Justice as Healing
A Newsletter on Aboriginal Concepts of Justice

Sentencing within a Restorative Justice Paradigm:
Procedural Implications of R. v. Gladue

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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. (Section 718.2 of the Criminal Code of Canada)

1. Introduction

The Supreme Court of Canada’s decision in R. v. Gladue\(^2\) clarified the duty of sentencing judges to consider background and systemic factors in sentencing Aboriginal offenders. In this appeal, the Court had to consider the appropriate interpretation of section 718.2(e) of the Criminal Code where an Aboriginal woman, Marie Gladue, pleaded guilty to manslaughter in the death of her common law husband. The offence took place in the town of Nanaimo, British Columbia. Ms. Gladue was one of nine children of a Cree mother and Metis father, born in McLennan, Alberta. She had been living with the deceased, Reuben Beaver, since she was 17 years old and they had one daughter, with another child on the way when he was killed. The relationship included a history of physical and alcohol abuse. The night he died, the two had been drinking and fighting over whether the deceased was having an affair with the accused’s sister. Mr. Beaver was fatally stabbed in the heart.

Ms. Gladue was sentenced to three years imprisonment along with a ten year weapons prohibition order. She appealed her sentence, in part, on the basis that the trial judge found that section 718.2(e) did not apply to her as she was “not within the aboriginal community as such” because she was living in Nanaimo when the offence occurred. The British Columbia Court of Appeal found that the trial judge’s decision was in error as section 718.2(e) applies to Aboriginal people, regardless of their residence. Nevertheless, the Court of Appeal upheld the trial judge’s sentence as Ms. Gladue had been granted day parole after six months of her sentence and was thought to be living in the community with appropriate supports. The Supreme Court of Canada upheld the disposition as to sentencing, but provided detailed reasons on the operation of section 718.2(e) and the duty of sentencing judges to find alternatives to incarceration for Aboriginal defendants.

The Gladue decision is an important watershed in Canadian criminal law. The interpretation of section 718.2(e) of the Criminal Code by the Supreme Court of Canada clarified that this provision is remedial in nature and not merely a codification of existing law and practice. In so construing the provision, the Court clearly endorsed the notion of restorative justice and a sentencing regime which is to pay fidelity to “healing” as a normative value. Healing is an Aboriginal justice principle which is slowly becoming merged into Canadian criminal law through the practice of circle sentencing and community-based diversion programs. The Gladue decision has brought the notion of healing into mainstream as a principle which a judge must weigh in every case of an Aboriginal person, in order to build a bridge between their unique personal and community background experiences and criminal justice.

The Supreme Court of Canada has acknowledged that the legacy of discrimination faced by Aboriginal peoples in Canada is one of the reasons for over-representation in the system and consequently, the courts
must address this in sentencing. Quite apart from the unique circumstances of Aboriginal peoples, the Supreme Court has criticized the over reliance on incarceration for all citizens in Canada. The recognition of the disproportionate representation of Aboriginal people in the criminal justice system, builds on a number of recent decisions relating to criminal justice and Aboriginal peoples, including R. v. Williams, which opened the door for juror challenges based on cultural or racial bias where there was a demonstrated potential of partiality. Other decisions, at the Provincial appeal level, such as R. v. Morin, have confirmed the restorative approach in the context of sentencing or healing circles. The implementation of the reasoning, and the regime contemplated in the Gladue decision, provides all criminal trial courts, and the appeal courts, with challenges and opportunities. The decision in Gladue explicitly builds upon over a decade of intense scrutiny of the criminal justice system and its impact on Aboriginal Peoples in Canada, including the thorough analyses of situation by the Royal Commission on Aboriginal Peoples, the Law Reform Commission of Canada, and the Manitoba Aboriginal Justice Inquiry.

