INDIGENOUS OFFENDERS SENTENCING CHECKLIST

JUDGE DINA YEHIA SC

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AUSTRALIAN CASE LAW

NEAL V R (1982) 149 CLR 305

Per Brennan J, at 326:

"The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion at first instance or for the Court of Criminal Appeal."

R V FERNANDO (1992) 76 A CRIM R 58

Per Wood J, at 62-63:

"In the course of his careful and helpful submissions on sentence, Mr Nicholson QC made reference to a number of authorities and reports or papers, concerning the sentencing of Aborigines including extracts from a paper "The Sentencing of Aboriginal Offenders" by Justice Toohey; the recent report of J H Wooten QC concerning the Royal Commission into Aboriginal deaths in custody; ***Neal*** (1982) 149 CLR 305; ***Davey*** (1980) 2 A Crim R 254; ***Friday*** (1984) 14 A Crim R 471; ***Yougie*** (1987) 33 A Crim R 301; ***Rogers and Murray*** (1989) 44 A Crim R 301 and ***Juli*** (1990) 50 A Crim R 31. As I read those papers and decisions they support the following propositions:

(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.

(H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective

circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part."

R v JOHN RICHARD HICKEY, UNREPORTED, 27 SEPTEMBER 1994, NSWCCA

Per Simpson J:

"It is a tragic truth well known to members of this court, that aboriginality is frequently accompanied by this very litany of disadvantage. So unfortunately common is it, that in The Queen v Fernando (unreported 14 March 1992), Wood J distilled from authoritative papers, precedents and reports, a series of propositions relating to the sentencing of Aboriginal offenders.

The first of these propositions is that sentencing principles are nondiscriminatory, in that they apply to all cases without differentiation by reason of the offender's membership of a particular racial or ethnic group. But this general proposition is followed by a recognition that those factors which constitute the disadvantage already described, and which may arise by reason of membership of that particular group, may have a role to play in the sentencing determination. Wood J in particular made mention of the need for "realistic recognition" of the fact of alcohol abuse, and its impact on Aboriginals and their communities. So much can readily be accepted, and it seems clear that this must have been the factor which led Judge Ford to impose the very lenient sentence he did."

R v KELLY [2000] NSWSC 701

Per Barr J at [16]:

"Counsel referred the Court to a number of authorities dealing with the principles to be applied when sentencing for manslaughter, including special considerations to be borne in mind when offenders are Aboriginal, and particularly for offences committed under the influence of alcohol. It is sufficient to refer to the remarks of Wood J (as his Honour then was) in ***R v Fernando*** (1992) 76 A Crim R 58 at 62 –

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects."

R v CEISSMAN (2001) 119 A CRIM R 535

Per Wood CJ at CL, at 539-540:

"29 Next, it appears to me that his Honour was at risk of misapplying the decision in ***Fernando*** (1992) 76 A Crim R 58, referred to with approval in ***Stone*** (1995) 84 A Crim R 218. As I endeavoured to explain in ***Fernando***, the eight propositions there enunciated were not intended to mitigate the punishment of persons of Aboriginal descent, but rather to highlight those circumstances that may explain or throw light upon the particular offence, or upon the circumstances of the particular offender which are, referable to their Aboriginality, particularly in the context of offences arising from the abuse of alcohol.

…

31 That ***Fernando*** is not to be regarded as a decision justifying special leniency, merely because of the Aboriginality of the offender, was recognised in ***Hickey*** NSW CCA 27 September 1994 where Simpson J noted that the first of the propositions stated by me in that decision "is that sentencing principles are non-discriminatory in that they apply to all accused without differentiating by reason of the offender's membership of a particular racial or ethnic group". This proposition is however varied by the recognition that those factors which constitute the disadvantage, and which may arise by reason of membership of the particular group, may have a role to play in the sentencing determination.

32 The principles stated should not be elevated so as to create a special class of persons for whom leniency is inevitably to be extended, irrespective of the objective and special circumstances of the case. To do so would itself be discriminatory of others."

Per Simpson J, at 544:

"63 Eighth: the sentencing judge, who is a very experienced judge, twice described the respondent's background as the most tragic he had ever seen. In my opinion, this Court should not lightly depart from such a finding nor its implications. In a shorthand fashion, it evokes the *Fernando* principles."

R v FERNANDO [2002] NSWCCA 28

Per Spigelman CJ (Wood CJ at CL and Kirby J agreeing):

"64 As is well established, it is a primary objective of sentencing for criminal offences that the community must be protected from the commission of crimes, by deterring both the particular offender and other possible offenders – referred to as personal and general deterrence respectively. In a case of the character now before the Court, by an offender with this record, the protection of the community requires a substantial period of imprisonment. It is, however, often the case that such considerations of deterrence are properly tempered by considerations of compassion which arise when the Court is

presented with information about the personal circumstances which have led an individual into a life of crime.

65 Such considerations are present in the case before the Court. The Respondent has a personal history of deprivation that is, regrettably, far too common amongst young people, particularly Aboriginal youth.

…

67 Aborigines who commit crimes of violence are not accorded special treatment by the imposition of lighter sentences than would otherwise be appropriate having regard to all of the relevant considerations, including the subjective features of a particular case. An offender is not entitled to any special leniency by reason of his or her Aboriginality. The principle of equality before the law requires sentencing to occur without differentiation by reason of the offender's membership of any particular racial or ethnic group. Nevertheless, particular mitigating factors may feature more frequently in some such groups than they do in others. (See *R v Fernando* (1992) 72 ACrimR 58 at 62-63 as further explained in *R v Hickey* (NSWCCA, 27 September 1994; unreported); *R v Stone* (1995) 84 ACrimR 218 at 221-223; *R v Ceissman* [2001] NSWCCA 73 esp at [29]-[33]; *R v Pitt* [2001] NSWCCA 156 at [19]-[21].)"

