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**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA)**

BETWEEN:

JAMIE TANIS GLADUE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

**THE ATTORNEY GENERAL OF CANADA, and
THE ATTORNEY GENERAL OF ALBERTA, and
ABORIGINAL LEGAL SERVICES OF TORONTO**

Interveners

**FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF CANADA**

ATTORNEY GENERAL OF CANADA

Department of Justice
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Per: Kimberly Prost
and Nancy Irving

Tel: (613) 957-4758

Fax: (613) 957-8412

Counsel for the Intervener,

Attorney General of Canada

MORRIS ROSENBERG

Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Per: Robert Frater

Tel: (613) 957-4763

Fax: (613) 957-8412

Solicitor for the Intervener,

Attorney General of Canada

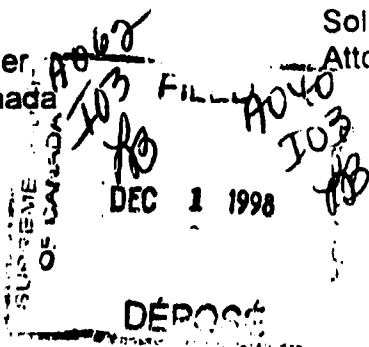


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BETWEEN:

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Respondent

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PART II: POINTS IN ISSUE

3. The Attorney General of Canada intervenes in this appeal to provide assistance to the Court in answering the following question:

What was Parliament's purpose in enacting ss.718.2(d) and (e) of the *Criminal Code*?

PART III: ARGUMENT

4. The Attorney General of Canada intervenes in this appeal to provide the Court with an overview of the legislative history of Bill C-41 as a background against which ss.718.2(d) and (e) of the *Criminal Code* were enacted and to make submissions on general principles applicable to this appeal. The Attorney General of Canada generally endorses the position of the Respondent Crown and specifically adopts the submissions in paragraphs 28 to 30, 54 to 62, and 84 of the Respondent's Factum regarding the statutory interpretation of s.718.2(e) but takes no position on the ultimate disposition of the case at bar.

A. Restraint in the Use of Incarceration:

a) Introduction

5. This appeal provides the Court with its first opportunity to consider the comprehensive sentencing amendments to Part XXIII of the *Criminal Code* introduced by Bill C-41 (and enacted by Statutes of Canada 1995, Chapter 22). In particular, the issues raised by this appeal directly engage the principle of restraint embodied in the Statement of Purpose and Principles of Sentencing now found in Part XXIII.
6. The amendments introduced by Bill C-41 enacted Canada's first-ever Parliamentary Statement of Purpose and Principles of Sentencing. This Statement, like much of the Bill, represented the culmination of years of sentencing reform efforts by bodies such as the Law Reform Commission of Canada (1974 and 1976), the Canadian Sentencing Commission (1987) and the House of Commons Standing Committee on Justice and Solicitor General (1988). The work of these commissions and several years of policy

development by the Department of Justice resulted in a Green Paper entitled *Directions for Reform in Sentencing* which was published in 1990.

b) The Principle of Restraint:

7. At Third Reading of Bill C-41 then Minister of Justice Allan Rock described the Statement of Purpose and Principles now found in Part XXIII as follows:

"Among the fundamental purposes of this bill is to codify and legislate for the first time in the Canadian law a statement of the purposes and principles of sentencing.

Until now, as hon. members know, the sentencing process has been guided and determined by principles developed only by the courts. While the common law system has produced cogent statements of those principles by judges across the country, the commissions, the committees and the authorities to which I referred at the outset have all recommended for years that those purposes be legislated by Parliament for the purpose of uniformity.

In this bill Parliament is given the opportunity to declare the key purposes of sentencing, to put before judges a list of factors to be taken into account, to provide direction to encourage uniformity so that the purpose of the process can be properly understood and so that it might be rendered more predictable than it is at present time."

