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

Jamie Tanis Gladue *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General for Alberta and Aboriginal Legal Services of Toronto Inc. *Interveners*

Indexed as: R. *v*. Gladue

File No.: 26300.

1998: December 10; 1999: April 23.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache and Binnie JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Sentencing -- Aboriginal offenders -- Accused sentenced to three years' imprisonment after pleading guilty to manslaughter -- No special consideration given by sentencing judge to accused's aboriginal background -- Principles governing application of s. 718.2(e) of Criminal Code -- Class of aboriginal

people coming within scope of provision -- Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(e).

The accused, an aboriginal woman, pled guilty to manslaughter for the killing of her common law husband and was sentenced to three years' imprisonment. On the night of the incident, the accused was celebrating her 19th birthday and drank beer with some friends and family members, including the victim. She suspected the victim was having an affair with her older sister and, when her sister left the party, followed by the victim, the accused told her friend, "He's going to get it. He's really going to get it this time". She later found the victim and her sister coming down the stairs together in her sister's home. She believed that they had been engaged in sexual activity. When the accused and the victim returned to their townhouse, they started to quarrel. During the argument, the accused confronted the victim with his infidelity and he told her that she was fat and ugly and not as good as the others. A few minutes later, the victim fled their home. The accused ran toward him with a large knife and stabbed him in the chest. When returning to her home, she was heard saying "I got you, you fucking bastard". There was also evidence indicating that she had stabbed the victim on the arm before he left the townhouse. At the time of the stabbing, the accused had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

At the sentencing hearing, the judge took into account several mitigating factors. The accused was a young mother and, apart from an impaired driving conviction, she had no criminal record. Her family was supportive and, while on bail, she had attended alcohol abuse counselling and upgraded her education. The accused was provoked by the victim's insulting behaviour and remarks. At the time of the offence, the accused had a hyperthyroid condition which caused her to overreact to emotional situations. She showed some signs of remorse and entered a plea of guilty.

The sentencing judge also identified several aggravating circumstances. The accused stabbed the deceased twice, the second time after he had fled in an attempt to escape. From the remarks she made before and after the stabbing it was clear that the accused intended to harm the victim. Further, she was not afraid of the victim; she was the aggressor. The judge considered that the principles of denunciation and general deterrence must play a role in the present circumstances even though specific deterrence was not required. He also indicated that the sentence should take into account the need to rehabilitate the accused. The judge decided that a suspended sentence or a conditional sentence of imprisonment was not appropriate in this case. He noted that there were no special circumstances arising from the aboriginal status of the accused and the victim that he should take into consideration. Both were living in an urban area off-reserve and not "within the aboriginal community as such". The sentencing judge concluded that the offence was a very serious one, for which the appropriate sentence was three years' imprisonment. The majority of the Court of Appeal dismissed the accused's appeal of her sentence.

Held: The appeal should be dismissed.

The considerations which should be taken into account by a judge sentencing an aboriginal offender have been summarized at para. 93 of the reasons for judgment. The following is a reflection of that summary.

Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence. In that Part, s. 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of

aboriginal offenders. The provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force. Section 718.2(*e*) must be read in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. In determining a fit sentence, all principles and factors set out in that Part must be taken into consideration. Attention should be paid to the fact that Part XXIII, through certain provisions, has placed a new emphasis upon decreasing the use of incarceration.

Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. The effect of s. 718.2(*e*), however, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(*e*) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. In order to undertake these considerations the sentencing judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions, which in

turn may come from representations of the relevant aboriginal community. The offender may waive the gathering of that information. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

If there is no alternative to incarceration the length of the term must be carefully considered. The jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence. However, s. 718.2(*e*) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. It is also unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

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

In this case, the sentencing judge may have erred in limiting the application of s. 718.2(*e*) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, he does not appear to have considered the systemic or background factors which may have influenced the accused to engage in criminal conduct, or the possibly distinct conception of sentencing held by the accused, by the victim's family, and by their community. The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors. Although in most cases such errors would be sufficient to justify sending the matter back for a new sentencing hearing, in these circumstances it would not be in the interests of justice to order a new hearing in order to canvass the accused's circumstances as an aboriginal offender. Both the sentencing judge and all members of the Court of Appeal acknowledged that the offence was a particularly serious one. For that offence by this offender a sentence of three years' imprisonment was not unreasonable. More importantly, the accused was granted, subject to certain conditions, day parole after she had served six months in a correctional centre and, about a year ago, was granted full parole with the same conditions. The results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the accused and society.

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Referred to: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. McDonald* (1997), 113 C.C.C. (3d) 418; *R. v. J. (C.)* (1997), 119 C.C.C. (3d) 444; *R. v. Wells* (1998), 125 C.C.C. (3d) 129; *R. v. Hunter* (1998), 125 C.C.C. (3d) 121; *R. v. Young* (1998), 131 Man. R. (2d) 61; *R. v. Fireman* (1971), 4 C.C.C. (2d) 82; *R. v. Williams*, [1998] 1 S.C.R. 1128; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

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APPEAL from a judgment of the British Columbia Court of Appeal (1997),

98 B.C.A.C. 120, 161 W.A.C. 120, 119 C.C.C. (3d) 481, 11 C.R. (5th) 108, [1997]

B.C.J. No. 2333 (QL), affirming a judgment of Hutchinson J. sentencing the accused to three years' imprisonment. Appeal dismissed.

Gil D. McKinnon, Q.C., and *Michael D. Smith*, for the appellant.

Wendy L. Rubin, for the respondent.

Kimberly Prost and *Nancy L. Irving*, for the intervener the Attorney General of Canada.

Goran Tomljanovic, for the intervener the Attorney General for Alberta.

Kent Roach and *Kimberly R. Murray*, for the intervener Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

//*Cory and Iacobucci JJ.*//

1 CORY AND IACOBUCCI JJ.-- On September 3, 1996, the new Part XXIII of the *Criminal Code*, R.S.C., 1985, c. C-46, pertaining to sentencing came into force. These provisions codify for the first time the fundamental purpose and principles of sentencing. This appeal is particularly concerned with the new s. 718.2(*e*). It provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. This appeal must consider how this provision should be interpreted and applied.