R v WELDON [2002] NSWCCA 308

Per Adams J (Dunford J agreeing):

"13 Whilst adverting to whether there were any special circumstances in Hughes' case - his Honour finding there were none, a decision held to be wrong by this court when considering Hughes' appeal - his Honour did not refer to the possibility of special circumstances in the applicant's case. In my view, not only were special circumstances present but they should have resulted in a significant reduction in the non-parole period which was imposed. Without going into details, this was a case in which ***Fernando*** (1992) 76 A Crim R 58 at 62-63) considerations required anxious consideration of the period of incarceration to be served in a practical sense by this applicant. A full history shows that the applicant is of Aboriginal descent, was raised with his father in Gilgandra until the age of thirteen, and he had an unfortunate relationship with his mother. His father spent time in prison when the applicant was quite young and his care was taken over by his paternal grandmother. His history showed a continual movement between one carer and another, a feature of which was his

repeated unsuccessful attempts to excite, for some reason or other, the care of his mother for him. He ran away from home at the age of fifteen years to go looking for his mother and shortly after was picked up by the police after breaking into a shop. He spent two days in Yasmar, returned to live with his father in Gulargambone, remaining there until the age of seventeen, at which time he left school. He has had a problem both with drinking and drugs, especially from the age of nineteen, when he began to use heroin and then, leaving heroin, moved on to cocaine."

R v FULLER-CUST (2002) 6 VR 496

Per Batt JA, at 515:

"[60] So far as the applicant's Aboriginality is concerned, the law, as I understand it, is that the same sentencing principles apply to an Aboriginal offender as to any other offender, but there may be particular matters which a court must take into account in applying those principles which are mitigating factors applicable to the particular offender, including disadvantages associated with the offender's membership of the Aboriginal race: *Neal v. The Queen*; *R. v. Rogers and Murray;* and *R. v. Fernando.*"

Per Eames JA, at 520 - 522:

"[78] Sentencing principles are the same for all Victorians. Race is not a basis for discrimination in the sentencing process. Nothing I say in these reasons should be taken as suggesting that Aboriginal offenders should be sentenced more leniently than non-Aboriginal persons on account of their race. The offences committed by the applicant, and admitted by him, are extremely serious – as I shall discuss. That is not to say, however, that considerations and factors of race may not be taken into account on sentencing, where they are relevant.

[79] To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself. Not only would that offend principles of individual sentencing which apply to all offenders but in this case it would fail to identify the reasons for his offending and, in turn, the issues which have to be addressed if rehabilitation efforts are to successfully be adopted so as to ensure that he does not re-offend and, in turn, to ensure the long-term safety of the public.

[80] To have regard to the fact of the applicant's Aboriginality would not mean that any factor would necessarily emerge by virtue of his race which was relevant to sentencing, but it

would mean that a proper concentration would be given to his antecedents which would render it more likely that any relevant factor for sentencing which did arise from his Aboriginality would be identified, and not be overlooked. Exactly the same approach should be adopted when considering the individual situation of any offender, so that any issue relevant to that offender's situation which might arise by virtue of the offender's race or history would not be overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored.

[81] In *Neal v. The Queen*[1] Brennan, J. held:

> "The same principles are to be applied, of course, in every case, irrespective of the identity of the particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account in accordance with those principles, all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the administration of justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal."

[82] In *R. v. Rogers and Murray* Malcolm, C.J., after observing that it would constitute racial discrimination were the sentencing of Aboriginal people to be based on their Aboriginality, noted:

> "It follows from this that the sentencing principles to be applied in relation to a sexual offence committed by an Aboriginal must be the same as those in any other case. It is apparent, however, that there may well be particular matters which the court must take into account in applying those principles, which are mitigating factors applicable to the particular offender. These include social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race."

[83] In *R. v. Gibuma and Anor* McPherson, S.P.J. (with whom Shepherd and De Jersey, JJ. agreed) was concerned with a Crown appeal in which the sentencing judge had remarked that the level of sentencing for indigenous people in Queensland, even for serious crimes, had generally been at a lower level than for non-indigenous persons. As to those remarks McPherson, S.P.J. observed:

> "A particular complaint is levelled by the appellant against this passage in the sentencing remarks. It is suggested that it embodies a principle, which is erroneous,

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1 (1982) 149 C.L.R. 305 at 326.

that indigenous people are, because of that characteristic alone and without more, to be treated differently from other Australians in the matter of sentencing. For my part, I did not so regard his Honour's remarks. I venture to suggest that it is neither colour nor race that commonly forms a determinant or a factor in matters of sentencing of the kind to which his Honour referred. It is the background, education, cultural outlook, and so on, of the particular individual involved. Considerations of that kind apply with equal force to persons who are not indigenes, or who are of races other than those commonly encountered in the northern part of the State. I do not doubt that this was both the opinion and the impression that his Honour was intending to convey by the remarks he made that have been challenged in this court."

[84] In *R. v. Woodleigh & Ors* the Court of Criminal Appeal in Western Australia considered a Crown appeal with respect to sentences imposed upon Aboriginal offenders for offences, including violence against women, committed against Aboriginal victims. The court rejected the notion that Aboriginal women would not receive proper protection from the courts by virtue of the fact that the offenders were also Aboriginal. Nonetheless, the court recognized that factors relevant to sentencing - on ordinary principles of sentencing - bearing upon the Aboriginality of the offender may ameliorate the sentence which would otherwise have been imposed. The court was concerned with the question whether the individual circumstances of offenders had been properly taken into account by the sentencing judge, or whether the offenders were treated as a group or class, without proper individual consideration. The court noted, first, as follows:

"We do not quarrel with the sentiment that there are many Aborigines who require special consideration when they appear before the courts. Each, however, needs to be dealt with individually and on the merits applicable to each. On his Honour's approach, who were the least blameworthy were treated exactly the same as those who were most blameworthy. . . . The principles applicable in connection with the sentencing of Aborigines are the same as those applicable to all members of the community, although the application of those principles to a particular Aboriginal offender will frequently lead to a disposition which is different from that which it would have been in the case of a non-Aboriginal offender."

[85] After a helpful analysis of relevant cases Wood, J. in *R. v. Fernando* extracted a number of propositions relevant to the sentencing of Aboriginal offenders, and aspects of two of those propositions stated by his Honour have relevance here. His Honour noted, and I agree, that in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt, yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender. Secondly, and subject to the important

consideration of the terms of s.6D and s.6E of the *Sentencing Act*, I also accept, that, as his Honour observed:

> "(I)n every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part".

[86] In a paper on sentencing of Aboriginal offenders Toohey, J. made the important observation that Aboriginality was not always an advantage for an offender on sentencing. His Honour noted:

> "The relevance of Aboriginality is not necessary to mitigate; rather, it is to explain or throw light on the circumstances of an offence. In so doing it may point the way to an appropriate penalty. Aboriginality may in some cases mean little more than the conditions in which the offender lives. In other cases it may be the very reason why the offence was committed."

