The Sentencing of Indigenous Offenders in Canada

Wayne K. Gorman

Canada's Indigenous population has been overrepresented in Canada's prison population for a considerable period of time. In the mid-1980s, for instance, aboriginal people made up approximately two percent of the population of Canada but made up ten percent of the penitentiary population.[1]

On September 3, 1996, the Parliament of Canada enacted a number of amendments to the *Criminal Code of Canada*, R.S.C., 1985.[2] One of these was in response to the level of incarceration of Indigenous people: section 718.2(e). This provision deals with the sentencing of "aboriginal offenders." It states as follows:

> 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.[3]

In this quarter's column I will review three Supreme Court of Canada decisions, which have considered this provision and the manner in which those decisions have been subsequently applied by other courts. As will be seen, the application of this provision has raised a number of questions concerning the sentencing of Indigenous Canadians.

The Supreme Court of Canada's initial consideration of this section came in *R. v. Gladue*, [1999] 1 S.C.R. 688.

R. v. GLADUE

In *Gladue*, an Indigenous offender was convicted of the offence of manslaughter. She had stabbed and killed her boyfriend. She was sentenced to a period of three years of imprisonment. The sentence was affirmed by the British Columbia Court of Appeal.

On appeal to the Supreme Court of Canada, the Court indicated that the "issue in this appeal is the proper interpretation and application to be given to s. 718.2(e) of the *Criminal Code*" (at paragraph 24).

The Supreme Court commenced its analysis by suggesting that section 718.2(e) of the *Criminal Code* was "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" (at paragraph 33).

The Supreme Court of Canada held that section 718.2(e) of the *Criminal Code* mandates a different approach to sentencing those of aboriginal heritage. The Court indicated that the "background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly" (at paragraph 66):

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

(a) Systemic and Background Factors:

Under this heading, the Supreme Court indicated in *Gladue* that "it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions" (at paragraph 68).

(b) Appropriate Sentencing Procedures and Sanctions:

Under this heading, the Supreme Court indicated in *Gladue* that it "is important to recognize" that "for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities" (at paragraph 73). The Court also indicated that "one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-vio-

Footnotes

1. See M. Jackson, *Locking Up Natives in Canada*, 23 U.B.C. L. REV. 215 (1988-89).
2. See *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22.
3. Alexandra Hebert, in *Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice*, 43:1 QUEEN'S L.J. 149 (2017), described the enactment of section 718.2(e) of the *Criminal Code* as a "fundamental paradigm change in the framework for sentencing Indigenous offenders" (at paragraph 4).

lent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective" (at paragraph 74).

THE DUTY OF THE SENTENCING JUDGE

The Supreme Court also commented on the "duty of the sentencing judge" when imposing sentence upon an aboriginal offender. The Court held that there "is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence" (at paragraph 82). In addition, it held that sentencing judges must "take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders" (at paragraph 83). The Court mandated an interventionist judicial approach by requiring the sentencing judge "to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. . . . Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives" (at paragraph 84).

A BACKING AWAY?

Having said all of this, at the end of its decision in *Gladue* the Supreme Court appears to have backed away from some of its earlier comments. The Court indicated, for instance, that it was not suggesting that "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" (at paragraphs 78). In addition, the Court stated that section 718.2(e) "should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal" (at paragraph 88). Finally, it indicated "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" (at paragraph 79).

In summary, the Supreme Court suggested in *Gladue* that Indigenous offenders must be sentenced individually, but in a different fashion than non-indigenous offenders. The Court indicated that "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," but not "necessarily" (at paragraph 95). The Court also held, however, that for violent or serious offences, Indigenous offenders will likely receive the same sentence as non-indigenous offenders.

So then, what real effect does section 718.2(e) have? This difficult question lies at the core of how Indigenous offenders should be sentenced in Canada.

