

Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going

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I. INTRODUCTION

Clearly the most significant development in the criminal law for Aboriginal people over the last 25 years was the decision by the Supreme Court of Canada in *R. v. Gladue*.¹ As significant and important as the *Gladue* decision was, eight years later, rates of Aboriginal over-representation in the Canadian prison system continue to rise.

This paper will sketch out the background and history behind the *Gladue* decision, the impact or lack of impact of the decision on Aboriginal rates of over-representation and the role that the *Canadian Charter of Rights and Freedoms*,² notably section 15, has played and might play in this issue over the coming years.

II. THE PRE-GLADUE ENVIRONMENT

Aboriginal over-representation is a phenomenon of post-war Canada. Prior to the end of the Second World War, Aboriginal people were not over-represented in prison, but the numbers of Aboriginal people in Canadian jails began to increase after the war.³ Over-representation was a notorious fact in Aboriginal communities by the 1970s. After all, it is

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¹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

³ A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), at 101 [hereinafter "Aboriginal Justice Inquiry"].

not hard to notice that your friends and relatives are going to jail in disproportionate numbers. In the broader, non-Aboriginal community, Aboriginal over-representation only came to the fore in the late 1980s.

In 1988, the Canadian Bar Association (“CBA”) Committee on Imprisonment and Release issued *Locking Up Natives in Canada*, a paper by Professor Michael Jackson of the University of British Columbia.⁴ The report was adopted by the CBA at its annual meeting in 1989.⁵ The report detailed levels of Aboriginal over-representation throughout Canada, with a particular emphasis on the western provinces. The report showed that approximately 10 per cent of federal male inmates and 13 per cent of federal female inmates were Aboriginal.⁶ The numbers were even greater in many provincial jail populations, particularly in the Western provinces.⁷ Even more worrying was the fact that rates of over-representation were increasing over time.

The impact of *Locking Up Natives*⁸ was felt in provincial inquiries into issues relating to Aboriginal people and the justice system. In 1991 Manitoba released its two-volume *Aboriginal Justice Inquiry* report⁹ and in that same year Alberta released *Justice on Trial — Report on the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*.¹⁰ Both these reports highlighted the issue of Aboriginal over-representation and raised concerns about the need to address the trend of ever-increasing rates of over-representation.

Over the same time period, non-Aboriginal Canadians became more aware of Aboriginal issues through both the Oka crisis¹¹ and Elijah

⁴ M. Jackson, *Locking Up Natives in Canada, Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988); reprinted in (1988-89) 23 U.B.C. L. Rev. 215 [hereinafter “Locking Up Natives”].

⁵ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996), at 29.

⁶ M. Jackson, *Locking Up Natives in Canada, Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988); reprinted in (1988-89) 23 U.B.C. L. Rev. 23, at 220.

⁷ M. Jackson, *Locking Up Natives in Canada, Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988); reprinted in (1988-89) 23 U.B.C. L. Rev. 23, at 220.

⁸ M. Jackson, *Locking Up Natives in Canada, Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988); reprinted in (1988-89) 23 U.B.C. L. Rev. 23.

⁹ A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1, The Justice System and Aboriginal People* (Winnipeg, Queen’s Printer, 1991).

¹⁰ (Edmonton: Solicitor General, 1991).

¹¹ For 78 days in the summer of 1990, the Mohawks of Kanesatake occupied land in the town of Oka, Quebec that they maintained was their traditional territory. Eventually the Canadian Army was called in, in an attempt to resolve the conflict. A good summary of the events can be found in G. York & L. Pindera, *People of the Pines* (Toronto: Little Brown, 1991).

Harper's stand against the Meech Lake Accord.¹² In the early 1990s, the federal government created the Royal Commission on Aboriginal Peoples ("RCAP"), whose report on criminal justice — *Bridging the Cultural Divide* — was released in 1996.¹³ In that report, the Commission found Aboriginal over-representation to be "injustice personified". The first major finding of the report was that:

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.¹⁴

At the same time as the Royal Commission was releasing its report on justice, Parliament was concluding its first major review of sentencing. The result of this process was Bill C-41,¹⁵ a comprehensive sentencing bill that moved the principles of sentencing out of the common law and enshrined them in the *Criminal Code*.¹⁶ The Bill included section 718.2(e). The section read:

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 section is unique among common law countries with Aboriginal populations as it is the only statute that specifically directs judges to

¹² The Meech Lake Accord was an attempt by Prime Minister Brian Mulroney to amend the Canadian Constitution. Elijah Harper was an NDP MLA in Manitoba and a former chief of the Red Sucker Creek First Nation in northern Manitoba. The Accord required the consent of the provinces and Harper prevented the Accord from coming to a vote in the legislature. Harper's opposition was grounded in the failure of the Accord to address any issues important to Aboriginal people.

¹³ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996) [hereinafter "Bridging the Cultural Divide"].

¹⁴ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996), at 309.

¹⁵ *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22.

¹⁶ R.S.C. 1985, c. C-46.

consider the circumstances of Aboriginal offenders. In explaining why the section was placed in the *Criminal Code*,¹⁷ then Justice Minister Alan Rock said to the Commons Justice Committee:

The reason we referred there specifically to aboriginal persons is that they are sadly over-represented in the prison population in Canada. I think it was the Manitoba justice inquiry that found that although Aboriginal people 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 the courts to look at alternatives where it's consistent with the protection of the public — alternatives to jail — and not simply resort to the easy answer in every case.¹⁸

Not surprisingly, the section came in for criticism. Both the Bloc Québécois and the Reform Party (as it then was) voiced strong opposition to the inclusion of what to them were considerations of race into the sentencing process.¹⁹

The amendments to the Code had been passed by the time RCAP released *Bridging the Cultural Divide*. In the context of that report, the Commission was not overly enthused about the section. It said:

This statement of purposes and principles certainly does not preclude imposing a sentence that emphasizes restorative and healing goals, but these are not given priority nor are they seen as anchoring the sentencing process.²⁰

The Commission then went on to contrast what an Aboriginal statement of purposes and principles for criminal law would look like.

¹⁷ R.S.C. 1985, c. C-46.

¹⁸ House of Commons, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, no. 62 (November 17, 1994), at 62.

¹⁹ *Hansard* (September 20, 1994) 5876; *Hansard* (November 19, 2004) 1205.

²⁰ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996), at 240.

III. *R. v. GLADUE*

The precise meaning of section 718.2(e) was not evident on the passage of Bill C-41.²¹ The enactment of the section did not lead immediately to any noticeable change in sentencing practices. Like much else in the legal landscape, it awaited a decision of the Supreme Court of Canada to map out its contours. That moment came in *R. v. Gladue*,²² decided in 1999.