[87] Toohey, J. continued:

> "The suggestion, sometimes made, that Aboriginality should be included among mitigating factors to be given some formal recognition is the more suspect. It carries overtones of patronage and superiority ....
>
> It is demeaning to Aborigines to suggest that somehow their Aboriginality is necessarily a mitigating consideration. Rather it is, to echo the words of Professor Rowley, 'a matter of justice' (Rowley, *A Matter of Justice*, 1978).
>
> Aboriginality may sometimes be a circumstance of aggravation in the sense that an Aboriginal community may regard an offence as more serious than would a non-Aboriginal community. Bringing liquor into the community is one example.
>
> But any sentence must be subject to the over-arching notion of proportionality ..."

[88] It may follow, therefore, that when applying the sentencing principles which are common to all Victorians different outcomes may result for an Aboriginal offender simply because mitigating factors in the background of the offender, or circumstances of the offence, occurred or had an impact peculiarly so because of the Aboriginality of the offender."

R v WORDIE [2003] VSCA 107

Per Cummins AJA (Phillips CJ and Vincent JA agreeing):

"[31] As to the influence of alcohol in the events leading up to and constituting Count One, His Honour's sentencing remarks above cited demonstrate that he was conscious of that matter and also that he understood its limitation. The most unfortunate cluster of physical and intellectual disabilities of the appellant were apparent to His Honour, who demonstrated close awareness of the medical and psychological material before him. Although His Honour did not refer in terms to the two incidents of suicidality of the appellant in custody, it cannot be thought that His Honour was unmindful of them, both for general and lamentable reasons and because they were referred to in the report of Dr Tuck of 4 June 2001 which report His Honour generally referred to. The appellant's aboriginality and most unfortunate social deprivation plainly were at the forefront of His Honour's mind. Counsel for the appellant submitted that 'aboriginality does not distinguish the appellant for sentencing purposes' but that the deprivation suffered in the past by the appellant and which was in substantial part a consequence of his aboriginality has relevance for sentencing. I wholly agree. Appropriate considerations were reviewed and considered by Eames J.A. in *R. v. Fuller-Cust* and for which I am indebted. In the present case the learned sentencing Judge was plainly, and rightly, sensitive to those considerations. His Honour also was clearly aware of the appellant's age, his prognosis, and the burden of imprisonment upon him. The circumstance that the appellant pleaded guilty exercised His Honour's consideration both of itself and as to remorse. Counsel for the appellant in this Court also referred to "an apparent lack of motive". As to that, His Honour correctly observed that "whilst it obviously arose out of the relationship between you" His Honour declined to speculate as to its precise character. All in all it is clear that His Honour carefully addressed all relevant considerations."

R v TAYLOR [2005] VSCA 222

Per Nettle JA (Eames JA and Hollingworth AJA agreeing):

"[14] That said, however, the circumstances of this case are unusual. As appears from the judge's sentencing remarks, his Honour discerned from the fact that the respondent had no relevant prior convictions and had not re-offended during the nine years since the offence was committed, and had striven to rehabilitate himself from alcoholism, that the respondent no longer posed a threat to the community. Specific deterrence would seem also not to be an issue, and it appears too that the judge was of the view that the sentence should take account of the respondent's remorse and prospects of rehabilitation, and that his Honour was influenced by the respondent's aboriginality, and his dysfunctional upbringing and the

parental neglect to which he had been subjected. Clearly, they were all factors to which the judge was entitled to have regard. As Eames, J.A. put it in *R v Fuller-Cust*:

> '79. To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself. Not only would that offend principles of individual sentencing which apply to all offenders but in this case it would fail to identify the reasons for his offending and, in turn, the issues which have to be addressed if rehabilitation efforts are to successfully be adopted so as to ensure that he does not re-offend and, in turn, to ensure the long-term safety of the public.
>
> 80. To have regard to the fact of the applicant's Aboriginality would not mean that any factor would necessarily emerge by virtue of his race which was relevant to sentencing, but it would mean that a proper concentration would be given to his antecedents which would render it more likely that any relevant factor for sentencing which did arise from his Aboriginality would be identified, and not be overlooked. Exactly the same approach should be adopted when considering the individual situation of any offender, so that any issue relevant to that offender's situation which might arise by virtue of the offender's race or history would not be overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored.
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> 81. In *Neal v R* Brennan J held:
> 'The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of the particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the administration of justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.'"

DPP (VIC) v TERRICK; MARKS; STEWART (2009) 24 VR 457

Per curiam (Maxwell P, Redlich JA and Robson AJA):

"[45] This submission – which was not advanced in these terms on the plea – raised the general question of the extent to which an offender's criminal responsibility can be viewed as reduced by background circumstances of hardship, deprivation and violence, and the extent of any such reduction where the offender is a recidivist. At the request of the court, counsel for Marks and counsel for the Director subsequently provided references to a large number of authorities addressing the significance for sentencing of disadvantage in general and of Aboriginal disadvantage in particular. We have been much assisted by that material, in particular by the seminal judgments of Wood J in *Fernando* and of Eames JA in *Fuller-Cust*.

[46] The following propositions emerge from the authorities:

1. The individual circumstances of an offender are always relevant to sentencing.

2. Circumstances of disadvantage, deprivation or (sexual) violence may be explanatory, if not causative, of the offending or (if relevant) of the offender's alcohol or drug addiction.

3. The (relative) weight to be given to circumstances of disadvantage or deprivation is a matter for the sentencing judge, and will depend on:

    a. the nature and extent of the disadvantage;

    b. the nexus (if any) with the offending; and

    c. the (relative) importance in the particular case of sentencing considerations such as rehabilitation, deterrence (specific and general), community protection and social rehabilitation.

4. The same sentencing principles apply irrespective of the offender's race. Thus, Aboriginal offenders are not to be sentenced more leniently than non-Aboriginal persons on account of their race.

5. In sentencing persons of Aboriginal descent, the court must avoid any hint of racism, paternalism or collective guilt. At the same time, the sentencing court is bound to take into account 'facts which exist only by reason of the offender's membership of an ethnic or other group.'

6. When applying sentencing principles, which are common to all Victorians, a different outcome may result for an Aboriginal offender if it is shown that 'mitigating factors in the background of the offender, or [in the] circumstances of the offence, occurred or had an impact peculiarly so because of the Aboriginality of the offender.'