"Indigenous offenders must be sentenced individually, but in a different fashion than non-indigenous offenders"

GLADUE CONCLUSION:

The Supreme Court concluded that the sentencing judge and the Court of Appeal had erred in failing to consider "the systemic or background factors which may have influenced the appellant to engage in criminal conduct" (at paragraph 94). The Court indicated that normally this would result in remitting the matter to the sentencing judge for reconsideration. However, by the time the Supreme Court had rendered its decision, the offender had been released on parole. As a result the Court decided not to remit the matter to the sentencing judge and dismissed the appeal.

Four years would pass before the Supreme Court considered the sentencing of Indigenous offenders again. This time, in *R. v. Wells*, [2000] 1 S.C.R. 207.

R. v. WELLS

In *Wells*, an Indigenous offender was convicted of the offence of sexual assault. He was sentenced to a period of twenty months of incarceration. He appealed seeking to have a "conditional period of imprisonment" substituted for the period of incarceration imposed.[4] The Alberta Court of Appeal dismissed his appeal.

The Supreme Court of Canada indicated that the appeal required it "to consider the conditional sentencing provisions of the *Criminal Code*, R.S.C., 1985, c. C-46, in the context of aboriginal offenders."

The Supreme Court suggested in *Wells* that section 718.2(e) "was intended to address the serious problem of overincarceration of aboriginal offenders in Canadian penal institutions." In very broad terms, the Court indicated that "Parliament intended to address this social problem, to the extent that a remedy was possible through sentencing procedures." The Court indicated that "given that most traditional aboriginal approaches place a primary emphasis on the goal of restorative justice, the alternative of community-based sanctions must be explored" for Indigenous offenders (at paragraphs 37 and 38).

However, despite this broad language the Supreme Court returned to the qualified approach it had explained in *Gladue* concerning the commission of "violent or serious" offences. The Court held in *Wells*, at paragraph 42, that "the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these cir-

4. Section 742.1 of the *Criminal Code* allows a sentencing judge to impose a period of imprisonment and to order that it be served in the community subject to certain conditions. It states as follows:

> If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3.

"the 'central issue in these appeals is how to determine a fit sentence ... of an Aboriginal offender'"

cumstances, the goals of denunciation and deterrence are accorded increasing significance." In addition, the Court also held in *Wells* that section 718.2(e) "requires a different methodology for assessing a fit sentence for an aboriginal offender; it does not mandate, necessarily, a different result" (at paragraph 44).

What is a sentencing judge to make of these words? A different approach, but the same result might suggest that the enactment of section 718.2(e) was meaningless.

THE SENTENCING JUDGE'S DUTY

The Supreme Court returned to this issue in *Wells* and this time indicated that section 718.2(e) "places an affirmative obligation upon the sentencing judge to inquire into the relevant circumstances. In most cases, the requirement of special attention to the circumstances of aboriginal offenders can be satisfied by the information contained in pre-sentence reports. Where this information is insufficient, s. 718.2(e) authorizes the sentencing judge on his or her own initiative to request that witnesses be called to testify as to reasonable alternatives to a custodial sentence" (at paragraph 54).

Once again, the Supreme Court mandated a very interventionist judicial approach to sentencing. An approach which is very different from the approach traditionally adopted by Canadian judges. However, at the very end of its decision in *Wells*, the Court stated that it "was never the Court's intention, in setting out the appropriate methodology for this assessment, to transform the role of the sentencing judge into that of a board of inquiry" (at paragraph 55).

WELLS CONCLUSION

The Supreme Court concluded in *Wells* that the trial judge did not err in declining to impose a conditional period of imprisonment. It held that "it was open to the trial judge to give primacy to the principles of denunciation and deterrence in this case on the basis that the crime involved was a serious one" (at paragraph 44).

The Supreme Court would return to the sentencing of Indigenous offenders twelve years later. This time in *R. v. Ipeelee*, [2012] 1 S.C.R. 433, in which it suggested that numerous courts had "erroneously interpreted" its decisions in *Wells* and *Gladue* (at paragraph 84).