Hansard, House of Commons Debates, Issue No. 219, June 15, 1995, p. 13922

8. The Statement of Purpose and Principles was designed to be a balanced declaration of principles that reflects traditional sentencing objectives of denunciation, deterrence and rehabilitation as well as more restorative objectives set out in s. 718(e) "to provide reparations for harm done to victims or to the community", and s.718(f) "to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community."

9. The Attorney General of Canada submits that it is not possible to construe the proper meaning of the clause relating to Aboriginal offenders in s.718.2(e) without considering the broader principle of restraint that applies to all offenders and its relationship to the fundamental purpose and other principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code*.

10. The principle of restraint in the use of incarceration finds expression not just in ss. 718.2(d) and (e), but also in s. 718(c) which describes one of the objectives of sentencing as being "to separate offenders from society, where necessary" (emphasis added) and in the new or enhanced diversion and sentencing options now found in Part XXIII of the *Code*, in particular s. 717 (alternative measures), s. 738 (restitution) and s.742.1 (conditional sentence of imprisonment).

11. The principle of restraint in the use of the criminal law in general and of imprisonment in particular, was a unifying theme in the commission reports and committee studies which preceded Bill C-41. *The Criminal Law in Canadian Society*, a White Paper published under the authority of the Minister of Justice in 1982, included in its Statement of Purpose and Principles of the Criminal Law that "...in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances".

20 *The Criminal Law in Canadian Society*, Ottawa: Minister of Supply and Services Canada, 1982, p. 6

12. The 1984 White Paper on *Sentencing*, also issued by the Government of Canada, contained the following discussion:

30 "Another significant principle in imposing sentence is related to the preceding discussion of the appropriate use of imprisonment as a sanction. As discussed in *The Criminal Law In Canadian Society*, this involves the minimum necessary intervention adequate in the particular circumstances (also called the principle of parsimony or economy in punishment). There are two implications to this concept: first, in all but the most serious or obvious cases, a judge should consider non-carceral

or community-based sanctions before imposing imprisonment; second, the court should consider a sentence as part of a hierarchy of sentencing options, from the least serious to the most serious. The more serious alternatives would be imposed only on grounds of necessity. It should be stressed that the choice of non-carceral sanctions in preference to prison terms for many offenders does not imply that a court is dealing leniently with an offender. A number of non-carceral alternatives can be very onerous indeed, as will be explained in the section of the paper describing the range of sanctions."

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Sentencing, Ottawa: Government of Canada, 1984, p. 38

13. The Canadian Sentencing Commission established by the federal government in 1984 (also known as the Archambault Commission) said the following in its 1987 Report:

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"Humanitarian concerns dictate that punishment should be inflicted with restraint. If one adds to this consideration the fact that the imposition of the harshest form of sanction appears to contribute only modestly to the maintenance of a harmonious society, a commitment to restraint is the inevitable result."

Sentencing Reform: A Canadian Approach, Ottawa: Minister of Supply and Services Canada, 1987, p. 165

14. In 1988, following a year-long review of sentencing, conditional release and related aspects of corrections, the Parliamentary Standing Committee on Justice and Solicitor General issued a report entitled *Taking Responsibility* in which it stated:

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"The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society."

Taking Responsibility, Ottawa: Canadian Government Publishing Center, Supply and Services Canada, 1988, p. 75

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15. It is respectfully submitted that at the time Bill C-41 was in the legislative process Parliament was aware of Canada's high rate of incarceration in comparative terms. The Standing Committee report mentioned that:

"Canada relies more heavily on imprisonment as punishment for crime than do many other Western nations. Among 16 European countries and the United States, only Poland and the U.S. have higher rates of incarceration than Canada. From 1982 to 1986, Canada's rate of criminal charges has declined, while its incarceration rate has increased. (Penitentiary populations increased by 43 per cent between 1972 and 1983 and by 20 per cent between 1982/83 and 1986/87). Despite this reality, the Committee senses that the Canadian public seems to think that fewer offenders are being incarcerated for shorter periods of time and that early release is easier to get. Generally speaking, the Canadian public is not as well-informed about sentencing practices as it should be and therefore sees a leniency in the system that is not borne out by reality."