7. Such considerations require a careful examination of the history of the offender. The relevance of Aboriginality to an offender's disadvantaged background must be established by appropriate evidence.

8. Where the offender has prior convictions, such that considerations of specific and general deterrence and community protection become increasingly important

sentencing factors, the significance of personal circumstances will correspondingly decrease.

We now examine some of these propositions in more detail.

[47] An offender's background may explain the offending conduct, though whether it provides an excuse is a separate question. Background circumstances may affect the assessment of moral culpability and in addition (or in the alternative) may require some moderation of general or specific deterrence or the need for denunciation, or may bear upon prospects of rehabilitation.

[48] Accordingly, facts peculiar to an offender's membership of an indigenous community, or which are a particular consequence of that membership, are to be taken into account if they elucidate some aspect of the commission of the offence or the personal circumstances of the offender. The weight to be attributed to these factors is a matter for the sentencing judge.

[49] As Eames JA observed in *Fuller–Cust*:

> *To have regard to the fact of the applicant's Aboriginality would not mean that any factor would necessarily emerge by virtue of his race which was relevant to sentencing, but it would mean that proper concentration would be given to his antecedents which would render it more likely that any relevant factor for sentencing which did arise from his Aboriginality would be identified and not be overlooked. Exactly the same approach should be adopted when considering the individual situation of any offender, so that any issue relevant to that offender's situation which might arise by virtue of the offender's race, or history, would not be overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored.*

[50] The prevalence of disadvantage within indigenous communities does not diminish its significance for the individual offender. On the contrary, membership of a community where disadvantage is widespread might compound the difficulties suffered by a particular individual. The social and economic disadvantages often found in indigenous communities are powerful considerations. The fact that disadvantage amongst members of an indigenous community is widespread must not be allowed to reduce the impact of disadvantage as a sentencing factor in a particular case.

[51] In the present case, the sentencing judge appreciated that he had to assess the extent to which the circumstances of the upbringing of the respondents – social, environmental and cultural factors – assumed a significance in the application of sentencing principles. Their backgrounds might explain the presence or absence of motive; identify influences which had contributed to the commission of the offence; or reveal circumstances relevant to the nature of the sentence which should be imposed. But background will not necessarily be a mitigating circumstance. As Franklin J said in *R v E (a child)*:

> *Whilst the factors of Aboriginality, ethnic oppression, socio-economic deprivation, family environment and similar matters or any of them may have relevance in a particular case to the appropriate sentence to be imposed on an offender, none of them is self-executing in the sense that its mere existence necessarily requires a reduction of the penalty otherwise appropriate to the offence.*

[52] The deprived background of the respondents was relevant to an assessment of the weight to be given to both general and specific deterrence. As Derrington J said in *R v Yougie*:

> *Of highest importance is the deterrent effect for the protection of potential victims and the turning of the court's face against violence as a general proposition is justifiable. At the same time it would be wrong to fail to acknowledge the social difficulties faced by Aboriginals in this context where poor self image and other demoralising factors have placed heavy stresses on them leading to alcohol abuse and consequential violence. Its endemic presence in these communities, despite heavy prison sentences, is proof of the serious problem and, to some extent, the limited nature of deterrence in this social context.*

[53] The respondents' deprived upbringing was also relevant to a consideration of their alcohol abuse and its contribution to the commission of the offence. The sentencing judge was entitled to consider the extent to which, as a result of the respondents' backgrounds, their chronic alcohol abuse was the result of a diminished choice. As we have noted, the abuse of alcohol reflected the environment in which each respondent grew up. As Wood J said in *Fernando*, there needs to be:

> *realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities and the gross social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.*"

KENNEDY V R [2010] NSWCCA 260

Per Simpson J (Fullerton and R A Hulme JJ agreeing):

"[50] In *Fernando*, Wood J set out a series of sentencing propositions that have too often been taken to have been designed specifically for Aboriginal offenders...

…

[52] That the *Fernando* propositions were intended to apply generally was stated in *R v Hickey* (NSWCCA, 27 September 1994, unreported) and re-stated by Wood J in *R v Morgan* [2003] NSWCCA 230; 57 NSWLR 533 at [20] and [21].

[53] Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime…

…

[55] … It was an error for the judge to say that there was "little evidence" to show that the applicant was raised in a community:

> "the toxic features of which prevented the development of a proper attitude to law abiding behaviour."

[56] The Pre-Sentence Report disclosed an early history of social deprivation, to the extent that, from the age of seven, the applicant was removed from his mother's care. He has had no relationship with his father. He has had little education. He succumbed to drug and alcohol use as early as 13 years of age. His upbringing was unstable, in part by reason of attempts on the part of his grandmother to deal with his drug and alcohol use.

[57] It is no answer to say that he did not come from "a remote part of the community"; social deprivation, resulting from alcohol consumption (or otherwise) is not confined to remote areas or communities."

BUGMY (2013) 87 ALJR 1022; 249 CLR 571

Per majority (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ):

> "[36] One evident point of distinction between the legislative principles governing the sentencing of offenders in Canada and those that apply in New South Wales is that s 5(1) of the Sentencing Act does not direct courts to give particular attention to the circumstances of Aboriginal offenders. The power of the Parliament of New South Wales to enact a direction of that kind does not arise for consideration in this appeal. Another point of distinction is the differing statements of the purposes of punishment under the Canadian and New South Wales statutes. 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.

[37] An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence. In this respect, Simpson J has correctly explained the significance of the statements in *Fernando*:

> "Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime."

[38] The propositions stated in *Fernando* are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct. However, his Honour recognised that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand. His Honour considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor. To do so, he said, is to acknowledge the endemic presence of alcohol in Aboriginal communities and:

> "the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects."

[39] The other respect in which Wood J proposed that an offender's Aboriginality may be relevant to the sentencing determination is in a case in which because of the offender's background or lack of experience of European ways a lengthy term of imprisonment might be particularly burdensome. In each of these respects, the propositions enunciated in *Fernando* conform with the statement of sentencing principle by Brennan J in *Neal*:

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is

essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal."

[40] Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.

[41] Mr Fernando was a resident of an Aboriginal community located near Walgett in far-western New South Wales. The propositions stated in his case are particularly directed to the circumstances of offenders living in Aboriginal communities. Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity and they, too, may be subject to the grave social difficulties discussed in *Fernando*. Nonetheless, the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.

