

One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal

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Introduction

It is now ten years since the Supreme Court of Canada issued its unanimous decision in *Gladue*.¹ The decision interpreting the instruction in s. 718.2(e) of the *Criminal Code* for judges to consider reasonable alternatives to imprisonment “for all offenders, with particular attention to the circumstances of aboriginal offenders” inspired both intense hope and intense controversy. *Gladue* required a new approach to the sentencing of Aboriginal offenders. The hope was that this new approach, along with the 1996 sentencing reforms that introduced conditional sentences of imprisonment and restorative purposes of sentencing, would give judges the ability and responsibility to respond to what the Supreme Court characterized in *Gladue* as a crisis of Aboriginal overrepresentation in the criminal justice system.² The controversy was that *Gladue* would produce a race-based discount on sentencing that would produce excessively lenient punishment³ and perhaps place crime victims, including Aboriginal women,⁴ at risk.

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1. *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, 23 C.R. (5th) 197. I acted as counsel for the intervener Aboriginal Legal Services of Toronto in this case.

2. *Ibid.*, at para. 64.

3. Philip Stenning and Julian Roberts, “Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders” (2001), 64

By and large, the hopes for *Gladue* have not been realized.⁵ Aboriginal overrepresentation has continued to increase since the decision in *Gladue*, with Aboriginal adults now amounting to almost 1 in 4 of sentenced admissions to provincial custody and Aboriginal youth constituting almost 1 in 3 of admissions to sentenced custody even while the use of imprisonment for all offenders has generally declined.⁶ *Gladue*, s. 718.2(e) and the 1996 reforms were intended to decrease reliance on imprisonment for all offenders and in particular Aboriginal people. There has been some success with respect to the former goal, but not with respect to the latter goal.⁷

Most of the controversy over s. 718.2(e) also appears to have died down. After almost being omitted in the 2002 *Youth Criminal Justice Act*,⁸ the section has not been repealed despite recent amendments designed to make the criminal justice system more punitive.⁹ Gladue Courts and Caseworkers have been established in a few centers, notably and somewhat surprisingly Toronto, but the special efforts that are required to ensure that a judge receives full information about why an

Sask. L. Rev. 137. For a variety of responses to this article see Symposium (2002), 65 Sask. L. Rev. 1ff.

4. Elizabeth Adjin-Tettey, "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society and the Decolonialization of Aboriginal Peoples" (2007), 19 Can. J. Women and the Law 179.
5. For commentary suggesting that *Gladue* has failed to reduce Aboriginal overrepresentation see Toni Williams, "Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada" (2007), 55 Cleveland State L. Rev. 269 at p. 287.
6. Juristat Adult Correctional Services Statistics 2005-2006, Vol. 28(6). Aboriginal adults represented 24% of admissions to provincial and territorial custody; 20% of admissions to conditional sentences; 19% of admissions to remand and 18% of federal custodial sentences. *Ibid.*, at p. 6. Aboriginal youth constituted 31% of admissions to youth custody. See Juristat Youth Custody and Community Services in Canada 2005-2006, Vol 28(8).
7. See Avani Babooram, "The changing profile of adults in custody, 2006/2007", online: <<http://www.statcan.gc.ca/pub/85-002-x/2008010/article/10732-eng.htm#a4>>, who notes a 9% decline in adults admitted to sentenced custody since 2001 has been accompanied by a 4% increase in the incarceration of Aboriginal offenders.
8. S.C. 2002, c. 1.
9. Jonathan Rudin, "Aboriginal Overrepresentation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" in J. Cameron and J. Stribopoulos, eds., *The Charter and Criminal Justice: Twenty Five Years Later* (Toronto: LexisNexis, 2008), p. 709.

Aboriginal offender is before the courts and community sanctions that may be available for that offender are not present in many Canadian courts.¹⁰ Section 718.2(e) remains good law today, but its effectiveness can be questioned. In addition, *Gladue* has different meanings in different provinces and places.

The acceptance of *Gladue*, as well as its failure to reduce Aboriginal overrepresentation, begs the question of how *Gladue* is applied in courts throughout the country. Of course, it should not be assumed that the failure of *Gladue* to reduce overrepresentation is necessarily related to the way that the courts have applied the precedent. As the Supreme Court recognized, the causes of Aboriginal overrepresentation are deep and multi-faceted. Yet the court also noted that sentencing decisions made by judges do play a role and it is to this role that s. 718.2(e) is addressed.¹¹ This paper will outline how *Gladue* has been applied and interpreted in reported decisions in the courts of appeal in various provinces. Although much sentencing innovation may occur without appeals being taken, the courts of appeal for each province send important signals about the meaning of *Gladue*.

The first part of this article will briefly outline how the Supreme Court interpreted s. 718.2(e) in *Gladue* and in the subsequent case of *Wells*.¹² In particular, we will see that appellate courts have attended disproportionately to just a few paragraphs in these two Supreme Court judgments — paragraphs that discuss the relevance of *Gladue* in serious cases and compare the sentencing of Aboriginal and non-Aboriginal offenders. To some extent, this focus is unfortunate. Appellate courts have not spent as much time discussing the bulk of the court's decision in *Gladue* with respect to the overrepresentation of Aboriginal people in jail, reliance on

10. See Judge Brent Knazan, "Time for Justice: One Approach to *R. v. Gladue*", *supra*, p. 431 and Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs", *supra*, p. 447. For an early recognition that *Gladue* would require lawyers and judges to present much more information to courts see Judge Mary Ellen Turpel-Lafond, "Sentencing with a Restorative Paradigm: Procedural Implications of *R. v. Gladue*" (2000), 43 C.L.Q. 34.

11. *Gladue*, *supra*, footnote 1, at para. 65.

12. *Infra*, footnote 21.

imprisonment, and the role of restorative sentencing purposes aimed at rehabilitating the offender and recognizing the harm caused by the offence. They have sometimes neglected the emphasis that the Supreme Court placed on the need for a different methodology to be applied to the sentencing of Aboriginal offenders in all cases including serious ones, even if in some (but not all) of those serious cases, the resulting sentence might be similar to those applied to other offenders.

The second part of this paper will examine reported sentence appeals taken by the Crown from the sentencing judgments in which the trial judge has applied *Gladue*. Crown appeals from *Gladue*-inspired sentences send important signals about the limits of sentencing innovation and departures from normal tariffs that may be allowed. This section will also introduce the important theme of significant regional variation in the application of *Gladue*, as it will be shown that Crown appeals from *Gladue*-inspired sentences have been rare and unsuccessful in Ontario, but much more frequent and successful in British Columbia and especially in Saskatchewan.

The third part of this article will examine appeals by the accused alleging that the trial judge has erred in applying s. 718.2(e) and *Gladue*. The discussion in this section will be broken down into a discussion of early and subsequent cases. The accused was successful in many of the early cases because the trial judge did not have the advantage of the Supreme Court's decision in *Gladue*. Accused persons have generally been less successful in subsequent cases, with courts of appeal frequently noting the limitations faced by appellate courts when attempting to change a trial judge's sentence. The cases in which the accused's appeals of sentence have failed are also noteworthy because they often focus on the seriousness of the offence. Indeed, the appellate decisions in general tend to focus more on the seriousness of the offence than the circumstances of the offender, with some notable exceptions.

The fourth part of this article will examine decisions that deal with the scope of *Gladue*, and in particular whether it applies to non-sentencing proceedings such as bail, contempt and dangerous offender proceedings. It is appropriate that most courts have extended *Gladue* beyond the sentencing context,

given that much of the court's reasoning in *Gladue* concerned the treatment of Aboriginal people throughout the criminal process. The Ontario Court of Appeal has emerged as the leader among courts of appeal in extending the reach of *Gladue* and in being sensitive to the need to apply its principles to all detention decisions regarding Aboriginal offenders.

If *Gladue* remains an important step forward in recognizing the failures of the justice system with respect to Aboriginal people, its implementation at a national level represents two disappointing steps back: the failure to reduce Aboriginal overrepresentation and the focus on the seriousness of the offence. Indeed, some of the cases even demonstrate a third step back, namely an acceptance of a pessimistic and legally wrong idea that some repeat and serious offenders have placed themselves beyond the purview of *Gladue*.

Even if we have only taken two steps back, there is a danger that appellate courts will approve of superficial compliance with *Gladue*. This approach which might be termed "*Gladue* at 20,000 feet", will not tap the potential of the decision or reduce Aboriginal overrepresentation because it will not dig into the background of offenders or the resources that may be available in the community. In some provinces, there is a danger that courts of appeal might stand in the way of *Gladue* in depth and at ground level in the form of true sentencing innovations for Aboriginal offenders in serious cases.