Taking Responsibility, supra, at p. 49

16. According to Council of Europe statistics published on September 1, 1993, for 1992-1993, Canada incarcerated 130 inmates per 100,000 people compared to a range in most western European countries from 51 (Holland) to 92 (United Kingdom). Our incarceration rate was exceeded only by South Africa (368), the U.S.A. (529) and Russia (558). This situation was mentioned by Members of Parliament who participated in the debate on Bill C-41 in the House of Commons in 1994 including Minister of Justice Allan Rock who said the following in his speech at Second Reading:

"It is worthwhile to remind the House that Canada's incarceration rate is extremely high compared with other industrialized countries."

Hansard, House of Commons Debates, Issue No. 93, September 20, 1994, p. 5872

17. The Minister of Justice emphasized the principle of restraint in that speech, when he said:

"A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration."

He concluded his remarks by saying:

10 "It is not simply by being more harsh that we will achieve more effective criminal justice. We must use our scarce resources wisely. It seems to me that Bill C-41 strikes that balance and I commend it to this Chamber for its consideration."

Hansard, supra, at p. 5873

18. That restraint in the use of imprisonment is a principal thrust of the sentencing amendments introduced by Bill C-41 has been recognized in numerous provincial appellate decisions cited in the *Facta* of the Appellant and Respondent. A summary of this jurisprudence is found in the Appellant's *Factum* at pages 24-27.
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19. At the same time, it is important to note that ss.718.2(d) and (e) contain instructive language regarding the application of the principle of restraint to a particular set of circumstances. The key words "appropriate in the circumstances" in s.718.2(d) and "reasonable in the circumstances" in s.718.2(e) signal Parliament's intention that the fundamental purpose and principle of sentencing are central to the sentencing process. In particular, the "fundamental principle" of proportionality found in s.718.1, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, remains the touchstone in determining a fit sentence in each and every case.
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B. Section 718.2(e) "...with particular attention to the circumstances of aboriginal offenders"

a) Introduction:

20. The Attorney General of Canada respectfully submits that by enactment of the above provision, Parliament expressed an intention to signal its concern over high Aboriginal incarceration rates and the socio-economic factors contributing thereto, to require sentencing judges to be sensitive to these matters and to consider the appropriate use of alternative sentencing processes including restorative, culturally sensitive approaches such as sentencing circles, healing circles and victim-offender mediation. It is respectfully submitted that this intention is apparent by virtue of Parliament's codification of the restorative justice notions found in ss. 718(e) and (f), which provide for reparation and responsibility on the part of the offender as part of the objectives of sentencing, and in accordance with the principle of restraint embodied in ss. 718(c), 718.2(d) and (e).

b) Parliamentary and Government Initiatives prior to Bill C-41:

21. The disproportionate involvement of Aboriginal people in the criminal justice system has been a long-standing concern of the Government and Parliament of Canada. The Attorney General of Canada respectfully submits that the legislative instruction to give particular consideration to the circumstances of Aboriginal offenders in s.718.2(e) must be considered in light of this concern.

22. In its 1988 report, *Taking Responsibility*, the Standing Committee on Justice and Solicitor General described the situation as follows:

"Natives represent a disproportionate percentage of offenders in federal institutions compared with their proportion of the general population. Native people make up approximately two per cent of the Canadian population. At the present time, Native offenders make up 9.6 per cent of the inmate population. Native offenders make up an even greater proportion of the inmate population in Canada's west and north. Specifically, 31 per cent of those incarcerated in institutions located in the prairies are of Native origin. Since the early 1980s, the rate of growth in the Native proportion of inmates in federal institutions has exceeded the rate of growth of the inmate population as a whole.

The serious disruption of the Native culture and economy that has taken place in this century has had a devastating effect on the personal and family life of Native inmates. They are often unemployed, and have low levels of education and vocational skills. Many of them come from broken families and have serious substance abuse problems. Some Native inmates, especially Native women, are incarcerated at great distances from their home cities or towns, or their reserves."