The Supreme Court of Canada in 1998 set the stage for *R. v. Gladue*²³ by deciding *R. v. Williams*.²⁴ *Williams* was a case dealing with challenging jurors for potential bias based on the race of the accused. The Ontario Court of Appeal decision in *R. v. Parks*,²⁵ which upheld such questioning in the context of black accused persons, had not been appealed to the Supreme Court and so this was the Court's first opportunity to consider the question of challenging jurors for potential racial bias.

Mr. Williams was an Aboriginal person charged with robbery in Victoria, British Columbia. His lawyer wished to question jurors regarding the possibility that they might be biased against Mr. Williams because he was an Aboriginal person. The trial judge denied the motion and the B.C. Court of Appeal upheld the decision. Essentially, the courts found that there was a presumption of juror impartiality that could not be overturned on the basis of evidence of generalized antipathy to members of certain groups.²⁶

Given the significance of the case and concern among lawyers in Ontario that the *R. v. Parks*²⁷ decision might be in jeopardy, the case attracted six interveners: the Attorneys General of Canada and Ontario, the African Canadian Legal Clinic, the Urban Alliance on Race Relations, the Criminal Lawyers Association (Ontario) and Aboriginal Legal Services of Toronto ("ALST"). ALST was the only organization whose mandate was to deal with issues relating to Aboriginal people.

The Supreme Court reversed the B.C. Court of Appeal and ordered a new trial where the accused could question prospective jurors regarding

²¹ *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22.

²² [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

²³ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

²⁴ [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128 (S.C.C.).

²⁵ [1993] O.J. No. 2157, 15 O.R. (3d) 324 (Ont. C.A.).

²⁶ [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at para. 7 (S.C.C.).

²⁷ [1993] O.J. No. 2157, 15 O.R. (3d) 324 (Ont. C.A.).

prejudice against Aboriginal people. For a unanimous court, McLachlin J. (as she then was) wrote:

Although they acknowledged the existence of widespread bias against aboriginals, both Esson C.J. and the British Columbia Court of Appeal held that the evidence did not demonstrate a reasonable possibility that prospective jurors would be partial. In my view, there was ample evidence that this widespread prejudice included elements that could have affected the impartiality of jurors. Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity. As the Canadian Bar Association stated in *Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (1988), at p. 5:

Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.

There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system: see Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, at p. 33; Royal Commission on the Donald Marshall, Jr., *Prosecution: Findings and Recommendations*, vol. 1 (1989), at p. 162; *Report on the Cariboo-Chilcotin Justice Inquiry* (1993), at p. 11. Finally, as Esson C.J. noted, tensions between Aboriginals and non-Aboriginals have increased in recent years as a result of developments in such areas as land claims and fishing rights. These tensions increase the potential of racist jurors siding with the Crown as the perceived representative of the majority's interests.²⁸

Having dipped their toes in the issue of the treatment of Aboriginal people by the justice system, the Court jumped in with both feet in 1999 with their decision in *R. v. Gladue*.²⁹ *Gladue* concerned itself squarely with the interpretation of section 718.2(e). Perhaps because of the perceived lack of universality of the issue, the case attracted only three interveners — the Attorneys General of Canada and Alberta, and Aboriginal Legal Services of Toronto.

²⁸ [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at para. 58 (S.C.C.).

²⁹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

Jamie Gladue pleaded guilty to manslaughter in the death of her common law husband, Reuben Beaver, in Nanaimo, British Columbia. At her sentencing, defence counsel asked that the judge apply section 718.2(e).

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.³⁰

*R. v. Gladue*³¹ was a unanimous decision of the Supreme Court written by Cory and Iacobucci JJ. The decision provides an examination of the purpose behind section 718.2(e), including a critique of Canada’s overuse of incarceration generally. While section 718.2(e) is often referred to as “the Aboriginal sentencing section”, the direction to judges regarding Aboriginal people is found only at the end of the section. The section clearly has applicability to all offenders and, as this paper points out, it is largely non-Aboriginal people who have benefited from these amendments.

*R. v. Gladue*³² is remarkable for the direct language the Court uses in addressing the issue of Aboriginal over-representation. Referring to the major works on the issue of over-representation (*Locking Up Natives*,³³ the *Aboriginal Justice Inquiry*³⁴ and *Bridging the Cultural Divide*),³⁵ the Court found that:

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

³⁰ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 18 (S.C.C.).

³¹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

³² [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

³³ M. Jackson, *Locking Up Natives in Canada, Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988); reprinted in (1988-89) 23 U.B.C. L. Rev. 23.

³⁴ A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1, *The Justice System and Aboriginal People* (Winnipeg, Queen’s Printer, 1991).

³⁵ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996).

sentencing treatment in section 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.

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.³⁶

The Court also quoted the first major finding from *Bridging the Cultural Divide* on the failure of the criminal justice system in relation to Aboriginal people and called it a "striking yet representative statement".³⁷

*R. v. Gladue*³⁸ offers as clear and direct a statement of the problem of Aboriginal over-representation as could ever be expected from an institution such as the Supreme Court of Canada. The frankness that the Court showed in discussing the problem made the decision headline news across the country.³⁹

As a statement of the problem, *R. v. Gladue*⁴⁰ bears repeated reading and stands as a condemnation of the way in which Aboriginal people

³⁶ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at paras. 64-65 (S.C.C.).

³⁷ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 62 (S.C.C.). Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996), at 309.

³⁸ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

³⁹ For example, the headline in the Saturday April 24, 1999, *Globe and Mail* was "Top court appalled as Natives fill Canada's jails."

⁴⁰ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

have been treated by the criminal justice system. It is significant that the Court found over-representation to be “a crisis in the Canadian criminal justice system”.⁴¹ The court recognized that the issue was not that Aboriginal people were necessarily committing more crime than non-Aboriginal people, but rather that Aboriginal people went to jail for their actions much more frequently than non-Aboriginal people.

The very real concern that the Court expressed about Aboriginal over-representation is likely one of the reasons that in 2001 the Speech from the Throne stated:

It is a tragic reality that too many Aboriginal people are finding themselves in conflict with the law. Canada must take the measures needed to significantly reduce the percentage of Aboriginal people entering the criminal justice system, so that within a generation it is no higher than the Canadian average.⁴²

Unfortunately, six years on from the Throne Speech, this target is moving further and further out of reach.

*R. v. Gladue*⁴³ does not just describe the problem of Aboriginal over-representation; the decision was also concerned with setting out a way for judges to address the sentencing of Aboriginal people on a daily basis. While the Court set out guidelines for judges, they have proven not to be as clear as the Court’s statement of the problem.

The Court instructed judges to look at two sets of factors when sentencing an Aboriginal offender:

- (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.⁴⁴

In terms of systemic factors, the Court said that judges should take judicial notice of the broad systemic factors that have affected Aboriginal people. This presumably extends to the impact of colonialist government policies

⁴¹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 64 (S.C.C.).

