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IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal
for the Province of British Columbia)

BETWEEN:

JAMIE TANIS GLADUE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

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PART 1**STATEMENT OF FACTS**

1. The Respondent accepts as substantially correct the Statement of Facts set out in Part 1 of the Appellant's Factum but submits that the following additional facts are relevant to the Court's assessment of the issues raised by this appeal.

Circumstances of Offender:

2. The Appellant was granted day parole on August 13, 1997 after having served six months in the Burnaby Correctional Centre for Women. She was directed to reside with her father, to take alcohol and substance abuse counselling and to comply with the requirements of the Electronic Monitoring Program. On February 25, 1998, the Appellant was granted full parole with conditions essentially the same as the ones applicable to her original release on day parole. (Appendix A)

Circumstances of Offence:

3. At the party at Ms. Atleo's apartment, the Appellant expressed anger towards the deceased for his infidelities, stating "I swear, the next time he fools around on me, I'll kill him." After Tara and the deceased had left the party, the Appellant went out to find him and became very upset when her efforts were unsuccessful. She eventually found him at Tara's apartment but he ran out through the back door of the residence. (A.R., pp.6-8)

4. Back at their apartment, the Appellant and the deceased engaged in a fight. Their next door neighbour Anthony Gretchen heard banging noises and yelling and swearing from a female voice. Mr. Gretchen decided to go next door to ask his neighbours to calm down. Before exiting his apartment, he heard the front door of the Appellant's residence slam. When he opened his door, he observed a man at Tara Chalifoux's residence banging on the front door with both hands and asking to be let in. At the same time, he saw the Appellant running out of her residence with

a knife in her right hand down at her waist. (A.R., p.9, p.39, ll.11-12)

5. In response to Mr. Gretchen's admonition to the Appellant of "hey, you guys better cool it down", the Appellant told him to "fuck off". In a "fast trot" she proceeded towards the deceased with the knife in her hand stating "You better fucking run. You better fucking run". She pursued the deceased along a walkway a distance of some 60 feet. When the Appellant reached the deceased who was still banging on Tara Chalifoux's front door, Mr. Gretchen heard a male voice shriek in pain. (A.R. p.9, p.78, p.85, ll.7-21)

6. The autopsy established that the deceased died as a result of a stab wound to the left chest which penetrated through the main artery to the lungs and into the left upper chamber of the heart, causing a massive haemorrhage into the heart sac and left chest cavity. The deceased also sustained a minor stab wound on his right upper arm. The police investigation revealed that drops of blood originating from the deceased were found in the living room, kitchen and hallway leading towards the front door of the deceased's and Appellant's apartment. A small paring knife was found on the living room floor with a small amount of the deceased's blood on it. (A.R., pp.11-12)

Sentencing Proceedings:

7. There was no material put before the sentencing judge apart from the submissions of counsel and a victim impact letter written by the deceased's mother. This letter was filed as an exhibit but has not been located in any of the Court files. It was described by Crown counsel as "a very Christian statement" reflecting Mary Yellow Knee's grief and her manner of dealing with the loss of her son. (A.R., p.59, ll.2-24)

8. The matter of the Appellant's aboriginal status arose at the initiative of the sentencing judge who inquired as to whether McLennan, Alberta where the Appellant had lived until the age of eighteen was a native community. Defence counsel replied that McLennan was "just a regular

community", that the Appellant was Aboriginal and that her parents were Cree. The sentencing judge was also informed that while on bail awaiting trial, the Appellant had undertaken drug and alcohol counselling at the Tillicum Haus Native Friendship Centre in Nanaimo. (A.R. p.42, 1.36 to p.43, 1.7 p.44, 11.34-39)

9. Defence counsel made no further reference to the Appellant's aboriginal background in the course of his submissions. Characterizing the stabbing as "a momentary act of stupidity", he submitted that her youth, her "unfortunate background", the alcohol and provocation involved in the offence, her remorse and the absence of a record were "exceptional circumstances" which justified the imposition of either a suspended sentence or a conditional sentence. (A.R. p.36, 11.41-2; p.52, 11.11-23)

20 **Reasons for Sentence:**

10. The learned sentencing judge found that the facts did not warrant drawing the inference that the Appellant was a battered or fearful wife. While specific deterrence was not in issue, the sentence had to denounce this form of unlawful conduct and "deter others from taking into their hands weapons and treating other people in the way that the deceased was treated here". In addition, the sentence had to take into account "the need to rehabilitate the accused and give her insight into her conduct and her propensity to drink." (A.R., p.80, 11.21-23; p.86, 11.4-21)

11. The sentencing judge concluded that neither a suspended sentence nor a conditional sentence would be appropriate dispositions in this case. With reference to the provisions of s. 718.2(e) of the *Code*, he noted that the accused and the deceased were aboriginals living off the reserve and then stated that in the absence of any apparent "special circumstances" related to aboriginal status here he was not giving "special consideration to their background in passing this sentence." (A.R. p.87)

12. Focussing on the severity of the offence, the sentencing judge continued:

This is a very serious offence. The accused has taken the life of another person. She was provoked by his conduct and his statements, but she lost her self control and stabbed [the deceased] in two different locations. She found a larger knife and pursued the deceased with it after he had left the apartment and then she killed him with it. For that conduct, despite the mitigating factors and the provocation, I conclude the appropriate sentence is three years. (A.R. p.87, 11,7-17)

Reasons of the Court of Appeal:

a) Rowles, J.A. (dissenting):

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13 As the wording of s. 718.2(e) did not suggest that its application was limited to aboriginal people living on reserves, the sentencing judge erred in concluding that it was unnecessary to consider the Appellant's background because she was not living "within the aboriginal community as such". While courts have accepted the principle of the availability of alternative sentences for aboriginal offenders where the offender resides in an isolated aboriginal community and where that community is able to take responsibility for administering its own sanctions, there are frequently resources in urban settings which are tailored to the needs of aboriginal offenders. Tillicum Haus Friendship Centre where the Appellant attended to upgrade her education and to take alcohol abuse counselling was a resource available to assist in her rehabilitation. (A.R. pp.123-125)

14. Though general deterrence and denunciation were important factors in this case, another relevant consideration was what adverse effects a denunciatory punishment would have on the rehabilitation of the offender. Rowles, J.A. concluded that the sentence of three years should be reduced to two years less a day plus probation in order to advance the Appellant's rehabilitation. (A.R. p.128)

b) Esson, J.A. (Prowse, J.A. concurring):

15. The majority declined to embark on a wide-ranging discussion of the reports and other materials referred to by Rowles, J.A. and what bearing they might have on the legislative purpose in s. 718.2(e) because the issues in this case could be resolved without reference to them and the submissions of counsel in this regard had been very limited. (A.R. p.131)

16. While agreeing that the wording in s. 718.2(e) did not limit the application of the clause to aboriginal offenders living in an aboriginal community, the majority found that the sentencing judge had not erred in concluding that in the circumstances of this case there was no basis for giving special consideration to the Appellant's aboriginal background in determining the appropriate sentence. (A.R. p. 132)

17. Distinguishing the circumstances of this offence from those in the careless but accidental shooting in *R. v. Pettigrew*, (1990), 56 C.C.C.(3d) 390 (B.C.C.A.), Esson, J.A. noted the elements of deliberation, persistence and viciousness that were present in the attack. He characterized it as "a near murder saved by the element of provocation from being murder". As the sentencing judge had properly incorporated the factors of general deterrence, denunciation and rehabilitation in arriving at a sentence within the range for like offences and like accused, no ground had been demonstrated which would justify interfering with the sentence imposed. (A.R.p.133)

PART II
ISSUES ON APPEAL

The Respondent respectfully submits that the following issues are raised by this appeal:

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18. What is the legislative purpose embodied in the words "with particular attention to the circumstances of aboriginal offenders" as found in s. 718.2(e) of the *Criminal Code*?

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19. Did the majority of the British Columbia Court of Appeal err in law in its interpretation of s. 718.2(e) of the *Criminal Code* by concluding that in the circumstances of this case the sentencing judge did not err in imposing a sentence of three years imprisonment on this aboriginal offender?