I. Factual Background

2 The appellant, one of nine children, was born in McLennan, Alberta in 1976. Her mother, Marie Gladue, who was a Cree, left the family home in 1987 and died in a car accident in 1990. After 1987, the appellant and her siblings were raised by their father, Lloyd Chalifoux, a Metis. The appellant and the victim Reuben Beaver started to live together in 1993, when the appellant was 17 years old. Thereafter they had a daughter, Tanita. In August 1995, they moved to Nanaimo. Together with the appellant's father and two of her siblings, Tara and Bianca Chalifoux, they lived in a townhouse complex. By September 1995, the appellant and Beaver were engaged to be married, and the appellant was five months pregnant with their second child, a boy, whom the appellant subsequently named Reuben Ambrose Beaver in honour of his father.

3 In the early evening of September 16, 1995, the appellant was celebrating her 19th birthday. She and Reuben Beaver, who was then 20, were drinking beer with some friends and family members in the townhouse complex. The appellant suspected that Beaver was having an affair with her older sister, Tara. During the course of the evening she voiced those suspicions to her friends. The appellant was obviously angry with Beaver. She said, "the next time he fools around on me, I'll kill him". The appellant told one of her friends that she wanted to test Beaver, and asked her friend to "hit on Reuben to see if he would go with her", but the friend refused.

4 The appellant's sister Tara left the party, followed by Beaver. After he had left, the appellant told her friend, "He's going to get it. He's really going to get it this time." The appellant, on several occasions, tried to find Beaver and her sister. She

eventually located them coming down the stairs together in her sister's suite. The appellant suspected that they had been engaged in sexual activity and confronted her sister, saying, "You're going to get it. How could you do this to me?"

5 The appellant and Beaver returned separately to their townhouse and they started to quarrel. During the argument, the appellant confronted him with his infidelity and he told her that she was fat and ugly and not as good as the others. A neighbour, Mr. Gretchin, who lived next door was awakened by some banging and shouting and a female voice saying "I'm sick and tired of you fooling around with other women." The disturbance was becoming very loud and he decided to ask his neighbours to calm down. He heard the front door of the appellant's residence slam. As he opened his own front door, he saw the appellant come running out of her suite. He also saw Reuben Beaver banging with both hands at Tara Chalifoux's door down the hall saying, "Let me in. Let me in."

6 Mr. Gretchin saw the appellant run toward Beaver with a large knife in her hand and, as she approached him, she told him that he had better run. Mr. Gretchin heard Beaver shriek in pain and saw him collapse in a pool of blood. The appellant had stabbed Beaver once in the left chest, and the knife had penetrated his heart. As the appellant went by on her return to her apartment, Mr. Gretchin heard her say, "I got you, you fucking bastard." The appellant was described as jumping up and down as if she had tagged someone. Mr. Gretchin said she did not appear to realize what she had done. At the time of the stabbing, the appellant had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

7 On June 3, 1996, the appellant was charged with second degree murder. On February 11, 1997, following a preliminary hearing and after a jury had been selected, the appellant entered a plea of guilty to manslaughter.

8 There was evidence which indicated that the appellant had stabbed Beaver before he fled from the apartment. A paring knife found on the living room floor of their apartment had a small amount of Beaver's blood on it, and a small stab wound was located on Beaver's right upper arm.

9 There was also evidence that Beaver had subjected the appellant to some physical abuse in June 1994, while the appellant was pregnant with their daughter Tanita. Beaver was convicted of assault, and was given a 15-day intermittent sentence with one year's probation. The neighbour, Mr. Gretchin, told police that the noises emanating from the appellant's and Beaver's apartment suggested a fight, stating: "It sounded like someone got hit and furniture was sliding, like someone pushed around" and "The fight lasted five to ten minutes, it was like a wrestling match." Bruises later observed on the appellant's arm and in the collarbone area were consistent with her having been in a physical altercation on the night of the stabbing. However, the trial judge found that the facts as presented before him did not warrant a finding that the appellant was a "battered or fearful wife".

10 The appellant's sentencing took place 17 months after the stabbing. Pending her trial, she was released on bail and lived with her father. She took counselling for alcohol and drug abuse at Tillicum Haus Native Friendship Centre in Nanaimo, and completed Grade 10 and was about to start Grade 11. After the stabbing, the appellant was diagnosed as suffering from a hyperthyroid condition, which was said to produce an exaggerated reaction to any emotional situation. The appellant underwent radiation

therapy to destroy some of her thyroid glands, and at the time of sentencing she was taking thyroid supplements which regulated her condition. During the time she was on bail, the appellant pled guilty to having breached her bail on one occasion by consuming alcohol.

11 At the sentencing hearing, when asked if she had anything to say, the appellant stated that she was sorry about what happened, that she did not intend to do it, and that she was sorry to Beaver's family.

12 In his submissions on sentence at trial, the appellant's counsel did not raise the fact that the appellant was an aboriginal offender but, when asked by the trial judge whether in fact the appellant was an aboriginal person, replied that she was Cree. When asked by the trial judge whether the town of McLennan, Alberta, where the appellant grew up, was an aboriginal community, defence counsel responded: "it's just a regular community". No other submissions were made at the sentencing hearing on the issue of the appellant's aboriginal heritage. Defence counsel requested a suspended sentence or a conditional sentence of imprisonment. Crown counsel argued in favour of a sentence of between three and five years' imprisonment.

13 The appellant was sentenced to three years' imprisonment and to a ten-year weapons prohibition. Her appeal of the sentence to the British Columbia Court of Appeal was dismissed.

II. Relevant Statutory Provisions

14 It may be helpful at this stage to set out ss. 718, 718.1 and 718.2 of the *Criminal Code* as well as s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21.

