our translation):

Hostile, parce qu'on représente le déviant comme un ennemi du groupe tout entier et parce qu'on veut établir une sorte d'équivalence nécessaire, voire ontologique, entre la valeur du bien offensé et l'affliction à produire chez le déviant. Abstraite, parce que le mal (concret) causé par la peine est reconnu mais conçu comme devant causer un bien moral immatériel (« rétablir la justice par la souffrance », « renforcer la moralité des gens honnêtes », etc.) ou encore un bien pratique invisible et futur (la dissuasion). Négative puisque ces théories excluent toute autre sanction visant à réaffirmer le droit par une action positive (le dédommagement, etc.) et stipulent que seul le mal concret et immédiat causé au déviant peut produire un bien-être pour le groupe ou réaffirmer la valeur de la norme. Et, enfin, atomiste, parce que la peine — dans la meilleure des hypothèses — n'a pas à se préoccuper des liens sociaux concrets entre les personnes sauf d'une façon tout à fait secondaire et accessoire (Ibid: 184).

Thirdly, the classic theories of punishment have created not only an authorization to punish but an obligation to do so (Ibid: 185). The notion of “last resort” is thrown out the window with the certainty of punishment as essential to deterrence and the moral obligation to punish attached to retribution, viewed as a categorical imperative (Ibid: 185). Finally, MPR is said to be a system of thought which developed prior to political division and independently from any political affiliation and therefore is not questioned or problematized by different political

orientations (Ibid: 186). This translates into very little variety of penal views. From the left to the right wing, opinions on penal matters and sentencing are very similar, with the adoption of one or the other of the official theories of punishment and sentencing (Ibid: 186). The criminal legal system has remained quite insulated, creating the perfect conditions for its self-preservation and self-perpetuation, making it self-sustaining (Ibid: 186).

The major sentencing reform of 1996 contained several elements designed to reduce the use of incarceration as a sanction. The legislation created a new community-based sanction called a conditional sentence of imprisonment. It also included the institution of a statement of principles of sentencing which urges judges to consider all alternatives to custody before depriving an offender of his liberty with particular attention to the circumstances of Aboriginal peoples. However, this statement of principles listed other objectives such as specific and general deterrence. The objectives are not listed in order of importance and therefore it would appear that they are all equally valid in law but this encourages judges to continue to determine sentences according to personal preference which encourages the maintenance of the “status quo” in matters of sentencing as outlined by Roberts (2001: 68). While the objectives of sentencing are listed in no particular order, the same cannot be said for the sentencing principles inserted within the *Criminal Code*. Section 718.1 outlines the importance of the principle of proportionality in sentencing while listing the subsequent principles as subordinate to this main aim (Ibid: 69). By qualifying this principle fundamental, the government almost forces judges to ignore some of the latter principles as they are directed to make proportional sentences and not necessarily ones which take into account the unique circumstances of an Aboriginal offender (Ibid: 69-70).

The sentencing reform of 1996 also introduced which aggravating factors must be considered during sentencing through section 718.2(a) while excluding the inclusion of any mitigating factors (Ibid: 71). While reforms in sentencing were underway, law C-68 was also adopted, creating mandatory minimum sentences for a handful of hand gun infractions (Ibid: 74). While the overall aim of the reform is said to be a decrease in incarceration, principles such as these do not lend themselves well to such an end, such directions have just the opposite effect in fact (Ibid: 75). It would appear that while section 718.2(e) may have been instituted with the hope that the number of Aboriginal people sentenced to imprisonment may be reduced, parliament seems to have invited judges to try to attain this goal by adopting methods for determining sentences which are little different from the ones available prior to the reform while expecting a radically different outcome. Statistics show that trends in Aboriginal incarceration have remained relatively unchanged post reform (Ibid: 77). A year prior to the reform, Aboriginal incarceration rates were at 13%, in the years that followed the reforms application, incarceration rates crept to 17% (Ibid: 77). Moreover, as incarceration increases, an inquiry on adult criminal courts revealed that during this period the frequency in probation orders has also accrued by 6% while the number of fine ordinances has decreased from 47% in 1994-1995 to only 40% in 1998-1999 (Ibid: 78). While the use of incarceration goes up and net-widening increases, alternative measures (such as the fine, a more commonly civil indemnity) decrease in use in sentencing.

The immutable framework of MPR has become an insurmountable roadblock to less exclusionary and punitive sanctions being applied within the realm of criminal law. Even though directives explicitly guide judges to seek out alternatives to incarceration the

framework within which they are forced to operate leaves them little freedom to accomplish such a goal as alternatives to not meet the requirements set out by modern penal rationality.

CHAPTER 3

METHODOLOGY

The objective of this chapter is to describe the methodology that was used to examine the application of section 718.2(e) of the *Criminal Code*. Much of the existing literature in this area is based on quantitative research, examining such things as rates of incarceration and types of offences in relation to Aboriginal offenders. While many academics have taken up the issue of problematizing Aboriginal over-incarceration and have studied the sentencing of this group (Anand, 2000; Brodeur, 2002; Daubney, 2002; Findlay, 2001; Stenning & Roberts, 2002; Roach & Rudin, 2002), few have looked at how section 718.2(e) is in fact being applied in this context thus creating an opening for the discussion of why judges apply or fail to apply the recommendations outlined in this sentencing provision. A line can be drawn in the literature on the subject, on the one side retributivist arguments against the potential of this added provision and on the other, restorative justice arguments for the great potential for change in the patterns of incarceration of Aboriginal offenders. There is a lack of qualitative research in this area and more specifically, there is little information which discusses section 718.2(e), its application in court and the reasons given by the judges in the application or non application of the section. The type of qualitative methodology and analytical strategy I chose to adopt in this research project is the constructivist approach to grounded theory. First, I wish to outline the details pertaining to the research sample which is central to this research.

3.1 EMPIRICAL FOUNDATIONS

In order to access the cases under scrutiny I utilized the *Nexis Lexis Quicklaw* database. Quicklaw is Canada's largest electronic legal publisher and is a highly utilized, reliable legal research search engine (Quicklaw, 2009). Quicklaw provides Canada's largest single source of full-text "Canadian court, board and tribunal decisions, and the largest collection of Canadian case law summaries" (Ibid). It provides 2,500 databases of statutory materials, case law, and legal commentary (Ibid). Quicklaw offers access to collections from Canada, the United States, the United Kingdom, Ireland, the European Union, Australia, Africa, Malaysia and the Caribbean (Ibid). Through Quicklaw's search directory, it is simple to narrow court decision searches to include only the most relevant information. From the directory the investigator must simply select from the "citators digest", "criminal law and disposition of offenders" under the "topics" rubric and then search under the "criminal law cases" category. Once these selections are complete, the search can be narrowed to find criminal case law including any criminal cases that appeared before a court at any level. The cases date as far back as 1876 and the database is updated daily.

Searches can be completed by case name, court, judge, counsel and words and phrases found in the document. Under the category "court", "court of appeal" is entered and then provinces/territories are individually selected. Then for the search term category, "718.2(e)/20 of the criminal code" is entered. The database is then able to search for cases containing these words, ensuring that only results from the province and court level specified, relating to section 718.2(e) of the *Criminal Code* and not any other subsections of 718 are retrieved. Since the section did not come into force until September 3rd, 1996, the cases range in date from September 1996 onwards. The decision was to restrict the study to 3 case decisions per province/territory, a total of 39 sample cases for review and analysis in

the first instance. The decision to restrict the sample to 39 cases is made in light of time constraints and project feasibility. The grounded theory approach can be a very laborious undertaking and coding and categorizing can be lengthy and chaotic, therefore in order to not be completely overwhelmed by the amount of data, this number of cases is still representative of the larger body of court of appeal cases related to this section. However, an important feature of a successful grounded theory study is saturation; therefore cases were gathered until I reached that point. The 39 cases therefore served as a provisional estimate, possibly more or less may be used depending on when saturation is achieved.

Ultimately, the research involved the analysis of 33 cases rather than 39 as no cases involving the application of section 718.2 (e) in the sentencing of Aboriginal offenders could be found, through the *Lexis Nexis* database, for Prince Edward Island or the Northwest Territories. This exposes one of the limitations of utilizing the *Lexis Nexis* database for retrieving the cases but this did not impede on the research project as saturation was still achieved regardless.

3.2 QUALITATIVE RESEARCH

In order to answer my research question, I utilized a qualitative approach to data collection and analysis because this research method allows for an in depth look at a particular phenomenon (Alasuutari, 1995: 111), in this case the application of section 718.2(e) and justification for the application or non application of the section. The decision to utilize a qualitative approach was made prior to undertaking the research project itself. Because the objective of this research is to identify, offer an interpretation/understanding of, and contextualize court of appeal judges' justifications for applying or failing to apply

section 718.2 (e) in the sentencing of Aboriginal persons, it seemed logical to go the qualitative route seeing as this type of approach allows for the production of this particular, contextualized/situated type of knowledge (Ritchie & Lewis, 2003: 2-3 & 41), whereas quantitative research most often aims to create generalizable and statistically significant knowledge (Ibid: 41) which is not the aim here. This is an exploratory research seeking to identify and deconstruct judges' justifications in the application of section 718.2 (e) to create an understanding of their practices in regards to this hopeful provision, the aims of this research go beyond the purview of a quantitative research approach. I do not wish to calculate the amount of times the provision is utilized or not, or identify the number of times a particular justification is utilized by judges to apply or not section 718.2 (e) in the sentencing of Aboriginal persons, this would be more appropriate for a quantitative approach. However, this research is motivated by the yearning for a more in depth understanding of the phenomenon than a quantitative approach could produce.

In this research assignment, I emphasize and value the human, interpretative aspects of knowing about the social world and as the investigator, my own understanding and interpretations of the phenomenon being studied, which is very much in keeping with the qualitative approach according to Ritchie and Lewis (2003:7). A qualitative research approach allowed me to frame and analyze the legal discourse surrounding the use of section 718.2 (e) in case law which has led to the production of knowledge that is vastly different from that which could be produced by tracking official statistics on the frequency with which this provision is applied, possible through a quantitative approach.

According to Ezzy (2002:81), another component that must be met in order to ensure the excellence of qualitative research is that "data analysis depends on following well-

thought-out procedures”. In this research assignment, this well-thought-out procedure comes in the shape of constructivist discourse analysis guided by the theory of modern penal rationality with an opening for an inductive (grounded theory inspired) approach to analysis. The intricacies of constructivist discourse analysis and the codes, categories and concepts utilized in this research project will be explained in greater detail in the following paragraphs, beginning with a thorough exploration of the constructivist paradigm which frames my research.

3.3 CONSTRUCTIVIST PARADIGM

It is said that to ensure a strong research design, researchers should choose a research paradigm that is “congruent with their beliefs about the nature of reality” (Mills et al., 2006: 2). Subjecting our beliefs about the nature of reality to an ontological interrogation will help illuminate the epistemological and methodological possibilities that are available and allow the researcher to decipher which course of action may be most suitable or practical for a particular research project (Ibid: 2).

We are all influenced by our history and cultural context, which in turn shape our view of the world and the meaning of truth. Often these underlying assumptions about the world are unconscious and/or taken for granted. Constructivism as a research paradigm, denies the existence of a directly accessible objective reality (Lincoln & Guba, 2005: 256). This inaccessibility means that what we deem to be “reality” is always constructed and this construction depends on the point of view from which one is constructing the “reality”. According to Guba and Lincoln (1989: 43), constructivism asserts that “realities are social constructions of the mind, and that there exists as many such constructions as there are

individuals (although clearly many constructions will be shared)". I, as a researcher, subscribe to this understanding of the nature of reality. I believe that there are multiple "realities", constructed and experienced by multiple individuals, as is supported through the constructivist paradigm. Constructivism allows me to take a sociological point of view to observe and analyze case laws which give me access to the legal "realities" constructed around section 718.2 (e) of the Canadian Criminal Code.

The findings produced under a constructivist paradigm provide "local and specific constructed realities" (Lincoln & Guba, 2005: 256). According to Lincoln and Guba (2005: 273), "truth—and any agreement regarding what is valid knowledge—arises from the relationship between members of some stake-holding community", and therefore the knowledge produced through my research assignment should not be seen as wholly unworthy of consideration as it was conducted with respect to particular evaluation criteria (which will be explored later in this chapter) and was linked to existing research on the subject when appropriate, while allowing for the inclusion of original findings and resulting in the creation of a thorough theoretical framework from which one valid interpretation of judges' justifications for applying or failing to apply section 718.2 (e) was constructed. Moreover, the production of knowledge was thoroughly imbedded in the research data as is required of a qualitative research approach, the constructivist paradigm and a constructivist discourse analysis methodology and analytical strategy utilized within this research project.

Individuals who deny the existence of direct accessibility to an objective reality assume what is called a relativist ontological position which is pursuant with the constructivist paradigm (Ibid: 256). Relativists claim that concepts such as rationality, truth, reality or norms must be understood as "relative to a specific conceptual scheme, theoretical

framework, paradigm, form of life, society, or culture [...] there is a non-reducible plurality of such conceptual schemes” (Bernstein, 1983: 8). Ultimately, from this perspective the world consists of multiple individual realities influenced by context. Research that is executed under the constructivist paradigm does not therefore presume to uncover data or reflect reality (Alasuutari, 1995). A researcher, like myself, working from this paradigm, presents one possible interpretation of the data analyzed and allows the readers the choice to agree with the conclusions presented (i.e. the researcher’s representations) or come up with their own through their interpretation of the material and data utilized within the research project, of which excerpts are included. As is forwarded by Best (1995), knowledge from a constructivist paradigm is produced and/or constructed through the interaction between the researcher and the participant (or, as is the case in this research project) the material under scrutiny, rather than possessed and disseminated by an expert. The co-construction of knowledge so central to this type of research approach is most evident through the decentered researcher stance adopted in this research assignment, upon which I will comment below.

Decentered researcher stance:

Within this research project I have adopted the stance of the decentered author (separate researcher voice) as identified in Grbich (2004: 84). Like the example of Helen Woodruffe-Burton (1998) in Grbich (2004), I do not wish to impose my interpretation of the data on the readers but simply interject a possible interpretation which is congruent with the constructivist paradigm. While I did not interact with human participants, I did analyze appellate court decisions during my research to identify and understand the reasons given by

judges for applying or failing to apply section 718.2(e) of the Canadian *Criminal Code* when sentencing Aboriginal persons and how this may be impacting on the use of this provision.

I have utilized a constructivist discourse analysis approach, leaving behind the assumption of the existence of a unidimensional external reality and embracing the belief of multiple social realities which recognizes the mutual creation of knowledge by the researcher and the subject and aims towards interpretive understandings of their meanings. This approach allows for a rigorous research method without losing oneself in positivist trappings such as the belief in objectivist renderings of data, objective and external understandings of reality, and the idea of the researcher as a neutral observer who discovers data (Jorgensen, 2002). This research process does not seek out truths but realities, in the case of this research project the reality under study is that of appeal court judge's justifications for applying or failing to apply section 718.2 (e) of the *Criminal Code* in the sentencing of aboriginal persons and how this is affecting the application of this hopeful provision.

From a decentered researcher stance, the researcher need not be completely removed from the text but should stand decentered from the narrative. The decentered researcher encourages the reader to entertain multiple interpretations (Grbich, 2004: 68) as not only is the researcher's interpretation of the data provided but excerpts from the material analyzed is included alongside these interpretations so as to encourage the reader to entertain their own interpretations and draw their own conclusions. It is this method of textual reflexivity that was utilized in my research project. My interpretations are included alongside excerpts of judges' justifications provided within the cases under study, as I wanted the reader to see where I drew my conclusions and allow him/her the possibility to interpret the same passages and to consider my conclusions as possible, as well as their own. "Textual reflexivity" (Ibid:

73) also helps ensure honest accountability of conclusions. It should prove most useful to interweave reflective commentary throughout the text alongside the subject's narrative to help bring the reader's attention to the complexities of text analysis. Moreover, when possible, in order to contribute to the internal coherence of the research findings, I included references to existing research which supports my conclusions, so that the reader may once again analyze for him/herself the coherence and usefulness of the conclusions drawn. I engaged proactively with the literature from the beginning of the research process as interweaving the literature throughout the process of adds another voice contributing to the researcher's theoretical reconstruction.

Ultimately, "the decentering of the author [...] [allows] all participants, including the author, to become actors in their own right [...] [t]he author becomes the eye of the text—the facilitator of the display of voices, including her/his own, and the illuminator of the text" (Grbich, 2004: 68). My aim, as a researcher, was to provide the reader with sound conceptual analyses as the result of the analytical study of the data utilized. This was achieved by adopting a research design that is congruent with my beliefs, paradigm, approach, methodology and analytical strategy selected for this research, pursuing the decentered researcher stance which aligns very well with the constructivist's belief of multiple realities and by following closely the steps I had set out for my research so that it maintained a strong internal coherence throughout the process which is reflected in the quality of the analytical concepts which are rendered as a result of this undertaking.

Another way in which I attempted to produce a sound conceptual analysis is by employing "positional reflexivity" throughout the research process, understanding how history and culture color the "analytic exercise" (Ibid: 1). According to Grbich (2004: 71),

this positional reflexivity can be accomplished when a conscious effort is made to question one's knowledge through an ongoing internal dialogue which scrutinizes "what I know and how I know it". It is about recognizing that I am coming from a constructivist perspective and this is the lens through which I am viewing and analyzing the issue under investigation. The conclusions drawn from my research must also be considered in light of the research utilized to support the final analysis as it was informed in large part by the theory of Modern Penal Rationality. I have also attempted, whenever possible, to utilize the judges' words in the creation of my analytical categories in order to not distance myself over much from the material in my interpretations while still allowing myself enough distance to encourage the production of original interpretations while remaining grounded in the data. "This self-referential interrogatory process [...] is essential in the understanding of the self and identifying the discourses which have impacted on the lenses through which the researcher views the worlds and participants under study" (Ibid: 71). I have mapped out the epistemological and ontological underpinnings of my research in my methodological chapter which allows the reader to apprehend the lens and perspective from which to approach my work, making my position as a researcher known to the reader.

Because I analyzed court decisions rather than participant narratives, I will not be speaking for or to judges but rather about them, or more precisely about the legal "realities" that are constructed in case laws and about their implications with regard to the decision making process pertaining to section 718.2 (e) of the Criminal code—my own results or/and analysis should not be understood as reality either, rather, they should be perceived as a sociological construction themselves, a sociological construction of the legal "reality" constructed around section 718.2 (e). While I have attempted to 'tease-out' well-founded

conclusions about the reasons behind the application or failure to apply section 718.2(e) in sentencing Aboriginal persons, I do not wish to imply first-hand knowledge of the complexity involved in handing down a sentence. What I would like to offer is an analytic framework from which one valid interpretation may be made about the judges' choice to apply this section or not and which patterns may be discerned in their justifications. These interpretations were compared against the existing body of research as an additional measure of confirmability therefore should not be treated as wholly subjective or unreliable.

I wish to offer my interpretations alongside the judges' narratives on the matter through a possible juxtaposition of their original judgment and justifications next to my theoretical interpretation of its meaning, allowing the readers to judge for themselves whether while following my interpretation they arrive at the same conclusions or entirely their own.

Constructivism's epistemology emphasizes the subjective interrelationship between the researcher and participant (or material), and the co-construction of meaning. According to Mills et al. (2006: 2), "[r]esearchers, in their 'humanness', are part of the research endeavor rather than objective observers, and their values must be acknowledged by themselves and by their readers as an inevitable part of the outcome".

In my search for a research methodology that would provide an ontological and epistemological fit with my position, I was led to explore the concept of a constructivist discourse analysis.

3.4 METHODOLOGY AND ANALYTICAL STRATEGY: CONSTRUCTIVIST DISCOURSE ANALYSIS

According to Turner (1981: 4), research analysis involves teasing out the properties of the object under study and gaining a fuller understanding of it. Turner (1981: 4) explains that “some of the decisions about which facts to pursue are solved for the researcher by subconscious perceptual processes which influence what is observed and other influences are directed upon the analysis by the limited capacity of the human mind”. The understanding that is meted out is the result of an interaction between the researcher and the phenomenon under study (Ibid: 4). In this research the analytical strategy that was pursued is that of a constructivist discourse analysis.

Originally, grounded theory was to be employed as the analytical strategy in this research. However, it quickly became evident that the concepts which emerged from this operationalization were in large part already supported by the theory of MPR, which made the elaboration of an original theory, as posited through grounded theory, impossible. It is in making this realization that the decision to utilize a broad approach to discourse analysis as posited in Duchastel (1993: 159) was made. This approach to discourse analysis is one which seeks to interpret and understand judges’ justifications surrounding the application of section 718.2 (e) of the *Criminal Code* in the sentencing of Aboriginal offenders in case law through the theoretical framework of MPR while considering the systemic and socio-historical context from which this sentencing provision has emerged and in which the criminal legal system is entrenched. However, the opportunity to simultaneously employ an inductive (grounded theory inspired) approach to analysis was utilized to ensure that any justifications falling outside MPR’s purview were not overlooked.

The broad approach to discourse analysis employed in this research combines both content analysis and strict discourse analysis to create a broad approach to discourse

analysis. Analysis is perceived differently through these different facets of discourse analysis. Content analysis views discourse as a source of knowledge and maintains that this knowledge is accessible in the content of the documents or (in this situation, case law) under study, however, analyzing the structures and context which gave rise to the discourse is the focus of strict discourse analysis (Dubé, 2008, p.117). “Content analysis interprets content and aims to understand and make sense of the discursive data” while “strict discourse analysis seeks to explain the effect of discourse and how it is produced” (Dubé, 2008: 117; our translation). In combining these two facets into one broad approach to discourse analysis an all encompassing analytical strategy is created. According to Duchastel (1993: 159),

Il n'est plus pertinent de distinguer analyse de contenu et analyse du discours, car il ne devrait plus y avoir d'analyse de contenu qui ignore totalement la nature langagière du discours, ni, non plus, d'analyse de discours qui ne pense la relation avec ses conditions sociohistoriques de production.

It is this inclusive approach to discourse analysis which has been privileged as analytical strategy in this research.

As outlined in Jorgensen and Phillips (2002: 5-6), there are 4 components to constructivist discourse analysis. The first is a critical approach to taken-for-granted knowledge (our knowledge of the world is subjective and not objective truth). According to this approach “reality is only accessible through categories, so our knowledge and representations of the world are not reflections of the reality ‘out there’ but rather are products of our ways of categorizing the world”, namely through discourse (Jorgenson & Phillips, 2002: 5). The second is historical and cultural specificity (our worldviews are not determined by “pre-given or external conditions” but are socially constructed and therefore not fixed). Accordingly, “discourse is a form of social action that plays a part in producing

the social world—including knowledge, identities and social relations—and thereby maintaining specific social patterns” (Jorgensen & Phillips, 2002: 5). Thirdly, “knowledge is created through social interaction in which we construct common truths and compete about what is true and false” (Jorgensen & Phillips, 2002: 5). Finally, there are links between knowledge and social action so therefore, “within a particular worldview, some forms of action become natural, others unthinkable” (Jorgensen & Phillips, 2002: 60).

Discourse analysis understands that language is “our access to reality” and through it, representations of reality are created which also contribute to constructing reality (Jorgensen, 2002: 8). Reality exists but only gains meaning through discourse. This “ascription of meaning in discourses works to constitute and change the world” (Jorgensen & Phillips, 2002: 9). Discourse analysis does not seek to uncover the reality behind the discourse because it does not believe this to be a possibility; rather it treats the discourse as the object of inquiry and identifies the consequences of different discourses of reality (Jorgensen & Phillips, 2002). Ultimately it is this research’s goal to do just that, to analyze, interpret, and understand how and what legal discourse is mobilized in the application of section 718.2 (e) in the sentencing of Aboriginal offenders and the consequences this has on the use of imprisonment as a sanction.