[42] It will be recalled that in the Court of Criminal Appeal the prosecution submitted that the evidence of the appellant's deprived background lost much of its force when viewed against the background of his previous offences. On the hearing of the appeal in this Court the Director did not maintain that submission. The Director acknowledges that the effects of profound deprivation do not diminish over time and he submits that they are to be given full weight in the determination of the appropriate sentence in every case.

[43] The Director's submission should be accepted. The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the

person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

[44] Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender."

Per Gaegler J:

"[56] As to whether there is, with the passage of time, a diminution in the extent to which it is appropriate for a sentencing judge to take into account the effects of social deprivation in an offender's youth and background, I am unable to accept either the Court of Criminal Appeal's categorical statement that there must be, or the Director's categorical concession in the appeal to this Court that there is not. Consistently with the statement of sentencing principle by Brennan J in *Neal v The Queen*, the weight to be afforded to the effects of social deprivation in an offender's youth and background is in each case for individual assessment."

MUNDA V WA (2013) 87 ALJR 1035; 249 CLR 600

Per majority (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ):

"[52] In *R v Fuller-Cust*, Eames JA observed that, in the application of the principle stated by Brennan J, regard to an offender's Aboriginality serves to ensure that a factor relevant to sentencing which arises from the offender's Aboriginality is not "overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual

circumstances related to their race should be ignored." Moreover, the personal disadvantages affecting an individual offender may be, because of the circumstances in which they were engendered, so deep and so broad that they serve to shed light on matters such as, for example, an offender's recidivism.

[53] Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence." It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.

[54] It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

…

[57] This observation by McLure P is particularly poignant in this case, given the very lenient sentence imposed on the appellant in May 2009 and its evident insufficiency to deter the appellant from the repetition of alcohol-fuelled violence against his de facto spouse, or to afford her protection from such violence. The circumstance that the appellant has been affected by an environment in which the abuse of alcohol is common must be taken into account in assessing his personal moral culpability, but that consideration must be balanced with the seriousness of the appellant's offending. It is also important to say that it should not be thought that indulging in drunken bouts of domestic violence is not an example of moral culpability to a very serious degree.

…

[62] The possibility that the appellant may, at some time in the future, face corporal punishment by way of payback was taken into account in his favour by the sentencing judge. The respondent accepted that that possibility is a factor relevant to sentencing. The Court of Appeal did not take a different view; and the respondent did not argue that this Court should take a different view.

[63] In these circumstances, this case does not afford an occasion to express a concluded view on the question whether the prospect of such punishment is a consideration relevant to the imposition of a proper sentence, given that the courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice. It is sufficient to say that the appellant did not suffer any injustice by reason of the circumstance that the prospect of payback was given only limited weight in his favour by the courts below."

Per Bell J:

"[133] The analysis in *Fernando*, to which the primary judge obliquely referred, was directed to the significance of intoxication to the sentencing of an Aboriginal offender raised in a community that is demoralised by social and economic disadvantage and in which the abuse of alcohol and alcohol-fuelled violence are endemic. It is recognised that a background of profound disadvantage of this description may be taken into account in mitigation of drunken offending. A second proposition stated in *Fernando* has particular application to traditional Aboriginal offenders: that the court may take into account in mitigation of sentence that a lengthy term of imprisonment served in a facility distant from the offender's community may be particularly harsh.

[134] The "*Fernando* propositions" do not all favour mitigation of sentence. They contemplate the necessity to ensure that Aboriginal Australians are not deprived of the protection which it is assumed punishment provides and to avoid the perception that serious violence in Aboriginal communities will be treated by the law as a matter of little moment. The propositions have internal tensions which fall to be weighed by the sentencing judge along with all of the other factors that bear on the ultimate discretionary determination.

[135] The law confers a wide discretion on the sentencing judge. It is trite to observe that inadequacy of sentence is not established by mere disagreement by the appellate court with the sentence imposed by the sentencing judge. It was open to the primary judge to take into account the isolation that the appellant, a traditional Aboriginal man, would experience in a prison distant from his community. So, too, was it open to his Honour to take into account the social disadvantages within the appellant's community, which had led to an acceptance of alcohol abuse and violence as normal. His Honour recognised that these factors were to be weighed against the need to structure a sentence that would play a role in protecting vulnerable Aboriginal women, who are frequently subject to abuse. In question is not the principles applied but whether, in the result, a sentence of five years and three months' imprisonment is eloquent of error."

INGREY V R [2016] NSWCCA 31

"[34] It is true, as the Crown submitted, that in *Bugmy v The Queen* the plurality said:

> "40 … The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence <u>may</u> mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way." (emphasis added)

[35] My understanding of that statement is that it refers to the ultimate effect of that factor. The plurality were not saying that a consideration of this factor was optional. What the plurality clearly had in mind was that even when that factor is taken into account, there may be countervailing factors (such as the protection of the community) which might reduce or eliminate its effect. In other words, this factor where it is present should be taken into account in the exercise of the sentencing discretion. That is something which his Honour did not do.

…

[39] It follows that although the applicant's background was marked by exposure to regular criminal activity, it was not of the kind (regrettably found all too often in such cases) where the abuse of alcohol and alcohol-fuelled violence were endemic. The applicant's background was considerably better than that described in *Bugmy, Fernando* and a number of similar cases which have come before the courts. Nevertheless, the applicant's exposure to crime at an early age would still have "compromise[d] the person's capacity to mature and learn from experience" (*Bugmy* at [43])."

CANADIAN CASE LAW

R v GLADUE [1999] 1 SCR 688

Per curiam, as delivered by Cory and Iacobucci JJ:

"E. *A Framework of Analysis for the Sentencing Judge*

(1) What Are the "Circumstances of Aboriginal Offenders"?

66 How are sentencing judges to play their remedial role? The words of s. 718.2(*e*) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. 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

(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*

67 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. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place

Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."

68 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 towards them is so often rampant in penal institutions.