Taking Responsibility, supra, at p. 211

23. The Committee agreed with submissions that more Native-centered alternative sentence programs be developed, and concluded that:

"Too many Native offenders are being incarcerated. Incarceration has a destructive impact on these offenders and their relationship with the community.

The Committee recommends that governments develop a greater number of programs offering alternatives to imprisonment to Native offenders - these programs should be run where possible for Native people by Native people."

Taking Responsibility, supra, at p. 212

24. The Government of Canada's 1990 Green Paper *Directions for Reform in Sentencing* was a response to the House of Commons Standing Committee's 1988 report *Taking Responsibility* and the 1987 Report of the Canadian Sentencing Commission. It acknowledged the concern over Aboriginal people in the justice system as follows:

"It is almost trite to suggest that aboriginal issues have been pivotal in discussions of the criminal justice system recently. The Report of the Royal Commission into the Prosecution of Donald Marshall Jr. in Nova Scotia, the Inquiry into Policing on the Blood Reserve in Alberta, and Manitoba's Inquiry into the Administration of Justice and Aboriginal People serve to focus concern."

Directions for Reform in Sentencing, Ottawa: Minister of Supply and Services Canada, 1990, at p. 2

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25. At the same time, then Minister of Justice Kim Campbell asked the Law Reform Commission of Canada to study, as a matter of special priority, the issue of Aboriginal people and the criminal justice system. The following year, by Order-in-Council dated August 21, 1991, the Royal Commission on Aboriginal Peoples was established.
26. In the fall of 1991, a national conference was held in Whitehorse, Yukon, co-sponsored by the governments of the Yukon Territory and Canada, to discuss partnerships and practical measures to address the special circumstances and needs of Aboriginal people and the criminal justice system. Participants included politicians, senior government officials, criminal justice practitioners and many Aboriginal persons. The Department of Justice issued a discussion paper entitled *Aboriginal People and Justice Administration* immediately prior to the Conference, which was prefaced with the following statement by Minister Campbell confirming the priority of the issue:
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30 "It has become undeniable that our system of justice is not working for aboriginal people. Aboriginal justice reform is therefore one of my highest priorities. Our system of justice must be made more inclusive - more responsive to aboriginal values and aspirations, fairer in its treatment of aboriginal people and effective in meeting the needs of aboriginal communities."

Aboriginal People and Justice Administration, Ottawa: Department of Justice Canada, 1991, at p.i

27. The introduction to this discussion paper further stated:

"Recent events, the various provincial inquiries and reports on aboriginal justice issues and a growing body of statistical information reveal disproportionately high rates of crime and victimization in aboriginal communities and over-representation of aboriginal people as accused in courts and as inmates in federal and provincial correctional institutions. Aboriginal people increasingly express a deep alienation from a system of justice that appears to them foreign and inaccessible. Coordinated action is required immediately to deal with the spiralling human and economic costs to aboriginal communities of these problems."

Aboriginal People and Justice Administration, *supra*, at pp.1-2

28. Noting estimated Aboriginal incarceration rates in the western provinces (which by that time had risen to figures ranging from 19% in British Columbia to 66% in Saskatchewan, where Aboriginal people comprise approximately 10% of the population), the relationship between the socio-economic conditions and involvement with the criminal justice system was underscored in the discussion paper:

"While there may be persistent debates among social scientists about the precise link between social and economic conditions and crime, few would dispute that the poor social and economic conditions suffered by many aboriginal peoples go a long way to explaining the high rates of crime, and specific problems of substance abuse and family violence.

Those aboriginal offenders incarcerated in federal penitentiaries are often marginalized and disadvantaged, often unemployed, with poor records of employment and education and with histories of alcohol abuse. Many had previous negative experiences with the systems of child welfare, youth justice and criminal justice.

Any approach to aboriginal justice will therefore have to cut across the jurisdictional barriers that divide government departments and levels of government and will have to address the complex interplay between crime prevention and social, cultural and economic development."