1. *Gladue* and Wells

Gladue involved the sentencing of a 19-year-old Aboriginal woman who pled guilty to manslaughter in the stabbing of her spouse. She had been drinking and suspected that her husband, with whom she had a child, was having an affair with her sister. Her husband had insulted her by calling her fat and ugly and "not as good as the others". She was later diagnosed with a thyroid condition that produced an exaggerated reaction to an emotional situation, and she also sought drug and alcohol counseling from an Aboriginal friendship centre in Nanaimo. She was sentenced to three years' imprisonment. The trial judge concluded that the fact that both the accused and her husband were Aboriginal was not relevant because they were living off-

reserve in an urban area. A sentence appeal to the British Columbia Court of Appeal was dismissed. Rowles J.A. in dissent would have reduced the sentence to two years less a day given the appellant's youth and success while on bail.

The Supreme Court in a unanimous decision written by Justices Cory and Iacobucci found that the courts below had erred in their approach to s. 718.2(e). They stressed that the provision must be given full effect as remedial legislation designed to respond to overincarceration in general and Aboriginal overincarceration in particular:¹³

In our view, s. 718.2(e) is *more* than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. It should be said that the words of s. 718.2(e) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders. What s. 718.2(e) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. In our view, the scheme of Part XXIII of the *Criminal Code*, the context underlying the enactment of s. 718.2(e), and the legislative history of the provision all support an interpretation of s. 718.2(e) as having this important remedial purpose.

Section 718.2(e) requires judges to consider “the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts”, including “low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation”.¹⁴ In addition, judges should consider “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”.¹⁵

13. *Gladue*, *supra*, footnote 1, at para. 33.

14. *Ibid.*, at paras. 66-67.

15. *Ibid.*, at para. 66.

The court suggested that at the end of the day the sentence must be appropriate and fit in light of all the relevant circumstances while noting s. 718.2(e) should give judges “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.”¹⁶ In oft-cited passages, Cory and Iacobucci JJ. stated:¹⁷

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.

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.

These passages are ambiguous: they suggest that *Gladue* can be relevant to the length of the sentence, but also that the goals of deterrence, denunciation and separation and the sanction of imprisonment will play a more important role with respect to more serious and violent offences. This ambiguity with respect to serious offences was duplicated in the summary that the court provided of its holding:¹⁸

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

16. *Ibid.*, at para. 81.

17. *Ibid.*, at paras. 78-79.

18. *Ibid.*, at para. 93.

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.

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.

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.

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.

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.

These passages suggest that *Gladue* is not only relevant to the decision about whether the accused is incarcerated, but also to the length of the sentence. That said, the court also indicated that the more serious the offence and perhaps the more serious the characteristics of the offenders, the more likely the sentence will be the same as for non-Aboriginal offenders.

The court’s studied ambiguity with respect to serious offences was also not clarified by its treatment of Ms. Gladue’s case. The court noted that the near murder of the victim in a situation of domestic violence was an aggravating factor that “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”.¹⁹ The court did not pay particular

attention to the gender dynamics in the case including the higher rates of overrepresentation of Aboriginal women in jail, as well as high rates of victimization of Aboriginal women by domestic violence. It is fair to say that subsequent appellate cases have also not explored these themes. On the other hand, the court recognized that Ms. Gladue's supervised release (after six months' imprisonment) with substance abuse counselling was in "the interests of both the appellant and society" and should not be disturbed.²⁰

The issue of the application of *Gladue* in serious cases would not go away and returned to the court within a year. In *R. v. Wells*,²¹ an Aboriginal accused appealed a sentence of 20 months for sexually assaulting an unconscious victim. The court dismissed the accused's appeal and indicated that the trial judge had not erred in his application of s. 718.2(e) and the conditional sentence regime. Iacobucci J. however also elaborated that:²²

The generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender. In some cases, it may be that these circumstances include evidence of the community's decision to address criminal activity associated with social problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice, notwithstanding the serious nature of the offences in question.

This statement continued the trend of ambiguity with respect to the application of *Gladue* in serious cases. The court did not rule out *Gladue*-inspired sentences in serious cases, but dismissed Wells's appeal despite a favourable pre-sentence report that related his offence to alcohol abuse and indicated that he could receive treatment in the community. The task of reconciling the demands of *Gladue* with more punitive purposes of sentencing

19. *Ibid.* at para. 96.

20. *Ibid.* at para. 98. In the end, the court dismissed Gladue's sentence appeal.

21. *R. v. Wells*, [2000] 1 S.C.R. 207, 141 C.C.C. (3d) 368, 30 C.R. (5th) 254. I represented Aboriginal Legal Services of Toronto in its intervention in this case.

22. *Ibid.*, at para 50.

in serious cases was left to trial judges guided by their Courts of Appeal to resolve.

2. Crown Appeals from *Gladue*-Inspired Sentences

Crown appeals from *Gladue*-inspired sentences will often focus on the seriousness of the offence. If successful, they can serve to restrain sentencing innovations at the trial level. This could potentially frustrate the grass-roots work that is necessary to ensure that sentencing judges are provided with all the information they need for a *Gladue* sentence and for innovative forms of community sanctions.²³ As will be seen, only a few such appeals have been taken in Ontario and with minimal success for the Crown. In other provinces, especially Saskatchewan, there have been more Crown appeals and the Crown appeals have been more successful.

In *R. v. H. (D.A.)*,²⁴ a 24-year-old Aboriginal man with a minor criminal record was convicted of incest with his 14-year-old half sister who was in foster care in the offender's home. The offender had a long history of substance abuse stemming in part from the substance abuse of his parents; he had disclosed the offence, admitted responsibility and pleaded guilty. The Crown appealed from an 18-month conditional sentence followed by one year of probation. The conditions imposed included continuing in school full time, attending a sexual behaviours program, psychological counselling and abstaining from alcohol and other substances as well as contact with the complainant. The Ontario Court of Appeal allowed the Crown's appeal, but rejected its request for an application of the usual three to five years' imprisonment for such an offence. Instead, it increased the conditional sentence and period of probation and imposed more punitive conditions with respect to a tight curfew and 150 hours of community service. Although technically the Crown's appeal was allowed, the end result

23. See Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs", *supra*, p. 447 and Hon. Brent Knazan, "Time for Justice: One Approach to *R. v. Gladue*", *supra*, p. 431.

24. *R. v. H. (D.A.)*, [2003] O.J. No. 143 (QL), 171 C.C.C. (3d) 309, 10 C.R. (6th) 109 (C.A.).

remained a community sanction and not a penitentiary term as the Crown had requested.

Chief Justice McMurtry cited *Gladue* and s. 718.2(e) as a justification for a non-penitentiary sentence in *H. (D.A.)*. He noted that²⁵

the respondent's upbringing is simply one of the most horrendous that I have seen. He was subjected to terrible physical abuse at the hands of his own mother and extensive sexual abuse from other relatives. He was heavily addicted to alcohol, having begun to consume alcohol as an infant. Only recently has he been able to start to overcome some of the effects of this background by participating in counselling and various programmes and educational upgrading.

In this way, the Ontario Court of Appeal paid considerable attention to offender characteristics even in the context of a serious offence.

The above decision, combined with the relative rarity of Crown appeals from sentence, has led to no other reported Crown appeals from a *Gladue*-inspired sentence in Ontario. By contrast, in British Columbia and Saskatchewan there have been a number of successful Crown appeals from sentences in situations where *Gladue* applies. Regional variation is a constant theme where *Gladue* is concerned. Although regional variation is accepted with respect to sentencing tariffs — this explains why there is no appeal to the Supreme Court of Canada on pure questions of fitness of sentence — it is more troubling with respect to the application of legal standards such as those articulated in s. 718.2(e) and *Gladue*.

In *R. v. P. (M.T.)*,²⁶ the British Columbia Court of Appeal raised from 10 to 15 years the period of parole ineligibility of an offender convicted of the beating and second degree murder of an 81-year-old woman during an invasion of her home. Oppal J.A. concluded that s. 718.2(e) “does not mean that in all cases aboriginal offenders will be treated differently”.²⁷ The same Court of Appeal allowed a Crown appeal and raised a one-year sentence (plus one year of pre-trial custody) to four years in the manslaughter conviction of a Cree and Metis offender with 62 prior convictions and substance abuse and anger management

25. *Ibid.*, at para. 37.

26. *R. v. P. (M.T.)*, 2005 BCCA 926 (C.A.).

27. *Ibid.*, at para. 18.

issues. In contrast to the Ontario Court of Appeal decision in *H. (D.A.)*, the British Columbia Court of Appeal did not discuss the accused's background at any length in this case. Instead, Oppal J.A. for the court interpreted the Supreme Court's decision in *Wells* as having revisited s. 718.2(e) and holding "that where an offence is particularly violent and serious, the principles of denunciation and deterrence may take precedence so that an appropriate sentence may not differ between aboriginal and non-aboriginal offenders".²⁸ This approach seems in tension with the suggestion in *Wells* that a restorative approach could be appropriate even in some serious cases.