Discourse analysis as an analytical strategy for my research represents a good fit as its main premises are in line with those utilized in my research. I have employed a postmodernist understanding of language which, much as discussed above, views language as an expression that is purposeful and interpretive (Alvesson, 2002). Postmodern perspectives view all knowledge as socially and culturally constructed (Clarke, 2005) which again is in keeping with the epistemology of discourse analysis. My research was conducted

within the constructivist paradigm and the epistemological and ontological assumptions which guide my research are in keeping with those involved in discourse analysis.

Constructivism embraces my beliefs about the production of knowledge as it fosters the creation of interpretations and not the development of truths and is based on the possibility of multiple realities to which I subscribe, allowing for a coherent research process. In this study I interpreted how judges justify the application or non-application of section 718.2(e) as it applies to Aboriginal persons. Ultimately this exercise can be summarized as the interpretation of judges' interpretation of this particular provision. In undertaking this research I attempted to assess justifications made within a particular sector, the legal arena. Adding to the interpretive character of this research is the fact that section 718.2(e) of the Canadian *Criminal Code* is in itself a Parliamentary interpretation of what constitutes a proper response to Aboriginal over-incarceration. My analytical exercise is comprised of my personal interpretation as a criminological researcher of interpretations made by legal professionals based on an interpretation instituted through a political process. The analysis derived from my research using constructivist discourse analysis cannot represent anything more than an "interpretive portrayal" of the area under study rather than an exact replica of it as it simply does not possess such a character. Given the nature of my research, the constructivist approach is a very suitable option because constructivism and consequently constructivist discourse analysis are based on the idea of multiple possible realities and in the production of interpretations rather than absolute truths which is congruent with my beliefs about the nature of reality and the way in which I view the production of knowledge contributing to the internal coherence of my research project.

3.4.1 Purposive Sampling

The concept of ‘purposive’ sampling (Strauss & Corbin, 1998: 201) has guided the determination of the size of the sample. It means in effect, sampling to the point of redundancy (Ibid: 140). This happened early on in the analytic process as after the coding of the first ten cases, patterns in judges’ justifications could already be discerned. An example of such patterns was the fact that judges justified the imposition of a custodial sanction by explaining that the sentence must have a deterrent and denunciatory effect which could only be achieved through incarceration. This type of reasoning was noted in a number of the cases under analysis, leading to the discernment of a pattern in justifications for applying or failing to apply section 718.2 (e) in the sentencing of Aboriginal persons. In order to reinforce the notion of sampling to the point of redundancy, all thirty-three cases which were retrieved were coded to ensure that no other patterns could be identified by this researcher in the sample under study.

The constant comparison method facilitates the operationalization of purposive sampling and saturation (Ibid: 138). Constant comparison involves comparing and integrating incidents and statements relevant to each theme that emerge from the data. Consequently, sampling, data collection and data analysis continue simultaneously. This enables the researcher to identify when little new is being learned, when narratives are beginning to repeat concepts and themes, indicating that ‘saturation’ is reached and comprehension is complete (Morse, 1994: 30). As aforementioned, the sampling of court of appeal cases referencing the application of section 718.2(e) in the sentencing of Aboriginal offenders continued until no new material or concepts emerged. In this approach to sampling, the researcher does not emphasize the generalizability of the sample, but rather focuses on the sample adequacy (Bowen, 2008: 140). The purpose is to create an analysis that is directly

linked to the reality of individuals and not necessarily to verify the analysis generated beyond the verification yielded by saturation of categories.

3.4.2 Data Analysis

Strauss and Corbin, (1998: 13) describe data analysis as the “interplay” between the researchers and their data. The analysis of the data is the stage of the research process which Morse (1994: 30) describes as “synthesizing”. This is the merging of several narratives, in order to find a composite pattern which illuminates the meanings of these narratives. It is moving from the individual stories to a more general composite stage of understanding, searching for commonalities of experiences and meanings that enable the researcher not only to suggest common patterns of experience, but which can in turn illuminate the individual story. This is the point in the study where the study of judges’ justifications for applying or failing to apply section 718.2(e) of the *Code* became sufficiently clear that patterns emerged and allowed for the creative, informed process of analysis to commence.

In order for this to be accomplished, the vast amount of “unstructured data” (Henwood & Pidgeon, 1992: 103), which the case summaries under analysis represent, needs to be ordered. The ‘tool’ which was utilized in this study is “line by line” coding, that is each line is meticulously coded without prior categories, which allows the emergent “in vivo” (Strauss and Corbin, 1998: 105) concepts to appear. Charmaz (2006: 43,45) defines qualitative coding as “the process of naming segments of data with a label that simultaneously categorizes, summarizes and accounts for each piece of data”, “it generates the bones of the analysis”. This is a creative process, which inevitably involves the interpretative powers of the researcher, therefore raises questions about the ‘neutrality’ of the

process. Just as the research participants construct the data, the researcher constructs the codes. Given the interpretive nature of the constructivist paradigm upon which this research is built, this seeming lack of neutrality is not a concern as the quality of this project is not measured in terms of objectivity but rather values an interpretive process, such as the one produced in this research project.

The initial codes facilitate the “selective or focused” codes which will be identified in the later cases (Charmaz, 2003: 260). From these initial and later focused codes, categories or themes emerge, which will bring us closer to an analysis that might explain judges’ justifications for applying or failing to apply the provision.

This process of initial and focused coding and the identification of themes also enables the researcher to engage in the constant comparative method discussed earlier in relation to saturation (Strauss and Corbin, 1990). Bowen (2006: 5), describes this aspect of the constant comparative method as an iterative process which helps to “identify the latent pattern in multiple participants’ perspectives, as specified primarily in their words”. This process is said to facilitate the convergence of themes, whereby the themes move from a lower level of abstraction to becoming major overarching themes rooted in the concrete experience of the data (Bowen, 2006: 5). The point of saturation (Bowen, 2008: 140) is reached when no new codes have emerged from the data. The codes that emerged from this process in this research are as follows:

Gladue:

This category of analysis is comprised of all justifications where judges considered the directives outlined in the *Gladue* case in sentencing the accused. This category explores both permissive and prohibitive dimensions of the *Gladue* case in regard to the application of

section 718.2 (e) of the *Criminal Code* and the positive discrimination towards Aboriginal offenders in sentencing as posited through this provision.

Protection of the public:

This category of analysis is comprised of all justifications where judges considered the protection of the public in sentencing the accused.

Denunciation and deterrence:

This category of analysis is comprised of all justifications where judges considered the denunciation and deterrence in sentencing the accused. The category includes both judges' justifications in favor (*permissive*) or not in favor (*prohibitive*) of positive discrimination towards Aboriginal persons in sentencing as outlined in section 718.2 (e) of the *Criminal Code*.

Denunciation and deterrence justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing:

This sub-category of analysis is composed of justifications where judges mentioned that their choice to impose a sanction of incarceration was swayed by considerations of denunciation and deterrence. While these two theories of punishment do share common elements, they are distinct, however they were treated simultaneously by judges in the cases under scrutiny as if they formed one justification for the imposition of a penal sanction.

Denunciation and deterrence justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing:

This sub-category of analysis is composed of justifications where judges mentioned that their choice to impose an alternative sanction to incarceration was swayed by

considerations of denunciation and deterrence. While these two theories of punishment do share common elements, they are distinct, however they were treated simultaneously by judges in the cases under scrutiny as if they formed one justification for the imposition of alternatives to incarceration.

Isolation/Separation:

This category of analysis is composed of justifications where judges mentioned that their choice to impose a sanction of incarceration was swayed by the apparent need to isolate and/or separate the offender from the greater population as it was deemed that he/she represented too much of a risk for society or that the serious nature of the offence called for this type of harsh punishment.

Rehabilitation:

This category of analysis is comprised of all justifications where judges considered rehabilitation in sentencing the accused. The category includes both judges' justifications in favor (*permissive*) or not in favor (*prohibitive*) of positive discrimination towards Aboriginal persons in sentencing as outlined in section 718.2 (e) of the *Criminal Code*.

Rehabilitation (of the first modernity) justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing:

This sub-category of analysis is composed of justifications where judges mentioned that their choice to impose a sanction of incarceration was swayed by the belief that rehabilitation is only possible within a closed setting such as within the confines of prison (thus subscribing to the understanding of the concept of rehabilitation of the first modernity).

Rehabilitation (of the second modernity) justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing:

This sub-category of analysis is composed of justifications where judges mentioned that their choice to impose an alternative sanction to incarceration was swayed by the belief that rehabilitation may be accomplished within an open setting such as the offender's community (thus subscribing to the understanding of the concept of rehabilitation of the second modernity).

Restorative justice:

This category of analysis is composed of justifications where judges mentioned that their choice to impose an alternative sanction to incarceration was swayed by restorative justice considerations. This category of analysis includes reference to sanctions which promote healing, reconciliation, reparation of harm and devalue social exclusion as well as a vengeful infliction of harm.

Consideration of resources/social infrastructure/alternatives to incarceration:

This category of analysis is comprised of all justifications where judges considered the availability of resources/social infrastructure/alternatives to incarceration in sentencing the accused. The category includes both judges' justifications in favor (*permissive*) or not in favor (*prohibitive*) of positive discrimination towards Aboriginal persons in sentencing as outlined in section 718.2 (e) of the *Criminal Code*.

Consideration of resources/social infrastructure/alternatives to incarceration justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing:

This sub-category of analysis is composed of justifications where judges mentioned that their choice to impose a sanction of incarceration was swayed by a lack of

appropriate services and resources available to conduct alternatives to incarceration; a lack of community support, also referred to as a lack of social infrastructure, necessary for the implementation and maintenance of alternatives when these were available; when a complete lack of alternatives within the community was noted; and finally when any combination of the three was observed thus apparently forcing the judges' hands away from alternatives to imprisonment.

Consideration of resources/social infrastructure/alternatives to incarceration justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing:

This sub-category of analysis is composed of justifications where judges mentioned that their choice to impose an alternative sanction to incarceration was swayed by the presence of appropriate services and resources to conduct alternatives; of community support and the necessary social infrastructure to see alternatives through to completion; the presence of pre-existing alternatives was noted and deemed appropriate; and finally when any combination of the three was observed, apparently allowing the judges to seek out alternatives.

Legalization of public opinion by the penal system: community and victim opinion:

This category of analysis is comprised of all justifications where judges considered public opinion in sentencing. The category includes both judges' justifications in favor (*permissive*) or not in favor (*prohibitive*) of positive discrimination towards Aboriginal persons in sentencing as outlined in section 718.2 (e) of the *Criminal Code*.

Legalization of public opinion by the penal system: Community and victim opinion justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing:

This sub-category of analysis is composed of justifications where judges mentioned that their choice to impose a sanction of incarceration was swayed by considerations of public opinion (in particular those most closely affected by the offence and/or the institution of a community sentence such as the selected community and the victim or those closest to the victim) in favor of incarceration.

Legalization of public opinion by the penal system: Community and victim opinion justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing:

This sub-category of analysis is composed of justifications where judges mentioned that their choice to impose an alternative sanction to incarceration was swayed by considerations of public opinion (in particular those most closely affected by the offence and/or the institution of a community sentence such as the selected community and the victim or those closest to the victim) in favor of the application of alternatives to incarceration.

For the purposes of my research, discourse analysis was interesting for understanding what judges' justifications are for applying or failing to apply section 718.2(e) in the sentencing of Aboriginal offenders. This approach allowed me to analyze how the criminal legal discourse surrounding the application of section 718.2 (e) was used by judges "as a resource" (Jorgensen, 2002: 21) to diminish the over-incarceration of Aboriginal people or how discourse "limits [the possibility] for action" (Jorgensen, 2002: 21), in my case how legal discourses may force judges' sentencing decisions in certain directions.

3.4.3 Reflexivity

Reflexivity, “means that researchers should constantly take stock of their actions and their role in the research process and subject these to the same critical scrutiny as the rest of their ‘data’” (Mason, 1996: 6). Law (2006: 94) points out that what is presented in research does not necessarily speak for itself, it has to be interpreted. This act of interpretation places the power of representation in the hands of the researcher, a power which the researcher must be aware of and reflect on. Reflexivity must grow from the personal awareness of the researcher’s own background, biases and ambitions, what Finlay (2003: 6) terms “introspection”. In order to exercise reflexivity and introspection, I have been careful to outline, explain and support my choice of research design, research methodology, and theoretical framework. I have not questioned the validity of other research designs but maintain that my choices in this regard were governed by my values and were selected for their perceived ability to attain my research goals and produce the type of interpretive knowledge which I aimed to achieve. I have made explicit my choices as is recommended by Guillemin & Gillam (2004: 274), and shall continue to do so in order to emphasize reflexivity.

As previously stated, this research undertook the task of carefully scrutinizing appeal court judge’s justifications for applying or failing to apply section 718.2(e) of the Criminal Code, a provision enacted by Parliament in order to address the over-representation of Aboriginal persons in the criminal justice system. It is understood that electing such a topic demonstrates an interest in uncovering how section 718.2(e) of the Criminal Code is in fact being applied despite the ways in which it was intended to be applied. More importantly, this research may shed light on what principles are guiding judges’ sentencing practices and what type of discursive justification is being utilized to defend these sentencing practices and

whether this may hinder the utilization or application of the aims and principles set out in section 718.2(e) of the Canadian Criminal Code.

According to Becker (1967: 245), it is essential for researchers to explicitly state their position with regard to their research in order to situate the reader. We must always look at the matter from someone's point of view and therefore, "the scientist who proposes to understand society must [...] get into the situation enough to have a perspective on it. And it is likely that his perspective will be greatly affected by whatever positions are taken by any or all other participants in that varied situation". I undertook an extensive literature review before beginning this research process and therefore cannot remain unaffected. While I did not interact with human participants Becker (1967: 245), claims that "even if his [the researcher's] participation is limited to reading in the field, he will necessarily read the arguments of partisans of one or another side to a relationship and will thus be affected, at least by having suggested to him what the relevant arguments and issues are".

I am sensitive to the plight of Aboriginal persons and consequently Aboriginal offenders. Aboriginal people as a group have suffered great injustice, and while I am not so naive as to believe that Aboriginal over-incarceration and Aboriginal offending can be fully explained and excused by the injustices suffered, I do feel that as parliament has added section 718.2 (e) as a measure to reduce the harmful practice of over-incarceration (particularly for this group) it is important to examine its application. Consequently, I had a strong interest in uncovering the reasons as to how and why this hopeful provision is being applied or not applied by court of appeal judges. My sensitivity towards the plight of Aboriginal persons and my hope to see a decrease in the use of incarceration as a sanction may well be evident in my writing and interpretations. With this in mind, as researchers we must remain wary as to "whether some distortion is introduced that must be taken into

account before the results of our work can be used” (Ibid: 246). We must grapple with our subjectivities and attempt to find a good balance throughout the research process and elect to remain reflexive as our subjectivities may very well lend themselves to a practical, original as well as creative work.

This is indeed a reality of research with which I was faced in undertaking this project. Another strategy used in order to remain reflexive, is that I chose to utilize the judges’ words in building the concepts which form the basis of my analysis and interpretation of judges’ justifications in an attempt to ground the research findings within the data. I then supported the findings with existing research, introducing some voices over others. As the theoretical framework guiding this research, I relied heavily on research which discussed the theory of Modern Penal Rationality and elected to frame my analysis in this way rather than another, creating one possible interpretation of judges’ justifications for applying or failing to apply section 718.2 (e) of the Criminal Code over other possible interpretations. However, as aforementioned, having adopted a constructivist approach, my goal is to present one possible interpretation of judges’ justification for applying or failing to apply section 718.2 (e) of the Criminal Code and therefore I am not deterred by this consideration but remain aware and open about my choice to pursue this course.

I have made such subjectivities explicit in my research as they arise in hopes of abating this issue. As such, it should be noted that the theory of Modern Penal Rationality which was developed in the previous chapter contributed to the elaboration of the concepts developed in this research project and framed the interpretation of judges’ justifications. My goal is that as Ezzy (2002: 94) makes clear, “[c]areful coding allows the researcher to move beyond pre-existing theory to ‘hear’ new interpretations and understandings present in the

data”. It is my belief that while my findings are framed by the theory of modern penal rationality, the careful coding executed in this research assignment has allowed me to frame some of the intricacies of sentencing Aboriginal people in light of the directives set out in section 718.2 (e) of the Criminal Code and to develop an MPR based but original interpretation of judge’s justifications for applying or failing to apply section 718.2 (e) of the Criminal Code in order to help move knowledge in this specific field forward.

3.5 EVALUATION CRITERIA

Measuring constructivist discourse analysis against traditional, positivist yardstick measures of reliability and validity can prove quite difficult and is not necessarily desirable. As noted by Morgan (in Lincoln & Guba, 1989: 236), “goodness criteria are themselves rooted in the assumptions of the paradigm for which they are designed; one cannot expect positivist criteria to apply *in any sense* to constructivist studies”. Criteria which are meaningful within a constructivist inquiry and upon which I will be building my research include: credibility; transferability; dependability and confirmability.

Credibility is achieved when the constructed realities of respondents coincide with the findings (i.e. reconstructions) produced by the investigator (Ibid: 237). In order to meet the requirement of credibility, I employed the peer debriefing technique outlined by Guba and Lincoln (1989: 237-243). As involved and consuming a process as research is, peer debriefing was an integral part of my research project. The sounding board concept of this credibility technique was a much utilized tool. Whether with peers and or my supervisor such an approach was essential in order to pick out findings, “make tacit and implicit

information that the evaluator [I] might possess”, and also helped me understand my own posture and values and their role in the inquiry.

Second is the criterion of transferability, which entails verifying how generalizable the findings are. The responsibility of proving/disproving the generalizability of the findings here rests with the receiver and not the inquirer, as is traditional with a more positivist approach. The main technique for establishing the degree of transferability is “thick description”. The research should produce clear and nuanced descriptions. The extensive and continuous literature review I have conducted has helped to provide an extensive and detailed contextualization of the issue under study and I have made every effort to document the research process as it develops, which should greatly facilitate transferability judgments on the part of others who wish to apply my findings to other settings.

Third, dependability is another criterion which I worked hard to uphold and is concerned with “the stability of data over time”. In a constructivist research such as the one I have undertaken, shifts are welcome and often serve as “hallmarks of a maturing—and successful—inquiry”. However, the criterion is only fulfilled if the changes are effectively “tracked and trackable (publicly inspectable), so that outside viewers of such an evaluation can explore the process, judge the decisions that were made, and understand what salient factors in the context led the evaluator to the decisions and interpretations made” (Ibid: 242). This criterion was met through reflexivity and consequently the transparency of my research process as previously detailed.

The fourth criterion is confirmability which is concerned with ensuring the integrity of the findings. Within a constructivist paradigm, this is ensured when “data (constructions,

assertions, and so on) can be tracked to their sources, and that the logic used to assemble the interpretations into structurally coherent and corroborating wholes is both explicitly and implicitly in the narrative of a case study”. In order to both attest to the quality and appropriateness of the “inquiry process” (i.e. dependability) and to confirm the credibility of findings I have dedicated an entire chapter to explaining in great detail the theory of Modern Penal Rationality which constitutes the major underpinning of my research findings, so that the reader may be thoroughly embedded in the framework from which my final interpretation was developed. My source material is also accessible to the public which allows the reader the possibility to review the data and evaluate whether my interpretation may indeed be confirmed by the data. I have placed at the readers’ disposition all the tools which were utilized in the analytical process and therefore have allowed him/her to possibility to attest to the confirmability of my conclusions.

3.6 LIMITATIONS

As with any research project, there are limitations to this study. This study will only examine Court of Appeal cases. The analysis will be restricted to the cases reviewed which appeared before Appeal Courts and any conclusions drawn will only be applicable in that domain. Moreover, utilizing the *Nexis Lexis Quicklaw* database to access the data will inevitably limit the cases which are included in the study as not all cases are found on *Quicklaw*.

CHAPTER 4

ANALYTICAL FINDINGS

In this chapter, a discussion of the themes that emerged from the research sample is presented. Interwoven with the discussion of themes are personal reflective commentaries and related research findings are included in order to provide possible insight and meaning into the justifications supplied by the judges in the application or non-application of section 718.2 (e) in the sentencing of Aboriginal offenders.

First, in the section entitled *Gladue*, data pertaining to the case of *R. v. Gladue* [1999] 1 S.C.R. 688 will be treated. The interpretation of section 718.2 (e)'s application produced as a result of this case is very important in order to understand judges' justifications in regard to the application or non-application of the provision. Both *R. v. Gladue*'s permissive and prohibitive dimensions will be illuminated in this section as well as their effect and that of MPR on section 718.2 (e)'s application in appeal court sentencing.

The second section entitled "Public Protection", outlines judges' use of the public protection rhetoric and *Gladue*'s prohibitive dimension in their justifications for the non-application of section 718.2 (e). MPR's potential influence on the mobilization of the provision is also commented in this section.

The third section, "Deterrence and denunciation", examines court of appeal judges' use of deterrence and denunciation in their justifications of the application of section 718.2 (e) in the sentencing of Aboriginal offenders. MPR's potential influence on the mobilization of the provision is also discussed in this section.

The fourth section, “Isolation/Separation”, analyzes how appeal court judges employ isolation/separation in their justification of the application of section 718.2 (e) in the sentencing of Aboriginal offenders. MPR’s potential influence on the mobilization of the provision is also discussed in this section.

The fifth section, “Rehabilitation”, focuses on judges’ use of rehabilitation in their justifications for or against the mobilization of section 718.2 (e) in the sentencing of Aboriginal offenders. This section examines both justifications which discuss rehabilitation of the first and second modernity and how they affect the application of the provision. MPR’s influence on the use of section 718.2 (e) is also examined in this section.

The sixth section, entitled “Restorative Justice”, explores restorative justice considerations in judges’ justifications of the application of section 718.2 (e) in the sentencing of Aboriginal offenders.

The seventh (“Consideration of resources/social infrastructure/ alternatives to incarceration), and eight (“Legalization of public opinion and of the public by the penal system: community and victim opinion”) sections discuss the unforeseen obstacles that affected the application of section 718.2 (e) of the *Criminal Code* in the sentencing of Aboriginal offenders.

Section nine, includes concluding thoughts on the judges’ justification in the application of section 718.2 (e) in the sentencing of Aboriginal offenders and the role played by *Gladue*’s prohibitive and permissive dimensions as well as modern penal rationality’s involvement in both.

4.1 *GLADUE* (permissive and prohibitive dimensions)

As previously noted in the introduction⁵, in 1996, Parliament added Part XXIII to the Canadian Criminal Code, which included the institution of provision 718.2 (e). Shortly thereafter, the first comprehensive judiciary interpretation of section 718.2 (e) was undertaken in the case of *R. v. Gladue* [1999] 1 S.C.R. 688, which set the boundaries for the provision's successive application. Since then, section 718.2 (e) and the guidelines outlined within *Gladue* have undergone subsequent interpretations within the courts. What can be noted by analyzing the application of section 718.2 (e) and its interpretation by the courts in cases after *Gladue* is the identification of both permissive and prohibitive dimensions to *Gladue* which affect the application of the provision. In summary, *Gladue* dictates that restorative justice is a very important consideration in sentencing (permissive aspect/dimension); however, restorative justice should not be achieved at any cost, but other factors must be considered and may well overshadow restorative contemplations (prohibitive aspect/dimension). In the case of *Gladue*, while section 718.2(e) of the *Criminal Code* was intended 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” (*R. v. Gladue* [1999] 1 S.C.R. 688, para 50) it is outlined that the application of these restorative principles is only possible insofar as they do not compromise the more traditional ends of sentencing such as deterrence, retribution and denunciation stated in section 718 (Ibid, para 50). In that regard, *Gladue* can be mobilized either in support of (permissive) or against (prohibitive) restorative justice principles. Empirically speaking, we have observed both possibilities in our research.