⁴² Speech from the Throne to Open the 37th Parliament of Canada, December 2001. Volume 139, Issue 76, 1st Session, 37th Parliament, Edited *Hansard*, No. 2, at para. 1530, available online: Senate <http://www.parl.gc.ca/37/1/paribus/chambus/house/debates/002_2001-01-30/HAN002-E.htm#LINKT2>.

⁴³ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁴⁴ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 66 (S.C.C.).

such as residential schools and the mass adoption of Aboriginal children in what has been referred to as “the 60s scoop”.

The Court was also clear that section 718.2(e) applied to all Aboriginal people, wherever they lived, whether they might be seen as assimilated or not.⁴⁵ Courts were required to consider the section for every Aboriginal person unless the offender expressly waived consideration of *R. v. Gladue*.⁴⁶ The fact that Aboriginal-specific alternatives might not always be available for an Aboriginal offender was also found not to be a bar in looking at sentencing options.⁴⁷ As well, even if incarceration was inevitable, judges had to look at the length of the period of incarceration for an Aboriginal offender. In part this was because of the fact that racism towards Aboriginal offenders was “rampant in penal institutions”.⁴⁸

The problem with this proposed methodology is that it is not clear how the necessary information will come before the court. With regard to this issue the Court said:

... 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.⁴⁹

Where the accused was unrepresented the Court indicated that it was still “incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person”.⁵⁰

What judges were to do if counsel were not being particularly helpful, or if there were no defence counsel present, was not really addressed in the decision. The Court appeared to assume that changes to the way that Aboriginal people were sentenced in Canada would occur just because the Court said that they should. Sadly, this assumption has not turned out to be correct. Why this particular dictate of the Court has not been followed while other decisions have received more prompt attention will be discussed later.

The Court wanted to make clear that while section 718.2(e) mandated a different way in which an Aboriginal person was to be sentenced, it did not mean that on all occasions an Aboriginal person would receive a

⁴⁵ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 91 (S.C.C.).

⁴⁶ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 83 (S.C.C.).

⁴⁷ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 92 (S.C.C.).

⁴⁸ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 68 (S.C.C.).

⁴⁹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 83 (S.C.C.).

⁵⁰ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 84 (S.C.C.).

different sentence than a non-Aboriginal person in similar circumstances. The Court's reasoning in this area has led to a great deal of confusion.

The Court stated:

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.⁵¹

For some, the last sentence of the paragraph is the determinative one. On this reading, while the methodology for determining a fit sentence for an Aboriginal offender might be different than if the offender were a non-Aboriginal person, once violence is involved, the result will be the same. This interpretation reduces *R. v. Gladue*⁵² to standing for the proposition that in cases of violence Aboriginal and non-Aboriginal offenders will receive the same sentence. This seems to be an odd message to take from a decision that spends most of its time talking about the problem of over-representation. It also ignores the fact that Jamie Gladue pleaded guilty to manslaughter — clearly a violent offence. Nevertheless, as reductive as this viewpoint might seem, it was picked up very quickly, particularly by Crowns and judges who might not agree with the other aspects of the Court's decision.

IV. THE IMPACT OF *GLADUE* ON THE COURTS

The waters were further muddied a year later in 2000, when the Supreme Court issued its decision in *R. v. Wells*.⁵³ *Wells* was one of a series of cases that came to the Court regarding the interpretation of the conditional sentencing provisions of Bill C-41.⁵⁴ Mr. Wells was an Aboriginal person convicted of a sexual assault at the Tsuu T'ina First Nation outside of Calgary, Alberta. He was sentenced to 20 months' imprisonment. The matter went to the Alberta Court of Appeal, which

⁵¹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 79 (S.C.C.).

⁵² [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁵³ [2000] S.C.J. No. 11, [2000] 1 S.C.R. 207 (S.C.C.).

⁵⁴ *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22.

considered section 781.2(e) and fresh evidence provided by the appellant but nevertheless upheld the sentence. This appeal was heard before the *R. v. Gladue*⁵⁵ decision and so the Supreme Court reviewed the fitness of the sentence in the context of that decision. At this hearing before the Supreme Court there was only one intervener, Aboriginal Legal Services of Toronto.

In another unanimous decision, this time by Iacobucci J. alone, the Court once again emphasized that *R. v. Gladue*⁵⁶ mandated a different methodology, not necessarily a different result. The Court went on to say:

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.⁵⁷

At the same time, the Court upheld the sentence of imprisonment even though the fresh evidence provided to the Court of Appeal provided treatment options in a non-incarceral setting.⁵⁸ As with *Gladue*, the case could be seen to stand for the proposition that sentence parity with non-Aboriginal offenders is the norm for violent offences or for the proposition that this is expressly not the case.

After dealing with Aboriginal-specific criminal cases for three years in a row (*R. v. Williams*,⁵⁹ *R. v. Gladue*⁶⁰ and *R. v. Wells*⁶¹), the Court has not revisited this area since 2000. In the interim, conflicting lower court decisions dealing with Aboriginal people convicted of violent offences have fallen into two camps.

One set of decisions focus on the portions of *R. v. Gladue*⁶² and *R. v. Wells*⁶³ that stress that serious and violent offences are still subject to

⁵⁵ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁵⁶ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁵⁷ [2000] S.C.J. No. 11, [2000] 1 S.C.R. 207, at para. 50 (S.C.C.).

⁵⁸ [2000] S.C.J. No. 11, [2000] 1 S.C.R. 207, at para. 48 (S.C.C.).

⁵⁹ [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128 (S.C.C.).

⁶⁰ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁶¹ [2000] S.C.J. No. 11, [2000] 1 S.C.R. 207 (S.C.C.).

⁶² [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

restorative sentences and that sentence length must be considered in all cases. Not surprisingly, this line of cases generally approves of conditional sentences or sentences with a shorter period of imprisonment than sought by the Crown.⁶⁴

The other set of decisions refers only to the sentence in *R. v. Gladue* that argues for sentence parity with non-Aboriginal offenders⁶⁵ and the restatement of this notion in *R. v. Wells*.⁶⁶ Once again it is not surprising to find that the resulting sentences pursuant to this manner of interpretation are incarceral sentences, rather than conditional sentences, and are consistent with the Crown's position on the length of the sentence.⁶⁷

*R. v. Gladue*⁶⁸ dealt with the interpretation of a section of the *Criminal Code*⁶⁹ that was expressly concerned with sentencing. One of the live questions arising from the decision was the extent to which the decision could be extended to other areas involving the treatment of Aboriginal offenders by the justice system.