69 In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

…

(2) The Search for a Fit Sentence

75 The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community. Nothing in Part XXIII of the *Criminal Code* alters this fundamental duty as a general matter. However, the effect of s. 718.2(*e*), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence

for aboriginal offenders. Section 718.2(*e*) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

76 In *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at p. 567, Lamer C.J. restated the long-standing principle of Canadian sentencing law that the appropriateness of a sentence will depend on the particular circumstances of the offence, the offender, and the community in which the offence took place. Disparity of sentences for similar crimes is a natural consequence of this individualized focus. As he stated:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

77 The comments of Lamer C.J. are particularly apt in the context of aboriginal offenders. As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors. Further, an aboriginal offender's community will frequently understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight. Through its reform of the purpose of sentencing in s. 718, and through its specific directive to judges who sentence aboriginal offenders, Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.

78 In describing the effect of s. 718.2(*e*) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these

latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

79 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.

80 As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

81 The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a

sentence which is just and appropriate in the circumstances. By means of s. 718.2(*e*), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender."

R v IPEELEE [2012] 1 SCR 433

Per McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ, as delivered by LeBel J:

"C. *The Offender — Sentencing Aboriginal Offenders*

[56] Section 718.2(*e*) of the *Criminal Code* directs that "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". This provision was introduced into the *Code* as part of the 1996 Bill C-41 amendments to codify the purpose and principles of sentencing. According to the then-Minister of Justice, Allan Rock, "the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada" (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl., November 17, 1994, at p. 15).

[57] Aboriginal persons were sadly overrepresented indeed. Government figures from 1988 indicated that Aboriginal persons accounted for 10 percent of federal prison inmates, while making up only 2 percent of the national population. The figures were even more stark in the Prairie provinces, where Aboriginal persons accounted for 32 percent of prison inmates compared to 5 percent of the population. The situation was generally worse in provincial institutions. For example, Aboriginal persons accounted for fully 60 percent of the inmates detained in provincial jails in Saskatchewan (M. Jackson, "Locking Up Natives in Canada" (1989), 23 *U.B.C. L. Rev.* 215, at pp. 215-16). There was also evidence to indicate that this overrepresentation was on the rise. At Stony Mountain penitentiary, the only federal prison in Manitoba, the Aboriginal inmate population had been climbing steadily from 22 percent in 1965 to 33 percent in 1984, and up to 46 percent just five years later in 1989 (Commissioners A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal*

Justice Inquiry of Manitoba, vol. 1, *The Justice System and Aboriginal People*(1991), at p. 394). The foregoing statistics led the Royal Commission on Aboriginal Peoples ("RCAP") to conclude, at p. 309 of its Report, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996):

> 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.

[58] The overrepresentation of Aboriginal people in the Canadian criminal justice system was the impetus for including the specific reference to Aboriginal people in s. 718.2(*e*). It was not at all clear, however, what exactly the provision required or how it would affect the sentencing of Aboriginal offenders. In 1999, this Court had the opportunity to address these questions in *Gladue*. Cory and Iacobucci JJ., writing for the unanimous Court, reviewed the statistics and concluded, at para. 64:

> 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 sentencing treatment in s. 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.

[59] The Court held, therefore, that s. 718.2(*e*) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm

existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(*e*) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (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 (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[60] Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27 (CanLII), 189 Sask. R. 190). To be clear, 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. These matters, on their own, 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. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(*e*) of the *Criminal Code*.

[61] It would have been naive to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely. In *Gladue*, Cory and

Iacobucci JJ. were mindful of this fact, yet retained a degree of optimism, stating, at para. 65:

> 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.

[62] This cautious optimism has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent (J. V. Roberts and R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003), 45 *Can. J. Crim. & Crim. Just.* 211, at p. 226). From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent (J. Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009), 54 *Crim. L.Q.* 447, at p. 452). As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when*Gladue* was decided, they accounted for 17 percent of federal admissions in 2005 (J. Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going", in J. Cameron and J. Stribopoulos,

eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (2008), 687, at p. 701). As Professor Rudin asks: "If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?" ("Addressing Aboriginal Overrepresentation Post-*Gladue*", at p. 452).

[63] Over a decade has passed since this Court issued its judgment in *Gladue*. As the statistics indicate, s. 718.2(*e*) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system. Granted, the *Gladue* principles were never expected to provide a panacea. There is some indication, however, from both the academic commentary and the jurisprudence, that the failure 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 following is an attempt to resolve these misunderstandings, clarify certain ambiguities, and provide additional guidance so that courts can properly implement this sentencing provision.

(1) Making Sense of Aboriginal Sentencing

[64] Section 718.2(*e*) of the *Criminal Code* and this Court's decision in *Gladue* were not universally well received. Three interrelated criticisms have been advanced: (1) sentencing is not an appropriate means of addressing overrepresentation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s. 718.2(*e*) of the*Criminal Code*.

[65] Professors Stenning and Roberts describe the sentencing provision as an "empty promise" to Aboriginal peoples because it is unlikely to have any significant impact on levels of overrepresentation (P. Stenning and J. V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001), 64*Sask. L. Rev.* 137, at p. 167). As we have seen, the direction to pay particular attention to the circumstances of Aboriginal offenders was included in light of evidence of their overrepresentation in Canada's prisons and jails. This overrepresentation led the Aboriginal Justice Inquiry of Manitoba to ask in its Report: "Why, in a society where justice is supposed to be blind, are the inmates of our

prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system" (p. 85; see also RCAP, at p. 33). The available evidence indicates that both phenomena are contributing to the problem (RCAP). Contrary to Professors Stenning and Roberts, addressing these matters does not lie beyond the purview of the sentencing judge.

[66] First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities. As Professors Rudin and Roach ask, "[if an innovative] sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?" (J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002), 65 *Sask. L. Rev.* 3, at p. 20).

[67] Second, judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing. Professor Quigley aptly describes how this occurs:

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.
>
> (T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in R. Gosse, J. Y. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, at pp. 275-76)

Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.

[68] Section 718.2(*e*) is therefore properly seen as a "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" (*Gladue*, at para. 64 (emphasis added)). Applying the provision does not amount to "hijacking the sentencing process in the pursuit of other goals" (Stenning and Roberts, at p. 160). The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(*e*), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.

[69] Certainly sentencing will not be the sole — or even the primary — means of addressing Aboriginal overrepresentation in penal institutions. But that does not detract from a judge's fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim. Nor does it turn s. 718.2(*e*) into an empty promise. The sentencing judge has an admittedly limited, yet important role to play. As the Aboriginal Justice Inquiry of Manitoba put it, at pp. 110-11:

> To change this situation will require a real commitment to ending social inequality in Canadian society, something to which no government in Canada has committed itself to date. This will be a far-reaching endeavour and involve much more than the justice system as it is understood currently. . . .
>
> Despite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation.