⁵ See page 1 for more detail.

With regard to the prohibitive mobilization of *Gladue*, Judges Cory and Iacobucci outlined that attention must be paid to the particular circumstances of Aboriginal people as their sentencing logic and principles are markedly different from those of the greater population (Ibid, para 68) and that appropriate sentencing procedures and sanctions will be determined keeping in mind that:

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) (Ibid, para 70).

While explicit mention of these directives is made and the judges expressed an urgent need for the restorative nature of the provision to be given real force, Cory and Iacobucci insist that alternatives and restorative justice shall not be pursued at the expense of other considerations, depending on the case at hand. The judges assert that we must also consider the other sentencing principles (which are at times, counter to restorative pursuits). What Cory and Iacobucci advance is that alternative and restorative justice considerations are important but are not the primary factor. Despite having emphasized the importance of alternatives to incarceration, the procedural errors committed in the two first judgments of the case, stressing that Jamie did not pose a threat to society and the restorative nature of section 718.2(e), Cory and Iacobucci decided to dismiss the appeal. The pervasive effect of modern penal rationality and the sentencing principles upon which it rests eclipsed the restorative potential of article 718 and more specifically section 718.2(e). Indeed, and as shown in the following excerpt, the judges Cory and Iacobucci were not able to break

through the cognitive obstacle created by modern penal rationality and the classical theories of punishment which call for social exclusion and punitive sanctions:

[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” [denunciation?]. Moreover, the offence involved domestic violence and a breach of the trust inherent in a spousal relationship [retribution?]. 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 (Ibid, para 98).

Similar sentiments were expressed in the cases under study. One case in which we can see the potential of s.718.2 (e) being stifled by this type of cognitive barrier created by MPR is that of *R. v. Andres* [2002] SKCA 98. Despite openly acknowledging that Andres had suffered and been affected by “the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts [...]” (*R. v. Gladue* [1999] 1 S.C.R. 688, para 93), the appeal judge maintained that the presence of these circumstances would not serve to mitigate his conduct (and indirectly his degree of culpability) or ultimately the sentence to be imposed in any way despite the permissive directives outlined in *Gladue*. Most interesting about the *Gladue* case in its interpretation of section 718.2 (e) is that it has created two incompatible directives, one permissive and one prohibitive of the provision’s application. The opportunity for judges to simply pursue sentencing in accordance to the directive they prefer and ignore the other has been created. *Gladue* emphasizes the application of alternatives but not at any price, and in introducing this prohibitive or limiting remark, a door has been opened for MPR to infiltrate and overpower the sentencing logic once more and that is precisely what can be witnessed in the following excerpt:

[29] With the greatest respect to the trial judge, there was no evidence before him that Mr. Andres' upbringing or the systemic factors referred to by the Supreme Court of

Canada in *Gladue* are connected to his crimes. His alcoholism may in part be traced to the circumstances of his upbringing, but the fact of his upbringing in difficult circumstances does not explain or mitigate his conduct of repeatedly driving after his ability to do so has become impaired. Admittedly, according to the material before the trial judge, Mr. Andres had a difficult childhood but in spite of that he completed grade 12, he completed his training and apprenticeship in masonry, cement and stucco and has continued to work steadily. [...] [32] In our opinion, the trial judge erred in the application of the principles enunciated in *Gladue* in the circumstances of this case (*R. v. Andres* [2002] SKCA 98).

4.1.1 Side note: Success in life, an aggravating factor in sentencing?

Also interesting to note in this example is how the offender's success in life (completing grade twelve, training and apprenticeship in masonry, cement, and stucco and the fact that he has remained gainfully employed), despite his difficult upbringing appears to work against Mr. Andres in this case. It seems as though the offender's good behaviour or demonstrated capacity towards such positive behaviour works to neutralize the mitigating impact the consideration of his difficult background and upbringing may have on the sentencing in this case. Moreover, it almost appears as though the positive behaviour displayed by the accused is actually being considered an aggravating circumstance in this case!

It was decided that as a repeat drunk driving offender, the protection of the public was paramount and therefore Andres would need to be disabled through a custodial sentence regardless of his troubled background. Here we can see the prohibitive dimension of *Gladue* being played out. In *R. v. Gladue*, the appellant was eventually granted full parole with conditions having served 6 months in prison but the issue remains that incarceration was deemed necessary in this case and that of *R. v. Andres* [2002] SKCA 98, given the pervading rationale of MPR and the sentencing theories upon which it rests.

Cory and Iacobucci explain that:

[88] 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 [...] 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 (*R. v. Gladue* [1999] 1 S. C.R. 688).

Appeal judges have taken note of this specification and in a number of cases maintained that aboriginal status does not entitle an offender to a lesser sentence as can be seen in the following example:

[16] It is in relation to ss. 718(d) and (e) that the factors referred to in *R. v. Gladue*, supra, must be taken into account. As noted above, the pre-sentence report indicated that the respondent himself claimed only to be affected in a general way by the poverty and alcoholism in the aboriginal community, and by racism in society in general. He did not claim to have been disadvantaged in any way that could be related to the offence which he committed. [17] Accordingly, the fact that the respondent is an aboriginal does not, per se, entitle him to a lesser sentence than any other person in like circumstances, and the trial judge erred in so doing. For reasons the same as those given in the cases relied on by the Crown and cited above, a conditional sentence in this case does not meet the requirements of the law respecting proportionality to the gravity of the offence and the responsibility of the offender, and respecting denunciation and deterrence (*R. v. Cappel* [2005] SKCA 134).

What becomes quite clear throughout the cases of *R. v. Gladue* and *R. v. Cappel* is that section 718.2(e) must and will continue to be interpreted in the context of the other, often more coercive principles outlined in section XXIII of the *Criminal Code* (such as denunciation, deterrence, proportionality, etc.). As long as this is the case, the alternative/restorative current underpinning section 718.2(e) stands little chance of affecting much change in the sentencing of Aboriginal persons as the alternative/restorative potential of this provision is severely limited by the weight given to the classical sentencing principles,

which is perfectly exemplified in this excerpt from the case of *R. v. Augustine* [1999] NBCA 541:

[31] The approach to sentencing has changed in that the courts are called upon to emphasize the goals of restorative justice. [...] This theme is repeated in *Gladue* but the Supreme Court also recognized factors that may unbalance the goal of restorative justice [...]. [32] In my opinion, a conditional sentence, considering the aggravating circumstances of this manslaughter is clearly unreasonable. The killing calls for a sentence of incarceration that is commensurate with the death and the circumstances that motivated the violence. 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.

While the case of *R. v. Augustine* is particular because it deals with the serious offence of manslaughter, the judge in the first instance when examining all the circumstances of the case and the particular circumstances of the offender, had deemed a conditional sentence appropriate (therefore keeping with a more alternative/restorative approach to sentencing and giving real force to s.718.2 (e) by employing alternatives to imprisonment whenever possible). However the appeal judge did not share this view and decided that the alternative/restorative considerations in this case would remain subordinate to those more coercive principles outlined in the *Criminal Code*.

In *R. v. Gladue*, Cory and Iacobucci explain that, “[i]n 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” (*R. v. Gladue* [1999] 1 S.C.R. 688, para.78). The judges even go as far as to say that:

[78] [i]t is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals [deterrence, denunciation, and separation], 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 (Ibid).

Modern penal rationality is so totalising that the same judges who claim that aboriginal people hold different conceptions of appropriate sentencing procedures and sanctions and for whom the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from their understanding of sentencing also believe that depending on the circumstances, Aboriginal people's fundamental conception of justice will be reversed to reflect the conception of justice upheld by modern penal rationality. Ultimately, while section 718.2(e) explicitly requires judges to apply all other sanctions other than incarceration when possible, with particular attention to the unique circumstances of Aboriginal people, this provision is subordinate to the classical theories of punishment and therefore is limited in its application. Cory and Iacobucci state that:

[33] 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 (Ibid).

Even though the determination of a sentence is said to be an individualized process, *Gladue* is just one of many examples where this principle is ignored in favour of a strict focus on the gravity of the offence committed. Despite not posing a threat to society, the efforts demonstrated towards her betterment, the consideration of her particular circumstances as an Aboriginal person, the judges felt compelled to impose a most punitive

sanction in the case of Jamie Gladue. The judges, Cory and Iacobucci, still felt the need to justify a sanction of incarceration on the grounds that such a crime needs to be punished by a harsh sanction. The judges are caught up in this punitive logic sustained by MPR. A perfect example of just how deeply rooted this rationality really is, evident when Cory and Iacobucci address what they deem a misconception surrounding the leniency of alternative/restorative justice:

[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 (*Ibid*).

A punitive response becomes the only possible response. Even the restorative approaches to sentencing will be co-opted by the system until they fulfill the requirements of the punitive sanction because modern penal rationality will not allow it to be any other way. Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered (*Ibid*, para 33). 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 (Ibid, para 33). While this tempering of custodial sentences to reflect the particular circumstances of the offender might be construed as restorative in nature, I believe it would be misleading to view this as such and feel it creates a real obstacle to the recourse of alternative sanctions as is directed in s.718.2 (e). In instituting this practice, judges are essentially encouraged to remain within the confines of MPR and continue with the popular use of incarceration as they convince themselves that by tempering custodial sentences they are well in line with the restorative current being conveyed through s.718.2 (e). One such example can be found in the case of *R. v. Oakoak* [2011] NUCA 21:

[42] [...] By reducing the length of the jail term significantly, the Sentencing Judge did exactly what Section 718.1(e) requires: he considered whether something other than imprisonment was appropriate, and when he concluded that a jail term had to be imposed, he reduced it as much as he felt he could under the circumstances.

This moderating of sentence duration supplies judges with yet another excuse to justify the use of imprisonment as a sanction and ignore the potential alternatives, remaining comfortably implanted in MPR's exclusionary and afflictive approach and practices.

Gladue made it clear though that alternatives and restorative justice would only be pursued in cases where alternative and/or restorative approaches would not compromise other, more customary, objectives such as the protection of the public (prohibitive). The protection of the public is the main sentencing objective. This public protection rhetoric has

a most limiting effect on the application of section 718.2 (e) as will be demonstrated in the following paragraphs.

4.2 PROTECTION OF THE PUBLIC

Protection of the public is a central consideration in sentencing in Canada (Szabo in Dubé, to appear: 2). It is primary in all instances to ensure the safety of citizens, and this may well be to the detriment of the offender's wellbeing given that he has violated the social contract to which all members of society are bound. Unfortunately, in cases where there is a real tangible threat to public safety, few alternatives to incarceration are seen as valid or appropriate to achieve the protection of the public as can be seen in the following example:

[49] [...] [B]ecause the appellant was an existing danger to the community, any suspension of sentence which involved his return to the community for treatment would have been inappropriate at that point. [50] [...] Furthermore, s. 742.1(b) specifically requires that the court be satisfied that a community sentence would not endanger the safety of the community. [55] [...] In the special circumstances of this case, given the nature of the evidence presented and the choices facing him, the sentencing judge cannot be faulted for emphasizing incarceration [...] (*R. v. Jacobish* [1998] NFCA 198).

Another case in which this can be noted is that of *R. v. Carrière* [2002] ONCA 1429. In this case the Aboriginal accused, Mr Carrière, was convicted of second degree murder after shooting a convenience store owner while committing a robbery. Aggravating factors of the case contributing to the seriousness of the offence include the fact that murder is a very serious offence and Mr. Carrière was a long-term offender (*Ibid*, para. 15). It was stated that Mr. Carrière approached the worst offender category (*Ibid*, para.15). Circumstances directly related to the commission of the offence also increased the seriousness of the offence as Mr. Carrière chose to wield a powerful hand gun (*Ibid*, para. 10) and concealed his face with a mask, demonstrating premeditation and planning (*Ibid*, para. 13). The offender also targeted

a vulnerable victim group (convenience store owners) (Ibid, para. 11) and shot the victim in the presence of his son (Ibid, para. 12). In mitigation, Mr. Carrière pointed to a very difficult personal background and maintained that since rediscovering his Aboriginal roots he had made considerable progress in terms of his behaviour (Ibid, para.16). The primary sentencing objective sought was the protection of the public and this was ultimately favored through the imposition of a custodial sanction:

[5] We agree with counsel that a very lengthy penitentiary sentence is required. [15] [...] Mr. Carrière has received penitentiary sentences on two prior occasions. Sadly, he seems totally unable to remain at large for any appreciable period of time without committing further serious criminal offences. [16] Like many people who have the kind of record Mr. Carrière has accumulated, he comes from a disadvantaged and troubled background. It is fair to say that Mr. Carrière has had very little chance in life. Unfortunately, whatever the forces may be that have caused Mr. Carrière to live the life he has led, the present reality is that Mr. Carrière presents a danger to the community. He has shown himself to be unable to live lawfully within the community” (*R. v. Carrière* [2002] ONCA 1429).

The case of *R v. Carrière* [2002] ONCA 1429, shows that consideration of systemic and background factors will not necessarily lead to different outcomes or non-custodial sanctions, where the protection of the public is considered fundamental.

As demonstrated in the above mentioned cases, the need to protect the public above all has a strong neutralizing effect on section 718.2 (e)’s directive to utilize alternatives to imprisonment as few judges view alternatives as having the same protective potential and validity as incarceration. Dubé (to appear: 4), explains that this is the result of attributing to criminal law the fundamental role of protecting the public:

[...] *le fait d’associer la protection de la société à la fonction du droit criminel—plutôt qu’à une simple prestation—assure, dans les réseaux de communication du système, la pérennité des théories de la peine les plus belliqueuses et la préservation [...], du coup, d’une auto-description dominante à travers laquelle le droit criminel, dans la société, [Dubé citant ici Pires, 2001] ne peut concevoir son rôle que de*

manière « hostile, abstraite, négative et atomiste ». On pourra en outre concevoir corolairement l'exclusion ou à tout le moins la forte marginalisation, en droit criminel, des pensées et pratiques non guerrières comme un phénomène découlant, du moins en partie, de ce même problème de sémantique et d'auto-description (Dubé, to appear: 4).

The theories of punishment upon which our criminal legal system is based rally around a common punitive and exclusionary notion of punishment which will become even stronger or more convincing when coupled with the public protection rhetoric, further disabling the application of section 718.2 (e). In this sense, Dubé argues:

Si, encore aujourd'hui, dans nos sociétés occidentales, l'enfermement punitif continue d'être pensé comme une peine « sans alternative », ce serait en grande partie dû à cette connivence que l'on observe entre ces théories. Au carrefour de ces théories, bien qu'on puisse reprocher à la prison d'être « dangereuse quand elle n'est pas inutile », elle paraît néanmoins être en effet la seule peine capable de faire valoir les valeurs de l'exclusion sociale et de la souffrance (Dubé, to appear: 6-7).

Within the logic of MPR, it appears as though nothing assures the protection of the public quite like the isolation of the offender from the rest of society, essentially incapacitating him through the use of a custodial sentence or demonstrates society's condemnation in such an overt manner. Dubé hypothesizes that even if the legitimacy of the theories of punishment were to be questioned, if the rhetoric surrounding the protection of the public is not also revised there is little chance that the system of criminal law would be sufficiently free from the influence of the “semantics” of public protection to allow for an evolution of the system which would welcome alternative sanctions:

Nous pourrions alors appuyer notre propre hypothèse à l'effet qu'une remise en question de ces théories ne peut favoriser l'évolution et soulever l'obstacle cognitif qu'elles représentent qu'à partir du moment où la critique s'étend à la question de la fonction et de sa sémantique, celle de la protection de la société (Dubé, to appear: 7).

Despite being aware of the reality that the offender will rejoin society at some point in the future and the negative impact imprisonment can have on the potential for reintegration, it is

the immediate threat represented by the offender needing to be contained which motivates this type of reaction and effectively limits s.718.2 (e)'s application and restorative potential.

The permissive dimension of *Gladue* is effectively disabled when subjected to this public protection rhetoric (which is indirectly fueled by MPR). This protection is assured in a number of ways, whether through deterrence and ultimately denunciation (as judges appear incapable of disassociating these two sentencing goals and principles), isolation or rehabilitation (whether in custody or in the community), further crippling section 718.2 (e)'s application and the permissive aspect of *Gladue* as will be demonstrated in the following paragraphs.

4.3 DENUNCIATION AND DETERRENCE

4.3.1 Denunciation and deterrence justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing

One of the most difficult questions facing courts in the application of the section 718.2 (e) analysis is how to balance the alternative/restorative aims of this provision with the other main principles of sentencing, most notably that of deterrence and denunciation. As was noted in the case of *R. v. Gladue*, “there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant” (*R. v. Gladue* [1999] 1 S. C.R. 688, para. 90). Iacobucci also iterated in the case of *R. v. Wells* [2000] 1 S.C.R. 207 that:

[42] Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goal of denunciation and deterrence are fundamentally relevant to the offender's community. As held in *Gladue* [...] to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical

matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances the goals of denunciation and deterrence are accorded increasing significance.

Denunciation and deterrence heavily weighed on the determination of an appropriate sentence in at least a dozen cases of the 33 cases under study. Denunciation and deterrence along with the protection of the public and retributive considerations (i.e. proportionality) dominated the sentence calculus employed by judges in the fastening of sentences. These theories form the basis of MPR and therefore it is no surprise to find that these two theories were often utilized by judges to justify the punitive and exclusionary sentence of incarceration, which inevitably stymied the employment of section 718.2 (e), as can be noted in the following excerpt:

[16] Because of the viciousness of the attack and the propensity of J.F. to commit violent acts, I am of the view that he must be treated as other offenders for this same type of crime. Compared to sentences other offenders have received for serious crimes, most notably aggravated assault, the sentence imposed by the sentencing judge here was demonstrably unfit. The goals of denunciation and deterrence cannot be sacrificed to the principle of restorative justice. This offender must be separated from society for a long period of time (*R. v. J.F.* [2001] NBCA 81).

The alternative/restorative justice considerations posited in section 718.2 (e) are severely limited in this example as the gravity of the offence is said to require denunciation and deterrence. In this case, it appears that the judge felt that a lengthy sentence of incarceration was the only legitimate option.

Denunciation and deterrence were often used interchangeably or in tandem as if the two theories were indivisible. While both these theories are said to have potentially deterring effects on crime, they remain distinctive theories as was explained in the theoretical chapter. However, both theories agree that punishment must be meted out when laws are violated in an attempt to protect the integrity of society's values and to deter criminal behaviour from

being repeated (Rychlak, 1990: 301 & 331). Although deterrence theory moderates punishment so that the cost it represents should be only slightly superior to the benefits associated to crime, denunciation theory determines the severity of punishment in an attempt to reflect the degree of the assumed indignation of the public with regard to the offence, both potentially leading to the application of very repressive sanctions. Neither denunciation, nor deterrence theory view pardons and/or reparation as valid sanctions and therefore both limit the inventory of alternative sanctions which are applicable in sentencing, favoring more punitive options as they are believed to demonstrate society's attachment to its social norms more clearly. With that logic it would appear that punitive sanctions are somehow more legitimate than alternatives as can be seen in this example:

[38] As the Crown aptly argued before us, the judge "gave insufficient weight to the accused's propensity for violence and disinclination to abide by court orders as reflected in his criminal record." That contributed to an unwarranted conclusion that the accused would not pose a danger to society, a necessary component of a conditional sentence. Even had that risk of danger not been so tangible, the underemphasis of the accused's criminal record led to a failure to give proper emphasis to meaningful denunciation and deterrence, which on the facts of this aggravated assault were unlikely to be realized by a sentence served in the community (*R. v. R.K.S.* [2005] MBCA 116).

There never seems to be a need to justify why a sentence of incarceration appears to be the only legitimate sanction to achieve deterrence and denunciation or why these considerations must always dominate over alternative/restorative justice considerations or why these aims and principles are more appropriate. MPR appears to be hard at work, blinding judges to all alternatives or justifications which do not call for afflictive or exclusionary punishment, as can be noted in the following example of the honourable judge Ryan:

[34] Having so noted I return to the heinousness of the crime and the rape that motivated it. I can see no functional justification for deference, as a standard of review, in the circumstances of this case. Sentencing of any offender, aboriginal or not, is individual. That is probably the main reason why there is disparity in sentences. Each sentence must be on a case-by-case basis. 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. [35] As a result of the violence involved in this case, I would hold that an appropriate sentence would be a term of imprisonment of ten years (*R. v. Augustine* [1999] NBCA 541).

It becomes of principal importance that the violence of the offence be considered in accordance with these denunciatory and deterrent ambitions, which creates an obstacle to the effective application of section 718.2 (e) as it runs counter current to these ideologies. The obstacle created by these theories of punishment is again evident in the following excerpt from the honorable judge Vézina:

[42] Il y a peu de facteurs atténuant ici. Un multirécidiviste de l'alcool au volant constitue une bombe à retardement. Tôt ou tard, s'il ne s'amende, il y aura des morts ou des blessés graves. La réinsertion sociale de l'Appelant ne saurait primer les facteurs de dissuasion et de dénonciation (Tremblay c. R. [2010] QCCA 2072).

4.3.2 Denunciation and deterrence justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing

Denunciation and deterrence continue to be relevant sentencing goals even when section 718.2 (e) and *Gladue* factors are successfully considered in sentencing Aboriginal offenders. While a punitive and exclusionary sentence such as incarceration was imposed in the majority of cases in which a judge referenced to denunciation or deterrence, in rare and exceptional cases such as that of *R. v. Semigak* [2000] NFCA 53, these ends were seen as possible through the application of (seemingly) less onerous alternative sanctions such as a conditional community sentence as can be seen in the subsequent passage:

[17] He [the sentencing judge] did not in fact ignore “traditional” sentencing principles, either. [...] He also addressed deterrence and concluded that it had been satisfied “to a certain extent”. As well, the imposition in the Conditional Sentence Order of the requirement (not challenged by the Crown) for the making of a carving of the respondent’s step-father and children with the idea that the respondent would not want to face their image if arrested again could be said to have a deterrent effect. [...] [18] The length of the sentence imposed (12 months) could also be said to have a denunciatory effect. I do not subscribe to the view that only incarceration can accomplish denunciatory aims.

A subsequent case in which a judge justified the application of an alternative sanction based on its potential to accomplish denunciatory and/or deterrent aims is that of *R. v. John* [2004] SKCA 13:

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

In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass".

Incarceration will usually provide more denunciation than a conditional sentence of imprisonment, but a conditional sentence which deprives or restricts an offender's liberty can effectively satisfy those principles. The Supreme Court of Canada made it clear in *Proulx* that severe restrictions on the offender's liberty are to be the norm and not the exception. [56] The Court can effectively denounce the offender's conduct by imposing sufficiently stringent conditions such as house arrest, which will make it clear to members of the community that the offender's conduct carries severe consequences. The sanction will be visible, restrictive, enforceable, and capable of attracting a severe sanction for failing to comply with the conditions (*R. v. John* [2004] SKCA 13).