Criminal Code

Purpose and Principles of Sentencing

718. [Purpose] The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

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

718.2 [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or

> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization
>
> shall be deemed to be aggravating circumstances;
>
> (*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Interpretation Act

> **12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

III. Judicial History

A. *Supreme Court of British Columbia*

15 In his reasons, the trial judge took into account several mitigating factors. The appellant was only 20 years old at the time of sentence, and apart from an impaired driving conviction, she had no criminal record. She had two children and was expecting a third although he considered her pregnancy a neutral factor. Her family was supportive and she was attending alcohol abuse counselling and upgrading her education. The appellant was provoked by the deceased's insulting behaviour and remarks. At the time of the offence, the appellant had a hyperthyroid condition which caused her to overreact

to emotional situations. The appellant showed some signs of remorse and entered a plea of guilty.

16 On the other hand, the trial judge identified several aggravating circumstances. The appellant stabbed the deceased twice, the second time after he had fled in an attempt to escape. Also, the offence was of particular gravity. From the remarks she made before and after the stabbing it was very clear that the appellant intended to harm the deceased. Further, the appellant was not afraid of the deceased; indeed, she was the aggressor.

17 The trial judge considered that specific deterrence was not required in the circumstances of this case. However, in his opinion the principles of denunciation and general deterrence must play a role. He was of the view that the sentence should also take into account the need to rehabilitate the appellant and give her some insight both into her conduct and the effect of her propensity to drink. The trial judge decided that in this case it was not appropriate to suspend the passing of sentence or to impose a conditional sentence.

18 The trial judge noted that both the appellant and the deceased were aboriginal, but stated that they were living in an urban area off-reserve and not "within the aboriginal community as such". He found that there were not any special circumstances arising from their aboriginal status that he should take into consideration. He stated that the offence was a very serious one, for which the appropriate sentence was three years' imprisonment with a ten-year weapons prohibition.

B. *Court of Appeal for British Columbia* (1997), 98 B.C.A.C. 120

19 The appellant appealed her sentence of three years' imprisonment, but not the ten-year weapons prohibition. She appealed on four grounds, only one of which is directly relevant, namely whether the trial judge failed to give appropriate consideration to the appellant's circumstances as an aboriginal offender. The appellant also sought to adduce fresh evidence at her appeal regarding her efforts since the killing to maintain links with her aboriginal heritage. The fresh evidence showed that the appellant had applied to become a full status Cree, and that she had obtained that status for her daughter Tanita. She had also maintained contact with Beaver's mother, who is a status Cree, and who was in turn assisting the appellant with the status applications.

20 The Court of Appeal unanimously concluded that the trial judge had erred in concluding that s. 718.2(*e*) did not apply because the appellant was not living on a reserve. However, Esson J.A. (Prowse J.A. concurring) found no error in the trial judge's conclusion that, in this case, there was no basis for giving special consideration to the appellant's aboriginal background. Esson J.A. noted that the appellant's actions involved deliberation, motivation, and "an element of viciousness and persistence in the attack", and that the killing constituted a "near murder" (p. 138). He found that, on the facts presented in this case, it could not be said that the sentence, if a fit one for a non-aboriginal person, would not also be fit for an aboriginal person. Esson J.A. concluded therefore that the trial judge did not err in not giving effect to the principle set out in s. 718.2(*e*) of the *Criminal Code* and dismissed the appeal. Although it is not entirely clear from the reasons of Esson J.A., he appears also to have dismissed the appellant's application to adduce fresh evidence regarding her efforts to maintain links with her aboriginal heritage.

21 Rowles J.A. (dissenting) reviewed many reports and parliamentary debates and determined that the mischief that s. 718.2(*e*) was designed to remedy was the excessive use of incarceration generally, and the disproportionately high number of aboriginal people who are imprisoned, in particular. She stated that s. 718.2(*e*) invites recognition and amelioration of the impact which systemic discrimination in the criminal justice system has upon aboriginal people. She referred to the importance of acknowledging and implementing the different conceptions of criminal justice and of appropriate criminal sanctions held by many aboriginal peoples, including, in particular, the conception of criminal justice as involving a strong restorative element.

22 In this case, Rowles J.A. agreed that the crime committed by the appellant was serious. The circumstances surrounding the offence were tragic for everyone, including the appellant's children. Yet, the circumstances of the offence included provocation, superimposed on an undiagnosed medical problem affecting the appellant's emotional stability. The offender was young and emotionally immature. She had an alcohol problem but no history of other criminal conduct or acts of violence. The success the appellant enjoyed while on bail awaiting trial showed that she was likely to be a good candidate for further rehabilitation. Rowles J.A. also referred favourably to the fresh evidence which showed that the appellant was taking steps to maintain links with her aboriginal heritage.

23 Rowles J.A. concluded that a sentence of three years' imprisonment was excessive. The principles of general deterrence and denunciation had to be reflected in the sentence, but the sentence could have been designed to advance the appellant's rehabilitation through a period of supervised probation. Rowles J.A. would have allowed the appeal and reduced the sentence to two years less a day to be followed by a three-year period of probation.

IV. Issue

24 The issue in this appeal is the proper interpretation and application to be given to s. 718.2(*e*) of the *Criminal Code*. The provision reads as follows:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The question to be resolved is whether the majority of the British Columbia Court of Appeal erred in finding that, in the circumstances of this case, the trial judge correctly applied s. 718.2(*e*) in imposing a sentence of three years' imprisonment. To answer this question, it will be necessary to determine the legislative purpose of s. 718.2(*e*), and, in particular, the words "with particular attention to the circumstances of aboriginal offenders". The appeal requires this Court to begin the process of articulating the rules and principles that should govern the practical application of s. 718.2(*e*) of the *Criminal Code* by a trial judge.

V. Analysis

A. *Introduction*

25 As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and

ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at p. 875; E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 131.

26 Also of importance in interpreting federal legislation is s. 12 of the federal *Interpretation Act*, which provides:

> **12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

27 Section 718.2(*e*) has already received judicial consideration in several provincial appellate court decisions: see, e.g., *R. v. McDonald* (1997), 113 C.C.C. (3d) 418 (Sask. C.A.); *R. v. J. (C.)* (1997), 119 C.C.C. (3d) 444 (Nfld. C.A.); *R. v. Wells* (1998), 125 C.C.C. (3d) 129 (Alta. C.A.); *R. v. Hunter* (1998), 125 C.C.C. (3d) 121 (Alta. C.A.); *R. v. Young* (1998), 131 Man. R. (2d) 61 (C.A.). This is the first occasion on which this Court has had the opportunity to construe and apply the provision.

