ISSUE 51: DID THE SENTENCING JUDGE PROPERLY CONSIDER THE ABORIGINAL HERITAGE OF THE OFFENDER?

a. The Problem

The drastic overrepresentation of Aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.[928] 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 by courts. 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.[929] The background considerations regarding the distinct situation of Aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

> (A) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
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> (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.[930]

b. Systemic Factors

The background factors which figure prominently in the causation of crime by Aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many Aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. When the social, political and economic aspects of our

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[928] *R. v. Gladue*, [1999] S.C.J. No. 19 at para. 64, [1999] 1 S.C.R. 688 (S.C.C.) [*Gladue*].
[929] *Ibid.*, at para. 65.
[930] *Ibid.*, at para. 66.

society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail.[931]

c. Different Understanding of Sentencing

A significant problem experienced by Aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community.[932] The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. However, a sentence focused on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence.[933]

d. The Sentencing Solution

(i) It is an Error of Law for a Sentencing Judge to Fail to Consider Section 718.2(*e*) of the *Criminal Code* when Sentencing an Aboriginal Offender

Pursuant to section 718.2(*e*) of the *Criminal Code* all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community must be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. The requirement to pay particular attention to the circumstances of Aboriginal offenders is not an instruction to pay more attention to the circumstances of Aboriginal offenders. Rather, the logical meaning to be derived from the special reference to the circumstances of Aboriginal offenders, juxtaposed as it is against a general direction to consider "the circumstances" for all offenders, is that sentencing judges should pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique, and different from those of non-Aboriginal offenders. The fact that the reference to Aboriginal offenders is contained in section 718.2(*e*), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about Aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.[934]

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[931] *Ibid.*, at para. 67.
[932] *Ibid.*, at para. 70.
[933] *Ibid.*, at para. 72.
[934] *Ibid.*, at para. 37.

(ii) It is an Error to Suggest that Section 718.2(*e*) of the *Criminal Code* does not Apply to all Aboriginals, including Adopted Children

The class of Aboriginal people who come within the purview of the specific reference to the circumstances of Aboriginal offenders in section 718.2(*e*) must be, at least, all who come within the scope of section 25 of the Charter and section 35 of the *Constitution Act, 1982*.[935] Section 35 of the *Constitution Act* indicates that "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. The *Indian Act*[936] defines an Indian. In respect of defining[937] an Aboriginal, first the claimant must self-identify as an Aboriginal. Second, the claimant must present evidence of an ancestral connection to a historic Aboriginal community. Proof is required that the claimant's ancestors belonged to the historic Aboriginal community by birth, adoption or other means. Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions.[938] Section 718.2(*e*) applies to all Aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area. Indeed it has been observed that many Aboriginals living in urban areas are closely attached to their culture.[939] Moreover, a person may be sentenced as an Aboriginal even if that person was adopted by non-Aboriginal persons.[940]

(iii) It is an Error to Fail to Consider the Aboriginal Heritage of an Offender for All Offences, including Serious Ones, in Considering not only Whether to Impose a Jail Sentence but Deciding the Length of Jail Sentence

The Aboriginal heritage of the offender must be considered for all offences, including serious offences.[941] Failure to consider the Aboriginal heritage of the offender, before sentencing, is an error in law. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation and deterrence are fundamentally relevant.[942] Yet, even where

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[935] *Ibid.*, at para. 90.

[936] R.S.C. 1985, c. I-5.

[937] In my view, if a person claims to be an Aboriginal, unless there is a good faith and reasonable basis to question the claim one should not question it particularly in light of the history of oppression and abuse of the Aboriginal people in Canada.

[938] *R. v. Lavigne*, [2007] N.B.J. No. 169 at paras. 31, 35, 39, 2007 NBQB 171 (N.B.Q.B.); *R. v. Powley*, [2003] S.C.J. No. 43 at paras. 31-33, 2003 SCC 43 (S.C.C.).

[939] *Gladue*, at para. 91.

[940] *R. v. Kreko*, [2016] O.J. No. 2552 at paras. 16, 21, 24, 2016 ONCA 367 (Ont. C.A.).

[941] *R. v. Ipeelee*, [2012] S.C.J. No. 13, 2012 SCC 13 at paras. 84-85 (S.C.C.).

[942] *Gladue*, at para. 78.

an offence is considered serious, the length of the term of imprisonment must be considered.[943] In *R. v. Kreko*,[944] a sentence of 12 years was reduced to nine years because the trial judge did not take into account the Aboriginal background of the offender. 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.[945]

(iv) It is an Error to View Section 718.2(*e*) of the *Criminal Code* as Race-based Discounting at Sentencing Rather than a Factor to Consider in Determining the Moral Culpability of the Offender

Justice LeBel explained that sentencing of Aboriginal Offenders is tied to the principle of proportionality[946] and has nothing to do with a race-based discount on sentencing.[947] *Gladue* is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed.[948] First, systemic factors may bear on the culpability of the offender. The constrained circumstances of an Aboriginal offender may diminish his or her moral responsibility[949] and impact the ultimate sentence.[950] Quoting the eloquent remarks of Greckol J., LeBel J. highlighted that "*[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled.*"[951]

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[943] *Ibid.*, at para.79.

[944] [2016] O.J. No. 2552 at paras. 16, 21, 24, 2016 ONCA 367 (Ont. C.A.).

[945] *Gladue*, at para. 79.