There is much that is innovative in the concise decision of Justices Cory and Iacobucci, written for a unanimous Supreme Court of Canada. However, hearing the clamour of criticism over judge-made law, it is vital to recall that the notion of alternatives to incarceration for Aboriginal peoples is not an innovation of the Supreme Court, but a Parliamentary proposal added to the Criminal Code when the package of amendments on sentencing were passed in 1996. Since 1996, there have been various interpretations of the sentencing amendments, with some courts of appeal deeming these amendments as a mere codification of pre-1996 law, while others construed them as a departure from the past. It was my own experience that while section 718.2(e) was part of the criminal law for a number of years, it was rarely, if ever, relied upon by sentencing judges or, more importantly, counsel. With the decision of the Court in Gladue, this has irrevocably changed. Indeed, the criminal bar and bench are in the throes of a transition grappling with the impact of the decision on a daily basis. Certainly in the Prairie provinces, the impact of Gladue on the administration of justice was immediate. The impact is national in scale and may in the long run transform the practice of criminal law.

This brief commentary will address procedural implications of the Gladue decision. The procedural implications are a matter of immediate concern as experience suggests there may be little understanding of the approach to Aboriginal offenders required by Gladue. Moreover, it is imperative that counsel, both Crown and Defence, take the initiative to adjust their practice to reflect the requirements of the decision. For example, simply citing the decision and suggesting to a Court that it should take into account “the Gladue factors,” is not a standard of practice which should be countenanced. How then should counsel approach this decision and, similarly, what are the duties of the sentencing judge? I will examine each of these questions in turn and leave aside the more fundamental policy issues for future analysis.

2. Practice Implications for Counsel

While the Supreme Court of Canada has created a duty on the sentencing judge to consider the unique circumstances for Aboriginal offenders in all cases, a sentencing judge can only effectively discharge this responsibility if counsel and the supporting agencies in the criminal justice system, such as probation and youth services, assist the court by providing a full picture of the circumstances of the defendant and the offence. The Gladue decision highlighted the responsibility of the judge and described it as follows:

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 … In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender, it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

Judges need to make informed decisions, drawing on sources of information that might not normally be before the Court. The role of counsel is vital and should be seen as a kind of twostep approach. First, the defence counsel needs to assist in bringing personal information regarding the defendant to the attention of
the Court. Second, the Crown will need to assist in identifying alternatives to incarceration, in some instances with the collaboration of defence counsel, so that the court understands the available options. Unless defence counsel, or the individual defendant, waives the inquiry, this information will be required in all cases involving Aboriginal people.

Clearly, *Gladue* has created additional burdens on counsel. Mr. Justice Klebuc of the Saskatchewan Court of Queen’s Bench adjourned a sentencing matter for several months to permit counsel to do their job and collect the information he required to make a decision regarding an Aboriginal defendant he was to sentence. In adjourning the matter, Justice Klebuc made it quite clear that counsel is expected to do more "if we are to honour the direction of the Supreme Court of Canada." While he expressed the recognition that counsel will have to work harder, he noted that the "court can only move as fast and as far as Crown counsel and defence counsel enable it to." Justice Klebuc’s sentiments are undoubtedly shared by many on the bench. The work of counsel is axiomatic for the practical implementation of *Gladue*.

Of course, if a defendant is unrepresented, the sentencing judge takes on most of the burden. The judge must question the defendant to determine personal circumstances. This kind of information would likely be better gleaned by counsel as a defendant might be very guarded in the formal context of judicial questioning. Judges will appreciate the assistance of counsel, where available, so that the disposition can fully reflect the concerns of Parliament and the Supreme Court of Canada regarding incarceration of Aboriginal people. One of the challenges for both counsel or the judiciary will be to encourage Aboriginal people to open up to them and describe their experiences. Because of the mistrust that has marked the relationships between Aboriginal and non-Aboriginal people in the criminal justice system, there will be a reluctance to share experiences. Furthermore, many Aboriginal people who have experienced racism, poverty, discrimination, addictions and family breakdown, may not be at a point in their life where they are willing to identify these issues, much less discuss them with strangers. This will be a significant hurdle in implementing the Supreme Court of Canada’s reasoning. It will change with time, but initially, many defendants may waive the inquiry so as to maintain their privacy out of mistrust. They will wonder, “Why are they asking me this information? Will it be used against me?” Strong communication skills, and understanding on the part of counsel and the judiciary, will be vital, to open up the exploration of background experiences.

The following is a simple checklist of the types of inquiries which should be made by counsel, or the judge where the individual is unrepresented, when dealing with an Aboriginal defendant who faces incarceration:

i) **Is this offender an Aboriginal person?**

Aboriginal person is defined according to section 35 of the Constitution Act, 1982, as being Indian, Metis (of mixed ancestry) or Inuit.