R. v. IPEELEE

In *Ipeelee*, the Supreme Court considered appeals involving two Indigenous offenders (Mr. Ipeelee and Mr. Ladue) in relation to the sentences imposed for breaches of long-term supervision orders (LTSO).[5]

Mr. Ipeelee had been declared to be a long-term offender. He was the subject of conditions for a period of seven years. He breached the LTSO by consuming alcohol. He was sentenced to a period of three years of incarceration.

Mr. Ladue had also been declared to be a long-term offender. He was the subject of conditions for a period of ten years. He breached his LTSO by taking drugs. He was sentenced to a period of one year of incarceration.

The Supreme Court indicated that the "central issue in these appeals is how to determine a fit sentence for a breach of an LTSO in the case of an Aboriginal offender. In particular, the Court must address whether, and how, the *Gladue* principles apply to these sentencing decisions" (at paragraph 34).

The Supreme Court repeated its comments in *Gladue* in which it described section 718.2(e) as being "remedial" in nature. It pointed out that though *Gladue* had been decided over a decade ago; it and section 718.2(e) have "not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system." The Court concluded that this "can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court's decision in *Gladue*." The Supreme Court indicated that it was taking the opportunity offered by *Ipeelee* "to resolve these misunderstandings, clarify certain ambiguities, and provide additional guidance so that courts can properly implement this sentencing provision" (at paragraph 63). Did it do so?

JUDICIAL NOTICE

The Court commenced with stressing the importance of judicial notice in the sentencing of Indigenous offenders. The Court held in *Ipeelee* that sentencing courts "must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples" (at paragraph 60).

A CAUSAL LINK?

The Court rejected the proposition that an Indigenous offender need "establish a causal link between background factors and the commission of the current offence before being

5. Section 753.1 of the *Criminal Code* allows for an offender to be declared a "long-term offender." If such a declaration is made, the sentencing judge can impose conditions. A breach of these conditions constitutes an offence. Section 753.1(1) states as follows:

> 753.1(1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (b) there is a substantial risk that the offender will reoffend; and
>
> (c) there is a reasonable possibility of eventual control of the risk in the community.

entitled to have those matters considered by the sentencing judge" (at paragraph 81). However, the Court went on to say that "[u]nless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence" (at paragraph 83).

SERIOUS OR VIOLENT OFFENCES

In *Ipeelee*, the Court returned to its comments in *Gladue* concerning serious or violent offences. The Court stated that a failure to apply *Gladue* "in any case involving an Aboriginal offender runs afoul of this statutory obligation. . . . Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender" (at paragraph 87).

IPEELEE CONCLUSION

The majority of the Court concluded that the sentence imposed on Mr. Ipeelee should be reduced to a period of one year of imprisonment. It concluded that the sentence imposed upon Mr. Ladue should be affirmed.

THE DISSENT

Ipeelee contained the first Supreme Court dissent in relation to the interpretation of section 718.2(e) of the *Criminal Code*. It is illustrative of the tensions caused by *Gladue*.

Mr. Justice Rothstein indicated that Aboriginal communities "are not a separate category entitled to less protection because the offender is Aboriginal. Where the breach of an LTSO goes to the control of the Aboriginal offender in the community, rehabilitation and reintegration into society will have faltered, if not failed" (at paragraphs 130 and 131).

Mr. Justice Rothstein would have affirmed the three-year sentence imposed upon Mr. Ipeelee and the one-year sentence imposed upon Mr. Ladue.

A SUMMARY

In summary, over the course of these three judgments the Supreme Court of Canada has attempted to formulate a national approach to the sentencing of Indigenous offenders. The decisions contain some bold and general statements, but there is also some hedging of these comments by reference to a lack of intent to create a race-based sentencing process and the end result being the same for Indigenous and non-indigenous offenders when a serious or violent crime has been committed. Thus, Indigenous offenders are to be sentenced differently, but how exactly?