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PART III
ARGUMENT

A. Introduction and Overview of Respondent's Position:

20 It is respectfully submitted that, in effect, the Appellant is asking this Court to find that
40 in enacting the phrase "with particular attention to the circumstances of aboriginal offenders" in
s. 718.2(e) of the *Criminal Code* Parliament intended to establish a separate sentencing regime
for aboriginal offenders in which they must be accorded differential treatment in the sentencing
process by virtue of their racial background.

20 21. The implications of the Appellant's argument seem to go much further: while s. 718.2(e)
directs differential treatment of aboriginal offenders, in enacting ss. 718.2(d) and (e) Parliament
expressed an intention to fundamentally alter the approach to the sentencing of **all** offenders as
it existed prior to September 3, 1996. In giving effect to the principle of restraint in ss.(d) and
(e), a sentencing judge may no longer be justified in imposing the sanction of imprisonment even
in the case of serious offences such as manslaughter where the primary sentencing goals are
deterrence and denunciation. A corollary proposition is that cases decided prior to the
30 amendments in Part 23 cannot be relied on in determining the appropriate range of sentence as
they do not incorporate the principle of restraint set out in ss. 718.2(d) and (e). (see Appellant's
Factum, paras. 66, 75, 80, 87)

40 22. As a starting point, it is respectfully submitted that the enactment of Bill C-41 into law
as the new Part 23 of the *Criminal Code* does not call into question the validity of the principles
of sentencing as articulated by this Court in the cases of *R. v. Lyons*, [1987] 2 S.C.R. 309, *R. v.*
Shropshire, [1995] 4 S.C.R. 227, *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, and *R. v. McDonnell*,
[1997] 1 S.C.R. 948.

23. The arguments advanced by the Appellant regarding the interpretation to be given to the

principle of restraint and its relationship to the sanction of imprisonment where the primary sentencing objectives engaged by the case are general deterrence and denunciation relate to the larger issue of whether the amendments in Part 23 were intended as a departure from established sentencing principles or as a codification and clarification of existing principles with a new emphasis on the use of community-based sanctions.

24. Determining the legislative intention expressed in the words "with particular attention to the circumstances of aboriginal offenders" in s. 718.2(e) necessarily involves a consideration of the context in which this phrase is found within s. 718.2 and within Part 23 as a whole. However, it is respectfully submitted that the broader question of the scope of the principle of restraint as applied to all offenders should not be addressed in this appeal.

25. In the same vein it is respectfully submitted that this Court should decline the Appellant's invitation to use this case as a platform from which to develop a new sentencing policy for all offenders by "filling in the legislative gap" and articulating specific guidelines to govern the exercise of sentencing judge's discretion as to whether a sentence should be served in the community or in jail. (A.F., para. 78)

26. These issues were not raised by the Appellant in argument in the courts below nor were they addressed in the Appellant's application for leave to appeal to this Court. The application was directed to the interpretation to be given to s. 718.2(e) as it pertains to the sentencing of aboriginal offenders and it is this issue which should remain the focus of the present appeal. It is respectfully submitted that expanding the inquiry to the whole of Part 23 and to the principle of restraint as it affects all offenders would detract from the important task at hand of developing a sound principled interpretation to s. 718.2(e) as it impacts on the sentencing of aboriginal offenders. (Application for Leave to Appeal, p. 144)

27. Furthermore, this Honourable Court has granted leave to appeal in the cases of *R. v.*

10 *R.N.S.* [1998] S.C.C.A. No. 60 (26462), *R. v. R.A.R.* [1997] S.C.C.A. No. 643 (26377), *R. v. Bunn* [1997] S.C.C.A. No. 637 (26339), *R. v. L.F.W.* [1997] S.C.C.A. No. 598 (26329) and *R. v. Proulx* [1997] S.C.C.A. No. 633 (26376). It can be reasonably anticipated that the nature of the conditional sentencing regime and its interaction with the general principles of sentencing set out in ss. 718, 718.1 and 718.2 will be fully canvassed in argument before this Court in those cases. Accordingly, it is respectfully submitted that it would be premature to address the interpretation and application of the principle of restraint in ss. 718.2(d) and (e) and its relationship with the principles of deterrence and denunciation in the sentencing of all offenders at this time.

20 28. Returning to the second half of s. 718.2(e), it is submitted that in enacting this clause it was not Parliament's intent to establish a separate sentencing regime for aboriginal offenders nor to legislate that Aboriginal status in itself will invariably constitute a mitigating factor in the imposition of a sentence. Rather, this clause is a legislative acknowledgement that there may be circumstances particular to aboriginal offenders that could have relevance to the determination of a just sanction and that in **all** cases the sentencing judge must be alert to this possibility.

30 29. Without limiting the range of issues that might be encompassed by the phrase, the fact of being Aboriginal may give rise to different considerations in sentencing such as the impact of a jail sentence or the availability of alternative sanctions. This clause enables a sentencing judge to consider community-based sanctions that have existed and are being developed within aboriginal communities which reflect a different concept of justice but which, depending on the circumstances, may harmonize with the principles of sentencing that apply to all offenders.

40 30. In considering what sanction is "reasonable in the circumstances", the distinctiveness of Aboriginal background is such that the fact that an offender is Aboriginal may result in a sentencing judge giving differing weight to applicable sentencing goals and exercising his or her discretion more flexibly where an evidentiary basis is put forward to warrant such an approach.

In light of the reality of the harsh impact that the criminal justice system has had on aboriginal people, as reflected in part in high Aboriginal prison populations, Parliament has provided a mechanism whereby a sentencing judge is obliged to consider less alienating and more effective measures where such sanctions are "reasonable in the circumstances". It is submitted that this legislative direction provides latitude to sentencing judges to bring cultural sensitivity and innovation into the crafting of sentences for aboriginal offenders without in any way compromising the sentencing goals set out in Part 23.

31. The issue raised in the present case can be stated as follows: assuming that a sentence of three years imprisonment is a fit sentence for this offence of "near murder" manslaughter, was the sentencing judge required to sentence this Appellant differently than he did because of the fact that she was Aboriginal? It is submitted that in the particular circumstances of this case, the majority of the British Columbia Court of Appeal correctly concluded that there was no basis for interfering with the sentencing judge's determination that three years imprisonment was a fit sentence to impose on this aboriginal offender.

B. Analysis of Appellant's Argument

(a) Affirmative Action Sentencing Policy:

32. It would appear that at the heart of the Appellant's argument is the proposition that the enactment of s. 718.2(e) requires that the principle of restraint in the use of imprisonment must, as a matter of law, be applied differently to aboriginal offenders than to non-aboriginal offenders. (A.F., para. 70) The alleged error in the Reasons for Judgment of Esson, J.A. was his statement that:

...the particular circumstances could not reasonably support a conclusion that the sentence, if a fit one for a non-aboriginal person, would not also be fit for an aboriginal person. (A.R. p. 132)

33. The Appellant argues that the mischief Parliament intended to remedy in ss. (d) and (e) was the high incarceration rate in Canada and the disproportionate representation of Aboriginals in jail. While Parliament intended to effect a reduction in incarceration rates for all offenders, it

must have intended an even steeper reduction in the number of Aboriginal offenders in jail because of the disproportionate number of Aboriginal offenders incarcerated relative to their representation in the population. So, how is the aboriginal offender to be accorded special consideration in this regime if the principle of restraint in the use of imprisonment is to be applied to all offenders?

34. The Appellant urges this Court to recognize s. 718.2(e) as "an affirmative sentencing policy" which would be consistent with s. 15(2) of the *Charter*. (A.F., paras. 71, 76) But nowhere in her argument does the Appellant specify the nature of this policy. It is submitted that the reason the Appellant does not expand on what form this "special consideration" is to take is that she cannot logically argue that differential treatment applied to the sentencing of all aboriginal offenders on the basis of status alone will ameliorate the conditions of aboriginal people as a group.

35. The Appellant states that the enactment of ss. 718.2(e) was designed to remedy the problem of "formal legal equality", which would seem to suggest that the application of the subsection might on its face appear to contravene the principle of equality before and under the law in s. 15(1) of the *Charter* by legislating different treatment for a certain segment of the population based on racial background. But the Appellant submits that s. 15(2) is the relevant *Charter* provision to consider in determining the legislative intention in s. 718.2(e) with regard to aboriginal offenders. (A.F., paras. 70, 71, 76) It is respectfully submitted that while Parliament has the legislative authority under s.15(2) to enact affirmative action policies into law, the second clause in s. 718.2(e) does not constitute such a legislative initiative.