However, as can be noted in the last paragraph of the excerpt, MPR has insidiously infiltrated the honorable judge Vancise’s justification of the application of a community

sanction. Vancise makes it clear that incarceration is the ultimate sanction to accomplish the goals of deterrence and denunciation, delegitimizing to some extent her application of the alternative community sentence she imposed, consequently reinforcing the firm attachment to incarceration promoted through MPR as a categorical imperative in sentencing. Moreover, Vancise insists on pointing out the fact that, if the stringent conditions of the alternative community sentence are not satisfied, there is no need to fret as incarceration will become the default sanction which she firmly believed to be the most suitable option in the first place, therefore only further promoting MPR in the application of section 718.2 (e). This type of reasoning creates much ambiguity in the application of this provision as it is meant to be restorative in nature. While judges are applying this provision, their justification for applying section 718.2 (e) is clearly being contaminated by MPR which is inconsistent with the provisions underlying restorative and alternative current.

Where a court deems it appropriate not to impose a sentence of incarceration, deterrence and denunciation may be achieved through the imposition of stringent conditions in non-custodial sentences. As we can see from *R. v. John* [2004] SKCA 13, if the conditions imposed are strict and the circumstances surrounding the offence and the community are exceptional then an alternative sanction may be considered, but rare are the cases which meet the criteria for this type of consideration. The conditions surrounding *R. v. John* are particular⁶ and very rarely would alternative sanctions be so readily suggested. Moreover,

⁶There were very few cases where judges were confronted with an exemplary candidate for the application of section 718.2 (e) such as Mr John. The offender's profile, the circumstances surrounding the offence and the possibility of applying of an alternative sanction were ideal and conducive to a non-contested application of section 718.2 (e). Mr. John had a traditional Aboriginal upbringing, he never attended school and made a living as a trapper and fisher. He had a negligible criminal record and was considered a very valuable member of his Aboriginal community providing its inhabitants with traditional wild food and resources as well as services for the elders on the reserve. Mr. John also provided Saskatchewan Environment with knowledge of the local area and reported illegal activities and forest fires. Mr. John's community had the necessary resources to allow for

while the application of an alternative sanction was wholeheartedly supported by the judge in this case, the justifications for applying a community sanction were not restorative in nature but appear to be tainted by MPR's punitive and exclusionary reasoning. This can be noted in the following excerpt where Judge Vancise argues that sanctions other than imprisonment may be legitimate options and may achieve deterrence and denunciation as they may at times prove to be as onerous, if not more so, than imprisonment. Vancise points to the shame which may be elicited by the public nature of a community sanction in a small community as an example of the exacting potential of alternatives:

[57] As Chief Justice Lamer noted in Proulx, judges should be wary of placing too much weight on deterrence. The public nature of the sentence in a small community is a constant reminder of the offender's conduct and the consequences of such conduct, and in my opinion is a more effective deterrent than a prison sentence served in some distant community. Sanctions other than imprisonment may be at least as onerous as a prison sentence. A person who serves the sentence in the community still carries a societal stigma of being a convicted offender serving a criminal sentence. Deterrence, to the extent that it is effective, can be satisfied by the imposition of a community based sentence (*R. v. John* [2004] SKCA 13).

The judge in this case justifies the choice of a conditional community sentence by stating that rigid conditions such as house arrest will be imposed, severely restricting the offender's freedom and denouncing the criminal behaviour. The judge also appreciates that the sentence will be served in a small community where the offender is well known and this will have a stigmatizing effect on him and contribute to specific deterrence. While section 718.2 (e)'s directive to apply alternative sanctions whenever possible is being respected in this case, it is obvious that the restorative nature of this disposition is being ignored in favour of a

the conditional sentence which was imposed and was wanting and willing to shoulder the task. The appeal judge in this case also felt that to impose a sentence of incarceration on such a particular type of Aboriginal offender would be much more damaging than on those accused who lead a non-traditional lifestyle (*R. v. John* [2004] SKCA 13).

rigid, exclusionary and punitive outlook on sentencing such as that which is sustained through MPR. The negative consequences of incarceration which the application of section 718.2 (e) attempts to negate are simply being recreated within the community in the case of *R. v. John* [2004] SKCA 13 (to a lesser extent of course), through the use of an alternative sanction. This example showcases just how much of an obstacle MPR is to the application of this disposition and how without an accompanying shift in the criminal law's punitive mindset, little actual change will take place. We may actually be bearing witness to a net-widening effect.

Roach (2000: 259) explains that while there may be an increase in the use of alternative sanctions, the theory of restorative justice utilised by the courts is not a "pure one". "[T]he court has indicated that restorative sanctions such as conditional sentences may have punitive elements such as house arrest and curfews and should result in imprisonment if the conditions are breached" (Ibid: 259), introducing punitive elements into what is meant to be a restorative approach to sentencing. What is really problematic for proponents of 718.2 (e)'s alternative/restorative potential and *Gladue's* permissive dimension is that, restorative sentences are being co-opted by MPR and transformed into the punitive sentences they were created to avoid. Roach (2000: 260) states that as "restorative justice becomes linked to the charging and sentencing process [as it has with the addition of restorative dispositions such as 718.2 (e) to the Criminal Code], the risk of widening the net of state control becomes greater". Roach (2000: 261) uses conditional sentences as an example to illustrate this point:

[...] It [The Supreme Court] has recently stated that 'punitive' conditions such as house arrest and strict curfew should generally accompany conditional sentences; that conditional sentences can extend for longer periods than otherwise would be

warranted for sentences of actual imprisonment [...] There is a presumption that a person arrested for breach will be detained. [...] This raises the real risk of increased state control including the increased use of imprisonment.

Roach (2000: 261) maintains that restorative justice may actually have the ability to “shrink” or reverse net widening and social control if properly employed but warns that the tendency for criminal justice professionals and the general public to disregard restorative justice as a legitimate means to deal with serious cases is very damaging. If restorative alternatives were seen as legitimate, it would decrease the use of imprisonment; however, if it is “deemed inappropriate for serious crimes, then restorative justice may be used to increase social control imposed on offenders who commit less serious crimes” (Ibid: 261-262). What the availability of restorative alternatives such as conditional sentences of imprisonment with strict conditions appear to have created under a system of law which still largely subscribes to MPR, is the possibility to inflict suffering and exclusion outside penal confines and within the community for less serious offences. Conditional sentences were applied in 5 of the 33 cases (15%) and it is likely that if judges are faced with a less serious crime where the imposition of a custodial sentence would seem excessive, they will resort to the application of this type of alternative sanction. While this may not seem like many cases, before conditional sentences became a sentencing option, judges might have applied less restrictive options which could have decreased the likelihood of breaches and the use of custody. Roach (2000: 262) states that the increased social control posited through sentencing alternatives such as conditional sentences “may have positive effects and help reintegrate offenders into communities of care”, however, he adds that “if these ends are, [...] imposed through the coercive apparatus of so called restorative sanctions such as conditional sentences, they may even increase the use of imprisonment”. From the excerpt stated above, taken from the case *R. v. John* [2004] SKCA 13, it would appear that these “so-called”

restorative alternatives are not always being applied properly, as the restorative nature of the sanction is being ignored in favor of its potential to denounce criminal behaviour and stigmatize the offender within the community which is much more in keeping with the logic utilised by MPR and accountability considerations promoted through retributive theories.

John was sentenced to a conditional sentence (including house arrest as a condition) under the belief that this type of sentence, while being restorative in theory, would allow for his conduct to be denounced and deterrence to be achieved through shaming. Restorative justice is said to encourage the offender to take responsibility for his actions and make amends for his behaviour. According to Roach (2000: 263), it is this “accountability spin on restorative justice” which “moves it closer to retributive theories and engages those who may believe that routine processing and short terms of imprisonment are not a meaningful means to acknowledge the consequences of crime to victims or the community”. Shame is often made a part of this accountability, as can be seen in the example of *R. v. John* [2004] SKCA 13. Roach (2000) questions whether shaming, as it is utilised here in Canada, will favor re-integration or stigmatization but points out that the Supreme Court observed that:

‘[t]he stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender’s criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison’ (*Proulx* 2000). This understanding of shame seems more related to stigmatization (Scheingold, Pershing, and Olson 1994) than reintegration (Braithwaite 1989) (in Roach, 2000: 264).

It certainly does appear to be the case in *R. v. John* [2004] SKCA 61. The sentence in this case seems much more punitive and exclusionary than restorative. As Roach (2000: 264) points out, “house arrest in particular is a punitive concept that by definition does not

promote re-acceptance in society”, and house arrest was the main condition of John’s sentence. Roach (2000: 265) sees real danger in “stressing the toughness of restorative justice as a response to crime”. Accountability through shaming as a consequence of a conditional sentence, for example, may lead to greater stigmatization than that experienced from being an ex-prisoner. Reintegration should be the main goal but as long as the focus remains on the denunciatory and deterrent potential of sentences, this goal is unlikely to be realized.

Roach (2000: 265) also notes that there are dangers in not stressing the “toughness” of restorative justice, stating that the “most immediate [danger] is that restorative justice will be thought appropriate for only less serious crimes and this will only increase the risk of net widening”. Unfortunately, this does appear to be happening in the cases under study as will be discussed further in the sub-section entitled “seriousness of the offence and offender”.

4.4 ISOLATION/SEPERATION

While deterrence and denunciation considerations dominate the sentencing calculus, the need to isolate or separate the accused from society remained a recurring theme in the cases under scrutiny as can be seen in the following passages:

[16] Because of the viciousness of the attack and the propensity of J.F. to commit violent acts, I am of the view that he must be treated as other offenders for this same type of crime. This offender must be separated from society for a long period of time (*R. v. J.F.* [2001] NBCA 81).

[14] In this case, the sentencing judge gave primary weight to the sentencing principle of separating the offender from society in order to protect the public, but she did not ignore the principle of rehabilitation. In view of her finding that Mr. Mack was an incorrigible offender, and the length and nature of his criminal record, I am not persuaded that the sentencing judge erred in this regard (*R. v. Mack* [2008] BCCA 520).

In all cases where separation and isolation were mentioned as a requirement in sentencing, judges sought imprisonment as the sanction of choice. It appears that judges see few alternatives to incarceration as suitable in order to accomplish the goal of separation and isolation of the offender, which unfortunately, renders the applicability of s.718.2 (e) practically moot when it is this goal they are attempting to accomplish through sentencing.

4.5 REHABILITATION

4.5.1 Rehabilitation (of the first modernity) justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing

As one of the central theories of punishment, it is no surprise that rehabilitation was a recurring theme throughout the cases under study. We shall first take note of rehabilitation as prohibitory to the application of positive discrimination and more closely in keeping with the social exclusion and punishment of the accused also known as rehabilitation of the first modernity⁷

In the case of *R. v. J.T.P.* [2009] YKCA 13, the accused appealed a sentence of 3 years' imprisonment imposed on him. The accused was convicted for breaking and entering, possession of stolen property, breaching probation and resisting a police officer. In this case the honorable appeal judge Ryan concluded that rehabilitation ought to play a significant role in the sentencing of the accused, however, judge Ryan also felt that this rehabilitation should be pursued in a custodial setting for the most part. While judge Ryan ultimately imposed a sentence of incarceration followed by a period of probation, imprisonment was still deemed a necessary part of the rehabilitation in this case as can be seen in the following passage:

⁷ See pages 21-22 for more detail regarding rehabilitation of the first modernity.

[14] Counsel for the Crown, Ms. Somji, has emphasized the position of the sentencing judge in understanding the needs of his community. She has pointed out the seriousness of these offences which occurred over the course of a nine month period. While we must pay considerable deference to the sentencing judge, I am nonetheless persuaded that he erred in failing to properly take into account rehabilitative and restorative principles in fashioning the appropriate total sentence. I am of the view that he erred in sending this young man to a federal penitentiary without first attempting his rehabilitation in the territorial system followed by a probation order designed both to protect the public and to encourage the appellants rehabilitation (*R. v. J.T.P.* [2003] YKCA 13).

Rehabilitation of the first modernity only acknowledges the reform of the offender as possible only if he/she is removed from society and therefore accomplished through the social exclusion of the offender. It appears as though judge Ryan agrees with this assertion as he insisted that J.T.P.'s rehabilitation must first proceed through imprisonment. While the judge did state that the offender should have remained in the territorial system (presumably to keep the offender near his community) and maintained that a portion of the sentence ought to be served within the community under probation, the fact remains that the judge considered it necessary that rehabilitation be pursued within the confines of a penal institution first, giving little support to the directives set out in section 718.2 (e). This form of rehabilitation is diametrically opposed to section 718.2 (e)'s aim of encouraging the application of alternative sentences to incarceration as rehabilitation from this standpoint is only possible through the exclusion of the offender through this most popular method.

4.5.2 Rehabilitation (of the second modernity) justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing

While not the most popular form of rehabilitation utilized in this study, rehabilitation through social inclusion (i.e. rehabilitation of the second modernity⁸) was also selected among alternative sentencing aims and can be seen in the example of *R. v. Dennis* [2001]

⁸ See pages 22-23 for more detail regarding rehabilitation of the first modernity.

BCCA 30. The appeal judge in this case stated, in reaction to the offender having been sentenced in the first instance to incarceration, that:

[27] [...] 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, regardless of whether the appellant was an aboriginal offender (*R. v. Dennis* [2001] BCCA 30).

The appeal judge noted that the offender had made significant progress in his rehabilitation while within the community and had found much support within his Aboriginal community and felt that in light of these facts Mr. Dennis would benefit from remaining within the community rather than being excluded through a sentence of incarceration. The judge sentenced the accused to a conditional sentence which he reduced to time served because of the time already spent in detention.

A second case in which rehabilitation of the second modernity was utilized as a sentencing principle is that of *R. v. John* [2004] SKCA 13:

[58] On a full consideration of all the principles of sentencing, including rehabilitation and the principles of restorative justice, as well as the principles of deterrence and denunciation, I find that a sentence of two years less one day to be served in the community is a fit and appropriate sentence (*R. v. John* [2004] SKCA 13).

It appears that the judges in these cases believed in the benefits of social inclusion and concluded that the re-education and treatment of the offender would be better served outside the repressive confines of imprisonment, much in keeping with the directives outlined in s.718.2 (e) of the *Criminal Code*. However, this remained a very rare occurrence and remained only feasible in the most exceptional of cases such as that of *R. v. John* [2004] SKCA 13 cited above. Moreover, upon closer inspection of this case, one can see that

rehabilitative considerations were not seen as valid enough on their own to warrant the application of an alternative sanction to incarceration, justifications of deterrence and denunciation had to be added to the judge's reasoning in order for the decision to be considered legitimate. Now, if this is a strategy on the judge's part rather than a reflection of his inability to break free of MPR's rhetoric, this could prove to be an interesting development for the application of section 718.2 (e).

4.5.2 (a) Personal reflection: The tainted application of section 718.2 (e)

It is very likely or at least a strong possibility, that the judge in *R. v. John* [2004] SKCA 13 mentioned the principles of deterrence and denunciation in his sentencing decision because he is caught in MPR's reasoning and consequently attached to these theories of punishment, seeing great value in these sentencing ends. But, what if there is more to it than that? Is it possible that judges, aware of the chokehold MPR has created surrounding the use of alternative sanctions, have decided to use the criminal legal system's very own theories against it? Judges may be using the punitive and exclusionary connotations attached to these theories of punishment to provide reinforcement in the application of alternative sanctions (which are often viewed as lesser sanctions) avoiding dissent from those within the system who remain entrapped by MPR and are unable to break free, therefore remaining insistent on achieving punitive and exclusionary results through the use of incarceration and the likes. Wrapped in the legitimacy of these theories, alternative sanctions would be implemented without question or reproach, perhaps leading to an eventual increase in their use. Wary that alternatives might be quickly dismissed if presented starkly, judges are perhaps "paying lip service" to the system with the mention of the theories of punishment in an attempt to outsmart the criminal legal system by implying that these sanctions hold the same punitive

and exclusionary potential as incarceration. Many judges may see the real potential afforded by alternative sanctions to achieve restoration, restitution and reform and may have concluded that the only way alternatives will be taken seriously is to not appear to threaten the existing rationale which is punitive and exclusionary. Therefore, judges must make these alternatives appear to fulfill the same function as incarceration (which is to punish and exclude the offender) by reasoning their decisions through the theories of punishment. However, this is just food for thought as further research would be necessary to test this interpretation, namely through the use of interviews with judges.

There is also a real chance that these judges are simply contributing to the net-widening of the criminal legal system in applying community sanctions while still imposing stringent conditions upon the offender, creating a type of imprisonment outside of prison. A community sentence may allow the accused to remain outside the prison confines but if the logic which drives this type of alternative remains punitive and exclusionary, are the prison walls then really necessary to create some of the harms alternatives to incarceration were created to avoid? The logic which drives the application of a sanction must count for something. Is this just another example of MPR co-opting an attempted innovation of change? The directives of section 718.2 (e) require that alternatives to incarceration be sought whenever possible to help decrease the criminal legal system's overreliance on incarceration but as mentioned time and again, if the mindset or rationale guiding the sentencing choices does not evolve, what will applying alternative sanctions really achieve if we are not looking for a different end result than that which is sustained by the MPR (which is to exclude and punish)? Judges may simply end up trying to attain these punitive ends

through alternative sanctions rather than truly embracing their unique restorative philosophy and potential, effectively quashing section 718.2 (e)'s alternative/restorative potential.

RESTORATIVE CONSIDERATIONS AND THE APPLICATION OF SECTION 718.2 (e) OF THE CRIMINAL CODE

4.6 RESTORATIVE JUSTICE

While section 718.2 (e) possesses restorative justice overtones, reference to and the application of this type of justice was seldom present in the cases under study. Much case law demonstrated practical difficulties associated with applying restorative sentences to Aboriginal offenders, particularly those who have little or no connection to an Aboriginal community and whose difficult personal circumstances could, in many cases, not be intimately connected to the commission of their offence. *R. v. John* [2004] SKCA 13 is one of few cases in which obvious reference and application of restorative justice was expressed:

[34] [...] The sentencing judge failed to properly consider all or any of the factors in s. 718.2 in deciding that a penitentiary term was appropriate in the circumstances. She also failed to consider whether the aims of restorative justice could be better satisfied with a community based sentence, that is, one that attempts to remedy the crime having regard for the needs of the victim, the community as a whole, and the offender, rather than a carceral or custodial sentence. [...] [37] In my opinion, given the position of the English River First Nation and the personal circumstances of the appellant, the traditional sentencing objectives are less relevant and the goals of restorative justice should be given more weight (*R. v. John* [2004] SKCA 13).

R. v. John [2004] SKCA 13 was unique amongst the cases under scrutiny in this research project. Mr. John represented the “ideal” Aboriginal offender to sentence to an alternative restorative sanction but not many Aboriginal offenders who came before the courts in the sample under scrutiny possessed this “ideal profile”, which may well have worked against them and the widespread application of section 718.2 (e) as will be discussed further when outlining the impact of the nature of the offence and offender.

One additional case in which openly restorative justifications were expressed by the appeal judge in sentencing an Aboriginal offender is *R. v. Semigak* [2000] NFCA 53 in which the judge stated the following in defense of the 12 month community sentence that was imposed in the first instance for assault causing bodily harm and breach of probation:

[11] I agree, [...] that s. 718.2(e) (which requires that the circumstances of aboriginal offenders be given particular attention in considering the availability of non-incarceral sanctions) is only one of a number of principles and purposes to be considered in fixing a fit sentence. [...] However, I disagree with the Crown's premise in this case. The sentencing judge did not focus solely on the respondent's aboriginal status as the only factor to be considered in sentencing. [...] His consideration of the victims of the crimes and their apparent lack of fear of the respondent and their forgiveness for what had happened; his consideration of the offender and the "light at the end of the tunnel" indicating his rehabilitative potential and healing; and his addressing the potential impact on the community, all point to restorative justice considerations.

Appeal court judge, Green, went so far as to call into question the legitimacy of incarceration as a sanction while affirming the value of restorative sentencing options for this offender for whom imprisonment had done little to abate his criminal behaviour or stem recidivism in the past:

[12] In *Gladue*, Cory, J. at para 50 accepted without disagreement the positions of the parties that "one of the roles of s. 718.2(e) and of the various other provisions in Part XXIII, is to encourage sentencing judges to apply principles of restorative justice alongside or in place of other, more traditional sentencing principles when making sentencing determinations." He went on to observe at para 57 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" and at para 68 that "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." [13] That is certainly the case with the respondent here. Although he has been in and out of jail on numerous other occasions, the traditional approach to sentencing does not appear to have had any success (*R. v. Semigak* [2000] NFCA 53).

With such justifications, the honorable judge Green is tapping into a completely different rationale from MPR as he is valuing restoration of harm over punishment and social inclusion over social exclusion. Judge Green is not only promoting the use and potential of alternative sanctions but calling into question the use of incarceration as the panacea to all criminal behaviour. Moreover, the judge in this case insists that the over-reliance on incarceration as the sanction *par excellence* is short-sighted as it ignores the restorative, rehabilitative and harm reducing potential of alternative sanctions:

[14] The submission of Crown counsel in this regard in any event begs the question as to how the "message" is to be delivered. Her unspoken assumption is that it can and should only be delivered by imprisonment. That is an all-too-narrow view. [16] In taking the approach that he did, the sentencing judge committed no error. [...] I am not satisfied that he did not have a sufficient basis for taking a broadly restorative justice approach to sentencing or that such an approach was inappropriate in the circumstances. [...] [25] [I]t would be inappropriate to tinker with any aspect of this innovative sentence [community sentence] at this stage (Ibid).

There seems to be an unwillingness to grant restorative justice the legitimacy it requires to accomplish the goals set out for it through the application of section 718.2 (e) while the legitimacy of retributivist justice goes unquestioned within our legal system as it excludes those who have transgressed the law and creates suffering rather than addressing the root causes of crime and repairing harm.

UNFORSEEN OBSTACLES TO THE APPLICATION OF SECTION 718.2 (e) OF THE CRIMINAL CODE

4.7 CONSIDERATION OF RESOURCES / SOCIAL INFRASTRUCTURE / ALTERNATIVES TO INCARCERATION

4.7.1 Consideration of resources/social infrastructure/alternatives to incarceration justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing

While MPR appears to be a the most notable obstacle impeding the consistent application of section 718.2(e) of the *Criminal Code* and more particularly in allowing for

the application of positive discrimination as it applies to aboriginal persons, other issues have also barred its potential. One additional barrier can be categorized as a lack of resources, be it fiscal or otherwise. What has become apparent throughout this research is that while there are judges who are willing to see value in the application of alternatives to incarceration especially when faced with the particular circumstances of aboriginal persons, many resort to incarceration by default, having either no suitable alternatives or lack of alternatives in general to this most oppressive sanction.

One such example is the case of *R. v. Jacobish* [1998] NFCA 198 in which the aboriginal accused was denied access to a community sentence in part due to the fact that the community did not dispose of the services and resources necessary in order for an alternative sanction to imprisonment to be implemented as can be seen in the following passages:

[45] [...] The type of evaluation and treatment required was not available locally. [...] The social development coordinator of the Innu Nation also indicated that local programs would not be of any assistance to the appellant except as follow-up services following extensive treatment elsewhere [...]. [46] The picture that was therefore presented to the court was of a local rehabilitative services network that was not then able to handle the appellant's particular problems, at least from the point of view of initial intervention. [47] [...] No doubt the general expressions of concern to the effect that "Charlie deserves help" were genuinely felt, but recognition of such needs "at large", so to speak, without identifying a specific means of achieving those goals in the community or elsewhere still leaves the judge in a sentencing vacuum. There was therefore nothing upon which the sentencing judge could, if he were so disposed, conclude that the consignment of the appellant to local aboriginal community-based control would result in the degree of social control, restraint and rehabilitation that would be necessary to achieve the goal of protection of the public and lead to his proper reintegration into the community. The sentencing process in many ways is a very blunt instrument. In restraining a person's liberty by incarceration, the court generally does not have the option to order an offender's detention in a facility other than a proper penal institution [...].