"the Supreme Court's three decisions contain a number of consistent themes"

Having said this, the Supreme Court's three decisions contain a number of consistent themes. The Court has consistently characterized section 718.2(e) of the *Criminal Code* as being "remedial" in nature and thus constituting a new approach to the sentencing of Indigenous offenders. The Court has consistently held that it is mandatory that judges take judicial notice of the history and present social economic plight of Indigenous Canadians. It has consistently directed judges to seek out background information on their own initiative when counsel have failed to present such evidence.[6]

These themes continue to be judicially debated in Canada. Let us now turn to how the interpretation of section 718.2(e) has unfolded since *Ipeelee*.[7]

GLADUE REPORTS

As noted earlier, the Supreme Court referred to the necessity of evidence being presented at the sentence hearing concerning the offender's Indigenous background. These reports have come to be known as "*Gladue* Reports." In *R. v. Macintyre-Syrette*, 2018 ONCA 259, the nature and importance of such reports was commented upon in the following manner (at paragraph 14):

> The *Gladue* factors are highly particular to the individual offender, and so require that the sentencing judge be given adequate resources to understand the life of the particular offender. But that is not all. A second enquiry is required by *Gladue*, assessing available sentencing procedures and sanctions, requires an understanding of available alternatives to ordinary sentencing procedures and sanctions. In particular, if, as in this case, the offender lives as a member of a discrete Indigenous community, the sentencing judge needs to be told what institutions exist within that community and whether there are specific proposals from community leadership or organizations for alternative sentencing to promote the reconciliation of the offender to his or her community:

6. An example of how far this can be taken can be found in *R. v. Bennett*, 2017 NLCA 41. In *Bennett*, the offender indicated at his sentence hearing that he was "native and a member of the local Qalipu band." Nothing else was referred to. On appeal from the sentence imposed, the Court of Appeal concluded that the sentencing judge "erred in principle by failing to obtain a waiver or to turn her mind to the application of section 718.2(e) of the *Code* when determining an appropriate sentence. While Mr. Bennett did not elaborate regarding his statement that he was a member of the local Qalipu band, it was incumbent on the judge to address the issue because it had been raised" (at paragraph 26).
7. One author has referred to *Ipeelee* as a "major step forward" (see Jonathan Rudin, *Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in* R. v. Ipeelee, (2012), 57 S.C.L.R. (2d) 375, at paragraph 18):

> There is no question that *Ipeelee* is more than just a strong re-statement of *Gladue*. For those concerned with increasing levels of Aboriginal over-representation over time — to the point where now approximately one-quarter of inmates in custody in Canada are Aboriginal, *Ipeelee* is a major step forward. In its clarification of some of the confusion that arose following *Gladue*, and in its repudiation of those academics and judges who have sought to minimize or trivialize that decision, the Court has made clear that addressing Aboriginal over-representation is properly the responsibility of all those in the justice system.

"the evidence did not establish a 'connection between' the offender's Aboriginal heritage and 'his culpability'"

Gladue, at para. 84; *R. v. Laliberte*, 2000 SKCA 27 (CanLII), at para. 59. The ordinary source of this information is the *Gladue* report.

In *Macintyre-Syrette*, the Court of Appeal concluded that it "was an error" for the sentencing judge "to have proceeded with sentencing on the strength of the materials before him. The *Gladue* report gave insufficient assistance to the sentencing judge with respect to the second aspect of the *Gladue* analysis: of determining the types of sentencing procedures and sanctions that would be appropriate given the offender's connection to his specific Aboriginal community" (at paragraph 19).

DO THE GLADUE PRINCIPLES APPLY OUTSIDE OF THE IMPOSITION OF SENTENCE?

How far can *Gladue* be extended? An unsuccessful attempt to extend *Gladue* well beyond the imposition of sentencing can be found in *R. v. Anderson*, [2014] 2 S.C.R. 167.