[946] *R. v. Ipeelee*, [2012] S.C.J. No. 13, 2012 SCC 13 at para. 73 (S.C.C.); see also para. 37 where proportionality is described as the *sine qua non* of a just sanction.

[947] *Ibid.*, at para. 75. Ultimately, LeBel J. appears to have taken no more than the moral culpability, in the context of the Aboriginal history (see paras. 72-73), and the gravity of the offence, into account. In respect of the gravity of the offence, LeBel J. emphasizes that the offence itself only involved consuming alcohol contrary to the LTSO and imposed a one-year sentence on Ipeelee — see *ibid.*, at paras. 91, 93.

[948] *Ibid.*, at para. 72.

[949] *Ibid.*, at para. 73.

[950] *Ibid.*, at para. 83.

[951] *Ibid.*, at para. 73. However, in *R. v. Hamilton*, [2004] O.J. No. 3252, 72 O.R. (3d) 1 (Ont. C.A.), Doherty J.A. noted that our criminal law rejects a determinist theory of crime. While environment factors can provide some mitigation, they should not be given prominence. The blunt fact is that a wide variety of societal ills — including, in some cases, racial and gender bias — are part of the causal soup that leads some individuals to commit crimes. If those ills are given prominence in assessing personal culpability, an individual's responsibility for his or her own actions will be lost (para. 140). Moreover, because factors which go to explain the reason for the offender's commission of the crime do not reduce the seriousness of the crime, those factors must be given less weight in cases where the seriousness of the offence is the pre-eminent consideration on sentencing. The same factors could be given more weight in cases involving less serious crimes where the personal responsibility of the offender takes on more significance

(v) It is an Error to Require an Aboriginal Offender to Show a Causal Link between Systemic Factors and the Offending Conduct

There is no requirement for an Aboriginal offender to show a causal link between systemic factors and the offending conduct.[952] Requiring a causal connection demonstrates "an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples", and also imposes an evidentiary burden on the offender that was not intended by *Gladue*.[953] In all instances, it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to Aboriginal offenders.[954] In *R. v. Kreko*,[955] a sentence of 12 years was reduced to 9 years because the trial judge required a causal connection between the Aboriginal offender, who was adopted, and the crime.

(vi) It is an Error to View Aboriginal Concepts of Sentencing as Ineffective

The second set of circumstances — the types of sanctions which may be appropriate — bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.[956]A significant problem experienced by Aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. The aims of restorative justice as now expressed in paragraphs (*d*), (*e*) and (*f*) of section 718 of the *Criminal Code* apply to all offenders, and not only Aboriginal offenders. However, most traditional Aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under section 718.2(*e*).[957]

(para. 139). The same point was made in *Gladue*, at para. 79 where the Court noted: "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."

952 *Ibid.*, at para. 82.

953 *R. v. Kreko*, [2016] O.J. No. 2552 at para. 21, 2016 ONCA 367 (Ont. C.A.).

954 *Gladue*, at para. 83.

955 *R. v. Kreko*, [2016] O.J. No. 2552 at paras. 16, 21, 24 (Ont. C.A.) [*Kreko*].

956 *R. v. Ipeelee*, [2012] S.C.J. No. 13, 2012 SCC 13 at para. 74 (S.C.C.).

957 *Gladue*, at para. 70.

(vii) The Trial Judge's Failure to Provide Reasons to Determine Whether and How Attention was Paid to the Circumstances of the Aboriginal Offender May Support an Appeal Based on Failure to Consider the Aboriginal Heritage of the Offender

Although section 718.2(*e*) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an Aboriginal person if at least brief reasons are given.[958] In my view, given the overrepresentation of Aboriginals within the criminal justice system, failure to provide sufficient reasons on whether and how attention was paid to section 718.2(*e*) of the *Criminal Code* may be fatal.

ISSUE 52: DID THE JUDGE ERR IN IMPOSING CONCURRENT OR CONSECUTIVE SENTENCES?

The Ontario Court of Appeal has held that insofar as the issue of whether a consecutive versus concurrent sentence ought to have been imposed and the totality of the sentence is concerned, this is an exercise of the judge's discretion that warrants a high degree of deference absent an error in principle.[959] A review and synthesis of the case law, however, suggests the following principles govern:

a. First Principle: Is Each Offence Deserving of its Own Period of Imprisonment in Accordance with the Principle of Proportionality?

In the seminal decision of *R. v. Paul*,[960] the Supreme Court of Canada held that if there are multiple offences and each offence is deserving of its own period of imprisonment, each offence should be sentenced in proportion to its gravity through the imposition of consecutive sentences.[961] The rationale for consecutive sentences is that:

> The punishment must be proportioned to the specific offence contained in the record, upon which the judgment is then to be pronounced; and must be neither longer nor shorter, wider nor narrower, than that specific offence deserves. The balance is to be held with a steady even hand; and the crime and the punishment are to counterpoise each other; and a judgment given, or to be given against the same person for a distinct offence, is not to be thrown into either scale, to add an atom to either.[962]

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[958] *Ibid.*, at para. 85.
[959] *R. v. Osman*, [2016] O.J. No. 358 at para. 8, 2016 ONCA 64 (Ont. C.A.).
[960] [1982] S.C.J. No. 32, [1982] 1 S.C.R. 621 (S.C.C.) [*Paul*]; see also *R. v. Mercer*, [2018] O.J. No. 889 at paras. 42, 52, 2018 ONSC 881 (Ont. S.C.J.).
[961] *Paul*, at para. 26.
[962] *Ibid.*, at paras. 33, 36.