- If the answer is yes, determine what community or band the defendant is from.
- Does the defendant reside in a rural area, on a reserve, or in an urban centre?

ii) **What unique circumstances have played a part in bringing this offender before the Courts?**

The sentencing judge *must* consider some of the following issues/factors and query counsel or unrepresented offenders.

- has this offender been affected by substance abuse in the community?
- has this offender been affected by poverty?
- has this offender been affected by overt racism?
- has this offender been affected by family or community breakdown?
- has this offender been affected by unemployment, low income and a lack of employment opportunity?
- has this offender been affected by dislocation from an Aboriginal community, loneliness and community fragmentation?
- has the offender been affected by residential school education?
A pre-sentence or pre-disposition report might be of great benefit to the court in canvassing some of these issues. In order to sensibly ask these questions, it is helpful if counsel, or the judge as the case may be, understands the historical and societal context of these questions. For example, has a community been relocated? Has a significant proportion of the Aboriginal community moved to urban centres? What are the reasons for these developments? Many of these issues have been thoroughly studied by the Royal Commission on Aboriginal Peoples, the reports from which are valuable educational resources for those unfamiliar with the broader context.

It is critical that all parties remember that this kind of inquiry is not necessary in all circumstances, but is imperative when the sentence would normally be one of incarceration. In terms of alternatives to incarceration, counsel can greatly assist the court in determining whether there are alternatives in the community, and whether or not the defendant would benefit, in a restorative justice sense, by participating in such alternative programming. Counsel will need to learn about the Aboriginal community, including in the urban context, in order to be familiar with the resources available to address the underlying problems which Aboriginal people experience. It may be in many instances that counsel will report to the court that there are no alternatives; leaving the judge to determine whether the term should be adjusted nevertheless.

Again, a simple checklist of how this information should be brought before the court might be of assistance to counsel in preparing submissions following Gladue:

A. Lawyers can request judges to take judicial notice of the systemic and background factors which have lead to Aboriginal people being disproportionately represented before the criminal courts and in the prison system. As the Court found: It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-Aboriginal offenders as well. However, it must be recognized that the circumstances of Aboriginal offenders differ from those of the majority because many Aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, Aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination toward them is so often rampant in penal institutions.11

B. Lawyers will need to address the concept of restorative justice in their sentencing submissions and explain how this is relevant to the particular Aboriginal offender. Restorative justice “will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context.” However, restorative justice means a philosophy of personal and community healing and “an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.”12

C. Lawyers should know what alternatives to incarceration are available in the community (or elsewhere) and remind sentencing judges of these alternatives, especially where consistent with restorative justice, and ensure that these alternatives are explored for Aboriginal offenders “wherever they reside, whether on-or off-reserve, in a large city or a rural area.”13 The Supreme Court of Canada noted that Aboriginal people living in urban centres, even with a fragmented connection to the community, must be afforded the same restorative justice approach. This will be the greatest challenge as judges do not always know what resources are available in a community and whether they would be appropriate in the circumstances of an individual offender. Judges will want to know if an Aboriginal community or urban centre has alternative programs and if they are accessible through a probation order or conditional sentence of imprisonment. The Supreme Court of Canada found that “even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative.”14 Further “the residence of an Aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to find an alternative. …”15

[Sample Article]
D. Even if there is no alternative to incarceration, lawyers should make submissions on the length of the term of imprisonment, taking into account the background circumstances of an Aboriginal offender. The term of imprisonment for an Aboriginal offender may be less than the term imposed on a non-Aboriginal offender for the same offence. The Supreme Court of Canada said “[g]enerally, 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-Aboriginal will be close to each other or the same, even taking into account their difference concepts of sentencing.”16 The sentencing judge will want to know background factors in fixing the length of sentence when imposing a sentence of incarceration.

E. Ultimately, in determining what is a fit sentence, the sentencing judge will make a holistic determination. Counsel should not forget this and review all relevant sentencing information and material with the Court. This includes considering the factors listed above, and also exploring the understanding of criminal sanctions held by the offender and her community. “Would imprisonment effectively serve to deter or denounce this offender …, or are crime prevention and other goals best achieved through healing?”17 What might be required for healing? This information is important in the sentencing process and will present some new challenges for everyone in sentencing.