Another instance where the application of section 718.2(e) was limited by a lack of resources/social infrastructure or alternative availability is *R. v. Tremblay* [2010] QCCA 2072. In this case, while the appeal judge felt that there was a real duty to give force to the

alternative/restorative principles underlying s.718.2 (e) as was affirmed in *Gladue*, a lack of alternatives to incarceration noted in the community contributed significantly to maintaining the custodial sentence that was imposed in the first instance. The only program available was deemed inappropriate in the circumstances of the case and worse was in no way specifically tailored to meet the particular needs of aboriginal offenders:

[38] La seconde, de CARAT, fait état que :

Le Centre CARAT offre un programme interne d'une durée minimale de cinq mois. Il s'agit d'un stage fermé : le résident doit être cueilli au centre de détention par un responsable de CARAT et doit résider au Centre; aucune permission de sortie n'est accordée lors des 45 premiers jours, ou est conditionnelle au dépôt d'un rapport d'évolution ainsi qu'à l'autorisation de la Cour. [39] Il ne s'agit ni d'une ressource propre aux autochtones ni ne mentionne-t-on de programme spécialement adapté pour eux. [40] En somme, cette preuve démontre l'absence de programme de peines substitutives spécifiques à la communauté malécite de Viger (R. v. Tremblay [2010] QCCA 2072).

It is unfortunate to realize that while Parliament invested much hope in the implementation of directives to help reduce rates of incarceration to the *Criminal Code*, it did not invest equally in the amount of resources necessary for the realization of this goal. While section 718.2(e) was expected to affect real change, there appears to have been a lack of investment from Parliament to see to this project's fruition. Suitable community alternatives and programs appear to be lacking. Moreover, there appears to be a prevailing yet misguided assumption that all communities have the social infrastructure necessary to see alternatives through and are even willing to take on such a heavy task, as can be seen in the two examples above.

4.7.2 Consideration of resources/social infrastructure/alternatives to incarceration justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing

Certain communities where programs and services were available and those which disposed of the necessary social infrastructure were able to accommodate alternative sentencing approaches as hoped by Parliament, but these cases remained extremely rare in my research. *R. v. John* [2004] SKCA 13, really showcased a community's ability to welcome an alternative sanction:

[33] The English River First Nation has a Justice Committee and a Justice Coordinator. The committee has the capacity to conduct healing circles and to deliver traditional holistic approaches to restorative justice. The committee can also offer programs such as anger management, victim services, and wellness programming. Mr. John has agreed to participate in whatever programs the chief probation officer or his designate determines is appropriate. The community is willing to provide community based sentencing and is willing to have Mr. John in the community. [...]
 [35] [...] Here, the aboriginal offender's community is totally supportive of a restorative approach to sentencing by the use of alternative measures, and the community has the resources to implement those alternative measures [...].

Ultimately there were very few instances where alternatives were sought, not always necessarily because of this lack of varied resources but often in part due to this reason. How is the application of alternatives as suggested by section 718.2 (e) going to be possible if the necessary financial and/or social infrastructures are not in place to see this idea through?

4.8 LEGALIZATION OF PUBLIC OPINION AND OF THE PUBLIC BY THE PENAL SYSTEM: COMMUNITY AND VICTIM OPINION

4.8.1 Legalization of public opinion by the penal system: Community and victim opinion justifications as prohibitive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing

According to the Ouimet Commission (1969), the protection of the public as it stands is closely related to criminal law's ability to see to the protection of society's fundamental values (in Dubé, to appear: 12). It is in the protection of these values that criminal law draws its legitimate right of intervention and demonstrates its respect for the public in its administration of justice (Ibid: 12).

Classical (19th century) conception of public protection however, associates respect for the public with the respect demonstrated towards the agreed upon procedures utilized in arriving at a sentencing decision rather than whether the decision arrived at is in keeping with societal values (Ibid: 13):

Pour le système judiciaire moderne, ce qui devait ainsi permettre de présupposer le respect du public, c'est le fait de s'être conformé aux procédures— et non d'avoir produit une décision qui au plan de son contenu, de son orientation ou de ses effets, pourrait être ultimement considérée « bonne » ou « juste » ou « vraie » par un « public-cible » (Ibid: 13).

It is through these established procedures that criminal law has developed this untouchable character of legitimacy and procedural irreproachability. From the system's point of view, procedures give the criminal legal system a validity which should be uncontested. Dubé (to appear: 13) explains that this allows the system to make decisions which will be assumed to be beyond reproach as long as the system's validity is maintained through the proper practice of established procedures:

Un système social [such as the criminal legal system] opère, prend des décisions, avec la présomption que la validité de ses propres procédures est socialement reconnue et qu'il peut donc, de ce fait, s'exposer au risque de déception inhérent à toute prise de décision.

From this standpoint, respect of the public through the administration of justice does not depend on the application of a specific sanction nor does it depend on satisfying the public by delivering anticipated outcomes. The respect of the public is strictly accomplished through the observation of procedure (Ibid: 13).

There is another possible interpretation available however, as maintained by the Ouimet Commission. This alternate explanation states that in order to demonstrate respect for the public through the administration of justice, judges must do more than simply respect

established procedures; they must in fact anticipate or consider how a sentencing decision will be received by its target public and ensure that it is in keeping with their expectations (Ibid: 14). Following procedures is no longer the judge's sole responsibility as he must now worry about how his decision will be received by the greater public in hopes that it will be welcomed by this audience. Under the pervading influence of the classical theories of punishment and the public protection rhetoric, there is a greater likelihood that the respect of the public through the administration of justice will "*passer par la valorisation de l'enfermement qui, comme le rappelait elle-même la Commission Ouimet, est généralement conçu comme la sanction la plus susceptible d'être bien reçue ou ayant le plus de chances d'être acceptée comme « valide » par l'environnement*" (Ibid: 14). In this alternate understanding of the respect of the public through the administration of justice, the criminal legal system loses part of its autonomy to the targeted public extending the system of law to include public opinion in not only procedure but the sentencing decisions themselves (Ibid: 14). In associating respect for the public through the administration of justice to the actual sentencing decision, reform becomes much more complex as it depends in large part on public opinion which is most often in favor of more punitive responses, inevitably refocusing the idea of punishment around incarceration as Dubé (to appear: 14) demonstrates using the Ouimet Commission as an example:

[L]a Commission à partir du moment où elle fera elle-même abstraction de ses propres réflexions critiques pour réitérer le fait que l'enfermement devra être privilégié dans les cas où « le défaut d'imposer une sentence d'emprisonnement traduirait mal l'opinion de la société sur la gravité de crime »; ce qui, logiquement, on le comprend, peut potentiellement viser un nombre considérable de cas. Lorsque la Commission Ouimet s'en remet à la sémantique de la protection de la société pour définir ce qui pour elle doit demeurer le « but fondamental » ou la fonction première du système de droit criminel canadien, elle en vient à neutraliser elle-même la portée des idées les plus innovatrices de son propre projet de réforme. Elle finit par accepter et même par valoriser ces mêmes modes d'intervention contre lesquels elle

s'était pourtant positionnée. [...] Le résultat paraît paradoxal et pour le moins étonnant si l'on considère l'ensemble du projet de réforme qui avait notamment pour but de limiter dans le pénal la portée de la peine d'emprisonnement et de ce qui trop souvent en découle, c'est-à-dire, dans les termes mêmes de la Commission, la « perte inutile de valeurs humaines ».

Like the Ouimet Commission's intention, section 718.2 (e) was added to the *Criminal Code* with the hope that criminal law could be reoriented towards alternatives to those presented by the first modernity. Section 718.2 (e)'s goal remains less lofty as it is only geared towards sentencing rather than the criminal legal system's operation as a whole, however parallels can be drawn between both initiatives in their attempts to introduce change within the criminal legal system.

As aforementioned, the protection of the public is of the utmost importance in the administration of justice and while this used to be solely accomplished by the strict observation of procedure, it appears that a most “pernicious distortion”⁹ (Dubé, to appear: 13, our translation) of this understanding has led to public opinion being included into the sentencing calculus (Ibid: 13). The particular sentencing considerations required by section 718.2 (e) and the case of *R. v. Gladue* [1999] S.C.C. 19 have somewhat increased this practice in cases where an aboriginal accused is involved. At para 71 the Court in *Gladue* said this:

[71] [...] 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 (*R. v. Gladue* [1999] 1 S.C.R. 688).

⁹Dubé observes that: “Selon une toute autre interprétation—qu'est celle que semble avoir privilégiée la Commission Ouimet et nous paraît relever d'une *distorsion pernicieuse* de la première—favoriser le respect du public dans l'administration de la justice irait jusqu'à exiger du décideur (le juge) qu'il ‘anticipe’ et tienne compte de la réception de sa décision au sein d'un certain ‘public-cible’ ”.

Among other imperatives, this watershed case has created the need for judges to make their decisions based on an intricate balance of legal procedures and the opinions of those most closely affected by the offence. The cases under study did not demonstrate a consistent application of this directive, however on more than one occasion the community, the victim(s) and the offender's opinions were considered in determining and appropriate sanction.

As stated by Dubé (to appear: 14) earlier, under the influence of the theories of punishment and the public protection rhetoric, incarceration appears as the most valued and logical sentencing option to translate the public's attachment to its social norms and the transgression of such norms. In a number of the cases utilized in this research, public input impeded the application of section 718.2 (e) by encouraging the application of custodial sentences rather than the use of alternatives. The following passages are just a few examples of this dilemma:

[56] [...] I conclude that, in the special circumstances of this case, because there was not a full canvassing of appropriate specific dispositions from a community perspective; because the victims were not participants in the process and the process of community healing could not be said to be complete without their involvement; [...] I conclude that the sentence [of 5 years and 3 months imprisonment] imposed was a realistic response to the specific factual circumstances that were presented (*R. v. Jacobish* [1998] NFCA 198).

[25] [...] [T]he sentencing judge erred by placing significant emphasis on community restoration without any clear representation of the community's view and against the express wishes of the victim's family. [...] [26] [T]he sentencing judge's notion of "restorative justice" was really only his own view of challenges faced by the Siksika community generally and not arising from this case. As for re-integration of the respondent with the community, and while sentencing is individualized to the case, the sentencing process is not exclusively about the offender. It is also about the harm to the victim and to the community (*R. v. Stimson* [2011] ABCA 59).

MPR is a most totalising and pervasive rationale, it is no wonder that society often calls for the application of punitive and exclusionary sanctions such as incarceration because this rationale does not favour any other type of reasoning. We hold dearly to the respect of our social norms, therefore when they are violated we feel the need to demonstrate our disdain for such a violation and MPR with its reliance on the theories of punishment leaves us with a very limited inventory of sanctions with which to respond. With the protection of the public at the heart of the legal system's operation and MPR as the system's dominant operating rationale as well as this new understanding of how respect for the public is to be demonstrated through the administration of justice, it appears as if another obstacle to the application of section 718.2 (e) has been unwittingly created.

4.8.2 Legalization of public opinion by the penal system: Community and victim opinion justifications as permissive to the application of section 718.2 (e) of the Criminal code and the positive discrimination of Aboriginal offenders in sentencing

The overvaluing of incarceration as a sanction, such a punitive and exclusionary sanction is very telling of the public's opinion of crime and those who commit crime. As was observed after the inclusion of section 718.2 (e) to the *Criminal Code*, there is a very strong public opinion against the application of positive discrimination forwarded by this disposition. As aforementioned, with the new pernicious turn that the understanding of respect for the public through the administration of justice has taken, there is now even less hope that this section will be applied or be able to fulfill its potential, nevertheless not all hope is lost yet. However, as insignificant as it may appear to be, two cases under study showed the accused receiving positive support from the victims and the community as can be seen in the following passage from the first case of *R. v. Cappo* [2005] SKCA 134:

[10] The sentencing circle's members were from the families of the respondent as well as relatives of the persons killed in the accident. Generally, they saw the respondent as a good man, strong parent and hard worker. They did not want the respondent to be imprisoned.

Unfortunately for the accused in this case, despite having support from the community and the victims' families, Cappo was imposed a custodial sentence. The appeal judge in this case felt that incarceration was necessary in order to meet the requirements of s.718.1, that a sentence be proportionate to the offence and therefore let the need for retribution override the public's opinion in this case, to the detriment of the accused. Nonetheless, this example demonstrates that the public's opinion may encourage the application of section 718.2 (e) if other obstacles do not impede its use¹⁰. An example which is more in keeping with the restorative underpinnings of section 718.2 (e) is that of *R. v. John* [2004] SKCA 13:

[33] The English River First Nation has a Justice Committee and a Justice Coordinator. The committee has the capacity to conduct healing circles and to deliver traditional holistic approaches to restorative justice. The committee can also offer programs such as anger management, victim services, and wellness programming [...]. [35] [...] Here, the aboriginal offender's community is totally supportive of a restorative approach to sentencing by the use of alternative measures, and the community has the resources to implement those alternative measures [...].

In this case the custodial sentence was ultimately overturned in favor of a community sentence in light of the community's and the victims family's support. John's sentence was reduced from 3 years imprisonment to a 3 year community sentence. While this case may be somewhat exceptional, we can see that taking the public's opinion into consideration in some cases can lead to a more positive alternative/restorative outcome as is encouraged through the use of section 718.2 (e), however, it must be acknowledge that such cases remain very

¹⁰What this example also shows is that public opinion is a social construct (a legal social construct) which normatively assumes that public opinion, if it were to be taken into consideration, would be repressive by nature.

rare. As Pires (2001: 200) explains, determining the way in which public opinion is used remains an empirical question:

Bien entendu, on ne peut pas dire que l'intégration du public comme une composante de la justice pénale produise nécessairement et dans toutes les circonstances des effets pervers. Ceci est d'ailleurs une question empirique, car elle dépend en bonne partie de comment le droit pénal s'organise lors de cette intégration. Mais pour que l'intégration du « public » puisse s'accomplir de façon innovatrice, elle doit être accompagnée d'un mode de pensée alternatif, tant sur le plan cognitif que de l'auto-organisation normative du système, ce qui est un phénomène aussi souhaitable que rare.

Unfortunately, the institution of section 718.2 (e) of the Criminal Code and the case of *Gladue* were not accompanied by the necessary shift in criminal legal rationale. This shift is important in order to incite demands for alternative sanctions to be considered in sentencing, as without it, the disposition's restorative potential is effectively diminished.

CHAPTER 5

CONCLUSION AND FINAL THOUGHTS

This project aimed at the exploration and examination of appeal court judges' justifications for applying or failing to apply section 718.2 (e) in the sentencing of Aboriginal offenders in an attempt to understand why judges are or are not utilizing this provision in sentencing. My specific goals were to identify the justifications offered by the judges favoring or disfavoring the use of section 718.2 (e) to better understand how and why it is being utilized the way it is. Towards this end, I used thirty-three appeal court cases which dealt with the application of section 718.2 (e) in the sentencing of Aboriginal offenders. The cases underwent a vertical analysis then a horizontal analysis (by theme) as the judges' main justifications were brought together and classified into the main categories of analysis as is consistent with the grounded theory approach utilized within this research.

I have analyzed judges' justifications for applying or failing to apply section 718.2 (e) of the *Criminal Code* in order to contribute to the understanding of how this provision is being applied and what is affecting its application as this has real consequences on section 718.2 (e)'s stated potential. Many of the justifications were supported by research and the theory of Modern Penal Rationality, though some of the justifications would benefit from further research in order to isolate how much they impact the application of section 718.2 (e) and their influence on the use of other justifications. It might be interesting to understand to what extent the availability or unavailability of resources/social infrastructure/ alternatives to incarceration affects the application of section of 718.2 (e) and whether the unavailability of these reinforces punitive justifications which can create obstacles to the mobilization of this provision. It would also be interesting to pursue research which examines how the accused's

history of overcoming adversity affects the application of section 718.2 (e) in the sentencing of Aboriginal offenders. As was noted in the case of *R. v. Andres* [2002] SKCA 98¹¹, it appears that an Aboriginal offender demonstrating success and resilience in certain aspects of his life nullifies any consideration of systemic and or particular circumstances (which may have contributed to the commission of the offence), which in turn may discount the directives outlined in section 718.2 (e) and *Gladue*.

One interesting finding which emerged from the analysis and could benefit from further elaboration and research, is the prohibitive and permissive dimensions identified in *Gladue* in regard to the application of section 718.2 (e). The impact of the *Gladue* decision on the judiciary is a significant one. Through this decision, the Supreme Court of Canada clarified Parliament's mandate in adding section 718.2 (e) to the Canadian Criminal Code. As a matter of criminal law, judges must now consider background and systemic factors in sentencing Aboriginal offenders and apply alternatives to imprisonment when appropriate. *Gladue* made it clear that this provision is remedial in nature and not merely a codification of existing law and practice. It endorsed, to a certain degree, the notion of restorative justice in sentencing. The implementation of the directives posited through the *Gladue* decision provides judges with challenges as well as opportunities in regard to the application of the section 718.2 (e). There is much that is innovative in the decision. Despite the fact that the notion of alternatives is a Parliamentary proposal added to the *Criminal Code* when the package of amendments on sentencing were passed in 1996 and not an innovation of the Supreme Court, the *Gladue* case indicated that real force should be given to the directive to impose alternatives whenever possible creating this permissive dimension which encourages

¹¹ See page 99 for more details.

positive discrimination towards Aboriginal offenders in sentencing, as emphasized in section 718.2 (e). The purpose of the sentencing reform (and section 718.2 (e) in particular) and of the *Gladue* decision was to lessen the country's reliance on incarceration. By considering the particular circumstances of Aboriginal offenders in sentencing and applying alternative/restorative sanctions in place of imprisonment, the positive discrimination of Aboriginal offenders is being considered and encouraged, which represents a very novel idea in sentencing.

However, the *Gladue* case has both facilitated (permissive dimension) the application of the provision and obstructed (prohibitive dimension) its mobilization which was noted in the analysis. *Gladue* made it clear that alternatives would only be pursued in cases where these approaches would not compromise other, more customary objectives such as the protection of the public which prohibits the application of section 718.2 (e) and the positive discrimination towards Aboriginal offenders in sentencing. In so doing, the *Gladue* case has created a cognitive opening allowing for MPR to intervene, creating an obstacle which limits the scope of this provision's permissive dimension. Indeed, the protection of the public, on which MPR would insist, is the primary concern and the criminal legal system has been tasked with ensuring this protection. In *Gladue*, Cory and Iacobucci insist that the permissive dimension of this case must be circumscribed by other considerations such as the protection of the public, limiting its permissive scope. This public protection rhetoric in turn, also has a limiting effect on the application of section 718.2 (e), as it is rarely believed to be accomplished through alternatives to incarceration and most often diminishes any mitigating potential the consideration of particular circumstances holds in sentencing. Moreover, public protection is most often assured through strategies such as deterrence and denunciation,

rehabilitation (within penal confines) and through isolation/separation, which were all justifications provided by appeal court judges in their non-application of section 718.2 (e) and are goals which are rarely deemed attainable through alternative means to incarceration which are counter to this provision's objectives and limit its application.

Judges' justifications for applying or failing to apply section 718.2 (e) of the *Criminal Code* are varied. While the prohibitive and permissive dimensions of the *Gladue* case play a role in the section's application, as suspected and also impeding this disposition's application in a very fundamental way is the criminal legal system's current punitive and exclusionary rationale also known as modern penal rationality (MPR). As discussed in the theoretical chapter, modern penal rationality continues to be embedded in the workings of the criminal legal system and with classical theories of punishment at the base of the fundamental principles of sentencing, section 718.2(e)'s potential for reducing the use of incarceration and increasing the use of alternatives is limited in sentencing. The most punitive and exclusionary sanction at our disposal remains imprisonment and therefore judges' "go-to" sanction by default. The rationality operating within the criminal legal system now is the same one which gave rise to the problem of Aboriginal over-incarceration in the first place, therefore it is not surprising to note that while section 718.2 (e) is often referenced in the sentencing of Aboriginal offenders, it resulted in the application of alternative sanctions in only 8 of the 33 cases under scrutiny¹².

Confined by modern penal rationality, judges employ tactics, logics and justifications which are coherent with the principles promoted through MPR. Judges are handicapped by

¹² *R. v. J.J.* [2004] NLCA 81; *R. v. Semigak* [2000] NFCA 53; *R. v. Etuangat* [2009] NUCA 1; *R. v. M.N* [2004] NUCA 2; *R. v. John* [2004] SKCA 13; *R. v. Dennis* [2001] BCCA 30; *R. v. Ittoshat* [2000] QCCA 186; and *Ross c. R.* [2011] QCCA 2179.

tunnel-vision, recognizing that which supports MPR and blinded to that which challenges it. MPR has shown itself to be an obstacle to less exclusionary and punitive sanctions being applied within the realm of criminal law. Even though directives such as section 718.2 (e) of the *Criminal Code* explicitly guide judges to seek out alternatives to incarceration, the legal framework within which they operate offers little freedom to achieve this goal as alternatives do not meet the requirements set out by MPR.

Aboriginal over-representation and incarceration continues to be a problem (Mason, 2009: 6). Problems associated with the practical application of section 718.2 (e) and the recommendations made through the *Gladue* case are apparent in the recent case law in this area. The jurisprudence demonstrates confusion and frustration in applying section 718.2 (e). Moreover, the case law under analysis exposes the difficulty in implementing alternative sentencing options in communities which are unwilling, unable, or too poorly equipped to properly integrate, monitor and follow-through with the approaches because of a lack of the necessary fiscal and social infrastructure.

Judges justifications for failing to apply section 718.2 (e) in the sentencing of Aboriginal offenders are substantially underpinned by MPR and the theories of punishment upon which it was built, impeding on the widespread application of the provision. Judges are preoccupied with upholding the classical sentencing principles of deterrence, denunciation, isolation/separation, rehabilitation (of the first modernity) and the protection of the public through incarceration. Judges also refrain from applying the provision in response to the wishes of the victims and the community through the application of custodial sentences. The result of the *Gladue* case decision requires that Aboriginal offenders and their individual, particular circumstances be properly brought before sentencing judges and considered

(permissive dimension). However, in the cases under study, consideration of the offender's particular circumstances was often overshadowed by more punitive considerations (i.e. deterrence, denunciation, isolation/separation, rehabilitation (of the first modernity), and community and/or victim opinion and protection of the public) (prohibitive dimension). MPR will seldom allow that alternative sanctions be granted the same kind of legitimacy as those options which promote social exclusion and suffering, giving little chance for section 718.2 (e) to be applied in these cases.

According to Alan Rock, Minister of Justice, when Bill C-41 was enacted, “[w]hat we are trying to do, particularly having regard to the initiatives in the Aboriginal communities to achieve justice, is to encourage courts to look at alternatives where it is consistent with the protection of the public –alternatives to jail– and not simply resort to that easy answer in every case” (*R. v. Gladue* [1999] 1 S.C.R. 688, para. 47). It has become a natural reaction to crime for judges to apply custodial sanctions to offenders, however, this mechanical reaction to sentencing offenders is not natural, it is the result of the conditioning resulting from MPR which permeates reasoning within the current criminal legal system. What seems to escape judges in many cases is the fact that reactions to crime can and possibly should be conceptualized and operationalized in a different way. The *alternative/restorative* shift encouraged by the institution of the 718.2 (e) sentencing provision may prove to be a very positive reaction to crime and have the potential to affect real harm reduction and reduce recidivism if properly supported. However, judges remain reluctant to apply section 718.2 (e) and the permissive dimension of *Gladue* in sentencing Aboriginal offenders mostly in light of the sentencing principles and aims supported by MPR

and without real regard for the potential of alternatives to incarceration because these alternatives are not supported by this punitive and exclusionary reasoning.