36. If Parliament had intended to enact a law that had as its object the amelioration of the conditions of aboriginal people and that required differential treatment in order to effect that purpose, one would expect the language used in establishing such a scheme to be explicit. As expressed in *R. v. T.(V.)*, [1992] 1 S.C.R. 749 at 763-4:

While it is open to Parliament...subject to over-arching constitutional norms...to change the law in whatever way it sees fit, the legislation in which it chooses to make these alterations known must be drafted in such a way that its intention is in no way in doubt.

10 37 Obviously, Parliament has at its disposal legislative drafters capable of expressing this legislative intention in clear and unambiguous terms. On its face, s. 718.2(e) does not purport to set up an affirmative action policy. It gives no direction to sentencing judges as to how the principle of restraint is to be applied differently in the case of aboriginal offenders. It simply directs them to pay particular attention to the circumstances of aboriginal offenders when considering what sanction is reasonable in the circumstances.

20 38. This Court has not yet directly addressed the interpretation of s. 15(2) but it appears that while the subsection may not require that the legislation use "proportionate means" to effect its ameliorative purpose, there must be a nexus between the proposed legislative action and the amelioration of conditions of the disadvantaged group. Here, unless systemic discrimination in the sentencing process itself has been identified as the reason for the disproportionately high incarceration rate, how would a legislated policy of greater restraint in the use of imprisonment for all aboriginal offenders relate to the improvement of conditions? It is respectfully submitted that the Appellant has not established that Parliament embarked upon a coherent and structured strategy of affirmative action pursuant to s. 15(2) in which the form of ameliorative action was rationally related to the cause of the disadvantage. (B.Archibald, *Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System*, (1989) 12 Dalhousie L.J. 377 at 407-8; *Lovelace v. Ontario* (1997), 33 O.R.(3d) 735 (O.C.A.) at 753-55)

30

40 39. In its 1996 Report *Bridging the Cultural Divide*, the Royal Commission on Aboriginal Peoples concluded that the over-representation of aboriginal people in the criminal justice system as a whole was a product of the interaction of high levels of crime among aboriginal people in conjunction with systemic discrimination that operated at various stages of the process from overpolicing and overcharging through to inadequate legal representation in court. The over-

10 representation of Aboriginals in the prison population is thus the endpiece of a host of social-
historical, cultural factors which form part of the disadvantaged condition of aboriginal people
as a group. The Royal Commission made no reference to an affirmative programme as
contemplated by s.15(2) of the Charter as a viable or desirable way of addressing the issue of
over-representation. Instead it reached the conclusion that the root cause of the crime rate and
over-representation in the justice system was found in the debilitating experience of colonialism
and must be addressed by healing relationships within aboriginal communities and between
aboriginal communities and the rest of Canada through increased self-determination. (*Bridging
the Cultural Divide*, pp. 33-53; 309-10; B. Archibald, *supra*, p. 382, p. 403)

20 40. Even if an individual considers that his or her condition has been ameliorated by not being
sent to jail, it is submitted that application of such an affirmative action policy could have very
negative effects on aboriginal victims of crime and on aboriginal communities. For example,
if s. 718.2(e) were applied as a direction to give a lesser incarceratory sentence to an aboriginal
offender for an offence involving violence, the message would be that both the victim and the
community, whether aboriginal or not, is less entitled to protection because of the fact that the
offender is aboriginal. And unless there exists a community which demonstrates that it is able
and willing to undertake the supervision of a community based sentence that would adequately
30 address relevant sentencing goals, then the victim and the community of the aboriginal offender
may be penalized by this provision.

40 41. In relation to the sentencing aims of general deterrence and denunciation, the implication
of the policy would be that a serious crime such as manslaughter would be regarded less seriously
by the courts if committed by an aboriginal offender than by a non-aboriginal offender. It is
submitted that this approach would tend to engender resentment and perpetuate the attitudes
identified in *R. v. Williams*, (1998), 124 C.C.C.(3d) 481 (S.C.C.); [1998] S.C.J. 49 rather than
ameliorating underlying conditions or restructuring relationships between Aboriginals and non-
Aboriginals. (*Bridging the Cultural Divide*, pp. 53-4; 309-310)

(b) **Reduced Moral Culpability:**

42. The principle of proportionality in the imposition of sentence is deeply embedded in our criminal law. Its rationale was expressed by Wilson, J. in *Reference re: s. 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 485 at 533:

10 It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserves" the punishment he received and feel a confidence in the fairness and rationality of the system.

This principle has now been codified as the "fundamental principle" of sentencing in s. 718.1 of the *Code* which states that "a sentence must be proportionate to the gravity of the offence and the degree of moral culpability of the offender".

20 43. If ss. (e) required a form of differential treatment for aboriginal offenders unrelated to the particularity of the offence or offender, this would appear to run afoul of the fundamental principle of proportionality. Moreover, it would tend to undermine rather than contribute to "respect for the law and the maintenance of a just, peaceful society". There is nothing in the wording of s. 718.2(e) and the structure of the legislation to suggest that Parliament intended the second clause in s. 718.2(e) to operate independently of the principle of sentencing set out in s. 30 718.1.

44. The Appellant submits that in order to reconcile his interpretation of s. 718.2(e) with the provision in s. 718.1 "a sentencing judge may have to recognize that an Aboriginal's "degree of responsibility" is diminished by the years of government policy that have contributed to the disadvantaged state of the Aboriginal community" (A.F., para. 73) and that "implicit in s. 40 718.2(e) is a recognition that a disadvantaged aboriginal background may lead to criminal behaviour and be partly responsible for it" (A.F., para. 69). Although the Appellant uses the permissive word "may" in introducing this concept of reduced moral culpability, it is submitted that the implication of the argument is that this is the rationale for the differential sentencing of aboriginals: in recognition of the relationship between the aboriginal crime rate and a

constellation of historical, political and socio-economic factors as noted, for example, by the Aboriginal Justice Inquiry of Manitoba (at 110), when sentencing an aboriginal offender his or her moral culpability for the offence in question is presumed to be lessened by these factors. In other words, the fact of being Aboriginal mitigates culpability, regardless of the nature of the particular offence or offender under consideration.

10

15 In formulating a fit sentence, a sentencing judge has always been required to take into account any relevant aggravating or mitigating circumstances relating to the offence or the offender. That obligation has now been codified in s. 718.2(a). There are countless factors that may be present that could call for a reduced sentence. Under the principle in ss. (a) a sentencing judge must consider any circumstance that would affect the gravity of the offence or the level of culpability of the offender.

20

46. The reference to the circumstances of aboriginal offenders is found not in ss. (a) but in the context of a provision that deals with the necessity of considering all available non-jail sanctions that are reasonable in the circumstances. Accordingly, the requirement is primarily related to the question of the selection of an appropriate sanction and how an offender's aboriginal background may have particular significance in that exercise. As the subsections of s. 718.2 are not watertight compartments, the explicit reference to the circumstances of aboriginal offenders in ss. (c) encompasses consideration of all circumstances pertinent to the overall assessment of culpability, gravity of the offence and determination of what would constitute a fit sentence for an individual aboriginal offender.

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47. But it is respectfully submitted that the direction to consider the circumstances of aboriginal offenders cannot be interpreted as signifying a general reduced level of moral culpability for all aboriginal offenders regardless of the specific features of the case under consideration. The Respondent submits that such a proposition would be unsupportable in principle and would have adverse ramifications for the development of the new relationship

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between aboriginal and non-aboriginal people advocated by the Royal Commission. (*Bridging the Cultural Divide*, pp.309-310)

10 48. If the Appellant means to suggest that aboriginal offenders as a group fall into a separate category of offenders with a lesser degree of moral culpability for their criminal acts, this would perpetuate the paternalistic attitudes of the past as reflected in government policies which have been found to have had deleterious effects on generations of aboriginal people. If aboriginal offenders were found to constitute a class of offenders who, invariably, bear less responsibility for their criminal offences than do other adult members of the population, this would erect a sentencing regime that would be contrary to the values of all Canadians, aboriginal and non-aboriginal alike. Surely this was not Parliament's intention in the enactment of s. 718.2(c)

20 (c) **Fettering of Judicial Discretion:**

30 49. The Respondent agrees that ss. 718.2(d) and (e) reflect Parliament's recognition that sentencing judges must address the reality of high incarceration rates for all offenders and the disproportionately high incarceration rate of aboriginal offenders. The point at which the Respondent diverges from the interpretation propounded by the Appellant is the implication that where an aboriginal offender comes before the court for sentencing, the fact of aboriginal background in itself means that he or she is to be sentenced differently than a non-aboriginal offender committing a similar offence in similar circumstances. (A.F., paras. 41, 49, 69) This suggestion strikes at the core of the sentencing judge's discretion to fashion a fit sentence that takes into account the particularity of the offence and the offender and that achieves the appropriate balance among the various sentencing goals engaged by the case.