F. Counsel will need to tailor their submission to sentencing judges so that they can discharge their duty “to craft sentences in a manner which is meaningful to Aboriginal peoples.”18 Defence lawyers will need to understand what is meaningful to a client and convey this to the Court. Although imprisonment is intended to serve the “traditional sentencing goals of separation, deterrence, denunciation and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals.”19 Prosecutor’s will need to identify how to balance public safety concerns with what the Supreme Court has termed a “crisis in the criminal justice system” because of the over-incarceration of Aboriginal peoples.

The impact of Gladue on counsel as a matter of criminal practice is considerable. Not only will there be additional burdens on counsel, in the case of legal aid, there will likely be a need for greater resources to discharge their obligations to the court. Continuing education on the implications of the decision will be valuable for best practices to be adopted. There will be a myriad of scenarios where the application of the reasoning in Gladue will be controversial. This will entail legal argument and more detailed sentencing submissions. For example, where there are two parties to the offence and one is an Aboriginal person and the other is not. For consistency, it would be difficult to sentence on offender to incarceration and the other to a community disposition. However, these kinds of cases will need to be worked out on an individual basis with full consideration of their unique circumstances. The Supreme Court of Canada has interpreted the provision, section 718.2(e), in such a fashion as to enunciate a series of facts and policy objectives which underpin the provision, while leaving broad flexibility to judges to find the appropriate dispositions.

3. Impact on the Judiciary

The potential impact of the Gladue decision on the judiciary is arguably profound. The Supreme Court of Canada has clarified that Parliament’s decision to add section 718.2(e) to the Criminal Code means that one must, as a matter of criminal law, recognize that Aboriginal people experience incarceration differently than others. While some might suggest that an Aboriginal person who receives the same sentence as a non-Aboriginal person is being treated equally, this has been rejected as fallacious reasoning by the Supreme Court of Canada. Sometimes treating different people the same results in inequality. Justices Cory and Iacobucci considered the argument that this treatment of Aboriginal peoples is “reverse discrimination” against non-Aboriginal people.20 They concluded that section 718.2(e) is not unfair to non-Aboriginal people, it simply requires judges to treat Aboriginal people fairly by taking into account their difference.

This decision will affect the judiciary in at least three fundamental ways. First, judges will need to be educated regarding Aboriginal peoples in Canada, including Aboriginal peoples’ history, culture, and experiences of discrimination. Second, judges will need to spend more time on the sentencing process to ensure that all information is before the court which is required to evaluate a more restorative approach to the defendant and the community. Third, judicial independence will be vital in discharging this function as individual judges and the judiciary may be subjected to considerable criticism and public attack for
applying the *Gladue* principles in individual cases. Each of these three areas are important and the judiciary will experience a period of transition.

The first issue regarding judicial education is probably the most significant. While “social context” education for judges has been an important feature of training for judges, it has not been consistent and as sophisticated as is required to provide for a fuller understanding of the situation. It has not always been social context education which involves representatives of the Aboriginal peoples from the regions in which the judges sit. Furthermore, judicial education is but one component of a wider education project regarding Aboriginal peoples. Legal education for lawyers is another—the experiences of Aboriginal peoples in the criminal justice system, and the society at large, should be emphasized in the university context. For example, without proper instruction, a judge might not know how to ask a defendant about their background and personal circumstances. Or worse, they might ask for the information in a fashion which closes off the discussion instead of opening it up. Once one has a narration of the personal circumstances, what does the judge do with that information; not only in terms of fashioning a sentence, but in terms of speaking to a defendant and the broader community regarding the meaning of it? To be meaningful, in the broadest sense, requires a substantial degree of understanding and education outside the individual case.

For example, when I first became a judge, I was observing a colleague in Youth Court as part of my training. In providing reasons for disposition to a young Aboriginal person, the judge suggested that among other factors taken into account, it had been considered as a mitigating factor that the young person was raised by his grandparents and not his birth parents and that this would have had a negative impact on his early childhood. After the proceeding, I explained to my colleague that for Aboriginal people, at least in my experience as Nehiyaw (Cree), being raised by one’s grandparents was a special gift. Perhaps the better way to appeal to the child raised by grandparents is to explain how they are bringing shame on their grandparents by acting the way they did. They were privileged to be raised by their grandparents and they of all people should know better. While this is a small point, it illustrates how useful it is to understand the Aboriginal peoples’ culture and values in order to communicate in a manner which is meaningful to the defendant.