In *Anderson,* an Indigenous offender was convicted of a drinking and driving offence. He had prior convictions for such an offence. The *Criminal Code* requires that in such a situation that minimum prescribed periods of incarceration must be imposed, depending on the number of prior convictions. However, for this mandatory minimum sentencing scheme to be activated, the Crown must serve the offender with a notice that it will be seeking this penalty. In this case, the Crown served Mr. Anderson with the appropriate notice.

Mr. Anderson argued that before serving such a notice the Crown was obliged to consider the offender's Indigenous status and that the Crown had not done so in his case. This argument was accepted by the trial judge and the Court of Appeal for Newfoundland and Labrador. However, it was rejected by the Supreme Court of Canada. The Supreme Court held that "there is no principle of fundamental justice that supports the existence of such a constitutional obligation" and thus "Crown prosecutors are under no constitutional duty to consider the accused's Aboriginal status when tendering the Notice" (at paragraphs 1 and 5).

Though the appeal to the Supreme Court in *Anderson* did not directly involve the issue of the sentencing of Indigenous offenders, the Court made some comments on this issue. It indicated that the "failure of a sentencing judge to consider the unique circumstances of Aboriginal offenders . . . breaches both the judge's statutory obligations, under ss. 718.1 and 718.2 of the *Code*, and the principle of fundamental justice that sentences be proportionate" (at paragraph 24).[8]

DOES SECTION 718.2(E) REQUIRE MORE THAN AN INDIGENOUS BACKGROUND TO APPLY?

One of the issues raised in *Gladue* was what is an "aboriginal offender" for the purpose of section 718.2(e) of the *Criminal Code*? In *Gladue*, the Supreme Court indicated that the "class of aboriginal people who come within the purview of the specific reference to the circumstances of aboriginal offenders in s. 718.2(e) must be, at least, all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*" (at paragraph 90). However, is this sufficient?

In R. *v. Lavergne*, 2017 ONCA 642, the offender was described as being "Indigenous." However, the Ontario Court of Appeal noted that "the record does not disclose anything else beyond his statement of his Indigenous heritage. There is no evidence of any systemic or background factors which may have played a part in bringing this accused before the court." The Court of Appeal held that a "bare assertion of Indigenous heritage, without more, would not have had any impact on the sentence imposed" (at paragraph 33). The British Columbia Court of Appeal used similar language in *R. v. Fontaine*, 2014 BCCA 1: "there was no suggestion or evidence in this case that there have been any 'systemic background factors' that might 'bear on the culpability' of the offender" (at paragraph 33). But how can these types of comments coexist with the Supreme Court's requirement that sentencing judges take judicial notice of the systematic background factors which apply to all Indigenous peoples?

In *R. v. Violette*, [2013] B.C.J. No. 110 (C.A.), the offender was sentenced to a period of six years imprisonment for the commission of a number of offences. On appeal from sentence he sought to introduce fresh evidence "revealing his Aboriginal heritage, which was not known to him at the time of sentencing" (see paragraph 4). The British Columbia Court of Appeal dismissed the application to introduce this evidence because it could not have affected the result. The Court of Appeal pointed out that the evidence did not establish a "connection between" the offender's Aboriginal heritage and "his culpability, or anything to suggest the sentencing objectives should be influenced by this newly discovered factor" (at paragraph 8):

> In this case, the appellant does not assert any personal background, or any systemic factors, that bear upon his appearance as an accused person. There is no material before the court which would suggest he has suffered deprivation because of Aboriginal heritage, nor is there connection between this circumstance and his culpability, or anything to suggest the sentencing objectives should be influenced by this newly discovered factor. It simply cannot be said, in my view, that the evidence sought to be adduced could have a bearing upon the sentence imposed for these offences. Accordingly, I would dismiss the application to adduce new evidence.