In a few select cases, section 718.2 (e) was applied and alternative sanctions to incarceration were deemed appropriate by the judges. The reality remains however, that these cases were the exception and not the rule. Moreover, while alternatives were sought in these cases, traces of MPR could be noted in the judges' justifications, tainting the application of section 718.2 (e) and alternative sanctions with punitive and exclusionary underpinnings rather than a restorative foundation¹³. Strangely, the classical sentencing principles of deterrence and denunciation (most often accomplished through the imposition of punitive and exclusionary sanctions such as incarceration) were also referenced in judges' justifications for applying alternative sanctions to incarceration, possibly questioning the legitimacy of a an alternative/restorative approach to stand on its own or in an attempt to pass the sentence without reproach through an MPR pre-approved choice of sentencing principles. Whatever the case, while it is better that section 718.2 (e) be applied in some cases rather than none at all, the limited opportunities in which it is deemed legitimate to resort to alternative sanctions (in large part due to the obstacle created by MPR) impedes the widespread application of the section and stifles its potential.

If judges manage to break free from MPR long enough to contemplate employing a more restorative approach to sentencing, it appears that it will go little further than this simple contemplation as MPR is quick to overshadow whatever mitigating factors and/or circumstances present within a given case through its punitive and exclusionary reasoning. Although a sentencing regime which is attentive to Aboriginal justice traditions (such as that

¹³ A notable example of this is the case of *R. v. John* [2004] SKCA 13.

which is encouraged through the application of section 718.2 (e)) is commendable, in order for it to take hold, a new alternative/restorative rationale would need to be instituted, validated and legitimized by the criminal legal system and its actors. The emergence of new principles, concepts and theories are necessary at the cognitive level to allow the legal system to free itself from the trappings of modern penal rationality. The system must break away from the norm and legitimize reactions to crime other than those privileged through the MPR's thought process, giving provisions like section 718.2 (e) a fighting chance. Until then it appears that the application of section 718.2 (e) and *Gladue's* permissive dimension will be greatly restricted and its restorative potential effectively diminished.

REFERENCES

- Acorn, A. (2004). Compulsory compassion: A critique of restorative justice. *Queen's Law Journal*, 30(2), 863-882.
- Adjin-Tettey, E. (2008). Sentencing Aboriginal offenders: Balancing offenders' needs, the interests of victims and society, and the decolonization of Aboriginal peoples. *Canadian Journal of Women & Law*, 19(1), 179-226.
- Alasuutari, P. (1995). Asking why?. In P. Alasuutari (Ed). *Researching Culture: Qualitative Method and Cultural Studies*. London: Sage Publications. Pp. 133-142.
- Alcoff, L.M. (2009). Introduction: The limit of voice. In A.Y. Jackson & L.A. Mazzei (Eds). *Voice in Qualitative Inquiry*. New York: Routledge. Pp. 117-136.
- Alvesson, M. (2000). Taking language seriously. In M. Alvesson (Ed). *Postmodernism and Social Research*. Buckingham: Open University Press. Pp. 63-89.
- Anand, S. (2000). The sentencing of Aboriginal offenders, continued confusion and persisting problems: A comment of the decision in *R. v. Gladue*. *Canadian Journal of Criminology & Criminal Justice*, 42(3), 412-420.
- Archibald, B.P. (1997-1998). Fault, penalty and proportionality: Connecting sentencing to subjective and objective standards of criminal liability (with ruminations on restorative justice). *Criminal Law Quarterly*, 40(1), 263-286.
- Artières, P. & P. Lascoume. (2004). *Gouverner et enfermer: la prison un modèle indépassable?* Paris: Presses de Sciences Po. Pp. 23-54.
- Bayda, E.D. (1996). The theory and practice of sentencing: Are they on the same wavelength? *Saskatchewan Law Review*, 60(2), 317-338
- Becker, H.S. (1967). Whose side are we on? *Social Problems*, 14(3), 239-247.
- Berger, P. & T. Luckmann. (1967). *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. New York: Doubleday.
- Bernstein, R.J. (1983). *Beyond objectivism and relativism: Science, hermeneutics, and praxis*. Philadelphia, Pennsylvania: University of Pennsylvania Press.
- Blumer, H. (1954). 'What is Wrong with Social Theory?', *American Sociological Review*, 18(1), 3-10.
- Bonner, K.M. (2001). 'Reflexivity and Interpretive Sociology: The Case of Analysis and the Problem of Nihilism'. *Human Studies*, 24(1), 267-292.
- Bowen, G.A. (2006). 'Grounded Theory and Sensitizing Concepts', *International Journal of Qualitative Methods*, 5(3), p. 1-9.

- Bowen, G.A. (2008). 'Naturalistic Inquiry and the Saturation Concept: A Research Note'. *Qualitative Research*, 8(1), 137–52.
- Bracken, D., L. Deane & L. Morrissette. (2009). Desistance and social marginalization: The case of Canadian Aboriginal offenders. *Theoretical Criminology*, 13(1), 61-78.
- Braithwaite, J. (2000). Restorative justice and social justice. *Saskatchewan Law Review*, 63(1), 185-194.
- Brodeur, J. (2002). On the sentencing of Aboriginal offenders: A reaction to Stenning & Roberts. *Saskatchewan Law Review*, 65(3), 45-52.
- Burr, V. (1995). *An Introduction to Social Constructionism*. London: Routledge.
- Cairns, A. (2002). Seeing and not seeing: Explaining mis-recognition in the Criminal Justice System. *Saskatchewan Law Review*, 65(3), 53-62.
- Cameron, A. (2006). Sentencing circles and intimate partner violence: A Canadian feminist perspective. *Canadian Journal of Women & Law*, 18(2), 479-512.
- Cameron, A., & E. Cunliffe. (2007). Writing the circle: Judicially convened sentencing circles and the textual organization of criminal justice. *Canadian Journal of Women & Law*, 19(1), 1-36.
- Canadian Criminal Justice Association. (May 2000). Aboriginal Peoples and the Criminal Justice System. Retrieved October 1, 2010 from the World Wide Web:
<http://www.ccja-acjp.ca/en/abori4.html>
- Carter, M. (2002). Of fairness and Faulkner. *Saskatchewan Law Review*, 65(3), 63-74.
- Charmaz, K. (2000). Constructivist and Objectivist Grounded Theory. In N.R. Denzin and Y.S. Lincoln (Eds). *Strategies of Qualitative Inquiry*. Thousand Oaks: Sage. Pp.509–535.
- Charmaz, K. (2003). Grounded Theory: Objectivist and constructivist methods. In N.R. Denzin and Y.S. Lincoln (Eds). *Strategies of Qualitative Inquiry*. Thousand Oaks: Sage.Pp. 249–291.
- Charmaz, K. (2005). Grounded theory in the 21st century: Applications for advancing social justice studies. In N.R. Denzin and Y.S. Lincoln (Eds). *Handbook of Qualitative Research*. Thousand Oaks: Sage. Pp. 507–535.
- Charmaz, K. (2006). *Constructing Grounded Theory*. London: Sage.
- Chauvenet, A. (2006.) Privation de liberté et violence: le despotisme ordinaire en prison. *Déviance et Société*, 30(3), 373-388.

- Clarke, A.E. (2005). *Situational Analysis: Grounded Theory after the Postmodern Turn*. Thousand Oaks: Sage.
- Criminal Code*, R.S.C. 1985, (1st supp.), c. C-46.
- Daubney, D. (2002). Nine words: A response to “Empty promises: Parliament, the Supreme Court, and the sentencing of Aboriginal offenders”. *Saskatchewan Law Review*, 65(3), 35-44.
- De Haan, W. (1992). Redresser les torts: l’abolitionnisme et le contrôle de la criminalité. *Criminologie*, 25(2), 115-137.
- Dubé, R. (2008). *Système de pensée et réforme du droit criminel: Les idées innovatrices du rapport Ouimet (1969)*. Pp. 1-310.
- Dubé, R. (to appear). *La fonction du droit criminel moderne: De la protection de la société à la stabilisation des attentes normatives*.
- Duchastel, J. (1993). « Discours et informatique: des objets sociologiques? ». *Sociologie et sociétés*, 25(2), 157-170.
- Ezzy, D. (2002). Coding data and interpreting text: Methods of analysis. In D. Ezzy (Ed). *Qualitative Analysis*. Victoria: Routledge. Pp.133-142.
- Findlay, I.M. (2001). Discourse, difference and confining circumstances: The case of R. v. Gladue and the ‘proper interpretation and application’ of s. 718.2(e) of the Criminal Code. *Griffith Law Review*, 10(2), 225-239.
- Fine, M. (1994). Working the hyphen: Reinventing self and other in qualitative research. In N.R. Denzin & Y.S. Lincoln (Eds). *Handbook of Qualitative Research*. Thousand Oaks: Sage. Pp. 70–82.
- Finlay, L. (2003). The reflexive journey: Mapping multiple routes. In L. Finlay & B. Gough (Eds). *Reflexivity: A Practical Guide for Researchers in Health and Social Sciences*. Oxford: Blackwell.
- Finlay, L. & B. Gough. (2003). *Reflexivity: A Practical Guide for Researchers in Health and Social Sciences*. Oxford: Blackwell.
- Foucault, M. (1979). *Discipline and Punish: The birth of the prison*. New York: Random House.
- Frauley, J. & F. Pearce. (2007). Critical realism and the social sciences: Methodological and epistemological preliminaries. In J. Frauley & F. Pearce (Eds). *Critical Realism and the Social Sciences: Heterox Elaborations*. Toronto: University of Toronto Press. Pp. 3-29.
- Garcia, M. (2010). *Le rapport paradoxal entre les droits de la personne et le droit criminel: Les théories de la peine comme obstacles cognitifs à l’innovation*. Pp. 1-435.

- Gergen, K.J. (1985). The social constructivist movement in modern psychology. *American Psychologist*, 40, p. 266–275.
- Goff, C. (1999). *Corrections in Canada*. Cincinnati, OH: Anderson Publishing Co.
- Grbich, C. (2004). The position of the researcher. In C. Grbich (Ed). *New Approaches in Social Research*. Thousand Oaks: Sage Publications. Pp. 67-79.
- Grbich, C. (2004). The position of the researcher. In C. Grbich (Ed). *New Approaches in Social Research*. Thousand Oaks: Sage Publications. Pp. 80-93.
- Gregor, M & R. Sullivan. (1996). *Kant: The Metaphysics of Morals*. United Kingdom: Cambridge University Press.
- Guba, E.G. & Y.S. Lincoln. (1989). Judging the quality of fourth generation evaluation. In E.G. Guba & Y.S. Lincoln (Eds). *Fourth Generation Evaluation*. Newbury Park: Sage Publications. Pp. 228-251.
- Guba, E.G. & Y.S. Lincoln. (2005). Paradigmatic controversies, contradictions, and emerging confluences. In N. Denzin & Y.S. Lincoln (Eds). *The Sage Handbook of Qualitative research Second Edition*. Thousand Oaks: Sage Publications. Pp. 253-291.
- Guillemin, M., & L. Gillam. (2004). Ethics, reflexivity, and “Ethically Important Moments” in research. *Qualitative Inquiry*, 10(2), 261-280.
- Hamilton, A.C. & C.M. Sinclair. (1991). *Report of the Aboriginal Justice Inquiry of Manitoba*. Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People.
- Hannah-Suarez, J. A. (2003). Moral luck in Canadian law: Socio-economic deprivation, retributive punishment and the judicial interpretation of section 718.2(e) of the Criminal Code. *Journal of Law and Equality*, 2(2), 255-285.
- Heath, P & J.B. Schneewind. (1997). *Kant: Lectures on ethics*. United Kingdom: Cambridge University Press.
- Henwood, K.L. & N.F. Pidgeon. (1992). Qualitative research and psychological theorizing. *British Journal of Psychology*, 83(1), 97–111.
- Hosking, D.M. and Bouwen, R. (2000). Organizational learning: relational- constructionist approaches: an overview. *European Journal of Work and Organizational Psychology*, 9, 129–132.
- Hulsman, L. & M. Cusson. (1990). Débat entre Cusson et Hulsman. *Déviante et Société*, 14(3), 313-337.
- Hurlbert, M. (2008). *R. v. Mocassin* and the continued struggle for fairness in Aboriginal sentencing. *Saskatchewan Law Review*, 71(2), 391-422.

- Ives, D.E. (2004-2005). Inequality, crime and sentencing: *Borde, Hamilton* and the relevance of social disadvantage in Canadian sentencing law. *Queen's Law Journal*, 30(1), 114-155.
- Jorgensen, M., & L. Phillips. (2002). The field of discourse analysis. In M. Jorgensen & L. Phillips (Eds). *Discourse Analysis as Theory and Method*. London: Sage Publications. Pp. 1-23.
- Jull, K. (1991-1992). Sentencing, corrections and conditional release: Principles or a penitentiary by any other name? *Criminal Law Quarterly*, 34(4), 443-468.
- Knazan, B. (2003). *Sentencing Aboriginal offenders in a large city: The Toronto Gladue (Aboriginal persons) court*. National Judicial Institute, Aboriginal Law Seminar, January 2003. Calgary, Alberta.
- Lachambre, S. (2011). *La théorie de la dénonciation: Émergence et institutionnalisation en droit criminel*. Pp. 1-392.
- Ladd, J. (1999). *Metaphysical elements of justice: Part one of the Metaphysics of Morals by Immanuel Kant*. Indiana: Hackett Publishing Company Inc.
- LaPrairie, C. (1987). Native women and crime in Canada. In Adelberg, E. & C. Currie, (Eds.), *Too Few to Count*. Vancouver: Press Gang Publishers. Pp.103-112.
- LaPrairie, C. (1990). The role of sentencing in the over-representation of aboriginal people in correctional institutions. *Canadian Journal of Criminology*, 32(3), 429-440.
- LaPrairie, C. (1992). The role of sentencing in the over-representation of Aboriginal People in correctional institutions. In Silverman, R.A. & M.O. Nielson, (Eds.), *Aboriginal Peoples and Canadian Criminal Justice*. Toronto: Harcourt Brace & Company Canada Inc. Pp. 133-144.
- LaPrairie, C. (1998). The 'new' justice: Some implications for Aboriginal communities. *Canadian Journal of Criminology*, 40(1), 61-79.
- Lash, J. (2000). Case comment: *R. v. Gladue*. *Canadian Women Studies*, 20(3), 85-93.
- Law, J. (2006). *After Method: Mess in Social Science Research*. London: Routledge.
- Letherby, G. (2003). *Feminist Research in Theory and Practice*. Buckingham: Open University Press.
- Linker, M. (1999). Sentencing circles and the dilemma of difference. *Criminal Law Quarterly*, 42(1), 116-128.
- Manson, A. (2001). *The law of sentencing*. Toronto: Irwin Law.
- Mann, M.M. (2009). *Good intentions, disappointing results: A progress report on federal Aboriginal corrections*. Ottawa, ON, Canada: Office of the Correctional Investigator of Canada.

- Mathiesen, T. (2006). *Prison on Trial*. Winchester: Waterside Press. Pp.141-201.
- Maxfield, M., & E. Babbie. (2001). *Research Methods for Criminal Justice and Criminology*. Toronto: Nelson Thomson Learning.
- Maynard, M. (1994). Methods, practice and epistemology: The debate about feminism and research. In M. Maynard & P. Purvis (Eds). *Researching Women's Lives from a Feminist Perspective*. London: Taylor and Francis.
- McLennan, G. (1995). Feminism, epistemology and postmodernism: Reflections on current ambivalence. *Sociology*, 29(3), p.391-409.
- Mills, J., Bonner, A., & K. Francis. (2006). The development of constructivist grounded theory. *International Journal of Qualitative Methods*, 5(1), 1-10.
- Milward, D. (2008). Not just the peace pipe but also the lance: Exploring different possibilities for Indigenous control over criminal justice. *Wicazo Sa Review*, 23(1), 97-122.
- Morellet, A. (1797). Beccaria: Des délits et des peines. Retrieved July 1, 2010. URL : <http://find.galegroup.com.proxy.bib.uottawa.ca/mome/infomark.do?sort=DateAscend&prodID=MOME&tabID=T001&searchType=AdvancedSearchForm&type=search¤tPosition=1&version=1.0&searchResultsPerPage=10&userGroupName=otta77973&queryId=Locale%28en%2CUS%2C%29%3AFQE%3D%28RN%2CNone%2C10%29U102659249%24&source=gale>
- Morris, R. (1989). *Crumbling Walls: Why prisons fail*. Oakville, Ont: Mosaic Press. Pp. 12-23 & 140-144.
- Morse, J.M. (1994). *Critical Issues in Qualitative Research Methods*. Thousand Oaks: Sage.
- Morse, J.M. (1995). The significance of saturation. *Qualitative Health Research*, 5(2), 147-149.
- Murdocca, C. (2009). From incarceration to restoration: National responsibility, gender and the production of cultural difference. *Social & Legal Studies*, 18(1), 23-45.
- Pasquali, P.E. (1995). *No rhyme or reason: The sentencing of sexual assaults*. Ottawa: CRIAW/ICREF.
- Pfefferle, B.R. (2006-2008). Gladue sentencing: Uneasy answers to the hard problem of Aboriginal over-incarceration. *Manitoba Law Journal*, 32(2), 114-143.
- Pires, A.P. (1991). «Éthiques et réforme du droit criminel: Au-delà des philosophies de la peine». *Ethica*, 3(1), 133-154.
- Pires, A.P. (1995). «Quelques obstacles à une mutation du droit pénal». *Revue générale de droit*, 26(1), 133-154.

- Pires, A.P. (1998). «Beccaria, l'utilitarisme et la rationalité pénale moderne ». In C. Debuyst, F. Digneffe, J. Labadie & A.P. Pires, (Eds). *Histoire des savoirs sur le crime et la peine. Tome II : La rationalité pénale et la naissance de la criminologie*. Montréal: Les Presses de l'Université de Montréal. Pp. 83-143.
- Pires, A.P. (1998). «Kant face à la justice criminelle». In C. Debuyst, F. Digneffe, J. Labadie & A.P. Pires, (Eds). *Histoire des savoirs sur le crime et la peine. Tome II : La rationalité pénale et la naissance de la criminologie*. Montreal: Les Presses de l'Université de Montréal. Pp. 145-205.
- Pires, A.P. (2001). « La rationalité pénale moderne, la société du risque et la juridicisation de l'opinion publique». *Sociologie et sociétés*, 33(1), 179-204.
- Pradel, J. (1989). *Histoires des doctrines pénales*. Paris: Presses universitaires de France.
- Presdee, M. & R. Walters. (1999). The perils and politics of criminological research and the threat of academic freedom. *Current Issues in Criminal Justice*, 10(2), 156-167.
- Quicklaw. (2009). Welcome to Quicklaw. Retrieved December 4th, 2010 from the World Wide Web: http://www.lexisnexis.ca/about/release_details.php?id=2
- Quigley, T. (1999). Are we doing anything about the disproportionate jailing of Aboriginal people? *Criminal Law Quarterly*, 42(1), 129-160.
- Ritchie, J. & J. Lewis. (2003). *Qualitative research practice: A guide for social science students and researchers*. Thousand Oaks, California: Sage Publications Inc.
- Roach, K., & J. Rudin. (2000). *Gladue*: The judicial and political reception of a promising decision. *Canadian Journal of Criminology*, 42(3), 355-388.
- Roach, K., & J. Rudin. (2002). Broken promises: A response to Stenning and Roberts' "Empty promises". *Saskatchewan Law Review*, 65(3), 3-34.
- Roach, K. (2000). Changing punishment at the turn of the century: Restorative justice on the rise. *Canadian Journal of Criminology*, 42(3), 249-280.
- Roach, K. (2009). One step forward, two steps back: *Gladue* at ten and in the Courts of Appeal. *Criminal Law Quarterly*, 54(4), 470-505.
- Roberts, J.V. (2001). Évolution et conséquence de la réforme de la sentence au Canada. *Sociologie et sociétés*, 33(1), 67-83.
- Roberts, J.V., & A. Von Hirsch. (1994-1995). Statutory sentencing reform: The purpose and principles of sentencing. *Criminal Law Quarterly*, 37(2), 220-242.
- Roberts, J.V & D.P. Coles. (Eds.) (1999). *Making sense of sentencing*. Toronto: University of Toronto Press.
- Roberts, J.V., & C. LaPrairie. (1996-1997). Sentencing circles: Some unanswered questions. *Criminal Law Quarterly*, 39(1), 69-83.

- Ross, R. (1992). Leaving our white eyes behind: The sentencing of Native accused. In Silverman, R.A. & M.O. Nielson, (Eds.), *Aboriginal Peoples and Canadian Criminal Justice*. Toronto: Harcourt Brace & Company Canada Inc. Pp.145-159.
- Ross, R. (1995). Restorative justice: Exploring the Aboriginal paradigm. *Saskatchewan Law Review*, 59(2), 431-436.
- Royal Commission on Aboriginal Peoples. (1996). *Bridging the divide: A Report on Aboriginal Peoples and Criminal Justice in Canada*. Ottawa: Canada Communication Group.
- Rubin, H., & I.S. Rubin. (1995). *Qualitative Interviewing: The art of hearing data*. Thousand Oaks: Sage Publications.
- Ruby, C.C. (1999). *Sentencing 5th edition*. Toronto: Butterworths.
- Rychlak, R.J. (1990-1991). Society's moral right to punish: A further exploration of the denunciation theory of punishment. *Tulane Law Review*, 65(2), 299-338.
- Siggner, A.J. (1992). The Socio-demographic conditions of registered Indians. In Silverman, R.A. & M.O. Nielson, (Eds.), *Aboriginal Peoples and Canadian Criminal Justice*. Toronto: Harcourt Brace & Company Canada Inc. Pp.19-30.
- Stenning, P., & J. V. Roberts. (2002). The sentencing of Aboriginal offenders in Canada: A rejoinder. *Saskatchewan Law Review*, 65(3), 75-96.
- Stenning, P., & J V. Roberts. (2001). Empty promises: Parliament, The Supreme Court, and sentencing of Aboriginal offenders. *Saskatchewan Law Review*, 64, 136-167.
- Stephens, M. (2007-2008). Lessons from the front lines in Canada's restorative justice experiment: The experience of sentencing judges. *Queen's Law Journal*, 33(1), 19-78.
- Strauss, A., & J. Corbin. (1990). *Basics of Qualitative research: Grounded theory procedures and techniques*. Newbury Park: Sage Publications Inc.
- Strauss, A.L. and Corbin, J. (1998). *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*. Thousand Oaks: Sage.
- Titsher, S., M. Meyer, R. Wodak & E. Vetter. (2000). Grounded theory. In Titsher & al. (Eds). *Methods of Text and Discourse Analysis*. London: Sage. Pp.74-78.
- Tracy, S.J. (2010). Qualitative quality: Eight "Big-Tent" criteria for excellent qualitative research. *Qualitative Inquiry*, 16(10), 837-851.
- Trotter, G.T. (1999). Appellate review of sentencing decisions. In Roberts, J.V & D.P. Coles. (Eds.) *Making sense of sentencing*. Toronto: University of Toronto Press. Pp. 230-241.

Turner, B.A. (1981). Some practical aspects of qualitative data analysis: One way of organizing the cognitive processes associated with the generation of grounded theory. *Quality and Quantity*, 15, 225-247.

Turpel-Lafond, M.E. (1999-2000). Sentencing within a restorative justice paradigm: Procedural implications of *R. v. Gladue*. *Criminal Law Quarterly*, 43(1), 34-50.

Turpel, M.E., & P.A. Monture-OKanee. (1992). Aboriginal people and Canadian criminal law: Rethinking justice. *University of British Columbia Law Review*, 26(Special Issue), 239-279.

