

# The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons

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# The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons

## **Abstract**

This article considers the disproportionate incarceration rate of Aboriginal offenders in Canadian prisons and the effectiveness of Parliament's attempts at alleviating this problem through the enactment of section 718.2(e) of the Criminal Code. This article focuses primarily on two recent Supreme Court of Canada decisions—*R. v. Gladue* and *R. v. Wells*. It is argued that the Court's narrow view of systemic factors, the limitation it places on section 718.2(e) through its discussion of serious offences, as well as a number of practical problems inherent in the framework provided by the Court, strip the provision of its remedial intent. The article then argues that the Courts' failure to recognize the distinct purposes of section 718.2(e) and the original sentencing provisions found in section 742.1, will aggravate the problem of Aboriginal over-representation in Canadian penal institutions.

# THE NULLIFICATION OF SECTION 718.2(e): AGGRAVATING ABORIGINAL OVER- REPRESENTATION IN CANADIAN PRISONS<sup>©</sup>

BY RENÉE PELLETIER\*

This article considers the disproportionate incarceration rate of Aboriginal offenders in Canadian prisons and the effectiveness of Parliament's attempts at alleviating this problem through the enactment of section 718.2(e) of the *Criminal Code*. This article focuses primarily on two recent Supreme Court of Canada decisions—*R. v. Gladue* and *R. v. Wells*. It is argued that the Court's narrow view of systemic factors, the limitation it places on section 718.2(e) through its discussion of serious offences, as well as a number of practical problems inherent in the framework provided by the Court, strip the provision of its remedial intent. The article then argues that the Court's failure to recognize the distinct purposes of section 718.2(e) and the original sentencing provisions found in section 742.1, will aggravate the problem of Aboriginal over-representation in Canadian penal institutions.

Cet article considère le taux d'incarcération disproportionné des contrevenants autochènes dans les prisons canadiennes et l'efficacité des tentatives du Parlement de résoudre ce problème à l'aide de la promulgation de l'article 718.2(e). L'auteure se concentre sur deux décisions récentes de la Cour suprême du Canada: *R. c. Gladue* et *R. c. Wells*. L'auteure maintient que plusieurs facteurs sauront démunir l'intention de redressement de la disposition législative, y compris le point de vue étroit de la Cour vis-à-vis les facteurs systémiques, les limites que ce point de vue étroit ainsi que l'analyse de la Cour en matière d'infraction graves placent sur l'article 718.2(e), et les nombreuses difficultés inhérentes en raison du cadre adopté par la Cour. L'auteure soutient que puisque la Cour suprême du Canada ne reconnaît pas les objectifs distincts entre l'article 718.2(e) et la disposition retrouvée anciennement à l'article 742.1, la sur-représentation des gens autochènes dans les institutions pénales canadiennes sera plus importante.

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I.	INTRODUCTION	

The extreme over-representation of Aboriginal peoples in Canadian prisons is a distressing reality. The disproportionate incarceration rate of Aboriginal offenders has been the subject of numerous studies, papers, and reports.<sup>1</sup> Although the federal government acknowledged this tragic injustice through its sentencing reforms introduced in 1996, and specifically section 718.2(e) of the *Criminal Code*,<sup>2</sup> the Supreme Court of Canada has stripped these reforms of their potential through its decisions in two recent cases.<sup>3</sup>

This article situates the federal sentencing reforms in the context of the crisis posed for both Aboriginal and non-Aboriginal communities by the "drastic over-representation of aboriginal peoples within both the Canadian prison population and the criminal justice system."<sup>4</sup> Section

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<sup>1</sup> See generally Canada, *Consolidated Report of the Solicitor General of Canada: Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act Five Years Later* (Ottawa: Solicitor General, 1998); Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada 1995-96* (Ottawa: Statistics Canada, Canadian Centre for Justice Statistics, 1997) [hereinafter *Adult Correctional Services*]; Canada, *Report of the Royal Commission on Aboriginal Peoples: Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996) [hereinafter *Report of the Royal Commission*]; Canada, *Examining Aboriginal Corrections in Canada* (Ottawa: Supply and Services Canada, 1996) [hereinafter *Examining Aboriginal Corrections*]; Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Government of Manitoba, 1991) [hereinafter *Manitoba*]; Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta*, vol. 1 (Edmonton: The Task Force, 1991); M. Jackson, *Locking Up Natives in Canada—A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (Ottawa: Canadian Bar Association, 1988); Canadian Corrections Association, *Report of the Law Reform Commission of Canada: The Native Offender and the Law* (Ottawa: Queen's Printer, 1974) (prepared by D.A. Schmeiser); Canada, *Report of the Canadian Corrections Association: Indians and the Law* (Ottawa: Queen's Printer, 1967).

<sup>2</sup> *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Code*].

<sup>3</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688 [hereinafter *Gladue*]; and *R. v. Wells*, [2000] 1 S.C.R. 207 [hereinafter *Wells*].

<sup>4</sup> *Gladue*, *ibid.* at 722.

718.2(e) of the *Code*,<sup>5</sup> which was introduced to alleviate this over-representation, will be discussed. This section held the promise of keeping Aboriginal offenders outside of prison, whenever possible, by directing sentencing judges to consider the “unique and systemic background factors” of Aboriginal offenders in the search for an appropriate non-incarceral sentence.

The article will then turn to two legal developments that have undermined the remedial intent of section 718.2(e). First, the case of *Gladue*<sup>6</sup> will be discussed in order to show how the legal analysis proposed by the Supreme Court in this decision limits the application of section 718.2(e). Second, the article will examine the framework provided by the Court in *Wells*<sup>7</sup> for the interplay between section 718.2(e) and the conditional sentencing provisions found in section 742.1. This discussion will demonstrate how the Court’s failure to recognize the distinct purposes of the provisions dealing with alternatives to incarceration and conditional sentences will aggravate the problem of Aboriginal over-representation in Canadian penal institutions.