40 (*R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at 554-555)

50. In the cases of *Lyons, Shropshire, M.(C.A.)*, and *McDonnell*, supra, this Court has unequivocally emphasized the central importance of the sentencing judge's discretion in formulating a sentence that is fit in the circumstances of an individual case. The sentencing

judge is entrusted with determining the relative weight and importance to be accorded to the interrelated sentencing objectives which will vary from case to case depending on the nature of the crime and the circumstances of the offender. As expressed by Lamer, C.J.C in *M.(C.A.)*, [1996] 1 S.C.R. 500 at 559:

In the final analysis, the overarching duty of the sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.

51. In enacting ss. 718, 718.1 and 718.2 Parliament endorsed the recommendations of various sentencing commissions that the legislation contain an express statement of the principles that govern the exercise of judicial discretion. But it is submitted that the amendments in Part 23 of the *Criminal Code* were not intended to detract from, limit or otherwise fetter that discretion. In fact, Parliament's obvious rejection of the recommendations of the Canadian Sentencing Commission regarding the establishment of sentencing guidelines as to whether a custodial or community sentence should be imposed and regarding custodial ranges indicates that the legislative intent was to uphold the inviolability of the sentencing judge's discretion. As Parliament clearly chose not to adopt this route in Bill C-41, the Court should not accede to the Appellant's suggestion that it ought to "fill in the legislative gap" by setting out explicit guidelines in this case as to whether a sentence should be served in custody or in the community. (A.F., para. 78; *Report of the Canadian Sentencing Commission*, pp. 170, 275-6, 328-31)

52. While ss. (e) directs a sentencing judge to consider the circumstances of aboriginal offenders, it does not instruct the sentencing judge as to how these circumstances are to be weighed or what effect they will have on the sentence imposed. Nor does it suggest that the fact of aboriginality is to have certain legal effect which will necessarily lead to a different or lesser sentence of imprisonment than would otherwise be imposed.

53. If ss. (e) were to be interpreted as a direction that the fact of Aboriginal status results in a lesser term of imprisonment or a form of lesser consequence on sentence, then sentencing

judges would be faced with having to determine who can legitimately make the claim that they are Aboriginal. Does an offender with one Aboriginal grandparent "qualify" for the presumed reduction in moral culpability? Or an offender adopted by a non-Aboriginal family with no current involvement with aboriginal culture or tradition? What about a person of aboriginal background who has successfully overcome his or her disadvantaged background and risen to a place of prominence in the aboriginal or non-aboriginal community? It is submitted that this is not the type of inquiry contemplated by ss. (c)

C. Statutory Interpretation of S. 718.2(e):

(a) Basic Rule:

54. While the Appellant has referred to the 2nd edition of *Driedger on the Construction of Statutes*, the third edition published in 1994 gives a more comprehensive definition of the "modern interpretation rule":

...courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of the proposed interpretations, the presumptions and special rules of interpretation as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. (p. 131)

55. What then is the meaning to be given to the words "with particular attention to the circumstances of aboriginal offenders"? It is submitted that this phrase requires a sentencing judge to consider that the fact that an offender is aboriginal may, depending on the circumstances, give rise to an approach and to a range of sentencing options that may be more culturally appropriate to the offender than imprisonment and more efficacious in achieving the goal of the imposition of a sentence that is "just and appropriate". While sentencing remains an inherently individualized process, ss.(e) is directed to ensuring that a sentencing judge in exercising his or her discretion will be cognizant that the offender is aboriginal and will consider whether that offender's circumstances as an aboriginal person should lead to the imposition of a different

sanction than might be the case for a non-aboriginal offender. It is respectfully submitted that ss.(e) provides the necessary flexibility and authority for sentencing judges to resort to the restorative model of justice in sentencing aboriginal offenders and to reduce the imposition of jail sentences where to do so would not sacrifice the traditional goals of sentencing.

(*R. v. M.(C.A.)*, supra, at 566-567; *R. v. J.(C.)* (1997), 119 C.C.C.(3d) 444 (Nfld. C.A.) at 459, D.Kwochka, *Aboriginal Injustice: Making Room for a Restorative Paradigm* (1996), 60 Sask.Law Rev. 153 at 172)

56. While ss. (d) and (e) are both directed to the principle of restraint, the structure of s. 718.2 indicates that there is a distinction to be drawn between them. Subsection (d) is a general statement that the least restrictive sanction appropriate in the circumstances should be adopted. The focus is on deprivation of liberty and therefore includes the sanction of imprisonment as well as any other conditions or terms in a probation or conditional sentencing order that could have an effect on the offender's liberty interest.

57. Subsection (e) is a further particularization of the principle of restraint expressed in ss. (d). The Appellant refers to the perception of the "bias" in favour of imprisonment commented upon in the Report of the Canadian Sentencing Commission and elsewhere (A.F., para. 47) which may have related in part to the absence of any realistic options available to the courts in terms of community-based sentences. Now, Parliament has specifically directed that a court that imposes sentence **shall** consider **all** available sanctions other than imprisonment for **all** offenders, subject to the overriding requirement that these non-carceratory sanctions are **reasonable in the circumstances**. As a sentencing judge moves through the steps of determining what is a fit sentence in a particular case, he or she cannot begin from any presumption that jail will be the only appropriate sanction to impose.

58. According to the Appellant, ss. (e) would be superfluous to the principle of restraint in (d) were it not for the phrase referring to aboriginal offenders and this clause must therefore be regarded as the repository of the intention of the subsection. As she puts it (A.F., para. 39) "it is

reasonable to conclude that the purpose of the entire s. 718.2(e) was to benefit Aboriginal offenders". The Respondent agrees that particular restraint may be called for in the use of imprisonment depending on the circumstances of the aboriginal offender in question. But it is submitted that the explicit unambiguous language in the first part of ss. (e) leaves no doubt that what is being expressed is a principle of general application to all offenders.

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50 The words "all available sanctions other than imprisonment" refer to non-jail sanctions that are legally available for the offence and that are actually available as a practical matter in the community in which the offender resides. The key words that govern the application of the principle of restraint in ss. (e) are found in the phrase "reasonable in the circumstances". It is only where these available non-jail sanctions are reasonable in the circumstances that they need

20 be considered by the sentencing judge.

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60. It is submitted that "reasonable in the circumstances" means that a proposed sanction must be reasonable when examined in relationship to the principles of sentencing set out in ss. 718, 718.1 and 718.2. The "fundamental purpose of sentencing" is defined in s. 718 and the "fundamental principle" of proportionality is found in s. 718.1. Besides the principle of restraint in ss. (d) and (e), the "Other Sentencing Principles" under s. 718.2 are the need to factor into the sentence a consideration of relevant mitigating and aggravating circumstances, parity in sentencing and totality of sentence. There is nothing in the wording or placement of ss. (d) and (e) to suggest that they are in any way paramount to the other principles of sentencing in Part 23.

30 *R. v. Wells* (1998), 125 C.C.C.(3d) 129 (Alta.C.A.) at 138-140; Application for leave to appeal to S.C.C. File 2664; *R. v. McDonald* (1997), 113 C.C.C.(3d) 418 (Sask.C.A.) at 464.