The success of Crown appeals from *Gladue*-inspired sentences in British Columbia has not been limited to the most serious cases, in which victims have died. In *R. v. Morris*,²⁹ a 40-year-old band chief without a substance abuse problem seriously assaulted his wife over a period of hours, and pointed a gun at and threatened to kill his wife's male companion. The Crown successfully appealed a suspended sentence with two years' probation. A talking circle in the community had recommended that the judge not imprison the offender, but the Aboriginal Women's Society had expressed reservations about the use of the sentencing circle because of the violence of the offence and the political power of the accused. Finch C.J.B.C. allowed the Crown's appeal and entered a sentence of one year of imprisonment. He stressed that the accused was not a victim of substance abuse or family breakdown and concluded:³⁰

the sentencing judge lost sight of the court's overriding duty to impose a sentence which, given the particular facts of the offence, the offender, the victim and the community, is fit in the circumstances. The fundamental principle of sentencing requires, for aboriginals and all others alike, that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender . . . The gravity of this offence and this offender's degree of responsibility put this case into the class of particularly violent and serious offences discussed in

28. *R. v. Mercier* (2004), 338 W.A.C. 299 at para. 12 (B.C.C.A.).

29. *R. v. Morris* (2004), 186 C.C.C. (3d) 549, 324 W.A.C. 235, [2004] 3 C.N.L.R. 295. But see *R. v. Charlie* (2008), 420 W.A.C. 134, 251 B.C.A.C. 134 (C.A.) denying a Crown appeal from a 18-month conditional sentence for drug offences in a case where an Aboriginal accused had good rehabilitation prospects.

30. *Ibid.*, at paras. 56-57.

Wells . . . where the appropriate sentences for aboriginal and non-aboriginal offenders are less likely to differ.

The Court of Appeal also deleted restorative conditions in the trial judge's probation order because of evidence of divisions in the community and concerns that it could not adequately define the trial judge's reference to Elders requiring that the offender host a Potlatch, take part in a Man's Talking and Sharing Circle and complete 60 hours of community service in consultation with the Kaska Tribal Council and the Liard Aboriginal Women's Society. Although the Court of Appeal did not state that restorative conditions were inherently inappropriate, the end result was a sentence that was dominated by the goals of punishment, denunciation and deterrence as opposed to the restorative and rehabilitative principles of sentencing or the involvement of Aboriginal communities in the administration of the sentence.

In a more recent 2008 case, the British Columbia Court of Appeal has dismissed a Crown appeal from a three-year manslaughter sentence. It rejected the Crown's argument that the sentencing judge had overemphasized s. 718.2(e) and that it had no relevance in the absence of a direct causal connection between the *Gladue* factors and the crime. Chiasson J.A. stated: "I agree that there was no evidence of a direct relationship between the *Gladue* factors and Mr. Jack or his commission of the crime, but that does not mean they were not relevant to the judge's consideration of Mr. Jack as an aboriginal offender. They have relevance generically and they had relevance in consideration of his possible rehabilitation."³¹

The Saskatchewan Court of Appeal has also been receptive to Crown appeals from *Gladue*-inspired sentences and increasingly inclined to see *Gladue* as essentially making no difference to the quantum of sentence once the offence passes a threshold of seriousness. *R. v. Laliberte*³² was a Crown appeal of a conditional sentence for an 18-year-old Aboriginal woman who pled guilty to trafficking in a controlled substance and possession of the proceedings of crime. The decision of Vancise

31. *R. v. Jack* (2008), 80 W.C.B. (2d) 84, 2008 BCCA 437 at para. 30 (C.A.).

32. *R. v. Laliberte*, [2000] 4 W.W.R. 491, 143 C.C.C. (3d) 503, 31 C.R. (5th) 1 (Sask. C.A.).

J.A. contained an extensive discussion of *Gladue* and s. 718.2(e) as well as other parts of the 1996 sentencing reforms. This discussion is one of the few appellate cases that recognizes that both *Gladue* and s. 718.2(e) speak to overreliance on incarceration in general in addition to overrepresentation of Aboriginal people in jails.³³

With respect to Aboriginal overrepresentation, however, *Laliberte* is relatively cautious. Vancise J.A. repeatedly emphasized that “s. 718.2(e) is not to be interpreted as requiring an automatic reduction of the sentence simply because the offender is aboriginal”³⁴ and also that specific evidence will be required relating the circumstances of both Aboriginal offenders and their communities to particular crimes.³⁵ The court dismissed the Crown’s appeal but, as noted by Jackson J.A. in her concurrence, the conditional sentence for trafficking in a controlled substance was upheld essentially without reliance on s. 718.2(e) or the particular circumstances of the offender as an Aboriginal person.³⁶

In *R. v. Andres*,³⁷ the Saskatchewan Court of Appeal allowed a Crown’s appeal from a sentence of six years for a series of impaired driving offences, including one involving serious bodily harm. The Court of Appeal substituted a new sentence for a total of 12 years’ imprisonment. The evidence before the trial judge demonstrated that the 41-year-old Metis offender was by the age of ten running away from his single mother to drink with his friends; he was in foster care by the age of 13. Despite this evidence, Vancise J.A. for the court concluded that there was no evidence that the offender’s upbringing or the systemic factors in *Gladue* “are connected to his crimes. His alcoholism may in part be traced to the circumstances of his

33. *Ibid.*, at para. 44.

34. *Ibid.*, at para. 70. See also paras. 45 and 56 where Vancise J.A. stated, “it is not intended as a general rule that sentences for aboriginal and non-aboriginals must necessarily be different” and “for serious offences where imprisonment must be considered the appropriate sentence, it is more likely that the terms of imprisonment for aboriginals and non-aboriginals will be similar if not the same, even taking into account the different concepts of sentencing”.

35. *Ibid.*, at para. 69.

36. *Ibid.*, at para. 121.

37. *R. v. Andres* (2002), 168 C.C.C. (3d) 372, 277 W.A.C. 121, 223 Sask. R. 121 (C.A.).

upbringing, but the fact of his upbringing in difficult circumstances does not explain or mitigate his conduct of repeatedly driving after his ability to do so has become impaired".³⁸ *Andres* seems to be quite harsh in its rejection of substance abuse as a *Gladue* factor. It also adopts a restrictive approach which requires direct evidence about how the systemic factors in *Gladue* are related to the particular crime. As suggested above, the British Columbia Court of Appeal has recently rejected such a narrow approach, indicating that systemic factors may be relevant to rehabilitation even if they played no obvious role in the commission of the crime.³⁹

Andres was followed in a subsequent case to justify allowing a Crown appeal from a conditional sentence in a case of criminal negligence causing death, and replacing it with a sentence of two years less a day.⁴⁰ Bayda C.J.S. dissented and deferred to the trial judge's exercise of sentencing discretion. The majority distinguished another case, *R. v. John*,⁴¹ on the basis that the Aboriginal offender in this case lived and worked in Regina and did not live in northern Saskatchewan where a sentence of imprisonment would cause particular hardship. The Court of Appeal did not, however, mention that the Supreme Court's decision in *Gladue*⁴² stressed the importance of allowing Aboriginal people in urban environments to benefit from the decision.

In a case involving an Aboriginal man characterized as a leader in his community, the Court of Appeal allowed a Crown appeal from a 12-month conditional sentence of imprisonment for impaired driving while disqualified, replacing it with a sentence of 18 months' imprisonment.⁴³

38. *Ibid.*, at para. 29.

39. *R. v. Jack*, *supra*, footnote 31, at para. 30.

40. *R. v. Cappo* (2005), 357 W.A.C. 311, 269 Sask. R. 311 (C.A.).

41. *R. v. John* (2004), 182 C.C.C. (3d) 273, [2004] 7 W.W.R. 643, 313 W.A.C. 268 (C.A.).

42. *Supra*, footnote 1, at para. 91, concluding that "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."

43. *R. v. Anaquod* (2005), 357 W.A.C. 298, 269 Sask. R. 298, [2005] S.J. No. 531 (QL) (C.A.).

In 2006 in *R. v. Pelly*, the Saskatchewan Court of Appeal allowed a Crown appeal from a sentence of six years' imprisonment for an Aboriginal man convicted of two robberies with violence including one home invasion. The Court of Appeal substituted a sentence of 15 years' imprisonment. Cameron J.A. for the Court of Appeal effectively rejected the relevance of s. 718.2(e) and *Gladue* given the seriousness of the offence, concluding that:⁴⁴

There are no mitigating circumstances in relation to the commission of the primary offences, and there are few, if any, in relation to the accused. True, he had a neglected and impoverished childhood, together with a trouble-laden youth, and along the way he developed an alcohol problem which has contributed to his criminal behaviour. One might make allowance for these considerations, were he a more youthful and less experienced offender, but allowance for them has undoubtedly been made in the past. He is now 46 years old. His lifestyle is of his own making at this stage in his life. He is intelligent enough, and sufficiently schooled by his experiences in the justice system, to have known that he had to overcome his childhood experience, his propensities, and his habits or suffer the consequences. Even on the most understanding and charitable view of the matter, there is no more to be fairly excused on this basis. He had ample opportunity, backed by a good deal of assistance along the way, to overcome his personal problems and take charge of his life but he failed to do so. Time and circumstances have run out on him in this respect, and for this reason, too, the considerations mentioned in *R. v. Gladue* are of little remaining relevance.