## II. SECTION 718.2(e): ATTEMPTING TO ALLEVIATE ABORIGINAL OVER-REPRESENTATION

The over-representation of Aboriginal people in Canada’s federal and provincial prisons is, in large part, a consequence of the discrimination inflicted upon them by the Canadian criminal justice system.<sup>8</sup> Prior to the Second World War, the percentage of Aboriginal people making up Canada’s prison population was no greater than their representation within the country.<sup>9</sup> In 1995-96, however, Aboriginal people comprised an estimated 3.7 per cent of the Canadian population while they accounted for 12 per cent of the federal prison population<sup>10</sup> and 16 per cent of offenders in provincial institutions.<sup>11</sup> The figures with respect to provincial correctional facilities are even more alarming: in British Columbia,

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> *Supra* note 3.

<sup>7</sup> *Ibid.*

<sup>8</sup> For an alternative view on this point, see *infra* note 43 and accompanying text.

<sup>9</sup> *Manitoba*, *supra* note 1 at 101.

<sup>10</sup> *Adult Correctional Services*, *supra* note 1 at 85.

<sup>11</sup> *Ibid.* at 30.

Aboriginal people constituted 17 per cent of sentenced offenders; in Alberta, 36 per cent; in Saskatchewan, 72 per cent; in Manitoba, 55 per cent; in Ontario, 8 per cent; in Québec, 1 per cent; in New Brunswick, 6 per cent; in Nova Scotia, 4 per cent; and in Newfoundland, 7 per cent.<sup>12</sup>

The fiscal and social costs associated with imprisoning offenders are very high. Statistics indicate that Canada has a much higher rate of incarceration than most other Western nations. A 1997 report commissioned by the Federal/Provincial/Territorial Ministers Responsible for Justice found that Canada has approximately 130 inmates per one hundred thousand people in the population. This results in Canada having one of the highest rates of incarceration among industrialized democracies.<sup>13</sup> It was with these facts in mind that the government introduced new sentencing reforms. Section 718.2(e) of the *Code* formed part of these reforms and was introduced in 1996 with the purpose of reducing over-reliance on incarceration and over-representation of Aboriginal people in Canadian prisons. Section 718.2(e) provides:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Parliament's intent in enacting this provision is best illustrated by statements made by the Minister of Justice and others, at the time Bill C-41 was being debated. Testifying before the House of Commons Standing Committee on Justice and Legal Affairs, the Minister stated:

[T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada ... [w]hat 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.<sup>14</sup>

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<sup>12</sup> *Ibid.*

<sup>13</sup> Canada, *First Report on Progress for Federal/Provincial/Territorial Ministers Responsible for Justice: Corrections Population Growth* (Fredericton: Federal/Provincial/Territorial Ministers Responsible for Justice, February 1997) at Annex B:1. The United States has the highest rate of incarceration among industrialized democracies with over 600 inmates per 100,000 population.

<sup>14</sup> Canada, *House of Commons Standing Committee on Justice and Legal Affairs: Minutes of Proceedings and Evidence*, No. 62 (17 November 1994) at 15.

Despite the fact that this legislation only addresses the issue of sentencing, which is but one stage of a larger system that has failed Aboriginal people, it is clear that Parliament's goal for section 718.2(e) was to decrease Aboriginal over-representation in prisons.

### III. A FRAMEWORK FOR ANALYSIS: *GLADUE*

In *Gladue*, the Supreme Court of Canada addressed the issue of the proper interpretation of section 718.2(e) for the first time. The accused was an Aboriginal woman charged with second-degree murder for the killing of her common-law husband. Following a preliminary hearing, Ms. Gladue pled guilty to manslaughter. Gladue's defence counsel did not raise the fact that she was an Aboriginal offender in his submissions on sentence at trial. When asked by the judge whether the accused was in fact an Aboriginal person, defence counsel informed the court that Gladue was Cree, but made no further submissions with respect to her Aboriginal heritage. Defence counsel requested a suspended sentence or a conditional sentence of imprisonment.<sup>15</sup> Gladue was sentenced to three-years imprisonment and to a ten-month weapon prohibition.

Gladue appealed her sentence to the British Columbia Court of Appeal<sup>16</sup> on four grounds, one being that the trial judge failed to give appropriate consideration to the appellant's circumstances as an Aboriginal offender. The Court dismissed the appeal and the case made its way to the Supreme Court of Canada in December 1998.

The Supreme Court of Canada was asked to consider whether the British Columbia Court of Appeal erred in finding that the trial judge correctly applied section 718.2(e) in imposing a sentence of three years.<sup>17</sup> The Court dismissed the appeal, but went on to provide a framework for interpreting section 718.2(e). The Court's decision instructs sentencing judges to consider the unique systemic or background factors that may have played a part in bringing the particular Aboriginal offender before the courts, and the types of sentencing procedures and sanctions that may be appropriate because of an offender's particular Aboriginal heritage or connection.<sup>18</sup>

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<sup>15</sup> *Supra* note 3 at 698.

<sup>16</sup> *R. v. Gladue* (1997), 119 C.C.C. (3d) 481(B.C. C.A.).

<sup>17</sup> *Supra* note 3 at 703-4.

<sup>18</sup> *Ibid.* at 723-24.

In *Gladue*, the Court held that sentencing judges must take judicial notice of the broad systemic and background factors affecting Aboriginal people,<sup>19</sup> thus eliminating much of the burden on the Aboriginal offender to raise these matters. Canada's policies of colonization and criminalization explain much of the over-representation of Aboriginal people in prisons. Among the background factors that figure in the production of Aboriginal criminality, the Court noted the years of dislocation and economic deprivation, the high unemployment rates, lack of opportunity, substance abuse, loneliness, and community fragmentation.<sup>20</sup> Although the Court acknowledged that systemic and background factors may also explain the incidence of crime and recidivism for non-Aboriginal offenders,<sup>21</sup> it went on to stress that the circumstances of Aboriginal offenders are different and unique. Many Aboriginal people are victims of systemic and direct discrimination—they suffer from the legacy of dislocation, and many are significantly affected by poor social and economic conditions. A further consequence of these unique systemic and background factors is that Aboriginal offenders are more adversely affected by incarceration and are less likely to be “rehabilitated” because “the internment milieu is often culturally inappropriate and, regrettably, discrimination towards them is so often rampant in penal institutions.”<sup>22</sup>

The Court also acknowledged that the conceptions of sentencing goals espoused by the Canadian criminal justice system contribute to Aboriginal over-representation in Canadian prisons. Mister Justice Cory (as he then was) and Mr. Justice Iacobucci, noted that the sentencing goals of the criminal justice system, namely deterrence, separation, and denunciation, are far removed from the understanding of sentencing held by Aboriginal offenders and their communities, who tend to emphasize ideals of restorative justice.<sup>23</sup> To this end, section 718.2(e) is to be

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<sup>19</sup> *Ibid.* at 731.