The first area where this issue arose was in bail decisions. Justice Brent Knazan of the Ontario Court of Justice addressed this matter in a paper he presented to the National Judicial Institute in 2003.⁷⁰ He noted the systemic barriers faced by Aboriginal accused persons, including, as the Supreme Court of Canada noted in *R. v. Gladue*,⁷¹ a greater reluctance to give bail to Aboriginal accused persons. The consequence of this practice is that without reliance on *Gladue* principles, many Aboriginal offenders will have effectively served their sentences by the time their plea is entered. The reason for this, of course, is that the amount of dead time they will have accrued will be equal to, or in excess of, what they

⁶³ [2000] S.C.J. No. 11, [2000] 1 S.C.R. 207 (S.C.C.).

⁶⁴ *R. v. R. (M.S.)*, [2002] B.C.J. No. 845 (B.C.C.A.); *R. v. Dennis*, [2001] B.C.J. No. 122 (B.C.C.A.); *R. v. Peters*, [2000] B.C.J. No. 959 (B.C.C.A.); *R. v. Sackanay*, [2000] O.J. No. 885 (Ont. C.A.); *R. v. A. (J.E.)*, [1999] B.C.J. No. 1661 (B.C.C.A.); *R. v. Logan*, [1999] O.J. No. 3411 (Ont. C.A.).

⁶⁵ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 79 (S.C.C.).

⁶⁶ [2000] S.C.J. No. 11, [2000] 1 S.C.R. 207 (S.C.C.).

⁶⁷ *R. v. W. (L.D.)*, [2005] B.C.J. No. 1746 (B.C.C.A.); *R. v. M. (K.E.)*, [2004] B.C.J. No. 2735 (B.C.C.A.); *R. v. Morris*, [2004] B.C.J. No. 1117 (B.C.C.A.); *R. v. J. (R.)*, [2004] B.C.J. No. 125 (B.C.C.A.); *R. v. Froman*, [2003] O.J. No. 4222 (Ont. C.A.); *R. v. K. (D.T.)*, [2002] B.C.J. No. 586 (B.C.C.A.); *R. v. Gates*, [2002] B.C.J. No. 416 (B.C.C.A.).

⁶⁸ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁶⁹ R.S.C. 1985, c. C-46.

⁷⁰ B. Knazan, "Sentencing Aboriginal Offenders in a Large City — The Toronto Gladue (Aboriginal Persons) Court", National Judicial Institute, Aboriginal Law Seminar, January 23-25, 2003, Calgary, available online <<http://aboriginallegal.ca/docs/knazan.pdf>>.

⁷¹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

might have received had they pleaded guilty at their first opportunity. The imposition of a “time-served” sentence precludes any meaningful consideration of the *Gladue* principles on sentencing. As a result, Justice Knazan concluded that the *Gladue* principles applied on bail hearings.⁷² This viewpoint was adopted by the Ontario Superior Court of Justice in *R. v. Bain*.⁷³

The decision by the Ontario Court of Appeal in *R. v. Sim*⁷⁴ extended the reach of *R. v. Gladue*⁷⁵ still further. *R. v. Sim* was an appeal of a decision by the Ontario Review Board regarding an application for release by an Aboriginal person who was found not criminally responsible and confined to a secure psychiatric facility. Justice Sharpe, for the Court, quoted extensively from *R. v. Williams*⁷⁶ and *R. v. Gladue* and concluded:

I do not think that the principles underlying *Gladue* should be limited to the sentencing process and I can see no reason to disregard the *Gladue* principles when assessing the criminal justice system’s treatment of NCR accused.⁷⁷

The National Parole Board has adopted a similar view and now requires that *Gladue* principles be considered when Aboriginal offenders have their parole hearings.

The result of decisions such as these has been to expand the reach of *R. v. Gladue*⁷⁸ to virtually every occasion in which the liberty of an Aboriginal person is at risk. The implications of this expansion of the principles will be discussed later.

V. ABORIGINAL OVER-REPRESENTATION SINCE *GLADUE*

Although *R. v. Gladue*⁷⁹ clearly set out a direction for judges and expressly gave them the mandate to address the issue of Aboriginal over-representation as best they could through the sentencing process,

⁷² B. Knazan, “Sentencing Aboriginal Offenders in a Large City — The Toronto Gladue (Aboriginal Persons) Court”, National Judicial Institute, Aboriginal Law Seminar, January 23-25, 2003, Calgary, available online: <<http://aboriginallegal.ca/docs/knazan.pdf>>, at 11-14.

⁷³ [2004] O.J. No. 6147 (Ont. S.C.J.).

⁷⁴ [2005] O.J. No. 4432, 78 O.R. (3d) 183 (Ont. C.A.).

⁷⁵ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁷⁶ [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128 (S.C.C.).

⁷⁷ [2005] O.J. No. 4432, 8 O.R. (3d) 183, at para. 16 (Ont. C.A.).

⁷⁸ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁷⁹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

the reality is that despite the enactment of section 718.2(e) and *Gladue*, rates of Aboriginal over-representation have continued to increase.

As a contemporary statement of the problem, the Office of the Correctional Investigator, in its 2005/2006 report, estimated that the incarceration rate for non-Aboriginal people is 117 per 100,000 adults. The incarceration rate for Aboriginal people is almost 10 times higher — 1,024 per 100,000 adults.⁸⁰

At the time *R. v. Gladue*⁸¹ was decided, Aboriginal people made up 12 per cent of all federal inmates and 19 per cent of all sentenced inmates. By 2004/2005 Aboriginal people accounted for 17 per cent of admissions to federal custody and 22 per cent of admissions to all provincial correctional facilities.⁸² The same trend is observable for young offenders as well, although the level of over-representation is worse for Aboriginal young people.⁸³ If this is progress, it is progress of the worst kind.

Julian Roberts and Ronald Melchers reviewed admissions to provincial correctional facilities from 1978 to 2001. The study found that over that period the number of Aboriginal people in custody increased from 14,576 to 15,349, while the number of non-Aboriginals decreased from 76,526 to 65,576.⁸⁴ Interestingly, the post Bill C-41⁸⁵ period, including a few years after the *R. v. Gladue*⁸⁶ decision, did not have any impact on Aboriginal incarceration rates.

What is mystifying is why the number of aboriginal admissions to custody did not decline at an accelerated rate (compared to non-aboriginal offenders) from 1996 onwards, as a result of the sentencing reforms introduced that year and the subsequent judgments from the Supreme Court within the next few years. In fact, although it encompasses only a few years (1997-1998 to 2000-2001), the post C-41 period reveals an increase in the volume of aboriginal admissions to custody of 3%, while non-aboriginal admissions declined by fully 27%. This is quite

⁸⁰ The Correctional Investigator Canada, *Annual Report of the Office of the Correctional Investigator 2005-2006* (Ottawa: Minister of Public Works and Government Services, 2006), at 11.