On the second issue of time, sentencing Aboriginal peoples, while fully taking into account the *Gladue* considerations, will be more time-consuming. This is a remark I’ve heard quite often since the decision and my own experience would suggest that it is the case. In a busy court context, such as the situation for the Provincial Court in Saskatchewan, the additional time required to address sentencing for Aboriginal peoples, after the Supreme Court of Canada’s decision, will mean delays in other matters. There will soon be a need for the dedication of greater resources in the administration of justice to discharge this task. It will also require patience and attention to the importance of the sentencing process. In many ways, this might be long overdue and be a benefit in the system to all defendants. We will take more time to sentence, as we should, given how significant a moment sentencing is in the criminal justice system, for both defendants and victims, not to mention the broader community. One significant impact then is that resources will be required in the community for alternative programming if the *Gladue* decision is to be implemented as imagined by the Court.

While the reasoning in *Gladue* is directed at sentencing, it is clearly applicable to other areas such as breaches of conditional sentences, show cause hearings, and parole reviews. One early concern was the application of the reasoning to the proceedings of the youth court under the *Young Offenders Act*. This was argued in Saskatchewan in a case of *R. v. A.J. & A.J.* where it was held that while the specific provision of the *Criminal Code*, section 718.2(e), is not applicable to young offenders, that the reasoning in the decision is applicable in terms of finding more restorative approaches to dispositions for young people. The reasoning in the *Gladue* decision is not of the sort that is narrowly confined to one specific component of the administration of justice, or criminal procedure. It is broad and of vast significance. Presumably, it will be introduced in a variety of contexts in the future with interesting results. It would be difficult to confine a notion like “healing” to only one component of the criminal justice system, i.e., initial sentencing for adults, and not to extend it beyond this to reviews of those sentences and to young people.
4. Impact on Aboriginal Communities

We should also consider the potential impact of the decision in *Gladue* on Aboriginal communities. These communities are diverse, culturally and geographically, although they have been engaged in focused efforts at community healing and development for some time. While the decision was greeted positively by representatives of the Aboriginal community, such as those attending a Canadian Bar Association-Indigenous Bar Association symposium on Aboriginal justice in Toronto in April 1999, the practical implications may raise some troubling problems.

For example, if judges are sentencing to community dispositions, drawing upon resources in the Aboriginal community, how heavily will this tax the limited resources of the community? While the financial resources dedicated to incarceration are significant on a per capita basis, will there be an investment in the Aboriginal community to meet the growing demand for community support, supervision, and healing resources? This is the crux of the matter from a practical perspective. The restorative turn in criminal justice might be only an imaginary one unless Aboriginal communities are able to engage in healing processes with support from the broader society. While personal counselling to address addictions, family distress and the ongoing effects of residential school education are vital to healing, so too are measures to eliminate or reduce poverty and other causes of crime. My point is that restorative justice, fully envisioned, is not something which is passed to the Aboriginal community who are directed to “fix” a problem on their own, especially if they do not have the basic tools to do so.

The sentencing practices which emerge from the application of the *Gladue* decision will also interact with strong concerns in the Aboriginal community, particularly from women, that the concerns of victims should not be disregarded in the healing enterprise. The court will need to weigh, in considering alternatives to incarceration, whether the victim’s interests are properly protected by a non-custodial disposition. This will be a strong consideration in remote communities where the victim will be living in close proximity to the offender.

The restorative notion of justice, as it is understood in the Aboriginal community, is not a notion which excludes the concerns of victims. To the contrary, the notion is rooted in the healing of the rift; and the restoration, if possible, of all those touched by the wrong-doing. This side of the equation cannot be ignored in sentencing after *Gladue*. The British Columbia Court of Appeal, in *R. v. J.E.A.*, reduced an Aboriginal defendant’s sentence from life-imprisonment for robbery and sexual assault to 20 years imprisonment, based on the background factors identified in *Gladue*. They did not reduce it further, even though the defendant had a horrific set of background and personal experiences, because of concern for public safety and the experiences of the victims.