This seems to be quite a harsh way to characterize the circumstances of an offender who grew up in a physically abusive home, whose parents drank to such excess that he was apprehended by the Department of Indian Affairs at eight years of age, and who spent much time in youth prisons.⁴⁵

The Crown's success on appeals of *Gladue*-inspired sentences in Saskatchewan are not limited to offences involving violence. The Court of Appeal has recently in *R. v. Gopher*⁴⁶ overturned conditional sentences and replaced them with sentences of three years' imprisonment with respect to three offenders who defrauded their band of over \$1 million. The Court of Appeal also noted that there was little evidence of racism, substance

44. *R. v. Pelly* (2006), 210 C.C.C. (3d) 416 at para. 54, 372 W.A.C. 252, 279 Sask. R. 252 (C.A.).

45. *Ibid.*, at paras. 14-15.

46. *R. v. Gopher*, [2006] 5 W.W.R. 659, 205 C.C.C. (3d) 1, 37 C.R. (6th) 125.

abuse and family dysfunction that affected the three accused. Richards J.A., however, went beyond these factors to stress that the trial judge had erred by not considering the fraud offence a serious one requiring denunciation and deterrence. He explained:⁴⁷

In my view, the sort of offence at issue here — criminal breach of trust by a public official in a position of leadership and authority — is the sort of serious offence where, as a general rule, one should anticipate no particular difference in the length of prison term imposed on an aboriginal as opposed to a non-aboriginal offender. No community, aboriginal or non-aboriginal, can succeed and move forward unless its members have faith that public affairs are conducted honestly and in accordance with the law. The significance and nature of the offences at issue in this case and the overriding need to clearly denounce and to deter similar offences, tends to leave little room to give effect to the unique circumstances of aboriginal offenders.

This suggests that the Saskatchewan Court of Appeal will at least in some circumstances consider non-violent offences to be serious for the purposes of administering *Gladue*.

The Saskatchewan Court of Appeal has characterized both violent and non-violent offences as serious and in a number of cases such as *Andres*, *Pelly* and *Gopher* has suggested that s. 718.2(e) and *Gladue* will make little, if any, difference in the sentencing of Aboriginal offenders in serious cases.

Crown appeals from *Gladue*-inspired sentences appear to be rarer and less successful in other jurisdictions. The Crown has been successful in one appeal in Manitoba, but only on the basis that the trial judge erred by concluding that the accused would not be a danger to society if a conditional sentence was imposed for an aggravated assault. The Court of Appeal held that the conditional sentence should be served as an 18-month prison sentence given the accused's record of violence, non-compliance with the court's order and long history of drinking problems.⁴⁸

The Newfoundland Court of Appeal dismissed a Crown appeal from a 12-month sentence of an Aboriginal offender from northern Labrador for assault, assault causing bodily harm and breach of probation. Green J.A. held that the

47. *Ibid.*, at para. 39.

48. *R. v. Sutherland*, 2005 MBCA 116 at para. 40.

sentencing judge had not overemphasized s. 718.2(e) but rather had taken a restorative approach to sentencing that was legitimate.⁴⁹ Given the seriousness of the offences and the offender's lengthy record, it is likely that a Crown appeal from the conditional sentence would have been successful in Saskatchewan and perhaps in British Columbia.

Although regional variations on tariff are an accepted part of sentencing practice in Canada, the regional variations in interpreting s. 718.2(e) remain troubling given that provision's role as a remedial law designed to address Aboriginal overrepresentation in prison in all parts of Canada.

3. Appeals by the Accused Alleging Errors in Applying *Gladue*

(1) Early Cases

In a series of cases decided shortly after *Gladue* and with respect to sentences that had been imposed by trial judges without the benefit of that decision, the Ontario Court of Appeal reduced a number of sentences of imprisonment. In *R. v. Logan*,⁵⁰ it reduced 30 months' imprisonment to a 20-month conditional sentence in a case where an accused was convicted of impaired driving causing death and bodily harm. The accused had the support of his small reserve community, had engaged in counseling and participated in drug and alcohol awareness programs, had stopped drinking after the fatal accident and had made attempts to assist the victim's sons. The attitudes of the victims to the sentence was dynamic, with the family originally taking the position that the accused should not go to jail, but changing their minds after the accused had appealed on the merits of his conviction and they had commenced a civil action against him.

In another early case, *R. v. Sackanay*,⁵¹ the Ontario Court of Appeal reduced an 8.5-year sentence to 6 years for aggravated sexual assault and a separate aggravated assault committed by a severely intoxicated Aboriginal man with a long criminal record. It noted that the trial judge, who had sentenced the

49. *R. v. Semigak*, 2000 NFCA 53 at para. 11 (Nfld. C.A.).

50. *R. v. Logan*, [1999] O.J. No. 3411 (QL), 139 C.C.C. (3d) 57 (C.A.).

51. *R. v. Sackanay* (2000), 47 O.R. (3d) 612, 131 O.A.C. 396 (C.A.).

offender before *Gladue* was released, had not considered either the role of substance abuse or the offender's background when determining the sentence. The offender had grown up in a household permeated by alcohol and domestic violence. He had tried to kill himself when he was eight years old and at nine years old had started drinking "to relieve the tension and loneliness of his upbringing".⁵² The Court of Appeal noted but did not dwell on the fact that the appellant had pled guilty and had written letters of apology to the victims,⁵³ despite the arguable relevance of these factors under the restorative principles articulated in *Gladue*. In 2001, however, the Ontario Court of Appeal denied an accused's appeal from a dangerous offender indeterminate sentence after a sexual assault conviction, with Laskin J.A. stating that "s. 718.2(e) has a much diminished impact in sentencing persons like the appellant who commit serious and violent offences".⁵⁴ The next year, the Ontario Court of Appeal also stressed the seriousness of a manslaughter with a 357 magnum during a convenience store robbery in holding that a 17-year sentence was required to stress the purposes of deterrence, denunciation and incapacitation. It did note that the accused was an Aboriginal person from a disadvantaged background who was only starting to reconnect with his heritage and culture. This was cited as a reason for not making him ineligible for parole until half his sentence was served.⁵⁵

The Ontario Court of Appeal's early decisions allowing appeals by the accused from sentence can be contrasted with early decisions of the British Columbia Court of Appeal. In one early case, *R. v. Devries*,⁵⁶ the British Columbia Court of Appeal upheld a sentence of 10 years' imprisonment for a manslaughter committed during a robbery despite the fact that the trial judge had relied upon the B.C. Court of Appeal's decision in *Gladue* that might have been interpreted as justifying ignoring the offender's Aboriginal heritage because

52. *Ibid.* at para. 11.

53. *Ibid.* at para. 8.

54. *R. v. Sutherland* (2001), 156 C.C.C. (3d) 264 at para. 35, 146 O.A.C. 53 (C.A.), leave to appeal to S.C.C. refused [2002] 3 S.C.R. xi.

55. *R. v. Carriere* (2002), 164 C.C.C. (3d) 569 at para. 23, 158 O.A.C. 36 (C.A.).

56. *R. v. Devries* (1999), 214 W.A.C. 25 (B.C.C.A.).

he had been adopted as an infant by a white family. Braidwood J.A. dismissed the accused's appeal, as well as the reference to attention to quantum of sentence in *Gladue*, by concluding that "there is obviously no alternative to incarceration".⁵⁷ Southin J.A. came perilously close to dismissing *Gladue* when she stated: "As far as I am concerned, the addition of the words 'with particular attention to the circumstances of aboriginal offenders' does not add much, if anything, to what was always the concerns of the judges of this Province whatever may have been the situation in other less enlightened parts of this country."⁵⁸ The British Columbia Court of Appeal also denied the accused's appeal in other early cases where the accused argued that the trial judge had not given adequate attention to the *Gladue* principles.⁵⁹

The British Columbia Court of Appeal dismissed an accused's appeal from a 3.5-year sentence in an impaired driving causing death case that is remarkably similar to the *R. v. Logan* case⁶⁰ discussed above in which the Ontario Court of Appeal reduced a sentence of 30 months' imprisonment to a 20-month conditional sentence. The accused in *R. v. Casimir*⁶¹ was a 57-year-old with a history of substance abuse, but who had rehabilitated himself in the 1980s and served as a band councillor before starting to drink again. The trial judge discussed the Supreme Court's decision in *Gladue*, but apparently did not go into all the background circumstances in this case. McEachern C.J.B.C. seemed to acknowledge that more of an inquiry into the offender's circumstances could have been made and that a community sentence might be appropriate. In the end, however, he dismissed the accused's appeal on the basis that the sentence was not unfit.⁶²

57. *Ibid.*, at para. 14.