Cory and Iacobucci JJ. were equally cognizant of the limits of the sentencing judge's power to effect change. Paragraph 65 of *Gladue* bears repeating here:

> 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. . . . 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.

[70] The sentencing process is therefore an appropriate forum for addressing Aboriginal overrepresentation in Canada's prisons. Despite being theoretically sound, critics still insist that, in practice, the direction to pay particular attention to the circumstances of Aboriginal offenders invites sentencing judges to impose more lenient sentences simply because an offender is Aboriginal. In short, s. 718.2(*e*) is seen as a race-based discount on sentencing, devoid of any legitimate tie to traditional principles of sentencing. A particularly stark example of this view was expressed by Bloc Québécois M.P. Pierrette Venne at the second reading for Bill C-41 when she asked: "Why should an Aboriginal convicted of murder, rape, assault or of uttering threats not be liable to imprisonment like any other citizen of this country? Can we replace all this with a parallel justice, an ethnic justice, a cultural justice? Where would it stop? Where does this horror come from?" (*House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., September 20, 1994, at p. 5876).

[71] In *Gladue*, this Court rejected Ms. Gladue's argument that s. 718.2(*e*) was an affirmative action provision or, as the Crown described it, an invitation to engage in "reverse discrimination" (para. 86). Cory and Iacobucci JJ. were very clear in stating that "s. 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" (para. 88 (emphasis added)). This point was reiterated in *R. v. Wells*, 2000 SCC 10 (CanLII), [2000] 1 S.C.R. 207, at para. 30. There is nothing to suggest that subsequent decisions of provincial and appellate courts have departed from this principle. In fact, it is usually stated explicitly. For example,

in *R. v. Vermette*, 2001 MBCA 64 (CanLII), 156 Man. R. (2d) 120, the Manitoba Court of Appeal stated, at para. 39:

> The section does not mandate better treatment for aboriginal offenders than non-aboriginal offenders. It is simply a recognition that the sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgment that to achieve real equality, sometimes different people must be treated differently.

[72] While the *purpose* of s. 718.2(*e*) may not be to provide "a remission of a warranted period of incarceration", critics argue that the *methodology* set out in *Gladue* will inevitably have this effect. As Professors Stenning and Roberts state: ". . . the practical effect of this alternate methodology is predictable: the sentencing of an Aboriginal offender is less likely to result in a term of custody and, if custody is imposed, it is likely to be shorter in some cases than it would have been had the offender been non-Aboriginal" (p. 162). These criticisms are unwarranted. The methodology set out by this Court in *Gladue* is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. *Gladue* directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) 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. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

[73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in *Wells* where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were

not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097 (CanLII), 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se*. As Cory and Iacobucci JJ. state in *Gladue*, at para. 69:

> In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

[74] 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. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: "What is important to recognize is 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." As the RCAP indicates, at p. 309, the "crushing failure" of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to "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". 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.

[75] Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[76] A third criticism, intimately related to the last, is that the Court's direction to utilize a method of analysis when sentencing Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are otherwise similarly situated. This, in turn, violates the principle of sentence parity. This criticism is premised on the argument that the circumstances of Aboriginal offenders are not, in fact, unique. As Professors Stenning and Roberts put it, at p. 158:

> If the kinds of factors that place many Aboriginal people at a disadvantage *vis-à-vis* the criminal justice system also affect many members of other minority or similarly marginalized non-Aboriginal offender groups, how can it be fair to give such factors more particular attention in sentencing Aboriginal offenders than in sentencing offenders from those other groups who share a similar disadvantage?

[77] This critique ignores the distinct history of Aboriginal peoples in Canada. The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP, at p. 309). As Professor Carter puts it, "poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares

to Aboriginal people's" (M. Carter, "Of Fairness and Faulkner" (2002), 65 *Sask. L. Rev.* 63, at p. 71). Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. Quite the opposite. Cory and Iacobucci JJ. specifically state, at para. 69, in *Gladue*, that "background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender".

[78] The interaction between ss. 718.2(*e*) and 718.2(*b*) — the parity principle — merits specific attention. Section 718.2(*b*) states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". Similarity, however, is sometimes an elusory concept. As Professor Brodeur describes ("On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts" (2002), 65 *Sask. L. Rev.* 45, at p. 49):

> ". . . high unemployment" has a different meaning in the context of an Aboriginal reservation where there are simply no job opportunities and in an urban context where the White majority exclude Blacks from segments of the labour-market; "substance abuse" is not the same when it refers to young men smoking crack cocaine and to kids committing suicide by sniffing gasoline; "loneliness" is not experienced in a similar way in bush reservations and urban ghettoes.

[79] In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2(*b*) simply requires that any disparity between sanctions for different offenders be justified. To the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(*e*). As Professor Quigley cautions, at p. 286:

> Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy.
>
> It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a

> society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the Charter. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity.

(2) Evaluating Aboriginal Sentencing Post-*Gladue*

[80] An examination of the post-*Gladue* jurisprudence applying s. 718.2(*e*) reveals several issues with the implementation of the provision. These errors have significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*.

[81] First, some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge. The decision of the Alberta Court of Appeal in *R. v. Poucette*, 1999 ABCA 305 (CanLII), 250 A.R. 55, provides one example. In that case, the court concluded, at para. 14:

> It is not clear how Poucette, a 19 year old, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. While it may be argued that all aboriginal persons have been affected by systemic and background factors, *Gladue* requires that their influences be traced to the particular offender. Failure to link the two is an error in principle.
>
> (See also *R. v. Gladue*, 1999 ABCA 279 (CanLII), 46 M.V.R. (3d) 183; *R. v. Andres*, 2002 SKCA 98(CanLII), 223 Sask. R. 121.)

[82] This judgment displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*. As the Ontario Court of Appeal states in *R. v. Collins*, 2011 ONCA 182 (CanLII), 277 O.A.C. 88, at paras. 32-33:

> There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence. . . .
>
> As expressed in *Gladue*, *Wells* and *Kakekagamick*, s. 718.2(e) requires the sentencing judge to "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": *Gladue* at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge.
>
> (See also *R. v. Jack*, 2008 BCCA 437 (CanLII), 261 B.C.A.C. 245.)