Vacheret, M. & G. Lemire. (2007). *Anatomie de la prison contemporaine*. Presses de l'université de Montréal. Pp.15-33.

Vancise, W. J., & P. Healy. (2002). Judicial notice in sentencing. *Saskatchewan Law Review*, 65(3), 97-106.

Vasey, A. (2003). Rethinking the sentencing of Aboriginal offenders: The social value of s. 718. 2(e). *Windsor Review of Legal & Social Issues*, 15(1), 73-97.

Walgrave, L. (1999). «La justice restaurative : à la recherche d'une théorie et d'un programme ». *Criminologie*, 32(1), 7-29.

Weinrath, M. (2007). Sentencing disparity: Aboriginal Canadians, drunk driving and age. *Western Criminology Review*, 8(2), 16-28.

Welsh, A., & J. R.P. Ogloff. (2008). Progressive reform or maintaining the status quo? An empirical evaluation of the judicial consideration of Aboriginal status in sentencing decisions. *Canadian Journal of Criminology & Criminal Justice*, 50(4), 491-517.

Wihak, L. (2008). Quiet contributions: Re-examining the benefits of a restorative approach to sentencing in the Aboriginal context. *Windsor Yearbook of Access to Justice*, 26(1), 53-82.

Zimmerman, S. (1992). The revolving door of despair: Aboriginal involvement in the Criminal Justice System. *UBC Law Review*, 26(1), 137-167.

Criminal Law Cases

R. v. Andres [2002] SKCA 98

R. v. Augustine [1999] NBCA 541

R. v. Blanchard [2009] YKCA 15

R. v. Cappo [2005] SKCA 134

R. v. Carrière [2002] ONCA 1429

R. v. C.P. [2009] NBCA 65

R. v. Dennis [2001] BCCA 30
R. v. Etuangat [2009] NUCA 1
R. v. Fox [2001] ABCA 64
R. c. Ittoshat [2000] QCCA 186
R. v. Jacobish [1998] NFCA 198
R. v. J.C.L. [2009] MBCA 52
R. v. J.F. [2001] NBCA 81
R. v. J.J. [2004] NLCA 81
R. v. John [2004] SKCA 13
R. v. Jordan (appeal by M.D.N.) [2004] YKCA 14
R. v. J.T.P. [2003] YKCA 13
R. v. Kakekagamick [2006] ONCA 3346
R. v. Knockwood [2009] NSCA 98
R. v. Lewis [2011] NSCA 49
R. v. Loring [2009] BCCA 166
R. v. Mack [2008] BCCA 520
R. v. M.N. [2004] NUCA 2
R. v. Oakoak [2011] NUCA 4
R. v. Poucette [1999] ABCA 305
R. v. Reykdal [2008] NSCA 110
Ross c. R. [2011] QCCA 2179
R. v. R.K.S. [2005] MBCA 116
R. v. Sackanay [2000] ONCA 885
R. v. Semigak [2000] NFCA 53
R. v. Stimson [2011] ABCA 59
Tremblay c. R. [2010] QCCA 2072
R. v. Thomas [2005] MBCA 61

Supreme Court Rulings

R. v. Gladue [1999] 1 S.C.R. 688

R. v. Wells [2000] 1 S.C.R. 207

APPENDICES

APPENDIX A
CASE SUMMARIES

NEWFOUNDLAND COURT OF APPEAL CASES

R. v. Jacobish [1998] NFCA 198

Appeal by the accused from the sentence imposed of 5 years and 3 months imprisonment. The accused pled guilty to 5 counts of sexual assault, 1 count of attempted sexual assault, 1 count of sexual intercourse with a girl under 14 years of age, 1 count of possession of a weapon, an axe for the purpose of committing an assault, and 1 count of breach of probation. The victims were both male and female, and ranged in age from 6 to 15 years old. There was also an order that the accused not to be eligible for parole until he served half of his sentence.

As a child the accused was neglected by his parents, attempted suicide at least once and was the victim of sexual assault at 6 years old. The accused was an Innu and had a history of alcohol and substance abuse, and had prior convictions for sexual assault. The main issue of contention in this case was whether an aboriginal offender, who committed serious crimes on other members of his community, should be sentenced in accordance with restorative justice principles as opposed to normally accepted sentencing principles.

The appeal was allowed in part. The order regarding the accused's eligibility for parole was quashed. The length of the sentence remained unvaried despite the fact that it was determined that the total length was inappropriate given traditional sentencing principle and the gravity of the offences as well as the fact that the victims were young and deeply affected. The accused had a history of serious sexual assault and it was felt that there was

need for denunciation. It was stated that the accused was clearly a danger to the community and a community based sanction would not have resulted in the degree of social control, restraint and rehabilitation deemed necessary to achieve the goal of protection of the public and allow for proper reintegration into the community. The appeal judge concluded that the sentence of incarceration imposed was appropriate and a realistic response to the specific factual circumstances that were presented.

R. v. J.J. [2004] NLCA 81

Appeal by the Crown from the conditional sentence of 2 years minus a day imposed on the accused. The accused was found guilty of 1 count of sexual assault and 1 count of breach of probation. The victim was his common law spouse with whom he had 2 children. The accused suffered from long-term chronic alcohol abuse and had a lengthy criminal record comprised of 16 previous assault charges against his common law partner and more against various other women (no more detail is given regarding this issue). He was also convicted of 39 previous offences, 21 of which were previous acts of violence including assault, assault causing bodily harm, assault with a weapon and death threats.

The major issue of contention in this case was whether a conditional sentence was appropriate in a case where the paramount sentencing objectives are said to be deterrence and denunciation. The appeal judge mentioned that s.718.2 (e) does require that a different methodology be undertaken for assessing a fit sentence for an aboriginal offender, he pointed out however that it does not necessarily mandate a different result. The section does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. He continued by underlining the fact that aboriginal offenders will not

always be sentenced in a manner which gives greatest weight to the principles of restorative justice and less weight to the principles of deterrence, denunciation, and separation, more particularly for violent or serious offences.

In the end the appeal judge left the sentence unvaried. The appeal judge explained that while he believed the sentence to be flawed having regard to denunciation and deterrence, in light of the developments with the passage of time he believed that it was in the interest of justice to leave the conditional sentence in place to run its course as imprisonment would jeopardize the accused's reformation.

R. v. Semigak [2000] NFCA 53

Appeal by the Crown from the 12 month conditional sentence imposed on Semigak for the offence of assault causing bodily harm. The main issue of contention in this appeal was whether the sentencing judge focussed too narrowly on the offender's aboriginal status in fastening a 12 month conditional sentence for assault causing bodily harm.

Semigak had a troubled background involving childhood physical and sexual abuse, running away from home, time spent in a group home, anger management and alcohol problems, failed rehabilitation efforts and a broken marriage. The accused had a lengthy criminal record which included other assaults causing bodily harm and a number of breaches of probation and violations of parole (no more detail is given regarding this issue). The Crown argued that the protection of the community was not observed in this sentence and that the nature of the crime requires a denunciatory and deterrence oriented sentence that can only be accomplished through imprisonment.

The appeal judge affirmed that the trial judge did not overemphasize the offender's aboriginal status in fastening the sentence but surely was concerned to follow a restorative justice approach to sentencing in this case. The appeal judge emphasized that while restorative justice principles are not the only factors and principles to be taken into account, s.718.2 (e) was added to encourage judges to apply principles of restorative justice alongside or in place of other more traditional sentencing principles when making sentencing determinations. He continued by stating that while imprisonment is used to achieve those traditional goals, there is little consensus that incarceration is an effective tool. The appeal judge believed that the Crown's view that imprisonment is the only way to get the message across is narrow minded.

The appeal judge did not feel that the trial judge erred in applying restorative justice principles, he did not feel that the other principles were ignored either (he considered rehabilitation/deterrence/reparation/denunciation) or that incarceration can even achieve the denunciatory aims that are claimed of it. Moreover, the appeal judge reiterated what Cory, J. stressed in *Gladue*, that a sentence based on restorative justice principles is not necessarily a lighter sentence. Therefore, the sentence remained unchanged.

NUNAVUT COURT OF APPEAL CASES

R. v. Oakoak [2011] NUCA 4

Appeal by the accused from the sentence of 45 days' imprisonment imposed for his 2 convictions for probation breaches, as he was found to be in communication with his wife and assaulted her on another occasion. The main issue in this case was whether the trial judge erred by failing to adequately address and consider the offender's circumstances as an

aboriginal by overemphasizing deterrence as a sentencing objective and by placing insufficient emphasis on rehabilitation.

The appeal judge outlined that s.718.2 (e) mandates restraint in the use of incarceration (especially when dealing with an aboriginal offender) and that this provision is remedial in nature, designed to address the problem of over-incarceration. In sentencing, judges must take into account the unique/particular circumstance of aboriginal persons. In this case the trial judge did not have the benefit of a Gladue report, however it would have been the trial judge's positive duty to gather the adequate information and his failure to do so was problematic. However, the appeal judge then made the observation that being within a predominantly aboriginal milieu, as was the case here, may affect the positive duty to gather relevant information as it is assumed that the circumstances are widely known and recognized.

The appeal judge pointed out that the Courts should take judicial notice of the fact that in aboriginal cultures priority is generally given to a restorative approach to conflict. The appeal judge affirmed that even though the trial judge did not refer explicitly to s.718.2 (e) or the offender's particular background as an aboriginal, it is said that through his reasoning it can be demonstrated that he did take the offender's aboriginal status into account. Moreover, the appeal judge stated that the trial judge did show restraint in applying a sentence of incarceration as he varied the length of the sentence to fit the circumstances. However, the appeal judge did allow the appeal in part by permitting the accused to serve the remainder of his sentence in the community.

The main issue in this case is that the Crown believed that the trial judge overemphasized rehabilitation while underemphasizing the principles of deterrence and denunciation and that the sentence was disproportionate to the circumstances of the offence and the offender. The sentence imposed was a suspended sentence with probation for the conviction of 1 count of spousal assault, 1 count possession of marijuana, and 4 counts of breach of undertaking while the Crown felt that the seriousness of the offence and circumstances required a custodial sentence.

It was noted that the accused had a terrible upbringing where he was subject to and witnessed abuse regularly. The accused had a criminal record which included 4 counts of assault and 5 previous breaches of probation.

The appeal judge emphasized that judges should avoid imprisoning aboriginal offenders particularly for less serious offences but that as the seriousness increases the sentencing of aboriginal and non-aboriginal offenders would be similar and place more weight on the principles of deterrence and denunciation. However, even in these cases, the length of the sentence must be considered carefully.

The appeal judge asked himself whether the sentencing principles of deterrence and denunciation should override s.718.2 (e) and *Gladue*, and decided that the case did not require that level of deterrence as suggested by the Crown. He continued by stating that this was a very borderline case where the trial judge appeared to have erred on the side of rehabilitation given the offender's progress since the assault and the appeal judge did not feel that he erred in imposing probation (and found that this sentence could potentially be more

serious than a conditional sentence as a breach would translate into serving time for the original offence regardless of time served in the community). The appeal was dismissed.

R. v. M.N. [2004] NUCA 2

The main issue in this case was that an application was made by the Crown for review of a transfer order decided by a youth court judge that proceedings were to be dealt with in youth court. An Inuit youth, MN, was charged with second degree murder after allegedly brutally beating his victim to death. The accused had no previous record. The main issue with this case was whether the offender should be sentenced in adult court given the severity of the offence and endure a harsher penalty than rehabilitation in a young offenders' facility in his community given that according to the Crown, MN's prospect of rehabilitation was over-estimated.

The appeal judge stated that incarceration negatively affects aboriginal people and special consideration should thus be given when sentencing aboriginal offenders because of their particular/unique circumstances. In applying those considerations the appeal judge felt that in this case the offender should indeed serve his sentence within the community as he had strong connections to his family and traditional aboriginal way of life. The appeal judge also mentioned that the positive influences in the offender's life were inextricably connected to his cultural community, therefore having him remain in the community was more likely to meet the objectives of rehabilitating the young person and consequently of protecting the public. Appeal dismissed, sentence of rehabilitation to be served in the community maintained.

YUKON COURT OF APPEAL CASES

R. v. J.T.P. [2003] YKCA 13

Appeal by the accused from the sentence of 3 years' imprisonment imposed on him. The accused was convicted for breaking and entering, possession of stolen property, breaching probation and resisting a police officer. He suffered from alcohol and drug abuse. The accused had a short youth and adult record but he had spent no more than a 30 day sentence in jail prior to committing the offences of this case (no more detail is provided regarding this issue).

The main issue in this case was whether the trial judge failed to properly consider the rehabilitative and restorative principles set out in the Criminal Code (s.718.2 (e)). The appeal judge affirmed that rehabilitation ought to have been considered the significant factor in this case and stated that the trial judge considered that the seriousness of the offences along with the appellant's poor response to bail conditions and probation orders outweighed the rehabilitative advantages of a shorter sentence followed by a probation order.

The appeal judge was persuaded that the trial judge erred in failing to properly take into account the rehabilitative and restorative principles in fashioning an appropriate sentence. He felt that the trial judge erred in sending the offender to a federal penitentiary without first attempting his rehabilitation in the territorial system followed by a probation order designed to both protect the public and to encourage the appellant's rehabilitation.

The appeal was allowed and the sentence was varied to a custodial sentence of 2 years less one day, followed by 2 years probation.

R. v. Blanchard [2009] YKCA 15

Appeal by the Crown from the sentence of 90 days' imprisonment and 3 years' probation imposed on Blanchard for impaired driving, following the revocation of a curative discharge. The accused was a chronic alcoholic with a record of 10 alcohol-related driving convictions at the time of the offence.

The main issue in this case was whether the need for general or specific deterrence of chronic alcoholics required a sentence of incarceration which was more than that which was imposed. It was stated that the case of *R. v. Donnessey* established that impaired driving by chronic recidivists requires a substantial sentence for the protection of society and general deterrence becomes the paramount sentencing principle in such cases.

The appeal judge saw in this case the broader issue of how the predominance of the concern for general deterrence was to be reconciled in individual cases with the rehabilitative purpose underlying the curative discharge provision as it is applied in Yukon Territory in the long-term interest of the communities put at risk by chronic alcoholics in a place where driving is a basic need. The appeal judge touched on the fact that Bill C-41 gave new emphasis to restorative justice and concluded that the punitive objectives of general deterrence and denunciation should not overwhelm the restorative justice objectives that were also embodied in the new sentencing regime. However, the appeal judge stated that the circumstances of the offence and the nature of the offender may call for greater emphasis on general deterrence and denunciation in some cases. The appeal judge adds that public protection may be better served through rehabilitation; however the importance of the rehabilitation principle diminishes where it is a repeat offender and a denunciatory aspect is required.

Ultimately the appeal judge affirmed that the trial judge did not err as he balanced the need for denunciation and deterrence with rehabilitation. The appeal was dismissed.

R. v. Jordan (appeal by M.D.N.) [2004] YKCA 14

Appeal by the accused, M.D.N., from his sentence. An accused named Jordan led a gang of enforcers who invaded a residence and attacked an individual. M.D.N. was a member of the gang. He was armed with a baseball bat and the attack was planned and vicious. The victim was left with lasting physical and psychological injuries. The accused pled guilty to 1 count of aggravated assault and 1 count of breach of recognizance. It was stated that the accused had an extensive criminal record (no more detail is provided regarding this issue). The main issue in this case was whether the sentence imposed of 3 years and 3 months imprisonment was excessive in light of the nature of the offence, the circumstances of its commission, and the circumstances of the offender (as an aboriginal person).

While the appeal judge was sympathetic to the fact that the offender did require treatment over punishment, he also believed that the offender represented such a danger to himself and others that the only option was to provide the required treatment in a secure setting (i.e. incarceration).

The appeal judge also noted that the offender laboured under difficulties that were at least in part the product of his disadvantaged past but maintained that the protection of society was paramount in this case.

The appeal judge noted that the particular circumstances of this aboriginal offender entitled him to different considerations in fastening an appropriate sentence, however, given

the nature of the offence, separation, denunciation, and deterrence become fundamentally relevant and paramount over restorative justice, regardless of aboriginal status.

The protection of the public remained paramount, therefore the appeal was dismissed and the offender was ordered to be treated within a closed setting.

SASKATCHEWAN COURT OF APPEAL CASES

R. v. John [2004] SKCA 13

Appeal by the accused from his sentence of 3 years' imprisonment and 3 year driving prohibition after being convicted of 1 count of criminal negligence causing death. The accused had a traditional aboriginal upbringing. John was a trapper and a fisherman and provided his First Nation community with traditional wild food and resources and services for the elders of the reserve. In addition to operating a commercial fishery, Mr. John helped Saskatchewan Environment by reporting illegal activities and forest fires in the area. He has also provided Saskatchewan Environment with knowledge of the local area. The accused has committed a previous offence but details are not provided.

The main issue in this case is whether the trial judge failed to apply the sentencing principles applicable to aboriginal offenders (restorative justice) and erred by imposing a custodial sentence on the aboriginal offender (a person who lives a traditional lifestyle and has difficulty coping with mainstream society), rather than a community based sentence with strict conditions to be served in the community.

The appeal judge outlined that the R. v. Gladue case made it clear that when sentencing an aboriginal offender the sentencing judge has a duty to consider the unique

systemic circumstances and background of the offender as the aboriginal offender's community may well understand and conceptualize a just sanction differently than non-aboriginals. Traditional sentencing objectives (deterrence/denunciation/separation) may be less relevant and restorative justice may be given more weight. Ultimately s.718.2 (e) empowers sentencing judges to craft sentences that are meaningful for aboriginal people. Armed with this information, the sentencing judge must determine whether to give more weight to traditional objectives or restorative justice in deciding whether the aboriginal offender should be incarcerated.

It was determined that the trial judge erred as he did not consider the offender's circumstance and whether a community sentence would be appropriate. The appeal judge believed the sentencing judge should have gathered the appropriate information before sentencing and that he overemphasized denunciation and deterrence and did not consider whether a conditional sentence could also have achieved these traditional sentencing aims.

According to the appeal judge, given the circumstances of this particular aboriginal offender, restorative justice should be given more weight than traditional sentencing objectives. Therefore the appeal was allowed as it was stated that a conditional sentence could facilitate both a punitive and restorative objective and that both objectives could be achieved in a given case, a conditional sentence was likely the better sanction than imprisonment would be. The primary question was whether the principles of denunciation and deterrence could be satisfied by the imposition of a community based sentence and in the appeal judge's opinion it could. He continued by stating that we should not place too much weight on deterrence and a sentence in a small community carries a societal stigma, therefore

is not an easy sanction. He felt that the conditional sentence included a consideration of all the principles (restorative justice/deterrence/denunciation).

R. v. Cappo [2005] SKCA 134

Appeal by the Crown from the sentence imposed on the accused following his conviction for criminal negligence causing death. Cappo drove home from a bar in a vehicle without working headlights and struck another vehicle head-on. An individual in each car died, and 3 others sustained injuries. The accused received a community sentence of 2 years less one day. He was also ordered to perform 240 hours of community service, abstain from alcohol and drugs, undertake treatment, and to participate in healing and reconciliation circles.

The accused had a criminal record which included 7 previous convictions, 2 of which were motor vehicle offences. He was a labourer and was married with six children. The presentence report found that Cappo was affected by poverty, alcohol use in the community and racism. A report assessed him at a high risk to re-offend.

The main issue in this case is whether a conditional sentence for the offence of criminal negligence causing death is an unfit sentence given the requirements of the law respecting proportionality to the gravity of the offence and the responsibility of the offender, and respecting denunciation, deterrence, and parity. The Crown also argued that Cappo's aboriginal status and particular circumstances as an aboriginal offender did not disadvantage him in any way that could be related to the offence committed and accordingly did not entitle him to a lesser sentence as contemplated by s.718.2 (d) & (e) of the Criminal Code.

The appeal judge stated that it has been established that incarceration is necessary in order to meet the requirements of s.718.1, that the sentence be proportionate and that the accused's particular circumstances as an aboriginal cannot be linked to the offence in question.

The appeal judge concluded that the accused's circumstances as an aboriginal offender could not be linked to the offence and that the conditional sentence did not meet the requirement of proportionality/responsibility/deterrence/denunciation. The appeal by the Crown was allowed and a custodial sentence was substituted for the conditional sentence, with due credit for time served.

R. v. Andres [2002] SKCA 98

Appeal by the Crown from the sentence imposed on Andres of 6 years imprisonment after being convicted of impaired driving causing bodily harm and driving while under the influence of alcohol.

The main issue in this case is whether the trial judge erred in the application of the principles enunciated in R. v. Gladue as the Crown maintains, and ultimately what is a fit sentence for an incorrigible and unrepentant repeat offender.

The accused's father died when he was 5 years old. He was a discipline problem for his mother. Andres suffered parental neglect and started running away from home when he was 10 years old to spend time with friends and drink alcohol. He was in foster care by the time he was 13 years old. He completed grade 12 and worked as a mason. Andres has a lengthy criminal record which includes 32 convictions for driving offences, 13 charges of failing to appear and 10 violations of recognizance/probation orders.

The appeal judge outlined that the fundamental principle of sentencing in cases of repeat drinking and driving offences (impaired driving causing bodily harm) such as this one is the protection of the public as all other sanctions and attempts at rehabilitation had failed with this offender. He also claimed that there was no evidence that the aboriginal offender's upbringing or the systemic factors alluded to in *Gladue* were connected to his offences and therefore he was not entitled to a lesser sentence.

In the opinion of the appeal judge, the trial judge erred in the application of the principles enunciated in *Gladue* in the circumstances of the case as rehabilitation had not worked on the offender which left the court with no choice but to disable the offender through incarceration to protect society. Appeal allowed and the period of incarceration was extended to 12 years imprisonment.

BRITISH COLOMBIA COURT OF APPEAL CASES

R. v. Mack [2008] BCCA 520

Appeal by the accused from the sentence of 1 year imprisonment after being convicted of 1 count of theft under \$5,000. The accused had an extensive prior record of 73 offences, including three recent theft convictions (no more detail is provided regarding this issue).

The main issue in this case is whether the sentencing judge erred by failing to consider the objective of rehabilitation and other available alternatives to incarceration when sentencing this aboriginal offender as well as failing to consider the aboriginal status of the offender.

The appeal judge maintained that while the trial judge did not inquire into the circumstances of the aboriginal offender it does not mean that she did not take note of the fact that the accused was aboriginal and incorporated her known familiarity with the community in sentencing the offender. There were no available alternatives to incarceration that were reasonable in this case according to the appeal judge. The appeal judge maintained that failure to mention s.718.2 (e) was not in itself an error and that it did not mandate an automatic reduction in sentence and restorative justice does not necessarily outweigh the importance for deterrence or denunciation.

The appeal judge outlined that the trial judge did give primary weight to the sentencing principles of separation/protection of the public but did not ignore rehabilitation, however the fact that the offender is a repeat offender steered the judgment away from rehabilitation. The appeal was dismissed and the sentence remained 1 year imprisonment.

R. v. Dennis [2001] BCCA 30

Appeal by the accused from the sentence of imprisonment of 2 years less one day imposed on him after being convicted of 1 count of assault with a weapon. The accused was a drug addict and had a lengthy record of property offences which arose out of his drug addiction and had a previous conviction for assault with a weapon.

The main issue in this case is whether the trial judge had erred by failing to consider the fact that the offender was an aboriginal and placed insufficient weight on the efforts made by the offender towards successfully rehabilitating himself after the offence.

According to the appeal judge, the trial judge had an obligation to make clear the objectives and factors he was taking into account in imposing the sentence he chose. He

continued by stating that the evidence and material was overwhelmingly in favour of the offender 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. The appeal was allowed and the sentence imposed was time served. It was found that the trial judge erred as he failed to include any analysis of the principles of sentencing applied in arriving at the sentence imposed (making it impossible to tell if he considered the offender's aboriginal status).