58. *Ibid.*, at para. 17.

59. See also *R. v. Lapointe* (1999), 207 W.A.C. 242 (B.C.C.A.); *R. v. Haines* (2001), 258 W.A.C. 26 (B.C.C.A.); *R. v. Cooper* (2001), 258 W.A.C. 12 (B.C.C.A.); *R. v. Mills* (2002), 264 W.A.C. 179 (B.C.C.A.).

60. *Supra*, footnote 50.

61. *R. v. Casimir*, 2001 BCCA 310 (C.A.).

62. McEachern C.J.B.C. stated: "I have the view that in the fullness of time we will come to realize that we should go back well into the childhood of aboriginal persons who suffer the kind of misfortune this person suffered and determine whether it is appropriate to sentence them in a conventional way. I think that matter needs a great deal of attention. If I did not find myself

The British Columbia Court of Appeal did not, however, dismiss all *Gladue*-inspired appeals from sentence. A sentence of two years less a day for assault with a weapon was reduced to time served in a case in which an Aboriginal accused had attempted to rehabilitate himself and the trial judge had not adverted to s. 718.2(e) or other sentencing principles.⁶³ The Court of Appeal reduced a period of parole ineligibility from 14 years to 12 with respect to a 24-year-old Aboriginal woman convicted of second degree murder who may have suffered from fetal alcohol syndrome and had a history of alcohol abuse, sexual abuse and offending. McEachern C.J.B.C. concluded that “the learned trial judge did not refer to the special attention required to be given to the circumstances of aboriginal offenders” and that “the circumstances of this aboriginal offender played a very substantial role in getting her to the stage where this offence was committed”.⁶⁴ He would not, however, reduce the period of parole ineligibility to the minimum of 10 years given that the offender had stabbed the victim 40 times.

In *R. v. Reid*,⁶⁵ the British Columbia Court of Appeal overturned a sentence of three years’ imprisonment for an aggravated domestic assault and substituted a 21-month conditional sentence followed by two years’ probation, largely on the basis of fresh evidence that the Heiltsuk community justice program in Bella Bella was willing to accept the offender into its program; that the victim of the assault, the offender’s estranged wife, did not object to his return to the community; and that the offender was now remorseful and had abstained from alcohol for two years.⁶⁶

In *R. v. Abraham*,⁶⁷ the Alberta Court of Appeal reduced a

constrained by authority, I would be seriously tempted to allow this appeal and to provide what I think would be a more enlightened sentence — a sentence that would return this person to his community under supervision where he would receive the kind of supervision and attention he deserves. In the present state of the law however, I do not think that I can say that the learned trial judge erred in failing to give proper consideration to the aboriginal status of the appellant.” *Ibid.*, at para. 9.

63. *R. v. Dennis* (2001), 244 W.A.C. 201 at para. 27 (B.C.C.A.).

64. *R. v. Courterille*, 2001 BCCA 254 (C.A.).

65. *R. v. Reid* (2002), 275 W.A.C. 107, [2002] B.C.J. No. 845 (QL) (C.A.).

66. *Ibid.*, at paras. 28-29.

67. *R. v. Abraham* (2000), 225 W.A.C. 192, 261 A.R. 192, 4 M.V.R. (4th) 35 (C.A.).

sentence for impaired driving causing death from seven to five years on the basis that the trial judge had not considered the circumstances of the Aboriginal offender. The Alberta Court of Appeal has rejected appeals by the accused from sentences of one year of imprisonment for manslaughter⁶⁸ and three years for sexual assault⁶⁹ on the basis that the systemic and background *Gladue* factors were not related to the circumstances of the particular offender before the court.

The Manitoba Court of Appeal has held that that the background of the accused and the systemic discrimination “must be considered”⁷⁰ but that other principles would dominate in the Manitoba Warriors trial because *Gladue* “was never meant to shield organized and violent cocaine traffickers who prey upon and exploit the most vulnerable members of our society for profit”.⁷¹ In a concurring judgment, Huband J.A. argued that once a decision was made that imprisonment was necessary, then s. 718.2(e) would not apply. In such circumstances, only the general principle that “the court must consider the unique circumstances of all offenders in the sentencing process” would apply.⁷²

(2) More Recent Cases

In *R. v. Peters*,⁷³ the British Columbia Court of Appeal dismissed an accused’s appeal from a sentence of two years less a day for a manslaughter conviction. The Court of Appeal concluded that the sentencing judge had paid adequate attention to the principles in *Gladue* and the fact that the Aboriginal offender had no prior offences and had remained sober while on bail. In *R. v. Cress*,⁷⁴ the same Court of Appeal dismissed the accused’s appeal of a two-year sentence for a number of offences including breaking and entering and arson despite the fact that the trial judge made no reference to s.

68. *R. v. Poucette* (1999), 213 W.A.C. 55, 250 A.R. 55 (C.A.).

69. *R. v. K. (T.)* (2004), 334 W.A.C. 18, 357 A.R. 18 (C.A.).

70. *R. v. Pangman* (2001), 154 C.C.C. (3d) 193 at para. 55, [2001] 8 W.W.R. 10, 246 W.A.C. 120, *sub nom.* *R. v. Vermette*.

71. *Ibid.*, at para. 56.

72. *Ibid.*, at para. 108.

73. *R. v. Peters* (2004), 333 W.A.C. 41 (B.C.C.A.).

74. *R. v. Cress* (2005), 358 W.A.C. 312 (B.C.C.A.).

718.2(e) and despite the fact that the appellant grew up in a house with substance abuse problems and that most of his offences involved the use of drugs or alcohol.⁷⁵ Kirkpatrick J.A. stated that while it was preferable for trial judges to recognize the importance of s. 718.2(e), any error was “of little significance” because the accused had abandoned his position that a conditional sentence should be ordered.⁷⁶ This is arguably an error given the reference in *Gladue* and the practice in other courts of using *Gladue* in appropriate cases as a reason for reducing the quantum of imprisonment.

The British Columbia Court of Appeal has considered the effect of s. 718.2(e) in a few shoplifting cases. In *R. v. Mack*,⁷⁷ the Court of Appeal dismissed an appeal from a sentence of one year of imprisonment for the theft of four bottles of mouthwash by an intoxicated Aboriginal offender with 73 prior convictions, even though the trial judge made no reference to the offender’s Aboriginal status or s. 718.2(e). The result seems quite harsh given the nature of the offence and arguably an error given the trial judge’s failure to consider s. 718.2(e). The emphasis that the Court of Appeal gave to the fact that the accused had not requested a sentence other than imprisonment also discounts the duty on the trial judge to consider reasonable alternatives to imprisonment. In *R. v. Char*, a sentence for various shoplifting offences was reduced from 12 to 6 months’ imprisonment after a Gladue Report was considered as fresh evidence.⁷⁸ Although this case accords greater meaning to s. 718.2(e) than *Mack*, it is also questionable because the option of a conditional sentence was apparently not considered despite the emphasis in s. 718.2(e) on alternatives to imprisonment.

In *R. v. P. (D.D.)*,⁷⁹ the British Columbia Court of Appeal reduced a sentence of imprisonment of nine years to seven for a 16-year-old Aboriginal youth raised by a single mother with a history of substance abuse who was convicted of manslaughter. The offender drank on a daily basis and had had 20 beers on the

75. *Ibid.*, at para. 8.

76. *Ibid.*, at para. 18.

77. *R. v. Mack* (2008), 81 W.C.B. (2d) 442, 2008 BCCA 520 (C.A.).

78. *R. v. Char* (2007), 74 W.C.B. (2d) 198, 2007 BCCA 346 (C.A.).

79. *R. v. P. (D.D.)* (2007), 218 C.C.C. (3d) 298, 396 W.A.C. 161 *sub nom. R. v. Pratt* (C.A.).

night in question. Both the trial judge and the defence seemed to have conceded that the accused's Aboriginal status should have little bearing on the sentence, something that could be said to be consistent with the Court of Appeal's decision in *R. v. Cress*.⁸⁰ Nevertheless, Saunders J.A. concluded that the trial judge had erred:⁸¹

While it is so that the more violent the offence, the less bearing aboriginal status may have, in the case of a young aboriginal person before the courts . . . and a history of broken family guidance and an absentee parent, as again was here the case, the [Youth Criminal Justice] Act requires greater attention to this circumstance than was accorded by the sentencing judge.