28 With this introduction, we now wish to discuss the wording of s. 718.2(*e*) and the scheme of Part XXIII of the *Criminal Code*, as well as the legislative history and the context behind s. 718.2(*e*), with the aim of determining and describing the circumstances of aboriginal offenders. This discussion is followed by a framework for

the sentencing judge to use in sentencing an aboriginal offender. The reasons then deal with the specific facts and sentence in this case.

B. *The Wording of Section 718.2(e) and the Scheme of Part XXIII*

29 The interpretation of s. 718.2(*e*) must begin by considering its words in context. Although this appeal is ultimately concerned only with the meaning of the phrase "with particular attention to the circumstances of aboriginal offenders", that phrase takes on meaning from the other words of s. 718.2(*e*), from the purpose and principles of sentencing set out in ss. 718-718.2, and from the overall scheme of Part XXIII.

30 The respondent observed that some caution is in order in construing s. 718.2(*e*), insofar as it would be inappropriate to prejudge the many other important issues which may be raised by the reforms but which are not specifically at issue here. However, it would be equally inappropriate to construe s. 718.2(*e*) in a vacuum, without considering the surrounding text which gives the provision its depth of meaning. To the extent that the broader scheme of Part XXIII informs the proper construction to be given to s. 718.2(*e*), it will be necessary to draw at least some general conclusions about the new sentencing regime.

31 A core issue in this appeal is whether s. 718.2(*e*) should be understood as being remedial in nature, or whether s. 718.2(*e*), along with the other provisions of ss. 718 through 718.2, are simply a codification of existing sentencing principles. The respondent, although acknowledging that s. 718.2(*e*) was likely designed to encourage sentencing judges to experiment to some degree with alternatives to incarceration and to be sensitive to principles of restorative justice, at the same time favours the view that

ss. 718-718.2 are largely a restatement of existing law. Alternatively, the appellant argues strongly that s. 718.2(*e*)'s specific reference to aboriginal offenders can have no purpose unless it effects a change in the law. The appellant advances the view that s. 718.2(*e*) is in fact an "affirmative action" provision justified under s. 15(2) of the *Canadian Charter of Rights and Freedoms*.

32 Section 12 of the *Interpretation Act* deems the purpose of the enactment of the new Part XXIII of the *Criminal Code* to be remedial in nature, and requires that all of the provisions of Part XXIII, including s. 718.2(*e*), be given a fair, large and liberal construction and interpretation in order to attain that remedial objective. However, the existence of s. 12 does not answer the essential question of what the remedial purpose of s. 718.2(*e*) is. One view is that the remedial purpose of ss. 718, 718.1 and 718.2 taken together was precisely to codify the purpose and existing principles of sentencing to provide more systematic guidance to sentencing judges in individual cases. Codification, under this view, is remedial in and of itself because it simplifies and adds structure to trial level sentencing decisions: see, e.g., *McDonald*, *supra*, at pp. 460-64, *per* Sherstobitoff J.A.

33 In our view, s. 718.2(*e*) is <u>more</u> than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. It should be said that the words of s. 718.2(*e*) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in

imprisonment for aboriginal offenders as often as for non-aboriginal offenders. What s. 718.2(*e*) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. In our view, the scheme of Part XXIII of the *Criminal Code*, the context underlying the enactment of s. 718.2(*e*), and the legislative history of the provision all support an interpretation of s. 718.2(*e*) as having this important remedial purpose.

34 In his submissions before this Court, counsel for the appellant expressed the fear that s. 718.2(*e*) might come to be interpreted and applied in a manner which would have no real effect upon the day-to-day practice of sentencing aboriginal offenders in Canada. In light of the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system, we do not consider this fear to be unreasonable. In our view, s. 718.2(*e*) creates a judicial duty to give its remedial purpose real force.

35 Let us consider now the wording of s. 718.2(*e*) and its place within the overall scheme of Part XXIII of the *Criminal Code*.

36 Section 718.2(*e*) directs a court, in imposing a sentence, to consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, "with particular attention to the circumstances of aboriginal offenders". The broad role of the provision is clear. As a general principle, s. 718.2(*e*) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.

37 The next question is the meaning to be attributed to the words "with particular attention to the circumstances of aboriginal offenders". The phrase cannot be

an instruction for judges to pay "more" attention when sentencing aboriginal offenders. It would be unreasonable to assume that Parliament intended sentencing judges to prefer certain categories of offenders over others. Neither can the phrase be merely an instruction to a sentencing judge to consider the circumstances of aboriginal offenders just as she or he would consider the circumstances of any other offender. There would be no point in adding a special reference to aboriginal offenders if this was the case. Rather, the logical meaning to be derived from the special reference to the circumstances of aboriginal offenders, juxtaposed as it is against a general direction to consider "the circumstances" for all offenders, is that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(*e*), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.

38 The wording of s. 718.2(*e*) on its face, then, requires both consideration of alternatives to the use of imprisonment as a penal sanction generally, which amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders. The respondent argued before this Court that this statutory wording does not truly effect a change in the law, as some courts have in the past taken the unique circumstances of an aboriginal offender into account in determining sentence. The respondent cited some of the recent jurisprudence dealing with sentencing circles, as well as the decision of the Court of Appeal for Ontario in *R. v. Fireman* (1971), 4 C.C.C. (2d) 82, in support of the view that s. 718.2(*e*) should be seen simply as a codification of the state of the case law regarding the sentencing of aboriginal offenders before Part XXIII came into force in 1996. In a

similar vein, it was observed by Sherstobitoff J.A. in *McDonald*, *supra*, at pp. 463-64, that it has always been a principle of sentencing that courts should consider all available sanctions other than imprisonment that are reasonable in the circumstances. Thus the general principle of restraint expressed in s. 718.2(*e*) with respect to all offenders might equally be seen as a codification of existing law.