R. v. Loring [2009] BCCA 166

Appeal by the accused from the sentence of 2 years less one day's imprisonment and 1 year's probation imposed on him after he was convicted of 1 count of breaking and entering, 1 count of assault, 1 count of careless use of a firearm and possession of a weapon for a dangerous purpose. The accused had a past involving drug use. There was recorded evidence that he was the victim of racial taunts on at least two occasions, he was a first time father at 16 years old, he had a grade ten education, and had a drinking problem. The accused had a previous criminal record which was stated to be composed of mostly youth offences (no more detail is provided regarding this issue).

The main issue in this case is whether the offender's aboriginal background and community support were properly considered during sentencing as is directed by s.718.2 (e) of the Criminal Code and whether the sentence imposed was unfit.

The appeal was allowed and the sentence was reduced to 9 months' imprisonment with increased probation. The appeal judge did find that the trial judge did not have the benefit of knowing the support that the offender would have from his clan which should have

been taken into account in determining how the principle of denunciation may be tempered by the need and genuine possibility of rehabilitation in this case. However, he also found that the offender's background factors were adequately addressed in the sentencing proceedings. While the appeal judge did still impose a period of incarceration he noted that the trial judge may have erred in ruling out a wholly community based sentence as he felt that a conditional sentence would not serve the goal of denunciation. The fresh evidence presented on appeal did not however include any proof of the victim's or the community's willingness to participate in the healing process, which is necessary as the appropriateness of a sanction is largely determined by the needs of the victims and the community as well as the offender.

Ultimately, the appeal judge decided that the trial judge adequately addressed the offender's personal circumstances and background as an aboriginal person and given his young age, clan support, and lack of adult an record, rehabilitation ought to play an equal role with that of denunciation therefore the sentence was reduced to 9 months' imprisonment. His probation was increased to 2 years to reflect that need.

QUÉBEC COURT OF APPEAL CASES

R. v. Tremblay [2010] QCCA 2072

Appeal by the accused from the sentence of 42 months' imprisonment imposed on him after being convicted of driving under the influence. The accused had an alcohol addiction which stemmed from adolescence, he was a drunk driving recidivist, and had a prior criminal record which included other driving offences (no more detail is provided concerning this issue).

The main issue of this case is that the accused argued that his aboriginal status was not addressed in the sentencing proceedings and therefore the judge did not utilize the application of s. 718.2(e) of the Criminal Code in considering alternatives to incarceration.

The appeal judge felt that it is a judge's duty to give real force to the restorative principles underlying s.718.2 (e) as was affirmed in *Gladue*. The appeal judge noted that there was little in the circumstances of this offender that could mitigate his responsibility, however, he also noted that his aboriginal background was a sad one and it would be difficult to say that it did not contribute in one way or another to his poor choices.

No alternatives to incarceration were noted in this community and according to the appeal judge there are few mitigating factors and circumstances as the offender is a repeat offender and the reintegration/rehabilitation must remain subordinate to the principles of deterrence and denunciation. The appeal was therefore allowed but the sentence was only reduced to 2 years and 6 months' imprisonment.

R. v. Ittoshat [2000] QCCA 186

Appeal by the accused from the sentence of 1 year and 6 months' imprisonment imposed on him after being convicted of 1 count of sexual assault. The accused is a former drug addict and alcoholic. He is said to be a good family man and is very involved in his community.

The main issue in this case is that the offender argues that the trial judge erred in the application of s.742.1 of the Criminal Code with respect to imposing a conditional sentence to be served in the community. In particular, he argued that the trial judge failed to take into account the factors set out in s.718.2 (e) and his rehabilitation since the offence.

The appeal judge stated that part XXIII of the Criminal Code required that incarceration be sought as a last resort, particularly for aboriginal offenders. He continued by remarking that 20 years have passed since the offence took place and the offender no longer posed the threat he once did (he was no longer an alcoholic or a drug addict and was a grown man). The appeal judge felt that the change in the offender had opened up the possibility of a suspended sentence. The appeal judge believed that the trial judge erred by not permitting the suspended sentence in the first place.

The appeal was allowed and the offender was sentenced to serve a 1 year and 6 months' conditional sentence in the community.

R. v. Ross [2011] QCCA 2179

Appeal by the accused from the sentence of 1 year imprisonment imposed on him after being convicted of 2 counts of possession of an illegal substance, 3 counts of trafficking an illegal substance, 3 counts of possession of an illegal substance with the intent to traffic, 2 counts of possession of goods obtained through illegal means and 1 count of failure to appear. The accused was a construction worker with steady employment and no previous criminal record.

The main issue in this case is that the accused maintained that his aboriginal background was not addressed in the sentencing proceedings. Alternative sentences to incarceration were not considered which goes against the directives outlined in s.718.2 (e) of the Criminal Code. Moreover, the accused argued that the trial judge erred as “il s'est appuyé sur des connaissances personnelles pour dire que la consommation de stupéfiants constituait un fléau dans la communauté autochtone d'Essipit” (para 4).

The appeal judge noted that the trial judge did not give any consideration to s.718.2 (e) as he is mandated to do. There was no information brought forth pertaining to the types of sanctions or procedures appropriate in the circumstances of this aboriginal offender or concerning alternative sentences.

The appeal judge stated that the trial judge erred and in fastening a new sentence consideration to the accused's aboriginal background and particular circumstances of the offender would need to be given. Moreover, this new sentence would need to reflect the gravity of the offence, the degree of culpability of the offender as well as include an examination of all available, alternative sentences to incarceration as mandated by s.718.2 (e).

Appeal allowed, sentence reduced to 1 year's conditional sentence to be served in the community but in light of time served, sentence reduced to time served.

MANITOBA COURT OF APPEAL CASES

R. v. J.C.L. [2009] MBCA 52

Appeal by the accused from the sentence of 8 years' imprisonment imposed on him after he was convicted of 1 count of sexual assault and 2 counts of assault.

The main issue in this case is the accused argues that the verdicts were inconsistent and that the Crown's address was inflammatory.

The appeal judge maintained that the trial judge did not err, that the sentence was consistent with regard to severity and consideration of the offender's particular circumstances as an aboriginal person. Where an offence is serious and involves violence

(which is the case here), the fit and appropriate sentence will generally not differ between aboriginal and non-aboriginal offenders.

Appeal dismissed, sentence of 8 years' imprisonment maintained.

R. v. Thomas [2005] MBCA 61

Appeal by the accused from the conviction of 1 count of manslaughter and sentence of imprisonment of more than 5 years and 6 months (the exact length of the original sentence is not stated). While not discussed in detail, it is stated that the accused had a difficult past linked to her particular circumstances as an aboriginal.

The main issue in this case is the accused argues that the verdict was unreasonable as was the sentence imposed.

The appeal judge noted that the trial judge did take notice and was very moved by the particular circumstances of the aboriginal offender but given the serious nature of the offence, both general and specific deterrence were the most important factors to take into account. However, the appeal judge is disturbed by the fact that a Gladue report was not prepared and presented and feels that it would have been most helpful in fastening and appropriate sentence.

Appeal allowed in part and the sentence was reduced to 5 years and 6 months' imprisonment.

R. v. R.K.S. [2005] MBCA 116

Appeal by the Crown from the conditional sentence of 2 years less one day imposed on the accused after being convicted of 1 count of aggravated assault. The accused, from the

age of 7 years old, was sexually abused by his baseball coach, and by his aunt's boyfriend. He had three children with different women. Alcohol had been a problem for the accused since age 11 and he had also used crack cocaine extensively. From age 17 until 25 the accused was a member of a street gang. His last employment was in 1999 for two months. This was the longest he had ever been employed. The accused had an extensive criminal record stemming from his youth. His youth record included: 1) assault; 2) failure to comply with recognizance; 3) breaking and entering and theft; 4) failure to comply with recognizance; 5) possession of property obtained by crime; 6) possession of a weapon; 7) mischief under \$1,000; and 8) theft. As an adult his record included: 9) accessory after the fact to aggravated assault; 10) failure to comply with recognizance; 11) assault; 12) failure to comply with recognizance (x2); 13) theft under \$5,000; 14) assault of a Peace Officer; 15) failure to comply with recognizance; 16) assault causing bodily harm; 17) assault; and 18) failure to comply with recognizance.

The main issue in this case is the Crown argues that the conditional sentence imposed is demonstrably unfit (given his lengthy record and the gravity of the offence of aggravated assault).

The appeal judge noted that the trial judge, after learning the particular circumstances of this aboriginal offender felt that the offender did not pose a danger to society. The appeal judge felt quite differently and stated that the offender was a danger to society and the sentence was clearly unfit. He said the pre-sentence report was clear; the risk of re-offending was high and the trial judge gave insufficient weight to the accused's propensity for violence and disinclination to abide by court orders as reflected in his criminal record. The appeal judge felt that the trial judge underemphasized the accused's criminal record and failed to

give proper emphasis to meaningful denunciation and deterrence which were unlikely to be realized by a sentence served in the community.

Appeal allowed, the conditional sentence was revoked and a sentence of incarceration was imposed for 1 year, followed by 3 years' probation.

NEW BRUNSWICK COURT OF APPEAL CASES

R. v. Augustine [1999] NBCA 541

Appeal by the accused from the conviction of manslaughter imposed on him and appeal by the Crown from the conditional sentence of 2 years less a day imposed. It is hinted that the accused was abused and abused alcohol and drugs. It is also mentioned that the accused had an extensive record of property offences and physical violence (no more detail was provided on this issue).

The main issue of this case is the accused appealed his conviction on the ground that the verdict was unreasonable. The Crown appealed the sentence as being clearly unreasonable.

The appeal judge noted that the trial judge felt that the offender was not a danger to the community. The appeal judge stated that in the deemed aggravating circumstances and violence of the case, relying upon subsections (d) and (e) is misplaced. The appeal judge recognized that the approach to sentencing had changed in that the courts are called upon to emphasize the goals of restorative justice but some factors may very well overshadow the goal of restorative justice.

According to the appeal judge a conditional sentence was unreasonable considering the aggravated circumstances. Despite recognizing the offender's aboriginal background and particular circumstances, it was decided that these factors should not reduce any sentence to be imposed for manslaughter and a sentence of incarceration was commensurate with the death and the circumstances that motivated the violence.

According to the appeal judge the offence demanded a sentence of imprisonment to effectively deter and denounce the crime such that it is significant to the offender and the aboriginal and non-aboriginal community.

The Crown's appeal was allowed and the conditional sentence was revoked and a 6 year sentence of imprisonment was imposed. The accused's appeal was denied.

R. v. J.F. [2001] NBCA 81

Appeal by the Crown from the sentence of 3 years and 6 months' imprisonment imposed on the accused after being convicted of 1 count of aggravated assault concurrent to another 3 years and 6 months sentence imposed on J.F. for aggravated sexual assault. It was stated that the accused had a substantial criminal record for violent offences (no more detail is provided regarding this issue). The accused was the father of three children and had the support of his common law wife.

The main issue in this case is the Crown argues that the sentence is demonstrably unfit. The Crown also argues that the sentences could not be concurrent because there was no nexus between the two crimes.

The appeal judge noted that in arriving at the sentence the trial judge did consider s.718.2 (e) and the case of *Gladue*. He also stated that a lot of things must come together in order for s.718.2 (e) to take effect, the nature of the offence and the circumstances of the offender, the victim and the community must be balanced. The application of s. 718.2(e) is one factor to be taken into consideration in the global consideration of the principles of sentencing.

The appeal judge felt that the sentence arrived at in this case was demonstrably unfit and that the goals of denunciation and deterrence could not be subordinate to the principle of restorative justice. It was decided that the offender must be separated from society for a long period of time.

Appeal allowed and the period of incarceration was increased to 5 years' imprisonment to be served consecutively to the sentence for sexual assault.

R. v. C.P. [2009] NBCA 65

Appeal by the accused from the sentence of 8 months of open custody and 4 months of community supervision imposed on him after being convicted of 1 count of assault. The accused had a criminal record but no more detail was given regarding this issue. C.P.'s biological parents abandoned him at a young age, he was however adopted and cared for by loving parents. It is stated that while facing several challenges in life, the accused had benefited from community programs and structures to assist him. He had benefited from enhanced educational programs to assist him in meeting his learning needs.

The main issue in this case is the accused argues that the trial judge erred in concluding that he met the requirements for the imposition of a custodial sentence pursuant

to s.39(1) of the YCJA. He also argues that the trial judge erred in failing to take into consideration, in the course of passing the sentence, the requirements of the YCJA in relation to a) contents of the pre-sentence report (s.40); b) the circumstances of aboriginal young persons (s.38(2)(d)).

The appeal judge affirmed that all alternatives to incarceration must be considered and that the trial judge erred in imposing a custodial sentence given that he did not have a pre-sentence report prepared. However, the appeal judge also acknowledged that in those circumstances where denunciation and deterrence are primary considerations, such as in cases of violent crimes (like this one), there is authority to limit the application of *Gladue*.

In the end however, the appeal judge felt that the custodial sentence was a little long considering the circumstances and reduced it to 2 months of open custody and 1 month of community supervision.

ONTARIO COURT OF APPEAL CASES

R. v. Kakekagamick [2006] ONCA 3346

Appeal by the accused from the conviction of 1 count aggravated assault imposed on him and the sentence of 5 years' imprisonment. The accused's mother attended and was very negatively affected by her experience in a residential school. There was a lack of opportunity and incentive on the reserve which is said contributed to the accused's substance and alcohol abuse problem. The reserve was very isolated with little to occupy the youth in the community. The accused had a grade 8 level education. He did not have a prior criminal record.

The main issue in this case is the appellant appeals his conviction for aggravated assault on the grounds that the trial judge erred in her application of the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. A second ground of appeal is that the trial judge failed to give the appellant the benefit of a reasonable doubt in relation to the credibility of the complainant. The appellant also appeals his sentence on the grounds that he considers it was harsh and excessive in the circumstances.

The appeal judge stated at trial, that neither counsel, nor the trial judge gave adequate consideration to the legal requirements of s.718.2 (e) of the Criminal Code as informed by *Gladue*. He continued by stating that the Court recently held that the failure to give adequate weight to an offender's aboriginal status amounts to an error in law. Moreover, the appeal judge asserts that the law requires the *Gladue* analysis to be performed in all cases involving an aboriginal offender, regardless of the seriousness of the offence.

The appeal judge noted that the pre-sentence report that was prepared in the first instance was not adequate and that throughout the case, although there was some reference made to the offender's aboriginal status not enough was known about the circumstances and it should have been signalled to those involved a possible need for further inquiry.

Ultimately, the appeal judge decided that failure to give consideration to the circumstances of the aboriginal offender as required by s.718.2 (e) amounts to an error justifying appellate intervention. The poor quality of the pre-sentence report made it difficult to discern the circumstances to be considered when sentencing an aboriginal offender, according to the appeal judge.

In the end, however, the appeal judge decided that the nature of offence was such that restorative justice could not be emphasized over the goals of separation/denunciation/deterrence, which were deemed paramount. The appeal was dismissed.

R. v. Sackanay [2000] ONCA 885

Appeal by the accused from the sentence of 8 years and 6 months' imprisonment imposed on him after being convicted of 1 count of aggravated sexual assault and 1 count of aggravated assault. The accused was addicted to both alcohol and crack cocaine. His father was killed when he was just an infant. His mother and step father were both alcoholics. The accused was witness to domestic violence. He attempted suicide when he was 8 years old and often tried to run away from home. He spent most of his adolescence in group homes or in custody. The accused had a grade 10 education and few skills. The accused also had a previous criminal record but it was not discussed in great detail, however, it was stated to be extensive and include several violent offenses.

The main issue in this case is that the accused submits that the trial judge did not give sufficient weight to the direction in s. 718.2(e) of the Criminal Code. Second, he submits that the trial judge erred by not giving any weight to the nexus between the two offenses.

The appeal judge agreed with the offender's arguments. However, the appeal judge also believed that the crime warrants a jail sentence though he states that the hardships the offender has suffered should be taken into account in determining a fit sentence. The appeal was allowed and the custodial sentence was reduced to 6 years.

R. v. Carrière [2002] ONCA 1429

Appeal by the accused from a verdict of second-degree murder, whereby the charge was reduced to manslaughter. The murder was perpetrated in the course of a convenience store robbery. The accused, an aboriginal, had an extensive criminal record of 52 convictions, including rape, robbery and assaults (no more detail is provided regarding this issue). In mitigation, the accused pointed to a very difficult personal background and the fact that since discovering his aboriginal roots, he was making some behavioural improvements.

Ultimately the appeal judge sentenced the accused to a total of 17 years in prison, minus 3 years of credit for time served, and a lifetime weapons ban. The primary sentencing objectives were denunciation, deterrence, and isolation from the public. Rehabilitation was possible but remained of secondary importance given the aggravating circumstances, the seriousness of the offence, and the nature of the offender (long-term offender). It was stated that the accused approached the worst offender category. Aggravating circumstances included the use of a large-calibre handgun and mask, planning, targeting a vulnerable victim group, the shooting of the victim in his son's presence, and the premeditation.

ALBERTA COURT OF APPEAL CASES

R. v. Stimson [2011] ABCA 59

Appeal by the Crown from the sentence of 90 days' imprisonment, 2 years' probation, and 3 years' driving prohibition imposed on the accused for impaired driving causing death and driving without a license. The accused began abusing alcohol at the age of 16 years old. The accused was taken into foster care at the age of 4 years old. She suffered physical and sexual abuse at the hands of a foster parent and she was moved multiple times to live with different family members. The accused had no previous criminal record.

The main issue in this case is the Crown argues that the sentence is demonstrably unfit. The appeal judge reinstated that the sentencing judge considered the sentencing principles outlined in sections 718, 718.1 and 718.2 of the Criminal Code. He placed particular emphasis on section 718.2(e) and the Supreme Court's decision in *Gladue*. He enumerated factors affecting members of the Siksika nation, including poverty, poor housing conditions, high substance abuse rates and the residential school system. The trial judge stated that while he was mindful of the objectives of deterrence and denunciation, the principles of rehabilitation and restorative justice should be applied alongside or in place of other more traditional sentencing principles. The appeal judge also reinstated that the trial judge stated that in this case the principles of deterrence and denunciation and the principle of rehabilitation were "of parallel dominance".

The appeal judge believed that if the trial judge's objective was to subordinate the principles of denunciation and deterrence to that of rehabilitation, he erred in doing so. He found the trial judge's consideration and emphasis on residential schools misplaced. He also felt that the trial judge erred by placing significant emphasis on community restoration without any clear representation of the community's view and against the expressed wishes of the victim's family (as stated in *Gladue*).

Ultimately the appeal judge concluded that the trial judge erred as it would appear that he gave an automatic reduction in sentence to the respondent because she was aboriginal. The Supreme Court in *Gladue* expressly rejected the view that section 718.2(e) "requires an automatic reduction in sentence for an aboriginal offender "or" remission of a warranted period of incarceration because the offender is aboriginal".

Appeal allowed, sentence varied to 2 years less one day's imprisonment.

R. v. Fox [2001] ABCA

Appeal by the accused from the sentence of 5 years' imprisonment after being convicted of 2 counts of dangerous driving causing death, 1 count of dangerous driving causing bodily harm and 1 count of leaving the scene of an accident with intent to escape criminal liability. He is said to have had a stable home life but quit school in grade 10. The accused suffered from drug and alcohol problems. He was found guilty as a young offender of arson involving a residence.

The main issue in this case is the accused argues that the sentence is demonstrably unfit. The appeal judge reiterated that the trial judge found that deterrence and denunciation must be given paramount consideration in this case and felt that that there was 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. He then imposed the sentence referred to above.

The appeal judge stated that with the respect to the special circumstances of an aboriginal offender, the trial judge committed no error in his detailed analysis of the application of the facts and circumstances in this case in the context of the law as stated in *Gladue* and *Wells*. Denunciation and deterrence were not "over-emphasized" by the trial judge here in terms of his decision that s. 718.2(e) would be a neutral factor in sentencing, according to the appeal judge.

The appeal judge agreed that denunciation and deterrence are principal objectives in a case of this nature. However, the rehabilitation of the offender must also be considered and therefore the sentence was reduced to reflect this reality.

The appeal was allowed and the sentence was reduced to a custodial sentence of 2 years and 6 months.

R. v. Poucette [1999] ABCA 305

Appeal by the Crown from the sentence of 1 year imprisonment and a 10 year weapon prohibition imposed on the accused after being convicted of 1 count of manslaughter. He was an alcoholic. The accused had no previous criminal record.

The main issue in this case is the Crown argues that the trial judge failed to consider the gravity of the offence and did not impose a proportionate sentence.

The appeal judge noted that the trial judge did not order a pre-sentence report. He was familiar with the broad systemic and background factors affecting the aboriginal community at Morley, but failed to tie those factors to the offender. It was not clear how Poucette, a 19-year old aboriginal, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. According to the appeal 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. According to the appeal judge, failure to link the two is an error in principle.

The appeal judge noted that the trial judge suggested that s. 718.2(e) may be interpreted to mean that when prison is required for an aboriginal offender, the period of imprisonment should be as short as possible but a manslaughter conviction resulting from a stabbing, in the circumstances of this case, was a serious and violent crime. The appeal judge concluded that the trial judge erred in principle and the sentence he imposed was demonstrably unfit. He believed it did not place sufficient importance on denunciation and deterrence, nor did it address rehabilitation or restorative justice.

Appeal allowed and the sentence was increased to 1 years' imprisonment, a 10 year firearms prohibition, and 3 years' probation.

NOVA SCOTIA COURT OF APPEAL CASES

R. v. Reykdal [2008] NSCA 110

Appeal by the accused from a 5 year sentence for robbery and a one year sentence for assault. The accused had a previous record including 9 priors ranging from break and entry to assault for which he received a conditional disposition. The accused was a 27 year old Aboriginal offender. He was adopted as a child and raised in a non-Aboriginal community by what was referenced as a loving family. It was noted that the accused suffered from fetal alcohol syndrome and that substance abuse tends to drive his criminal behavior.

The appeal judge gave leave to appeal but dismissed the appeal as he stated that while the sentencing judge did not reference the *Gladue* report in sentencing, he was alive to the particular circumstances lived by the accused and did not underemphasize the relevant factors.

R. v. Lewis [2011] NSCA 49

Appeal by the accused from a sentence of 1,058 days of incarceration for 18 charges of fraud, forgery, theft and breaches of probation. The main issue in this case is the accused argues that the sentence is demonstrably unfit. The appeal judge stated that the judge in the first instance, having reviewed a pre-sentence report, considering the accused's difficult background (no additional information was supplied concerning this issue) and Aboriginal status, and the *Gladue* factors (no additional information was supplied concerning this issue) should emphasize specific deterrence in sentencing.

The appeal judge saw no error in the sentencing judge's reasoning and granted leave to appeal but demised the appeal.

R. v. Knockwood [2009] NSCA 98

Appeal by the accused from a sentence of 12 months imprisonment followed by 2 years probation for assault causing bodily harm perpetrated against his wife. This was second assault against his wife and the attack was considered "vicious". The main issue in this case is the accused argues that the sentencing judge failed to give sufficient weight to his aboriginal status and the mitigating factor of the harsh conditions of his pre-trial release.

The appeal judge stated that, having assessed the *Gladue* principles, the appellant's background, and the pre-trial conditions, there were no grounds on which to justify mitigation of the sentence. A conditional sentence was not deemed appropriate in the circumstances by the sentencing judge in respect for the safety of the community. The

appeal judge found no fault in the sentencing judge's reasoning and the appeal was dismissed.