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61. Had Parliament intended "reasonable in the circumstances" to mean that deterrence and denunciation should be secondary to the goals of rehabilitation and reparation either for all offenders or for aboriginal offenders, it would have said so. If it had intended that courts no longer resort to imprisonment where the primary sentencing goals are deterrence and

denunciation, it could have expressed this intention in the statutory language it employed. (Driedger, pp. 298-9, 368; *R. v. T.(V.)*, supra.) There is nothing in the language used in ss. (d) or (e) or elsewhere in Part 23 to suggest that Parliament intended to impose any constraints on the sentencing judge's discretion to impose a sentence based on what he or she deems to be the relevant sentencing goals engaged by the particular case and the emphasis to be given to them. (see *R. v. Sidhu*, [1998] B.C.J. 2039)

62. Furthermore, the phrase "with particular attention to the circumstances of aboriginal offenders" is a dependent clause rather than an exception to or a variation of the general statement contained in the first half of ss. (e). Applying the contextual principle of interpretation, it is submitted that the immediate context of the phrase suggests that the ambit of the words in this subordinate clause cannot extend beyond the reach of the main clause. (Driedger, pp. 197-8) So, the Appellant's suggestion that they indicate Parliament's direction to sentencing judges to "consider and give mitigating effect to the historical, social, political and economic factors relevant to Aboriginals in conflict with the criminal law" (A.F., para. 41) must be considered in relation to the fact that Parliament has not given this phrase independent operation within the statute. Rather, it has been made subject to the principle in the first half of ss. (e) that the sanction under consideration must be "reasonable in the circumstances" which in turn means that it must comport with the other applicable goals and principles of sentencing in Part 23.

b. Extrinsic Aids:

(i) Parliamentary Debates:

63. It is respectfully submitted that the Minister of Justice's remarks in introducing the debate on Bill C-41 does not support the affirmative action interpretation which the Appellant seeks to put on the latter half of s. 718.2(e). Had Parliament intended to initiate a policy in which sentencing judges were invariably required to sentence aboriginal offenders differently than non-aboriginal offenders in order to redress the historical injustices perpetrated on aboriginal people, one would expect that there would be some reference to this new initiative in the Minister's

speech.

64. But the Minister makes only two brief references to aboriginal offenders, neither of which suggest the creation of such a program. In the first reference, he states: "When appropriate, alternatives must be contemplated, especially in the case of Native offenders." (House of Commons Debates, Sept 20, 1994, p. 5871) The second reference is contained in a passage relating to the issue of imprisonment for non-payment of fines:

At the present time, nearly a third of the people liable to incarceration in provincial jails are in that situation because they did not pay fines. Studies have shown that Natives are the most at risk of being incarcerated for failing to pay fines. (p.5872)

And in summarizing the innovative measures introduced by the Bill, the Minister cited diversion, conditional sentences, and the statement of rules of evidence and procedure for the sentencing hearing but made no reference to aboriginal offenders or s. 718.2(e). (Debates, June 15, 1995, pp. 13922-23)

65. What emerges from the Minister's statements is that while Bill C-41 was intended to reform the sentencing process in Canada by setting out the applicable principles of sentencing, rationalizing the procedures in the sentencing hearing and expanding the availability of community-based options, it was not intended to herald the beginning of a new era and the departure from sentencing law as it had developed prior to the introduction of this Bill:

Among the fundamental purposes of this bill is to codify and legislate for the first time in Canadian law a statement of the purposes and principles of sentencing. (p.13922)...

The bill includes a complete restructuring of Part XXIII of the Criminal Code of Canada. It brings together most of the provisions relating to sentencing now in the Code. It presents them in such a way as to make them, I hope, more logical and more accessible both to criminal justice professionals and to the public...With this bill and with the other initiatives in the area of criminal justice the government is providing a balanced and a comprehensive approach to the challenge of crime in Canada. **Improving the process and clarifying the principles of sentencing** is not going to solve all of our social problems but the bill will, I hope, contribute along with crime prevention initiatives to respect for the law and the maintenance of a just, peaceful and safe society. (p.5873) (emphasis added)

66. Finally, in his concluding remarks on the subject of the principle of restraint the Minister indicated it was not Parliament's intention to undercut the importance of jail as a criminal sanction but to expand the range of options to reduce recourse to imprisonment particularly for non-violent crime:

Jails and prisons will be there for those who need them, **for those who should be punished in that way or separated from society.** But we must remember as well that only 10 per cent of all crime is violent and that over 53 per cent of all crime involves property, not people. Therefore, this bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done. (5873)

(ii) Commission Reports:

67. At the time the federal government introduced Bill C-41 on Sept 20, 1994 and enacted it into law on September 3, 1996, the disproportionate representation of Aboriginal in Canadian prisons had been canvassed in numerous authoritative reports. (A.F., paras. 54, 55) It is submitted that by inclusion of the phrase regarding aboriginal offenders in s. 718.2(e) it was Parliament's intent that the fact that an offender was aboriginal would not go unnoticed in the exercise of the principle of restraint in the use of imprisonment. But a review of the major reports on the subject of sentencing reform and Aboriginal people does not support the proposition being advanced by the Appellant.

68. In its inquiry into the issue of reform of sentencing in Canada, the 1987 *Report of the Canadian Sentencing Commission* makes no specific reference to aboriginal offenders. In the 1988 Report of the Standing Committee on Justice and Solicitor General titled *Taking Responsibility*, the first recommendation regarding aboriginal offenders was the government-sponsored development of Aboriginal-run programs offering alternatives to jail to aboriginal offenders. The balance of the recommendations focussed on the creation and delivery of programs sensitive to the needs of aboriginal inmates and of procedures by Correctional Services and the National Parole Board in conjunction with aboriginal organizations to assist inmates in preparing plans for early release. (pp. 211-217)

69. The issues of Aboriginals and the criminal justice system are directly and comprehensively addressed in numerous reports, including the 1991 Report of the Aboriginal Justice Inquiry of Manitoba entitled *The Justice System and Aboriginal People*, the 1993 Report of the Cariboo-Chilcotin Justice Inquiry, and the 1996 Report of the Royal Commission on Aboriginal People and Criminal Justice in Canada entitled *Bridging the Cultural Divide*. The unequivocal emphasis in the Manitoba and Royal Commission reports is on the necessity of the development of aboriginal justice systems as a component of aboriginal self-government which is perceived as the only effective route to redressing the disenfranchisement of aboriginal people in Canada. (See Manitoba Report pp. 251-267; 321-23; 336)

70. The flavour of these recommendations can be gleaned from the following excerpts from the report of the Manitoba Inquiry:

A century of paternalism and duplicity in government policies has had disastrous consequences. Canada's original citizens have lost much of their land and livelihood, family life has been ruptured, and community leadership and cohesion have broken down. These policies have left many Aboriginal people not only impoverished, but also dependent and demoralized. These government policies must also be held ultimately responsible for a good portion of the high rates of Aboriginal crime, which are the almost inevitable result of social breakdown and poverty.

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 will involve much more than the justice system as it is understood currently. It will require governments to commit themselves to economic and social policies that will allow Aboriginal citizens to participate fully in Canadian life. In the case of Aboriginal people, it will also involve a significant redistribution of political and economic power as governments honour the historical commitments made to Aboriginal people through treaties and other formal agreements. (p.110)

The Inquiry calls for separate, Aboriginally controlled justice systems:

Aboriginal governments need to establish systems to deal appropriately with those people causing problems in their communities and to provide a means for other community members to resolve their legal problems. Aboriginal governments need to provide them with culturally appropriate ways to achieve the ultimate result of restoring and ensuring peace among individuals and stability in the community.