39 With respect for the contrary view, we do not interpret s. 718.2(*e*) as expressing only a restatement of existing law, either with respect to the general principle of restraint in the use of prison or with respect to the specific direction regarding aboriginal offenders. One cannot interpret the words of s. 718.2(*e*) simply by looking to past cases to see if they contain similar statements of principle. The enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law. Each of the provisions of Part XXIII, including s. 718.2(*e*), must be interpreted in its total context, taking into account its surrounding provisions.

40 It is true that there is ample jurisprudence supporting the principle that prison should be used as a sanction of last resort. It is equally true, though, that the sentencing amendments which came into force in 1996 as the new Part XXIII have changed the range of available penal sanctions in a significant way. The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration. The general principle expressed in s. 718.2(*e*) must be construed and applied in this light.

41 Further support for the view that s. 718.2(*e*)'s expression of the principle of restraint in sentencing is remedial, rather than simply a codification, is provided by the articulation of the purpose of sentencing in s. 718.

42 Traditionally, Canadian sentencing jurisprudence has focussed primarily upon achieving the aims of separation, specific and general deterrence, denunciation, and rehabilitation. Sentencing, like the criminal trial process itself, has often been understood as a conflict between the interests of the state (as expressed through the aims of separation, deterrence, and denunciation) and the interests of the individual offender (as expressed through the aim of rehabilitation). Indeed, rehabilitation itself is a relative late-comer to the sentencing analysis, which formerly favoured the interests of the state almost entirely.

43 Section 718 now sets out the purpose of sentencing in the following terms:

> **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (*a*) to denounce unlawful conduct;
>
> (*b*) to deter the offender and other persons from committing offences;
>
> (*c*) to separate offenders from society, where necessary;
>
> (*d*) to assist in rehabilitating offenders;
>
> (*e*) to provide reparations for harm done to victims or to the community; and
>
> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. [Emphasis added.]

Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (*a*) through (*d*). What are new, though, are paras. (*e*) and (*f*), which along with para. (*d*) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras. (*d*), (*e*), and (*f*) is briefly discussed below, but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process: D. Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996), 60 *Sask. L. Rev.* 153, at p. 165. Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament's choice to include (*e*) and (*f*) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s. 718.2(*e*) will necessarily be informed by this re-orientation.

44 Just as the context of Part XXIII supports the view that s. 718.2(*e*) has a remedial purpose for all offenders, the scheme of Part XXIII also supports the view that s. 718.2(*e*) has a particular remedial role for aboriginal peoples. The respondent is correct to point out that there is jurisprudence which pre-dates the enactment of s. 718.2(*e*) in which aboriginal offenders have been sentenced differently in light of their unique circumstances. However, the existence of such jurisprudence is not, on its own, especially probative of the issue of whether s. 718.2(*e*) has a remedial role. There is also sentencing jurisprudence which holds, for example, that a court must consider the unique circumstances of offenders who are battered spouses, or who are mentally disabled. Although the validity of the principles expressed in this latter jurisprudence is

unchallenged by the 1996 sentencing reforms, one does not find reference to these principles in Part XXIII. If Part XXIII were indeed a codification of principles regarding the appropriate method of sentencing different categories of offenders, one would expect to find such references. The wording of s. 718.2(*e*), viewed in light of the absence of similar stipulations in the remainder of Part XXIII, reveals that Parliament has chosen to single out aboriginal offenders for particular attention.

C. *Legislative History*

45 Support for the foregoing understanding of s. 718.2(*e*) as having the remedial purpose of restricting the use of prison for all offenders, and as having a particular remedial role with respect to aboriginal peoples, is provided by statements made by the Minister of Justice and others at the time that what was then Bill C-41 was before Parliament. Although these statements are clearly not decisive as to the meaning and purpose of s. 718.2(*e*), they are nonetheless helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision in the context of Part XXIII as a whole: *Rizzo & Rizzo Shoes*, *supra*, at paras. 31 and 35.

46 For instance, in introducing second reading of Bill C-41 on September 20, 1994 (*House of Commons Debates*, vol. IV, 1st Sess., 35th Parl., at pp. 5871 and 5873), Minister of Justice Allan Rock made the following statements regarding the remedial purpose of the bill:

> Through this bill, Parliament provides the courts with clear guidelines
>
> . . . .
>
> . . .

> The bill also defines various sentencing principles, for instance that the sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility. When appropriate, alternatives must be contemplated, especially in the case of Native offenders.
>
> . . .
>
> A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.
>
> ...
>
> Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. . . . [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.
>
> It is not simply by being more harsh that we will achieve more effective criminal justice. We must use our scarce resources wisely. [Emphasis added.]

The Minister's statements were echoed by other Members of Parliament and by Senators during the debate over the bill: see, e.g., *House of Commons Debates*, vol. V, 1st Sess., 35th Parl., September 22, 1994, at p. 6028 (Mr. Morris Bodnar); *Debates of the Senate*, vol. 135, No. 99, 1st Sess., 35th Parl., June 21, 1995, at p. 1871 (Hon. Duncan J. Jessiman).

47 In his subsequent testimony before the House of Commons Standing Committee on Justice and Legal Affairs (*Minutes of Proceedings and Evidence*, Issue No. 62, November 17, 1994, at p. 62:15), the Minister of Justice addressed the specific role the government hoped would be played by s. 718.2(*e*):

> [T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of

> Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.
>
> What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of the public -- alternatives to jail -- and not simply resort to that easy answer in every case. [Emphasis added.]

48 It can be seen, therefore, that the government position when Bill C-41 was under consideration was that the new Part XXIII was to be remedial in nature. The proposed enactment was directed, in particular, at reducing the use of prison as a sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders.

D. *The Context of the Enactment of Section 718.2(e)*

49 Further guidance as to the scope and content of Parliament's remedial purpose in enacting s. 718.2(*e*) may be derived from the social context surrounding the enactment of the provision. On this point, it is worth noting that, although there is quite a wide divergence between the positions of the appellant and the respondent as to how s. 718.2(*e*) should be applied in practice, there is general agreement between them, and indeed between the parties and all interveners, regarding the mischief in response to which s. 718.2(*e*) was enacted.