8. Interestingly, legislation has been presented in Parliament to require an offender's aboriginal status to be considered in bail hearings. In *An Act to Amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, Bill C-75, the bail provisions in the *Criminal Code* would be amended to require that judges "pay particular attention to circumstances of Aboriginal accused and accused who belong to other vulnerable populations overrepresented in the criminal justice system and disadvantaged in obtaining release."

Thus, it appears that the Court of Appeal is saying that if an offender is Indigenous, a Canadian judge must consider this factor in determining an appropriate sentence, but it will be insignificant unless there is a connection between the offender's Indigenous heritage and the offence. This sounds like requiring a causal connection. So then, when will an offender's Indigenous background result in a lesser sentence being imposed?

WHEN THEN WILL AN OFFENDER'S INDIGENOUS BACKGROUND RESULT IN A LESSER SENTENCE?

In *R. v. F.L.*, 2018 ONCA 83, [2018] O.J. No. 482, the Ontario Court of Appeal asked the ultimate question: "In what circumstances, then, will an offender's Aboriginal background influence their ultimate sentence?" The Court of Appeal indicated that the answer is not "easily ascertained or articulated" (at paragraph 38).

The Court of Appeal stated that "the mere assertion of one's Aboriginal heritage is insufficient" and that "more is required 'than the bare assertion of an offender's Aboriginal status.'" The Court of Appeal also indicated that it is "insufficient for an Aboriginal offender to point to the systemic and background factors affecting Aboriginal people in Canadian society. While courts are obliged to take judicial notice of those factors, they do not "necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel" (at paragraphs 38 and 39).

The Court of Appeal concluded in *F.L.*, that the correct approach may be articulated as follows: (at paragraph 40):

> For an offender's Aboriginal background to influence his or her ultimate sentence, the systemic and background factors affecting Aboriginal people in Canadian society must have impacted the offender's life in a way that (1) bears on moral blameworthiness, or (2) indicates which types of sentencing objectives should be prioritized in the offender's case. This approach finds support both in *Ipeelee* and decisions of this court.

As a result, the Court of Appeal held that sentencing judges "must take judicial notice of the systemic and background factors affecting Aboriginal peoples in Canadian society" and then consider whether those "factors have impacted the offender's own life experiences — in other words, whether the offender has 'lift[ed] his life circumstances and Aboriginal status from the general to the specific'...If systemic and background factors have impacted an Aboriginal offender's own life experiences, the sentencing judge must then consider whether they 'illuminate the offender's level of moral blameworthiness" or disclose the sentencing objectives that should be prioritized'" (at paragraphs 44 and 45).

This approach is similar to the approach adopted in relation to all offenders in Canada in the sense that a Canadian sentencing judge must impose a proportionate sentence based upon the offence and the offender's degree of moral responsibility for the offence (see *R. v. Levesque*, [2000] 2 S.C.R. 487, at paragraph 18 and *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at paragraph 56). The only difference suggested by the reasoning utilized in *F.L.* involves the requirement for the sentencing judge, without the requirement of evidence, to accept the existence of there being systemic and background factors that have negatively affected Indigenous people in Canada. This interpretation would appear to effectively render section 718.2(e) meaningless despite the Supreme Court comments concerning its importance.

"the devastating intergenerational effects of the collective experience of First Nations people may shape ... sentencing"

Interestingly, *R. v. Boutilier*, [2017] 2 S.C.R. 936, the Supreme Court held that "through s. 718.2(e) of the *Criminal Code*, Parliament has directed sentencing judges to pay particular attention to the circumstances of Indigenous offenders. This recognizes that the systemic disadvantages and marginalization faced by Indigenous people inform moral blameworthiness and therefore the proportionality of sentences for Indigenous offenders" (at paragraph 108).

CONCLUSION

It is clear that in Canada, "sentencing judges are required to consider the *Gladue* principles in every case involving the sentencing of an Indigenous offender" (see *R. v. Sanderson*, 2018 MBCA 63, at paragraph 10).