To enable this to be done, Aboriginal communities must have the right, as part of self-government, to establish their own rules of conduct, to develop means of dealing with disputes, appropriate sanctions, and the full range of probation, parole, counselling and restorative mechanisms once applied by First Nations. (p.260)

71. Accordingly, it calls for recognition by federal and provincial governments of the right of Aboriginal people to establish their own justice systems as part of their inherent right to self-government and the enactment of appropriate legislation to begin the process of establishing such systems. (p.266) To the same effect, the Royal Commission concludes that the historical roots of Aboriginal crime point directly to the need to heal relationships both internally and externally between Aboriginal and non-Aboriginal people and that at the core of this new relationship is the recognition of the right of self-government which encompasses the authority to establish Aboriginal justice systems. (pp. 46, 53-69; 76-81)

72. It is submitted that the reference to the circumstances of aboriginal offenders in ss.(e), standing alone, was not intended to constitute legislative recognition of the inherent right of aboriginal self-government in the area of the creation of aboriginal justice systems. In fact, in the view of the Royal Commission, there was nothing radically new in the amendments in Bill C-41:

Though long overdue, these amendments represent a codification of existing sentencing principles developed by the courts rather than a fundamental shift in emphasis. This statement of purposes and principles certainly does not preclude imposing a sentence that emphasizes restorative and healing goals, but these are not given priority nor are they seen as anchoring the sentencing process. (*Bridging the Cultural Divide*, p. 241) (emphasis added)

73. However, both of these Reports acknowledge the necessity of reforms to the existing system pending the sweeping measures required to institute aboriginal justice systems. To this end, the Manitoba Inquiry Report proposed a number of reforms under the broad headings of Changes to Court Structure and Administration, Juries, Jails, Parole, Aboriginal women, Young Offenders and Policing aimed at increasing cultural sensitivity from non-Aboriginals and increasing the input and responsibility of Aboriginal communities. The Commission recommended that sentencing reform encompass less dependence on incarceration, strengthening of community sanctions; greater consideration to be given to cultural factors and the need to give the community a more meaningful role in the process. (Manitoba Inquiry Report, pp. 339; 402-498; Royal Commission Report, pp. 78, 284-5)

10 74. The Royal Commission reviewed aboriginal initiatives in the areas of policing, "indigenization", diversion, young offenders and prison programs. With regard to sentencing, the Commission referred to the progress made in opening up the sentencing of Aboriginal people to greater Aboriginal input by way of Elders Panels and Sentencing Circles which provided an example of how the current system can be made significantly more responsive to aboriginal concerns without a major restructuring of the process. It also recommended the value of community input at other stages in the criminal justice system such as bail, plea discussion and trial. (pp.109, 113, 115)

20 75. The importance of developing such programs and making room within the present system for uniquely aboriginal approaches to sentencing is echoed in numerous articles on the subject. Interestingly, the most far-reaching developments in breaking the cycle of disadvantage are not found at the sentencing end of the criminal process but at the front end in the area of aboriginal diversion. (See D.Kwochka, supra at pp.164, 169-71; J. Hylton, *Financing Aboriginal Justice Systems*, in R. Gosse, J.Y. Henderson, R. Carter, *Continuing Peardmaker and Riel's Quest*, at pp. 163-5; Toronto's Community Council Project and Manitoba's Hollow Water Holistic Circle Healing Project as described in *Bridging the Cultural Divide*, pp. 148-167)

30 76. In summary, these extrinsic aids suggest that by including a reference to the circumstances of aboriginal offenders Parliament was responding to the issues of aboriginal over-representation and cultural insensitivity to aboriginal offenders caught up in the net of the criminal justice system. But they do not support an interpretation of the clause as the embodiment of a major reform initiative in the sentencing of aboriginal offenders. This subsection cannot be construed as a response to the clarion call for self-government. It is, on the other hand, a limited but real
40 acknowledgment of the unique place that aboriginal offenders have in the system and a direction that a sentencing judge must be alert to how the circumstances of an aboriginal offender may impact on the dynamics of sentencing and how the imposition of a "just and appropriate" sanction may be best achieved.

c. **Judicial Interpretation:**

(i) **Cases pre-dating the enactment of s. 718.2(e):**

77. As Parliament is presumed to have intended that courts would read its enactments against the background of the relevant common law unless it used language clearly indicating that it was altering that law, a brief review of the prevailing situation pertaining to the sentencing of aboriginal offenders as it existed prior to the enactment of ss.(e) is relevant in discerning the rationale behind the subsection. (*R. v. Cuerrier*, [1998] S.C.J. 64; per McLachlin, Driedger, p. 298)

78. It is submitted that three themes can be identified in the sentencing of aboriginal offenders prior to the advent of Bill C-41 and that all three remain relevant to a consideration of the "circumstances of aboriginal offenders" under s. 718.2(e):

- a) reduction of a jail sentence where it would have a markedly injurious effect on an aboriginal offender from a rural or remote community;
- b) expansion of the role of the aboriginal community in the sentencing process; and,
- c) the fact of aboriginality is not per se a mitigating factor on sentencing.

79. The 1971 decision of the Ontario Court of Appeal in *R. v. Fireman* (1971), 4 C.C.C.(2d) 83 (O.C.A.) is an early and oft-cited judicial acknowledgement that a sentence of imprisonment in a penitentiary may be unduly harsh or inappropriate when imposed on an aboriginal offender living in a remote aboriginal community. The defendant was a 25 yr old trapper who lived in a settlement on James Bay with few regular ties to the non-aboriginal community. On his appeal from the 10 year sentence imposed on him for manslaughter, the Court of Appeal reduced the sentence to two years and stated:

...one can only proceed to consider the fitness of the sentence meted out to this man upon a proper appreciation of his cultural background and of his character, as it is only then that the full effect of the sentence upon him will be clear. (p.85)

As he spoke no English and had only lived in a traditional aboriginal lifestyle in the north,

removal of this man from his community to a penitentiary would result in a severe sense of isolation so that even a short term of imprisonment would be very substantial punishment to him.

80. It is submitted that the recognition that a prison term may have a particularly deleterious effect on certain aboriginal offenders has been incorporated into ss. (e) as an aspect of the circumstances of aboriginal offenders that should be considered. The fact that an aboriginal offender would therefore be sentenced differently than an aboriginal offender for similar conduct in otherwise similar circumstances would not necessarily violate the principle of disparity. The focus is on the "dispositive effect" of the sentence on the offender rather than on the type of sanction imposed. This principle need not be confined to reduction of the length of a prison term but could apply to the selection of an appropriate alternative sanction. As expressed in *R. v. J.(C.)* *supra* at 460:

Where...it can be said in a given case that sanctions other than incarceration are just as onerous as a prison sentence and will equally accomplish the sentencing objectives, there is no reason in principle why a prison sentence in one case and a community disposition in another could not be said to be comparable.

(See *R. v. Taylor* (1997), 122 C.C.C.(3d) 376 (Sask.C.A.))

81. A second theme that emerges from *Fireman* is the judicial recognition that in an aboriginal community with a certain degree of cohesion, the traditional sentencing goals may be realized differently than they would be in non-Aboriginal society. In *Fireman*, the community's initial ostracism of the defendant expressed their denunciation of his behaviour. The fact that the court procedures took place a great distance away from the settlement in a foreign language without any participation or even attendance by members of the community would have significantly undercut the objective of general deterrence intended by the imposition of this ten year sentence. In these circumstances, the real deterrent value of the sentence was not the length of imprisonment but the message that the conduct which had already been condemned by the appellant's settlement was condemned by the rest of society.

82. There has been an increasing awareness on the part of the judiciary, particularly in

jurisdictions with a substantial aboriginal population, of the need to involve the offender's community in the process of sentencing. Sentencing circles came about through the initiative of aboriginal communities and the support of judges who recognized that without recourse to the community's view in the case of an aboriginal offender, they might be less effective in determining a sentence that would truly address the objectives of deterrence, denunciation and rehabilitation. The sentencing circle could assist the judge in the determination of a fit sentence while at the same time employing a process of broadened community participation which in itself was more consistent with the values of aboriginal justice. Commenting on the origins and purpose of the sentencing circle, the Saskatchewan Court of Appeal in *R. v. Morin* (1995), 101 C.C.C.(3d) 124 stated:

The very purpose of sentencing circles seems to be to fashion sentences that will differ in some mix or measure from those which the courts have up to now imposed in order to take into account aboriginal cultures and traditions and in order to permit and to take into account direct community participation in both imposition and administration of the sentence. (p. 137)

83 Where an offender has substantial roots in a community and is willing, along with the victim, to be referred to a sentencing circle and where the community is willing and able to participate in the ongoing supervision and reintegration of the offender, a judge may involve a sentencing circle in the sentencing of an aboriginal offender while retaining the ultimate discretion as to what sentence to impose. It is submitted that the sentencing circle process and the options generated by it were incorporated into ss. (c) as legislative recognition of judicial resort to this aspect of restorative justice. (*R. v. Morin*, supra, at 139; *R. v. Taylor*, supra; *R. v. Johnson* (1994), 91 C.C.C.(3d) 21 (B.C.C.A.) at 24.