<sup>20</sup> *Ibid.* at 724.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at 725-26. However, it should be noted that although many Aboriginal communities adopt concepts of restorative justice, it cannot be said that all Aboriginal people and communities share this view. A complaint that is sometimes heard from people living in Aboriginal communities and from Aboriginal women who have been victimized by their spouses or partners, is that the criminal justice system is too lenient. This view was expressed by representatives of the Inuit Women's Association in their testimony before the House of Commons Standing Committee on Justice and Legal Affairs. Canada, *House of Commons Standing Committee on Justice and Legal Affairs: Minutes of Proceeding and*



interpreted as directing a sentencing judge to give weight to the principles of restorative justice when sentencing an Aboriginal offender.<sup>24</sup>

### A. *Evaluating the Framework in Gladue*

Although the Court acknowledged many of the injustices facing Aboriginal people and took steps towards alleviating some of the impacts of systemic discrimination, the decision in *Gladue* cannot be celebrated as a victory for the Aboriginal community. As a result of the Court's narrow view of systemic factors, the limitation it places on section 718.2(e) through its discussion of serious offences, and the number of practical problems inherent in the application of the Court's section 718.2(e) framework, the decision is a disappointment.

#### 1. Narrow view of systemic factors

The Court's analysis in *Gladue* fails to acknowledge and identify a number of systemic or background factors that are helpful in understanding the reasons behind Aboriginal over-representation in prisons. The reliance of sentencing judges on legally relevant factors such as the presence of a prior criminal record,<sup>25</sup> an offender's employment status, and an offender's education level, can have an undue influence on the imprisonment rate for Aboriginal people. It is well accepted that people under the age of twenty-five most often commit breaches of the law.<sup>26</sup> If the Aboriginal population's younger generation is increasing in number,<sup>27</sup> if these people are

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*Evidence*, No. 85 (28 February 1995) at 19-22.

<sup>24</sup> *Gladue*, *supra* note 3 at 729.

<sup>25</sup> The presence of a prior criminal record as a relevant sentencing consideration is particularly devastating for Aboriginal offenders. See T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders" in R. Grosse, J.Y. Henderson & R. Carter, eds., *Continuing Poundmakers and Riel's Quest* (Saskatoon: Purich, 1994) 269 at 270 where the author states: "If the proportion of Aboriginal admissions to youth custody facilities is on the increase, given that those with a prior young offender record are more apt to receive sentences of imprisonment if convicted as adults, we can only expect the chances of incarceration for Aboriginal adults to increase unless drastic steps are taken."

<sup>26</sup> See e.g. *Adult Correctional Services*, *supra* note 1.

<sup>27</sup> Statistic Canada figures from the 1991 census showed that over 56 per cent of the Aboriginal population was under twenty-five years of age, and almost 37 per cent were under fifteen. By contrast, only 35 per cent of the overall Canadian population was under twenty-five years of age, and 21 per cent under fifteen years of age. M. Jacko & J. Rudin, "Brief to the Standing Committee on Justice and Human Rights on Bill C-3 (Youth Criminal Justice Act) From Aboriginal Legal Services of Toronto" online: Aboriginal Legal Services of Toronto <<http://www.web.net/~alst/BRIEF2.htm>> (date accessed:

disproportionately unemployed,<sup>28</sup> idle and alienated,<sup>29</sup> and if they are overly scrutinized by the police,<sup>30</sup> it should not be surprising that numerous breaches of the law are detected and punished. Combined with the greater likelihood of being denied bail,<sup>31</sup> the greater likelihood of fine default,<sup>32</sup> and the diminished likelihood of receiving probation,<sup>33</sup> Aboriginal offenders face a greater prospect of being imprisoned. Many of these factors also increase the odds of the same person re-offending and being detained on further occasions. Once this has occurred, every subsequent conviction is much more likely to be punished by incarceration. Jail becomes virtually the only option for the sentencing judge, regardless of the gravity of the offence.<sup>34</sup>

A second flaw in the Court's analysis is its failure to appreciate the impact that colonization, dislocation, and alienation from the community can have on an Aboriginal offender. The Court places a great deal of emphasis on an Aboriginal offender's connection to the community and culture when considering the offender's systemic and background factors

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1 March 2000).

<sup>28</sup> *Report of the Royal Commission, supra* note 1. The Report finds that, on a national level, unemployment rates for Aboriginal people are three times the average of those for non-native Canadians. On certain reserves, up to 95 per cent of the population subsists on welfare or unemployment benefits.

<sup>29</sup> See C. LaPrairie, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future" (1992) 34 Can. J. Crim. 281 at 288. The author suggests that, although a relevant factor, poverty alone is not the cause of criminal behaviour. Factors such as enforced idleness and lack of opportunities are also to blame.

<sup>30</sup> See Quigley, *supra* note 25 at 273.

<sup>31</sup> *Manitoba, supra* note 1 at 108.

<sup>32</sup> Quigley, *supra* note 25 at n. 10. The author cites information given to him by G. King, Executive Assistant to D. Till, Executive Director Corrections, Corrections and Justice Services, Saskatchewan Justice. The data provided indicate that in 1993, of 6889 jail admissions in the province of Saskatchewan, nearly one-third, or 2292, resulted from fine default. Of the fine defaulters, 1714 were self-classified as being of Aboriginal descent. See also *Manitoba, supra* note 1 at 109.

<sup>33</sup> J. Hathaway, "Native Canadians and the Criminal Justice System: A Critical Examination of the Native Courtworker Program" (1984-85) 49 Sask. L. Rev. 230. The assertion that Aboriginal offenders are more likely than non-Aboriginal offenders to be denied probation is also supported in Canada, *Report of the Saskatchewan Métis Justice Review Committee* (Regina: Saskatchewan Justice, 1992) at 11. The report indicates that in Saskatchewan, from 1990-91, Aboriginal offenders constituted 68 per cent of individuals in prison. By contrast, Aboriginal offenders constituted only 58 per cent of offenders with probation orders, 41 per cent of the restitution caseload (restitution is most often imposed via a condition in a probation order) and 39 per cent of community service order participants (also imposed via a probationary condition).