⁸¹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁸² "Adult Correctional Services in Canada 2004-2005" (2006) 26 (5) *Juristat*, at 15-16.

⁸³ J. Latimer & L. Foss, *A One-Day Snapshot of Aboriginal Youth in Custody Across Canada: Phase II* (Ottawa: Department of Justice Canada, 2004), at ii; see also J. Rudin, "Incarceration of Aboriginal Youth in Ontario 2004-2006 — the Crisis Continues" (2007) 53 *Crim. L.Q.* 260.

⁸⁴ J. Roberts & R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003) 45 *Can. J. Crim. & Crim. Just.*, at 211.

⁸⁵ *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22.

⁸⁶ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

the reverse of what would be expected in light of sentencing reforms specifically addressing the plight of aboriginal offenders. After all, both statutory reforms and appellate jurisprudence during this period encouraged judges to consider the use of alternatives to incarceration for all offenders but to pay particular attention to the circumstances of aboriginal offenders.

This suggests that these developments, including a proliferation of publications highlighting the issue, codification of a special direction to judges (and its subsequent endorsement by the Supreme Court), and the creation of a new alternative to imprisonment (the conditional sentence of imprisonment) have all failed to benefit aboriginal offenders to quite the same extent as non-aboriginal offenders. ...⁸⁷

The continued rise in over-representation of Aboriginal people in prisons is not really that mystifying. First, as was noted earlier, section 718.2(e) is not an Aboriginal sentencing provision. It is a provision of general application that mentions consideration of Aboriginal offenders at the end of the section. The section in no way suggests that judges should not look for alternatives to incarceration for non-Aboriginal people. What the statistics show is that courts find it easier to come up with alternatives for non-Aboriginal offenders than for Aboriginal offenders.

The same situation applies with regard to young offenders. The *Youth Criminal Justice Act*,⁸⁸ which came into force in 2003, contains many restraints on the use of imprisonment for young people. The Act also includes the equivalent of section 718.2(e) (a greater discussion on this section of the YCJA follows later). Incarceration statistics following the implementation of the YCJA show rates of Aboriginal over-representation increasing. In the case of young offenders, fewer Aboriginal and non-Aboriginal youth are being sent to jail, but the drop in imprisonment rates for non-Aboriginal offenders is much greater than that for Aboriginal offenders. As a result, rates of Aboriginal over-representation continue to rise.⁸⁹

The key reason that rates of Aboriginal over-representation have not decreased is that the process by which judges are to get information

⁸⁷ J. Roberts & R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003) 45 Can. J. Crim. & Crim. Just. 211, at 226.

⁸⁸ S.C. 2002, c. 1 [hereinafter "YCJA"].

⁸⁹ See J. Latimer & L. Foss, *A One-Day Snapshot of Aboriginal Youth in Custody Across Canada: Phase II* (Ottawa: Department of Justice Canada, 2004) and J. Rudin, "Incarceration of Aboriginal Youth in Ontario 2004-2006 – The Crisis Continues" (2007) 53 Crim. L.Q. 260.

about Aboriginal offenders proposed in *R. v. Gladue*⁹⁰ does not work in practice. As courts have repeatedly stated, *Gladue* is in no way a “get out jail free card” for Aboriginal offenders.⁹¹ Aboriginal offenders do not receive a discount in their sentence by virtue solely of being Aboriginal. *Gladue* emphasizes that in order to craft a different sentence for an Aboriginal offender, judges need information, both about the offender and about the systemic factors that have played a role in the life of the offender.

It is not surprising that judges are not getting this information. Defence counsel do not have any particular knowledge or expertise on the systemic factors that have led to Aboriginal over-representation. Nor do defence counsel necessarily have the skills to gather information on the life history of their client. Law schools still spend very little time teaching about sentencing and sentencing submissions. While a vital part of the work of defence counsel, sentencing is rarely the subject of continuing legal education sessions. Even if counsel do possess the skills necessary to gather the requisite information for a substantive sentencing submission, they do not necessarily get remunerated for this work. In many legal aid plans a guilty plea is a guilty plea — regardless of the work that is put into the plea. While it would be nice to think that money should not be a factor in this area, that view would reveal a striking degree of naivety.

Theoretically, issues of the kind raised in *R. v. Gladue*⁹² could be the subject of pre-sentence reports (“p.s.r.s”). Although some provinces indicate that they include *Gladue* considerations in their p.s.r.s, the reality is that this is a very hit and miss process. In some provinces the amount of time a probation officer can spend on a p.s.r. is prescribed and might preclude taking the time necessary to acquire the requisite information. As well, the scope of many p.s.r.s, particularly for adult offenders, is simply to determine whether the offender is suitable for a community disposition, not what that disposition might be. For the most part, the reality is that the sentencing of Aboriginal offenders in the post-*Gladue* world proceeds very much like it did pre-*Gladue*. When the

⁹⁰ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁹¹ In *R. v. Kakekagamick*, [2006] O.J. No. 3346, 81 O.R. (3d) 664 (Ont. C.A.), the Ontario Court of Appeal said, at para. 34:

The [Supreme] Court affirmed that s. 718.2(e) imposes a duty on the sentencing judge to approach the sentencing of Aboriginal offenders differently. That is, it is not a mitigating factor on sentencing simply to be an Aboriginal offender, as the Crown erroneously asserts in its factum. Nor is being an Aboriginal offender, as I have heard it referred to, a “get out of jail free” card.

⁹² [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

prevailing ethos is “business as usual” then there is no reason to expect that sentencing practices will change. If sentencing practices do not change, then rates of Aboriginal over-representation will not change either; indeed, they may worsen.

One might wonder why the direction from the Supreme Court of Canada to change the way Aboriginal offenders are sentenced has not met with the same response as other decisions of the Court. For example, when the Court stated that delays in getting matters to trial meant that charges would be thrown out of court,⁹³ governments responded by building more courthouses and appointing more judges. When the Court mandated more expansive disclosure rules,⁹⁴ disclosure practices changed quickly. Recently, the Court required a change to the laws regarding those held on security certificates⁹⁵ and an amended law was passed by Parliament within months. Should not all directions from the Court be addressed promptly?

The key difference between *R. v. Gladue*⁹⁶ and the other examples cited above is that in the latter cases, failure by the government to act would mean that potentially guilty people might go free or be released from custody. Inaction on these issues would lead to serious questions from the opposition, editorials in newspapers and the fanning of fears for public safety. On the other hand, inaction in response to *Gladue* means that Aboriginal people continue to go to jail. While this development clearly constitutes “a crisis in the Canadian criminal justice system” in the eyes of the Court, it does not carry the political baggage that being “soft on crime” carries.