5. Future Challenges

As a judge in a criminal trial court in Saskatchewan which deals predominately with Aboriginal people, one often feels like Anthony Trollope’s *Harry Heathcote*, constantly rushing about the territory trying to keep the fires abated, with no control over the weather causing the hazard. The tendency is to view the problems Aboriginal peoples experience as those of someone else’s making and to view oneself as disposed to limited tools to contain the situation. However, a more balanced view would be to see that the criminal law is a critical site for the mediation of conflict between Aboriginal people and non-Aboriginal people in our society. The lawyer or judge working in the criminal law will benefit from an understanding of their mediating function beyond the circumstances of any individual case. This might seem unusual as judges tend to view the task as highly individuated. Nevertheless, the structural circumstances of Aboriginal peoples’ entanglements with the criminal justice system will assist us in viewing our position in its full context. The task of the court, and the judge, is to dispense justice, understanding that justice as a human enterprise is hardly mechanistic.

This kind of approach pre-supposes a more nuanced interpretation of the rule of law than has historically been the case in mainstream legal discourse. For some, this would be a welcome departure as it potentially embraces the legal pluralism which is the basis of Canada law and holds promise for a more inclusive criminal justice system. For others, it might be vigorously challenged as a departure from the
formal equality of the pre-Charter era. As a barometer of Canadian law, the Gladue decision certainly registers as vital departure point. Applying the reasoning in Gladue requires a strong understanding of how structural factors impact individual cases; or, how individual experiences reflect broader historical and community events. Perhaps this is no more than the history of the common law with its dialectic of stability and change. Nevertheless, reasoning which weighs both structural considerations and specific contexts, is vital to criminal justice. It is a form of reasoning which does not always sit well with the judiciary, as ingrained as we are with particularizing decision-making. Nevertheless, Gladue is a reminder that highly particularized decisions, without regard for broader structural and historical factors, might lead to injustice.

The Gladue transition period will continue for some time as numerous matters are considered in a new light in various courts across the land. It is clear that society expects us to carefully consider the experiences of Aboriginal peoples and find creative responses which are appropriate to unique circumstances. The reasoning in this watershed decision will resonate throughout the criminal justice system, and spill over into the correctional institutions and youth justice system. For judges, the defendant’s personal factors will be need to be weighed differently in the sentencing equation, however, the exercise is still one of careful balancing, taking into account the needs of the community and society, in crafting a disposition which is just for all.

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5 The impact of the work of the Royal Commission on Aboriginal Peoples is especially evident in the decision. This Commission is having a broad influence on judicial decision-making. For an analysis of this, see D. Stack, “The Impact of RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom,” (1999) 62 Sask. L. Rev. 471.
6 Supra, para. 82-83, p.227.
7 R. v. Carratt, unreported decision of 21 May 1999, Saskatoon.
8 Ibid, p. 9, lines 22-23.
10 Ibid, para. 67 & 80, pgs. 222 & 226.
11 Ibid, para. 69, p. 222.
12 Ibid., para. 71, p. 223.
13 Ibid., para. 91, p. 230.
14 Ibid., para. 92, p. 230.
15 Ibid., para. 93, p. 231.
16 Ibid., para. 79, p. 226.
17 Ibid., para. 80, p. 226.
18 Ibid., para. 77, p. 225.
19 Ibid., para. 57, p. 218.
20 Ibid., paras. 86-88, pp. 228-229.
21 See decision of Judge Whelan of the Saskatchewan Provincial Court in R. v. R.J. Stewart, June 11, 1999, which concerned a breach of a conditional sentence and applied the Gladue principles to that disposition. Judge Whelan held: “I conclude without hesitation that the principles discussed in R. v. Gladue, continue to have application in a s.742.6 hearing. In arriving at the appropriate decision...I must consider the unique systemic or background factors which may have played a part in bringing Mr. Stewart, an aboriginal offender, before the court...” para. 20.
22 Unreported decision of Youth Court, May 14, 1999 (J. Lafond). This decision addressed whether or not Gladue applies to young persons given section 20(8) of the Young Offenders Act which exempts Part XXIII of the Criminal Code. In this matter, it was held that while section 718.2(e) does not technically apply to young people, the reasoning in Gladue regarding systemic discrimination and alternatives to incarceration is incorporated through section 3 of the Young Offenders Act.