Aboriginal People and Justice Administration, *supra*, at pp. 7-8

29. The report of the Law Reform Commission of Canada that was issued in December 1991 recommended that:

"13.(1) Alternatives to imprisonment should be used whenever possible. The *Criminal Code* provisions creating such alternatives should ensure that those alternatives are given first consideration at sentencing. A judge imprisoning an Aboriginal person for an offence amenable to the use of alternative dispositions should be required to set forth the reasons for using imprisonment rather than a non-custodial option."

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Law Reform Commission Report #34, *Aboriginal Peoples and Criminal Justice*, 1991, at p. 68

30. The Law Reform Commission supported its recommendation for special alternative programs for Aboriginal offenders on the basis that they would:

- a) effect a reduction in the Aboriginal prison population;
- b) be amenable to incorporation of customary law making the alternatives more acceptable to the affected population; and
- c) promote community control and restorative justice approaches consistent with Aboriginal values.

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Law Reform Commission Report #34, supra, at p. 68

31. There have also been various provincial commissions and inquiries which have inquired into the status of Aboriginal people in the criminal justice system. The findings of these commissions and inquiries are canvassed in both the Appellant's and Respondent's Facts.

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32. The initiatives described above preceded Bill C-90, which was tabled in the House of Commons on June 23, 1992. This Bill contained sentencing reforms similar to those in Bill C-41, including provisions codifying the restraint principle and a specific reference to Aboriginal offenders similar to that in the present s.718.2(e). Bill C-90 also proposed a statutory Statement of Purpose and

Principles of Sentencing and provisions identical to those now found in ss 718(e) and (f). At second reading, Parliamentary Secretary Peter McCreath described these reforms as follows:

"The bill describes, for example, the objective of providing reparations for the harm done to both individuals and to the community. Also included is provision for promoting a sense of responsibility on the part of offenders and an acknowledgement of the harm done to victims and to the community. While having general application and importance to the community at large, these two objectives may be particularly appropriate to aboriginal communities which are interested in bringing the concept of healing to criminal justice.

The statement of purpose and principles of sentencing states that all available alternatives to imprisonment that are reasonable in the circumstances should be considered. This is so generally, but particularly in the case of aboriginal offenders."

Hansard, House of Commons Debates, May 7, 1993, p. 19119

33. Bill C-90 received Second Reading approval in principle before it died on the Order Paper when the 1993 election was called.

c) Bill C-41

34. The statements of the Minister of Justice, other Members of the House of Commons and the Senate, and witnesses who appeared before Committees in both Houses at the time that Bill C-41 proceeded through the legislative process, support the suggestion that Parliament intended to address concerns for Aboriginal people in the sentencing process in a meaningful way. When Bill C-41 received Second Reading in the House of Commons, Minister of Justice Allan Rock stated that "alternatives [to incarceration] must be contemplated, especially in the case of Native offenders."

Hansard, House of Commons Debates, Issue No. 93, September 20, 1994, p. 5871

35. In his subsequent testimony before the House of Commons Standing Committee on Justice and Legal Affairs, Minister Rock explained s.718.2(e) as follows:

"...the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.

What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of the public -- alternatives to jail -- and not simply resort to that easy answer in every case."

Hansard, Standing Committee on Justice and Legal Affairs, Issue No. 62, November 17, 1994, p. 15

- 20 36. Other Members of Parliament voiced support for this amendment in the House of Commons. For example, Morris Bodnar (Saskatoon-Dundurn) stated:

"...The use of alternatives for aboriginal offenders is a very important principle of this bill. In my province of Saskatchewan the aboriginal population is the fastest growing segment of society today. It also represents a disproportionate percentage of offenders incarcerated.

The courts in Saskatchewan have started to experiment with sentencing circles...

The emphasis is not on retribution but rather on returning the community to its sense of harmony as defined by the aboriginal population.

We must resist the urge to incarcerate everyone who commits a crime. It costs more money to keep someone in jail for a year than it does to send a student to school."