VI. GLADUE COURTS AND GLADUE REPORTS

In 2000, the Ontario Conference of Judges and the Canadian Association of Provincial Court Judges held their annual conference in Ottawa. One of the focuses of discussion at the conference was sentencing Aboriginal offenders post-*R. v. Gladue*.⁹⁷ According to Justice Knazan:

⁹³ *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.).

⁹⁴ *R. v. Stinchcombe*, [1990] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

⁹⁵ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

⁹⁶ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁹⁷ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

There was much interest and discussion that revealed stark problems. Four years after s. 718.2(e) was proclaimed and almost two years after the judgement in *R. v. Gladue*, there was confusion about how to consistently apply the section. The problems were fundamental; many judges had difficulty even knowing when an Aboriginal offender was before the court.⁹⁸

At the conference, discussions began with judges from the Old City Hall Court in Toronto, representatives from Aboriginal Legal Services of Toronto and Professor Kent Roach (who represented ALST before the Supreme Court in *R. v. Williams*,⁹⁹ *R. v. Gladue* and *R. v. Wells*¹⁰⁰) about creating a specialized court that dealt only with Aboriginal people. In October 2001, the *Gladue* (Aboriginal Persons) Court began hearing cases at Old City Hall. The court now sits two days a week. Two other *Gladue* Courts have been established in Toronto, one at the College Park Court and the other at the 1000 Finch Court. All *Gladue* Courts deal with bail hearings and sentencing Aboriginal offenders. The courts do not do trials.

In order to support the *Gladue* Court, ALST created the position of the *Gladue* Caseworker. It is the role of the *Gladue* Caseworker to prepare written reports on Aboriginal offenders at the request of the judge, defence or Crown. The reports, known as *Gladue* Reports, are generally prepared only where there is a strong likelihood that an offender will receive a period of incarceration as part of his or her sentence.

Gladue Reports go into great detail concerning the life circumstances of the offender. All efforts are made to speak with friends, family members and anyone who can shed light on the life of the person. The reports extensively quote interviewees verbatim. The reports also place the individual's life circumstances in the context of the systemic factors that have affected Aboriginal people. The reports also contain concrete plans as to alternatives to incarceration. For example, if the report suggests that the offender take a program for substance abuse, an application to a program will often have been completed and an acceptance date received prior to the report being filed. ALST will, if necessary, provide the funds to allow the offender to attend the treatment centre if it is out of town. Over the past two years, ALST has created additional positions

⁹⁸ B. Knazan, "Sentencing Aboriginal Offenders in a Large City — The Toronto Gladue (Aboriginal Persons) Court", National Judicial Institute, Aboriginal Law Seminar, January 23-25, 2003, Calgary, available online: <<http://aboriginallegal.ca/docs/knazan.pdf>>, at p. 3.

⁹⁹ [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128 (S.C.C.).

¹⁰⁰ [2000] S.C.J. No. 11, [2000] 1 S.C.R. 207 (S.C.C.).

for *Gladue* Aftercare Workers, to assist clients in meeting the terms of their sentence or bail conditions.

What this means in practice is that a judge who is in receipt of a *Gladue* Report will have a greater understanding of the life of the offender before him or her and of how systemic issues have impacted that life, and there will also be a very detailed plan presented that will attempt to address the factors that have led the offender into the criminal justice system. *Gladue* Caseworkers prepare reports in Toronto and in the Hamilton/Brantford area. In some cases the reports are ordered in *Gladue* Courts; in many cases they are not.

Evaluations of the program have shown that *Gladue* Reports have an impact on the sentences that are handed down to Aboriginal offenders. Campbell Research Associates found that judges, Crown counsel and defence counsel all agreed that *Gladue* Reports enable the courts to better meet the requirements of the *Criminal Code*¹⁰¹ and the *Youth Criminal Justice Act*¹⁰² regarding the sentencing of Aboriginal offenders.¹⁰³ Crown attorneys often changed their position on sentence after receiving a *Gladue* Report.¹⁰⁴ All the judges interviewed in the evaluation agreed that the reports formed a sound basis for a sentence.¹⁰⁵

The experience of the *Gladue* Courts and *Gladue* Reports shows that jail need not be the default option when sentencing Aboriginal offenders. It also shows that there is a need to consciously address how to do things differently if change is going to occur.

VII. *R. v. KAKEKAGAMICK*

The need for adequate information to allow judges to make an informed sentencing decision was front and centre in the Ontario Court

¹⁰¹ R.S.C. 1985, c. C-46.

¹⁰² S.C. 2002, c. 1.

¹⁰³ Campbell Research Associates, "Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program, Year Two, October 2005-September 2006", November 2006, available online: <http://Aboriginaloriginallegal.ca/docs/Year_2.pdf>, at 20.

¹⁰⁴ Campbell Research Associates, "Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program, Year Two, October 2005-September 2006", November 2006, <http://Aboriginaloriginallegal.ca/docs/Year_2.pdf>, at 21.

¹⁰⁵ Campbell Research Associates, "Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program, Year Two, October 2005-September 2006", November 2006, <http://Aboriginaloriginallegal.ca/docs/Year_2.pdf>, at 20.

of Appeal decision in *R. v. Kakekagamick*.¹⁰⁶ Mr. Kakekagamick, a first-time offender in his late twenties, was convicted in Kenora, Ontario of aggravated assault against his girlfriend. At his sentencing there were no substantive submissions to the Court with respect to the applicant's Aboriginal background and no reference was made to *R. v. Gladue*.¹⁰⁷ While the trial judge made reference to the fact that the offender was an Aboriginal person, she failed to consider any of the principles raised in the decision.¹⁰⁸

When the matter came before the Court of Appeal, neither defence counsel nor the Crown cited *R. v. Gladue*¹⁰⁹ in their factums or raised it in their argument. The Court of Appeal took the unusual step of ordering another pre-sentence report — which it referred to as a *Gladue Report* — and reserved judgment until the report was received.¹¹⁰

In a unanimous judgment by LaForme J., the Court of Appeal concluded that the lack of any substantive consideration of *R. v. Gladue*¹¹¹ on sentencing was an error of law. The effect of the error of law was to require the Court to sentence the appellant anew on the basis of the fresh evidence that the court requested.¹¹²

*R. v. Kakekagamick*¹¹³ makes it clear that failure to address the issues raised in *R. v. Gladue*¹¹⁴ when sentencing an Aboriginal offender is an error of law that requires the offender to be resentenced by a Court of Appeal. It is not enough for the sentencing judge to note that the offender is Aboriginal and mention *Gladue* in passing to render the sentence appeal-proof. On the contrary, where defence counsel or the Crown fails to address the *Gladue* factors, the judge must take it upon himself or herself to launch such an inquiry. *Kakekagamick* clearly raises the bar in terms of the expectations placed on all parties when an Aboriginal offender is sentenced.