<sup>34</sup> Quigley, *supra* note 25 at 275-76.

and when attempting to craft an appropriate sentence.<sup>35</sup> However, while a connection to Aboriginal heritage and culture may be integral to the lives of many Aboriginal people, the Court does not appear to make room in the application of section 718.2(e) for the Aboriginal offender who has been unable to participate in his or her culture. This is particularly significant given the recent trend of many Aboriginal people to move off-reserve and relocate to urban centres.

The impact of colonialism on Aboriginal communities has been devastating. Federal government legislation such as the *Indian Act*,<sup>35</sup> with its creation of reserves,<sup>37</sup> its enfranchisement provisions that were repealed less than twenty years ago,<sup>38</sup> and the resort to residential schools and various provincial child welfare legislation to remove Aboriginal children from their families, have resulted in large numbers of Aboriginal people experiencing little or no connection with their communities and culture. A recent evaluation of the Community Council Program of Aboriginal Legal Services of Toronto, a native diversion program, found that of the 106 clients it worked with between January 1995 and March 1997, over half reported having no involvement with the Aboriginal community, organizations or services.<sup>39</sup> A lack of ties with the Aboriginal community and its culture is a “systemic and background” factor that should be considered by a sentencing judge. Ignoring this reality and requiring a connection with the Aboriginal community before section 718.2(e) can be considered will inhibit its application to deserving people.

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<sup>35</sup> *Gladue*, *supra* note 3 at 730.

<sup>36</sup> R.S.C. 1985, c. I-5.

<sup>37</sup> *Ibid.*, s.18(1).

<sup>38</sup> In 1985, changes were made to the membership provisions of the *Indian Act* found under s. 6. Prior to this date, the *Indian Act* included “enfranchisement” provisions that initiated the voluntary and involuntary loss of “Indian” registration. One notorious provision (formerly subsection 12(1)(b)) resulted in the loss of registration to “Indian” women who married men not registered as “Indians.” “Indian” men, on the other hand, did not lose status and their “non-Indian” wives gained status. The 1985 amendments (Bill C-31) attempted to remove discriminatory provisions and re-register most of those who had lost registered status. However, the amendments have not been sufficient in removing all inequities, as those re-registered under Bill C-31 will not be able to pass on their status to grandchildren, while those who never lost status (primarily men) will be able to do so. For further discussion of the impacts of Bill C-31, see Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 4 (Ottawa: Supply and Services Canada, 1996) at 33-40.

<sup>39</sup> J. Campbell, “Evaluation of the Aboriginal Legal Services of Toronto Community Council Program: Final Report” (2000), online: Aboriginal Legal Services of Toronto: <<http://www.web.net/~alst/evals.htm>> (date accessed: 8 December 2001).

A final systemic or background factor that was not considered by the Court is illustrated in the circumstances of the accused in *Gladue*. There was evidence at trial that Gladue had endured emotional and physical abuse at the hands of her partner,<sup>40</sup> but this was not regarded by any of the three levels of court as forming part of her circumstances as an Aboriginal offender. While domestic violence and physical, emotional, and sexual abuse are a reality for many women in Canada, this abuse is a particularly pervasive problem for Aboriginal women. One study has shown that while one in ten women in Canada is abused by her partner, for Aboriginal women the figure is closer to one in three.<sup>41</sup> The most recent study on Aboriginal women conducted by the Ontario Native Women's Association in 1989 found that eighty per cent of Aboriginal women had experienced family violence.<sup>42</sup>

With respect to the violence that Aboriginal women face outside of the community, Emma LaRocque, a Métis woman and professor of Native Studies at the University of Manitoba, wrote to the Aboriginal Justice Inquiry of Manitoba and attempted to explain what she feels are some of the reasons for the disproportionate victimization of Aboriginal women:

The portrayal of the squaw is one the most degraded, most despised and most dehumanized anywhere in the world. The 'squaw' is the female counterpart of the Indian male 'savage' and as such she had no human face; she is lustful, immoral, unfeeling and dirty. Such grotesque dehumanization has rendered all Native women and girls vulnerable to gross physical, psychological and sexual violence ... I believe that there is a direct relationship between these horrible racist/sexist stereotypes and violence against Native women and girls. I believe, for example, that Helen Betty Osborne was murdered in 1972 by four young men from The Pas, because these youths grew up with twisted notions of "Indian girls" as "squaws" ... Osborne's attempts to fight off these men's sexual advances challenged their racist expectations that an "Indian squaw" should show subservience ... [causing] the whites ... to go into a rage and proceed to brutalize the victim.<sup>43</sup>

Violence and abuse towards Aboriginal women have become a contemporary reality, which contradicts the traditional values of many communities that were matrilineal or matrilocal in nature. This violence results in profound effects on the Aboriginal woman's self image, self worth, and identity. The violence and abuse directed towards Aboriginal

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<sup>40</sup> *Supra* note 3 at 697.

<sup>41</sup> *Manitoba*, *supra* note 1 at 482.

<sup>42</sup> Ontario Native Women's Association, *Breaking Free: A Proposal for Change to Aboriginal Family Violence*, (Thunder Bay: Ontario Native Women's Association, 1989) at 10.

<sup>43</sup> *Manitoba*, *supra* note 1 at 479.

women should be recognized as a “unique systemic or background factor” that may serve to explain their criminality. The failure of the Supreme Court of Canada to recognize this factor resulted in the dismissal of Gladue’s appeal and will likely serve to mask the current realities of many other Aboriginal women before Canada’s criminal courts.<sup>44</sup>

## 2. Serious offences

One of the most problematic features of the analysis of section 718.2(e) lies in the Court’s decision to avert its application from serious offences. In determining whether the sentencing judge had given sufficient weight to Gladue’s circumstances as an Aboriginal offender, the Court concluded that the sentencing judge “[did] not appear to have considered the systemic or background factors which may have influenced the appellant to engage in criminal conduct ... .”<sup>45</sup> The Court also noted that “[i]n most cases, errors such as those in the courts below would be sufficient to justify sending the matter back for a new sentencing hearing.”<sup>46</sup> Despite these findings, the Court decided against sending the matter back due to the fact that “the offence in question is a most serious one.”<sup>47</sup>

The first concern that is raised by the Court’s ruling in this regard centres on the judicial creation of a new category of “serious” offence. Statutorily speaking, there is no such thing as a “serious” offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered “serious.” The Court’s ruling on this point is problematic when one considers the relative ease with which a sentencing judge could deem any number of offences to be “serious.” Limiting the remedial application of section 718.2(e) to non-serious offences severely narrows the number of offenders who will be able to benefit from its application.