84. But while the aboriginal background of an offender may under certain circumstances result in a different sentencing proceeding and different sanctions than for a non-aboriginal offender, aboriginal status per se does not constitute a mitigating factor on sentence. This position was articulated by the Alberta Court of Appeal in *R. v. Brown* (1992), 73 C.C.C.(3d) 242

at 253:

When the offence in question is not a minor one, but a grave offence of violence and aggression as in the case of a man who beats his wife, neither a trial court nor an appellate court is likely to be impressed by some vague reference by counsel to cultural differences between the Aboriginal communities and non-Aboriginal society unsupported by more. In the case of wife-assault, the court cannot be expected to take unspecified cultural differences into account, no matter what racial or religious community is involved. Does the accused's community regard spousal violence as a less serious problem than mainstream society does? Does that community - including the female members of the community - really prefer that serious cases of spousal assault be treated differently when the accused is a member of that community than if he were a member of the mainstream community? - the courts of this province and of this country should be alert to the risk of moderating sentencing policy in such a case where to do so would mean that some women in Canadian society would be afforded less protection than others.

(See *R. v. Hunter* (1994), 370 A.P.R. 298 (Nfld. C.A.) at 302)

85. It is submitted that the concerns expressed in *Brown* are as applicable to sentencing in 1998 as they were in 1992 and that the enactment of ss. (e) does not state or imply that aboriginal status in itself operates as a mitigating factor which should result in the imposition of a reduced term of imprisonment. While the kinds of considerations in *Fireman* and *Morin* were included within the ambit of the phrase, the wording in ss.(e) suggests that Parliament's intention was not to circumscribe application of the subsection to offenders within aboriginal communities but to leave it to the discretion of the sentencing judge to determine on a case by case basis what matters may have relevance to the selection of a reasonable sanction for the offender.

(ii) S. 718.2(e):

86. In *R. v. Wells*, supra, the Alberta Court of Appeal found that s. 718.2(e) did not set up a separate system of sentencing for aboriginal offenders. The Respondent respectfully submits that this is an approach which this Court should endorse.

87. In *Wells* the accused was sentenced to 20 months imprisonment after his conviction for "a major...or near major" sexual assault. The offence occurred on the Saree Reservation and involved an assault upon a sleeping or unconscious complainant in her bedroom in the course of a drinking party. The Pre-Sentence report at trial referred to the accused's serious alcohol problem. Noting that the accused was aboriginal and the relevance of the provision in s. 718.2(e).

the trial judge identified the primary sentencing factors as deterrence and denunciation and declined to impose a conditional sentence in the circumstances of this case.

88. On appeal, Mr. Wells argued that the trial judge erred in principle in not examining the issue of his aboriginal status more fully. Relying on its recent decision in *R. v. Brady* (1998), 121 C.C.C.(3d) 504 the Court found that a conditional sentence would be an unlikely result for a serious sexual assault where the principles of deterrence and denunciation would ordinarily call for prison. So, the issues for determination were (1) whether s. 718.2(e) meant that the application of the ordinary principles of sentencing were modified in the case of an aboriginal offender, and (2) the nature of a judge's obligation under ss. (e). (*Wells*, at 135, 137)

89. The clause of general application in s. 718.2(e) required a sentencing judge to consider "all sanctions other than imprisonment that are reasonable in the circumstances". The term "circumstances" in the context of imposing sanctions for criminal conduct included consideration of the gravity and nature of the crime committed, the record of the accused, impact on victims and the community, the need for denunciation and deterrence, the need to maintain proportionality, aggravating and mitigating factors not restricted to those outlined in 718.2(a), the particular circumstances applicable to the accused, and any relevant case law. (*Wells*, at 138) As for the term "reasonable", the Court held that:

[this term] must mean commensurate with the purposes and principles of sentencing found in the Criminal Code sections [718, 718.1 and 718.2]. A sentence which is not commensurate with the purposes and principles of sentencing cannot by definition be reasonable, and this provision applies to all offenders, whether aboriginal or not. (p.139)

90. Turning to the words "with particular attention to the circumstances of aboriginal offenders", while Parliament had not defined the scope of this phrase it must have intended that in sentencing aboriginal offenders a court would have regard all of the "circumstances" referred to above together with additional circumstances arising out of the fact of the offender's background. The directions in ss. (d) and (e) must be read and applied in conjunction with the purposes, objectives and the rest of the principles, fundamental and other, set out in ss. 718, 718.1

and 718.2, and there was nothing in the legislation to suggest that Parliament intended to make s. 718.2(e) in any way paramount to these provisions. (*Wells*, at 138-140)

91. The Respondent agrees with the Court's conclusion that in dealing with a serious offence calling for denunciation and deterrence and the application of the principle of proportionality, s. 718.2(e) cannot be interpreted to mean that in some fashion an alternative to imprisonment **must** be imposed as a sentence for an aboriginal offender. (*Wells*, at 142)

92. With respect to the provisions in ss. 723(3) and (4) of the *Criminal Code* which permit a sentencing judge to require production of evidence or witnesses to assist in the determination of an appropriate sentence, the Respondent adopts the Court's conclusion that Parliament could not have intended to require that an inquiry must be made respecting each offender, aboriginal or otherwise. In view of the permissive language used in ss. 723(3) and (4), they do not mandate a judge-initiated inquiry in every case. As a general rule, the onus is on the accused to put forward specific alternative sanctions which, to be acceptable for consideration, must be supported by evidence and reasonable in the circumstances and commensurate with the other sentencing provisions in the *Code*. Provided that the trial judge is cognizant that he or she is dealing with an aboriginal offender and addresses his or her mind to the pertinent circumstances, it must remain within the discretion of the sentencing judge to make such determinations as the nature of the sentencing proceedings, the advisability of a judge-initiated inquiry, and whether alternative community based sanctions are justifiable in the case. (*Wells*, at 141)

93. The Alberta Court of Appeal applied *Wells* to the disposition of the appeal in *R. v. Hunter (1998)*, 125 C.C.C.(3d) 121. The Crown appealed a suspended sentence with two years of probation imposed on a 42 year old man for a vicious spousal assault. The sentencing judge had conducted an extensive inquiry into the social, political and financial conditions of the Stoney Reserve where the accused lived. His interpretation of "circumstances of aboriginal offenders" in ss. (e) caused him to focus on the multiplicity of factors which play a role in aboriginal crime

in general. But the sentencing judge did not have before him evidence addressing the key issues of whether the offender's community would support an alternative sanction process and whether that process would meet the aims of sentencing. In view of the accused's long record and unresolved alcohol problem, the court concluded that he had not established that he would not endanger the safety of the community and substituted a sentence of 18 months. (See also: *R. v. A.G.A.*, (1998) 215 A.R. 20 (Q.B.))

94. Finally, the Newfoundland Court of Appeal's decision of *R. v. J.(C.)*, supra, is significant in that it canvasses the extent to which the provision in ss. (e) and the amendments in Part 23 enable judges to incorporate some of the values of restorative justice into the sentencing of aboriginal offenders without relinquishing or sacrificing the values of the retributive system. In that case, a young Innu accused had been sentenced to over five years imprisonment for five offences of sexual assault against young members of his own community. While extensive material was put before the judge regarding the Innu community's recognition of the extent of the problem of sexual victimization and their desire to assist the accused to break the cycle through healing and counselling, it was evident that the community did not have the resources to handle the necessary evaluation and treatment of the accused's problems. Nor was there any evidence from the victims as to their views on the sentencing process.

95. In view of the nature of the offences and of the offender, the sentence was not inappropriate according to "traditional sentencing principles." Thus the issue on appeal was whether, because the offender was aboriginal, the trial judge should have adopted a fundamentally different approach which would have resulted in a non-custodial or a much reduced custodial sentence. Alternatively, the appellant argued that even according to ordinary principles but taking into account the appellant's aboriginal background should result in a reduction of the sentence. The court concluded that there was no basis on which the sentencing judge could have imposed a community based sanction in this case. But the Respondent endorses its reasoning which gave a broad interpretation to the reach of the phrase "particular attention to the circumstances of

aboriginal offenders" while maintaining the primacy of the sentencing goals expressed in the balance of Part 23. (*J.(C.)*, supra, at 455, 457)

96. In contrast to the restorative approach with its emphasis on resolution of conflict in the community as a way of achieving protection of the public, Canadian sentencing policy focuses on past acts and the need for assignment of individual responsibility for wrongs done and accordingly emphasizes the importance of retribution and denunciation. In the amendments to Part 23, Parliament has retained this retributive philosophy. However, the present system does not exclude the types of dispositions considered appropriate in restorative justice, "at least to the extent where they provide an alternate means of achieving traditional sentencing objectives". (*J.(C.)*, supra, at 459; *Bridging the Cultural Divide*, at 240-241)

97. But caution is required in determining on a case by case basis whether a restorative justice approach is feasible. At a minimum, the court must be in a position to devise a case-specific plan based on a realistic assessment of the needs of the offender and on the existence of a community able to take on a measure of responsibility for the healing process and for the protection of the public during that period. Here, there was no basis on which the judge could legitimately employ an alternative approach and consign the accused to the community. While leaving open the possibility that such an approach could be adopted under the right circumstances, in the absence of any evidence before the court of a plan which was supportable by the community and addressed the sentencing issues raised here, "the sentence imposed was a realistic response to the specific factual circumstances that were presented."