*R. v. Kakekagamick*¹¹⁵ is not without its problems, however. While the Court of Appeal was quite forthright in declaring that the sentencing

¹⁰⁶ [2006] O.J. No. 3346, 81 O.R. (3d) 664 (Ont. C.A.). Leave to Appeal to the Supreme Court of Canada was refused.

¹⁰⁷ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹⁰⁸ *R. v. Kakekagamick*, [2006] O.J. No. 3346, 81 O.R. (3d) 664, at para. 51 (Ont. C.A.).

¹⁰⁹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹¹⁰ *R. v. Kakekagamick*, [2006] O.J. 1449 (endorsement) para. 3 (Ont. C.A.).

¹¹¹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹¹² *R. v. Kakekagamick*, [2006] O.J. No. 3346, 81 O.R. (3d) 664, at para. 51 (Ont. C.A.).

¹¹³ [2006] O.J. No. 3346, 81 O.R. (3d) 664 (Ont. C.A.).

¹¹⁴ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹¹⁵ [2006] O.J. No. 3346, 81 O.R. (3d) 664 (Ont. C.A.).

judge had erred, it nevertheless sentenced Mr. Kakekagamick to a five-year sentence — the same sentence as the trial judge imposed. Thus, even though there was no real consideration of *R. v. Gladue*¹¹⁶ at the initial sentencing and even though the pre-sentence report relied upon at that sentencing was found of little use, the Court of Appeal essentially upheld the sentence. The Court's rationale for this decision was that the offence was "serious and violent" and so there was no reason to depart from the sentence that would have been imposed on a non-Aboriginal offender.¹¹⁷ In this part of its interpretation of *Gladue* and *R. v. Wells*,¹¹⁸ *Kakekagamick* sides with the status quo.

VIII. THE CHARTER, *GLADUE* AND ABORIGINAL OVER-REPRESENTATION

Where does the Charter fit into all of this? In *R. v. Gladue*¹¹⁹ there is a very brief discussion of section 15(2). Counsel for *Gladue* argued that section 718.2(e) was, in some ways, an affirmative action program and therefore protected under s. 15(2) of the Charter. The respondent felt that this viewpoint amounted to reverse discrimination against non-Aboriginal offenders. The Court chose not to wade into the section 15 waters.

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.¹²⁰

This is not to say that section 15 might not play a role in ensuring that *Gladue* remains the applicable law in the sentencing of Aboriginal offenders, at least until the promise of the 2001 Throne Speech is met.

¹¹⁶ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (Ont. C.A.).

¹¹⁷ *R. v. Kakekagamick*, [2006] O.J. No. 3346, 81 O.R. (3d) 664, at para. 73 (Ont. C.A.).

¹¹⁸ [2000] S.C.J. No. 11, [2000] 1 S.C.R. 207 (S.C.C.).

¹¹⁹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹²⁰ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 87 (S.C.C.).

When the federal government drafted its new *Youth Criminal Justice Act*,¹²¹ an equivalent section to 718.2(e) was absent. A number of reasons were suggested for why such a section was missing. On the one hand, it was suggested that the existing wording in the Act, while not mirroring section 718.2(e), made the same point. On the other hand, the more cynical viewpoint was that the government felt that the law was going to be enough of a challenge to pass given concerns from the Bloc Québécois that the law was too repressive and restricted innovations being carried out in Quebec, and concerns from the Reform Party that the law was too lenient on young offenders. As was noted earlier, the one area that the Bloc Québécois and the Reform Party agreed on was their displeasure with section 718.2(e). Keeping it out of the YCJA would stop these two opponents of the legislation from banding together on this issue.

Aboriginal Legal Services of Toronto appeared before the Senate Standing Committee on Legal and Constitutional Affairs to raise its concerns about the omission of a 718.2(e) section in the bill. As part of its submissions ALST said that allowing adult Aboriginal offenders to avail themselves of the provisions of section 718.2(e) but denying Aboriginal youth that opportunity was a violation of section 15. ALST promised to launch a Charter challenge against the *Youth Criminal Justice Act*¹²² if it was not amended.¹²³ ALST had secured funding from the Court Challenges Program¹²⁴ to launch such a case.

The Senate made only one amendment to the *Youth Criminal Justice Act*¹²⁵ before sending it back to Parliament one last time for approval. That amendment was to put the wording of section 718.2(e) in two sections of the YCJA. While it is impossible to determine the original intent of the framers of these amendments, it would appear that concerns for fairness and equality of treatment of Aboriginal youth were part of the motivation behind the Senate's decision. When introducing the amended YCJA to Parliament for its final approval, then Minister of Justice Martin Cauchon noted that the amendment essentially ensured that

¹²¹ S.C. 2002, c. 1.

¹²² S.C. 2002, c. 1.

¹²³ Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 13, Evidence for October 23, 2001.

¹²⁴ May it rest in peace.

¹²⁵ S.C. 2002, c. 1.

Aboriginal youth were now treated in an equal fashion to Aboriginal adults.¹²⁶

One of the ways in which the impact of sections such as section 718.2(e) can be blunted is by legislation mandating minimum sentences. One of the purposes behind minimum sentence laws is to tie the hands of judges and to prevent them from relying on other sentencing options such as conditional sentences. While the Conservative Party has recently introduced a number of bills adding minimum sentences to the *Criminal Code*,¹²⁷ the previous Liberal government was not shy in introducing new mandatory minimums as well.¹²⁸

The fact that mandatory minimums restrict attempts by judges to address over-representation is a by-product of a more generalized desire by legislators to direct judges in sentencing offenders for certain offences. Whether an intended consequence or not, the use of mandatory minimums cannot help but make it harder to reduce levels of Aboriginal over-representation. This suggests that there might well be a role for section 15 when an Aboriginal offender is being sentenced for an offence where there is a mandatory minimum.

Although this issue has not yet come before a court of appeal, the Ontario Court of Justice has considered it on at least two occasions. In *R. v. King*,¹²⁹ Knazan J. found that mandatory minimum provisions for Aboriginal people convicted of second or subsequent impaired driving offences violated section 15 and could not be saved by section 1. The precise nature of the infringement in this case arose, in part, because of the specific nature of the impaired driving provisions. Section 727 of the *Criminal Code*¹³⁰ gives the Crown discretion to introduce evidence of previous impaired driving convictions. Upon proof of prior convictions the judge is required to impose at least the mandatory minimums. The Crown's discretion as to whether or not to introduce prior convictions distinguishes this mandatory minimum from others in the *Criminal Code*.

¹²⁶ Canada. House of Commons, January 30, 2002, 37th Parliament, 1st Session Edited *Hansard*, No. 135, at 1535, available online: Parliament of Canada <http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/135_2002-01-30/HAN135-E.htm#Int-113678>.