An additional problem arises if the Court views some offences as being more serious than others, rendering Aboriginal offenders who are in the greatest need of rehabilitation unable to receive a sentence aimed at

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<sup>44</sup> For further discussion on this point, see J. Lash, “Case Comment on *R. v. Gladue*” (2000) 20 *Can. Women’s Stud.* 85. In this comment, the author argues that the Supreme Court of Canada should have considered Gladue’s crime in the context of the domestic violence perpetrated against her, and that domestic violence against women should be included in the Court’s analysis of Aboriginal heritage.

<sup>45</sup> *Supra* note 3 at 739.

<sup>46</sup> *Ibid.* at 740.

<sup>47</sup> *Ibid.*

achieving this goal. It is reasonable to assume that people who have committed what the Court considers to be “serious” offences likely have committed offences in the past, albeit not necessarily “serious” ones. Although, it is not the case for every offender, quite frequently, there is a progression in an individual’s criminal behaviour. An offender may begin by committing “minor” or “less serious” offences and as they become entangled in the criminal justice system and in the harmful cycle of recidivism, the severity of their offences increases. For Aboriginal offenders, getting caught up in this cycle is especially harmful given the bias and discrimination they face in the criminal justice system.<sup>48</sup>

A third problem with the Court’s decision is its statement that it is “unreasonable to assume that Aboriginal peoples do not believe in the importance of traditional [Canadian] sentencing goals such as deterrence, denunciation, and separation, where warranted.”<sup>49</sup> The Court does not give any basis for this opinion and the comment stands in direct contrast to its earlier statement that “for many if not most Aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of Aboriginal people or Aboriginal communities.”<sup>50</sup>

Finally, disallowing the application of section 718.2(e) for “serious” offences does more than limit its remedial force—it renders the provision

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<sup>48</sup> But see P. Stenning & J.V. Roberts, “Empty Promises: Parliament, The Supreme Court of Canada, and the Sentencing of Aboriginal Offenders” (2001) 64 Sask. L. Rev. 137. This article attempts to refute the assertion that Aboriginal offenders are discriminated against at the sentencing stage by indicating that there is some evidence to suggest that Aboriginal offenders may already be receiving shorter sentences than non-Aboriginal offenders charged with comparable offences. The authors do acknowledge that the available research may not be adequate to support firm conclusions on the matter (see text accompanying note 27). Although I submit that it would be difficult to draw such an inference based on data that merely looks at the type of offence, sentence length, and the presence of a prior record, given the various factors taken into account by a sentencing judge in setting the length of a sentence, it is possible that in some cases Aboriginal offenders may in fact be receiving shorter sentences than non-Aboriginal offenders. However, I do not agree with the authors that this possibility alleviates the need for s. 718.2(e). Aboriginal over-representation in Canadian prisons is the result of numerous factors: greater Aboriginal rates of offending, greater susceptibility to criminal justice proceedings, and differential policing, among other examples noted by the authors. Section 718.2(e) was meant to alleviate Aboriginal over-representation in prisons as best as could be done through the sentencing process. The fact that there is evidence that “some judges are aware of the realities facing Aboriginal people in everyday life and that this is reflected in length of sentences” should not relieve Parliament of its obligation to ensure that others follow suit. See C. Laprairie, “The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions” (1990) 32 Can. J. Crim. 429 at 437.

<sup>49</sup> *Gladue*, *supra* note 3 at 739.

<sup>50</sup> *Ibid.* at 727.

virtually useless. Section 718.2(e) is meant to direct judges to consider alternative sanctions to incarceration. Aboriginal offenders who have committed offences that the Court does not consider "serious" would likely not be given a sentence of incarceration. If section 718.2(e) is meant to alleviate Aboriginal over-representation in prison, then limiting it to offenders that are unlikely to receive a jail term strips the provision of its remedial intent. It should be emphasized that in enacting section 718.2(e), the legislature did not limit its application to certain categories of offences.

### 3. Practical problems

A number of practical difficulties that arise from the application of section 718.2(e) also thwart the section's remedial purpose. First, counsel are inadequately trained in law school and bar admission courses to deal with Aboriginal issues. It is also questionable whether non-Aboriginal lawyers and judges could ever be taught to understand Aboriginal culture, especially when one considers that there is a significant range of cultural beliefs and values between different Aboriginal groups and within communities. Although *Gladue* mandates a judge to inquire into the circumstances of an Aboriginal offender, if these issues are not raised, and raised properly by defence counsel, they will likely go unaddressed.

Pre-sentence reports create another set of difficulties. There is no legal requirement for the submission of a pre-sentence report<sup>51</sup> and the standard format often used does not address many of the factors that should be considered by the sentencing judge in applying section 718.2(e).

Other problems are posed by the lack of funding for community-based alternatives to incarceration. Many remote communities, particularly Aboriginal communities, do not have access to treatment centres, healing lodges, and similar facilities. A judge is unlikely to opt for the imposition of a rehabilitative sanction when reputable programs are not available.

## IV. *WELLS*: AN EVEN BIGGER STEP BACKWARDS

Any hope that Parliament's sentencing reforms would help alleviate the problem of Aboriginal over-representation in prison was further deflated when the Supreme Court of Canada ruled on the relationship between sections 742.1<sup>52</sup> and 718.2(e) in *Wells*.

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<sup>51</sup> See *Code*, *supra* note 2, s. 721.

<sup>52</sup> *Supra* note 2.