In this case, the Court of Appeal interpreted a reference to responding to the needs of Aboriginal young persons in s. 3(1)(c) of the *Youth Criminal Justice Act* as a "specific direction" that instructs the courts "that they must respond to the needs of aboriginal young persons that come before them while maintaining a standard of fair and proportionate accountability".⁸²

The Manitoba Court of Appeal allowed an accused's appeal from a 12-month sentence for assault causing bodily harm in *R. v. Bird*⁸³ and reduced the accused's sentence to six months' imprisonment followed by 18 months' probation. The appeal was based more on the trial judge's error in ignoring the accused's expression of remorse in a pre-sentence report than on the fact that the accused was a 25-year-old single mother, a first-time offender and an Aboriginal person. There was little apparent attention to the option of a conditional sentence in this case, which did admittedly involve a group assault on a pregnant woman.

In *R. v. John*,⁸⁴ the Saskatchewan Court of Appeal allowed an accused's appeal from a three-year sentence of imprisonment for criminal negligence causing death in relation to an automobile accident that killed his wife. Vancise J.A. held for the Court of Appeal that the trial judge

80. *Supra*, footnote 74.

81. *Ibid.*, at para. 83.

82. *Ibid.*, at para. 81.

83. *R. v. Bird* (2008), 419 W.A.C. 304, 225 Man. R. (2d) 304 (C.A.).

84. *R. v. John*, 2004 SKCA 13 (C.A.).

had erred by not considering s. 718.2(e) and by failing to consider whether deterrence and denunciation could be achieved by a conditional sentence of imprisonment. The Court of Appeal noted that “there is no indication that alcohol abuse, poverty, racism, or family violence or breakdown contributed to this offence”.⁸⁵ As suggested above, this is a narrow view of the relevance of the background systemic factors identified in *Gladue* and one that has not been followed by other Courts of Appeal.⁸⁶ The Saskatchewan Court of Appeal did stress the adverse effects that imprisonment would have on the offender who “grew up in the wilderness, had no formal schooling, and as a result has lived off the land for much of his life”.⁸⁷ It ordered a conditional sentence of two years less a day that included 240 hours of community service assisting the elders at his reserve and participating in a healing circle with the daughters of the deceased.⁸⁸ The approach in this case seems sensitive and sensible, but somewhat out of step with the cases discussed in the above section where the same Court of Appeal allowed Crown appeals from *Gladue*-inspired sentences. One difference might be that the offender in *John* lived in a traditional way in a remote community whereas many of the offenders in the other cases lived in an urban environment. That distinction would be problematic given the Supreme Court’s clear statement in *Gladue* that s. 718.2(e) applies to urban Aboriginal offenders as well as those living in more traditional settings.

A recent decision of the Nova Scotia Court of Appeal dismissed the accused’s appeals from sentence in large part by relying on well-established precedents that require appellate deference to decisions of sentencing judges.⁸⁹ Although appellate deference is an important principle, it should not be used to excuse arguable errors of law that may be committed if the trial judge fails to advert to s. 718.2(e). In another recent

85. *Ibid.*, at para. 32.

86. See *R. v. Jack*, *supra*, footnote 31.

87. *R. v. John*, *supra*, footnote 84, at para. 31.

88. *Ibid.*, at para. 59.

89. *R. v. Reykdal* (2008), 81 W.C.B. (2d) 10, 2008 NSCA 110 (C.A.). The trial judge in the case had a *Gladue* Report but made no reference to it in reasons for judgment.

decision the Alberta Court of Appeal reduced a five-year sentence for two robberies to four years because s. 718.2(e) was not considered.⁹⁰ This approach demonstrates attentiveness to the error of law that is committed by not making reference to s. 718.2(e). At the same time, courts should explain why the reduced quantum in sentence is justified on the facts of the particular case lest they not be perceived to apply a mechanical Aboriginal discount on the sentence.

(3) More Recent Ontario Court of Appeal Cases

The Ontario Court of Appeal has been the most active Court of Appeal with respect to interpreting s. 718.2(e).⁹¹ In *R. v. Brizard*,⁹² the Ontario Court of Appeal allowed the accused's appeal and reduced a sentence for being a party to a manslaughter from eight years' imprisonment to five years in part because the trial judge had erred in law by not giving adequate weight to the offender's Aboriginal background. The trial judge had also erred by not recognizing that restorative approaches to sentencing "need not take place within or be specific to the Aboriginal community".⁹³ In *R. v. Sellen*,⁹⁴ the Ontario Court of Appeal reduced an attempted murder sentence from nine to six years' imprisonment on the basis of fresh evidence relating to a Gladue Report from the penitentiary that should have been made available at trial.

In *R. v. Kakekagamick*,⁹⁵ the Ontario Court of Appeal found

90. *R. v. Morning Bird* (2008), 438 W.A.C. 396, 440 A.R. 396 (C.A.).

91. This may be related in part to the work of Aboriginal Legal Services of Toronto with respect to specialized courtworkers who prepare Gladue Reports to assist in sentencing, with respect to the establishment of Gladue Courts, and with respect to providing experienced lawyers to represent accused or by intervening in s. 718.2(e) cases. On the Aboriginal Legal Service of Toronto's multi-faceted work on Gladue materials see Aboriginal Legal Services of Toronto Gladue (Aboriginal Persons) Court, online: <<http://www.aboriginallegal.ca/gladue.php>>.

92. *R. v. Brizard*, [2006] O.J. No. 729 (QL), 2006 CanLII 5444 (C.A.), February 27, 2006, Docket No. C43626. But see *R. v. Doxtater* (2004), 187 O.A.C. 180, 5 M.V.R. (5th) 24 (C.A.) denying the accused's appeal of a one-year sentence for impaired driving causing death.

93. *Ibid.*, at para. 4.

94. *R. v. Sellen* (2008), 79 W.C.B. (2d) 455, 2008 ONCA 623 (C.A.).

95. *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664, 211 C.C.C. (3d) 289, 40 C.R. (6th) 383 (C.A.), leave to appeal refused 217 C.C.C. (3d) vi.

an error in failing to consider *Gladue* in a case where the Crown and the trial judge made only passing reference to *Gladue* and the accused's own lawyer made none. A 22-year-old first offender with substance abuse problems had been sentenced to five years' imprisonment for a brutal assault of his domestic partner that left her with fractured ribs, a fractured collarbone and two broken vertebrae in her neck. The Court of Appeal held that the deference paid by the Supreme Court to the sentencing judge in *Wells* was not appropriate here because the sentencing judge did not have access to the *Gladue* background information about the offender.⁹⁶ The Court of Appeal ordered that a new pre-sentence report be prepared, noting that it did not have the power under s. 687 of the *Criminal Code* of remitting the sentence back to the trial judge.⁹⁷ It also noted that this approach⁹⁸

should not be viewed as a substitute for any future failure on the part of counsel or the trial judge to address s. 718.2(e) and the *Gladue* principles when dealing with an aboriginal offender. Such a process is awkward, is unduly time consuming, no doubt incurs greater expense, and may be unfair to an offender who is incarcerated while awaiting the outcome of his appeal.

The Court of Appeal is undoubtedly correct to point out the limits of its powers on appeal, but it also should have adverted to the possible benefits of having the offender sentenced in or at least closer to his community. To the extent that *Gladue* seeks to incorporate the principles and practices of restorative justice, the importance of how the process is connected and draws on the local community should not be ignored. Connections with the community can encourage an offender to accept responsibility for his or her conduct and in some cases can provide sentencing options that may not be apparent from a capital city where an appellate court sits.

On the merits, the Court of Appeal's decision in *Kakekagamick* resonates with the one step forward, two steps back theme of this paper. The Court of Appeal concluded that while the trial judge should have required a Gladue Sentencing Report, she did not err in sentencing the offender to five years'

96. *Ibid.*, at para. 50.

97. *Ibid.*, at para. 60 and cases cited in that paragraph.

98. *Ibid.*, at para. 63.

imprisonment for an aggravated assault. LaForme J.A. concluded:⁹⁹

In all the circumstances, especially the aggravating features that include the nature of the assault, that it was in the context of a domestic relationship, and that the appellant had been assessed as a high risk to re-offend, it would not be fit and proper to sentence the appellant to anything other than a period of imprisonment. This offender and this offence are serious enough that the objectives of restorative justice . . . together with the principles established in *Gladue* ought not to weigh significantly more favourably than those of separation, denunciation and deterrence. Moreover, the appellant's failure to accept responsibility for his actions weighs against affording him significant consideration by way of mitigation.

Mr. Kakekagamick remains in Stoney Mountain Penitentiary, where he is in a unit set aside for inmates with no gang affiliation and has completed a substance abuse program.¹⁰⁰ It is difficult to escape the conclusion that the Court of Appeal has effectively applied some measure of deference to the trial judge's determination of the appropriate quantum of imprisonment, despite the fact that the trial judge did not have access to a Gladue Pre-Sentence Report. A similar theme is found in four subsequent cases where the Ontario Court of Appeal accepted Gladue Reports as "helpful and necessary" fresh evidence, yet did not overturn the trial judge's original sentence.¹⁰¹

In *R. v. Batisse*,¹⁰² the Ontario Court of Appeal halved a trial judge's sentence of five years' imprisonment for the abduction of a baby from a hospital. Gillese J.A. for the majority stressed that the 30-year-old Aboriginal woman had "no prior criminal

99. *Ibid.*, at para. 73.