Hansard, House of Commons Debates, Issue No. 95, September 22, 1994, p. 6028

37. During its extensive consideration of Bill C-41, the Standing Committee on Justice and Legal Affairs heard repeated references to the fact of overrepresentation of Aboriginal people, and Aboriginal women in particular, in institutions. Among the witnesses were three Native groups: the Federation of Saskatchewan Indian Nations, the Inuit Women's Association and the Assembly of First Nations. The Committee was informed of various Aboriginal justice initiatives that were then available, including use of sentencing circles, local justice committees, adult diversion programs, reparative sanctions, restitution in the forms of hunting for the benefit of the victim or providing food to the victim, and healing circles. Initiatives in the nature of "alternative processes" were also described by Chief Ovide Mercredi, including elder-assisted sentencing, community involvement in monitoring, if not defining, the sanctions of aboriginal offenders.

Hansard, Standing Committee on Justice and Legal Affairs, Issues No. 66:34; 75:10; 79:5 and 6; 80:5; 85:8; 88:4, 8 and 12

38. Chief Blaine Favel, appearing on behalf of the Federation of Saskatchewan Indian Nations, described to the Committee that community justice initiatives were based "more on wellness, trying to bring the community back together in cases of where an individual has violated the community standard of conduct, and trying to make peace between the people". The Federation endorsed s.718.2(e) to the extent that it supported the "direction and the recognition" of aboriginal communities' criminal justice initiatives.

Hansard, Standing Committee on Justice and Legal Affairs, Issue No. 79, February 14, 1995, pp. 5 and 21

39. The nature of Aboriginal justice initiatives was further described by Martha Flaherty, President of Pauktutit (Inuit Women's Association of Canada):

"Community-based justice and correctional services...are seen as one important way for Inuit and other aboriginal communities to regain control over our own affairs in accordance with our self-government aspirations. Community-based systems are also set [sic] to offer Inuit and other aboriginal communities the chance to deal with accused and offenders in ways that are more consistent with our own traditional cultural values.

10 The expectation is that this will lead to less emphasis being placed on retribution or mere punishment and more on restorative justice that is directed at restoring harmony between the offender, the victim and his or her community. The underlying intent is to empower a community to deal with its own problem in a way that meets broader social goals, not just narrow legal ones."

Hansard, Standing Committee on Justice and Legal Affairs, Issue No. 85, February 28, 1995, p. 8

40. National Chief of the Assembly of First Nations, Ovide Mercredi, supported the
20 wording of s.718.2(e) because it was not drafted so narrowly as to apply only to cultural considerations, but to allow judges to take into account the social and economic conditions of aboriginal offenders.

Hansard, Standing Committee on Justice and Legal Affairs, Issue No. 88, March 2, 1995, p. 8

41. When Bill C-41 reached Second Reading in the Senate, Senator Duncan Jessiman noted the Bill's attempt to reduce incarceration rates expressed in s.718.2(e) and observed:

30 "The present incarceration rate in Canada is 1.5 per 1,000 adults. About 1 in 6 persons incarcerated are aboriginals. In 1993-94, the average number of inmates in correctional institutions was 32,800, being 13,300 in federal custody and 19,500 in provincial custody. Outside the territories, the proportion of aboriginal inmates was highest in the prairie provinces; 56 per cent in Saskatchewan; 48 per cent in Manitoba; 24 per cent in Alberta. The provision to try and find another way is most welcome."

Hansard, Senate Debates, Issue No. 99, June 21, 1995, p. 1871

42. When the Royal Commission on Aboriginal Peoples reported in 1996, it expressed concern that the disproportionate representation of Aboriginal people in prison was likely to intensify in the years ahead. The latest statistics indicate that this concern was well-founded; by March 31, 1997, the percentage of federally incarcerated Aboriginal offenders had risen to 15%.

Towards a Just, Peaceful and Safe Society, Ottawa: Department of the Solicitor General, 1998, p. 23

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43. The Parliamentary discussion of Bill C-41 evidences the concerns about the overrepresentation of Aboriginal persons within Canada's prison populations and the need to "find another way". The Attorney General of Canada submits that subsection 718.2(e) is designed to address these concerns. It is intended to encourage the consideration and use of alternative, culturally sensitive sanctions where appropriate, allowing for a more effective and inclusive sentencing process, which would contribute to the ultimate goal of a reduction in crime and recidivism.