Mister Wells, an Aboriginal man, was convicted of sexual assault contrary to section 271 of the *Code*. He had attended a house party at the home of the victim, an eighteen-year-old Aboriginal woman living with friends. Evidence at trial established that the victim was assaulted in her bedroom while she was either asleep or unconscious from the effects of alcohol. The accused was also intoxicated.<sup>53</sup>

A pre-sentence report had recommended a conditional sentence, and had assessed Wells as posing no threat to the community as long as he abstained from the consumption of alcohol. Despite these recommendations and the fact that Wells' status as an Aboriginal man "obliged" the judge "to bear in mind section 718.2(e) of the *Code*," a sentence of twenty months in a provincial correctional institution was nonetheless imposed.<sup>54</sup> Wells appealed his sentence on the basis that he was a good candidate for a conditional sentence and that section 718.2(e) had not been properly considered by the sentencing judge. The Alberta Court of Appeal dismissed the appeal and upheld the sentence imposed by the trial judge.<sup>55</sup>

In May of 1999 the case made its way to the Supreme Court of Canada. The Court released its decision in February 2000, dismissing Wells' appeal and upholding his sentence of twenty-months incarceration. Of concern to the Court was the issue of "how and when a sentencing judge should consider the particular circumstances of an aboriginal offender in relation to the determination of the availability of a conditional sentence pursuant to s. 742.1."<sup>56</sup>

Section 742.1, which is found in Part XXIII of the *Code*, provides:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and

(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

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<sup>53</sup> *Supra* note 3 at 212.

<sup>54</sup> *Ibid.* at 216.

<sup>55</sup> *R. v. Wells* (1998), 216 A.R. 61.

<sup>56</sup> *Supra* note 3 at 221.



the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.<sup>57</sup>

The introduction of section 742.1 in Bill C-41 was another way in which Parliament attempted to alleviate reliance on incarceration. Although this provision, unlike the wording in section 718.2(e), is not explicitly directed towards Aboriginal people, when applied to Aboriginal offenders it would presumably contribute to reducing their over-incarceration.

Prior to *Wells*, the relationship between sections 718.2(e) and 742.1 had been the subject of many inconsistent judicial decisions.<sup>58</sup> In sentencing an Aboriginal offender the analysis undertaken by judges appeared to give little independent weight to the wording of section 718.2(e). In *Wells*, the Court had the opportunity to set out a framework of analysis for the interplay of these two provisions that could have given force to Parliament's remedial intent to alleviate Aboriginal over-representation in Canadian prisons. However, rather than taking this route, the Court's decision is only likely to increase sentencing judges' over-reliance on conditional sentences, thereby aggravating the problem of over-incarceration.

#### A. *The Structure Laid Out in Wells*

Relying heavily on its decision in *R. v. Proulx*,<sup>59</sup> which interpreted section 742.1, the Court laid out the steps to be taken by a sentencing judge in determining the availability of a conditional sentence for an Aboriginal offender. The Court stated that at the preliminary stage, the judge must exclude two possibilities: 1) the imposition of probationary measures; and

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<sup>57</sup> *Supra* note 2.

<sup>58</sup> See e.g. *R. v. Wisnayer* (1997), 33 O.R. (3d) 225 (C.A.); *R. v. Pariser* (1997), 159 N.S.R. (2d) 166 (C.A.); *R. v. Horvath* (1997), 117 C.C.C. (3d) 110 (Sask. C.A.); *R. v. McDonald* (1997), 113 C.C.C. (3d) 418 (Sask. C.A.); *R. v. Biancofiore* (1997), 35 O.R. (3d) 782 (C.A.); *R. v. Froult* (1997), 121 C.C.C. (3d) 68 (Man. C.A.); *R. v. Wells*, *supra* note 54.

<sup>59</sup> [2000] 1 S.C.R. 61. Mister Proulx, a non-Aboriginal man, [entered guilty pleas for one count of dangerous driving causing death and one count of dangerous driving causing bodily harm. He was sentenced to eighteen-months' incarceration. The sentencing judge declined to impose a conditional sentence. Proulx appealed the portion of the judge's decision that required him to serve his sentence in an institution. In allowing his appeal and imposing a conditional sentence, the Supreme Court of Canada noted that a conditional sentence is consistent with the principles listed in s. 718 and those contemplated by s. 718.2(e). This article argues that this interpretation is incorrect, as s. 718.2(e) requires a judge to consider "all available sanctions other than imprisonment," and a conditional sentence is a sentence of imprisonment.

2) the imposition of a penitentiary term. “The duration and venue of the sentence are not determined at this preliminary stage.”<sup>60</sup> The judge is also “required to consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 only to the extent necessary to narrow the range of sentence for the offender. If, at this point, either a penitentiary or a suspended sentence is appropriate, then a conditional sentence should not be imposed.”<sup>61</sup> The Court failed to include the consideration of the circumstances of Aboriginal offenders at this preliminary stage.

The Court then stated that before moving to the next stage of the analysis, the sentencing judge must determine whether the statutory prerequisites of section 742.1 have been satisfied. These prerequisites include: 1) the absence of a minimum term of imprisonment; 2) a sentence of imprisonment of less than two years; and 3) that the safety of the community not be endangered by the offender serving the sentence in the community.<sup>62</sup>

The second, and according to the Court in *Wells*, “most substantial stage of the analysis,”<sup>63</sup> involves the determination of whether the imposition of a conditional sentence would be consistent with the fundamental principles and purposes of sentencing set out in sections 718 and 718.2. The consideration of these provisions in this second stage of the analysis differs from that in the first. It is meant to be a “comprehensive consideration” that leads the judge to the third stage—determining the appropriateness of a conditional sentence. During this stage the sentencing judge considers: 1) whether the offender should serve the sentence in the community or in jail; 2) the duration of the sentence; and 3) if a conditional sentence is chosen, the nature of the conditions to be imposed.<sup>64</sup>

If a sentencing judge has excluded the possibilities of imposing a suspended or penitentiary sentence, and if the statutory prerequisites of section 742.1 are fulfilled, then it is not until the third stage, when determining the appropriateness of a conditional sentence, that a sentencing judge is required to consider section 718.2(e) and the circumstances of Aboriginal offenders. In its discussion of this final stage of analysis, the Court held that “whenever a judge narrows the choice to a

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<sup>60</sup> *Wells*, *supra* note 3 at 221.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* at 222.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

sentence involving incarceration, the judge is obliged to consider the unique systemic or background circumstances which may have played a part in bringing the particular aboriginal offender before the courts.<sup>65</sup> In effect, a judge must have already decided to impose a term of imprisonment before applying section 718.2(e). The consideration of the circumstances of the Aboriginal offender at this stage is only meant to assist the judge in determining whether the sentence of imprisonment should be served in the community, not whether a less restrictive sanction should be imposed.