100. *Ibid.*, at para. 69.

101. *R. v. R. (J.)* (2008), 59 C.R. (6th) 158, [2008] O.J. No. 1054 (QL) (C.A.), leave to appeal to S.C.C. refused July 31, 2008 (accepting Gladue Report as fresh evidence but upholding a two-year sentence for sexual assault); *R. v. Chickekoo* (2008), 79 W.C.B. (2d) 66, 2008 ONCA 488 (C.A.) (accepting Gladue Report as fresh evidence but upholding 18 months' imprisonment for aggravated assault); *R. v. Stevens* (2008), 76 W.C.B. (2d) 627, 2008 ONCA 155 (accepting Gladue Report as fresh evidence but not lowering 14-year period of parole ineligibility); *R. v. Whiskeyjack*, (2008), 243 O.A.C. 150 at para. 21, 239 C.C.C. (3d) 47 *sub nom.* *R. v. W. (R.)* (accepting Gladue Report as fresh evidence but affirming the trial judge's sentence of two years less a day for a mother's aggravated assault on her child).

102. *R. v. Batisse* (2009), 81 W.C.B. (2d) 605, 2009 ONCA 114 (C.A.).

record. She survived an unimaginably abusive and cruel childhood in which she was physically, emotionally and sexually abused.”¹⁰³ She also concluded that the trial judge had erred by relying on precedents that were decided before s. 718.2(e) stressed the importance of restraint in the use of sentences of imprisonment. The restraint principle applied to the length of an imprisonment sentence and had particular importance in cases with Aboriginal offenders.¹⁰⁴ She also stressed the offender’s mental health issues and the adverse effects of her imprisonment 750 km from her home.¹⁰⁵ Blair J.A. dissented and stressed appellate deference to the trial judge’s decision. He also suggested that once that the trial judge had concluded that a conditional sentence was not appropriate, the restraint principle in s. 718.2(e) should not be re-applied to the length of the imprisonment sentence.¹⁰⁶ This latter holding seems at odds with the Supreme Court’s recognition in *Gladue* and *Wells* that the section could be relevant to the length of imprisonment even though neither case involved whether a conditional sentence of imprisonment should be imposed.

(4) Summary

The decisions examined in this part show substantial variation even when due allowance is made for the inevitable differences between all sentencing cases. The Ontario Court of Appeal’s decision in *Logan* to impose a conditional sentence in a case of impaired driving causing death can be contrasted with the British Columbia Court of Appeal’s decision to uphold a 3.5-year imprisonment in a similar case. These differences are also consistent with the differences seen in the way that different courts of appeal have approached Crown appeals from *Gladue*-inspired sentences. Indeed, the British Columbia Court of Appeal in *Devries* and *Peters* and the Saskatchewan Court of Appeal in *Andres* all seem to suggest that there is an undefined line of seriousness and chronic offending that for all practical purposes places an offender beyond *Gladue*. The Ontario Court

103. *Ibid.*, at para. 21.

104. *Ibid.*, at para. 36.

105. *Ibid.*, at paras. 37-38.

106. *Ibid.*, at paras. 65 and 74.

of Appeal has in contrast taken a less categorical approach. It has expressly rejected the idea that there are cases “in which the *Gladue* principles do not apply . . . the *Gladue* principles remain applicable in all cases where an aboriginal person is the offender”.¹⁰⁷ In addition, the Ontario Court of Appeal has recognized that *Gladue* considerations can justify a reduction in the quantum of an imprisonment sentence.¹⁰⁸ That said, the acceptance of a full Gladue Report as fresh evidence in the Ontario Court of Appeal is by no means a guarantee that the quantum of an imprisonment sentence will be reduced.¹⁰⁹

The British Columbia Court of Appeal’s use of a conditional sentence in *R. v. Reid*¹¹⁰ and the Saskatchewan Court of Appeal’s use of a conditional sentence in *R. v. John*¹¹¹ suggest that courts of appeal may be more likely to sanction departures from what would usually be sentences of incarceration in cases where Aboriginal offenders come from traditional backgrounds and have community support. The Ontario Court of Appeal’s decision in *R. v. Brizard*,¹¹² however, is an appropriate reminder that the Supreme Court in *Gladue* stressed that s. 718.2(e) applies to all Aboriginal people, including Aboriginal people living in the cities.

4. Decisions Concerning the Scope of *Gladue*

Gladue has been applied to the determination of years of parole ineligibility. In *R. v. Courterille*, the British Columbia Court of Appeal reduced a period of parole ineligibility from 14 years to 12 with respect to a 24-year-old Aboriginal woman convicted of second degree murder who may have suffered from fetal alcohol syndrome and had a history of alcohol abuse, sexual abuse and offending. McEachern C.J.B.C. concluded that “the learned trial judge did not refer to the special attention required to be given to the circumstances of aboriginal

107. *R. v. Jensen* (2005), 195 C.C.C. (3d) 14 at para. 27, 27 C.R. (6th) 240, 74 O.R. (3d) 561 (C.A.).

108. *R. v. Brizard*, *supra*, footnote 92; *R. v. Sellen*, *supra*, footnote 94; *R. v. Batisse*, *supra*, footnote 102.

109. See cases *infra*, footnote 101.

110. *Supra*, footnote 65.

111. *Supra*, footnote 84.

112. *Supra*, footnote 92.

offenders” and that “the circumstances of this aboriginal offender played a very substantial role in getting her to the stage where this offence was committed”.¹¹³ He would not, however, reduce the period of parole ineligibility to the minimum of 10 years given that the offender had stabbed the victim 40 times.

In *R. v. Jensen*,¹¹⁴ the Ontario Court of Appeal held that the *Gladue* principles would apply to the determination of parole ineligibility as part of a life sentence for second degree murder. Simmons and LaForme JJ.A. did “not read *Gladue* as saying that there are cases in which the *Gladue* principles do not apply . . . the *Gladue* principles remain applicable in all cases where an aboriginal person is the offender”.¹¹⁵ As suggested above, this is an important statement of principle that has not always been observed by other courts of appeal. Still, the court found no error in the trial judge’s order of 12 years’ parole ineligibility with respect to a brutal murder by an offender with a record for crimes of violence.

The Ontario Court of Appeal has continued its trend to expansively applying *Gladue* by holding that it applies “when fashioning a sentence for civil or criminal contempt on the part of aboriginal contemnors”.¹¹⁶ It recognized that “the *Gladue* principles have already been extended to a variety of other contexts in the criminal justice system, including bail, parole eligibility, dangerous offender applications, and disposition hearings of the Ontario Review Board”.¹¹⁷ On the merits, the court found that six months’ imprisonment and high fines were excessive penalties for open contempt of a court order. It noted that three factors highlighted in *Gladue*, “the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation, and whether imprisonment would be meaningful to the community of which the offender is

113. *R. v. Courterille* (2001), 252 W.A.C. 190 (B.C.C.A.).

114. *Supra*, footnote 107. See also *R. v. Carriere*, *supra*, footnote 55, citing s. 718.2(e) and the accused’s emerging connection with his Aboriginal culture and heritage as a reason not to order that half his 17-year sentence for a near-murder manslaughter be served before he became eligible for parole.

115. *R. v. Jensen*, *ibid.*, at para. 27.

116. *Frontenac Ventures v. Ardoch Algonquin First Nation* (2008), 295 D.L.R. (4th) 108 at para. 54, 91 O.R. (3d) 1, 239 O.A.C. 257 (C.A.), leave to appeal to S.C.C. refused 297 D.L.R. (4th) vii.

117. *Ibid.*, at para. 56.

a member”,¹¹⁸ were all relevant to the case at hand. In examining the factors that brought the Aboriginal offenders before the court, MacPherson J.A. stated that¹¹⁹

the use of incarceration as the first response to breach of the injunction dramatically marginalizes the significance of aboriginal law and aboriginal rights. Second, imposing a lengthy term of imprisonment on a first offender fails to recognize the impact of years of dislocation. The fact that persons of the stature of Mr. Lovelace and Chief Sherman saw no meaningful avenues of redress within the justice system and felt driven to take these drastic measures demonstrates the impact of years of dislocation and the other problems discussed in *Gladue* at paras. 67-69. Finally, imprisonment, far from being a meaningful sanction for the community, had the effect of pitting the community against the justice system. That the court found it necessary to imprison the leaders of the AAFN simply serves to emphasize the gulf between the dominant culture’s sense of justice and this First Nation’s sense of justice.

The Court of Appeal also noted that the use of imprisonment was not appropriate given other penalties given in similar circumstances and that the offenders had purged their contempt by agreeing not to conduct further blockades and protests.