¹²⁷ Bill C-10 (1st Sess., 39th Parl., 2006) in particular proposes adding a number of new minimum sentences for a variety of firearms offences.

¹²⁸ Bill C-2 (S.C. 2005, c. 32), passed by the Liberal government, added minimum sentences to 11 sexual offences; in some cases the minimum sentences were as low as 14 days' imprisonment.

¹²⁹ [2007] O.J. No. 2099 (Ont. C.J.).

¹³⁰ R.S.C. 1985, c. C-46.

In his analysis, Knazan J. noted that *R. v. Gladue*¹³¹ makes clear that “the Canadian penal justice system has historically discriminated against Aboriginal people, generally and in particular through the excessive incarceration of aboriginal persons in a systemic manner”¹³² and that section 718.2(e) was Parliament’s attempt to address this discrimination. Because mandatory minimums preclude a sentencing judge “from considering an aboriginal person’s particular circumstances and [mandate a judge] to sentence an aboriginal offender to jail, a sentencing judge may perpetuate the historical and continuing discrimination against aboriginal people”¹³³.

Justice Knazan concludes his section 15 analysis by saying:

The effect of the impugned legislation is to return aboriginal offenders, and only aboriginal offenders, to a situation in which the historical discrimination against them is an established fact. It is localized and severe. It deprives them of the benefit of s. 718.2(e), which was enacted to address the discriminatory treatment of aboriginals by sentencing courts.¹³⁴

The remedy was to grant Mr. King a constitutional exemption to allow him to argue for a non-incarceral sentence in his case.

Importantly, Knazan J.’s reasoning was grounded on *R. v. Gladue*¹³⁵ and its analysis of Aboriginal over-representation. Section 718.2(e) was seen as the method by which over-representation could be addressed, but it was not the motivating factor for finding discrimination in the mandatory minimum provisions.

Another judge of the Ontario Court of Justice came to the opposite conclusion in a similar case.¹³⁶ The decision in *King*¹³⁷ has not been appealed by the Crown.¹³⁸ It will have to wait until a later date to see whether this decision will have more universal application. Such challenges can be expected as legislation requiring more and more mandatory minimums take effect.

¹³¹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹³² *R. v. King*, [2007] O.J. No. 2099, at para. 38 (Ont. C.J.).

¹³³ *R. v. King*, [2007] O.J. No. 2099, at para. 38 (Ont. C.J.).

¹³⁴ *R. v. King*, [2007] O.J. No. 2099, at para. 69 (Ont. C.J.).

¹³⁵ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹³⁶ *R. v. Boissoneau*, [2006] O.J. No. 5607 (Ont. C.J.).

¹³⁷ *R. v. King*, [2007] O.J. No. 2099 (Ont. C.J.).

¹³⁸ While granting the exemption, Knazan J. did sentence Mr. King to a period of incarceration.

Since the Supreme Court of Canada rendered its decision in *R. v. Gladue*¹³⁹ there have been concerns that the portion of section 718.2(e) dealing with Aboriginal people might be repealed. Given the antipathy to the section expressed by both the Conservative Party and the Bloc Québécois, it is certainly possible to imagine a scenario in which this takes place.

Even if this part of the section were repealed, however, that would not necessarily negate the impact of *R. v. Gladue*.¹⁴⁰ The findings of that decision did not rest on the existence of a section of the *Criminal Code*.¹⁴¹ That the Canadian criminal justice system has failed Aboriginal people is a finding of the Supreme Court of Canada. That finding did not rest on the passage of section 718.2(e). The Court made clear that this section was Parliament's attempt to address the issue of Aboriginal over-representation. Repealing section 718.2(e) will not make the reality of Aboriginal over-representation go away.

Further entrenching *R. v. Gladue*¹⁴² in the legal landscape are decisions such as *R. v. Bain*¹⁴³ and *R. v. Sim*.¹⁴⁴ The reasoning behind these decisions is that *Gladue* extends beyond the sentencing process. Since section 718.2(e) does not apply to bail, review board or parole hearings, repealing the section will not change the law in these areas mandating consideration of the *Gladue* principles. In the event of repeal, it would be open to counsel to argue that *Gladue* is still the definitive case on sentencing even if section 718.2(e) no longer exists.

What is more problematic is the fact that despite *R. v. Gladue*,¹⁴⁵ Aboriginal rates of over-representation continue to rise. Given the finding that the criminal justice system has failed Aboriginal people, is there the possibility of a section 15 challenge to the lack of action on over-representation? Does the fact that the only *Gladue* Courts in Canada are located in Toronto give rise to a challenge from Aboriginal offenders in other jurisdictions?

There certainly could be strong arguments marshalled in favour of a section 15 challenge to government inaction in the face of *R. v. Gladue*¹⁴⁶

¹³⁹ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹⁴⁰ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹⁴¹ R.S.C. 1985, c. C-46.

¹⁴² [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹⁴³ [2004] O.J. No. 6147 (Ont. S.C.J.).

¹⁴⁴ [2005] O.J. No. 4432, 8 O.R. (3d) 183 (Ont. C.A.).

¹⁴⁵ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹⁴⁶ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

and rising rates of Aboriginal over-representation. A finding that the criminal justice system has failed Aboriginal offenders is a finding that the system does not treat Aboriginal offenders in the same way that other offenders are treated.

The problem, of course, is that a successful challenge would require that the courts compel governments to direct resources to address this issue. As recent section 15 jurisprudence has shown, courts are increasingly reluctant to embark on such a road. Making matters more difficult is that empirical evidence does not yet exist to show precisely what governments should do to address the problem. While the lack of definitive solutions is not a bar to innovation, indeed it should spur on new approaches, the fact that there are no easy-to-describe, inexpensive, off-the-shelf responses to the problem would likely inhibit courts from moving to require government action in this area.

IX. CONCLUSION

That the Charter will not serve as the instrument by which Aboriginal over-representation is wrestled to the ground is not a condemnation of the Charter or the courts. It is a recognition of reality. Section 718.2(e) and *R. v. Gladue*¹⁴⁷ provided a groundwork upon which change could occur. While this change is not happening fast enough, if indeed it is happening at all, it does not mean that the effort should be abandoned. Initiatives such as *Gladue* Courts and *Gladue* Reports, the day-to-day efforts of counsel, the work of Aboriginal organizations, the commitment of funding and programming by governments and the continued expansion of *Gladue* by the courts will all play a role.

Real societal change cannot come from courts. They can help spur action but that is as far as they can go. In the face of indifference or hostility, the most progressive decisions will simply be ignored. *R. v. Gladue*¹⁴⁸ has given the opportunity for more widespread recognition and action on the problem of Aboriginal over-representation. It is up to those who are committed to seeing such change occur to do what they can in the areas that they occupy to see that the opportunity is not wasted.

¹⁴⁷ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

¹⁴⁸ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