## B. *Analysis*

The framework provided by the Court for analyzing the interplay between sections 718.2(e) and 742.1 poses two concerns. First, it dispenses with Parliament's intent in enacting the two provisions. Second, the application of the framework established in *Wells* will likely lead to the problem of net widening.

### 1. Ignoring Parliament's intent

Requiring a sentencing judge to consider the circumstances of Aboriginal offenders only in the context of determining the appropriateness of a conditional sentence confuses the purpose of these distinct provisions. Section 718.2(e) directs a sentencing judge to look at the circumstances of Aboriginal offenders in order to determine whether alternatives to imprisonment can be imposed. Section 742.1 clearly and unambiguously defines a conditional sentence as a sentence of imprisonment.<sup>65</sup>

The Court's decision in *Wells* failed to give any real force to the purpose of section 718.2(e). Parliament's intent in introducing section 718.2(e) was clear<sup>67</sup>—a term of imprisonment should be imposed as a last resort, especially when dealing with an Aboriginal offender whose unique circumstances must be considered. A proper 718.2(e) analysis should logically come before a consideration of section 742.1.

Through the framework provided by the Court, a sentencing judge is not required to consider the circumstances of the Aboriginal offender in deciding whether the imposition of probationary measures would be

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<sup>65</sup> *Ibid.* at 223.

<sup>66</sup> *Wells*, *supra* note 3 (Intervenor's factum, Aboriginal Legal Services of Toronto at 5).

<sup>67</sup> For further discussion of Parliament's intent in enacting s. 718.2(e), see discussion at pages 2-4 of this article.

appropriate. However, the Court in *Gladue* had stated that the “effect of s.718.2(e), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.”<sup>68</sup> A sentencing judge is told to consider the circumstances of the particular Aboriginal offender before the court, as well as take judicial notice of the broad systemic factors that have generally disadvantaged Aboriginal people. In considering these factors, a sentencing judge may or may not determine that probationary measures are an appropriate sentence. However, by following the framework set out in *Wells*, a judge is instructed to wait until a term of imprisonment has already been selected before taking into account the circumstances of Aboriginal offenders.

Considering an offender’s circumstances at the final stage of the conditional sentencing analysis gives insufficient attention to the factors outlined in *Gladue*, and will not assist in achieving Parliament’s objective of alleviating Aboriginal over-representation in prisons. In *Wells*, had the sentencing judge considered Wells’ circumstances as an Aboriginal offender prior to embarking on an analysis of whether a sentence of imprisonment was warranted, a rehabilitative, non-incarceral sentence aimed at addressing the root causes of his criminality may have been imposed.

## 2. The problem of net widening

Although Aboriginal offenders may be good candidates for conditional sentences of imprisonment in the community, they should only be given such sentences when less restrictive sanctions are not reasonable in the circumstances. Less restrictive alternatives include diversion under section 717, absolute and conditional discharges under section 730, as well as suspended sentences, fines, and restitution.<sup>69</sup>

There is some evidence to suggest that conditional sentences are giving rise to the problem of net widening, which occurs when alternatives to incarceration<sup>70</sup> are extended to offenders who would not otherwise

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<sup>68</sup> *Gladue*, *supra* note 3 at 728.

<sup>69</sup> *Wells*, *supra* note 3 (Intervenor’s factum, Aboriginal Legal Services of Toronto at 5).

<sup>70</sup> By “alternatives to incarceration” I am referring to alternative sanctions given to people who would normally be given a sentence of imprisonment—sanctions in lieu of incarceration. I am not merely referring to sentences other than incarceration.

receive a sentence of imprisonment.<sup>71</sup> In beginning the sentencing analysis by selecting a term of imprisonment, a sentencing judge may opt to impose a conditional sentence where less restrictive means would have otherwise been appropriate. A sentencing scheme that permits offenders to serve their terms of imprisonment in the community should result in a decrease in the prison population, thus furthering Parliament's objective. However, although 42,941 conditional sentences have been ordered in Canada as of September 1999,<sup>72</sup> provincial incarceration rates do not appear to have declined since the introduction of the new sanction.<sup>73</sup> This may indicate that conditional sentences are drawing more cases from probation, rather than from custody.<sup>74</sup>

The eagerness of sentencing judges to impose conditional sentences may be explained by the misconception that in imposing such sanctions, the courts are furthering Parliament's objective of decreasing reliance on incarceration.<sup>75</sup> Although a conditional sentence does permit the offender to serve his or her sentence outside of a penal institution, the conditions imposed may result—in the context of Aboriginal offenders—in that offender being sent to prison. Conditions under section 742.3 can be quite arduous, and if formulated in a culturally insensitive manner, can lead to undue hardship for Aboriginal offenders.<sup>76</sup> Section 742.6 states that the

<sup>71</sup> J. Gemmill, "The New Conditional Sentencing Regime" (1997) 39 *Crim. L.Q.* 334 at 349.

<sup>72</sup> Canada, *Conditional Sentencing in Canada: An Overview of Research Findings* (Ottawa: Department of Justice Canada, 2000) at 19, online: Department of Justice Canada <<http://canada.justice.gc.ca/en/ps/frs/rep/tr00-6a-c.html>> (date accessed: 8 December 2001) [hereinafter *Conditional Sentencing in Canada*].

<sup>73</sup> J.V. Roberts, "Discovering the Sphinx: Conditional Sentencing After the Supreme Court Judgement in *R. v. Proulx*" in *The Changing Face of Conditional Sentencing Symposium Proceedings* (Ottawa: Dept. of Justice Canada, 2000) at 42 n. 11.