20 d) Judicial consideration of 718.2(e)

44. In addition to the many provincial appellate decisions referred to in the other *Facta* filed in this appeal, the Attorney General of Canada draws to the Court's attention the very recent decision of the Manitoba Court of Appeal in *R. v. Young* which also involved an Aboriginal woman convicted of manslaughter. The Court of Appeal's judgment includes the following dramatic recognition of the conditions of Aboriginal offenders:

"That aboriginal offenders are likely to be disadvantaged members of the community need not be emphasized in this jurisdiction. Sentencing judges are too often faced with serious crimes committed by aboriginal persons with little formal education or employment skills and with backgrounds of dysfunctional family and community structures, physical

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and/or sexual abuse, and alcoholism. The sentence appeals heard by the Court on the day this accused's appeal was argued illustrate that reality. The other three appeals involved aboriginal offenders convicted of serious offences, including sexual interference, robbery, break and enter, and dangerous use of a firearm. In each case, the hallmarks of aboriginal socio-economic deprivation were factors.

At the same time, I must say that when these or related factors are present, I would expect them to be taken into consideration by the sentencing judge regardless of the racial, ethnic, or cultural background of the accused."

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R. v. Young, [1998] M.J. No. 495 (Q.L.) at para 11 and 12

C. **Conclusion:**

45. The Attorney General of Canada respectfully submits that the reports of the Law Reform Commission of Canada, the Canadian Sentencing Commission, the Standing Committee on Justice and Solicitor General, the provincial inquiries and the background papers prepared by the Department of Justice Canada constitute evidence of external context that "can be helpful in understanding the meaning of legislative language and in inferring legislative purpose." Many of these reports are part of Bill C-41's legislative history and can be looked at to discover the mischief at which the legislation is aimed.

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Sullivan, Ruth, *Driedger on the Construction of Statutes*, 3rd ed., Toronto: Butterworths, 1994, at pp. 429, 431-449

46. In addition, the speeches by Members of Parliament during the debate of Bill C-41 and the testimony of witnesses who appeared before the Standing Committee on Justice and Legal Affairs provide a record of information that was brought to the attention of Parliament during the legislative process. As such, this information forms part of the understanding on which the legislation was both formulated and passed and sheds light on the purpose of ss.718.2(d) and (e).

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R. v. Morgentaler, [1993] 3 S.C.R. 463, at 483-485

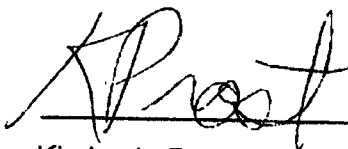
Canada (Attorney General) v. Mossop, [1991] 1 F.C. 18 (C.A.), aff'd
[1993] 1 S.C.R. 554

47. In conclusion, the Attorney General of Canada respectfully submits that the legislative history and other background information to Bill C-41 does not demonstrate an intent on the part of Parliament to establish a separate sentencing regime for Aboriginal offenders as suggested by the Appellant. What this evidence does demonstrate is Parliament's concern with the overrepresentation of Aboriginal people in the criminal justice system, the socio-economic factors contributing to that overrepresentation, and its admonition to courts in sentencing Aboriginal offenders to consider alternative sanctions to imprisonment, where reasonable in the circumstances, and in particular to consider the use of alternative sentencing processes including restorative, culturally sensitive approaches.

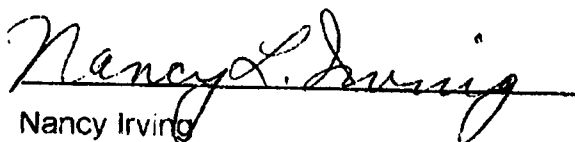
PART IV: ORDER SOUGHT

48. The Attorney General of Canada takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
dated at Ottawa this 1st day of December, 1998.



Kimberly Prost



Nancy Irving

Counsel for the Intervener,
the Attorney General of Canada

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