Gladue continues to be the source of significant appellate court commentary. For instance, in *R. v. Skookum*, 2018 YKCA 2, it was indicated that section 718.2(e) "recognizes that the devastating intergenerational effects of the collective experience of First Nations peoples may shape the way in which expression is given to the fundamental purposes and principles of sentencing" (at paragraph 98). However, in *R. v. Holloway*, [2014] A.J. No. 217 (C.A.), it was held that "nothing in s. 718.2(e) of the *Code* suggests that there should be a discount from a proportional sentence automatically because the offender is an aboriginal person" (at paragraph 42). In contrast, in *R. v. Sellars*, 2018 BCCA 195, the British Columbia Court of Appeal held that a "disparity between sentences for Aboriginal offenders and other offenders can be justified where there are circumstances unique to the Aboriginal offender, even when considering the principle of parity as codified in s. 718.2(b) that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (at paragraph 31).

In *R. v. Anderson*, 2018 MBCA 42, the Manitoba Court of Appeal held that "sentencing judges have the legal duty in every case involving an Indigenous offender to alter their method of analysis in the assessment of moral culpability in order to achieve a truly fit and proper sentence in terms of the circumstances of the offence, the offender, the victim and the wider community. . . . There is no discretion to ignore this legal duty even in cases where the offence is serious (see *Gladue* at para 82; and *Ipeelee* at para 87). The failure of a sentencing judge to fully engage in their legal duty is an error in principle justifying appellate intervention" (at paragraph 57).

In *R. v. Giroux*, 2018 ABCA 56, an Indigenous offender was convicted of the offence of possession of cocaine for the purpose of trafficking and sentenced to a period of ninety days of

imprisonment. On appeal, the Albert Court of Appeal indicated that the "starting point" for the offence was a period of three years of imprisonment, but only increased the sentence imposed to one of nine months of imprisonment. In doing so, the Court of Appeal indicated that it was applying "the mitigating effect of the guilty plea, her lack of criminal record, an absence of financial incentive, her work and family life, and the influence of *Gladue* factors in her life" (at paragraph 31).

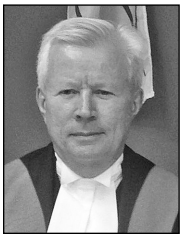
Thus, the offender's Indigenous heritage was a factor in the Court of Appeal imposing a sentence which was lower than normal. However, it is difficult from the Court's comments to ascertain what impact the offender's Indigenous heritage had upon the sentence imposed.

In Australia, the sentencing of Aboriginal offenders has also been an issue of significant debate.[9] The Australia High Court has adopted a much different approach than the one adopted by the Supreme Court of Canada.

In *Bugmy v. The Queen* [2013] HCA 37, the High Court of Australia considered the Supreme Court of Canada's decisions in *Gladue* and *Ipeelee*. The High Court distinguished *Gladue* based upon the wording of the *Criminal Code of Canada* being different than the applicable Australian legislation (see section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)). In addition, however, the High Court also refused to adopt the *Gladue* sentencing approach on the basis that it would result in the sentencing of Aboriginal offenders ceasing "to involve individualised justice" (at paragraph 36):

> …There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.

In conclusion, it has been over twenty years since section 718.2(e) has been added to Canada's *Criminal Code* and its application remains a challenge for sentencing judges. The section requires a broad application of judicial notice and an interventionist approach, but determining its practical effect on the sentence imposed is still far from certain. Though the Supreme Court of Canada has rejected the requirement for a "causal link" some recent appellate court decisions appear to be applying such an approach.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. *Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.*

9. See "Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples" (Australian Law Reform Commission, Report 133, March 28, 2018), which made the following recommendation (Recommendation 6.1):

> Sentencing legislation should provide that, when sentencing Aboriginal . . . offenders, courts take into account unique systemic and background factors affecting Aboriginal . . . peoples.