<sup>74</sup> But see C. Laprairie, "Reconstructing Theory: Explaining Aboriginal Over-Representation in the Criminal Justice System in Canada" (1997) 30 *Aus. & N.Z. J. of Crim.* 39 at 48. The author considers a study of Native Alaskans who are also subject to over-representation in the criminal justice system. The research found that Native Alaskans commit more violent offences than Caucasian offenders. Some might argue that such findings suggest that conditional sentences may not be drawing cases from probation in the context of Aboriginal offenders. However, more research would be needed before any firm conclusions can be made on this point.

<sup>75</sup> See *Wells*, *supra* note 3 at 223-24.

<sup>76</sup> Conditions of a sentence imposed under s. 742.1 are found in subsection 742.3(1): Compulsory conditions of conditional sentence order, and subsection 742.3(2): Optional conditions of conditional sentence order. Some of the more onerous conditions are found in subsection 742.3(2) and include:

(a) abstain from

(i) the consumption of alcohol or other intoxicating substances, or  
 (ii) the consumption of drugs except in accordance with a medical prescription;

Crown need only establish on a balance of probabilities that the offender has, without reasonable excuse (the proof of which lies with the offender), breached any condition. Once a breach is proven, the offender is exposed to incarceration, including incarceration for the remainder of the conditional sentence, without eligibility for parole or remission.<sup>77</sup> This possibility is particularly inequitable for Aboriginal offenders as studies have shown that they are especially susceptible to breach-related convictions.<sup>78</sup> Net widening results from cases in which offenders who do not necessarily merit a term of imprisonment end up serving the remainder of their sentence in a penal institution because they cannot comply with the conditions imposed.<sup>79</sup> This only aggravates the problem of Aboriginal over-representation in prisons.

The framework for section 742.1 provided by the Supreme Court of Canada also presents a third possibility for net widening. According to

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(b) abstain from owning, possessing or carrying a weapon;

Subsection 742.3(2)(f) also grants the sentencing judge discretion to impose "... such other reasonable conditions as the court considers desirable ... ." *Supra* note 2. Conditions such as those listed above can be onerous for an Aboriginal offender, particularly the conditions of abstaining from alcohol and drugs. When considering the fact that Aboriginal communities are marked by substance abuse problems, alcohol and drugs can often be linked to the root causes of Aboriginal criminality. A sentencing judge has the ability to craft a conditional sentence that could address some of the root causes of the offender's criminal behaviour, such as ordering the offender to attend a community substance abuse treatment program. Simply imposing a condition that the offender must abstain from drugs and alcohol, without considering enrolling that offender in a treatment program, is setting the offender up for failure.

<sup>77</sup> *Wells, supra* note 3 (Intervenor's factum, Aboriginal Legal Services of Toronto at 6).

<sup>78</sup> See *Examining Aboriginal Corrections, supra* note 1 at 39, 174-75. Although the study indicates that the over-representation of Aboriginal offenders in prison is largely due to their disproportionate convictions for person offences, it does indicate that administrative offences (which include failure to appear and failure to comply/breach of probation) are also related to the problem of over-representation. In the province of Alberta for example, there is a seven per cent spread between Aboriginal and non-Aboriginal sentenced admissions for administrative offences. The reasons for the disproportionate convictions of breach-related offences for Aboriginal offenders are not fully understood. Factors such as the over-policing of Aboriginal people and Aboriginal communities may explain why breaches are more frequently detected (see discussion at pages 4-5 of this article). The nature of the conditions imposed on probation orders (and conditional sentences), as discussed in note 76 above, may also provide a systemic explanation as to why Aboriginal offenders are more susceptible to breach proceedings.

<sup>79</sup> Statistics show that of the 42,941 conditional sentences ordered in Canada as of September 1999, 6,244 resulted in breach. Thirty per cent of the breach cases resulted in the offenders being incarcerated for the duration of the order. An additional 19 per cent of cases resulted in the offender being incarcerated for a term that was less than the remaining duration. In 22 per cent of the cases the court elected to modify the optional conditions imposed. In 28 per cent of the cases no recorded action was taken. *Conditional Sentencing in Canada, supra* note 72 at 24.

*Wells*, a judge is required to consider the circumstances of Aboriginal offenders in determining both the appropriateness of a conditional sentence, as well as the length of that sentence.<sup>80</sup> The wording of section 742.1 specifically directs a judge to set the length of the sentence, and to determine whether that sentence may be served in the community. However, the duration of the sentence should be the same whether the judge orders the offender to serve it within the community or in a penal institution.

By introducing the elements of section 718.2(e) at this third stage of analysis, the framework provided by the Court permits a sentencing judge to vary the length of the sentence depending on whether a conditional sentence has been chosen. Thus, having determined that a term of imprisonment is truly warranted, a judge may increase the length of a sentence in deciding to permit the offender to serve it in the community. Since the breach of a condition exposes the offender to jail time for the remainder of his or her sentence, an individual may be forced to serve more time in custody than he or she would have if originally incarcerated under a shorter term.<sup>81</sup>

## V. CONCLUSION

Parliament has revamped its sentencing provisions in an attempt to address the problem of Aboriginal over-representation. The Supreme Court of Canada has acknowledged that the criminal justice system has failed Aboriginal people.<sup>82</sup> Despite the legislature's attempts and the Court's acknowledgments, section 718.2(e) has been stripped of its potential to reduce Aboriginal incarceration rates. The framework provided by the Court to the sentencing judge for interpreting the provision, alone and in the context of section 742.1, are likely to aggravate Aboriginal over-representation in prisons. One can only hope that it will not take a more drastic increase in the Aboriginal prison population for the legislature and the courts to recognize their mistakes.

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<sup>80</sup> *Supra* note 3 at 222-23.

<sup>81</sup> See J.V. Roberts, "The Hunt for the Paper Tiger: Conditional Sentencing after Brady" (1999) 42 *Crim. L.Q.* 39 at 42-43. In his article, Roberts discusses how the possibility of "widening of the net of penal control" is the opposite of what Parliament had intended when it created the conditional term of imprisonment. He draws attention to the fact that net widening was the result in England and in Wales when the suspended term of imprisonment was introduced, and that some have warned that a similar result may ensue in Canada with the conditional sentencing regime.

<sup>82</sup> See especially *Gladue*, *supra* note 3 at 721-22.