[83] As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:

> Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

Furthermore, the operation of s. 718.2(*e*) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless 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.

[84] The second and perhaps most significant issue in the post-*Gladue* jurisprudence is the irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences. As

Professor Roach has indicated, “appellate courts have attended disproportionately to just a few paragraphs in these two Supreme Court judgments — paragraphs that discuss the relevance of *Gladue* in serious cases and compare the sentencing of Aboriginal and non-Aboriginal offenders” (K. Roach, “One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal” (2009), 54 *Crim. L.Q.* 470, at p. 472). The passage in *Gladue* that has received this unwarranted emphasis is the observation that “[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-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing” (para. 79; see also *Wells*, at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 2002 CanLII 41803 (ON CA), 164 C.C.C. (3d) 569 (Ont. C.A.)).

[85] Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear that sentencing judges have a *duty* to apply s. 718.2(*e*): “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” (*Gladue*, at para. 82). Similarly, in *Wells*, Iacobucci J. reiterated, at para. 50, that

> [t]he 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.

This element of duty has not completely escaped the attention of Canadian appellate courts (see, e.g., *R. v. Kakekagamick* (2006), 2006 CanLII 28549 (ON CA), 214 O.A.C. 127; *R. v. Jensen* (2005), 2005 CanLII 7649 (ON CA), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159 (CanLII), 261 A.R. 192).

[86] In addition to being contrary to this Court’s direction in *Gladue*, a sentencing judge’s failure to apply s. 718.2(*e*) in the context of serious offences raises several questions. First, what offences are to be considered “serious” for this purpose? As Ms. Pelletier points out: “Statutorily speaking, there is no such thing as a ‘serious’

offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 *Osgoode Hall L.J.* 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(*e*) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

[87] The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the*Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention."

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Name	Author	Link
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RCIADIC, *Report of the Inquiry into the Death of Mark Anthony Quayle* (1991)	Commissioner J. H. Wootten QC	http://www.austlii.edu.au/au/other/IndigLRes/rciadic/individual/quayle/
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Counting the cost: estimating the number of deaths among recently released prisoners in Australia (2011) Med J Aust 195 (2)	Stuart A Kinner, David B Preen, Azar Kariminia, Tony Butler, Jessica Y Andrews, Mark Stoové and Matthew Law	https://www.mja.com.au/journal/2011/195/2/counting-cost-estimating-number-deaths-among-recently-released-prisoners
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Aboriginal and Torres Strait Islander Health Performance Framework 2008 Report	The Department of Health and Ageing (Cth)	http://webarchive.nla.gov.au/gov/20120316220511/http://www.health.gov.au/internet/main/publishing.nsf/Content/health-oatsih-pubs-framereport
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Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse: Ampe Akelyrnemane Meke Mekarle	Northern Territory Board of Inquiry into the Protection of Aboriginal	http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf

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PROGRAMS

Program	About	Address	Contact details
Wirringa Baiya Aboriginal Women's Legal Centre	Wirringa Baiya is a state-wide community legal centre for Aboriginal women, children and youth. Wirringa Baiya focuses on issues relating to violence. The service is available to both Aboriginal and Torres Strait Islander women, children and young people.	Addison Road Community Centre Building 13, 142 Addison Road	1800 686 587 or (02) 9569 3847 wirringa_baiya@clc.net.au http://www.wirringabaiya.org.au/
New Horizons	New Horizons provides services that support people from all backgrounds to enhance their wellbeing. They also provide specialist aged care, disability, homeless, humanitarian, Indigenous, justice, mental health and youth support services.	15 Twin Road North Ryde NSW 2113	(02) 9490 0000 mywellbeing@newhorizons.net.au http://newhorizons.org.au
Tribal Warrior Association	The Association provides quality training for employment skills, and extends everyday practical assistance by distributing food and groceries to struggling families. The Association has a long and proud history of working with disadvantaged indigenous and non-indigenous youth, providing mentoring and training leading to self-esteem, empowerment and employment.	Gadigal House 160-180 George Street Redfern NSW 2016 Australia PO Box 3200 Redfern NSW 2016 Australia	(02) 9699 3491 http://tribalwarrior.org/

	The training and mentoring programs on offer include: Clean Slate Without Prejudice, Maritime Training, Tribal Warrior Mentoring Program and Tribal Warrior Cultural Activities.		
Marrin Weejali Aboriginal Corporation	Since 1996, Marrin Weejali has been providing alcohol and other drug services to Aboriginal and Torres Strait Islander people and to non-Indigenous clients living in the Sydney metropolitan area, and to people visiting from the country. The vast majority of their clients, though, live in Western and South-Western Sydney. Their model of service is based upon a spiritual and cultural healing approach. Their services are free of charge. The Corporation also has formal partnerships and informal collaborations with a wide range of service providers who deliver services from their centre.	79 - 81 Jersey Road, Blackett, New South Wales, Australia, 2770 PO Box 147 Emerton New South Wales Australia 2770	(02) 9628 3031 http://www.marrinweejali.org.au/
Women in Prison Advocacy Network (WIPAN)	WIPAN is a grassroots community organisation committed to advancing the prospects and wellbeing of women and female youth affected by the criminal justice system. WIPAN addresses the issues facing criminalised women through advocacy to make criminal justice systems fairer and on an individual level by mentoring.	Suite 4, Level 6, 377-383 Sussex Street, Sydney NSW 2000 PO BOX 345, Broadway, NSW, 2007	(02) 8011 0699 info@wipan.net.au mentoring@wipan.net.au https://www.wipan.net.au/

Miranda Project	The Miranda Project is an innovative, gender specific approach to crime prevention targeting women with complex needs who are at risk of offending and re-offending. It aims to do this through the establishment of a holistic inclusive support service. The service will assist women to desist from offending, function as a diversionary program and provide post-release support for those returning to the community. The Miranda Program is • A pre-sentence option for women on bail • A community based sentencing option • A post-release condition of parole • Ongoing support following sentence completion Designed as a diversionary option for police and magistrates, the Miranda Program offers support and guidance across identified areas of risk/need such as alcohol and other drugs misuse, financial support and attitude/emotional self-regulation.	174 Broadway, Chippendale, NSW 2008 PO Box 541, Broadway, NSW 2007	(02) 9288 8700 Miranda.project@crcnsw.org.au www.crcnsw.org.au