The Nunavut Court of Appeal has held that *Gladue* principles were relevant to a determination of whether a young person should be tried in youth or adult court. To this end it held that “the principles enunciated in *Gladue* militate in favour” of trial in youth court because “having the young person remain within his cultural community is more likely to meet the objectives of rehabilitating the young person”¹²⁰ while trial in adult court opened up the possibility of a penitentiary sentence that would be served outside of Nunavut.

Two decisions by the Ontario Superior Court of Justice have concluded that *Gladue* applies to bail decisions. These decisions are of particular importance given the dramatic expansion of remand populations in recent years. In releasing an accused who had no one to act as a surety and who had been rejected by a bail program, Justice Archibald ordered that he report to an Aboriginal organization weekly and held that “clearly the

118. *Ibid.*, at para. 57.

119. *Ibid.*, at para. 58.

120. *R. v. N. (M.)*, [2006] 5 W.W.R. 625 at para. 54, 329 W.A.C. 243, 354 A.R. 243 (Nu. C.A.).

principles of *Gladue* are overriding principles in the justice system from the time a person comes into the justice system to sentence".¹²¹ This latter principle was accepted by Justice Wein in another proceeding, but in that case, bail was denied pending firmer evidence about the programming and sureties that would be available if the accused was released.¹²² Given the relationship between denial of bail and the ultimate sentence of imprisonment, findings of disproportionate denials of bails against African Canadian offenders and the dramatic increase of remand populations over the last decade,¹²³ these decisions have the potential to influence a critical stage of the criminal process and it would be helpful to have them affirmed by clear appellate authority. Much will depend on the quality of representation and programming available at individual bail hearings.¹²⁴

In *R. v. Sim*,¹²⁵ the Ontario Court of Appeal held that the principles of *Gladue* should apply to proceedings under Part XX.1 of the *Criminal Code* relating to the continuing detention of a 34-year-old man of Irish and Cree descent who had been detained for almost five years after having been found not criminally responsible for a theft under \$5,000. Sharpe J.A. reasoned that the Supreme Court had based the principles in *Gladue* on concerns about systemic discrimination against Aboriginal people in the entire criminal justice system and that information about the person's "background, including aboriginality"¹²⁶ could be helpful for a review board in determining the appropriate placement of the accused to help him reintegrate into society and to respond to his needs.¹²⁷

121. *R. v. Bain*, February 18, 2004 (Ont. S.C.J.), online <<http://aboriginallegal.ca/docs/Bain.pdf>>.

122. *R. v. Crawford* (2007), 76 W.C.B. (2d) 445 (Ont. S.C.J.) at <<http://aboriginallegal.ca/docs/Crawford.pdf>>.

123. See Kent Roach, "A Charter Reality Check" (2008), 40 S.C.L.R. (2d) 717 at pp. 724ff.

124. In *R. v. Batisse* (2008), 78 W.C.B. (2d) 569 (Ont. C.A.) Cronk J.A. of the Ontario Court of Appeal denied bail pending appeal without examining a *Gladue* report, but this had to do with an inadequate record and not a decision that s. 718.2(e) did not apply.

125. *R. v. Sim* (2005), 78 O.R. (3d) 183, 203 O.A.C. 128, 201 C.C.C. (3d) 482 *sub nom. Sim v. Ontario (Review Board)* (C.A.), available at <<http://aboriginallegal.ca/docs/Sim.pdf>>.

126. *Ibid.*, at para. 18.

Although the duty of the sentencing judge to acquire information regarding the circumstances of the offender as an Aboriginal person under s. 718.2(e) does not apply to the review board, the Ontario Court of Appeal found that a similar duty applied to the review board to obtain information where relevant to its dispositions.¹²⁸ In the result, however, the Court of Appeal held that the pre-sentence report prepared by Aboriginal Legal Services of Toronto should not be admitted because it would assist only with respect to disposition and not with respect to the review board's primary determination that the offender could not be released because he remained a substantial threat to public safety. The Court of Appeal noted "had this been a closer case, a report indicating that the aboriginal community could assist the appellant in maintaining his medication and could provide appropriately supervised housing might have been helpful and perhaps even decisive".¹²⁹ In *R. v. Mumford*,¹³⁰ Kitley J. of the Ontario Superior Court indicated that the *Gladue* analysis should apply in a dangerous offender application and this case will soon be heard in the Ontario Court of Appeal.

Conclusion

This paper has attempted to provide an outline of the appellate jurisprudence interpreting and applying the Supreme Court's jurisprudence in *Gladue*. Because it focuses on reported decisions from the courts of appeal, this paper should not be taken as any indication of how sentencing judges are using their discretion to apply *Gladue* when sentencing Aboriginal offenders. But the reported Court of Appeal decisions reveal some factors that may help explain why *Gladue* has been unable to stem the tide of Aboriginal overrepresentation in prison.

Many of the Court of Appeal decisions revolve around an attempt to resolve the ambiguity in *Gladue* and *Wells* about the relevant importance of offender and offence characteristics in

127. *Criminal Code*, s. 672.54.

128. *Sim*, *supra*, footnote 125, at para. 29.

129. *Ibid.*, at para. 31.

130. *R. v. Mumford* (2007), 75 W.C.B. (2d) 784 (Ont. S.C.J.), November 6, 2007, Court file no. 059106, available online: <<http://aboriginallegal.ca/docs/Mumford.pdf>>.

serious cases involving violence and death. This focus on what to do with serious cases may to some extent be a product of the data set of appeal cases. Both the Crown and the accused are probably more likely to appeal in serious cases. Nevertheless, the focus on the serious case has the effect of deflecting attention away from the primary concerns expressed in *Gladue* about the overuse of prison. In this way, the transformative potential of *Gladue* may have been blunted by the focus on the most serious cases, in appellate cases at least.

With respect to how judges should treat serious criminal cases, there are significant regional variations in the application of *Gladue*. The Ontario Court of Appeal has stated that there are no cases involving Aboriginal offenders in which *Gladue* does not apply.¹³¹ It has also indicated that *Gladue* can affect the quantum of sentences even in cases where conditional sentences may not be warranted.¹³² In contrast, the British Columbia and Saskatchewan Courts of Appeal appear to have operated on the assumption that *Gladue* does not really apply in cases that are particularly serious. The Saskatchewan Court of Appeal seems to have a low threshold of seriousness that does not necessarily require that an offence be violent before the *Gladue* principles have significantly less weight. These regional variations are surprising given that *Gladue* and s. 718.2(e) should apply as matters of law that have been resolved by Parliament and the Supreme Court of Canada. Nevertheless, they reflect the Supreme Court's own ambiguity in both *Gladue* and *Wells* about whether reductions in terms of imprisonment can be justified in serious cases. The Supreme Court has left these questions open and the provincial courts of appeal have supplied different answers.

The British Columbia and Saskatchewan Courts of Appeal have also been more receptive to Crown appeals of *Gladue*-inspired sentences than the Ontario Court of Appeal. Although they can play a role in ensuring some proportionality between the crime and the sentence, successful Crown appeals can serve as disincentives for an in-depth *Gladue* approach that depends on information about the offender and sentencing options that

131. *R. v. Jensen*, *supra*, footnote 107, at para. 27.

132. *R. v. Batisse*, *supra*, footnote 102.

often require much on-the-ground work. Even the Ontario Court of Appeal, however, has been reluctant to reduce sentences in cases like *R. v. Kakekagamick*¹³³ that involve serious violence. The Ontario Court of Appeal's decision in that case also demonstrates that trial judges continue to have difficulties both in learning about the systemic factors that may help explain why Aboriginal offenders come before them and about resources that may or may not be available in their communities with respect to the sentencing of Aboriginal offenders. It is disturbing that these two central ingredients of a *Gladue*-inspired approach to sentencing often remain missing. In the absence of such on-the-ground information, there is a danger of a superficial approach to compliance with s. 718.2(e). Such an approach will not result in significant sentencing innovation or reduction of Aboriginal overrepresentation in prison.

Although some courts of appeal have been willing to endorse alternatives to imprisonment in a few serious cases, these cases have generally involved Aboriginal offenders from traditional backgrounds and with demonstrated community support¹³⁴ even though *Gladue* itself stresses its applicability to Aboriginal offenders in an urban environment¹³⁵ and even though many Aboriginal communities face difficulties and divisions¹³⁶ that may make it difficult for them to offer support to offenders.

Gladue remains a significant decision that undoubtedly has made an important difference in some individual cases, but courts of appeal remain cautious about applying it in serious cases. The appellate jurisprudence applying *Gladue* has so far failed to engage with the troubling facts that Aboriginal overrepresentation in prison continues to rise and that Aboriginal communities remain faced with a host of social problems stemming from colonialism, substance abuse and dislocation.

133. *R. v. Kakekagamick*, *supra*, footnote 95.

134. *R. v. Reid*, *supra*, footnote 65; *R. v. John*, *supra*, footnote 84.

135. See also *R. v. Brizard*, *supra*, footnote 92.

136. *R. v. Morris*, *supra*, footnote 29.