D. Application of s. 718.2(e) to this Case:

98. The sentencing judge was alive to the fact that the Appellant was a person of aboriginal background. In response to his questioning, he was informed that the Appellant's home town of McLennan, Alberta was "just a regular community", that the Appellant was Aboriginal born to Cree parents and that at the time of the offence she was living in a townhouse complex in

Nanaimo. He was also made aware of her personal circumstances as a teenaged mother with little education who appeared to have a drinking problem and of her attendance at the Tillieum Haus Native Friendship Centre for educational upgrading and drug and alcohol counselling while on pre-trial bail.

10 99. No further reference was made to Aboriginal status. It was apparent that the Appellant was not ~~also~~ living in a community in which she had deep roots and there was no reference during the sentencing proceedings to any alternative sanctions that might address the goals of denunciation and deterrence. Rather, the thrust of defence counsel's submissions was that her youth, lack of record, "unfortunate background" and remorse combined with the facts of the offence itself, referred to as a "momentary act of stupidity", constituted "exceptional circumstances" which justified the imposition of a suspended or conditional sentence.

20 100. It is the Respondent's contention that there was no error on the part of the sentencing judge in concluding that neither a conditional sentence nor a suspended sentence were appropriate in the circumstances of this case. The maximum sentence for manslaughter is life imprisonment and the offence in question was at the "near murder" end of the spectrum. It is submitted that in view of the gravity of the offence and the culpability of the offender, the sentencing judge did not err in finding that a sentence other than incarceration would not adequately address the objectives of denunciation and deterrence and was therefore not "reasonable" in the circumstances. (*R. v. McDonald*, supra, at 466)

30 40 101. It is submitted that the real issue is whether the trial judge erred in principle by the approach he took to the phrase "with particular attention to the circumstances of aboriginal offenders". Was the sentencing judge required to impose a lesser sentence of imprisonment or no imprisonment at all on the Appellant and to emphasize rehabilitation over denunciation and deterrence because she was an aboriginal offender? It is respectfully submitted that the sentencing judge did not err in the way he applied the provision in ss. (e) to the circumstances of

this case:

102. The sentencing judge was conscious of the fact that the statutory requirement to pay particular attention to the circumstance of aboriginal offenders was engaged here. By noting that both the Appellant and the deceased were living in a non-Aboriginal urban setting when the offence occurred he did not imply that ss.(e) therefore had no application to the Appellant. Rather, ~~her place of~~ residence and living situation were an aspect of the circumstances of this aboriginal offender. While the Respondent agrees that the wording of ss. (e) draws no distinction between offenders living within an aboriginal community and those living outside of an aboriginal community, it is submitted that this fact does have relevance in assessing the impact of a proposed sentence of imprisonment or determining the availability or viability of community-based sanctions. In general, in the case of a very serious offence which would normally attract a custodial sentence, unless an aboriginal offender has a well-established level of interaction with and accountability to a community, whether urban or rural, the sentencing goals of deterrence and denunciation would rarely be achieved by the imposition of a non-custodial sentence.

103. Prior to referring to the issue of aboriginal background, the sentencing judge had already determined that a sentence other than imprisonment was not "reasonable in the circumstances" pursuant to the first part of s. 718.2(e). He then found that the circumstances of this aboriginal offender as they were presented to him did not provide him with any basis to depart from the determination that imprisonment was the just and appropriate sanction to impose in this case.

104. The Appellant argues that in upholding the sentence imposed by the sentencing judge the Court of Appeal committed the two errors of 1) relying on the "usual range" for this type of offence, and, 2) concluding that there was nothing in the circumstances of this case which called for the imposition of a different sentence on the Appellant because of the fact that she was Aboriginal. As far as the first alleged error, the Respondent reiterates its position that a sentence of three years for "near murder" manslaughter is not demonstrably unfit and does not involve any

error in principle with reference to the provisions of ss. (d) and (e). (para. 31, supra)

105. With respect to the second alleged error, it is submitted that there was nothing in the circumstances of this aboriginal offender as disclosed to the sentencing judge which could justify the imposition of a different or more lenient sentence. The sentencing judge considered the Appellant's rehabilitation and found that this objective was not inconsistent with a term of imprisonment. As for restitution and reparation, given that the victim was dead and that the Appellant was living far from the community in which both he and she had been raised, it is difficult to see how these objectives were factors in the sentence to be imposed for this manslaughter. In any event, there was no case-specific plan before the sentencing judge which in any way purported to address the goals of denunciation and deterrence.

106. But the Appellant's argument as to the interpretation to be given to ss.(e) would not even require the presentation of any such case specific proposal. In its starkest form, the Appellant's argument seems to be that the Appellant should receive a reduction in the sentence imposed on her because she is aboriginal and that this is what the words "with particular attention to the circumstances of aboriginal offenders" must be taken to mean. With reference to the "modern rule" of statutory interpretation, it is respectfully submitted that this interpretation cannot be justified in terms of its plausibility, its efficacy or its acceptability. (Driedger, at 131)

107. In enacting ss. (e), Parliament intended to alert the sentencing judge to the realities of an aboriginal person's circumstances as they may impinge on the appropriateness of the sanctions to be imposed. Recognizing the availability of unique tools and procedures and the desirability of resorting to them to address the high aboriginal prison population, Parliament meant to ensure that a sentencing judge would not simply send an aboriginal offender to jail if there were other available sanctions that were reasonable in the circumstances. It is respectfully submitted that ss. (e) was intended to encourage and endorse the creativity and innovation of sentencing judges and the initiatives of aboriginal people in developing and resorting to community-based sanctions

that do not compromise the overarching sentencing goal of protection of society but help to realize it in a more effective way which is compatible with the aspirations and values of aboriginal people.

108. But it is submitted that it was not Parliament's intention in enacting ss. (e) to dispense with any of the objectives of sentencing or to depart from the principle of proportionality in the sentencing of aboriginal offenders. In giving remedial effect to this legislation, it must be interpreted in a way that harmonizes with the other principles of sentencing in conjunction with which it was intended to be applied.

109. It is submitted that the courts below properly emphasized the importance of denunciation and deterrence in this case. Even Rowles, J.A. in dissent did not suggest otherwise or accept that the sentence should be served in the community but simply proposed varying the sentence to two years less a day plus three years probation as a preferable way of addressing the goal of rehabilitation. Given the reality that the Appellant is serving her jail sentence at home under the Electronic Monitoring Programme, this variation may amount to a more substantial deprivation of liberty than the three year term imposed by the sentencing judge.

110. What must be borne in mind is that the offence in question was a "near murder" manslaughter. While specific deterrence was not in issue and the Appellant is a young woman from a disadvantaged background, it is submitted that in the circumstances of this case these factors do not detract from the necessity of imposing the one sanction which, as our society's most invasive deprivation of liberty, most clearly communicates the abhorrence of the conduct engaged in here. It is respectfully submitted that the amendments in Part 23 have not altered or lessened the significance of retribution and denunciation as principles animating the sentencing process. As stated by Lamer, C.J.C. in *M.(C.A.)*, supra:

In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances (556). Retribution requires that a judicial sentence properly reflect the moral

blameworthiness of that particular *offender*. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's *conduct*... The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*. (558-559)

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111. In conclusion, it is submitted that the majority of the British Columbia Court of Appeal correctly concluded that there was no basis for appellate intervention with respect to the three year sentence imposed by the learned sentencing judge and that the appeal should therefore be dismissed.

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PART IV

NATURE OF ORDER REQUESTED

112. It is respectfully submitted that the appeal be dismissed.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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October 23, 1998
Vancouver, BC

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