50 The parties and interveners agree that the purpose of s. 718.2(*e*) is to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples. They also agree that one of the roles of s. 718.2(*e*), and of various other provisions in Part XXIII,

is to encourage sentencing judges to apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations. As the respondent states in its factum before this Court, s. 718.2(*e*) "provides the necessary flexibility and authority for sentencing judges to resort to the restorative model of justice in sentencing aboriginal offenders and to reduce the imposition of jail sentences where to do so would not sacrifice the traditional goals of sentencing".

51 The fact that the parties and interveners are in general agreement among themselves regarding the purpose of s. 718.2(*e*) is not determinative of the issue as a matter of statutory construction. However, as we have suggested, on the above points of agreement the parties and interveners are correct. A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada's aboriginal peoples, provides additional insight into the purpose and proper application of this new provision.

(1) The Problem of Overincarceration in Canada

52 Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison. Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada's rate of approximately 130 inmates per 100,000 population places it second or third highest: see Federal/Provincial/Territorial Ministers Responsible for Justice, *Corrections Population Growth: First Report on Progress* (1997), Annex B, at p. 1; Bulletin of U.S. Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 1998* (March 1999); The

Sentencing Project, *Americans Behind Bars: U.S. and International Use of Incarceration, 1995* (June 1997), at p. 1. Moreover, the rate at which Canadian courts have been imprisoning offenders has risen sharply in recent years, although there has been a slight decline of late: see Statistics Canada, "Prison population and costs" in *Infomat: A Weekly Review* (February 27, 1998), at p. 5. This record of incarceration rates obviously cannot instil a sense of pride.

53 The systematic use of the sanction of imprisonment in Canada may be dated to the building of the Kingston Penitentiary in 1835. The penitentiary sentence was itself originally conceived as an alternative to the harsher penalties of death, flogging, or imprisonment in a local jail. Sentencing reformers advocated the use of penitentiary imprisonment as having effects which were not only deterrent, denunciatory, and preventive, but also rehabilitative, with long hours spent in contemplation and hard work contributing to the betterment of the offender: see Law Reform Commission of Canada, Working Paper 11, *Imprisonment and Release* (1975), at p. 5.

54 Notwithstanding its idealistic origins, imprisonment quickly came to be condemned as harsh and ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals. The history of Canadian commentary regarding the use and effectiveness of imprisonment as a sanction was recently well summarized by Vancise J.A., dissenting in the Saskatchewan Court of Appeal in *McDonald, supra*, at pp. 429-30:

> A number of inquiries and commissions have been held in this country to examine, among other things, the effectiveness of the use of incarceration in sentencing. There has been at least one commission or inquiry into the use of imprisonment in each decade of this century since 1914. . . .
>
> . . . An examination of the recommendations of these reports reveals one constant theme: imprisonment should be avoided if possible and should be

> reserved for the most serious offences, particularly those involving violence. They all recommend restraint in the use of incarceration and recognize that incarceration has failed to reduce the crime rate and should be used with caution and moderation. Imprisonment has failed to satisfy a basic function of the Canadian judicial system which was described in the Report of the Canadian Committee on Corrections entitled: "Toward Unity: Criminal Justice and Corrections" (1969) as "to protect society from crime in a manner commanding public support while avoiding needless injury to the offender". [Emphasis added; footnote omitted.]

55 In a similar vein, in 1987, the Canadian Sentencing Commission wrote in its report entitled *Sentencing Reform: A Canadian Approach*, at pp. xxiii-xxiv:

> Canada does not imprison as high a portion of its population as does the United States. However, we do imprison more people than most other western democracies. The *Criminal Code* displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment. A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction. [Emphasis added.]

56 With equal force, in *Taking Responsibility* (1988), at p. 75, the Standing Committee on Justice and Solicitor General stated:

> It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution, as the lengths of prison sentences handed down vary for the same type of crime.
>
> Since imprisonment generally offers the public protection from criminal behaviour for only a limited time, rehabilitation of the offender is of great importance. However, prisons have not generally been effective in reforming their inmates, as the high incidence of recidivism among prison populations shows.

> The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society. Moreover, modern technology may now permit the monitoring in the community of some offenders who previously might have been incarcerated for incapacitation or denunciation purposes. Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments. [Emphasis added; footnotes omitted.]

The Committee proposed that alternative forms of sentencing should be considered for those offenders who did not endanger the safety of others. It was put in this way, at pp. 50 and 54:

> [O]ne of the primary foci of such alternatives must be on techniques which contribute to offenders accepting responsibility for their criminal conduct and, through their subsequent behaviour, demonstrating efforts to restore the victim to the position he or she was in prior to the offence and/or providing a meaningful apology.
>
> . . .
>
> [E]xcept where to do so would place the community at undue risk, the "correction" of the offender should take place in the community and imprisonment should be used with restraint.

57 Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(*e*) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.

(2) The Overrepresentation of Aboriginal Canadians in Penal Institutions

58 If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people were about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population. In Manitoba and Saskatchewan, aboriginal people constituted something between 6 and 7 percent of the population, yet in Manitoba they represented 46 percent of the provincial admissions and in Saskatchewan 60 percent: see M. Jackson, "Locking Up Natives in Canada" (1988-89), 23 *U.B.C. L. Rev.* 215 (article originally prepared as a report of the Canadian Bar Association Committee on Imprisonment and Release in June 1988), at pp. 215-16. The situation has not improved in recent years. By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates: Solicitor General of Canada, Consolidated Report, *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act -- Five Years Later* (1998), at pp. 142-55. The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia: Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada, 1995-96* (1997), at p. 30.

59 This serious problem of aboriginal overrepresentation in Canadian prisons is well documented. Like the general problem of overincarceration itself, the excessive incarceration of aboriginal peoples has received the attention of a large number of commissions and inquiries: see, by way of example only, Canadian Corrections

Association, *Indians and the Law* (1967); Law Reform Commission of Canada, *The Native Offender and the Law* (1974), prepared by D. A. Schmeiser; Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (1996).

60 In "Locking Up Natives in Canada", *supra*, at pp. 215-16, Jackson provided a disturbing account of the enormity of the disproportion:

> Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Native people come into contact with Canada's correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject to the damaging impacts of the criminal justice system's heaviest sanctions. Government figures -- which reflect different definitions of "native" and which probably underestimate the number of prisoners who consider themselves native -- show that almost 10% of the federal penitentiary population is native (including 13% of the federal women's prisoner population) compared to about 2% of the population nationally. . . . Even more disturbing, the disproportionality is growing. In 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate in native communities.
>
> Bad as this situation is within the federal system, it is even worse in a number of the western provincial correctional systems. . . . A study reviewing admissions to Saskatchewan's correctional system in 1976-77 appropriately titled "Locking Up Indians in Saskatchewan", contains findings that should shock the conscience of everyone in Canada. In comparison to male non-natives, male treaty Indians were 25 times more likely to be admitted to a provincial correctional centre while non-status Indians or Métis were 8 times more likely to be admitted. If only the population over fifteen years of age is considered (the population eligible to be admitted to provincial correctional centres in Saskatchewan), then male treaty Indians were 37 times more likely to be admitted, while male non-status Indians were 12 times more likely to be admitted. For women the figures are even more extreme: a treaty Indian woman was 131 times more likely to be admitted and a non-status or Métis woman 28 times more likely than a non-native.

> The Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25 (that age range being the one with the highest risk of imprisonment). The corresponding figure for non-status or Métis was 34%. For a non-native Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents. [Emphasis added; footnotes omitted.]

61 Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".

62 Statements regarding the extent and severity of this problem are disturbingly common. In *Bridging the Cultural Divide*, *supra*, at p. 309, the Royal Commission on Aboriginal Peoples listed as its first "Major Findings and Conclusions" the following striking yet representative statement:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada -- First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural -- in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

63 To the same effect, the Aboriginal Justice Inquiry of Manitoba described the justice system in Manitoba as having failed aboriginal people on a "massive scale",

referring particularly to the substantially different cultural values and experiences of aboriginal people: *The Justice System and Aboriginal People*, *supra*, at pp. 1 and 86.

64 These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(*e*), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

65 It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed

which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

E. *A Framework of Analysis for the Sentencing Judge*

(1) What Are the "Circumstances of Aboriginal Offenders"?

66 How are sentencing judges to play their remedial role? The words of s. 718.2(*e*) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

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

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

(a) *Systemic and Background Factors*

67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education,

substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."

68 It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

69 In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique

background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

(b) *Appropriate Sentencing Procedures and Sanctions*

70 Closely related to the background and systemic factors which have contributed to an excessive aboriginal incarceration rate are the different conceptions of appropriate sentencing procedures and sanctions held by aboriginal people. A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. The aims of restorative justice as now expressed in paras. (*d*), (*e*), and (*f*) of s. 718 of the *Criminal Code* apply to all offenders, and not only aboriginal offenders. However, most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(*e*).

71 The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context. In general terms, restorative justice may be described as an approach to remedying crime in which it is

understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime. See generally, e.g., *Bridging the Cultural Divide*, *supra*, at pp. 12-25; *The Justice System and Aboriginal People*, *supra*, at pp. 17-46; Kwochka, *supra*; M. Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", [1992] *U.B.C. L. Rev. (Special Edition)* 147.

72 The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focussed on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence. See Kwochka, *supra*, who writes at p. 165:

> At this point there is some divergence among proponents of restorative justice. Some seek to abandon the punishment paradigm by focusing on the differing goals of a restorative system. Others, while cognizant of the differing goals, argue for a restorative system in terms of a punishment model. They argue that non-custodial sentences can have an equivalent punishment value when produced and administered by a restorative system and that the healing process can be more intense than incarceration. Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.

73 In describing in general terms some of the basic tenets of traditional aboriginal sentencing approaches, we do not wish to imply that all aboriginal offenders, victims, and communities share an identical understanding of appropriate sentences for particular offences and offenders. Aboriginal communities stretch from coast to coast and from the border with the United States to the far north. Their customs and traditions and their concept of sentencing vary widely. What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.

74 It is unnecessary to engage here in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects, which are available especially to aboriginal offenders. What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions. Sentencing judges should not conclude that the absence of alternatives specific to an aboriginal community eliminates their ability to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved. Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.

(2) The Search for a Fit Sentence

75 The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community. Nothing in Part XXIII of the *Criminal Code* alters this fundamental duty as a general matter. However, the effect of s. 718.2(*e*), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(*e*) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

76 In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at p. 567, Lamer C.J. restated the long-standing principle of Canadian sentencing law that the appropriateness of a sentence will depend on the particular circumstances of the offence, the offender, and the community in which the offence took place. Disparity of sentences for similar crimes is a natural consequence of this individualized focus. As he stated:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

77 The comments of Lamer C.J. are particularly apt in the context of aboriginal offenders. As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors. Further, an aboriginal offender's community will frequently

understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight. Through its reform of the purpose of sentencing in s. 718, and through its specific directive to judges who sentence aboriginal offenders, Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.

78 In describing the effect of s. 718.2(*e*) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

79 Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

80 As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For <u>this</u> offence, committed by <u>this</u>

offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

81 The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(*e*), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and

purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

(3) The Duty of the Sentencing Judge

82 The foregoing discussion of guidelines for the sentencing judge has spoken of that which a judge must do when sentencing an aboriginal offender. This element of duty is a critical component of s. 718.2(*e*). The provision expressly provides that a court that imposes a sentence should consider all available sanctions other than imprisonment that are reasonable in the circumstances, and should pay particular attention to the circumstances of aboriginal offenders. There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.

83 How then is the consideration of s. 718.2(*e*) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

84 However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.

85 Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(*e*) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. In the same vein, it should be noted that, although s. 718.2(*e*) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.

(4) The Issue of "Reverse Discrimination"

86 Something must also be said as to the manner in which s. 718.2(*e*) should not be interpreted. The appellant and the respondent diverged significantly in their interpretation of the appropriate role to be played by s. 718.2(*e*). While the respondent saw the provision largely as a restatement of existing sentencing principles, the appellant

advanced the position that s. 718.2(*e*) functions as an affirmative action provision justified under s. 15(2) of the *Charter*. The respondent cautioned that, in his view, the appellant's understanding of the provision would result in "reverse discrimination" so as to favour aboriginal offenders over other offenders.

87 There is no constitutional challenge to s. 718.2(*e*) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the *Charter*. We would note, though, that the aim of s. 718.2(*e*) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(*e*) is to treat aboriginal offenders fairly by taking into account their difference.

88 But s. 718.2(*e*) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. To the extent that the appellant's submission on affirmative action means that s. 718.2(*e*) requires an automatic reduction in sentence for an aboriginal offender, we reject that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as a part of the task of weighing the multitude of factors which must be taken into account in striving to impose a fit sentence. It cannot be forgotten that s. 718.2(*e*) must be considered in the context of that section read as a whole and in the context of s. 718, s. 718.1, and the overall scheme of Part XXIII. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon <u>all</u> the factors which must be taken into account in each individual case. The weight to be

given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.

(5) Who Comes Within the Purview of Section 718.2(*e*)?

89 The question of whether s. 718.2(*e*) applies to all aboriginal persons, or only to certain classes thereof, is raised by this appeal. The following passage of the reasons of the judge at trial appears to reflect some ambiguity as to the applicability of the provision to aboriginal people who do not live in rural areas or on a reserve:

> The factor that is mentioned in the *Criminal Code* is that particular attention to the circumstances of aboriginal offenders should be considered. In this case both the deceased and the accused were aboriginals, but they are not living within the aboriginal community as such. They are living off a reserve and the offence occurred in an urban setting. They [*sic*] do not appear to have been any special circumstances because of their aboriginal status and so I am not giving any special consideration to their background in passing this sentence.

It could be understood from that passage that, in this case, there were no special circumstances to warrant the application of s. 718.2(*e*), and the fact that the context of the offence was not in a rural setting or on a reserve was only one of those missing circumstances. However, this passage was interpreted by the majority of the Court of Appeal as implying that, "as a matter of principle, s. 718.2(*e*) can have no application to aboriginals 'not living within the aboriginal community'" (p. 137). This understanding of the provision was unanimously rejected by the members of the Court

of Appeal. With respect to the trial judge, who was given little assistance from counsel on this issue, we agree with the Court of Appeal that such a restrictive interpretation of the provision would be inappropriate.

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

91 Section 718.2(*e*) applies to all aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area. Indeed it has been observed that many aboriginals living in urban areas are closely attached to their culture. See the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (1996), at p. 521:

> Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.

And at p. 525:

> Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable.... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

92 Section 718.2(*e*) requires the sentencing judge to explore reasonable alternatives to incarceration in the case of all aboriginal offenders. Obviously, if an aboriginal community has a program or tradition of alternative sanctions, and support and supervision are available to the offender, it may be easier to find and impose an alternative sentence. However, even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative. For all purposes, the term "community" must be defined broadly so as to include any network of support and interaction that might be available in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

VI. Summary

93 Let us see if a general summary can be made of what has been discussed in these reasons.

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

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

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

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

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

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

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

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

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

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

9. Section 718.2(*e*) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.

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

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

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

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

VII. Was There an Error Made in This Case?

94 From the foregoing analysis it can be seen that the sentencing judge, who did not have the benefit of these reasons, fell into error. He may have erred in limiting the application of s. 718.2(*e*) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, and perhaps as a consequence of the first error, he does not appear to have considered the systemic or background factors which may have influenced the appellant to engage in criminal conduct, or the possibly distinct conception of sentencing held by the appellant, by the victim Beaver's family, and by their community. However, it should be emphasized that the sentencing judge did take active steps to obtain at least some information regarding the appellant's aboriginal heritage. In this regard he received little if any assistance from counsel on this issue although they too were acting without the benefit of these reasons.

95 The majority of the Court of Appeal, in dismissing the appellant's appeal, also does not appear to have considered many of the factors referred to above. However, the dissenting reasons of Rowles J.A. discuss the relevant factors in some detail. The majority also appears to have dismissed the appellant's application to adduce fresh evidence. The majority of the Court of Appeal may or may not have erred in ultimately deciding to dismiss the fresh evidence application. The correctness of its ultimate decision depends largely upon the admissibility of the fresh evidence and its relevance to the weighing of the various sentencing goals. However, assuming admissibility and relevance, it was certainly incumbent upon the majority to consider the evidence, and especially so given the failure of the trial judge to do so. Moreover, if the fresh evidence before the Court of Appeal was itself insufficient to inform the court adequately regarding the circumstances of the appellant as an aboriginal offender, the proper remedy

would have been to remit the matter to the trial judge with instructions to make all the reasonable inquiries necessary for the sentencing of this aboriginal offender.

96 In most cases, errors such as those in the courts below would be sufficient to justify sending the matter back for a new sentencing hearing. It is difficult for this Court to determine a fit sentence for the appellant according to the suggested guidelines set out herein on the basis of the very limited evidence before us regarding the appellant's aboriginal background. However, as both the trial judge and all members of the Court of Appeal acknowledged, the offence in question is a most serious one, properly described by Esson J.A. as a "near murder". Moreover, the offence involved domestic violence and a breach of the trust inherent in a spousal relationship. That aggravating factor must be taken into account in the sentencing of the aboriginal appellant as it would be for any offender. For that offence by this offender a sentence of three years' imprisonment was not unreasonable.

97 More importantly, the appellant was granted day parole on August 13, 1997, after she had served six months in the Burnaby Correctional Centre for Women. She was directed to reside with her father, to take alcohol and substance abuse counselling and to comply with the requirements of the Electronic Monitoring Program. On February 25, 1998, the appellant was granted full parole with the same conditions as the ones applicable to her original release on day parole.

98 In this case, the results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the appellant and society. In these circumstances, we do not consider that it would be in the interests of justice to order a new sentencing hearing in order to canvass the appellant's circumstances as an aboriginal offender.

99 In the result, the appeal is dismissed.

Appeal dismissed.

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Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.

Solicitor for the intervener the Attorney General for Alberta: Alberta Justice, Calgary.

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